



City Council Staff Report

DATE: JULY 5, 2017
BUSINESS

UNFINISHED

SUBJECT: A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF PALM SPRINGS, CALIFORNIA, COMPLYING WITH WRIT OF MANDATE, REQUIRING ELIMINATION OF THE EVENT AREA FROM PLANNED DEVELOPMENT DISTRICT PD-374, THE "750 LOFTS" PROJECT LOCATED AT 750 N. PALM CANYON DRIVE, CONFIRMING CONFORMITY WITH THE CITY'S MUNICIPAL CODE WITH REGARD TO PARKING, AND OTHERWISE AFFIRMING APPROVAL OF PD-374, INTROCUPTION OF A RELATED ORDINANCE AFFIRMING APPROVAL OF PLANNED DEVELOPMENT DISTRICT 374, AND A RELATED RESOLUTION AFFIRMING APPROVAL OF A MAJOR ARCHITECTURAL APPLICATION AND CONDITIONAL USE PERMITS

FROM: David Ready, City Manager

BY: Edward Kotkin, City Attorney

SUMMARY:

The Writ of Mandate issued in relation to this project's consideration by the Superior Court required that the City adequately address all parking issues, including event space parking, as required by the Palm Springs Municipal Code. In harmony with the writ, the Court's judgment in this matter granted the writ only as to the issue of parking, noting the City's failure to consider the event space in calculating required parking, and denying the writ on all other grounds. The effect of the Resolution drafted and recommended to the Council for adoption is implementation of the Court's direction, per the writ and in accord with the judgment, in the context of an affirmation of the original approval of the project in September 2015. As the original staff report for June 21, 2017 noted, and the supplemental staff report for that same meeting expanded upon, the Council has other options. The Council has absolute discretion in this case, but must take some action on July 5, 2017. The return to the Court's Writ is due on July 6, 2017.

ITEM NO. D.1.

RECOMMENDATION:

Take one of the following actions:

1. Approve the "750 Lofts" project as follows.
 - a. Adopt "A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF PALM SPRINGS, CALIFORNIA, COMPLYING WITH WRIT OF MANDATE, REQUIRING ELIMINATION OF THE EVENT AREA FROM PLANNED DEVELOPMENT DISTRICT PD-374, THE "750 LOFTS" PROJECT LOCATED AT 750 N. PALM CANYON DRIVE, CONFIRMING CONFORMITY WITH THE PALM SPRINGS MUNICIPAL CODE WITH REGARD TO PARKING, AND OTHERWISE AFFIRMING APPROVAL OF PD-374."
 - b. Waive the reading of text in its entirety, read by title only, and introduce for first reading Ordinance No. _____, AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF PALM SPRINGS, CALIFORNIA, AFFIRMING APPROVAL OF PLANNED DEVELOPMENT DISTRICT 374 (CASE 5.1350 PDD 374/GPA/CUP/3.3795 MAJ).
 - c. Adopt "A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF PALM SPRINGS, CALIFORNIA, AFFIRMING APPROVAL OF A MAJOR ARCHITECTURAL APPLICATION AND CONDITIONAL USE PERMITS (CASE 5.1350 PDD 374/GPA/CUP/3.3795 MAJ)."
2. Reject the "750 Lofts" project as follows. Affirm the May 3 rescission of the PDD (Ordinance 1886), and the MAJ and CUPs (Resolution 23899). Rescind Resolution 23898 adopting the mitigated negative declaration ("MND") for this project, and Resolution 23900 approving the general plan amendment ("GPA") for this project.
3. Determine that the Council lacks sufficient information to decide whether to approve or deny the "750 Lofts" project at this time, and send the project, or a portion thereof, to the Historic Site Preservation Board and/or Planning Commission for further consideration with direction from the Council.
4. Express an intent to approve the "750 Lofts" project including the event space, but resolving all parking issues under the Palm Springs Municipal Code *via* a modification as to the scope and nature of the project as newly approved, *e.g.*, a decision to approve the project with fewer hotel rooms, fewer seats in the restaurant and lounges, etc.
5. Express an intent to approve the "750 Lofts" project inclusive of the event space as per alternative #4, but with the addition or removal of specific conditions of approval.
6. Express an intent to approve the "750 Lofts" project excluding the event space, but with the addition or removal of specific conditions of approval.

DISCUSSION.

The Council now makes its decision as to the manner in which it wants to comply with the Court's Writ of Mandate related to this project. Each of these alternatives will place this item on the City Council agenda once more. That said, action now is essential so that the City does not violate the Court's Writ, which required that past approvals be set aside until the City "adequately addressed all parking issues, including event space parking, as required by the City's Municipal Code." In taking whatever action is desired by the Council, the City of Palm Springs will be doing what the Court ordered, and legal counsel for the developer can prepare a Return to the Writ consistent with the action. The City's return must be filed with the Clerk of the Superior Court on July 6, 2017.

The proposed Resolution that has been before the Council before, now complemented by an Ordinance and a second Resolution encompass the City's fullest conceivable response to the Writ that affirms the approvals of the 750 Lofts project. If the Council wants to approve the project with the only modification being the removal of the event space, this matter will only return to the Council's agenda for second reading of the Ordinance. The proposed Ordinance and the second Resolution specific to affirmation of the approval of the major architectural application and conditional use permits reflect the City's determination to eliminate potential challenges against the City's action if the Council wants to approve the project without further hearings, and exclusive of any changes except removal of the event space.

If the Council decides to pursue any of the other alternatives outlined above (alternatives 2 through and including 6, or a combination thereof), there will be a more substantive second step to the City's response to the Writ.

Alternative #2 completes a rescission of all land use entitlements originally approved by the City Council in September 2015. Such a rescission, unlike the summary minute action taken on May 3, 2017, should be based upon factual findings in denial of the entitlements as now reconsidered and rejected by the Council. In the event that the Council wishes to pursue this alternative, staff requests time to prepare a Resolution stating the Council's determinations, upon reconsideration, in support of the new denial of the project. With the Council's assistance, these findings will be as specific as possible, and include, without limitation, a Council determination of whether the event space is a part of the project, and whether the project as denied provides adequate parking in relation to the project's full scope as considered by the Council.

If the Council opts to pursue alternative #3 and the developer decides to continue to pursue the entitlement of this project, the HPSB and/or the Planning Commission will be considering this project again, and there can be no certainty that it will return to the City Council. This alternative effectively places this project back to "square one." In the event that the Council wishes to pursue this alternative, staff requests time to prepare at least a resolution consistent with the Council's direction, so that the HSPB and/or Planning Commission has a clear statement of what the Council wants. The only limitation upon

what the HSPB and/or Planning Commission does/do is that any project approval, with the project ultimately revised per Board and/or Commission input and Council decision, must adequately addresses all parking issues, including event space parking, as required by the Palm Springs Municipal Code.

Pursuit of alternative #4, #5, or #6 will require extensive staff work. In the event that the Council wishes to pursue any of these alternatives, staff requests time to prepare a staff report, and as necessary and appropriate, an Ordinance, and Resolution(s) consistent with the Council's direction. The only limitation upon what the Council does is that any project approval, with the project revised per Council direction, must adequately addresses all parking issues, including event space parking, as required by the Palm Springs Municipal Code.

This Council is reminded that the list of alternatives in the recommendation is illustrative, not exhaustive.

The issue with the 750 Lofts, LLC legal entity has been resolved since publication of the supplemental staff report. The Council is reminded that per the developer's attorney and consistent with the company's newly filed statement of information, the only member, and only manager of 750 Lofts, LLC is David Jankilevitsch. Also per the developer's lawyer, Mr. Jankilevitsch is also the only investor in the company. Finally, upon inquiry, the developer's attorney has indicated that neither John Wessman nor Richard Meaney has ever invested in this project.

During the public hearing on June 21, 2017, discussion among Councilmembers suggested that the Council would like to see a transcript from the hearing on the Writ. Legal counsel for the community group that sued the City transmitted that transcript to the Councilmembers the following day, and that transcript is provided to the Council and the public with this staff report.

Communications with a councilmember have prompted staff to provide additional information related to HSPB and Planning Commission consideration of this matter, and regarding the Las Palmas Business Historic District Conceptual Design Guidelines.

HSPB/Planning Commission Actions

The Historic Site Preservation Board (HSPB) reviewed the project on January 13, 2015, and voted to approve a Certificate of Approval for project by a vote of 6 to 1, subject to the following conditions:

1. The overall project height should be reduced to approximately 34 feet (a reduction of approximately four feet from the original submittal).
2. The elevation along Indian Canyon Drive should be reduced to two stories and twenty (20) feet closest to the street, and allowed to step back to higher elevations further within the site;

3. No additional rooftop structures should be permitted other than those illustrated in the submitted plans (no umbrellas, etc.); and
4. The parking study should be reviewed by the City Engineer for adequacy of off-street parking such that the project no adversely impact the historic district.

The applicant filed an appeal of the HSPB action, requesting that conditions #1 and #2 be removed. The City Council heard the appeal on February 4, 2015, and voted to uphold the appeal and remove conditions #1, #2, and #3. Consequently, only Condition #4 was preserved (see condition #PLN 15 in the final conditions of approval).

The Planning Commission reviewed the project over the course of several meetings, and took action on the project on August 12, 2015. At that meeting, the Planning Commission voted to recommend approval of the project to the City Council by a vote of 6 to 0, subject to the conditions of approval proposed by staff. The commission recommended the following added condition:

“The applicant to work with Public Works & Engineering Department to designate an on-street parking space adjacent to the site for limited-term loading and unloading.”

The condition was incorporated as condition #PLN 26; no other conditions of approval were added by the Planning Commission.

Las Palmas Business Historic District Conceptual Design Guidelines

Planning staff provided an analysis to the HSPB of the project relative to the Conceptual Design Guidelines as part of the staff report that was reviewed on January 13, 2015. The analysis is summarized below:

1. Maintain the height of other structures in the surrounding area.

The height of the building is harmonious with the adjacent Howard Lapham-designed building at 666 N. Palm Canyon (Rackstrom-Reid Building), but is in contrast with the small one-story buildings such as those at 700 N. Palm Canyon and 756 N. Palm Canyon.

2. Maintain the general alignment of facades at the sidewalk edge.

The proposed project maintains the façade alignment.

3. Maintain the pattern of façade proportions.

The proposed project is large in volume, but its façade has been broken down into multiple parts, thereby giving it a compatible relationship to the scale of existing structures in the vicinity.

4. Maintain the relationship between upper and lower floors of other structures in the surrounding area.

The proposed project conforms to this standard by having commercial uses (restaurant, cocktail lounge) on the ground floor and the hotel rooms on the upper level.

5. Maintain the spacing pattern of upper story windows.

The façade is broken down into a series of vertical panels, screens and window surfaces, and has a sympathetic relationship to the buildings adjacent to it.

6. Use building materials that are similar in texture and finish to those found historically.

The proposed project utilizes stucco, glass, and concrete as the primary materials, which are similar to materials used historically.

7. Use components of the façade that are similar in size and shape to those found historically.

The components of the façade of the proposed structure are similar in size and shape to the adjacent Rackstrom-Reid Building and Kocher-Sampson Building, but contrast with Spanish Colonial buildings in the district.

8. Maintain the pattern of roof types.

The proposed flat roof is similar to other flat-roofed buildings in the district.

9. Maintain the existing site design pattern.

The proposed project is consistent with this guideline in that it maintains the building edge along Palm Canyon and introduces retail/restaurant uses on Indian Canyon that will help encourage pedestrian activity.

10. Although contemporary designs are encouraged, replicas of historic designs may be considered if they meet these conditions.

The design is contemporary, and is therefore in conformance to the guideline.

ALTERNATIVES:

Stated above.

ENVIRONMENTAL ASSESSMENT:

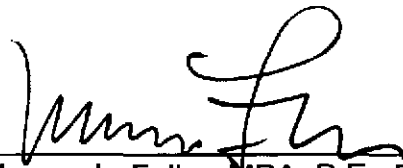
Unless the Council revisits it, the environmental assessment prepared and approved in conjunction with the 750 Lofts Project is the controlling environmental assessment for purposes of this matter. The only defect in this assessment, per the Court's ruling issued in relation to the Writ, was analysis of parking related to the event area. If it wishes to do so regardless of the Court's conclusions, the Council can rescind the City's entire prior approval of that assessment.

FISCAL IMPACT:

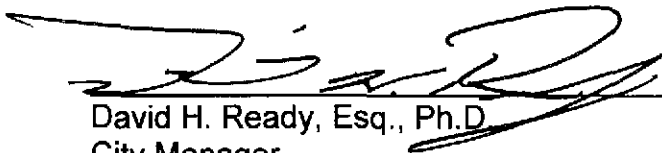
No significant change to City revenue or expenditures is expected as a result of adopting the proposed Resolution.



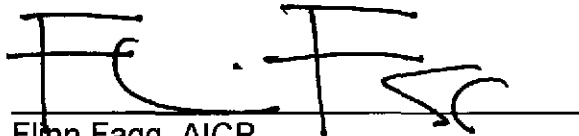
Edward Z. Kotkin,
City Attorney



Marcus L. Fuller, MPA, P.E., P.L.S.,
Assistant City Manager



David H. Ready, Esq., Ph.D.
City Manager



Flinn Fagg, AICP
Director of Planning Services

ATTACHMENTS:

- A. Resolution Complying with Writ
- B. Ordinance Affirming PDD Approval
- C. Resolution Affirming MAJ and CUP Approval
- D. Transcript of Hearing

RESOLUTION NO.

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF PALM SPRINGS, CALIFORNIA, COMPLYING WITH WRIT OF MANDATE, REQUIRING ELIMINATION OF THE EVENT AREA FROM PLANNED DEVELOPMENT DISTRICT PD-374, THE "750 LOFTS" PROJECT LOCATED AT 750 N. PALM CANYON DRIVE, CONFIRMING CONFORMITY WITH THE CITY'S MUNICIPAL CODE WITH REGARD TO PARKING, AND OTHERWISE AFFIRMING APPROVAL OF PD-374

THE CITY COUNCIL OF THE CITY OF PALM SPRINGS, CALIFORNIA, FINDS:

A. In 2014, 750 Lofts, LLC a California limited liability company applied for approval of Planned Development District PD-374, General Plan Amendment, Conditional Use Permit and Major Architectural Application (the "Entitlements") in order to construct a 39 room hotel on 1.13 acres of property located at 750 N. Palm Canyon Drive, Palm Springs (the "Property").

B. The Property, while itself not a historic structure, is located within the Las Palmas Business Historic District. On October 12, 2014, the Historic Site Preservation Board ("HSPB") reviewed the General Plan Amendment ("GPA"), Conditional Use Permit ("CUP"), and Planned Development District ("PDD") for the original project application which, at that time, included a hotel with forty-six (46) rooms, sixty-two (62) parking spaces and a maximum height of fifty feet (50'), with lower heights at the street frontages. The HSPB approved the Project subject to certain conditions, one of which required that the Major Architectural Application ("MAJ") come back to the HSPB for review.

