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February 10, 2020

Michael W. Shonafelt
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VIA EMAIL AND HAND DELIVERY

Terry Tornek, Mayor, and Members of the City Council
City of Pasadena
175 N. Garfield Ave.
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lrocha@cityofpasadena.net

Re: Revocation of Conditional Use Permit #5530

Dear Mayor Tornek :

This office represents Pasadena Lots-70, LLC ("Applicant") regarding the above-referenced conditional use permit (#5535; PLN 2010-00384) ("CUP"). This letter presents our legal grounds for the appeal of the Board of Zoning Appeals' ("BZA") October 31, 2019, revocation of the CUP. This matter is set as item 10 on the February 10, 2020, agenda.

As a preliminary note, on February 5, 2020, Applicant sent a letter to the City Attorney's Office requesting a continuance of this matter to a date and time sufficient for the City to adequately respond to Applicant's November 25, 2019, Public Records Act request pursuant to Government Code, §§ 6250–6276.48 (City Request No. 0012299, "PRA Request"). The City's response to the PRA Request was incomplete and until the City provides Applicant with a complete response, Applicant will be prejudiced in its efforts to present its case against the revocation of the CUP. We hereby incorporate by this reference, and enclose, all of Applicant's prior correspondence to the City on this matter, including: (1) Applicant's July 16, 2019, letter to the Hearing Officer; (2) Applicant's October 29, 2019, letter to the Board of Zoning Appeals; (3) Applicant's November 25, 2019, PRA Request; and (4) Applicant's February 5, 2020, letter to the City Attorney.

1. INTRODUCTION AND SUMMARY OF GROUNDS FOR APPEAL.

The City of Pasadena ("City") approved the CUP on March 6, 2013. Since that time the Applicant has been availing itself of the rights granted by that entitlement, namely, allowing private group events at the former Ambassador College Campus. Its use of the CUP right has matured into a constitutionally protected, vested right. (See, e.g., *Goat Hill Tavern v. City of Costa Mesa* (1992) 6 Cal.App.4th 1519, 1525-1526 [8

Cal.Rptr.2d 385]; see also *Tex-Cal Land Management v. Agric. Labor Relations Bd.* (1979) 24 Cal.3d 335, 343-344 [156 Cal.Rptr. 1].)

The BZA's October 31, 2019, decision rests on only one of the six possible grounds for revoking a vested CUP right: the "changed circumstances" ground. (PMC, § 17.78.090(a).) That finding cannot properly be made, because the foreseeability of purportedly "changed" conditions was a matter of record at the time the City granted the CUP. Nor do any of the changed circumstances conflict with the terms of the CUP or the Applicant's ability to comply with the CUP conditions of approval. Specifically:

(a) The CUP Entitles the Applicant to Continue Its Events at Fowler Garden, Regardless of the Elimination of the Other Venues: The BZA's main basis for terminating the CUP is that three of the four original locations for events allowed by the CUP (Merritt Mansion, Terrace Villa, and Italian Garden) are no longer available for event use, thereby concentrating the uses into the Fowler Garden. This argument reads restrictions into the CUP that are not there. Nothing in the original CUP prohibited the allotment of events from occurring on only one site. If the City were concerned about concentrating event and guest maximums on one site, it could have fashioned an appropriate condition of approval prohibiting that manner of use or placing venue-specific caps; it did not do so. This ground is insufficient to support a termination of the Applicant's vested CUP rights.

(b) Ther's Compatible Use Argument Is not Supported by the Record: The BZA concluded that allowance of event uses is inconsistent with new residential uses on the western boundary of the Fowler Garden. The City approved that residential project on April 12, 2007, some six years before it approved the CUP. The findings to approve the CUP required the City to determine compatibility, not just with existing uses, but also known ***future*** uses. (See, e.g. PMC, § 17.61.050.H.6.) When the City approved the CUP it was fully aware of the residential uses that would be located adjacent to the Fowler Garden. It cannot therefore invoke this ground as a basis for revoking the CUP right.

( ) The BZA's Assertion about Use of On-Site and Off-Site Facilities Is Devoid of Legal Support: The third ground for the BZA's revocation was based on a finding that the lack of kitchen and/or restroom amenities from adjacent facilities qualifies as grounds to revoke the CUP. In fact, the CUP contains no restrictions on how the Applicant may avail itself of amenities for its events. There is no restriction on the use of ported kitchen or bathroom amenities, nor does the CUP prohibit use of such amenities on alternative adjacent facilities. The City is prohibited from revoking the CUP on the basis of uses and activities that the CUP allows. Nor does the BZA's references to changes in the Applicant's use of parking amenities sufficient to revoke the CUP. If the Applicant seeks to avail itself of only one of many alternative parking resources, it is free to do so without facing the penalty of a revocation of its CUP right, as long as it remains in compliance with the CUP conditions.

(c) The BZA's Reference to Purported Failures to Provide Monthly Reports Is Improper in this Proceeding: As noted in the Applicant's October 29, 2019, letter to the BZA, the Applicant has been in strict compliance with the conditions of approval for the CUP since its issuance. Staff's passing attempt to undermine this

showing by invoking a purported failure to comply with a condition of approval requiring monthly reporting to the Zoning Administrator is not proper. (See Board Staff Report at p. 7.) The proper procedure for enforcing a failure to comply with a condition of approval for a CUP is an enforcement action under section 17.78.090(c). This is a revocation action, proceeding on only one criterion for revocation -- section 17.78.090(a) for purportedly "changed" circumstances.

2. DISCUSSION.

In determining whether to revoke a CUP right, the City is bound, not only by the provisions of the City of Pasadena Municipal Code ("PMC"), but also state law. As the staff report notes, PMC section 17.78.090 governs the revocation of CUPs. That ordinance sets forth limited criteria for revocation of CUPs. The BZA invoked only one of those criteria, which allows the City to revoke a CUP if

> [c]ircumstances under which the permit or entitlement was granted have been changed by the applicant to a degree that one or more of the findings contained in the original permit or entitlement can no longer be made in a positive manner and the public health, safety, and welfare require the revocation.

