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Via email to cityclerksoffice@sanbruno.ca.gov and mthurman@sanbruno.ca.gov and overnight mail

City Clerk
City of San Bruno
567 El Camino Real
San Bruno, CA 94066-4299
Attn: Melissa Thurman, CMC

Re: Appeal of Administrative Decision—Plaza Project, 406-418 San Mateo Avenue,
San Bruno, California

Dear Ms. Thurman:

Pursuant to San Bruno Municipal Code Section 1.32, on behalf of San Bruno, LLC (“Owner”) this letter requests City Council review of the administrative decision issued by the Community Development Director Darcy Smith (“Director”) by letter dated November 28, 2018 (“Determination Letter,” attached as Appendix A). Specifically, this appeal addresses the Director’s determination that “*the proposed restaurant does not conform to the Parking Exception for this project in City Council Resolution 2014-112.*”¹

On October 28, 2014, the City of San Bruno (“City”) approved Signature Land Advisors, Inc.’s (“Signature”) proposed mixed use, infill redevelopment project for 83 units of residential housing and 6,975 square feet of ground-floor commercial space on San Mateo Avenue (the “Project”). The Project was approved to replace four commercial properties, including an outdated theater building with an existing 97-space parking deficit, on a site identified in the City’s General Plan and Transit Corridors Plan (“TCP”) as “Catalytic Site #3.” The Project

¹ We also note the letter determines the restaurant use will require a Conditional Use Permit if it proposes to serve alcohol, which we are not appealing at this time. However, we do note that, as discussed below, this Zoning Code section is also inconsistent with the Transit Corridors Plan, which identifies the use as expressly permitted. It was anticipated by the Project that the City would complete its long-planned process to bring the Zoning Code into compliance with the TCP and remove this extra procedural step to support and encourage the success of commercial uses in the downtown.

entitlements² included, among other things, a Parking Exception issued pursuant to Municipal Code section 12.100.120 which exempted the Project from providing any on-site parking for the commercial area. The 2014 Entitlements contain no express limitation on the wide range of uses authorized for the commercial space by the General Plan, TCP, or Zoning Code in the Central Business District (“C-B-D”) zone and no express limitations on the Parking Exception.

In the City’s 2015 Housing Element, the Project was held out as an example of the City’s successful long-range planning as a new mixed use “anchor” for downtown.³ The City emphasized that the Project “is consistent with the 2025 General Plan and the TCP and the overall goals of this Housing Element.”⁴ And, in direct contradiction to the sudden reversal in the Determination Letter, the City held the Project out to the California Department of Housing and Community Development, the public, and the development community as “an important example of how San Bruno has been *consistent in its message about mixed-use, higher density development in the city, especially in proximity to transit.*”⁵ As discussed below, the City has—for years now—committed in the 2009 General Plan, the 2013 TCP, the 2014 Entitlements, and the 2015 Housing Element to updating its outdated Zoning Code, reducing parking requirements consistent with the TCP, and implementing appropriate parking management programs to support housing, including mixed-use housing in the downtown.

In 2015, in reliance on the City’s long-range planning documents and 2014 Entitlements after appropriate due diligence, the Owner (a California Public Employees Retirement System (CALPERS) investment entity) made a substantial investment and acquired the Project from Signature.⁶ The Owner then began the hard work of bringing the development and the City’s vision for downtown to life, which is not at all easy. The Owner obtained its building permit in 2016, commenced construction immediately, and the Project is nearly complete. After further

² City of San Bruno Resolution No. 2014-111 (Oct. 28, 2014) (resolution approving an amendment to the San Bruno Transit Corridors Plan to ensure consistency with the 2009 General Plan and the proposed mixed use development located at 406-418 San Mateo Avenue); City of San Bruno Resolution No. 2014-112 (Oct. 28, 2014) (resolution approving a conditional use permit and parking exception for the proposed mixed use development located at 406-418 San Mateo Avenue); City of San Bruno Resolution No. 2014-113 (Oct. 28, 2014) (resolution approving installation of one loading zone space adjacent to the proposed mixed use development t 406-418 San Mateo Avenue); City of San Bruno Resolution No. 2014-114 (Oct. 28, 2014) (resolution approving an architectural review permit for the proposed mixed used development located at 405-418 San Mateo Avenue) (hereinafter “2014 Entitlements”), attached as Appendices B, C, D, and E respectively.

³ City of San Bruno 2015-2023 Housing Element, page 4-7, attached as [Appendix N](#).

⁴ *Id.*

⁵ *Id.* (*emphasis added*).

⁶ The Owner is a bona fide third party purchaser for value. “[A] bona fide purchaser for value who acquires his interest in real property without notice of another’s asserted rights in the property takes the property free of such unknown rights.” *Hochstein v. Romero* (1990) 219 Cal. App. 3d 447, 451; *see also In re Marriage of Cloney* (2001) 91 Cal. App. 4th 429, 437; *Reiner v. Danial* (1989) 211 Cal. App. 3d 682, 689-690. “The elements of bona fide purchase are payment of value, in good faith, and without actual or constructive notice of another’s rights.” *Gates Rubber Co. v. Ulman* (1989) 214 Cal. App. 3d 356, 364. “Thus, the two elements of being a BFP are that the buyer (1) purchase the property in good faith for value, and (2) have no knowledge or notice of the asserted rights of another.” *Melendrez v. D&I Investment, Inc.* (2005) 127 Cal. App. 1238.

careful review of the 2014 Entitlements and discussions with City Staff in August 2018, the Owner, in good faith reliance, entered into a binding lease for the ground-floor commercial area on August 21, 2018 with Sea Pot, Inc. (“Sea Pot”). Sea Pot is a high-quality sit-down restaurant with a proven track record of success, and will provide an excellent commercial anchor in this highly visible location. Since entering the lease, Sea Pot has been working in good faith on tenant improvement plans, and anticipates submitting these plans to the City to allow the restaurant to open in Fall 2019. The overall Project is nearing completion and anticipates its first residents in March 2019.