C. The Project, including the MAJ, was brought back to the HSPB on January 13, 2015, and at that time, the HSPB approved the Project subject to conditions requiring reductions in building height, limitations on rooftop structures, and a requirement that the parking study be reviewed by the City Engineer for adequacy of off street parking such that the Project would not adversely impact the historic district.

D. The Project was revised in an effort to respond to the HSPB conditions, resulting in a hotel of only thirty-nine (39) rooms, thereby reducing room count by seven (7), and reducing some building heights

E. An initial study was prepared for the Project pursuant to the California Environmental Quality Act ("CEQA"), and was circulated for a twenty (20) day period from February 6, 2015 to February 25, 2015. With the revisions to the Project prompted by the HSPB review, the initial study was revised and re-circulated for public comment from June 29, 2015 to July 20, 2015.

F. On June 24, 2015, July 22, 2015, and August 12, 2015 the Planning Commission conducted a public hearing and reviewed the project. At its August 12, 2015 meeting, the Planning Commission recommended that the Project be approved subject to the conditions of approval.

G. On September 16, 2015, the City Council held a public hearing and, after taking public testimony, approved the Project, including the GPA, PDD, CUPs, MAJ and Mitigated Negative Declaration and deleted HSPB conditions 1, 2 and 3.

H. On October 23, 2015, Advocates for Better Community Development filed a Petition for Writ of Mandate (the "Petition"), seeking to compel the City to rescind its approval of the Entitlements.

I. In adjudicating the Petition, the Court heard three (3) basic arguments: (a) that the City Council abused its discretion when it deleted the HSPB conditions without sending the Project back to the HSPB, (b) that the City violated its municipal code for approving the Project without considering the parking requirements for the "event space", and (c) that the approval of the Project was "spot zoning."

J. The Court denied the Petition as to the claim that the City Council abused its discretion in deleting the HSPB conditions and it found nothing in the municipal code that requires the Council to refer the revised Project back to the HSPB.

K. The Court also denied the Petition as to the claim of spot zoning, finding that no spot zoning occurred as no "island" was created, and the Court further found that even if it had been spot zoning, such zoning was in the public interest as it provided tourist accommodations and revitalized Indian Avenue.

L. The Court, however, granted the Petition as to the issue of parking, and on April 6, 2017, issued a "Peremptory Writ of Mandate" (the "Writ") to the City. The Writ requires neither more nor less than that the City set aside its approvals of the Entitlements until such time as the City adequately addresses all parking issues, including event space parking, as required by the City's Municipal Code.

M. On May 3, 2017, the Council took affirmative action rescinding Ordinance No. 1886 (the past approval of the PDD), Resolution No. 23899 (the past approval of the MAJ), and directing staff to schedule a public hearing in this matter.

N. Staff first issued and gave proper notice of this public hearing to take place on May 17, 2017, then re-noticed this public hearing for June 7, 2017, and then continued, after being opened and properly adjourned until June 21, 2017.

O. At the public hearing in this matter, the City Council considered a report and a supplemental report from its staff, inclusive of the entire City Council staff report considered on September 16, 2015 inclusive of all attachments, and a true and correct copy of the Writ; in addition, the Council received any and all written or oral testimony offered, and deliberated upon its intended action with respect to the Entitlements.

P. The public hearing concluded on June 21, 2017, and the City Council instructed staff to present this case to them for a final decision upon the precise manner in which it would comply with the Court's Writ on July 5, 2017.

Q. The City Council has carefully, and independently reviewed and considered all of the evidence presented in connection with this public hearing, including but not limited to the staff report and all written and oral testimony presented and has reviewed and considered the Initial Study and Mitigated Negative Declaration as approved pursuant to Resolution No. 23898.

R. Given the scope and nature of the Court's Writ, the Council has determined that this matter does not require further consideration by the HSPB or the Planning Commission, and that the Council can and should take independent action at this juncture consistent with restoration and affirmation of Ordinance No. 1886 (the Council's past approval of the PDD), Resolution No. 23899 (the Council's past approval of the MAJ and the CUP) in a manner consistent with the Writ.

S. Concurrent with the Council's action in considering and approving this Resolution, the Council has introduced an Ordinance that specifically affirms the original approval of the PDD in a manner consistent with the Writ, and adopted a second Resolution that specifically affirms the Major Architectural Application and Conditional Use Permits in a manner consistent with the Writ.

THE CITY COUNCIL HEREBY FURTHER FINDS AND RESOLVES:

Section 1: The true and correct recitals above are incorporated by this reference herein as the factual basis for this Resolution.

Section 2: The list of permitted uses and development standards reflected in the Project's conditions of approval did not contain the "event space." Regardless of the terms and conditions of approval, and independent of whether the parking study in support of the Project referenced or included the "event space," that space was not removed from the Project plans prior to Council approval of the Project, and ambiguity existed in the administrative record as to whether the Project included the event space.

Section 3: With the elimination of the event area, the Project consists of a thirty-nine (39) room hotel, a one hundred thirteen (113) seat restaurant on Palm Canyon Drive, a thirty-nine (39) seat lounge on Indian Canyon, and a twenty (20) seat roof top lounge

Section 4: Palm Springs Municipal Code ("PSMC") Section 93.060.00(16) requires one (1) parking space for each hotel room in any hotel having less than fifty (50) rooms.

Section 5: PSMC Section 93.060.00(30) one (1) parking space for every three (3) seats in restaurants and lounges.

Section 6: Given the PSMC requirements, the parking requirement for the Project includes thirty-nine (39) spaces for the hotel and fifty-eight (58) spaces for the restaurant and lounges, for a total parking requirement ninety-seven (97) spaces.

Section 7: The Project plans as approved will provide for a total of one hundred eight (108) spaces, thirty-four (34) of which will be on-site valet spaces. The Project is conditioned to provide valet service at all times.

Section 8: Condition of Approval number ADM 15 provides that any deviation from the number of restaurant or lounge seats shall require prior approval by the Director of Planning by means of an amendment to the use permit associated with each use, thereby assuring that the City retains control to enforce Project compliance with the PSMC as to parking.

Section 9: An independent traffic engineer reviewed the Project's parking requirements exclusive of the event area, and found that based on the PSMC and the widely accepted and used Urban Land Institute shared parking methodology, the forecast shared parking demand for the Project can be accommodated by the one hundred eight (108) off-street parking spaces in the Project.

Section 10: Since the issuance of the Writ and pending the City of Palm Springs' adoption of this Resolution, all Project approvals have been and remained effectively "set aside." As such, the City has neither processed nor issued any Project permits. To ensure certainty on the part of all parties regarding the status of all Project approvals and resolutions pending adoption of this Resolution, the City Council formally rescinded approval of the PDD and the MAJ on May 3, 2017.

Section 11. The environmental assessment prepared and approved pursuant to and in accord with the California Environmental Quality Act in conjunction with the Project is the controlling environmental assessment for purposes of this Resolution. The only defect in this assessment, per the Court's ruling issued in relation to the Writ, was the City's parking analysis related to the "event space." Although the Writ set aside the City's approval of that assessment, the analysis contained therein, complemented by this Resolution's clarification that the event area/space is no longer a part of the Project, supports the recommended action.

Section 12: If any section, subsection, clause or phrase of this Resolution is for any reason held by a court of competent jurisdiction to be invalid, such a decision shall not affect the validity of the remaining portions of this Resolution. The City Council of the City of Palm Springs, hereby declares that it would have passed this Resolution and each section of subsection, sentence, clause and phrase thereof, irrespective of the clauses or phrases being declared invalid.

Section 13: This Resolution shall be effective immediately upon its adoption, and the City Attorney and City Clerk are hereby directed to take all necessary action to ensure the City's timely compliance with the Writ, including without limitation the filing of a Return to the Writ, explaining the City's action(s) taken to comply with the terms of the Writ.

NOW THEREFORE, BE IT FURTHER RESOLVED that, based upon the foregoing, the City Council hereby orders that (i) an additional condition shall be placed on the Project which expressly requires that the "event area," also referenced in the Writ and from time to time in relation to the Project as "event space," is eliminated from PDD-374, and that (ii) subject to that change, the approval of PDD-374 and all related approvals and resolutions, including without limitation Ordinance No. 1886 and Resolution No. 23899, adopted arising from and related to the Project are hereby reinstated and affirmed in their entirety.

ADOPTED this 5th day of July, 2017.

David H. Ready, City Manager

ATTEST:

Kathleen Hart, Interim City Clerk

CERTIFICATION

STATE OF CALIFORNIA)
COUNTY OF RIVERSIDE) ss.
CITY OF PALM SPRINGS)

I, Kathleen Hart, Interim City Clerk of the City of Palm Springs, hereby certify that Resolution No. ____ is a full, true and correct copy, and was duly adopted at a regular meeting of the City Council of the City of Palm Springs on _____, by the following vote:

- AYES:
- NOES:
- ABSENT:
- ABSTAIN:

Kathleen Hart, Interim City Clerk
City of Palm Springs, California

ORDINANCE NO. _____

AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF PALM SPRINGS, CALIFORNIA, AFFIRMING APPROVAL OF PLANNED DEVELOPMENT DISTRICT 374 (CASE 5.1350 PDD 374/GPA/CUP/3.3795 MAJ).

City Attorney Summary

This Ordinance approves a Planned Development District in lieu of a change in zone for a 1.13 acre parcel located at 750 North Palm Canyon Drive.

THE CITY COUNCIL OF THE CITY OF PALM SPRINGS FINDS AND DETERMINES AS FOLLOWS:

A. In 2014, 750 Lofts, LLC a California limited liability company applied for approval of Planned Development District PD-374, General Plan Amendment, Conditional Use Permit and Major Architectural Application (alternatively the "Entitlements," and/or the "Project") in order to construct a 39 room hotel on 1.13 acres of property located at 750 N. Palm Canyon Drive, Palm Springs (the "Property").

B. The Property, while itself not a historic structure, is located within the Las Palmas Business Historic District. On October 12, 2014, the Historic Site Preservation Board ("HSPB") reviewed the General Plan Amendment ("GPA"), Conditional Use Permit ("CUP"), and Planned Development District ("PDD") for the original project application which, at that time, included a hotel with forty-six (46) rooms, sixty-two (62) parking spaces and a maximum height of fifty feet (50'), with lower heights at the street frontages. The HSPB approved the original project subject to certain conditions, one of which required that the Major Architectural Application ("MAJ") come back to the HSPB for review.

C. The Project, including the MAJ, was brought back to the HSPB on January 13, 2015, and at that time, the HSPB approved the Project subject to conditions requiring reductions in building height, limitations on rooftop structures, and a requirement that the parking study be reviewed by the City Engineer for adequacy of off street parking such that the Project would not adversely impact the historic district.

D. The Project was revised in an effort to respond to the HSPB conditions, resulting in a hotel of only thirty-nine (39) rooms, thereby reducing room count by seven (7), and reducing some building heights.

E. An initial study was prepared for the Project pursuant to the California Environmental Quality Act ("CEQA"), and was circulated for a twenty (20) day period from February 6, 2015 to February 25, 2015. With the revisions to the Project prompted

by the HSPB review, the initial study was revised and re-circulated for public comment from June 29, 2015 to July 20, 2015.

F. On June 24, 2015, July 22, 2015, and August 12, 2015 the Planning Commission conducted a public hearing and reviewed the project. At its August 12, 2015 meeting, the Planning Commission recommended that the Project be approved subject to the conditions of approval.

G. On September 16, 2015, the City Council held a public hearing and, after taking public testimony, approved the Project, including the GPA, PDD, CUPs, MAJ and Mitigated Negative Declaration and deleted HSPB conditions 1, 2 and 3.

H. On October 23, 2015, Advocates for Better Community Development filed a Petition for Writ of Mandate (the "Petition"), seeking to compel the City to rescind its approval of the Entitlements.

I. In adjudicating the Petition, the Court heard three (3) basic arguments: (a) that the City Council abused its discretion when it deleted the HSPB conditions without sending the Project back to the HSPB, (b) that the City violated its municipal code for approving the Project without considering the parking requirements for the "event space", and (c) that the approval of the Project was "spot zoning."

J. The Court denied the Petition as to the claim that the City Council abused its discretion in deleting the HSPB conditions and it found nothing in the municipal code that requires the Council to refer the revised Project back to the HSPB.

K. The Court also denied the Petition as to the claim of spot zoning, finding that no spot zoning occurred as no "island" was created, and the Court further found that even if it had been spot zoning, such zoning was in the public interest as it provided tourist accommodations and revitalized Indian Avenue.

L. The Court, however, granted the Petition as to the issue of parking, and on April 6, 2017, issued a "Peremptory Writ of Mandate" (the "Writ") to the City. The Writ requires neither more nor less than that the City set aside its approvals of the Entitlements until such time as the City adequately addresses all parking issues, including event space parking, as required by the City's Municipal Code.

M. On May 3, 2017, the Council took affirmative preliminary action, making no findings, but rescinding Ordinance No. 1886 (the past approval of the PDD), Resolution No. 23899 (the past approval of the MAJ and the CUP) by minute action, and directing staff to schedule a public hearing in this matter.

N. Staff first issued and gave proper notice of a public hearing to take place on May 17, 2017, then re-noticed this public hearing for June 7, 2017, and then continued, after being opened and properly adjourned until June 21, 2017.

O. At the public hearing in this matter, the City Council considered a report and a supplemental report from its staff, inclusive of the entire City Council staff report considered on September 16, 2015 inclusive of all attachments, and a true and correct copy of the Writ; in addition, the Council received any and all written or oral testimony offered, and deliberated upon its intended action with respect to the Entitlements.

P. The public hearing concluded on June 21, 2017, and the City Council instructed staff to present this case to them for a final decision upon the precise manner in which it would comply with the Court's Writ on July 5, 2017.

Q. The City Council has carefully, and independently reviewed and considered all of the evidence presented in connection with this public hearing, including but not limited to the staff report and all written and oral testimony presented and has reviewed and considered the Initial Study and Mitigated Negative Declaration as approved pursuant to Resolution No. 23898.

R. Given the scope and nature of the Court's Writ, the Council has determined that this matter does not require further consideration by the HSPB or the Planning Commission, and that the Council can and should take independent action at this juncture consistent with restoration and affirmation of Ordinance No. 1886 (the Council's past approval of the PDD), Resolution No. 23899 (the Council's past approval of the MAJ and the CUP) in a manner consistent with the Writ.

