



1 CHRISTINE M. DAVI, SBN 178389  
 2 City Attorney  
 3 CITY OF MONTEREY  
 4 City Hall  
 5 Monterey, California 93940  
 6 Telephone: (831) 646-3915  
 7 Facsimile: (831) 373-1634  
 8 Email: davi@ci.monterey.ca.us

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AUG 13 2012  
 CONNIE MAZZE  
 CLERK OF THE SUPERIOR COURT  
 DEPUTY  
 L STROUD

9 SABRINA V. TELLER, SBN 215759  
 10 REMY MOOSE MANLEY, LLP  
 11 455 Capitol Mall, Suite 210  
 12 Sacramento, California 95814  
 13 Telephone: (916) 443-2745  
 14 Facsimile: (916) 443-9017  
 15 Email: steller@rmmenvirolaw.com

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16 Attorneys for Respondents  
 17 CITY OF MONTEREY

18 SUPERIOR COURT FOR THE STATE OF CALIFORNIA  
 19 COUNTY OF MONTEREY

20	TURN DOWN THE LIGHTS,	)	CASE NO. M116731
21	Petitioner,	)	
22	v.	)	<b>DECLARATION OF CHRISTINE</b>
23		)	<b>DAVI IN SUPPORT OF</b>
24		)	<b>RESPONDENT'S REQUEST FOR</b>
25	CITY OF MONTEREY,	)	<b>JUDICIAL NOTICE IN SUPPORT</b>
26		)	<b>OF ITS DEMURRER</b>
27	Respondent.	)	Hearing Date: September 7, 2012
28		)	Time: 9:00 a.m.
29		)	Dept.: 15
30		)	<b>Filing Date of Action:</b>
31		)	<b>March 22, 2012</b>

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 ///

1 I, Christine Davi, declare as follows:

2 1. I am a member of the State Bar of California, and I am the City Attorney for the City of  
3 Monterey and one of the attorneys for Respondent City of Monterey. I make this declaration in support  
4 of Respondent's Request for Judicial Notice in Support of its Demurrer to Petitioner Turn Down the  
5 Lights' Petition for Writ of Mandate filed concurrently with this declaration.

6 2. I have personal knowledge of the matters set forth in this declaration, and if called upon  
7 to testify to those matters, I could and would so testify.

8 3. The City of Monterey City Council meetings are open public forums where the Council  
9 makes local laws, policies, and basic decisions relating to the City. The Council holds regular meetings  
10 on the first and third Tuesdays of each month at 4 and 7 p.m. in the Council Chamber. The Council  
11 Agenda is available on the City's website along with staff reports on specific agenda items after 4:00  
12 p.m. on the Wednesday prior to the City Council meeting. Copies of the Council agenda packet also are  
13 available for public review after 4:00 p.m. on the Wednesday prior to the Council meeting at the City  
14 Clerk's Office and at the Library on the weekend before the meeting. Copies of the Council Agenda are  
15 posted outside the Council Chamber and are provided at City Council meetings.

16 3. Attached hereto as Exhibit A is a true and correct copy of the December 1, 2009  
17 Monterey City Council Regular Meeting Agenda.

18 4. Attached hereto as Exhibit B is a true and correct copy of the December 1, 2009  
19 Monterey City Council Regular Meeting Minutes.

20 5. Attached hereto as Exhibit C is a true and correct copy of the December 1, 2009 Staff  
21 Report for Monterey City Council Regular Meeting Agenda Item Number 7.

22 6. Attached hereto as Exhibit D is a true and correct copy of the September 7, 2010  
23 Monterey City Council Regular Meeting Agenda.

24 7. Attached hereto as Exhibit E is a true and correct copy of the September 7, 2010  
25 Monterey City Council Regular Meeting Minutes.

26 8. Attached hereto as Exhibit F is a true and correct copy of the September 7, 2010 Staff  
27 Report for Monterey City Council Regular Meeting Agenda Item Number 7.

28 9. Attached hereto as Exhibit G is a true and correct copy of the November 1, 2011  
29 Monterey City Council Regular Meeting Agenda.

30 10. Attached hereto as Exhibit H is a true and correct copy of the November 1, 2011  
31 Monterey City Council Regular Meeting Minutes.

32 ///

1 11. Attached hereto as Exhibit I is a true and correct copy of the November 1, 2011 Monterey  
2 City Council "Council Agenda Report" for Agenda Item Number 7.