On November 28, 2018, four years after the City approved the 2014 Entitlements and two months after the Owner entered the lease with Sea Pot, the Director issued the unsolicited and surprising Determination Letter reversing the City’s prior interpretation and asserting for the first time that a sit-down restaurant use was not authorized in the Project under the approved Parking Exception. As discussed below, the record demonstrates that the Director’s reversal is an abrupt and unsubstantiated departure from the express text of the 2014 Entitlements, the clear intent of the 2013 TCP and 2015 Housing Element—and contrary to the representations of the City Staff who had been personally responsible for the preparation and adoption of the 2014 Entitlements.⁷

It is understood that residential parking pressures have increased since the Project was approved in 2014. It is also clear that concerns with residential parking existed at the time the Project was approved, and that this problem is not with the Project or demand for commercial parking, but residential parking itself. For a number of reasons entirely unrelated to the Project, the City has not followed through on its commitments in the 2013 TCP, the 2014 Entitlements, or the 2015 Housing Element to address these issues to support the Project, housing production goals, and the revitalization of the downtown. It is simply unfair—and legally inappropriate—at this late stage in a very long process to suddenly reverse course on the interpretation of the 2014 Entitlements. This is not a viable short- or long-term solution to the difficulties the City is facing with residential parking, and it undermines the City’s revitalization goals.

For the reasons set forth below, the Owner respectfully appeals the Director’s decision in the Determination Letter, and requests that the City Council affirm its commitment to the success of this Catalyst Project and the successful revitalization of downtown San Bruno by confirming the Parking Exception for the Project applies to *all* allowed commercial uses in the Central Business District, including a sit-down restaurant. Since the issuance of the Determination Letter, the Owner has met with City staff and has had numerous discussions in hopes of a satisfactory solution, without success, leading to this appeal.

⁷ It is not coincidental that this sudden reversal came after a November 2018 City Council election, and changes in City Staff leadership. Connie Jackson, the City Manager for 14 years, retired in 2018, and was replaced by Jovan Grogan in June 2018. David Woltering, the Community Development Director for 5 ½ years who oversaw the 2013 TCP, the 2014 Entitlements, and the 2015 Housing Element retired on August 24, 2018. He was replaced in the interim by planning contractor Marvin Rose, and permanently replaced by Ms. Smith in November 2018.

I. STATEMENT OF FACTS

A. City's Long Range Planning for the Downtown.

With key major transit nodes near downtown, including BART and Caltrain, the City has an unprecedented opportunity to take advantage of modern, transit-friendly development. But despite its many advantages, the City's downtown has continued to suffer in recent years. There has been a high rate of vacancy in commercial spaces, including the site in question, which previously held a vacant theater and three vacant restaurants. As described in detail by City staff during the City Council meeting on October 28, 2014, this section of downtown was envisioned as the lynchpin of revitalization, but has remained underutilized for a decade. The City Council staff report for the Project noted that, "The [existing] site is an attractant for nuisances, including dumping and graffiti, and the existing buildings are in a significant state of disrepair and present a poor image as the gateway to downtown."⁸ It is also noted that former uses on the site required a total of 131 parking spaces per the San Bruno Municipal Code standards. However, only 34 parking spaces were provided on-site, leaving a pre-existing deficit of 97 parking spaces on the property.⁹

In order to revitalize the downtown area and create a dynamic, transit-oriented community center, the City approved and adopted the TCP. The TCP was the result of a community-based process with numerous levels of resident input, including two community workshops and a public Steering Committee process. The TCP formulation team undertook a community outreach strategy with multiple avenues to obtain input. The strategy included stakeholder meetings, community workshops, and steering committee meetings comprised of residents, property owners, business owners, City Council representatives, Planning Commission representatives, developers, community organizations, and youth representatives. From these meetings and workshops, the steering committee developed a comprehensive community vision for the Transit Corridors Area.

The centerpiece of the TCP is the "[r]evitalization of the oldest part of the City."¹⁰ The TCP was designed to "encourage replacement of underutilized, deteriorating and obsolete commercial land uses with new mixed-use development."¹¹ The TCP was "intended to set forth a transformative new vision for the Transit Corridors Area, including downtown San Bruno, historically represented by four converging central area streets: San Mateo Avenue, El Camino Real, San Bruno Avenue and Huntington Avenue."¹² The Plan established a development framework, development standards and design guidelines for public and private realm

⁸ Staff Report to City Council, Hold Public Hearing and Take the Following Actions to Approve the Plaza Project, a Mixed-Use Project at 406-418 San Mateo Avenue, and Associated Environmental Determinations at 2 (Oct. 28, 2014) ("City Council Staff Report"), attached as [Appendix F](#).

⁹ San Bruno City Council Meeting October 28, 2014 at 1:13:00-1:13:22.

¹⁰ Statement of Overriding Considerations for TCP (Feb. 12, 2013), attached as Appendix K.

¹¹ *Id.*

¹² Draft EIR for TCP at 2-1, attached as [Appendix L](#).

improvements, a set of transportation and related infrastructure improvements, and implementation strategies to achieve the new vision. The basic objectives of the proposed TCP include:

- stimulating the economic revitalization of the downtown and transit station areas;
- reinvigorating the community's identity;
- capturing the potential for transit-oriented development;
- strengthening the area's walkability and bikeability; and
- creating a cohesive implementation approach to enhance the character and development of the Transit Corridors Area.