S. The Council hereby re-states the following findings, originally made on September 16, 2015, that pursuant to Palm Springs Zoning Code Sections 94.03.00 (Planned Development District) and 94.07.00 (Change of Zone), the City Council has considered and determined that the following conditions are met and justify approval of a planned development district in lieu of a change of zone:

1. The proposed change of zone is in conformity with the general plan map and report.

The Planned Development District application allows for uses and development standards that are consistent with the proposed CBD land use designation of the General Plan. The CBD designation allows for a mix of commercial, residential, and office uses, and allows hotel uses at a density of up to 70 units per acre if a Planned Development District is prepared and approved.

2. The subject property is suitable for the uses permitted in the proposed zone, in terms of access, size of parcel, relationship to similar or related uses, and other considerations deemed relevant by the Planning Commission and City Council.

The subject property is suitable for hotel and restaurant uses; similar uses are located on adjacent properties within the Uptown area. The parcel has access from two major thoroughfares (Palm Canyon, Indian Canyon) as designated by

the General Plan, and is consistent with the intensity of development allowed under the proposed CBD land use designation. Further, the project site is located within the boundaries of the "R" Resort Overlay Zone. The proposed development would provide additional hotel rooms, restaurant, retail, spa, and cocktail lounge uses that are supportive of the tourist nature of the Uptown area, and which are consistent with the Resort Overlay Zone.

3. *The proposed change of zone is necessary and proper at this time, and is not likely to be detrimental to the adjacent property or residents.*

The proposed development plan will assist in the redevelopment of the subject site, and will enhance economic development efforts in the area. Furthermore, as set forth in the Initial Study/Mitigated Negative Declaration prepared for the project, the project would not have a significant effect on the environment. Therefore the project is not likely to be detrimental to the adjacent properties or residents.

THE CITY COUNCIL OF THE CITY OF PALM SPRINGS HEREBY ORDAINS:

SECTION 1. The true and correct recitals above, inclusive of all definitions, are incorporated by this reference herein as the factual basis for this Ordinance. The Council adopts this Ordinance in compliance with "Peremptory Writ of Mandate" issued by the Superior Court of the State of California to the City on April 6, 2017.

SECTION 2. The list of permitted uses and development standards reflected in the Project's conditions of approval did not contain the "event space." Regardless of the terms and conditions of approval, and independent of whether the parking study in support of the Project referenced or included the "event space," that space was not removed from the Project plans prior to Council approval of the Project, and ambiguity existed in the administrative record as to whether the Project included the event space.

SECTION 3. With the elimination of the event area, the Project consists of a thirty-nine (39) room hotel, a one hundred thirteen (113) seat restaurant on Palm Canyon Drive, a thirty-nine (39) seat lounge on Indian Canyon, and a twenty (20) seat roof top lounge.

SECTION 4. Palm Springs Municipal Code ("PSMC") Section 93.060.00(16) requires one (1) parking space for each hotel room in any hotel having less than fifty (50) rooms.

SECTION 5. PSMC Section 93.060.00(30) one (1) parking space for every three (3) seats in restaurants and lounges.

SECTION 6. Given the PSMC requirements, the parking requirement for the Project includes thirty-nine (39) spaces for the hotel and fifty-eight (58) spaces for the restaurant and lounges, for a total parking requirement ninety-seven (97) spaces.

SECTION 7. The Project plans as approved will provide for a total of one hundred eight (108) spaces, thirty-four (34) of which will be on-site valet spaces. The Project is conditioned to provide valet service at all times.

SECTION 8. Condition of Approval number ADM 15 provides that any deviation from the number of restaurant or lounge seats shall require prior approval by the Director of Planning by means of an amendment to the use permit associated with each use, thereby assuring that the City retains control to enforce Project compliance with the PSMC as to parking.

SECTION 9. An independent traffic engineer reviewed the Project's parking requirements exclusive of the event area, and found that based on the PSMC and the widely accepted and used Urban Land Institute shared parking methodology, the forecast shared parking demand for the Project can be accommodated by the one hundred eight (108) off-street parking spaces in the Project.

SECTION 10. Since the issuance of the Writ and pending the City of Palm Springs' adoption of this Ordinance, all Project approvals have been and remained effectively "set aside." As such, the City has neither processed nor issued any Project permits. To ensure certainty on the part of all parties regarding the status of all Project approvals and resolutions pending adoption of this Resolution, the City Council formally rescinded approval of Ordinance No. 1886, regarding the Council's prior approval of the PDD, and Resolution No. 23899, regarding the Council's prior approval of the MAJ and the CUPs on May 3, 2017.

SECTION 11. The environmental assessment prepared and approved pursuant to and in accord with the California Environmental Quality Act in conjunction with the Project is the controlling environmental assessment for purposes of this Ordinance. Resolution 23898, which adopted the mitigated negative declaration for the GPA for this Project, was not formally rescinded on May 3, 2017. The only defect in this environmental assessment, per the Court's ruling issued in relation to the Writ, was the City's parking analysis related to the "event space." Although the Writ set aside the City's approval of that assessment, the analysis contained therein, complemented by this Ordinance's clarification that the event area/space is no longer a part of the Project, supports the recommended action.

SECTION 12. Concurrent with this Ordinance, the City Council adopts a Resolution effective immediately and consistent herewith. The City Attorney and City Clerk are hereby directed to take all necessary action to ensure the City's timely compliance with the Writ, including without limitation the filing of a Return to the Writ, explaining the City's action(s) taken to comply with the terms of the Writ.

SECTION 13. The City Council hereby re-approves Planned Development

District 374 in lieu of zone change, subject to the conditions of approval contained in Exhibit "A" to Ordinance 1866 and now again to this Ordinance, said conditions of approval being attached to and incorporated herein by this reference herein, except as inconsistent with the Court's Writ of Mandate and/or herewith, *i.e.*, this re-approval excludes any terms, conditions, plans, or other document in the administrative record of the Entitlements that might reasonably be deemed to include the "event space" as a part of the approved Project.

SECTION 14. Moreover and based upon the foregoing, *(i)* an additional condition shall be placed upon this approval of Planned Development District 374 which expressly requires that the "event area," also referenced in the Writ and from time to time in relation to the Project as the "event space," is eliminated from PDD-374, and *(ii)* given that additional condition, the approval of PDD-374 and all related approvals and resolutions, including without limitation Ordinance No. 1886 and Resolution No. 23899, adopted arising from and related to the Project are hereby reinstated and affirmed in their entirety.

SECTION 15. The City Council approves the zone map change from C-1/PDD 104 to PDD 374 for the 1.13 acre parcel at 750 North Palm Canyon Drive (APN: 505-303-018).

SECTION 16. If any section, subsection, clause or phrase of this Ordinance is for any reason held by a court of competent jurisdiction to be invalid, such a decision shall not affect the validity of the remaining portions of this Ordinance. The City Council of the City of Palm Springs, hereby declares that it would have passed this Ordinance and each section of subsection, sentence, clause and phrase thereof, irrespective of the clauses or phrases being declared invalid.

SECTION 17. The Mayor shall sign and the City Clerk shall certify to the passage and adoption of this Ordinance and shall cause the same, or a summary thereof, to be published and posted pursuant to the provisions of law and this Ordinance shall take effect thirty (30) days after its adoption on second reading.

PASSED, APPROVED, AND ADOPTED BY THE PALM SPRINGS CITY COUNCIL
THIS 5th DAY OF JULY, 2017.

ROBERT MOON, MAYOR

ATTEST:

KATHLEEN D. HART,
INTERIM CITY CLERK

RESOLUTION NO. _____

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF PALM SPRINGS, CALIFORNIA, AFFIRMING APPROVAL OF A MAJOR ARCHITECTURAL APPLICATION AND CONDITIONAL USE PERMITS (CASE 5.1350 PDD 374/GPA/CUP/3.3795 MAJ).

THE CITY COUNCIL OF THE CITY OF PALM SPRINGS FINDS AND DETERMINES AS FOLLOWS:

A. In 2014, 750 Lofts, LLC a California limited liability company applied for approval of Planned Development District PD-374, General Plan Amendment, Conditional Use Permit and Major Architectural Application (alternatively the "Entitlements," and/or the "Project") in order to construct a 39 room hotel on 1.13 acres of property located at 750 N. Palm Canyon Drive, Palm Springs (the "Property").

B. The Property, while itself not a historic structure, is located within the Las Palmas Business Historic District. On October 12, 2014, the Historic Site Preservation Board ("HSPB") reviewed the General Plan Amendment ("GPA"), Conditional Use Permit ("CUP"), and Planned Development District ("PDD") for the original project application which, at that time, included a hotel with forty-six (46) rooms, sixty-two (62) parking spaces and a maximum height of fifty feet (50'), with lower heights at the street frontages. The HSPB approved the original project subject to certain conditions, one of which required that the Major Architectural Application ("MAJ") come back to the HSPB for review.

C. The Project, including the MAJ, was brought back to the HSPB on January 13, 2015, and at that time, the HSPB approved the Project subject to conditions requiring reductions in building height, limitations on rooftop structures, and a requirement that the parking study be reviewed by the City Engineer for adequacy of off street parking such that the Project would not adversely impact the historic district.

D. The Project was revised in an effort to respond to the HSPB conditions, resulting in a hotel of only thirty-nine (39) rooms, thereby reducing room count by seven (7), and reducing some building heights.

E. An initial study was prepared for the Project pursuant to the California Environmental Quality Act ("CEQA"), and was circulated for a twenty (20) day period from February 6, 2015 to February 25, 2015. With the revisions to the Project prompted by the HSPB review, the initial study was revised and re-circulated for public comment from June 29, 2015 to July 20, 2015.

F. On June 24, 2015, July 22, 2015, and August 12, 2015 the Planning Commission conducted a public hearing and reviewed the project. At its August 12, 2015 meeting, the Planning Commission recommended that the Project be approved subject to the conditions of approval.

G. On September 16, 2015, the City Council held a public hearing and, after taking public testimony, approved the Project, including the GPA, PDD, CUP, MAJ and Mitigated Negative Declaration and deleted HSPB conditions 1, 2 and 3.

H. On October 23, 2015, Advocates for Better Community Development filed a Petition for Writ of Mandate (the "Petition"), seeking to compel the City to rescind its approval of the Entitlements.

I. In adjudicating the Petition, the Court heard three (3) basic arguments: (a) that the City Council abused its discretion when it deleted the HSPB conditions without sending the Project back to the HSPB, (b) that the City violated its municipal code for approving the Project without considering the parking requirements for the "event space", and (c) that the approval of the Project was "spot zoning."

J. The Court denied the Petition as to the claim that the City Council abused its discretion in deleting the HSPB conditions and it found nothing in the municipal code that requires the Council to refer the revised Project back to the HSPB.

K. The Court also denied the Petition as to the claim of spot zoning, finding that no spot zoning occurred as no "island" was created, and the Court further found that even if it had been spot zoning, such zoning was in the public interest as it provided tourist accommodations and revitalized Indian Avenue.

L. The Court, however, granted the Petition as to the issue of parking, and on April 6, 2017, issued a "Peremptory Writ of Mandate" (the "Writ") to the City. The Writ requires neither more nor less than that the City set aside its approvals of the Entitlements until such time as the City adequately addresses all parking issues, including event space parking, as required by the City's Municipal Code.

M. On May 3, 2017, the Council took affirmative preliminary action, making no findings, but rescinding Ordinance No. 1886 (the past approval of the PDD), Resolution No. 23899 (the past approval of the MAJ and the CUP) by minute action, and directing staff to schedule a public hearing in this matter.

N. Staff first issued and gave proper notice of a public hearing to take place on May 17, 2017, then re-noticed this public hearing for June 7, 2017, and then continued, after being opened and properly adjourned until June 21, 2017.

O. At the public hearing in this matter, the City Council considered a report and a supplemental report from its staff, inclusive of the entire City Council staff report considered on September 16, 2015 inclusive of all attachments, and a true and correct copy of the Writ; in addition, the Council received any and all written or oral testimony offered, and deliberated upon its intended action with respect to the Entitlements.

P. The public hearing concluded on June 21, 2017, and the City Council instructed staff to present this case to them for a final decision upon the precise manner in which it would comply with the Court's Writ on July 5, 2017.

Q. The City Council has carefully, and independently reviewed and considered all of the evidence presented in connection with this public hearing, including but not limited to the staff report and all written and oral testimony presented and has reviewed and considered the Initial Study and Mitigated Negative Declaration as approved pursuant to Resolution No. 23898.

R. Given the scope and nature of the Court's Writ, the Council has determined that this matter does not require further consideration by the HSPB or the Planning Commission, and that the Council can and should take independent action at this juncture consistent with restoration and affirmation of Ordinance No. 1886 (the Council's past approval of the PDD), Resolution No. 23899 (the Council's past approval of the MAJ and the CUP) in a manner consistent with the Writ.

THE CITY COUNCIL OF THE CITY OF PALM SPRINGS DOES HEREBY RESOLVE AS FOLLOWS:

SECTION 1. The true and correct recitals above, inclusive of all definitions, are incorporated by this reference herein as the factual basis for this Ordinance. The Council adopts this Ordinance in compliance with "Peremptory Writ of Mandate" issued by the Superior Court of the State of California to the City on April 6, 2017.

SECTION 2. The list of permitted uses and development standards reflected in the Project's conditions of approval did not contain the "event space." Regardless of the terms and conditions of approval, and independent of whether the parking study in support of the Project referenced or included the "event space," that space was not removed from the Project plans prior to Council approval of the Project, and ambiguity existed in the administrative record as to whether the Project included the event space.

SECTION 3. With the elimination of the event area, the Project consists of a thirty-nine (39) room hotel, a one hundred thirteen (113) seat restaurant on Palm Canyon Drive, a thirty-nine (39) seat lounge on Indian Canyon, and a twenty (20) seat roof top lounge.

SECTION 4. Palm Springs Municipal Code ("PSMC") Section 93.060.00(16) requires one (1) parking space for each hotel room in any hotel having less than fifty (50) rooms.

SECTION 5. PSMC Section 93.060.00(30) one (1) parking space for every three (3) seats in restaurants and lounges.

SECTION 6. Given the PSMC requirements, the parking requirement for the Project includes thirty-nine (39) spaces for the hotel and fifty-eight (58) spaces for the restaurant and lounges, for a total parking requirement ninety-seven (97) spaces.

SECTION 7. The Project plans as approved will provide for a total of one hundred eight (108) spaces, thirty-four (34) of which will be on-site valet spaces. The Project is conditioned to provide valet service at all times.

SECTION 8. Condition of Approval number ADM 15 provides that any deviation from the number of restaurant or lounge seats shall require prior approval by the Director of Planning by means of an amendment to the use permit associated with each use, thereby assuring that the City retains control to enforce Project compliance with the PSMC as to parking.

SECTION 9. An independent traffic engineer reviewed the Project's parking requirements exclusive of the event area, and found that based on the PSMC and the widely accepted and used Urban Land Institute shared parking methodology, the forecast shared parking demand for the Project can be accommodated by the one hundred eight (108) off-street parking spaces in the Project.