(PMC, § 17.78.090(a).) As demonstrated in this letter, the City cannot properly invoke section 17.78.090(a) and must allow the Applicant to continue to avail itself of the rights of the CUP.

Administrative decisions -- such as this -- must rest on findings supported by substantial evidence. (Code Civ. Proc., § 1094.5.) As the courts repeatedly have concluded, substantial evidence "means more than a mere scintilla; it means 'such relevant evidence as a reasonable man might accept as adequate to support a conclusion ....'" The term "substantial evidence "cannot be deemed synonymous with 'any' evidence. It must be reasonable in nature, credible, and of solid value; it must actually be 'substantial' proof of the essentials which the law requires in a particular case." (*Nakasone v. Randall* (1982) 129 Cal.App.3d 757, 762 [181 Cal.Rptr. 324] quoting *United Professional Planning, Inc. v. Superior Court* (1970) 9 Cal.App.3d 377, 392-393 [88 Cal.Rptr. 551].) To support a denial, the agency "must set forth findings to bridge the analytic gap between the raw evidence and ultimate decision or order." (*Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 515 [113 Cal.Rptr. 836].)

Importantly, the standard of review for terminating CUP rights is a heightened one because it deals with vested rights. In such cases, ***no deference is to be paid to the public agency's findings***. (*Nightlife Partners, Ltd. v. City of Beverly Hills* (2003) 108 Cal.App.4th 81, 89 [133 Cal.Rptr.2d 234].) As one court observed:

> If [an administrative] decision does not substantially affect a fundamental vested right, the trial court considers only whether the findings are supported by substantial evidence

> in light of the whole record." [Citation.] If, however, "an administrative decision substantially affects a fundamental vested right, the trial court must exercise its independent judgment on the evidence and find an abuse of discretion if the findings are not supported by the weight of the evidence. [Citation.]

(*Goat Hill Tavern v. City of Costa Mesa*, *supra*, 6 Cal.App.4th at pp. 1525-1526; see also *Tex-Cal Land Management v. Agric. Labor Relations Bd.*, *supra*,24 Cal.3d at pp. 343-344.)

In this case, the BZA's decision to revoke the CUP under PMC section 17.78.090(a) is devoid of substantial evidence and cannot withstand the heightened scrutiny applicable to administrative decisions to terminate constitutionally vested CUP rights. The BZA's decision rests on three substantive grounds. Each ground is devoid of legal support, as demonstrated below.

A. The CUP Entitles the Applicant to Continue Its Events at Fowler Garden, Regardless of the Elimination of the Other Venues:

The BZA's primary contention for termination of the CUP is that three of the four original locations for events allowed by the CUP (Merritt Mansion, Terrace Villa, and Italian Garden) are no longer available for event use, leaving only the Fowler Garden open for the events contemplated by the CUP. The BZA asserts that the CUP's originally findings -- which supported up to 32 events a year, with a maximum of 300 guests on four locations -are no longer tenable for only one event location.

The BZA's finding reads restrictions into the CUP that are not there. Nothing in the original CUP prohibited the maximum allotment of events from occurring on only one site. Nor did the City impose venue-specific caps on the number of maximum attendees. The Applicant always was -- and still is -- entitled by the CUP to hold its events wherever it deems appropriate as long as its use is consistent with its grant under the CUP. If the City were concerned about concentrating event and guest maximums on one site, it could have fashioned an appropriate condition of approval prohibiting that manner of use or otherwise imposing venue-specific caps; it did not do so. Use of Fowler Garden as the situs of the CUP's annual allotment of events is not precluded by the CUP, and the City has no legal basis to read that prohibition into the CUP or to purport to base a termination of the CUP rights on that ground.

If concentration of the uses granted by the CUP remains a major concern for the City, other measures exist -- short of revoking the Applicant's constitutionally protected CUP rights -that can adequately address that concern. Specifically, an amendment can be crafted to reduce the maximum events and/or attendee caps at the Fowler Garden. The Applicant is willing to work with staff to determine a mutually acceptable maximum event/guest cap.

B. The BZA's Compatible Use Ground Is Unsupported by Substantial Evidence.

The BZA's decision also rested on a finding that allowance of event uses is inconsistent with new residential uses on the western boundary of the Fowler Garden. On that basis, the BZAs concluded that findings three, four and six no longer can be made. The "adjacent" residential uses to which the BZA refers are part of the City Ventures Grove project. Notably, the City approved that project on April 12, 2007, some six years before it approved the CUP.

The findings to approve the CUP required the City to determine compatibility, not just with existing uses, but also known ***future*** uses. (See, e.g. PMC, § 17.61.050.H.6.) When the City approved the CUP it was fully aware of the residential uses that would located adjacent to the Fowler Garden, and it made an express finding that

> [t]he hours of operation, noise level, maximum number of attendees permitted, and parking have been conditioned to be compatible with the surrounding existing ***and proposed*** residential uses.

(See CUP Staff Report, Findings (Mar. 6, 2013), at p. 13, emphasis added.) Indeed, the CUP uses were disclosed to the purchasers of the residential units that ostensibly now oppose the CUP. The Second Amendment to the Ambassador West Declaration of Covenants, Conditions and Restrictions (Oct. 31, 2013) ("CC&Rs") amends section 2.4 of the original Master HOA CC&Rs to expressly prohibit the HOA from "limiting or abridging" the commercial uses allowed by the CUP for the Fowler Garden. (CC&Rs, § 8, p. 4.) That provision goes on to state that the HOA shall not "interfere with or challenge, whether by legal challenge or otherwise the operation and/or use by the respective owner of the Merritt Mansion, Terrance Villa or Fowler Garden ... ." (*Ibid.*) \

The revocation findings also generally reference "148 multi-family residences that have been constructed on the Ambassador College Campus, in and around areas originally approved for events." (City Council Staff Report (Feb. 10, 2020) ("Staff Report"), p 6.) Aside from conceding that "a majority of these uses were contemplated when the CUP was approved," this finding also overlooks that the General Plan policy the BZA invokes addresses only "adjoining" incompatible uses. (See Staff Report, finding 3 [invoking Policy 25.7 of the Land Use Element of the City of Pasadena General Plan.) As noted above, the "adjoining" residential uses were approved well before the CUP was issued, and the City knew all about those adjoining uses at that time. That is why it crafted conditions of approval designed to mitigate potential impacts to those residential uses. (See, e.g., BZA Staff Report, Attachment E (Staff Report for Approval of CUP #5535] Conditions of Approval.) The City cannot now invoke impacts to residential uses as a ground for revoking the CUP.