The City Council approved the TCP on February 12, 2013. While the term "guidelines" have been used in various staff reports, the term means more than just general guidance that can be ignored and disregarded by the City. It is important to clarify that the TCP is a *Specific Plan* under the California Government Code provisions related to Planning and Zoning that provides a greater level of definition to the area's land uses and character of development than is articulated in the General Plan. The City noted that its "authority for preparation and adoption of specific plans is set forth in the California Government Code, Sections 65450 through 65457" (governing specific plans) and that "[o]nce adopted, the TCP will guide all new development in the Transit Corridors area in both the public and private realms. ***New development projects will be required to follow the policies, programs and guidelines set forth in the specific plan.***"¹³

On November 4, 2014, San Bruno voters approved Measure N by over a 68% margin, which relaxed restrictions on building height, residential density and above ground parking garages in the TCP area to achieve the desired character and scale of development along the corridors.¹⁴

And, on April 14, 2015, the City Council adopted and transmitted to the HCD, the City's 2015-2023 Housing Element (since approved by HCD on July 30, 2015). The City committed in the Housing Element to implement the TCP, to reduce parking standards consistent with the TCP, and to bring its zoning code into compliance with the TCP. On page 3-5, the City specifically stated:

"City adopted a Transit Corridors Plan in February 2013 that focuses on commercial/transit corridors of El Camino Real, San Bruno Avenue, and San Mateo Avenue, adjacent to the future location of the Caltrain Station on San

¹³ TCP at 5-6 (emphasis added), attached as [Appendix J](#).

¹⁴ [https://ballotpedia.org/City_of_San_Bruno_%22Downtown_and_Transit_Corridors_Economic_Enhancement_Initiative%22_Proposal_Measure_N_\(November_2014\)](https://ballotpedia.org/City_of_San_Bruno_%22Downtown_and_Transit_Corridors_Economic_Enhancement_Initiative%22_Proposal_Measure_N_(November_2014)) (viewed 1/27/19), attached as [Appendix M](#).

Bruno Avenue. The Plan serves as the regulatory document to implement the new General Plan Update transit-oriented development and mixed-use land use classifications. The Plan includes design guidelines, development regulations, parking standards, and an implementation strategy that will facilitate development of mixed-use projects in the area.”¹⁵

As explained in the 2015 Housing Element, the City committed in its 2009 General Plan to review and revise existing parking requirements to ensure they do not add unnecessary costs to housing developments and to ensure parking needs could be met without increasing parking requirements.¹⁶ The City has also adopted numerous other policies supporting a decreased parking requirement to foster more transit-oriented communities.¹⁷

As part of specific plan adoption process, in the voter information supporting Measure N, the adoption of the General Plan Housing Element, as well as the approval of the Project, the City committed to updating its inconsistent and outdated Zoning Code to reflect the changes envisioned in the transformative TCP—and to implementing parking management programs to support revitalization and address residential parking concerns. Since that time, for a number of reasons entirely unrelated to the Project, the City has not implemented numerous objectives and policies from the TCP. In particular, the TCP, as reiterated in the City’s 2015 Housing Element, specified that the City was to (1) develop a strategy for a Parking Management Program, (2) promote a “Park Once and Walk” parking strategy, (3) develop a Parking Implementation Plan, (3) evaluate Metered Parking/Parking Pricing, (4) create a Parking Benefits District, (5) encourage unbundled parking, (6) develop New Parking Standards for the Transit Corridors Area, and (7) consider a Transit Corridors Area TDM program.¹⁸ We note that these parking studies make clear that the primary parking pressures are not caused by commercial uses in the downtown, but rather by changing *residential* demographics.¹⁹

During this same period, the Owner has upheld its end of the bargain and proceeded with acquisition, construction, marketing, and leasing activity in reliance on the 2014 Entitlements and the commitments of the City to help address parking and revitalize of the downtown by supporting additional development investment and by updating its zoning code to be consistent with the TCP. The City has not met its commitments, and now the City staff has unfairly and inappropriately have laid these ongoing parking challenges at the door of a near-complete development designed and approved to help fulfill the policies envisioned in the TCP by revitalizing and anchoring downtown development.

¹⁵<https://www.sanbruno.ca.gov/civicax/filebank/blobdload.aspx?blobid=24103> (viewed 1/28/19)

¹⁶ City of San Bruno, Housing Element at 3-5.”

¹⁷ See, e.g., Land Use Policy-26, Housing Element Program 3-1, and Transportation Element Policies T-34 & T-40.

¹⁸ TCP at 153.

¹⁹ CDM Smith, San Bruno Downtown Parking Study at 1, 38, attached as Appendix P.

B. Project Approval History.

Signature applied for City approval of what the TCP EIR termed “Catalytic Site #3.” As described in the EIR, Catalytic Site #3 was “envisio[n]ed as] a four-story, 50,000 square foot development at this location, at the terminus of the triangular parcel and active storefronts along San Mateo Avenue.”²⁰ The TCP indicates that the location of this site calls for a retail or mixed use that can draw visitors from El Camino Real into Downtown. The Plan indicates that the site also has potential for a mixed-use medium- to high-density residential building with retail space on the ground floor to activate the street edge along San Mateo Avenue.²¹

On September 8, 2014, Signature submitted plans for a three-story mixed use commercial and residential development with approximately 5,562 square feet of commercial space—which was increased to 6,975 square feet of commercial space at the City’s urging to provide more flexibility—83 residential units, and a sub-grade parking garage containing 106 residential parking spaces.

After a neighborhood outreach process and multiple public hearings, City staff found that, “[t]he project would be the most significant new development in the downtown in many years and would visually enhance the existing site and would provide an improved visual anchor and entry to the City’s downtown commercial area. The project would alleviate physical and economic blight and improve and enhance the downtown area. Located at the prominent intersection of San Mateo Avenue and Taylor Avenue, the project would play a key role as a catalyst for economic development and revitalization in the greater downtown area and throughout the entire TCP area. The TCP emphasizes creating a vital, pedestrian-friendly Central Business District for shopping, entertainment and dining, as well as new residential uses. In addition, the project is located within a short distance of SamTrans bus routes, the new Caltrain station, and BART, increasing transportation options for the project’s residents and reducing dependency on automobiles.”²²

On October 28, 2014, based on the unanimous Planning Commission recommendation for approval, the City Council unanimously approved the Project, issuing entitlements including the Parking Exception at issue today. The 2014 Entitlements have not been modified since approval.