SECTION 10. Since the issuance of the Writ and pending the City of Palm Springs' adoption of this Ordinance, all Project approvals have been and remained effectively "set aside." As such, the City has neither processed nor issued any Project permits. To ensure certainty on the part of all parties regarding the status of all Project approvals and resolutions pending adoption of this Resolution, the City Council formally rescinded approval of Ordinance No. 1886, regarding the Council's prior approval of the PDD, and Resolution No. 23899, regarding the Council's prior approval of the MAJ and the CUPs on May 3, 2017.

SECTION 11. The environmental assessment prepared and approved pursuant to and in accord with the California Environmental Quality Act in conjunction with the Project is the controlling environmental assessment for purposes of this Ordinance. Resolution 23898, which adopted the mitigated negative declaration for the GPA for this Project, was not formally rescinded on May 3, 2017. The only defect in this environmental assessment, per the Court's ruling issued in relation to the Writ, was the City's parking analysis related to the "event space." Although the Writ set aside the City's approval of that assessment, the analysis contained therein, complemented by this Ordinance's clarification that the event area/space is no longer a part of the Project, supports the recommended action.

SECTION 12. This Resolution shall be effective immediately upon its adoption. The City Attorney and City Clerk are hereby directed to take all necessary action to ensure the City's timely compliance with the Writ, including without limitation the filing of a Return to the Writ, explaining the City's action(s) taken to comply with the terms of the Writ.

SECTION 13. If any section, subsection, clause or phrase of this Resolution is for any reason held by a court of competent jurisdiction to be invalid, such a decision shall not affect the validity of the remaining portions of this Resolution. The City Council of the City of Palm Springs, hereby declares that it would have passed this Resolution and each section of subsection, sentence, clause and phrase thereof, irrespective of the clauses or phrases being declared invalid.

SECTION 14. The City Council hereby re-approves a Conditional Use Permit for the cocktail lounge use, the spa use, and for hotels with kitchen facilities in more than 10% of the rooms, and consistent with the requirements of Section 94.02.00 of the Palm Springs Zoning Code (PSZC), re-states and affirms the factual findings set forth in Section 1 of Resolution 23899, originally approved on September 16, 2015, attached hereto as Exhibit "A," and incorporated by this reference herein, except as inconsistent with the Court's Writ of Mandate and/or herewith, i.e., this re-approval excludes any terms, conditions, plans, or other document in the administrative record of the Entitlements that might reasonably be deemed to include the "event space" as a part of the approved Project.

SECTION 15. The City Council hereby re-approves a Conditional Use Permit for a high-rise building, and consistent with the requirements of Section 94.02.00 of the PSZC, re-states and affirms the factual findings set forth in Section 2 of Resolution 23899, originally approved on September 16, 2015, attached hereto as Exhibit "A," and incorporated by this reference herein, except as inconsistent with the Court's Writ of Mandate and/or herewith, i.e., this re-approval excludes any terms, conditions, plans, or other document in the administrative record of the Entitlements that might reasonably be deemed to include the "event space" as a part of the approved Project.

SECTION 16. The City Council hereby notes again, as it did in Resolution 23899, that following review by the Historic Site Preservation Board (HSPB), on June 15, 2015, the Project applicant submitted revised plans that reduce the building's overall height and massing. The Council further notes that as compared to the proposal reviewed by the HSPB, the revised plans reduced the height of the building on the Palm Canyon frontage from 32'-0" to 31'-0". Further, the Council notes that the height of the building at the Indian Canyon frontage has been reduced from a range of 32'-0" to 35'-0", and now varies between 29'-3" to 34'-0" in height.

SECTION 17. The City Council specifically rejects, removes, and strikes from the approvals of the Entitlements the first two (2) full sentences of the second paragraph of Section 3 of Resolution 23899 which reference the “event space” removed from the Project pursuant to and consistent with this Resolution.

SECTION 18. The City Council hereby notes again, as it did in Resolution 23899, that the pool area has been moved inward, and is now 30' from the building's edge on Indian Canyon Drive. Further, the third story, which was proposed for hotel rooms in the applicant's prior submittal, has been removed and will now be utilized as a mezzanine balcony.

SECTION 19. The City Council finds again, as it did in Resolution 23899, that the HSPB concerns relating to building height and massing were adequately addressed by the June 15, 2015 plan submittal. Additionally, the City Council finds again that the proposed development, has been sensitively designed within the context of the Las Palmas Business Historic District, and is in general conformance within the Design Guidelines established for the Las Palmas Business Historic District. As it did in approving Resolution 23899, the City Council again deletes Conditions No. 1, No. 2, and No. 3 of the Certificate of Approval recommended by the HSPB at its January 13, 2015 meeting, which conditions imposed a maximum overall building height of 34 feet, a maximum building height of 20 feet as measured at the closest setback to the Indian Canyon Drive frontage, and a limitation on any additional shade structures on the 4th floor roof deck.

SECTION 20. The City Council hereby re-approves the Major Architectural Application and, consistent with the requirements of Section 94.04.00(D) of the PSZC, re-states and affirms the factual findings set forth in Section 4 of Resolution 23899, originally approved on September 16, 2015, attached hereto as Exhibit “A,” and incorporated by this reference herein, except as inconsistent with the Court’s Writ of Mandate and/or herewith, i.e., this re-approval excludes any terms, conditions, plans, or other document in the administrative record of the Entitlements that might reasonably be deemed to include the “event space” as a part of the approved Project.

SECTION 21. The City Council of the City of Palm Springs hereby re-approves Case 5.1350 PDD 374/GPA/CUP/3.3795 MAJ, subject to conditions of approval outlined in Exhibit "A" except as inconsistent with the Court's Writ of Mandate and/or herewith, i.e., this re-approval excludes any terms, conditions, plans, or other document in the administrative record of the Entitlements that might reasonably be deemed to include the “event space” as a part of the approved Project.

SECTION 22. Moreover and based upon the foregoing, *(i)* an additional condition shall be placed upon the Conditional Use Permits and the Major Architectural Application which expressly requires that the "event area," also referenced in the Writ and from time to time in relation to the Project as the "event space," is eliminated from Case 5.1350 PDD 374/GPA/CUP/3.3795 MAJ, and that *(ii)* subject to that change, the approval of Case 5.1350 PDD 374/GPA/CUP/3.3795 MAJ and all related approvals and resolutions, including without limitation Ordinance No. 1886 and Resolution No. 23899, adopted arising from and related to the Project are hereby reinstated and affirmed in their entirety.

ADOPTED this 5th day of July, 2017.

David H. Ready, City Manager

ATTEST:

Kathleen Hart, Interim City Clerk

CERTIFICATION

STATE OF CALIFORNIA)
COUNTY OF RIVERSIDE) ss.
CITY OF PALM SPRINGS)

I, Kathleen Hart, Interim City Clerk of the City of Palm Springs, hereby certify that Resolution No. ____ is a full, true and correct copy, and was duly adopted at a regular meeting of the City Council of the City of Palm Springs on _____, by the following vote:

- AYES:
- NOES:
- ABSENT:
- ABSTAIN:

Kathleen D. Hart, Interim City Clerk
City of Palm Springs, California

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RIVERSIDE, CALIFORNIA; JANUARY 9, 2017

BEFORE THE HONORABLE SHARON J. WATERS

THE COURT: Come on up, Counsel. This is Advocates for Better Community Development versus City of Palms Springs. Appearances.

MS. HEMPHILL: Good morning, Your Honor. Emily Hemphill representing the City and the real parties in interest.

MR. NAFICY: Good morning, Your Honor. Babak Naficy for petitioner Advocates for Better Community Development.

THE COURT: So here are my tentative thoughts, and that is to grant the petition on the grounds that City has not complied with its own ordinance. I apologize. I didn't write the ordinance number, but the one that requires a certificate of approval from the Historic Preservation Board.

Two, the parking is inadequate under the City's ordinances because there appears to be an event space, although I'm not sure where its located or how big it is, somewhere on the site that was not addressed in the parking analysis, plus there does not appear to be provision -- adequate provision for onsite employee parking.

But to deny the petition to the extent petitioners contend there is an illegal spot zoning; although even on that, I think I'm going to need some more information from the City.

So who wants to start?

MS. HEMPHILL: May I, Your Honor?

THE COURT: Do you care?

MR. NAFICY: No, Your Honor. Given the tentative, I would be happy to defer to counsel.

1 MS. HEMPHILL: Okay. First of all, Your Honor, I guess
2 I would like to talk about the whole concept of the
3 reconsideration motion and so on, which is the procedural issue
4 that the petitioner has raised. Because what the City did was
5 the HSPB had their review. The applicant did, in fact, file a
6 timely appeal. The City upheld that appeal.

7 After that, because we have had so many threats of
8 litigation from this particular petitioner and, in fact, he has
9 sued on five or six other cases, the City looked at it and
10 realized that at the point at which they had upheld the appeal
11 for HSPB conditions, they had not yet finished the CEQA process.

12 And because they felt that having made that decision
13 without finishing the CEQA process would simply trigger a piece
14 of litigation, they contacted the applicant and indicated what
15 their suggestion was was to rescind the motion, go through the
16 CEQA process so that they had full analysis in front of them,
17 including the analysis with respect to the historic preservation
18 issues, and then consider it all at the same time. That way
19 they would not have in any way put themselves in a position to
20 have -- be accused of violating CEQA in not having to look at
21 the environmental review before they made these decisions.

22 So that was the genesis of it, and it was done with the
23 applicant's concurrence. And when it came before the council,
24 the applicant did not object. The timeframes that are required
25 that the petitioner cites to are timeframes there to protect the
26 appellant so that the appellant is assured of a timely
27 processing of his appeal. The appellant agrees to an extension
28 of that for good cause. It's essentially a tolling agreement,

1 and that's what they did --

2 THE COURT: Is there anything --

3 MS. HEMPHILL: -- to allow for the CEQA process to be
4 completed. I'm sorry.

5 THE COURT: No. My apologies to you for cutting you
6 off.

7 Is there anything in the record that supports, number
8 one, the reasons that you've just given for the repeal of the
9 initial resolution; and, number two, anything that indicates
10 that the applicant slash appellant agreed to an extension of
11 time. And if so, to what -- I mean, was it an indefinite
12 extension of time?

13 MS. HEMPHILL: No. At the point at which all of this
14 was happening, they were in the process of completing their CEQA
15 document. So they knew that the CEQA document was going out and
16 they were going to have a particular comment period. And so
17 what was agreed was that that CEQA process would be completed
18 before, and then everything would be brought up together.

19 The process -- or the rescission was done in an open
20 meeting. It was done -- if you look at the timeframes, you'll
21 see that the CEQA process didn't finish until -- I think it was
22 the end of June. And then the decision was in September,
23 whereas the rescission of the HSPB conditions occurred earlier
24 than that. If you look at the records, you'll see the CEQA
25 process occurred after both the HSPB decision, the appeal, and
26 the rescission of that appeal. And then the CEQA process ends
27 later.

28 When the council went ahead and did the rescission,

1 there is no objection from the applicant. And that's because
2 the applicant recognized the need for the completion of the CEQA
3 process.

4 THE COURT: So as I recall from the record, the repeal
5 was on the consent agenda. There was no discussion of it at
6 all. Admittedly, there was no -- nothing in the record to
7 suggest anyone tried to pull it from the consent agenda. I
8 presume there is an ability to do that.

9 MS. HEMPHILL: Yes, there is.

10 THE COURT: I didn't see any objections so, yeah, I
11 guess we can imply that they didn't object to the repeal. But
12 the repeal doesn't even say what we are going to do with the
13 certificate of approval. It refers it to the Planning
14 Commission and the Architectural Advisory Committee, I think is
15 what it's called. But it doesn't discuss at all what we are
16 doing with the underlying certificate of approval.

17 And then later on when the project was approved, I
18 don't even believe there was a discussion of the initial
19 conditions that the HSPB imposed. They didn't even discuss
20 that, that we are going to accept the certificate of approval,
21 but delete the conditions that -- there was just nothing after
22 that repeal.

23 MS. HEMPHILL: The resolution when they approved the
24 project did, in fact, address the HSPB conditions of approval.
25 And the resolution itself indicates that the adjustments to the
26 project -- it is Resolution 23899, which is the council approval
27 approving the project. And that addresses the issues of the
28 appeal and indicates that those conditions related to -- I

1 believe it was the height and I forget the other one.

2 But those two conditions had been, in fact, adequately
3 addressed by the revisions to the project and, therefore, the
4 council was deleting those two conditions. That is in the City
5 council's resolution. And I believe the number is 23899.

6 THE COURT: Counsel, do you agree with that?

7 MR. NAFICY: With what specifically?

8 THE COURT: That in the final approval of the project,
9 Resolution No. 23899, the City addressed the conditions imposed
10 by the certificate of appropriateness and determined that they
11 had been satisfied by the revisions?

12 MR. NAFICY: Well --

13 THE COURT: Just yes or no. I know you want to argue
14 the point, but did they address it in --

15 MR. NAFICY: They addressed it in some fashion, but not
16 in the context of an appeal. They said it was merely advisory
17 and --

18 MS. HEMPHILL: Your Honor, I think that is -- if I
19 could read this to you.

20 THE COURT: Do you have copies of the record?

21 MS. HEMPHILL: I have a copy of the resolutions, if I
22 can take a minute.

23 THE COURT: That's fine.

24 MR. NAFICY: May I ask what page are we on?

25 THE COURT: It appears to be AR102. It is Page 6 of
26 Resolution 23899.

27 MR. NAFICY: That's correct, Your Honor. I'm there.

28 THE COURT: Section 3. Let me read it.

1 Okay. I missed that. Thank you.

2 MS. HEMPHILL: Your Honor, also on this same issue,
3 it's pretty well settled that in order to bring an issue,
4 whether it's legal or factual, before the Court in circumstances
5 like this, one has to have exhausted one's administrative
6 remedies by raising the issue during the administrative process.

7 I sat down after having received the petitioner's reply
8 brief and went through the transcripts of the various hearings.
9 And this issue is not raised in those hearings. So the
10 petitioner has failed to exhaust its administrative remedies on
11 this particular issue and, therefore, is not entitled to
12 adjudication of the Court on it.

13 Then in terms of -- you know, if one wants to say that
14 indeed, you know, it -- the exhaustion of remedies is not going
15 to stop it, which I believe it should. But for the sake of
16 argument, let's take a look and say what happens if we are
17 looking at this.

18 The council clearly has the ability to hear an appeal
19 of the HSPB conditions, which it did. And it upheld that
20 appeal. So now the petitioner is taking issue with this
21 reconsideration. Well, if the reconsideration was invalid, then
22 the appeal was upheld and the conditions are eliminated.