C. The BZA's Conclusions about Use of On-Site and Off-Site Facilities Is Devoid of Legal Support.

The third substantive ground cited by the BZA for the termination of the CUP is that use of kitchen and/or restroom amenities brought on-site or from adjacent facilities qualifies as grounds to revoke the CUP. In fact, the CUP contains no restrictions on use of on-site kitchen or bathroom amenities, nor does it prohibit use of such amenities on adjacent facilities. Nor does the reference to the change in the Applicant's use of parking amenities support a finding of denial. The Applicant is entitled to draw from any one of its allowed parking resources to meets its parking demands, as long as the Applicant does not violate the conditions of approval and terms of the CUP. The City is prohibited from revoking the CUP on the basis of uses and activities that the CUP allows.

D. The BZA's Reference to Purported Failures to Provide Monthly Reports to the Zoning Administrator Is Misplaced in this Proceeding.

As noted in the Applicant's October 29, 2019, 2019, letter to the BZA, the Applicant has been in strict compliance with the conditions of approval for the CUP since its issuance. The staff's passing attempt to undermine this showing by invoking a purported failure to comply with a condition of approval requiring monthly reporting to the Zoning Administrator is not proper. (See Board Staff Report at p. 7.) The proper procedure for enforcing a failure to comply with a condition of approval for a CUP is an enforcement action under section 17.78.090(c). This is a revocation action, proceeding on only one criterion for revocation -- section 17.78.090(a) for purportedly "changed" circumstances.

3. CONCLUSION

For the foregoing reasons, among others, the BZA's decision to revoke the CUP is unsupported by law and/or evidence. Nor can the City meet the stringent standard for revocation of a vested CUP right. In fact, upholding the BZA's decision to revoke the CUP under the grounds presented in that decision could give rise to a viable action for a regulatory taking. We respectfully request that the City Council overturn the BZA's decision to revoke the CUP.

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The undersigned will be on hand at the February 10, 2020, hearing to answer any questions.

Very truly yours,

Michael W. Shonafelt

MWS

Enclosures

cc: David Reyes, Director, City of Pasadena Department of Planning and Community Development (davidreyes@cityofpasadena.net)
Michele Beal Bagneris, Esq., City Attorney (mbagneris@ci.pasadena.ca.us)
Philip Kerr, Chief Executive Officer, City Ventures, (phil@cityventures.com)
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ATTORNEYS AT LAW

MICHAEL W. SHONAFELT
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File No.:
2470.105

July 16, 2019

VIA EMAIL AND HAND DELIVERY

Hearing Officer
c/o Carrie Banks
City of Pasadena
175 N. Garfield Ave.
Pasadena, CA 91101
cbanks@cityofpasadena.net

Re: Revocation of Conditional Use Permit #5530

Dear Ms. Banks,

This office represents Pasadena Lots-70, LLC ("PL-70") regarding the above-referenced conditional use permit (#5535; PLN 2010-00384) ("CUP"). Revocation of the CUP is set for a hearing before the Hearing Officer on July 17, 2019, and is item D on the agenda.

The City of Pasadena ("City") approved the CUP on March 6, 2013. Since that time, PL-70, the CUP applicant, has been availing itself of the rights granted by that entitlement, namely, allowing private group events at various locations located at the former Ambassador College Campus. Since the date of the issuance of the CUP, PL-70 and has been in strict compliance with all CUP conditions of approval.

In determining whether to revoke a CUP right, the City is bound, not only by the provisions of the City of Pasadena Municipal Code ("PMC"), but also state law. As the staff report notes, PMC section 17.78.090 governs the revocation of CUPs. That ordinance sets forth limited criteria for revocation of CUPs. Staff invoke one of those criteria, which allows the City to revoke a CUP if

> [c]ircumstances under which the permit or entitlement was granted have been changed by the applicant to a degree that one or more of the findings contained in the original permit or entitlement can no longer be made in a positive manner and the public health, safety, and welfare require the revocation.

(PMC, § 17.78.090(a).) As demonstrated in this letter, the City cannot properly invoke section 17.78.090(a) and must allow PL-70 to continue to avail itself of the rights of the CUP.

Administrative decisions -- such as this -- must rest on findings supported by substantial evidence. (Code Civ. Proc., § 1094.5.) As the courts repeatedly have concluded, substantial evidence "means more than a mere scintilla; it means 'such relevant evidence as a reasonable man might accept as adequate to support a conclusion ....'" The term "substantial evidence "cannot be deemed synonymous with 'any' evidence. It must be reasonable in nature, credible, and of solid value; it must actually be 'substantial' proof of the essentials which the law requires in a particular case." (*Nakasone v. Randall* (1982) 129 Cal.App.3d 757, 762 [181 Cal.Rptr. 324] quoting *United Professional Planning, Inc. v. Superior Court* (1970) 9 Cal.App.3d 377, 392-393 [88 Cal.Rptr. 551].) To support a denial, the agency "must set forth findings to bridge the analytic gap between the raw evidence and ultimate decision or order." (*Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 515 [113 Cal.Rptr. 836].)

Importantly, the standard of review for terminating CUP rights is a heightened one because it deals with vested rights. In such cases, ***no deference is to be paid to the public agency's findings***. (*Nightlife Partners, Ltd. v. City of Beverly Hills* (2003) 108 Cal.App.4th 81, 89 [133 Cal.Rptr.2d 234].) As one court observed:

> If [an administrative] decision does not substantially affect a fundamental vested right, the trial court considers only whether the findings are supported by substantial evidence in light of the whole record." [Citation.] If, however, "an administrative decision substantially affects a fundamental vested right, the trial court must exercise its independent judgment on the evidence and find an abuse of discretion if the findings are not supported by the weight of the evidence. [Citation.]