3 12. Attached hereto as Exhibit J is a true and correct copy of the Notice of Exemption (NOE)  
4 for the "Street and Tunnel Light Replacement Project" filed by the City of Monterey on February 21,  
5 2012.

6 I declare under penalty of perjury, under the laws of the State of California, that the foregoing is  
7 true and accurate.

8 Executed this 13<sup>th</sup> day of August, 2012, at Monterey, California.

9  
10  
11 By: Christine Davi  
12 Christine Davi  
13 Attorneys for Respondent  
14 CITY OF MONTEREY  
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6 Telephone: (831) 646-3915  
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8 Email: davi@ci.monterey.ca.us

9 SABRINA V. TELLER, SBN 215759  
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16 Attorneys for Respondents  
17 CITY OF MONTEREY

18 SUPERIOR COURT FOR THE STATE OF CALIFORNIA

19 COUNTY OF MONTEREY

20 TURN DOWN THE LIGHTS, )

CASE NO. M116731

21 Petitioner, )

**DEMURRER OF RESPONDENT CITY  
OF MONTEREY TO PETITION FOR  
WRIT OF MANDATE OF TURN DOWN  
THE LIGHTS; MEMORANDUM OF  
POINTS AND AUTHORITIES**

22 v. )

23 CITY OF MONTEREY, )

24 Respondent. )

Hearing Date: September 7, 2012

Time: 9:00 a.m.

Dept.: 15

Filing Date of Action:

March 22, 2012

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1 TO PETITIONER AND ITS ATTORNEY OF RECORD:

2 PLEASE TAKE NOTICE that on September 7, 2012 at 9:00 a.m. in Department 15 of the above  
3 entitled court, located at 1200 Aguajito Road, Monterey, California, Respondent City of Monterey will  
4 and does hereby demur under California Code of Civil Procedure section 430.10, subdivision (e) to the  
5 entire Petition for Writ of Mandate filed on March 22, 2012, by Petitioner Turn Down the Lights in the  
6 above-captioned matter.

7 This demurrer is made and based upon this notice and demurrer, memorandum of points and  
8 authorities, all relevant matters judicially noticeable, and oral argument of counsel at the hearing of this  
9 matter.

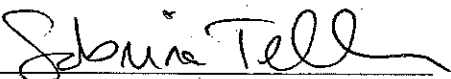
10 **DEMURRER OF RESPONDENTS TO PETITION FOR WRIT OF MANDATE**

11 Respondent City of Monterey demurs to the entire "Petition for Writ of Mandate and to Enforce  
12 California Environmental Quality Act" filed by Petitioner Turn Down the Lights on the grounds that it  
13 does not state facts sufficient to constitute a cause of action in that it shows on its face and based on  
14 judicially noticeable facts that it is barred because Petitioner failed to exhaust administrative remedies.  
15 Section 430.10, subdivision (e), provides that a petition may be objected to by demurrer on the ground  
16 that the pleading does not state facts sufficient to constitute a cause of action. (Code Civ. Proc. § 430.10,  
17 subd. (e); see also *Hood v. Hacienda La Puente Unified Sch. Dist.* (1998) 65 Cal.App.4th 435, 439  
18 (*Hood*) [failure to plead exhaustion of administrative remedies or facts which indicate the duty to do so  
19 has been excused barred cause of action].) If sustained without leave to amend as requested, the effect of  
20 Respondent's demurrer, filed pursuant to Code of Civil Procedure section 430.10, will be to dismiss the  
21 petition without leave to amend because all of the included causes of action are brought under the  
22 California Environmental Quality Act (CEQA) and are barred because Petitioner failed to exhaust its  
23 administrative remedies as required by CEQA. (Pub. Resources Code, § 21177, subdivision (a).)

24 Dated: August 13, 2012

Respectfully Submitted,

25 REMY MOOSE MANLEY, LLP

26  
27 By: 

28 Sabrina V. Teller

29 Attorneys for Respondents  
30 CITY OF MONTEREY  
31  
32



1 MEMORANDUM OF POINTS AND AUTHORITIES

2 **I. INTRODUCTION**

3 Respondent City of Monterey (hereafter Respondent or City) hereby demurs to the entire  
4 "Petition for Writ of Mandate and to Enforce California Environmental Quality Act" (Petition) filed on  
5 March 22, 2012, by Petitioner Turn Down the Lights (Petitioner). Petitioner failed to exhaust its  
6 administrative remedies and the action is therefore barred under the California Environmental Quality  
7 Act (CEQA) (Pub. Resources Code, § 21000 et seq.).