23 If the reconsideration was valid, then it went back to
24 the Planning Commission. It finished the CEQA process. It came
25 back to the council. The council looked at the HSPB issue and
26 decided to eliminate those two conditions that were the subject
27 of the appeal. Either way, Your Honor, the end result is the
28 same, in those two conditions are validly removed.

1 The other issue with respect to this particular
2 issue -- this particular point is that the motion for
3 reconsideration was done back in May, May 6 of 2015. And if the
4 petitioner had a problem with that, he had an obligation to
5 mount some sort of a challenge at that point, but he didn't.
6 He let it go back to the Planning Commission without staying
7 anything, went through the process, didn't object to that
8 process at the hearing when the project was approved. And it's
9 only now later in the litigation that he's bringing it up.

10 So he's failing to exhaust his administrative remedies.
11 And if indeed he wanted to challenge the decision of the
12 reversal, that happened back in May of 2015. Generally
13 speaking, land use decisions outside of CEQA have a 90-day
14 statute of limitations. He would have had to challenged that by
15 August, and he did not do that. This action was not filed until
16 October, which is full five months after the decision for the
17 reconsideration.

18 So I don't think his challenge to that reconsideration
19 decision at this point is appropriate because, as I say, he
20 hasn't exhausted his administrative remedies on the issue. And
21 if he wanted to challenge it, he had to challenge to it in a
22 timely manner, not five months after the decision was made.

23 And whether you say -- if you say reconsideration was
24 not allowed, then the appeal was upheld and the two conditions
25 are gone. If you say the reconsideration was permissible, then
26 they went through the process. They did their analysis. They
27 considered it, and they addressed it in their resolution.

28 And, therefore, I think it is appropriate and the

1 petitioner's claim on this should fail.

2 THE COURT: And then the third issue is whether or not
3 since the plan had been revised, whether -- rather than just
4 proceeding with the original certificate and conditions which
5 they then eliminated, the City should have sent it back to the
6 Historic Preservation Board.

7 MS. HEMPHILL: Your Honor, the City is -- the way the
8 Municipal Code is set up, the City is the appellate body for the
9 HSPB. What they did was they took the project that the HSPB
10 conditioned, met the conditions as much as they could, but
11 could -- did not exacerbate the HSPB issues, but rather tried to
12 meet them, so that there was no need to send it back to the HSPB
13 because we weren't doing anything more extreme than what HSPB
14 had already approved subject to those conditions.

15 The council then had to decide were they going to
16 impose those conditions or were they not. The fact that we made
17 an attempt to respond to those conditions shouldn't end up being
18 a punitive issue where we're punished and made to go through the
19 whole process again. The council is the appellate body here,
20 and it makes no sense to have an appellate body if the appellate
21 body has to go back to the lower court and ask if that's okay.

22 THE COURT: Before you move on to the next issue, let
23 me hear from petitioner on this issue.

24 MR. NAFICY: Thank you, Your Honor. First of all, I
25 want to apologize, but for some reason I'm really not feeling
26 well this morning, and I feel slightly lightheaded. So I hope
27 it's not going to substantially interfere with this proceeding,
28 but I want to alert the Court to that fact.

1 And I want to start with by noting that both of the
2 arguments that counsel is raising here today, one, that the
3 original decision to approve the appeal -- to grant the appeal
4 from the Historic Site Preservation Board was delayed because of
5 some concern about CEQA process. And now this argument about
6 exhaustion of administrative argument -- administrative
7 remedies, neither one were raised in their brief.

8 And so I think it's patently unfair for me to now have
9 to address these arguments when the time to raise them was
10 during the briefing. And I object to the raising of these
11 arguments at this late date.

12 And so let's take the first one first.

13 THE COURT: You know, actually let's not. Because I
14 still did not hear that there was anything in the record that
15 explained why the city council repealed the initial resolution.
16 I've heard counsel tell me the timing sequence, which is evident
17 from the record. But that doesn't really tell me that that was
18 the motivating factor.

19 So I don't really care why they decided to repeal and
20 refer the matter back to the planning commission. So move on.
21 That's not really important. I was curious, but it's not really
22 important.

23 MR. NAFICY: So the related issue to that is that --
24 Your Honor, the way that city zone ordinance sets up the
25 process -- and as Mr. Fagg, the Director of Planning, explains
26 in his staff report on the appeal, he explains that the City had
27 an obligation. It would make sense for them to decide the
28 appeal at the time they did initially to give guidance to the

1 other bodies within the City who are reviewing the project.

2 For example, the Planning Commission to whom this
3 project was referred by the City at the time they rescinded
4 their approval or granted of the appeal operated on the
5 assumption that the conditions imposed by the Historic Site
6 Preservation Board applied. And their whole analysis and
7 recommendation for approval and recommendation for certification
8 of the negative declaration was based on that assumption.

9 But -- so the fact that the City went back and forth on
10 this really was a disruptive of their own scheme for how proper
11 review should be made. This was not the kind of rule that
12 really had no significance in the grand scheme of things. So
13 that's, I think, a very important issue. And we cite to it in
14 our brief where quote Mr. Fagg as saying, "You must decide this
15 issue right now because it is affects other agencies."

16 So -- and the way counsel describes the process
17 as really not -- like the appeal and reconsideration and all
18 these things, the City had the right to go back and forth or
19 somehow the code -- City Code allows the applicant to
20 unilaterally waive these timelines.

21 Your Honor, I've dealt with the City, as counsel had
22 said, numerous times. And they are ordinarily very strict about
23 deadlines. They are very strict about their procedural
24 deadlines. So to suggest now that they really don't matter
25 and -- it really stretches credulity. The idea that the council
26 without really making any attempt to note that they're
27 postponing a decision on this issue and now in this late date to
28 say, oh, we just put it up.

1 The truth of the matter -- I mean, the records supports
2 this, and I'm prepared to go through and cite to it. The City's
3 take on this issue was that the opinion of -- or the conditions
4 imposed by the Historic Site Preservation Board are mere
5 suggestions, and that the City can take the suggestion or not.

6 In some circumstances, the opinion or the
7 recommendations of a lower body are in the nature of mere
8 suggestions. But that was not the case here. This is a
9 certificate that requires an appeal. If it's a meer
10 recommendation, you don't have to appeal it because the ultimate
11 action is taken by the city council.

12 Here if the applicant hadn't appealed the conditions of
13 the Historic Site Preservation Board, the matter would have been
14 closed. Now counsel says because they appealed it one time,
15 that means that that keeps the appeal open indefinitely. We
16 don't agree with that. We think that the City had a timeline to
17 respond to the appeal. Having failed to do so, that the
18 decision of Historic Site Preservation Board became final. And
19 the City's position -- which incidentally, I note that the City
20 is not here, which I find troubling. Because counsel for real
21 party is taking positions on behalf of a city which I believe is
22 contradicted by the city's both code and practice and policy.
23 So I find that a little disturbing.

24 But regardless, there was no suggestion that as a
25 matter of law they are correct in characterizing the conditions
26 imposed by Historic Site Preservation Board as merely advisory.
27 And all this argument about, well, you could have appealed,
28 somehow you could have sued when they first approved it or all

1 of this, these are post-hoc rationalizations. They were never
2 raised anywhere. And it's not even -- I think it's really quite
3 disingenuous, because clearly we're not challenging the now
4 defunct decision to initially grant the appeal. What we're
5 objecting to is the abusive process of ignoring their own --

6 THE COURT: But even that, you're only wanting to
7 object to part of it. If the City did not have the authority to
8 repeal the resolution when they did, that means its initial
9 resolution upholding the certificate, but without the conditions
10 is the final word.

11 But what you want to do is gloss over the fact that
12 they three months later repealed it and focus on what they did
13 afterwards, which is eventually, as pointed out, delete the same
14 conditions they initially deleted. So you want to object to the
15 fact that the City didn't follow part of the procedure, but you
16 gloss over the fact that when they attempted to repeal it,
17 perhaps they lost and didn't have jurisdiction to repeal their
18 initial resolution.

19 So why does that -- suddenly that resolution, which
20 arguably was invalidly repealed, suddenly that decision goes
21 away and so what we have is the original certificate with
22 conditions. I don't know how you jump all the way back to that.

23 MR. NAFICY: Your Honor, first of all, I think I
24 appreciate the point. But, again, that's not a point that was
25 made in this litigation. I mean, it's an interesting point, but
26 it was not something that counsel -- the real parties have ever
27 argued. And we're not contending that the City had no
28 ability -- if I have to take a position, we're not contending

1 that the City had no ability to rescind its previous grant of
2 the appeal.

3 But there is no provision in the City Code to preserve
4 the issue after that point. I mean -- and perhaps they could
5 have fashioned something. But the real problem became -- and
6 this is just a practical issue. So I think counsel is -- and I
7 don't say this lightly. But I think counsel is not being
8 completely frank for the reason why the rescission of the grant
9 of the appeal.

10 THE COURT: Again, Counsel, I don't care. It's not
11 part of the record by either party. It wasn't part of the
12 arguments. It doesn't matter why they attempted to repeal their
13 initial resolution deleting those conditions.

14 MR. NAFICY: Your Honor, if I may, we did actually
15 address it, and we pointed out that the real reason was that
16 there was no notice of the appeal hearing. So my client had no
17 ability to get in there and challenge the appeal. So by the
18 time the issue was rescinded, we welcomed that.

19 But then as the project was going through other
20 approval -- for example, the Planning Commission. The Planning
21 Commission, as I pointed out earlier, had assumed -- I mean the
22 resolution is clear that when they describe the project, they
23 clearly state that it was subject to those conditions.
24 Therefore, we had no occasion to really object to it or address
25 it because it seemed like that's the project that was going
26 forward.

27 So we literally found out about the City's change of
28 heart on this issue -- because it wasn't even addressed in the

1 staff report. It was only when Mr. Fagg the night before the
2 hearing e-mailed me a copy of the draft resolution that for the
3 first time we saw the City intends to go back and address that
4 issue in this piecemeal fashion.

5 So that's why it's important because we were
6 blind-sided, because we had no idea throughout the process that
7 this was the trap that they had set because we assumed that
8 those issues were addressed per the conditions of the Historic
9 Site Preservation Board. So this is not an exercise in
10 futility. When they did that, we lost the ability to martial
11 our resources and really object to that added height, which is
12 of great importance to my client because of the impact it has on
13 the historic district.

14 So that's why I went back and harped on the reason,
15 because -- and if counsel wants to point to where in the record
16 it says anything about CEQA. So that's really the problem.
17 That's -- and we're not glossing over it. We welcome that
18 because there was no notice. And at that point we were
19 preparing to file a lawsuit. And that's why -- I think that
20 they saw the writing on the wall and went back and rescinded it
21 because they were vulnerable.

22 The staff report says that the applicant, quote,
23 "waived the notice requirement." Of course, the notice
24 requirement is not for benefit of the applicant. It's for the
25 benefit of the public because the applicant is the appellant and
26 knows when the project is going to come back.

27 MS. HEMPHILL: Your Honor, first of all, this is the
28 transcript from the city council hearing. And Mr. Tyson, who is

1 the client, did, in fact, show up and did, in fact, protest the
2 height of the building. So counsel is incorrect in saying, Oh
3 gee. We were blind-sided and didn't have the chance to go in
4 and protest that.

5 While he was there he could have said, And by the way,
6 City, you did not have the right to rescind that approval of the
7 appeal that you did on the HSPB. He did not do that. The issue
8 as to whether or not the council had the right do the
9 reconsideration was never brought up at the hearing, and,
10 therefore, is waived as a legal issue to be brought before the
11 Court.

12 In terms of why we are bringing it up now, it was only
13 in his reply brief that Mr. Naficy first brought up the issue
14 that the council only had 90 days to do something. And so we
15 went back and looked at it and realized what was going on. And
16 you know, we believe that the hearing and the arguments are part
17 of the record in this matter, and so we are bringing it forward
18 because it's a matter of law. You have to exhaust your
19 administrative remedies, and they did not do that.

20 THE COURT: Why wasn't that raised in your opposition
21 brief?

22 MS. HEMPHILL: Because I believed at this point that --
23 well, when we originally did the opposition brief, I felt that
24 we had adequately explained that the council was going back and
25 was delaying it. It was only when he did his reply brief that
26 he brought up the issue of the 90 days which caused me to have
27 to have to go back and look in greater depth, see where we were
28 in terms of all of these specific issues being brought up. That

1 specific issue of 90 days is all you had and you can't go
2 further than that was never brought up until his reply brief
3 came in.

4 THE COURT: When the City repealed its initial ruling,
5 if you will, repealed its initial ruling --

6 MS. HEMPHILL: Rescinded.

7 THE COURT: -- on the appeal -- or rescinded -- it
8 didn't set a further hearing on the repeal.

9 MS. HEMPHILL: No. What it did is it rescinded it and
10 sent it to the Planning Commission for consideration in
11 conjunction with all of the other applications that the project
12 involved.

13 THE COURT: Where is the authority to send the issue
14 regarding the certificate of approval or appropriateness to the
15 Planning Commission?

16 MS. HEMPHILL: The Planning Commission is by statute
17 authorized to review projects, and it is its obligation to
18 analyze and provide that those recommendations to the City
19 Council on issues that go to the City Council. And therefore,
20 the council was relying on that and the fact that the Planning
21 Commission would be reviewing all of the applications and the
22 Planning Commission would be reviewing the CEQA documents so
23 that they would be in a position to have everything in front of
24 them at once and could offer the City Council a more complete
25 recommendation in terms of the project rather than looking at
26 just little pieces of the project without looking at the whole
27 thing.

28 THE COURT: Is it correct that when the Planning

1 Commission did this review after the repeal or rescission, it
2 assumed that the initial conditions of approval, if you will,
3 issued by the HSPB were part of the project.

4 MS. HEMPHILL: Your Honor, it's difficult to know what
5 they assumed. But what they knew was that there was an appeal
6 pending on those conditions.

7 THE COURT: What does the record reflect in terms of
8 what assumptions they were making when they did their review?

9 MS. HEMPHILL: I think the record says they looked
10 simply at the project as it was and made their conditions based
11 on the project as it was, which was the revised project with the
12 slight revisions in terms of height and limitation of some of
13 the facilities. The Planning Commission, frankly, did not
14 recommend changes in the HSPB conditions. But again --

15 THE COURT: Did they discuss it?

16 MS. HEMPHILL: I believe they did, Your Honor.

17 THE COURT: And what was the nature of that discussion?

18 MS. HEMPHILL: I would have to go back and look. I
19 don't have that at my fingertips. I'm sorry.

20 THE COURT: But -- and it went forward to the city
21 council with the Planning Commission's recommendation that they
22 approve the revised project?

23 MS. HEMPHILL: Correct.

24 THE COURT: Even though they knew or should have known
25 that the revised project still did not comply with the
26 conditions set forth in the certificate of appropriateness?