For the reasons set forth below, the Owner respectfully appeals this decision to the City Council and requests that the City Council affirm its commitment to the success of this catalyst Project approved in 2014, and the successful revitalization of downtown San Bruno, by confirming the Parking Exception for the Project applies to all allowed commercial uses in the

²⁰ TCP Draft EIR at 3-14, attached as [Appendix I](#).

²¹ *Id.*

²² Staff Report to City Council, Hold Public Hearing and Take the Following Actions to Approve the Plaza Project, a Mixed-Use Project at 406-418 San Mateo Avenue, and Associated Environmental Determinations at 11 (Oct. 28, 2014) (“City Council Staff Report”), attached as [Appendix E](#).

Central Business District, including a sit-down restaurant. To do otherwise is a major reversal in the City’s long-range planning commitments and the reasonable investment-backed expectations of the Owner.

II. STANDARD OF REVIEW

The City Municipal Code provides that any “person aggrieved by an administrative action taken by an officer, board, commission, or other body of the city may appeal from the action to the city council by filing a written notice of appeal with the city clerk.”²³ The City Municipal Code does not specify the particular standard of review applied to these administrative actions. However, should the actions of the City be challenged in court, the court will likely apply the substantial evidence test to “determine whether substantial evidence supports the findings of the [agency] and whether the findings support the [agency’s] action.”²⁴ The City Council should therefore take care to ensure that the administrative actions of City Staff have the support of *substantial* evidence.

III. ARGUMENT

A. The Project Approvals Authorize the Planned Use with the Planned Parking Levels.

The Parking Exception adopted by the City Council on October 28, 2014 makes the requisite findings under Municipal Code section 12.100.120 without a specific discussion of any intended limitation on the commercial uses. None of the 2014 Entitlements issued by the City Council in 2014 in any way limit the wide range of permitted uses identified in the Zoning Code or TCP—uses that expressly include and encourage restaurant uses. The City had at its disposal the appropriate means to limit the use of the commercial space if it has desired to do so in the 2014 Entitlements, but chose instead to provide maximum flexibility to allow the site owners to respond to changing economic circumstances.

1. The Planned Uses Have Not Materially Changed.

The Project as described in the City Council materials contained 6,975 square feet of commercial uses on the ground floor.²⁵ No specific uses were identified by the commercial space, although several possibilities were proposed during hearings before the Planning Commission and City Council. Within the Central Business District, “cafes, restaurants, and catering shops which are accessory to restaurants or delicatessens” are permitted *as-of right*.²⁶ Nothing in the Project plans, the City Resolution approving the Project, or the Conditions of Approval purport in any way to limit the uses in the Project’s commercial areas beyond what was

²³ Municipal Code § 1.32.

²⁴ *Topanga Association for a Scenic Community v. County of Los Angeles* (1974) 11 Cal. 3d 506, 510, 515 (“the agency which renders the challenged decision must set forth findings to bridge the analytic gap between the raw evidence and ultimate decision or order”).

²⁵ City Council Resolution 2014-112 (Oct. 28, 2014).

²⁶ Municipal Code § 12.96.120(B)(4).

articulated in the Zoning Code. To the contrary, the Conditions of Approval contain several conditions expressly applicable to future restaurant uses.²⁷

By contrast and recent direct example, the City has demonstrated it is readily able to limit the uses of a commercial space when it chooses to do so. In approving the entitlements associated with Catalyst Project #2 in October 2018, the City again applied the parking requirements from the TCP—not the “outdated” requirements from the Municipal Code.²⁸ The City Staff noted that the applicant had confirmed that there would be no sit-down restaurant use and—most importantly—expressly included that limitation among the written Conditions of Approval.²⁹ Unlike the circumstances here, a bona fide purchaser for value would have adequate notice of the limitation on 111 San Bruno Avenue. No similar condition of approval was placed on this Project.

If the City had intended to limit any particular use, the appropriate process for clarity of implementation—in light of situations exactly like this one where there is a foreseeable change in ownership and changes in City Staff and elected officials staff over time—would have been to add specific language to the project’s conditions of approval. As discussed in detail above, it was clear that the Project was intended to rely on the new development vision articulated in the TCP, and it was understood the Project was pioneering and risky and needed maximum flexibility to succeed. It is for that reason that no condition or limit was imposed on the Project in the 2014 Entitlements. Again, actions proposed to address residential parking concerns raised at the City Council were clearly identified as the City’s responsibility to implement, not the Owner’s.³⁰ The responsibility of the Owner was to construct the Project and to identify and lease the commercial and bring activity and life to the downtown. The Owner has done its part.

As a bona fide purchaser for value, the Owner relied on the statements and conditions in the 2014 Entitlements adopted by the City Council, as well as the City’s commitments to update the Zoning Code and implement parking management programs to support additional investment in the downtown. In reliance on those approvals and commitments, the Owner entered a lease with a high quality, financially secure and successful tenant for its commercial space that is an expressly permitted use under the Zoning Code, the TCP, and the General Plan.

²⁷ Conditions of Approval 11, 31, 37.

²⁸ San Bruno City Council Agenda Packet at 85 (“Parking Requirement: The TCP requires 60 – 92 parking spaces for 62 dwelling units in the unit mix proposed (see table 3). . . . The TCP requires 12 - 23 parking spaces for 7,730 square feet of general retail space.”), 110 (“Parking Requirements ▪ Refer to Table 7.8 in the Transit Corridors Plan for Parking Requirements.”)

²⁹ *Id.* at 124, Condition of Approval 18 (“A restaurant use shall not be permitted within the ground floor commercial space because the Project does not have enough off-street parking to meet the demands of the use.”).