8 Petitioner opposes the City's decision, made last fall, to approve a project that consists of  
9 replacing existing high-pressure-sodium light bulbs in several of the City's street lighting fixtures with  
10 new, energy-efficient light-emitting diode (LED) bulbs. The City decided to replace its lights to help the  
11 City achieve its overall energy efficiency goals and to reduce the City's carbon footprint. (Declaration  
12 of Christine Davi in Support of Respondents' Request for Judicial Notice in Support of Demurrer  
13 (Decl.), Exhibit (Exh.) I.) Despite the copious objections freshly conceived by Petitioner and recited in  
14 the Petition, the City did not receive a single comment during the public decision-making process even  
15 though it encouraged public participation and provided ample opportunities for public comments.  
16 Petitioner is now attempting to use CEQA to reverse the project long after it was approved and  
17 implemented, without ever having participated in the decision-making process. This tactic is expressly  
18 prohibited by CEQA's exhaustion-of-administrative-remedies requirement. Petitioner's members had  
19 many opportunities to express their concerns to the City about the project prior to the City Council  
20 approving the light replacement. They failed to do so and therefore have waived their opportunity to  
21 challenge the project.

22 The petition fails to allege facts demonstrating that Petitioner satisfied the exhaustion-of-  
23 administrative-remedies requirement. As judicially noticeable documents show, this fatal defect cannot  
24 be cured. Therefore, the court should sustain the demurrer without leave to amend.

25 **II. STATEMENT OF FACTS**

26 **A. The Project**

27 The Street and Tunnel Lighting Replacement Project (the "Project") consisted of replacing the  
28 City's existing high-pressure-sodium street light and tunnel light fixtures with LED street light fixtures  
29 and induction tunnel fixtures. (Decl., Exh. I.) The Project was developed as an economically feasible  
30 way to help make the City more energy efficient and represents an important milestone for the City of  
31 Monterey, as it will bring the City into compliance with State goals and requirements regarding  
32 municipal greenhouse gas emissions. (Id.) The City expects that the Project will result in energy

1 savings of approximately 40 percent with a reduction of greenhouse gas emissions of nearly 553 metric  
2 tons annually, helping the City complete its cumulative reduction requirements. (Id.) The project was  
3 funded by a low-interest loan provided by the California Energy Commission (Energy Commission) for  
4 the City to spend on energy efficiency upgrades. (Id.)

5 **B. Administrative Proceedings at the City**

6 The City holds its City Council meetings on a regular bi-monthly basis on the first and third  
7 Tuesday. (Decl., ¶ 3.) The meetings are open to the public and public participation is encouraged. The  
8 City Council accepts public comments regarding any item on the agenda and also designates a portion of  
9 meeting for the public to comment on any item that is not on the agenda. (Decl., Exh. A, D, G.) All  
10 meeting agendas contain express provisions that members of the public have the right to address the City  
11 Council on any item on the Agenda, before or during its consideration and that any person or group  
12 desiring to bring an item not on the agenda to the attention of the City Council may do so by addressing  
13 the Council during Public Comments or by submitting a letter to the City. (Id.) Agendas for the  
14 meetings and all other meeting materials (meeting packets) are posted on the City's website<sup>1</sup> and copies  
15 of every document are available to the public before the meeting. (Decl., ¶ 3.) Minutes from past  
16 meetings, including detailed descriptions of what transpired, are also made available to the public after  
17 they are approved by the Council. (Decl., Exh. B, E, H.)

18 At the City Council meeting held on December 1, 2009, the City approved an application for a  
19 low-interest loan from the Energy Commission to implement energy efficiency measures. (Decl., Exh.  
20 B.) The staff report for that item indicated that the City's intent was for the loan to be applied to various  
21 lighting projects in the City including street lights and tunnel lighting to improve the City's energy  
22 efficiency. (Decl., Exh. C.) The staff report also stated that implementation of these energy efficiency  
23 measures would not cause an environmental impact. (Id.) There were no public comments regarding  
24 this item and the Council approved the application. (Decl., Exh. B.)