27 MS. HEMPHILL: They understood what the conditions were
28 that the HSPB put before them, because do they have the entire

1 HSPB minutes and resolutions and so forth in their packets as
2 they go in. They knew that the council had an appeal. They
3 knew what the council had done with the appeal. So they were
4 aware of those items, yes.

5 MR. NAFICY: May I, Your Honor?

6 THE COURT: Yes.

7 MR. NAFICY: Your Honor, first on this issue of what
8 City -- what the Planning Commission assumed or didn't assume,
9 on Page 58 of the record, which is Page 3 of 11 of Planning
10 Commission Resolution 6518, it begins the previous page, the
11 resolution discusses the mitigation measures that apply to this
12 project. And it says on Page 57 that, "mitigation measures were
13 identified and incorporated in the following impact areas:
14 Cultural resources, hazards, and hazardous materials," et
15 cetera.

16 Then on Page 58 --

17 THE COURT: Counsel, please read slower.

18 MR. NAFICY: I beg your pardon.

19 Then on page 58, mitigation measure V-1, it's "the
20 building height shall be reduced by four feet over all." Then
21 it says "the cultural mitigation." And V-2 says, "The elevation
22 of the building on Indian Canyon shall be limited to two stories
23 and 20 feet adjacent to the street and can step back to include
24 additional height further from the street."

25 So no additional rooftop structure is permitted beyond
26 those illustrated in the approved plans. So while the project
27 as such remains as the applicant approved, the approval by the
28 Planning Commission included those conditions imposed by the

1 Historic Site Preservation Board which they referred to here as
2 mitigation measures.

3 I actually wrote the City, Mr. Fagg, and asked him now
4 that the issue of those recommendations, those conditions have
5 been resolved, why don't you change the description of the
6 project to reflect those conditions. And -- I beg your pardon.
7 I don't know where it is in the record. I'd be happy to do
8 supplemental briefing.

9 Mr. Fagg wrote me back, to his credit, and said, The
10 reason we are not doing that is because we don't want to confuse
11 the project description with the mitigation measures, because --
12 he basically argued that if we just now change it, it would
13 not -- the record would not reflect the fact that the changes
14 were mitigation measures and did not include original
15 description of the project.

16 So, in fact, the Planning Commission -- the project
17 Planning Commission approved and recommended for approval
18 included those mitigation measures. If you look on Page 57,
19 again, the same resolution, after item I, it says that, "On
20 May 6, the city council voted repeal the resolution." And then
21 it says, "On June 15, the applicant submitted their revision to
22 the plan."

23 There is no mention of carrying the issue over, that
24 there is a pending appeal. There is no mention that this issue
25 of the height is up for grabs. They don't even consider making
26 a recommendation one way or another on an issue that as far as
27 they are concerned is settled, as evidenced by the fact they are
28 including this mitigation measures.

1 THE COURT: Why did they include them as mitigation
2 measures if they were already included as conditions attached to
3 the certificate?

4 MR. NAFICY: Because the mechanism by which you can
5 require -- well, one answer is that they serve dual functions.
6 So for CEQA purposes, the mitigation measures -- there are
7 mitigation measures that would reduce the cultural impact to
8 less than significant. So if you go back to the MND, the MND
9 also assumes these mitigation measures. And it's on the basis
10 of these mitigation measures that it concludes that the impact
11 on the cultural resource here, the Las Palmas Business District,
12 would be less than significant.

13 But the mechanism by which the cities typically are
14 able to enforce mitigation measures is to include them as
15 conditions of approval as mitigation measures. That's just the
16 mechanism by which these are implemented. The conditions
17 attached to a certificate of approval by the Historic Site
18 Preservation Board are arguably not enforceable after the fact
19 unless they are made conditions of approval, which then become
20 mitigation measures essentially.

21 THE COURT: So at the end of the day, how is the
22 petitioner, members of the public, harmed if whether
23 characterized as conditions attached to the certificate, which
24 you just said is nonenforceable unless it's a condition of
25 approval, is subsequently made a mitigation effort which then
26 becomes a condition of approval, how is the public harmed? You
27 still have the ability to litigate the propriety of the City's
28 decision to eliminate those conditions or change them at their

1 final resolution.

2 MR. NAFICY: Well, Your Honor, I thought I more or less
3 exactly answered that question without really wanting to get
4 into harmless error and all that. But when -- counsel still
5 goes back -- and this is something that I left out in my
6 previous answer. The harm was not that we didn't oppose the
7 rescission of the appeal. The harm was that we went through the
8 process after the rescission. So they appealed. They granted
9 the appeal. Then they rescinded that. So the world essentially
10 believed that those conditions approved.

11 How can I claim that? Well, the MND had those as
12 conditions of approval/mitigation measures. The Planning
13 Commission resolution assumed those. And the staff reports all
14 refer to the project as subject to the conditions. So we didn't
15 really -- that was not an active issue for us anymore. We were
16 really focusing on parking and all these other issues.

17 So it was only the very last minute that they said,
18 aha, but now we're going back. And, Your Honor, I've been doing
19 this for a long time. It almost never happens that a city
20 council considers an issue like this without there being any
21 discussion of it in the staff report.

22 I mean staff reports are guides to what to expect. And
23 there is nothing in the staff report that says the city is now
24 considering this an appeal issue and will be addressing it. Had
25 they done that, we would have approached it differently. But
26 this was really a trap. And so I -- you know, maybe I'm wrong.
27 Ask -- please, direct counsel to tell us where in the record did
28 the City put me as the attorney for ABCD on notice that this

1 issue is alive.

2 THE COURT: What issue?

3 MR. NAFICY: The issue of the height of the building
4 and whether the height would be based on those conditions
5 imposed by the Historic Site Preservation Board, or the City was
6 going to just approve the applicant's revised project that they
7 put forth on June 15, which counsel says, well, it didn't go
8 against those recommendations.

9 So where does it say that? Where was it explained to
10 the public that that appeal issue was alive and well and could
11 be addressed? Where is the staff report discussion of it? I
12 mean the City made a finding -- the page that counsel pointed
13 to -- that the concerns raised by the Historic Site Preservation
14 Board -- here. This is Page 102.

15 It says, "The city council finds that the Historic Site
16 Preservation Board concerns relating to building heights and
17 massing have been adequately addressed by the June 15th, 2015
18 plan submittal." Even the finding doesn't say anything about an
19 appeal. It treats those as recommendations as if there was no
20 need for an appeal.

21 So how is that an adequate finding to sustain the
22 appeal? It just says those concerns were met. Where is the
23 staff analysis of how that is done? Where is the -- I mean
24 counsel makes a lot of arguments in their brief, but that's too
25 late. Where was it in the record giving us notice that this was
26 something that we need to go and address? So that's the harm.
27 Because we -- you know, this was really never properly
28 addressed.

1 And if the city council genuinely was seeking advice on
2 this issue from the Planning Commission, where was that question
3 ever posed to the Planning Commission? We cited in our brief
4 one of the commissioner's questioning of Mr. Fagg as to, well,
5 wait. If this is an issue -- if we're now saying that, you
6 know -- if these conditions have never been addressed, this new
7 revised project never been addressed by the Historic Site
8 Preservation Board, why aren't we submitting it back to them?
9 And Mr. Fagg says --

10 THE COURT: Why shouldn't the appropriate remedy here
11 be set a hearing on the appeal?

12 MR. NAFICY: Because, Your Honor, the time came and
13 went. Honestly, I haven't thought a whole lot about an
14 appropriate remedy. We are not saying, oh, you know -- I've not
15 really addressed a remedy.

16 But, you know, if they want to remand and set up a
17 hearing -- I mean, we think it would be appropriate to go back
18 to the Historic Site Preservation Board, let them -- I mean,
19 these are the folks that the City has identified as experts in
20 this very area and given them essentially permitting authority.
21 So, yeah. If the issue is let's send it back to the Historic
22 Site Preservation Board, perhaps that would be appropriate. But
23 I honestly haven't really thought through what an appropriate
24 remedy would be. Again, be happy to do supplemental briefing on
25 that issue.

26 MS. HEMPHILL: Your Honor, if I may.

27 THE COURT: Sure.

28 MS. HEMPHILL: Mr. Naficy is indicating that he had no

1 way of knowing that the Planning Commission was going to be
2 looking at the appeal issues. And yet when the council made its
3 rescission, it specifically rescinded its decision on the appeal
4 and sent it to the Planning Commission for review. It was right
5 there in their action when they took that rescission action. So
6 Mr. Naficy's client was well aware that that was going back to
7 the Planning Commission for review.

8 Now, the Planning Commission with respect these kinds
9 of issues is an advisory body of the city council, and the city
10 council is the final decision making power. The fact that the
11 Planning Commission put conditions of approval in and the
12 council certainly considers them, but they certainly have the
13 ability to approve the project and modify those conditions if
14 they believe that's an appropriate thing to do. And that's what
15 they did here.

16 And it is a process that happens all the time.
17 Planning Commissions set forth conditions of approval. When it
18 gets to council, sometimes they're accepted completely.
19 Sometimes they are modified. So there is not any trap or any
20 kind of, you know, thing going on here where we are trying to
21 fool someone. We go through the same process we always do.

22 The rescision clearly said we are sending it back to the
23 Planning Commission to consider this with all the other
24 applications that are for this project. They wanted the
25 Planning Commission's recommendation to them total, not
26 piecemeal on this issue and then the other issues later.

27 And so, you know, the fact that the Planning Commission
28 had that in its conditions of approval is irrelevant to the

1 issue. The council gets to make its decision in the final
2 analysis. When the council made its decision in the final
3 analysis, it had the HSPB stuff in front of it. It had the
4 Planning Commission stuff in front of it. It also had in front
5 of it a report from a historic preservation consultant saying
6 that it believed that the changes to the project made it
7 compatible with the district.

8 This building is not itself a historic building. It's
9 an old eyesore. Everyone agrees on that. The only reason we
10 are at the HSPB is it's the district that is in there. The
11 requirements for the district are is that the building height is
12 to be generally similar to what is surrounding it. The building
13 right next to it is 29 feet. Whereas our building abuts it, our
14 building is 29 feet, 3 inches. And that frontage along Indian
15 only varies, what 5 feet, I think.

16 The height part of the building is pushed back 60-some
17 feet from Indian and 30 feet back from the face of the building.
18 So you can't even see it from Indian Canyon or from Palm Canyon.
19 So that when they looked at that -- and there is even a section
20 in the guidelines that talks about varying of heights. It says,
21 "The height of new construction should be generally similar to
22 other buildings in the surrounding area, a variety" --

23 THE COURT: You know, it's hard for me to get to the
24 issue of the merits of this issue because it's a procedural
25 issue here. We haven't even talked about assuming a proper
26 appeal, how is it handled at the city council level. I know
27 there is some differing opinions there.

28 I agree with petitioner that unlike the process in the

1 ordinance for designating a building historic, which clearly
2 indicates the HSPB submits a recommendation. When it comes to
3 the certificate of appropriateness, they make findings and
4 presumably with conditions, which I don't even know if the
5 ordinance talks about conditions.

6 It goes to the city council who can take evidence. I
7 don't think there is any disagreement there. And then it comes
8 up on appeal, and I presume that I would be reviewing it for a
9 substantial evidence review slash abusive discretion. We never
10 had a clear appeal hearing for the Court to even get to the
11 merits of whether there was a basis for the city council to
12 delete these conditions or not because the manner in which it
13 was handled.

14 So I don't really think it would be appropriate for me
15 to be deciding that it either was or was not consistent with
16 guidelines or that there was an evidentiary basis for the city
17 council to eliminate those conditions. Okay.

18 MS. HEMPHILL: Uh-huh.

19 THE COURT: So let's move on to the parking issue.

20 MS. HEMPHILL: Your Honor, with respect to parking,
21 again, because this project has gone through a great deal of
22 evolution, the original discussion was an event area on the
23 rooftop. As things moved along, that event area, as the record
24 shows, got pushed back from Indian and pushed back from Palm
25 Canyon.

26 THE COURT: It still exists.

27 MS. HEMPHILL: It still exists. But what the rooftop
28 area consists of a swimming pool, a deck, and a bar area.

1 THE COURT: You're citing from what?

2 MS. HEMPHILL: From the Administrative Record, Page
3 248.

4 THE COURT: What is 248?

5 MS. HEMPHILL: I believe it is the staff report from
6 the planning director. And the only enclosed areas on the top
7 floor now are restrooms, a storage space, and the tower for the
8 elevators.

9 THE COURT: What is the date of that report?

10 MS. HEMPHILL: That is the last report that went to
11 council. Let me see if I can put my hands on this quickly.

12 MR. NAFICY: Your Honor --

13 MS. HEMPHILL: The one I'm referring to here is
14 February of '15.

15 THE COURT: Which is not the last staff report.

16 MS. HEMPHILL: Well, essentially what they did was --

17 THE COURT: I recall a staff report in July of 2015
18 indicating that there was a problem because the event space has
19 not been addressed and that the one way of solving it was to
20 limit use of that event space to hotel guests and not allow the
21 public to be using it which would increase the parking needs.
22 If it's limited to hotel guests, it wouldn't increase the
23 parking needs and that never got resolved.

24 MS. HEMPHILL: Actually, it did get resolved in terms
25 of limitations because the seating numbers -- when they did
26 their parking calculations, they did a calculation considering
27 the 39 hotel rooms. They did a calculation for the ground floor
28 restaurant with 113 seats. They did a calculation for a 39-seat

1 lounge, which is also on the ground floor, and 20-seat rooftop
2 area.

3 THE COURT: Which is not the event space.

4 MS. HEMPHILL: But it says that, "The seating numbers
5 for each area are included in the conditions of approval, and
6 any deviation from those numbers require prior approval by the
7 director of planning by means of amendment to the use permit
8 associated with each use."

9 So essentially what ended up happening is they
10 calculated what the rooftop bar at 20 seats would take in terms
11 of parking and said if you're going to do anything other than
12 that, you have to come in for an amendment. So they conditioned
13 the project so you can't do events like a convention center
14 event there. You can do an event in the sense if people are at
15 the pool and they want to hang around on the deck, they can do
16 that. But it's not something that you can bring in a lot of
17 people because you're only allowed 20 seats on the roof.

18 MR. NAFICY: May I, Your Honor?

19 THE COURT: Yes.

20 MR. NAFICY: Your Honor, there is a lot of citations in
21 the record to the event center, but maybe the most germane is
22 the city council Resolution 23899 which approved the project.
23 At Page 102 of the record, Page 6 of the resolution, section 3,
24 middle paragraph. This is the same page counsel cited, and it
25 says: "The fourth floor event space, which is approximately
26 4,000 square feet, has been moved towards the center of the
27 building and is now located approximately 68 feet from Indian
28 Canyon Drive property line."

1 So -- and again, I don't want to through a litany of
2 cites. I did blow up a couple of pages of the Administrative
3 Record. And showed it to counsel. With the Court's permission,
4 I would like to show you.