³⁰ Indeed, when newly elected Councilmember Medina commented on the potential of spillover parking from the Project at the October 28, 2014 meeting, the Prior Director Mr. Woltering provided a comprehensive response regarding parking management within the TCP. City Council Meeting on October 28, 2014 at 2:08:20-2:09:30.

2. The Project Parking Levels Have Not Materially Changed.

As reiterated in the Project’s plans, the Planning Commission Staff Report, and the City Council Staff Report, the Project as approved by the City Council clearly states that no parking is required for the commercial uses without any express limitation on allowed uses. As noted in the Detailed Findings:

“The TCP provides a baseline for parking standard guidelines, which will provide the framework for the parking component during the comprehensive zoning update. Based on the recommended parking standards within the TCP, the number of parking spaces required to accommodate the residential component of the proposed project would fall between 83 – 121 parking spaces. As proposed, the project calls for 106 parking spaces and falls within the recommended range found within the TCP. . . . The project does not include parking for retail customers.”³¹

The Project continues to provide 106 parking spaces. Under the TCP, the parking requirements are as follows:³²

TCP RESIDENTIAL PARKING REQUIREMENTS		
Use	Parking Requirement	As Applied to Project
Residential – Studio	0.75 per Unit	1.5
Residential – 1 Bedroom Apartments	1 per Unit	43
Residential – 1+ Bedroom Apartments	1 to 2 per Unit	38 to 76
	TOTALS	82.5 to 120.5

These totals, even taking into account a sit-down restaurant as proposed, remain consistent with the City’s analysis in 2014. The City did not provide any back up calculations or explanation for commercial uses based on the TCP in the administrative record for the 2014 Entitlements. Instead, the City was clear that the TCP provided the relevant commercial parking requirements as well as residential, and the City was in the process of implementing a Zoning Code update to be consistent with the adopted TCP. If the City intended to limit the uses or Parking Exception, the City would have, as is common practice, included calculations and express limitation in the Conditions of Approval, similar to 111 San Mateo. This was not done. While the City’s priorities may have shifted recently, this should not be used to re-interpret the 2014 Entitlements at the expense of the Project. If the City no longer supports the goals and requirements of the City’s duly adopted TCP, the appropriate process is for the City to provide notice and process and approve an amendment *to the TCP itself for future projects with sufficient advance notice to make adjustments.*

³¹ Attachment 2 to City Council Staff Report.

³² TCP at Table 7.8.

At the time the Project was approved in 2014, the City staff appropriately explained, “The Municipal Code is outdated and is not consistent with the parking concepts found with the TCP.”³³ Further, and as discussed in greater detail below, the zoning regulations must be consistent with the general and specific plans of the City—not the other way around.³⁴ Under long-standing California planning and zoning law, the framework developed in the general and specific plans, like the TCP, control. The relevant parking requirements from the TCP are therefore shown below based on the possible uses for the Project.

PARKING REQUIREMENTS FOR COMMERCIAL BASED ON TYPE OF USE		
Use	Parking Requirement	As Applied to Project
General Retail	1.5 to 3 per 1,000 s.f. of GFL	10.5 to 21
Restaurants ³⁵	3 to 6 per 1,000 s.f. of GFL	21 to 42

As the City repeatedly noted and explained, the Project did not propose, and was not required to provide, any parking for the commercial uses. The Project therefore anticipated a deficit of between 11 and 42 parking spaces from the TCP’s standards. It should also be noted that this was a substantial reduction in the *existing 97-space parking deficit* resulting from the then-existing use (theater and three restaurants) on the site that were removed and replaced by the Project.³⁶ The Project is a redevelopment project, and was designed and planned to help mitigate an existing problem in San Bruno, not exacerbate it. It would be revisionist history to ignore the prior use of the site that formed a basis for the 2014 Entitlements.

3. The Factual Bases for the Parking Exemption Have Not Materially Changed.

Under Section 12.100.120, the City may issue an exception to the parking requirements if it makes the following findings:

1. The strict application of the parking requirements would cause particular difficulty or undue hardship in connection with the use and enjoyment of said property; and
2. That the establishment, maintenance and/or conducting of the off-street parking facilities as proposed are as nearly in compliance with the requirements as are reasonably possible.

On October 28, 2014, the City Council made these findings. The City Staff’s November 28, 2018 letter does not indicate any factual basis for changing these findings. The strict application

³³ Attachment 2 to City Council Staff Report.

³⁴ Gov. Code §§ 65860, 65455; *Pfeiffer v. City of Sunnyvale City Council* (2011) 200 Cal. App. 4th 1552, 1565; *City of Irvine v. Irvine Citizens Against Overdevelopment* (1994) 25 Cal. App. 4th 868, 879; *deBottari v. City Council* (1985) 171 Cal. App. 3d 1204, 1213.

³⁵ Unlike the still outdated Municipal Code, The TCP does not differentiate between “specialty” and sit down restaurants.

³⁶ San Bruno City Council Meeting October 28, 2014 at 1:13:00-1:13:22.

of the parking requirements would still cause particular difficulty in connection with the use and enjoyment of said property.

While there can be no doubt that San Bruno is facing difficult policy choices with respect to its residential parking program, these problems cannot be laid at the door of this vested Project. As explained in a January 22, 2019 report to the City Council, parking occupancy has increased in the area due to “an increase in the area population.” As the City’s consultant explained in that meeting, residential parkers are overflowing into commercial areas, impacting existing commercial parking stock. The residential parking areas are “near or over capacity, implying that there is very high demand for residential parking.”³⁷ Indeed, the report notes that “the plan cannot solve the problem of too many cars owned by the residents themselves.”³⁸

This Project does not contribute to this problem and in fact remedies it by providing well-over the minimum number of spaces required for the residential aspects of the Project, and a much-needed restaurant use that on-site residents and neighbors can walk to without the need to drive and park. As the City repeatedly noted, the Project did not and has never purported to provide any parking for the commercial uses for any allowed use in the Central Business District. Even without commercial parking, as noted above, the Project facilitates a substantial reduction in the 97-space parking deficit resulting from the then-existing use (theater and three restaurants). Nothing has changed with regard to the Project to change the City’s findings. Additionally, the spaces provided by the Project remain the same.