25 At the City Council meeting held on September 7, 2010, the City authorized the appropriation of  
26 funds to cover the cost of the Project after the Energy Commission granted the low-interest loan. (Decl.,  
27 Exh. E.) The staff report stated that the Project was exempt from CEQA. (Decl., Exh. F.) Again, there  
28 were no public comments on this item and it was approved by the Council. (Decl., Exh. E.)

29 At the City Council meeting held on November 1, 2011, the City decided to approve the Project  
30 and committed to a definite course of action by approving a contract bid for the Project. (Decl., Exh. H.)  
31 The Council considered a resolution prepared by the City's Planning, Engineering, and Environmental  
32

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<sup>1</sup> / <http://www.isearchmonterey.org/meetings.html>

1 Compliance Division that awarded a contract for the Project to a company called Republic ITS. (Id.)  
2 The topic was included in the meeting agenda as item number 7. (Decl., Exh. G.) The staff report that  
3 accompanied the agenda thoroughly explained the details and scope of the Project including that LED  
4 street light fixtures would be replacing the high-pressure-sodium street lights. (Decl., Exh. I.) The  
5 "Discussion" section of the staff report included the following description of the Project:

6 The project scope consists of furnishing all labor, materials, equipment, and incidentals required  
7 for the removal of existing high-pressure-sodium street light and tunnel light fixtures, and  
8 installation of new LED street light fixtures and new induction tunnel fixtures. An approximate  
9 quantity of 1,676 street lights are located Citywide, and a quantity of 273 lights are located in the  
10 Lighthouse Avenue tunnel. Construction will require traffic control including flagging and  
11 detours, according to the approval of the City Traffic Engineer. The replacement fixtures are  
12 energy efficient upgrades and will provide an estimated \$103,000 annual savings in electric  
13 utility costs. Longer product lifetimes of the new LED and induction lighting technologies will  
14 also provide maintenance savings to the City. The light output of new energy efficient  
15 streetlights will result in a light that is more white than yellow. LED lights however have the  
16 advantage of dispersing the light in a more controllable manner than the current lights.

14 (Id.) The staff report also stated that the City had determined that the Project was exempt from CEQA,  
15 specifically citing CEQA Guidelines Section 15302<sup>2</sup> as the authority for the exemption. (Id.) The  
16 "Environmental Determination" section of the staff report stated:

17 The City's Planning, Engineering, and Environmental Compliance Division determined that this  
18 project is exempt from CEQA regulations under Article 19, Section 15302.

19 (Id.) Immediately following the discussion of the project, Mayor Della Sala opened public comments on  
20 the item. There were no requests to speak and no written comments were submitted. (Decl., Exh. H.)  
21 The Council subsequently voted on the matter and approved the adoption of the resolution. (Id.) The  
22 Project was thereby approved.

23  
24 <sup>2</sup> / CEQA Guidelines section 15302. Replacement or Reconstruction

25 Class 2 consists of replacement or reconstruction of existing structures and facilities where the new  
26 structure will be located on the same site as the structure replaced and will have substantially the same  
27 purpose and capacity as the structure replaced, including but not limited to:

28 (a) Replacement or reconstruction of existing schools and hospitals to provide earthquake resistant  
29 structures which do not increase capacity more than 50 percent.

30 (b) Replacement of a commercial structure with a new structure of substantially the same size, purpose,  
31 and capacity.

32 (c) Replacement or reconstruction of existing utility systems and/or facilities involving negligible or no  
expansion of capacity.

(d) Conversion of overhead electric utility distribution system facilities to underground including  
connection to existing overhead electric utility distribution lines where the surface is restored to the  
condition existing prior to the undergrounding.

1           **C.     The Notice of Exemption**

2           The City filed a Notice of Exemption (NOE) for the Project on February 21, 2012. (Decl., Exh.  
3 J.) The NOE described the Project as “replacement of existing street and tunnel lights with LED street  
4 light fixtures and induction fixtures in the tunnel.” (Id.) The NOE stated that the Project fell within one  
5 of CEQA’s Categorical Exemptions. (Id.) Specifically, the NOE stated that the project fit under CEQA  
6 Guidelines section 15302. (Id.) The City stated that the project was exempt from CEQA because “[t]he  
7 project replaces existing light fixtures” and that “[t]he project does not include any new lights.” (Id.)