5 THE COURT: Okay.

6 MS. HEMPHILL: Your Honor, whatever you call it, you
7 can only have 20 seats in it under the conditions of approval.
8 And that's the basis upon which the parking discussion -- or the
9 parking analysis was done.

10 THE COURT: What is this first blowup I'm looking at?

11 MR. NAFICY: On the lower right-hand side, there is a
12 date on it. And those were renderings that were attached to --
13 that were made available to the public. They were added to or
14 supplemental to the staff reports.

15 THE COURT: Okay. It's dated June 12, 2015. And it is
16 showing hotel event space. This is Administrative Record,
17 Page 2112. The second one is Administrative Record, Page 1846.
18 This one dated July 7, 2015, which again shows the -- in pink
19 hotel event space.

20 So what the City and real party is saying now is that
21 it doesn't matter that there is an event space. If they tried
22 to put more than 20 seats up there, they have to get permission.

23 MS. HEMPHILL: Yes. We have to do an amendment of the
24 use permit.

25 MR. NAFICY: Your Honor, the project as described and
26 approved includes an event center, albeit a moving target, but
27 it clearly is an event center there. And -- no other -- I mean
28 they didn't need to get a special permit or anything for this as

1 they did, for example, for the spa. But the project -- and
2 the -- if you look at the maps, I'm sure -- I don't have the
3 tentative maps, but the maps will show an event center.

4 If counsel wants to stipulate that there will not be an
5 event center on the roof so we can document it and we can get a
6 judgment on it that there will be no event center, and if they
7 want to come back -- if they want an event center, they have to
8 come back and go through the CEQA process and do a traffic study
9 and all that, we will have achieved what we are seeking to do.
10 So if they are willing to stipulate that those drawings are
11 wrong, all the project descriptions are wrong, and there will be
12 no event center, then we basically, you know, feel like, okay,
13 we got what we wanted.

14 MS. HEMPHILL: Your Honor, we are willing to stipulate
15 that the only thing on the roof is the swimming pool, the roof
16 deck, and bar area sufficient to provide for 20 seats, and that
17 the only enclosed areas are the restrooms, the storage space,
18 and stair elevator towers. That's the project. So, yeah, we
19 are willing to say that that is the project. It's not a
20 convention center.

21 MR. NAFICY: Well, Your Honor, that's not quite what we
22 ask. One issue is that we're not, quite frankly, sure where the
23 event center is because it's moved around. So to -- so that was
24 the City's response to my comment. Well, what about parking for
25 the event center that is going to be on the roof? And they said
26 there won't be an event center on the roof.

27 My understanding also is that the event center as
28 planned -- and I'm now looking at Administrative Record,

1 Page 3829. And this is an -- we cited to this in our papers,
2 and it's an unsigned memo dated June 12, 2015. And it says,
3 "Regarding rules and regulation for rooftop outlet operations."
4 I don't know what that means. But hours of operations in the
5 middle of that will page, it says, "Event space 8:00 a.m. to
6 10:00 p.m. for any functions that include open, retractable
7 walls. Event centers that are held in the interior of the space
8 with no walls, windows will be allowed to continue until 1:00
9 a.m. on a case-by-case basis."

10 So although this is the only place I was able to find
11 in the record sort of dealing with this issue, it seems like the
12 event space includes retractable walls. So perhaps it's not
13 brick and mortar walls, but some other mechanism for adding
14 walls, to the point where they have anticipated rules for
15 operating the event center.

16 So if counsel's offer is to blankly say there will be
17 no event center located anywhere, then, you know, I would
18 probably be okay with that.

19 MS. HEMPHILL: Your Honor, first of all, what counsel
20 was just quoting to was an effort to address concerns about
21 noise. They did not -- the neighbors wanted to make certain
22 there would not be people partying on the roof late into the
23 night. So that's why the indoor versus outdoor issue was
24 brought up on that.

25 The bottom line here is the conditions of approval says
26 there are 20 seats on the roof, a deck, and a swimming pool, and
27 that's all we want. We don't want anything more than that. So,
28 you know, in terms of stipulating to that, I'm happy to

1 stipulate to that.

2 I don't understand what he's talking about in terms of
3 what is an event center. You know, if he's saying that no one
4 can congregate on the roof, well, no. I can't say that because
5 that's where the pool is and that's where the bar is.

6 THE COURT: The problem with your analysis, Counsel, is
7 you talk about the seats and yet in determining parking, it's
8 either based on the number of seats or based on the square
9 footage. And if there are plans to use the rooftop for events
10 other than sitting next to the bar --

11 MS. HEMPHILL: There is not.

12 THE COURT: Well, then you should be willing to
13 stipulate that there is no event space on the rooftop.

14 MS. HEMPHILL: Then, Your Honor, we will stipulate
15 there is no event space on the rooftop, but there is a rooftop
16 bar and deck that has 20 seats.

17 THE COURT: Which is separately addressed. I don't
18 think there is any question about that. It's using it beyond
19 the bar for some other type of event. And I can see a wedding
20 reception up there, especially in the nice Palm Springs weather,
21 with no walls, just open space, tables, no seating. That would
22 require additional parking. And that's the reason the
23 petitioner continues to raise this issue, and that's why the
24 Court has a concern. Because there are throughout the materials
25 references of an intent to use the rooftop for events other than
26 just going up and having a drink at the bar, which, you know,
27 you're not going to get a hundred people up there if there are
28 only seats for 20.

1 There is, obviously -- or there's an indication that
2 there's space that can be made available for some event. And
3 that because if there is no seating, we are talking about
4 measuring the parking needs by square footage. We can't get a
5 clear idea of what the square footage is which makes it even
6 more difficult to determine what the parking needs are.

7 So I'm uncomfortable with the state of the record as it
8 relates to this parking issue because of a multitude of
9 references that there is an intent to hold events there on the
10 roof other than just come up and have a drink at the bar.

11 MS. HEMPHILL: Your Honor, if one wanted to have a
12 wedding reception and you had a small wedding of 20 people,
13 would that be able to happen up there? Yes. If you had a
14 wedding reception with 50 people, would that be able to happen
15 up there? No, because you don't have enough seating for it and
16 you can have only have 20 seats.

17 THE COURT: Move on to the onsite employee parking
18 issue. I think you're losing this issue. I think it's going to
19 be appropriate to grant some sort of writ, if nothing else, to
20 require that this issue or any conditions that -- appropriate
21 conditions be imposed to prevent the use of the rooftop for any
22 sort of events, period, beyond people drinking at the bar or
23 swimming at the pool. I guess there is a pool up there.

24 MS. HEMPHILL: Yes, there is a pool.

25 THE COURT: 34 seats, or whatever, for the pool. I
26 don't remember what the number was.

27 So what about employee parking?

28 MS. HEMPHILL: Under the city's code, the employee

1 parking -- the way they set it up is the code ratios include
2 both customer and employee parking so that when they do the
3 calculations based on the city code, that already allows for
4 employee parking.

5 THE COURT: Onsite?

6 MS. HEMPHILL: Uh-huh.

7 THE COURT: Okay.

8 MR. NAFICY: Your Honor, obviously we agree with the
9 Court's analysis on the parking issue. And I'm not going to add
10 much more to it other than to say we're talking about the same
11 event space that there were these multiple e-mails from Mr. Ken
12 Lyon.

13 On the issue of employee parking, again, that issue was
14 raised by Mr. Lyon. And he -- what he said was that -- his
15 concern was that this project being sort of a luxury project,
16 that the ratio of employee staff to hotel guests is going to be
17 high, and that that is going to put pressure on the local
18 parking, especially in light of the loss of the parking for the
19 Alcazar Hotel that previously used the site.

20 This issue was not really ever properly addressed.
21 Now, technically counsel is correct that the specific
22 requirement for hotel employees is -- is in relation to these
23 resort hotels. But as I mentioned, Mr. Lyon, I think,
24 persuasively argued that because -- and because of all the
25 different pieces that fit together here, it would have been
26 appropriate to address employee parking because just the number
27 of employees that are likely to be effecting the parking in that
28 area.

1 THE COURT: So the standard of review is either
2 substantial evidence of an impact that they failed to address or
3 abusive discretion for failure to follow the law. Was there a
4 failure to follow the law?

5 MR. NAFICY: Your Honor, there was a failure to follow
6 the city zone code on these issues, so I think that was
7 abusive --

8 THE COURT: You just indicated that counsel was
9 correct, that under the ordinance it was proper to include
10 employee parking along with customer parking.

11 MR. NAFICY: What I indicated was that the mandatory
12 requirement without any analysis for employee parking is for a
13 resort hotel. So if there is a resort hotel, there is no
14 discussion. But in this case, I don't think that the City even
15 considered the issue. And I think employee parking would have
16 been appropriate under these circumstances for those reasons.

17 So basically what we are arguing following the city's
18 zone planning staff is that this is a functional equivalent of a
19 resort hotel because of many amenities, because the number, the
20 cocktail lounge and the restaurant and the spa and the pool and
21 the cabana, which is typical of resort hotels, and then the
22 ratio. It says there are 39 hotel rooms, but these are suites
23 with mini kitchens in there. So these are not tiny, hundred
24 square foot rooms.

25 So I think the issue at least is merited consideration,
26 but I think that because this is the functional equivalent of a
27 resort hotel, there should have been employee parking.

28 MS. HEMPHILL: Your Honor, again, you know, counsel

1 wants to go by the letter of the law when it works in his way,
2 and he wants to go by the functional equivalent when it works
3 his way. The fact of the matter is under the City Ordinance, it
4 is not a resort hotel because it's only 39 rooms.

5 The analysis was done based on the city's parking code
6 and based on the city's parking code, I think we were twelve
7 spaces excess based on the code. That was then reviewed by RK
8 Engineering, which is parking consultant, and they concluded
9 that there was adequate parking for the project as it currently
10 exists.

11 In accordance with the HSPB requirement, this study was
12 then sent out by the City for a peer review. And that peer
13 review also supported that the study was adequate. So the idea
14 that, you know, two professional traffic and parking consultants
15 are wrong, the city code is wrong, and we're going to do the
16 functional equivalent of a resort hotel because the rooms are
17 big, there is no basis for that.

18 MR. NAFICY: Well, there is no basis for that other
19 than the City's own planning staff who basically make the exact
20 same argument. And I note that none of these e-mails -- I mean
21 I don't know what the function of us not getting a full record
22 or there really was simply no response to these e-mails. But
23 these e-mails we cited from Mr. Lyon to the planning director.
24 There are -- we don't have responses in the record.

25 Your Honor, I think that parking issue should be
26 revisited. And whether the writ includes direction to consider
27 employee parking or not, I think that issue should be, you
28 know -- and would be appropriately considered if there is a

1 further proceedings on this issue. As long as there is further
2 proceedings on the parking issue, I think the public will have a
3 chance to raise these issues, hopefully, again and that the
4 issue could be resolved that way.

5 MS. HEMPHILL: Your Honor, if I may, Mr. Naficy keeps
6 going back to something that Mr. Lyon said. Mr. Lyon is a
7 junior planner at the city of Palm Springs, and he's making
8 recommendations to his boss. His boss then applies the code and
9 the applied code requires a parking study. His boss commissions
10 a peer review of that parking study and they all conclude that
11 the park is adequate. So there is no basis for wiping all that
12 out and going back to the junior planner's idea.

13 THE COURT: Spot zoning.

14 MR. NAFICY: Your Honor, I understand -- the spot
15 zoning issue, in all candor, Your Honor, is a closer call. I
16 readily admit that. The problem really is that if you look at
17 the totality of this project, it really is shoehorned into this
18 1.1 acre space. And it has -- and so there were so many
19 exemptions granted to it for height, for setbacks. And then on
20 top of that, there was this switch, this general plan amendment,
21 which basically tripled the allowable density.

22 Now if you just consider that this -- I mean counsel
23 says, well, there is this eclectic zoning. What we are talking
24 about here is really density, because that density, the extra
25 square footage is directly related to the value of the real
26 estate, how much money you can make.

27 So if you grant one property three times the density of
28 properties around it, you're basically discriminating against

1 everybody else that was -- basically complied with the existing
2 zoning. If the City believes or believed that it would be
3 appropriate to add density in this part of the city, the
4 appropriate vehicle for that is a general plan amendment. But
5 if the City is not prepared to do that, piecemealing -- you
6 know, allowing an island essentially of high density to allow
7 Miss Hemphill's client to build this relatively big hotel with
8 all these ancillary uses, it really is, I think, is a clear
9 example of spot zoning.

10 The only thing that makes this a closer call is the
11 fact that the CBD zoning -- the Central Business District zoning
12 is not that far away. So that I think makes this a little bit
13 of a gray area because -- I mean they say it's a transition
14 zone. But the problem ultimately with that argument is that,
15 well, because it's kind of close. At first the City documents
16 referred to it as "relatively close." Then it became "close
17 proximity." But problem with that is that if we are going to
18 not maintain a hard edge because something is close to something
19 else, then this is going to have a cascading effect.

20 So -- and the cases that I've reviewed on this issue,
21 they have just really focused on what is immediately surrounding
22 it, not whether it's close proximity or relatively close and all
23 that. But honestly -- and I know that this is not part of the
24 record, but this is typical of the city of Palm Springs is to
25 basically through this PDD process and now the general plan
26 amendment process create these islands and really essentially
27 favor one developer, one project over all others. And we feel
28 that this was not appropriate here.

1 I know it's a very fundamental issue, and the City's
2 police power as far as regulating land use is -- that's where
3 they have the most discretion. I recognize that. But there has
4 to be a limit to what they can do. And in this case, I think
5 the limit comes from the discriminatory affect that this
6 decision has on everybody else.

7 So what is going to be the de facto impact of this
8 decision is that the City has basically taken away its
9 discretion to deny other projects in this area on the basis of
10 added density. There was no argument why -- I mean, counsel has
11 talked about -- and I know what city counsel was concerned
12 about, well, this project, this area really needed maybe a
13 little uplift. And nobody says there should not be any project
14 in this spot.

15 But on the other hand, there has never been a showing
16 why there needed to be this much density, why it had to be so
17 high and include so much restaurants and all this other stuff.
18 Why couldn't it be like these other projects around it?

19 And if you think about the issues we picked up for
20 litigation, the height really is related because they just want
21 all this additional density. The parking issue is the same
22 thing. They just want to have so much density, cram so much in
23 there that there is not enough parking for it. So this is, I
24 think, the problem with this, a discriminatory effect.

25 I can understand if the Court is reluctant to maybe on
26 sort of separation of power issues, but I really don't think
27 this is the Court substituting its judgment for the City. I
28 think this is looking objectively at what is this project, what

1 is the zoning and underlying ground general plan land use
2 designation? What exists around it? What is the density, and
3 whether or not this creates an island?