B. City Staff Has Not Articulated Any Substantial Evidence Supporting the Abrupt Reversal from Prior Approvals and Representations.

In light of residential parking pressures unrelated to the Project, City Staff are turning the land use hierarchy on its head by lifting the importance of an outdated Zoning Code over its duly adopted General Plan and TCP. Simply put, the Director is using revisionist history to justify the sudden reversal in interpretation to argue that the proposed restaurant use does not conform to the Parking Exception, because the Exception “was approved on the basis that the parking requirement for the proposed ground floor retail uses with five individual retail tenant spaces with a parking requirement range of 23 to 38 spaces” based on the outdated and inconsistent Municipal Code.

1. A Sit-Down Restaurant Was Contemplated by the City.

No specific uses were identified by the commercial space, although several possibilities were proposed during hearings before the Planning Commission and City Council. As Former City Community Development Director Woltering noted, “That [commercial] space could be divided in a variety of ways depending on the type of tenant or number of tenants being proposed on the ground floor. At this time the vision is certainly to reenergize San Mateo Avenue with

³⁷ CDM Smith, San Bruno Downtown Parking Study at 1

³⁸ *Id.* at 38.

retail and commercial uses—restaurants—and create a very active, dynamic streetscape.”³⁹ None of the 2014 Entitlements adopted that day imposed *any limitation* on the wide range of uses permitted under the Zoning Code, TCP, General Plan or any limitations on the Parking Exception. To the contrary, it was fully anticipated the City would update its Municipal Code to comport with the TCP along with certain parking management programs to help ensure the success of downtown and address residential concerns.

Contrary to the plain language of the 2014 Entitlements, the Director now relies on a back calculation of estimated commercial parking spaces—that does not exist in the administrative record—to assert that a restaurant is not permitted under the Parking Exception. Doing so impermissibly inserts limiting language into the Parking Exception and other approvals where none exists. During the public hearing on the Project, the City Council specifically noted the desirability of restaurants in the TCP area, with Former Director Woltering pointing out that a restaurant would create a dynamic ground floor, and the staff presentation showed images of sidewalk seating for a restaurant.⁴⁰ The Conditions of Approval for the Conditional Use Permit and the Parking Exception in fact specifically include standards applicable only to a restaurant use (Conditions of Approval 11, 31, 37). The Environmental Checklist for the Project specifically notes that the commercial ground use “is permitted to include eating establishments.”⁴¹ As noted above, if the City had intended in 2014 to limit the allowed uses, it had the means to do so clearly and expressly in the conditions of approval, but did not.

2. The Appropriate Parking Requirements for the Project Are Found in the 2014 Entitlements Based on the TCP not the Zoning Code.

In rejecting the proposed use of the approved commercial space, City staff has relied on back calculations based on the Zoning Code. The City Council and Planning Commission noted throughout the various staff reports that “[t]he San Bruno Municipal Code parking standards are outdated and were established based on national guidelines that are typically based on suburban locations and do not take into consideration access to other modes of transportation,” that “the current standards are not consistent with the parking policies found with the TCP,” and “[t]he Municipal Code regulations are outdated and are not consistent with the recommended TCP parking standard guidelines.”⁴²

³⁹ San Bruno City Council Meeting October 28, 2014 at 1:28:00-1:28:20.

⁴⁰*Id.*

⁴¹ Signature did make several statements regarding the infeasibility of a sit-down restaurant use during the Planning Commission and City Council meetings. However, these were all statement based on forecasts not an express commitment. The City made the reasoned decision not to include any such restriction in the text of the 2014 Entitlements, instead preserving flexibility to respond to a changing economy for what everyone perceived as a pioneering and risky project. Additionally, the statements of the prior owner cannot be held against the current Owner as a bona fide third party purchaser without notice of the prior developer’s representations.

⁴² City Council Staff Report at 5; City Council Staff Report Attachment 2.

As discussed above, it is a fundamental tenet of land use law that a zoning ordinance is only valid so long as it conforms to the general and specific plans.⁴³ Indeed, the City has an affirmative obligation to timely bring the zoning ordinance into compliance with a newly adopted plan.⁴⁴ As discussed in detail above, the TCP was adopted in 2013 as a specific plan and is intended to “guide all new development in the Transit Corridors area in both the public and private realms.”⁴⁵ Because the zoning is outdated and inconsistent with the adopted TCP, the parking standards as described in the TCP control.

In addition to conflicting with the TCP, the Zoning Code flies in the face of the policies adopted through the General Plan Housing Element, Land Use Element, and Transportation Elements, as discussed above. Again, the City has failed to timely comply with its obligation to update the Zoning Code.

3. The Proposed Restaurant Use Falls Within the Parking Exemption.

The TCP does not distinguish between specialty and sit-down restaurants, and nor does any express term or condition in the 2014 Entitlements. The only parking requirement described is a 3 to 6 space per 1,000 sq. ft. of gross floor area for any restaurant use. As demonstrated above, this results in a parking requirement of 21 to 42 spaces which is closely aligned with the projected deficit described in the 2014 Entitlements. This is a far cry from the 100+ deficit alleged by the Director in the Determination Letter. It once again bears noting that, as discussed above, this is a substantial reduction in the 97-space parking deficit resulting from the then-existing use (theater and three restaurants).⁴⁶

C. The City Staff’s Interpretation of San Bruno Land Use Law Exposes the City to Substantial Legal Liability.

1. The Owner Has a Vested Right in Its Development.

To obtain a vested right in a construction permit, a property owner must have “performed substantial work and incurred substantial liabilities in good faith reliance” upon that permit.⁴⁷ Courts have generally held “substantial work” and “substantial liabilities” reference actual work performed in connection with the permit.⁴⁸

⁴³ Gov. Code §§ 65860, 65455; *Pfeiffer v. City of Sunnyvale City Council* (2011) 200 Cal. App. 4th 1552, 1565; *City of Irvine v. Irvine Citizens Against Overdevelopment* (1994) 25 Cal. App. 4th 868, 879; *deBottari v. City Council* (1985) 171 Cal. App. 3d 1204, 1213.