(*Goat Hill Tavern v. City of Costa Mesa* (1992) 6 Cal.App.4th 1519, 1525-1526 [8 Cal.Rptr.2d 385]; see also *Tex-Cal Land Management v. Agric. Labor Relations Bd.* (1979) 24 Cal.3d 335, 343-344 [156 Cal.Rptr. 1].)

In this case, staff's recommendation to revoke the CUP under PMC section 17.78.090(a) is devoid of substantial evidence and cannot withstand the heightened scrutiny applicable to administrative decisions to terminate CUP rights. Staff cite three reasons to revoke the CUP. Each reason is devoid of legal support, as demonstrated below.

(a) The CUP Entitles PL-70 to Continue Its Events at Fowler Garden, Regardless of the Elimination of the Other Venues: Staff's main contention for termination of the CUP is that three of the four original locations for events allowed by the CUP (Merritt Mansion, Terrance Villa, and Italian Garden) are no longer available for event use, leaving only the Fowler Garden open for the events contemplated by the CUP. Staff contend that the CUP's originally findings -- which supported up to 32 events a year, with a maximum of 300 guests on four locations -- are no longer tenable for only one event location. The problem with the staff's argument is that it reads restrictions into the CUP that are not there. Nothing in the original CUP

prohibited the maximum allotment of events from occurring on only one site. PL-70 always was -- and still is -- entitled by the CUP to hold its events wherever it deems appropriate as long as its use is consistent with its grant under the CUP. If the City were concerned about concentrating event and guest maximums on one site, it could have fashioned an appropriate condition of approval prohibiting that manner of use; it did not do so. Use of Fowler Garden as the situs of the CUP's annual allotment of events is not precluded by the CUP, and the City has no legal basis to read that prohibition into the CUP or to purport to base a termination of the CUP rights on that ground.

(b) Staff's Compatible Use Argument Is Baseless: Staff next concludes that allowance of event uses is inconsistent with new residential uses on the western boundary of the Fowler Garden. On that basis, staff conclude that findings three, four and six no longer can be made. The residential uses to which staff refers are part of the City Ventures Grove project. Notably, the City approved that project on April 12, 2007, some six years before it approved the CUP. The findings to approve the CUP required the City to determine compatibility, not just with existing uses, but also known ***future*** uses. (See, e.g. PMC, § 17.61.050.H.6.) When the City approved the CUP it was fully aware of the residential uses that would located adjacent to the Fowler Garden, and it made an express finding that "[t]he hours of operation, noise level, maximum number of attendees permitted, and parking have been conditioned to be compatible with the surrounding existing ***and proposed*** residential uses." (See CUP Staff Report, Findings (Mar. 6, 2013), at p. 13, emphasis added.) Indeed, the CUP uses were disclosed to the purchasers of the residential units. The Second Amendment to the Ambassador West Declaration of Covenants, Conditions and Restrictions (Oct. 31, 2013) ("CC&Rs") amends section 2.4 of the original Master HOA CC&Rs to expressly prohibit the HOA from "limiting or abridging" the commercial uses allowed by the CUP for the Fowler Garden. (CC&Rs, § 8, p. 4.) That provision goes on to state that the HOA shall not "interfere with or challenge, whether by legal challenge or otherwise the operation and/or use by the respective owner of the Merritt Mansion, Terrance Villa or Fowler Garden … ." (*Ibid.*)

(c) Staff's Contention about Use of On-Site and Off-Site Facilities Is Devoid of Legal Support: The third ground cited by staff for recommending termination of the CUP is that use of kitchen and/or restroom amenities brought on-site or from adjacent facilities qualifies as grounds to revoke the CUP. In fact, the CUP contains no restrictions on use of on-site kitchen or bathroom amenities, nor does it prohibit use of such amenities on adjacent facilities. The City is prohibited from revoking the CUP on the basis of uses and activities that the CUP allows.

For the foregoing reasons, among others, staff's recommendation of revocation of the CUP is unsupported by law and/or evidence. Nor can the City meet the stringent standard for revocation of a vested CUP right. The City must refrain from following staff's recommendation and affirm PL-70's right to continue the uses granted by the CUP.

Representatives of PL-70 will be on hand at the July 17, 2019, hearing to answer any questions.

Very truly yours,

Michael W. Shonafelt

MWS

cc:

David Reyes, Director, City of Pasadena Department of Planning and Community Development (davidreyes@cityofpasadena.net)
Michele Beal Bagneris, Esq., City Attorney (mbagneris@ci.pasadena.ca.us)
Joe Oftelie, Vice President of Development, City Ventures, LLC.

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October 29, 2019

Michael W. Shonafelt
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VIA EMAIL AND HAND DELIVERY

Luis Rocha
Board of Zoning Appeals
City of Pasadena
175 N. Garfield Ave.
Pasadena, CA 91101
lrocha@cityofpasadena.net

Re: Revocation of Conditional Use Permit #5530

Dear Mr. Rocha,

This office represents Pasadena Lots-70, LLC ("Applicant") regarding the above-referenced conditional use permit (#5535; PLN 2010-00384) ("CUP"). This letter presents our legal grounds for the appeal of the Hearing Officer's July 17, 2019, revocation of the CUP. This matter is set as item 2.A. on the October 30, 2019, agenda.

1. INTRODUCTION AND SUMMARY OF GROUNDS FOR APPEAL.

The City of Pasadena ("City") approved the CUP on March 6, 2013. Since that time the Applicant has been availing itself of the rights granted by that entitlement, namely, allowing private group events at the former Ambassador College Campus. Its use of the CUP right has matured into a constitutionally protected, vested right. (See, e.g., *Goat Hill Tavern v. City of Costa Mesa* (1992) 6 Cal.App.4th 1519, 1525-1526 [8 Cal.Rptr.2d 385]; see also *Tex-Cal Land Management v. Agric. Labor Relations Bd.* (1979) 24 Cal.3d 335, 343-344 [156 Cal.Rptr. 1].)