8           **D.     Turn Down the Lights’ Petition**

9           On March 22, 2012, Petitioner - the newly created organization “Turn Down the Lights” - filed a  
10 petition for writ of mandate, claiming the City had violated CEQA by impermissibly relying on a  
11 categorical exemption for the project. (Petition, p. 13.) Petitioner claims the City did not perform the  
12 required environmental review for the new street lights and alleges, among other things, that the Project  
13 will result in intrusion of light onto private property, intrusion of private enjoyment, health and safety  
14 hazards, energy impacts and aesthetic impacts from the light and glare of the LED bulbs. (Petition, pp.  
15 14-15.)

16           Petitioner never presented any of these concerns – or any others – to the City during the  
17 administrative process for the Project. The City did not receive a single comment regarding the Project  
18 during the administrative process leading up to the Council’s approval, nor did anyone otherwise object  
19 to the Project.

20 **III.    ARGUMENT**

21           **A.     Standard of Review**

22           Code of Civil Procedure sections 430.10, subdivision (e), and 430.50 provide that a respondent  
23 may demur to one or more causes of action where the petition “does not state facts sufficient to  
24 constitute a cause of action against that [respondent].” A petition fails to state a cause of action if it  
25 omits an essential element of the cause of action by, for example, failing to plead facts demonstrating  
26 compliance with requirements to exhaust administrative remedies. (See, e.g. *Hood v. Hacienda La*  
27 *Puente Unified Sch. Dist.* (1998) 65 Cal. App. 4th 435, 439 (*Hood*) [failure to plead exhaustion of  
28 administrative remedies or facts which indicate the duty to do so has been excused barred cause of  
29 action].)

30           The court’s task in ruling on a demurrer “is to determine whether the complaint states a cause of  
31 action. Accordingly, [the court] assume[s] that the complaint’s properly pleaded material allegations are  
32 true and give[s] the complaint a reasonable interpretation by reading it as a whole and all its parts in

1 their context. [Citations.] [The court does] not, however, assume the truth of contentions, deductions, or  
2 conclusions of fact or law. [Citation.]” (*Moore v. Regents of Univ. of Cal.* (1990) 51 Cal.3d 120, 125;  
3 see Code Civ. Proc., § 430.10, subd. (e).)

4 Under the Code of Civil Procedure, an objection “may be taken by a demurrer to the pleading”  
5 when the ground for objection “appears on the face [of the pleading], or from any matter of which the  
6 court is required to or may take judicial notice.” (Code Civ. Proc., § 430.30, subd. (a).) In determining  
7 the sufficiency of a complaint or petition against a general demurrer, a court must treat the demurrer “as  
8 admitting all material facts properly plead, but not contentions, deductions, or conclusions of fact or  
9 law.” (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318 [quoting *Serrano v. Priest* (1971) 5 Cal.3d 584, 591];  
10 *Evans v. City of Berkeley* (2006) 38 Cal.4th 1, 6 [stating that a “complaint otherwise good on its face is  
11 subject to demurrer when facts judicially noticed render it defective”]; *Friends of Glendora v. City of*  
12 *Glendora* (2010) 182 Cal.App.4th 573, 573.) “Conclusory allegations without facts to support them are  
13 ambiguous and may be disregarded.” (*Interior Systems, Inc. v. Del E. Webb Corp.* (1981) 121  
14 Cal.App.3d 312, 316.)

15 When a demurrer is sustained, the court may grant leave to amend the challenged pleading, but is  
16 not required to do so. (Code Civ. Proc., § 472a, subd. (c); see also *Baldwin v. Daniels* (1955) 132  
17 Cal.App.2d 560, 563.) While liberality in permitting amendment of a defective pleading is the rule, if it  
18 is clear that the problems with the complaint cannot be cured by amendments, then the court should  
19 sustain a demurrer without leave to amend. (See *Johnson v. County of Los Angeles* (1983) 143  
20 Cal.App.3d 298, 306.)