⁴⁴ Gov. Code § 65860(c).

⁴⁵ TCP at 5-6.

⁴⁶ San Bruno City Council Meeting October 28, 2014 at 1:13:00-1:13:22.

⁴⁷ *Avco Community Developers, Inc. v. South Coast Regional Com.* (1976) 17 Cal. 3d 785, 791.

⁴⁸ See, e.g., *Hermosa Beach Stop Oil Coalition v. City of Hermosa Beach* (2001) 86 Cal. App. 4th 534, 552 (“no right to develop vests until all final discretionary permits have been authorized and significant ‘hard costs’ have been expended in reliance on those permits—that is, until substantial construction has occurred in reliance on a

The Owner acquired the Project in 2015 after conducting thorough and appropriate due diligence on the Project, including review of the City's long range planning documents and the 2014 Entitlements. As noted above, the face of the approvals themselves do not limit the range of permitted uses for the commercial spaces or the Parking Exception. Since that time, the Owner has expended very substantial resources in acquiring and constructing the Project and marketing and negotiating a binding lease with Sea Pot. The Project is nearly complete. The commercial space is ready to start tenant improvements. At this incredibly late stage, the Owner has—without any question—vested its rights under the 2014 Entitlements, including the Parking Exception.

It would be a clear violation of the Owner's vested rights (to develop the commercial spaces for any allowable commercial use permitted in the C-B-D zone) to deny such use based on inference and a revisionist interpretation of the 2014 Entitlements.

2. The City Is Estopped from Requiring Further Parking Permitting.

As explained in *City of Long Beach v. Mansell*, the seminal case on estoppel, “[t]he government may be bound by an equitable estoppel in the same manner as a private party when the elements requisite to such an estoppel against a private party are present and, in the considered view of a court of equity, the injustice which would result from a failure to uphold an estoppel is of sufficient dimension to justify any effect upon public interest or policy which would result from the raising of an estoppel.”⁴⁹ *Mansell* set forth four factors for establishing an estoppel: “(1) the party to be estopped must be apprised of the facts; (2) he must intend that his conduct shall be acted upon, or must so act that the party asserting the estoppel has a right to believe it was so intended; (3) the other party must be ignorant of the true state of facts; and (4) he must rely upon the conduct to his injury.”⁵⁰ All of these elements were present in this case.

In 2015, the Owner acquired the Project in reliance on the City's long range planning documents and the express language of the 2014 Entitlements. As explained above, the face of these approvals contains *no limitation* on the wide range of uses that are permitted as of right in the C-B-D zone and *no limitation* on the Parking Exception. On August 15, 2018, representatives from the Owner met with Prior Director Woltering and City Planner Matt Neubaumer who had been responsible for the Project since the submission of Signature' application. In the course of that meeting, Mr. Woltering indicated that a restaurant was a permissible use under the 2014 Entitlements, including the Parking Exception, but suggested that the Owner investigate possible additional avenues to mitigate San Bruno's parking problems in

building permit”); *San Diego Coast Regional Com. v. See the Sea, Limited* (1973) 9 Cal. 3d 888, 890 (permit rights vested “for builders performing substantial lawful construction of their projects” prior to change in law); *County of San Diego v. McClurken* (1951) 37 Cal. 2d 683, 691 (“If an owner has legally undertaken the construction of a building before the effective date of a zoning ordinance, he may complete the building and use it for the purpose designed after the effective date of the ordinance.”).

⁴⁹ *City of Long Beach v. Mansell* (1970) 3 Cal. 3d 462, 496-97.

⁵⁰ *Id.* at 488-89.

order to mollify residents' concerns. As discussed above, after David Woltering's retirement on August 21, 2018, Marvin Rose and Matt Neuebaumer repeated this interpretation to the Owner in meetings on September 10, 2018 and October 4, 2018.

On November 28, 2018, the Director issued the Determination Letter suddenly reversing course and acknowledging in the letter itself, "*I understand that this is a change from what may have been communicated to you in your initial conversations with City staff.*"⁵¹ This new and surprising staff determination has endangered the Owner's lease and directly affects the financial value of the Project. The Owner engaged with Sea Pot because it is a proven and experienced operator, financially sound, and very likely to succeed on a long term basis. Many of the alternatives tenants contemplated were high-risk, inexperienced tenants with substandard concepts or franchise businesses. Since the Project was approved, the retail landscape has changed significantly. There are fewer tenants in the retail world and much greater volatility, turn over, and risk. Additionally, a multi-tenant leasing scenario would have applied undue financial pressure on the Owner as a result of multiple leases and significant construction costs to split up the space. Under these circumstances, the Owner's reliance on statements of the city representatives was entirely reasonable and in fact necessary for the success of the Project.

In applying the *Mansell* factors, it is clear the City should be estopped from asserting its new position. The City was certainly apprised of the statements made in the meetings ranging from August to October, and was aware the Owner was proceeding actively with the Project and negotiating a lease with Sea Pot. The City, through its representatives, instructed the Owner on the acceptability of the proposed use with the intention that the Owner act in reliance on those instructions. The Owner was ignorant of any other interpretation of the 2014 Entitlements, since this interpretation was first made only in the November 28, 2018 letter, and relied on the 2014 Entitlements and City staff's original statements in entering into a lease with Sea Pot. Sea Pot has been investing substantial additional funds in preparing tenant improvement plans and anticipates opening in Fall 2019.