The Hearing Officer's July 17, 2019, revocation rests on only one of the six possible grounds for revoking a vested CUP right: the "changed circumstances" ground. (PMC, § 17.78.090(a).) That finding cannot properly be made, because the foreseeability of purportedly "changed" conditions was a matter of record at the time the City granted the CUP. Nor do any of the changed circumstances conflict with the terms of the CUP or the Applicant's ability to comply with the CUP conditions of approval. Specifically:

(a) The CUP Entitles the Applicant to Continue Its Events at Fowler Garden, Regardless of the Elimination of the Other Venues: The Hearing Officer's main basis for terminating the CUP is that three of the four original locations for events allowed by the CUP (Merritt Mansion, Terrace Villa, and Italian Garden) are no longer available for event use, thereby concentrating the uses into the Fowler Garden. This argument reads restrictions into the CUP that are not there. Nothing in the original CUP prohibited the allotment of events from occurring on only one site. If the City were concerned about concentrating event and guest maximums on one site, it could have fashioned an appropriate condition of approval prohibiting

that manner of use or placing venue-specific caps; it did not do so. This ground is insufficient to support a termination of the Applicant's vested CUP rights.

(b) The Hearing Officer's Compatible Use Argument Is not Supported by the Record: The Hearing Officer concluded that allowance of event uses is inconsistent with new residential uses on the western boundary of the Fowler Garden. The City approved that residential project on April 12, 2007, some six years before it approved the CUP. The findings to approve the CUP required the City to determine compatibility, not just with existing uses, but also known ***future*** uses. (See, e.g. PMC, § 17.61.050.H.6.) When the City approved the CUP it was fully aware of the residential uses that would be located adjacent to the Fowler Garden. It cannot therefore invoke this ground as a basis for revoking the CUP right.

(c) The Hearing Officer's Assertion about Use of On-Site and Off-Site Facilities Is Devoid of Legal Support: The third ground for the Hearing Officer's revocation was based on a finding that the lack of kitchen and/or restroom amenities from adjacent facilities qualifies as grounds to revoke the CUP. In fact, the CUP contains no restrictions on how the Applicant may avail itself of amenities for its events. There is no restriction on the use of ported kitchen or bathroom amenities, nor does the CUP prohibit use of such amenities on alternative adjacent facilities. The City is prohibited from revoking the CUP on the basis of uses and activities that the CUP allows. Nor does the Hearing Officer's references to changes in the Applicant's use of parking amenities sufficient to revoke the CUP. If the Applicant seeks to avail itself of only one of many alternative parking resources, it is free to do so without facing the penalty of a revocation of its CUP right, as long as it remains in compliance with the CUP conditions.

(d) The Hearing Officer's Reference to Purported Failures to Provide Monthly Reports Is Improper in this Proceeding: As noted in the Applicant's July 16, 2019, letter to the Hearing Officer, the Applicant has been in strict compliance with the conditions of approval for the CUP since its issuance. Staff's passing attempt to undermine this showing by invoking a purported failure to comply with a condition of approval requiring monthly reporting to the Zoning Administrator is not proper. (See Board Staff Report at p. 7.) The proper procedure for enforcing a failure to comply with a condition of approval for a CUP is an enforcement action under section 17.78.090(c). This is a revocation action, proceeding on only one criterion for revocation -- section 17.78.090(a) for purportedly "changed" circumstances.

2. DISCUSSION.

In determining whether to revoke a CUP right, the City is bound, not only by the provisions of the City of Pasadena Municipal Code ("PMC"), but also state law. As the staff report notes, PMC section 17.78.090 governs the revocation of CUPs. That ordinance sets forth limited criteria for revocation of CUPs. The Hearing Officer invoked only one of those criteria, which allows the City to revoke a CUP if

> [c]ircumstances under which the permit or entitlement was granted have been changed by the applicant to a degree that one or more of the findings contained in the original permit or entitlement can no longer be made in a positive manner and the public health, safety, and welfare require the revocation.

(PMC, § 17.78.090(a).) As demonstrated in this letter, the City cannot properly invoke section 17.78.090(a) and must allow the Applicant to continue to avail itself of the rights of the CUP.

Administrative decisions -- such as this -- must rest on findings supported by substantial evidence. (Code Civ. Proc., § 1094.5.) As the courts repeatedly have concluded, substantial evidence "means more than a mere scintilla; it means 'such relevant evidence as a reasonable man might accept as adequate to support a conclusion ....'" The term "substantial evidence "cannot be deemed synonymous with 'any' evidence. It must be reasonable in nature, credible, and of solid value; it must actually be 'substantial' proof of the essentials which the law requires in a particular case." (*Nakasone v. Randall* (1982) 129 Cal.App.3d 757, 762 [181 Cal.Rptr. 324] quoting *United Professional Planning, Inc. v. Superior Court* (1970) 9 Cal.App.3d 377, 392-393 [88 Cal.Rptr. 551].) To support a denial, the agency "must set forth findings to bridge the analytic gap between the raw evidence and ultimate decision or order." (*Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 515 [113 Cal.Rptr. 836].)

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> If [an administrative] decision does not substantially affect a fundamental vested right, the trial court considers only whether the findings are supported by substantial evidence in light of the whole record." [Citation.] If, however, "an administrative decision substantially affects a fundamental vested right, the trial court must exercise its independent judgment on the evidence and find an abuse of discretion if the findings are not supported by the weight of the evidence. [Citation.]

(*Goat Hill Tavern v. City of Costa Mesa*, *supra*, 6 Cal.App.4th at pp. 1525-1526; see also *Tex-Cal Land Management v. Agric. Labor Relations Bd.*, *supra*, 24 Cal.3d at pp. 343-344.)