21 **B. The court should sustain the demurrer without leave to amend because the Petition**  
22 **does not state facts sufficient to constitute a cause of action against the City.**

23 **1. The Petition fails to state a cause of action in that it fails to plead facts**  
24 **demonstrating that Petitioner or any of its members exhausted their**  
25 **administrative remedies.**

26 A court cannot consider a claim unless the petitioner presented that claim to the agency prior to  
27 bringing suit. This requirement to exhaust available administrative remedies is a jurisdictional  
28 prerequisite to bringing an action that challenges an agency’s decision. (See *Abelleira v. District Court*  
29 *of Appeal* (1941) 17 Cal.2d 280, 292.) The doctrine of exhaustion exists to ensure that lead agencies,  
30 such as the City, have an opportunity to address public concerns before they are litigated. The goal is to  
31 put agencies on notice when there is a potential problem so that they have the opportunity to address it  
32 before there is a lawsuit. (*Bohn v. Watson* (1954) 130 Cal.App.2d 24, 37.)

1 CEQA includes an express requirement that only persons who have exhausted administrative  
2 remedies may sue for noncompliance. (Pub Resources Code § 21177.) According to Public Resources  
3 Code Section 21177, subdivision (a), an action or proceeding may not be brought unless the alleged  
4 grounds for noncompliance with CEQA were presented to the agency orally or in writing<sup>3</sup>.

5 Under the exhaustion doctrine, specific objections to the agency's CEQA decision must have  
6 been presented to the agency before an action challenging the decision may be maintained. Petitioners  
7 must submit all factual and legal issues to the administrative agency before seeking judicial review. (Pub  
8 Resources Code § 21177, subd. (a); see *Sierra Club v. California Coastal Comm'n* (2005) 35 Cal.4th  
9 839, 864.) Generalized concerns or conclusory arguments, unsupported by specific factual or legal  
10 arguments against the challenged actions, are not sufficient. (See *Corona-Norco Unified Sch. District v.*  
11 *City of Corona* (1993) 13 Cal.App.4th 1577; *Coalition for Student Action v. City of Fullerton* (1984) 153  
12 Cal.App.3d 1194, 1197-8 (“[T]he agency should be given an opportunity to meet all the issues and  
13 defenses during administrative hearings and offer opposing evidence and arguments, so that appropriate  
14 rulings and findings may be made.”).) The purpose of the exhaustion doctrine is to ensure that public  
15 agencies are given the opportunity to receive and respond to articulated factual issues and legal theories  
16 before their actions are subjected to judicial review. (*Coalition for Student Action, Supra*, 153  
17 Cal.App.3d 1198, *Bohn v. Watson, supra*, 130 Cal.App.2d 24, 37; see also *Hood, supra*, 65 Cal.App.4th  
18 435, 441 (affirming trial court decision granting demurrer without leave to amend for failure to  
19 exhaust).) An issue that is not timely raised before the agency is waived. (*Central Delta Water Agency v.*  
20 *State Water Resources Control Bd.* (2004) 124 Cal.4th 245, 274.)

21 The California Supreme Court recently held that CEQA's exhaustion requirement applies to  
22 categorical exemptions in *Tomlinson v. County of Alameda* (2012) 54 Cal.4th 281 (*Tomlinson*). In  
23 *Tomlinson*, the Supreme Court determined that Public Resources Code section 21177 imposes an  
24 exhaustion requirement for exemption decisions under certain circumstances. Specifically, the Court  
25 held that the exhaustion-of-administrative-remedies requirement set forth in Public Resources Code  
26 section 21177, subdivision (a), applies to a public agency's decision that a proposed project is  
27 categorically exempt from CEQA compliance where the public agency gives notice of the grounds for  
28 its exemption determination, and that determination is preceded by a public hearing at which members  
29

30 <sup>3</sup>/ Public Resources Code Section 21177, subdivision (a) provides: “An action or proceeding shall not  
31 be brought Section 21167 unless the alleged grounds for noncompliance with this division were  
32 presented to the public agency orally or in writing by any person during the public comment period  
provided by this division *or prior to the close of the public hearing on the project* before the issuance of  
the notice of determination pursuant to Sections 21108 and 21152.” (Italics added.)

1 of the public had the opportunity to raise any concerns or objections to the proposed project. (*Tomlinson*,  
2 *supra*, 54 Cal.4th 281, 291.)