3. The City Has Created Substantial Liability Under the Housing Accountability Act and Senate Bill 35.

On August 28, 2018, the Legislature adopted Assembly Bill 3194 ("AB 3194"). AB 3194 amends the existing Housing Accountability Act ("HAA") to prohibit housing development projects from being found inconsistent, not in compliance, or not in conformity, with the applicable zoning ordinance, and would prohibit a local government from requiring a rezoning of the project site, if the existing zoning ordinance does not allow the maximum residential use, density, and intensity allowable on the site by the land use or housing element of the general plan. AB 3194 was intended to prevent exactly the situation here—where a city has failed to update its zoning code to reflect changes to general or specific plans and then uses that inconsistent code as a basis to deny General Plan and Specific Plan-compliant housing

⁵¹ Determination Letter, Attachment A.

development projects. As explained above, the City has a statutory obligation to update its Zoning Code to comply with the adopted specific plan, the TCP.⁵² If the City has a change in policy and priority, this must start with the General Plan and TCP using the appropriate noticed public process—not simply by elevating the importance of the zoning code and using it as a shield.⁵³

It should also be noted that the City is currently subject to the streamlined approval process outlined in SB 35, which also prioritizes the General Plan and Specific Plans over inconsistent and out-of-date zoning codes, because the City has failed to meet or exceed its share of the regional housing need allocation as determined by HCD. According to the most recent data from December 2018, the City has completed 0% of its very low income housing allocation, only 11.2% of its lower income allocation, 20.5% of its moderate allocation, and 12.3% of its above moderate allocation.⁵⁴ The City should be aware that any HAA-eligible project presented to the City will be subject to the streamlined approval process outlined in SB 35 and the strictures of AB 3194, particularly as it relates to the City's delay in updating its Zoning Code to be consistent with the 2009 General Plan, 2013 TCP and 2015 Housing Element.

This inversion of the land use hierarchy is a violation of state law. Under the HAA, the applicant, any potential resident, or housing organization may sue the City for its violation and court shall issue an order or judgment compelling compliance.⁵⁵ The court may also award attorney's fees and costs of the suit to the petitioner.⁵⁶ If the City persists in applying the lower density standards from the Zoning Code, the City would also be exposed to fines of \$10,000 per unit of housing. If the City persists in elevating its Zoning Code above its General and Specific Plans, it will expose itself to substantial liability to the other pipeline development projects and future applications.

IV. CONCLUSION

The Owner has, in good faith reliance on the plain language of the 2014 Entitlements and the representations of the Former Director Woltering and City Staff, invested heavily in the future of downtown San Bruno and cares deeply about its success. The Owner has upheld its end of the bargain made in the 2014 Entitlements. We respectfully request the City Council do the same and reaffirm its commitment to this Project and the goal of revitalizing downtown San Bruno as a place of vibrant, transit-oriented development. It is understood the City is facing increased pressure from changes in residential parking that affect the downtown, but it is also clear from the City's recent parking report that this Project (and commercial parking in general

⁵² Gov. Code § Gov. Code § 65860(c).

⁵³ Governor Newsom has proposed linking transportation funds to successful compliance with these new requirements in order to meet housing goals.

⁵⁴ http://www.hcd.ca.gov/community-development/housing-element/docs/SB35_StatewideDeterminationSummary01312018.pdf (viewed 1/28/19)

⁵⁵ *Id.* at § 65589.5(k).

⁵⁶ *Id.*

January 28, 2019

Page 18

in the downtown) is not the cause of the problem. This sudden reversal is not a viable short or long-term solution, and exposes the City to legal liability from this Project, from other projects in the pipeline and the HCD. The Owner therefore respectfully requests that the City Council reverse City Staff's interpretation of the 2014 Parking Exception.

Sincerely yours,

HOLLAND & KNIGHT LLP



Tamsen Plume

TP:mlm

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ATTACHMENTS

- A. Letter from D. Smith (San Bruno Community Development Director) to K. Busch (Sares Regis) regarding Proposed Restaurant at 406-418 San Mateo Avenue – Aperture (Nov. 28, 2018)
- B. City of San Bruno Resolution No. 2014-111 (Oct. 28, 2014)
- C. City of San Bruno Resolution No. 2014-112 (Oct. 28, 2014)
- D. City of San Bruno Resolution No. 2014-113 (Oct. 28, 2014)
- E. City of San Bruno Resolution No. 2014-114 (Oct. 28, 2014)
- F. City Council Agenda Item 8 Staff Report (Oct. 28, 2014)
- G. Minutes of October 28, 2014 City Council Meeting
- H. Planning Commission Agenda Item 5.A. Staff Report (Oct. 7, 2014)
- I. Minutes of October 7, 2014 Planning Commission Meeting
- J. City of San Bruno, Transit Corridors Plan (Feb. 2013)
- K. City Council Agenda Item 8.A. Staff Report (Feb. 12, 2013)
- L. Excerpts of Transit Corridors Plan Draft Environmental Impact Report (March 2012), available in full at <https://www.sanbruno.ca.gov/civicax/filebank/blobdload.aspx?BlobID=23003> (last viewed Jan. 28, 2019).
- M. City of San Bruno, Measure N (2014).
- N. Excerpts of City of San Bruno General Plan, available in full at https://www.sanbruno.ca.gov/gov/boards_commissions_n_committees/planning_commission/planning_commission_archives.htm (last viewed Jan. 28, 2019).
 - 1. Land Use Element
 - 2. Transportation Element
 - 3. Housing Element
- O. SB 35 Determination Methodology and Background Data (Dec. 2018)

P. CDM Smith, San Bruno Downtown Parking Study