In this case, the Hearing Officer's decision to revoke the CUP under PMC section 17.78.090(a) is devoid of substantial evidence and cannot withstand the heightened scrutiny applicable to administrative decisions to terminate constitutionally vested CUP rights. The Hearing Officer's decision rests on three substantive grounds. Each ground is devoid of legal support, as demonstrated below.

A. The CUP Entitles the Applicant to Continue Its Events at Fowler Garden, Regardless of the Elimination of the Other Venues:

The Hearing Officer's primary contention for termination of the CUP is that three of the four original locations for events allowed by the CUP (Merritt Mansion, Terrace Villa, and Italian Garden) are no longer available for event use, leaving only the Fowler Garden open for the events contemplated by the CUP. The Hearing Officer asserts that the CUP's originally findings -- which supported up to 32 events a year, with a maximum of 300 guests on four locations -- are no longer tenable for only one event location.

The Hearing Officer's finding reads restrictions into the CUP that are not there. Nothing in the original CUP prohibited the maximum allotment of events from occurring on only one site. Nor did the City impose venue-specific caps on the number of maximum attendees. The Applicant always was -- and still is -- entitled by the CUP to hold its events wherever it deems appropriate as long as its use is consistent with its grant under the CUP. If the City were concerned about concentrating event and guest maximums on one site, it could have fashioned

an appropriate condition of approval prohibiting that manner of use or otherwise imposing venue-specific caps; it did not do so. Use of Fowler Garden as the situs of the CUP's annual allotment of events is not precluded by the CUP, and the City has no legal basis to read that prohibition into the CUP or to purport to base a termination of the CUP rights on that ground.

If concentration of the uses granted by the CUP remains a major concern for the City, other measures exist -- short of revoking the Applicant's constitutionally protected CUP rights -- that can adequately address that concern. Specifically, an amendment can be crafted to reduce the maximum events and/or attendee caps at the Fowler Garden. The Applicant is willing to work with staff to determine a mutually acceptable maximum event/guest cap.

B. The Hearing Officer's Compatible Use Ground Is Unsupported by Substantial Evidence.

The Hearing Officer's decision also rested on a finding that allowance of event uses is inconsistent with new residential uses on the western boundary of the Fowler Garden. On that basis, the Hearing Officers concluded that findings three, four and six no longer can be made. The "adjacent" residential uses to which the Hearing Officer refers are part of the City Ventures Grove project. Notably, the City approved that project on April 12, 2007, some six years before it approved the CUP.

The findings to approve the CUP required the City to determine compatibility, not just with existing uses, but also known ***future*** uses. (See, e.g. PMC, § 17.61.050.H.6.) When the City approved the CUP it was fully aware of the residential uses that would located adjacent to the Fowler Garden, and it made an express finding that

> [t]he hours of operation, noise level, maximum number of attendees permitted, and parking have been conditioned to be compatible with the surrounding existing ***and proposed*** residential uses.

(See CUP Staff Report, Findings (Mar. 6, 2013), at p. 13, emphasis added.) Indeed, the CUP uses were disclosed to the purchasers of the residential units that ostensibly now oppose the CUP. The Second Amendment to the Ambassador West Declaration of Covenants, Conditions and Restrictions (Oct. 31, 2013) ("CC&Rs") amends section 2.4 of the original Master HOA CC&Rs to expressly prohibit the HOA from "limiting or abridging" the commercial uses allowed by the CUP for the Fowler Garden. (CC&Rs, § 8, p. 4.) That provision goes on to state that the HOA shall not "interfere with or challenge, whether by legal challenge or otherwise the operation and/or use by the respective owner of the Merritt Mansion, Terrance Villa or Fowler Garden … ." (*Ibid.*) \

The revocation findings also generally reference "148 multi-family residences that have been constructed on the Ambassador College Campus, in and around areas originally approved for events." (Board of Zoning Appeals Staff Report (Oct. 30, 2019) ("Board Staff Report"), p 6.) Aside from conceding that "a majority of these uses were contemplated when the CUP was approved," this finding also overlooks that the General Plan policy the Hearing Officer invokes addresses only "adjoining" incompatible uses. (See Board Staff Report, at p. 9, finding 3 [invoking Policy 25.7 of the Land Use Element of the City of Pasadena General Plan.) As noted above, the "adjoining" residential uses were approved well before the CUP was issued, and the City knew all about those adjoining uses at that time. That is why it crafted conditions of approval designed to mitigate potential impacts to those residential uses. (See, e.g., Board

Staff Report, Attachment E (Staff Report for Approval of CUP #5535] Conditions of Approval.) The City cannot now invoke impacts to residential uses as a ground for revoking the CUP.

C. The Hearing Officer's Conclusions about Use of On-Site and Off-Site Facilities Is Devoid of Legal Support.

The third substantive ground cited by the Hearing Officer for the termination of the CUP is that use of kitchen and/or restroom amenities brought on-site or from adjacent facilities qualifies as grounds to revoke the CUP. In fact, the CUP contains no restrictions on use of on-site kitchen or bathroom amenities, nor does it prohibit use of such amenities on adjacent facilities. Nor does the reference to the change in the Applicant's use of parking amenities support a finding of denial. The Applicant is entitled to draw from any one of its allowed parking resources to meets its parking demands, as long as the Applicant does not violate the conditions of approval and terms of the CUP. The City is prohibited from revoking the CUP on the basis of uses and activities that the CUP allows.

D. The Hearing Officer's Reference to Purported Failures to Provide Monthly Reports to the Zoning Administrator Is Misplaced in this Proceeding.

As noted in the Applicant's July 16, 2019, letter to the Hearing Officer, the Applicant has been in strict compliance with the conditions of approval for the CUP since its issuance. The staff's passing attempt to undermine this showing by invoking a purported failure to comply with a condition of approval requiring monthly reporting to the Zoning Administrator is not proper. (See Board Staff Report at p. 7.) The proper procedure for enforcing a failure to comply with a condition of approval for a CUP is an enforcement action under section 17.78.090(c). This is a revocation action, proceeding on only one criterion for revocation -- section 17.78.090(a) for purportedly "changed" circumstances.