3 Here, the conditions outlined by the *Tomlinson* Court as triggering the duty to exhaust  
4 administrative remedies under Public Resources Code section 21177, subdivision (a) have been  
5 satisfied. The City provided notice of the grounds for its exemption determination for the proposed  
6 project, and that determination was preceded by a public hearing at which members of the public had the  
7 opportunity to raise any concerns or objections to the proposed project. The public hearing for the  
8 Project occurred on November 1, 2011, at one of the City's regular Council meetings. (Decl., Exh. G, H,  
9 I.) The meeting agenda and staff report for the Project were posted on the City's website and made  
10 publicly available before the meeting as required by law.<sup>4</sup> (Decl., ¶ 3) The staff report included a  
11 thorough and accurate description of the project (including the specific fact that the new bulbs would be  
12 LED lights) and expressly stated the grounds for the City's exemption determination. (Decl., Exh. I.)  
13 The staff report stated that the Project is exempt from CEQA regulations under Article 19, Section  
14 15302. (Id.) The meeting agenda contains an express provision stating that members of the public have  
15 the right to address the City Council on any item on the Agenda, before or during its consideration.  
16 (Decl., Exh. G.) Therefore, the exhaustion-of-administrative-remedies requirement applies here, and  
17 Petitioner failed to comply with that requirement because none of its members (or any other member of  
18 the public) made any attempt to participate.

19 Additionally, the facts demonstrating compliance with administrative remedy requirements must  
20 be affirmatively pled in the petition. (see *Hood, supra*, 65 Cal.App.4th 435.) Otherwise, the Petition  
21 does not state facts sufficient to constitute a cause of action against that defendant. (Id.) This  
22 requirement reflects the rule that the petitioner bears the burden of demonstrating that it exhausted its  
23 administrative remedies. (*Sierra Club v. City of Orange* (2008) 163 Cal.4th 523, 536.) Here, the Petition  
24 is lacking this essential element. The Petition does not include any facts that demonstrate compliance  
25 with the mandatory duty to exhaust administrative remedies. Nowhere in the petition does Petitioner  
26 mention any attempt to present the issues raised in the Petition to the City before the conclusion of the  
27 public hearing. The Petition does, however, mention the only comments that the City ever received  
28 regarding the Project. At the February 21, 2012 Council Meeting, James Bryant spoke about the new  
29 LED lighting that were already being installed throughout the City. Mr. Bryant expressed concern that

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31 <sup>4</sup> / Meeting packet (agenda plus reports) for the November 1, 2011 meeting was published in  
32 accordance with the Ralph M. Brown Act (Cal. Gov. Code § 54950 et seq.) requirements. Cal. Gov.  
Code §54954.2 requires that the agenda must contain a brief general description of each item to be  
discussed and the time and location of the meeting.

1 the new lights could detract from the atmosphere of the Historic District and asked that a different  
2 standard be established for that area. (Petition, p. 9, ¶ 32) Although the City agreed to address Mr.  
3 Bryant's concerns, his comments are irrelevant to Petitioner's duty to exhaust. Two important  
4 limitations on the timing for raising issues are contained in Public Resources Code section 21177. First,  
5 no one may bring an action for failing to comply with CEQA unless that person objected to the approval  
6 of the project during the public comment period provided by CEQA or *before the close of the public*  
7 *hearing on the project.* (Pub. Resources Code § 21177, subd. (b).) Second, the grounds for the alleged  
8 noncompliance must also be provided within the same time period. (Pub. Resources Code, § 21177,  
9 subd. (a).) Mr. Bryant's comments were made on February 21, 2012 - long after the close of the public  
10 hearing on the project, which occurred on November 1, 2011. Furthermore, the Petition does not state  
11 that Mr. Bryant is a member of Turn Down the Lights. Thus, even if his comments were within the  
12 required timeframe, they would not excuse Petitioner's failure to exhaust its administrative remedies  
13 through any of its members.<sup>5</sup> The Petition does not mention any other comments provided to the City  
14 regarding the Project because the City did not receive any other comments. Therefore, the court should  
15 sustain the demurrer without leave to amend because the Petition fails to plead facts demonstrating  
16 compliance with the requirement to exhaust administrative remedies prior to filing suit. The Petition  
17 lacks this essential element, and cannot be corrected to provide it, because Petitioner, in fact, did not  
18 participate in the public process at all.

19 Furthermore, the Petition does not include any facts indicating that Petitioner may be excused  
20 from CEQA's exhaustion-of-administrative-remedies requirement. Therefore, Petitioner has failed to  
21 plead facts demonstrating exhaustion of administrative remedies or facts which indicate the duty to do  
22 so has been excused, and therefore the demurrer should be sustained without leave to amend.