3. CONCLUSION

For the foregoing reasons, among others, the Hearing Officer's decision to revoke the CUP is unsupported by law and/or evidence. Nor can the City meet the stringent standard for revocation of a vested CUP right. In fact, upholding the Hearing Officer's decision to revoke the CUP under the grounds presented in that decision could give rise to a viable action for a regulatory taking. We respectfully request that the Board of Zoning Appeals overturn the Hearing Officer's decision to revoke the CUP.

Representatives of the Applicant will be on hand at the October 30, 2019, hearing to answer any questions.

Very truly yours,

Michael W. Shonafelt

MWS

cc: David Reyes, Director, City of Pasadena Department of Planning and Community Development (davidreyes@cityofpasadena.net)
Michele Beal Bagneris, Esq., City Attorney (mbagneris@ci.pasadena.ca.us)
Joe Oftelie, Vice President of Development, City Ventures, LLC. (joe@cityventures.com)

Newmeyer & Dillion LLP
895 Dove Street
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Newport Beach, CA 92660
949 854 7000

November 25, 2019

Michael W. Shonafelt
Michael.Shonafelt@ndlf.com

VIA CERTIFIED MAIL,
ONLINE PORTAL &
FASCIMILE 626-744-4190 W/ ENCL.
Mark Jomsky
City Clerk
City of Pasadena
175 N. Garfield Ave.
Pasadena, CA 91101

Re: Request for All Public Records Concerning Conditional Use Permit No. 5535

Dear Mr. Jomsky,

This office represents Pasadena Lots-70, LLC ("PL-70") regarding the above-referenced conditional use permit (No. 5535; PLN 2010-00384) ("CUP"). The City of Pasadena ("City") approved the CUP on March 6, 2013. On October 30, 2019, the City of Pasadena Board of Zoning Appeals took action to revoke the CUP. PL-70 timely appealed that decision to the City Council and that appeal is pending ("Appeal").

PL-70 hereby requests certain public records from the City regarding the CUP pursuant to the Public Records Act (Gov. Code, § 6250, et seq.) ("PRA"). This PRA request seeks the following categories of documents:

1. The complete administrative record for the Appeal/revocation of the CUP.
2. Any and all public notices related to the Appeal/revocation of the CUP.
3. Any and all public comments, correspondence and/or complaints received by the City, its elected or appointed officials, its various departments and/or employees/representatives related to the Appeal/revocation of the CUP.
4. Any and all transcripts or recordings related to the Appeal/revocation of the CUP.
5. Any and all reports or recommendations made by any relevant advisory committee related to the Appeal/revocation of the CUP.

6. Any and all documents required by statute, executive order, agency rule, or other local, state, or federal rule or regulation to be considered or to be made public related to the Appeal/revocation of the CUP.

7. Any and all internal City memoranda, email correspondence and/or communications related to the Appeal/revocation of the CUP.

8. Any and all documents and/or communications between or among the City and any other party or parties related to the Appeal/revocation of the CUP.

9. Any and all other documents and/or communications that have been or will be referenced in evaluating the Appeal/revocation of the CUP.

The above-mentioned documents are considered "public records" as defined in Government Code section 6250 subdivision (d). We are prepared to pay the applicable copying charges for the requested documents upon demand from the City. We hope that this stated purpose will aid the City in "identify[ing] records and information that are responsive to the request or to the purpose of the request, if stated." (See *id.*, § 6253.1, subd. (a).)

We request that you provide the responsive information within ten (10) days of receipt of this letter, or earlier, if possible. Should you deny any part of this request, please provide a written response describing the legal authority or authorities on which you relied for your determination to deny the request. Please also describe where the requested records are located and provide suggestion for overcoming any practical basis for denying access to the records or information sought. If the records are located with another public agency, please forward a copy of this request to that department and advise this office of your doing so. Finally, please provide the undersigned with the anticipated cost of duplicating the requested public records prior to incurring the direct costs of their duplication.

Thank you for your anticipated cooperation and attention to this matter.

Very truly yours,

Michael W. Shonafelt

cc:

David Reyes, Director, City of Pasadena Department of Planning and Community Development (davidreyes@cityofpasadena.net)
Michele Beal Bagneris, Esq., City Attorney (mbagneris@ci.pasadena.ca.us)
Joe Oftelie, Vice President of Development, City Ventures, LLC.

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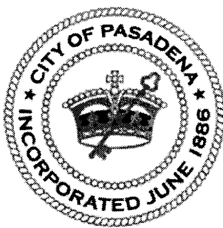

CITY OF PASADENA
FAX (626) 744-4190

PUBLIC RECORDS ACT REQUEST FORM

DATE: November 25, 2019

REQUESTOR	Michael W. Shonafelt, Esq., Newmeyer & Dillion LLP
ADDRESS	895 Dove Street, 5th Floor
CITY, STATE, ZIP	Newport Beach, CA 92660
TELEPHONE #	949-271-7196
E-MAIL ADDRESS	Michael.Shonafelt@ndlf.com

Please provide a written description of the records you are requesting below. The more specific you are, the easier it will be to determine if such records exist in city files.

This public record request is made pursuant to the Public Records Act (Gov. Code, § 6250, et seq.) and seeks the following categories of documents: (1) The complete administrative record for the Appeal/revocation of the conditional use permit No. 5535; PLN 2010-00384 ("CUP"). (2) Any and all public notices related to the Appeal/revocation of the CUP. (3) Any and all public comments, correspondence and/or complaints received by the City, its elected or appointed officials, its various departments and/or employees/representatives related to the Appeal/revocation of the CUP. (4) Any and all transcripts or recordings related to the Appeal/revocation of the CUP. (5) Any and all reports or recommendations made by any relevant advisory committee related to the Appeal/revocation of the CUP. (6) Any and all documents required by statute, executive order, agency rule, or other local, state, or federal rule or regulation to be considered or to be made public related to the Appeal/revocation of the CUP. (7) Any and all internal City memoranda, email correspondence and/or communications related to the Appeal/revocation of the CUP. (8) Any and all documents and/or communications between or among the City and any other party or parties related to the Appeal/revocation of the CUP. (9) Any and all other documents and/or communications that have been or will be referenced in evaluating the Appeal/revocation of the CUP.

SAVE

EMAIL

PRINT

Please note that the California Public Records Act (Government Code Section 6250 et. seq.) applies to writings in city files "containing information relating to the conduct of the public's business prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics." The City will provide those documents to you, unless they are exempt from disclosure under the Public Records Act or other legal reason prevents the documents from being disclosed to the public.

Public Records Request

Thank you for your public records request to the City of Pasadena. The city will promptly research your request and contact you should there be any questions. Documents will be prepared and delivered by each department via the mode requested (USMAIL).

The complete administrative record for the Appeal/revocation of the conditional use permit No. 5535. See records described in attachment.

Your public records request number is: 0012299
Please refer to this number if contacting the city regarding this request.

Please print this page for your records.
If you provided an email address you will receive an email confirmation soon.

start over

submit paper form

Viola R. Fennell

From: Right Fax
Sent: Monday, November 25, 2019 4:15 PM
To: Viola R. Fennell
Subject: Your fax has been successfully sent to City Clerk at 6267444190.

Your fax has been successfully sent to City Clerk at 6267444190.

Account: 2470.105

11/25/2019 4:13:48 PM Transmission Record
Sent to 916267444190 with remote ID ""
Result: (0/339;0/0) Success
Page record: 1 - 5
Elapsed time: 01:12 on channel 5

Newmeyer & Dillion LLP
895 Dove Street
Fifth Floor
Newport Beach, CA 92660
949 854 7000

February 5, 2020

Michael W. Shonafelt
Michael.Shonafelt@ndlf.com

VIA CERTIFIED MAIL &
E-MAIL MBAGNERIS@CI.PASADENA.CA.US

Michele Beal Bagneris, Esq.
City Attorney
City of Pasadena
100 N. Garfield Avenue Room N-210
Pasadena, CA 91101

Re: Notice of Failure to Properly Respond to Public Records Request No. 0012299 & Request for 30-day Extension of February 10, 2020, Revocation Hearing Conditional Use Permit No. 5535; PLN2010-00384

Dear Ms. Bagneris,

This office continues to represent Pasadena Lots-70, LLC ("PL-70"), regarding revocation of the above-referenced Conditional Use Permit No. 5535; PLN 2010-00384 ("CUP") and the related public records request made pursuant to the California Public Records Act ("PRA") (Gov. Code, §§ 6250–6276.48),[1] City Request No. 0012299 ("PRA Request").

This letter provides the City of Pasadena ("City") with formal notice of its failure to properly respond to PL-70's PRA Request. As a result, PL-70 seeks a minimum 30-day extension of the CUP revocation hearing, presently set for February 10, 2020, to allow the City to conduct a further search of its files.

PL-70 requests that the City confirm that it will provide all responsive public records and grant the reasonable 30-day extension of the CUP hearing. PL-70 asks that the City provide this written confirmation by 5:00 p.m. (PST), Friday, February 7, 2020. If the City fails to do so, PL-70 may need to pursue other avenues for recourse due to the City's failure to comply with its clear and present duties under the PRA.

For brief background, in or around July 2019, the City held the first of several hearings in the administrative process for the CUP's revocation. Following that initial hearing, the City Board of Zoning Appeals heard the CUP's revocation in or around October 2019.

[1] All future references are to the Government Code unless otherwise stated.

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To exhaust administrative remedies, PL-70 timely appealed all determinations. Shortly thereafter, PL-70 sent the City a PRA Request. The PRA Request sought the complete administrative record for the CUP's revocation, including any and all documents comprising internal emails, written memoranda and other written communications to and from the City. PL-70 submitted that request to the City on November 25, 2019.

On or about December 19, 2019, the City responded with a scant collection of documents already in PL-70's possession. Notably absent were any documents comprising internal communications, memoranda, emails and correspondence to and from the City concerning the revocation of the CUP. As a result, PL-70 must now prepare for a hearing that may deprive it of its long-held CUP without being afforded a full and fair opportunity to respond to the contents of the complete administrative record. For those reasons, among others, PL-70 respectfully requests a minimum 30-day extension of the CUP's final revocation hearing to allow the City to fully respond to our request.

The City is under a clear and present constitutional and statutory duty to provide the public with prompt access to its own information. The PRA requires a prompt response within ten days of receipt of the initial PRA request:

> [U]pon a request for a copy of records, shall, within 10 days from receipt of the request, determine whether the request, in whole or in part, seeks copies of disclosable public records in the possession of the agency and shall promptly notify the person making the request of the determination and the reasons therefor.

(§ 6253, subd. (c).) Only in "unusual circumstances" may the City extend that timeframe. (*Ibid.*) To do so, the City must provide written notice, setting forth the reasons for the extension and the date on which a determination is to be dispatched. (*Ibid.*) Under no circumstances is such an extension to go beyond 14 days. (See *ibid.*) In this case, the City utilized several extensions, only to supply PL-70 with a mere fragment of the documents that should be included in the administrative record.

Again, PL-70 requests that the City immediately provide the complete administrative record and confirm, in writing, the requested minimum 30-day extension of the CUP's revocation hearing. PL-70 requests this written confirmation from the City by ***5:00 p.m., Friday, February 7, 2020***.

If the City fails provide this written confirmation, PL-70 will be forced to pursue additional remedies to address the City's failure to comply. It bears noting that an award of attorneys' fees and costs is available to a prevailing petitioner under the PRA. (See § 6259.) A petitioner prevails under the PRA only "if the litigation substantially contributed or was demonstrably influential in setting in motion the process which eventually achieved the desired result." (See *Garcia v. Bellflower Unified Sch. Dist. Governing Bd.* (2013) 220 Cal.App.4th 1058, 1063 [163 Cal.Rptr.3d 689, 692].)

Should the City have any questions regarding the above, please do not hesitate to contact the undersigned.

Very truly yours,

Michael W. Shonafelt

MWS:vrf