23 **2. The court should sustain the demurrer without leave to amend because the**  
24 **defect in the Petition cannot be cured.**

25 While liberality in permitting amendment of a defective pleading is the rule, if it is clear that the  
26 problems with the complaint cannot be cured by amendments, then the court should sustain a demurrer  
27 without leave to amend. (See *Johnson v. County of Los Angeles* (1983) 143 Cal.App.3d 298, 306.)

28 There is no way that the exhaustion problems in the petition can be cured because Petitioner did  
29 not participate in any way during the administrative process and was not excused from doing so. The

30 \_\_\_\_\_  
31 <sup>5</sup> / The statutory exhaustion requirement does not preclude an organization formed after the approval of  
32 the project from maintaining an action as long as a member of the organization objected to the project,  
either orally or in writing, before the end of the agency's hearing on the matter. (Pub. Resources Code §  
21177, subd. (c).)



1 close of the public hearing on the Project occurred at the conclusion of the City Council meeting held on  
2 November 1, 2011. Petitioner could have raised its objections any time before then either by speaking at  
3 any of the numerous City Council meetings or by submitting written comments to the City. Petitioner  
4 failed to fulfill this obligation. The City did not receive a single comment during the public hearing for  
5 the project or at any other time before that public hearing concluded. Therefore, Petitioner cannot amend  
6 the Petition to assert that it exhausted its administrative remedies.

7         Additionally, Petitioner cannot claim that it is somehow excused from exhausting its  
8 administrative remedies. The Petition does not mention any reasons that Petitioner may be excused from  
9 CEQA's exhaustion-of-administrative-remedies requirement. This is because no such reason exists here.  
10 Courts have recognized exceptions to the exhaustion doctrine only under a few limited circumstances.  
11 For example, the exhaustion requirement does not apply when the administrative procedure did not  
12 provide for a public hearing or other opportunity for members of the public to raise objections before  
13 project approval. (Pub. Resources Code § 21177, subd. (e); *Tomlinson, supra*, 54 Cal.4th 281.) This  
14 exception does not apply here because there was a public hearing for the Project on November 1, 2011  
15 and ample other opportunities for public participation.

16         Another exception is when the required notice is not provided. (Pub. Resources Code §  
17 21177(e); *Tomlinson, supra*, 54 Cal. 4th 281.) Again, this exception does not apply here because the  
18 City provided notice of its exemption determination, including the grounds for the exemption. (See  
19 *Tomlinson, supra*, 54 Cal. 4th 281.) The City provided regular notice of the public hearing on the project  
20 and specifically stated that it was relying on section 15302 for the exemption determination. (Decl.,  
21 Exh. I.) Petitioner cannot point to any notice or hearing law with which the City failed to comply. That  
22 Petitioner might not have had actual notice does not excuse it from the exhaustion requirement.  
23 (*Resource Defense Fund v. LAFCO* (1987) 191 Cal.3d 886, 895 [if the required notice was given, the  
24 petitioner is not excused from exhausting administrative remedies by lack of actual notice].)

25         The courts have also recognized an exception where the notice is misleading. (*Temecula Band of*  
26 *Luiseno Mission Indians v. Rancho Cal. Water Dist.* (1996) 43 Cal.App.4th 425.) This exception also  
27 does not apply here because Petitioner was not given misleading or inaccurate information. The City  
28 provided an accurate description of the project in the staff report for the Project, including an explicit  
29 statement that the LED lights that Petitioner now complains of would replace the existing streetlights.  
30 (Decl., Exh. I.) The City also identified the legal authority for its reliance on the exemption  
31 determination. (Id.) Furthermore, Petitioner cannot claim that the City's exemption determination was  
32 deceiving or misleading because the City cited only the relevant section of the CEQA Guidelines that it


1 was relying on and no additional text that could have misled anyone about the criteria of the exemption.  
2 (Id.) Therefore, the defect in the Petition cannot be cured by amendment, and the demurrer should be  
3 sustained without leave to amend.

4 **IV. CONCLUSION**

5 Based on the foregoing evidence and arguments, Respondent respectfully requests that the court  
6 sustain this demurrer to the entire Petition without leave to amend.

7  
8 Dated: August 13, 2012

Respectfully Submitted,  
REMY MOOSE MANLEY, LLP

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11 By:   
12 Sabrina V. Teller  
13 Attorneys for Respondent  
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