4 So I don't want to say that counsel concedes this
5 issue, but I mean we can agree on the facts. The facts are what
6 they are. And while it is -- it's not that far CBD. It's not
7 surrounded by CBD. So the only other issue really becomes the
8 public benefit issue. So in cases where courts have granted --
9 there aren't that many. But where the courts have acknowledged
10 that spot zoning was appropriate because of the public benefit,
11 there was a close connection between the zoning change or the
12 benefit bestowed or the restriction imposed and the goal of the,
13 you know, the public benefit.

14 So here the added density doesn't add to the public
15 benefit. They could have a hotel there, like a normal-sized
16 hotel that is not too high. You know, the height is consistent,
17 that has enough parking that would revitalize that area, that
18 would add pedestrian traffic, that would look very nice, and be
19 an asset to the city. So there is no intrinsic benefit to the
20 added density.

21 If you look at the cases -- so that *Foothill* case we
22 cited is a really good example where they allowed senior housing
23 and the court said, Well, senior housing provides a benefit to
24 this community, and so we are willing to tolerate spot zoning
25 because that benefits the public.

26 Here does the added density really -- is that what
27 benefits the public? If there was a showing that but for the
28 added density, the project would be completely infeasible. I

1 wouldn't be standing here arguing it. But -- I wouldn't be
2 making this point because, you know, the -- it wouldn't be as
3 strong.

4 But I think that here there has been no showing that
5 the added density is something but -- you know, there is a but
6 for to -- but for the added density. So I don't want to dwell
7 too much on this, because I'm not adding, frankly, much to -- if
8 anything, to what we argued.

9 I think I agree with the Court that it is a closer
10 call, but I don't think there has been enough offer on the
11 public benefit issue, and the facts support a finding that it is
12 an island of three times the density, so it meets the criteria.

13 THE COURT: So this is where I indicated the City may
14 want to do something more today, because what you presented in
15 the request for judicial notice was very hard for the Court to
16 see.

17 MS. HEMPHILL: On the zoning map?

18 THE COURT: Yes.

19 MS. HEMPHILL: I'm sorry.

20 THE COURT: And a blowup is something that I think
21 might assist the Court.

22 MS. HEMPHILL: Happy to do that, Your Honor.

23 THE COURT: Because I couldn't really study the map, I
24 kind of just went on argument here. But I think the record
25 needs to be clear and a blowup that's --

26 MS. HEMPHILL: Of just that section?

27 THE COURT: Of the important part would make it clearer
28 for everybody. And I'm going to ask the City to provide a

1 blowup. Please make sure petitioner sees it before you submit
2 it to the Court.

3 One thing that was not real clear to me, and I'll ask
4 either one of you, what is around this area? What is next door?
5 What is across the street? What do we have?

6 MS. HEMPHILL: Your Honor, this is a part of the
7 downtown area. I don't know how familiar you are with Palm
8 Springs, but Palm Canyon Drive is the drag.

9 THE COURT: I'm familiar with the general area.

10 MS. HEMPHILL: And you have the big mall that is the
11 right at Palm Canyon and Tahquitz. And if you keep going north
12 on that street, you'll come to this project in a couple of
13 blocks. So you have a hotel right next door, the Alcazar Hotel,
14 which is a 29-foot tall hotel. You have restaurants. You have
15 office space. You have retail. It's a mix of a lot of things.
16 There is another hotel across Indian from it. So it's a
17 continuation of the downtown area.

18 In terms -- one of the biggest problems that the city
19 of Palm Springs has had for many, many years -- I mean, I worked
20 for them 30 years ago before becoming a lawyer and struggled
21 with this. Their main drag is Palm Canyon Drive. Everybody
22 knows Palm Canyon Drive. The other side of that -- because that
23 goes in one direction. The other side of that is Indian Canyon
24 Drive.

25 Well, if you've ever driven down Indian Canyon Drive,
26 you look at the back doors of all the buildings. It looks like
27 a big, wild alley, except for what used to be the Spa Hotel, which
28 is now gone. So one of the things that the City was always

1 trying to do was instead of making it a one-street downtown,
2 they wanted it to be a two-street downtown. They have tried for
3 years to revitalize Indian Avenue.

4 This project sits on property that's an old bank
5 building that has been abandoned for many years and has become
6 quite an eyesore. And so the City was very pleased when
7 somebody decided to come forward to get rid of that eyesore. If
8 you look at the Administrative Record and the council's
9 discussions of the project, particularly council member Mills
10 who has been on the council for a very, very long time, and he
11 talks about the -- "in my mind, showing an increase in the
12 pedestrian experience and activities occurring on Indian Avenue,
13 which is something" --

14 THE COURT: Slow down, please.

15 MS. HEMPHILL: I'm sorry. "To increase in pedestrian
16 experience and activities occurring on Indian Avenue, which is
17 something that this council has been working on for years and
18 years, to make Indian Avenue not just as a former planning
19 commissioner called it, 'the way out of town.'"

20 And the second council member echoed the same thing,
21 about "the Bank of America building being an eyesore," and he
22 felt "it fit very well into the eclectic nature of North Palm
23 Canyon." And these are -- and it's -- he appreciated that, we
24 listened to him and did not turn our backs on Indian Avenue.
25 This is the big picture that really matters to me.

26 There has to be not just a little quiet hotel sitting
27 there if you're going to energize Indian Avenue. You have to
28 create some energy there. And that's what this project does.

1 Because what it does is it puts a restaurant on Indian Avenue,
2 and it creates a pedestrian passthrough from Indian to Palm
3 Canyon. And it's been conditioned to construct a crosswalk on
4 Palm Canyon. So it's essentially moving people through the
5 site, moving people from their currently successful downtown
6 street to what they hope will be a successful downtown street,
7 and it creates a certain amount of energy.

8 Now, Mr. Naficy is talking as though we're building an
9 enormous hotel. It's only 39 rooms. It's not a big hotel. But
10 you have to -- if you're going to achieve the don't put your
11 backdoor on Indian, you have to put something on Indian to make
12 it have energy and to make it have a reason for people to walk
13 there. So that's why there is restaurants on both sides of it.

14 And those kinds of things tend to energize the site and
15 really accomplish what the city council is trying to do. They
16 are not trying to put a sleepy B&B here. They're trying to
17 energize their downtown, trying to energize Indian Avenue, and
18 they have been trying for 30 years that I know of and they are
19 finding a project that's willing to say, yes, we will help you
20 do that. To do that, you have to be able to have enough going
21 on on the site to create that energy. Just putting a sleepy B&B
22 there is just going to put another backdoor on Indian and not
23 achieve what the City is looking for.

24 I mean it achieves of the City's objective in terms of
25 energizing Indian. It achieves the City's objective with the
26 resort overlay which is in this areas. So they say there is lot
27 of mixed restaurants, little stores, a lot of things. But this
28 is a hotel site that they can bring -- to help bring tourists

1 right downtown, which is what their resort overlay is looking to
2 do.

3 They have also -- we have already conditioned it -- the
4 north end of Palm Springs is kind of an art district. And this
5 kind of borders on the north end of there, so they are also
6 providing an art walk where local artists could be able to
7 display on a rotating basis their art in a special created area
8 that would exist right where you have a passthrough between
9 Indian and Palm Canyon.

10 So they included a lot of things that achieve the
11 objectives that the council is really trying to achieve for
12 downtown, particularly on the Indian Avenue, and they have been
13 trying many years and had no luck. So it was important that the
14 City get something here that created a lot of energy to try and
15 get that process started.

16 MR. NAFICY: Your Honor, I don't want to sound petty
17 about this, but what the City's objectives were and what they
18 have tried to do in this neighborhood and all that is not in the
19 record, and counsel's representation -- and I don't think it's
20 appropriate for the Court to consider.

21 THE COURT: Except to the extent she cited to the
22 transcript and comments of the city council members.

23 MR. NAFICY: I appreciate that, Your Honor. But -- and
24 I appreciate counsel's comments. But I think counsel's
25 comments really -- those facts are going to cut both ways. If
26 it's true indeed that the City wants to change -- to convert
27 this neighborhood into downtown, the Central Business District,
28 and this project is an effort to do that, that kind of supports

1 our arguments that they are trying to do zoning -- spot zoning
2 and do this in a piecemeal fashion.

3 And when counsel says, Well, this is not an enormous
4 project, it's all relative. I agree that by say Los Angeles'
5 standards, it's not enormous. But the facts remain to put this
6 project in this location, they needed a PDD to not have
7 setbacks. They needed an exemption from the height restriction
8 under the high rise ordinance. They needed a general plan
9 amendment to add density. So all of these things had to be done
10 because this project didn't fit the square that the general plan
11 had designated for it.

12 This area -- this is not downtown. This is called
13 uptown. Now, counsel knows Palm Springs better than I do. I
14 spent the weekend there this past couple of days. And there is
15 a difference. And so it is basically bringing CBD into this
16 area. And we're not here debating the merits of that. Maybe
17 it's good idea, maybe it's a bad idea.

18 But the fact remains that the existing neighborhood and
19 the people in it like the neighborhood community commercial.
20 That was their understanding where they were buying into, and to
21 now say, well, this is all very good for the public good. I
22 mean if the City really has the intention of converting this
23 neighborhood, which is a historic neighborhood, lower intensity
24 into an extension of CBD, the proper way of doing that is
25 general plan amendments for the whole block.

26 But I suspect that their real problem is -- and the
27 record shows that Alcazar Hotel was originally part of this
28 application, then it dropped out. I suspected record -- that

1 the fact is that the people in this neighborhood are not onboard
2 with this plan to convert it into CBD. I know that the
3 residents of Palm Springs are very interested in maintaining the
4 historic significance, the historic feel of the city.

5 And, yes, this area is somewhat eclectic. But there
6 was a determination by the Historic Site Preservation Board that
7 this project didn't squarely fit. So I don't know that we can
8 even really get too much into the policy reasons why the City
9 may have wanted to create a CBD niche in the middle this
10 neighborhood commercial, you know, lower intensity development.
11 But I think the only way we can look at it is in terms of this
12 public benefit.

13 And, again, I don't think the council has established
14 by substantial evidence that --

15 THE COURT: We will stop there. She doesn't have any
16 burden.

17 MR. NAFICY: What I was going to say is that to
18 establish the public interest, you have -- I think you have to
19 be able to show that but for the added density, the public
20 benefit, the project would not be realized. So could there not
21 have been a hotel and a restaurant under the existing land use
22 designation? There's no evidence for that. There are other
23 businesses operating in that area.

24 So I think to establish the public benefit exemption
25 exception to the spot zoning, I think they do have to make is a
26 showing that this -- that not just the project -- I mean, if
27 their definition of public benefit is accurate, then every
28 project meets that burden, because presumably every project is

1 consistent with the city's underlying intentions and zoning when
2 they approve it. They will generate taxes and create
3 employment.

4 So that can't be the definition that, oh, it's just a
5 business, brings business to this area. I think there has to be
6 something more linking the benefit bestowed on this parcel to
7 the public benefit. And other than saying, well, we didn't want
8 to build a sleepy hotel, I don't think there is evidence in the
9 record that the hotel you would build consistent with the
10 underlying land use designation would have been sleepy or not
11 generate foot traffic. I don't think there is any evidence for
12 that. So it's only in that limited sense.

13 THE COURT: Okay. I don't need any more argument on
14 this point. I would like the enlarged, zoomed in zoning map --
15 can you have it in by the end of the week?

16 MS. HEMPHILL: I will make sure it gets here.

17 THE COURT: Make sure petitioner sees it.

18 MR. NAFICY: Would you like anything from us, Your
19 Honor?

20 THE COURT: No, I don't think so. If I decide that I'm
21 going to reach the failure to exhaust issue, I will give you an
22 opportunity to submit a supplemental brief explaining why you
23 did or did not exhaust the administrative remedies. I'm not
24 sure I will need that issue right now, so I won't make you brief
25 it yet.

26 All right. Matter is under submission.

27 MR. NAFICY: Thank you, Your Honor.

28 MS. HEMPHILL: Thank you, Your Honor.

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(Proceedings concluded.)

SUPERIOR COURT - STATE OF CALIFORNIA
COUNTY OF RIVERSIDE

ADVOCATES FOR BETTER COMMUNITY)
DEVELOPMENT,)
)
Plaintiffs/Petitioner,)
Vs.) Case No. RIC1512884
)
CITY OF PALM SPRINGS, et al.,)
)
)
Defendants/Respondents.)
_____)

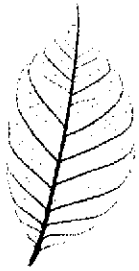
I, KAREN L. BURKS, Certified Shorthand Reporter, No. 7703,
do hereby certify:

That on January 9, 2017, in the county of Riverside, state
of California, I took in stenotype a true and correct report of
the testimony given and proceedings had in the above-entitled
case, Pages 1 through 49, and that the foregoing is a true and
accurate transcription of my stenotype notes, taken as
aforesaid, and is the whole thereof.

DATED: Riverside, California, May 5, 2017

/s/ Karen L. Burks

KAREN L. BURKS, CSR No. 7703



June 26, 2017

Via Email and US Mail

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Re: City Council's upcoming consideration of 750 Lofts Project

Advocates for Better Community Development ("ABCD") submits this letter in connection with the City Council's upcoming consideration of the 750 Lofts Project ("Project") and ongoing issues surrounding the City's attempt to comply with the Writ of Mandate issued in Riverside Superior Court Case No. RIC 1512884.

ABCD would like to reiterate that in the course of its consideration of the project for possible re-approval, the City Council may choose to reconsider some or all aspects of the Project, including but not limited to the Project's height and compatibility with the Las Palmas Historic Business District. In fact, without carefull consideration of the Project in detail, individual City Councilmembers who are new to the Project are not in a position to use their independent judgment to make the findings necessary to re-approve the Project. As more fully set forth below, ABCD urges the City Council to take this opportunity to ask the Historic Site Preservation Board ("HSPB") and the Planning Commission fully consider the Project's consistency with the Las Palmas Historic District, because neither the HSPB nor the Planning Commission has ever considered the Project with the substantial added height as was approved by the City Council.

One of the most important issues related to this Project is its height as it relates to the Las Palmas Historic District. As explained in the June 21, 2017 Staff Report, when HSPB considered this project in January 2015, it imposed strict height limits on the Project in order to make it compatible with the historic district. The Staff Report fails to mention, however, that the height reductions proposed by the applicant and approved by the City Council were in fact substantially less than the height reductions the HSPB had required as condition of approving the Project.

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The Project as approved before Rescission was between 29'-3" to 34'-0" high along Indian Canyon Drive, well in excess of the 20 foot limit set by the HSPB or the limits contained in the Las Palmas Historic Business District design guidelines. Likewise, at a maximum height of 48 feet, the Project is well in excess of the 34 foot limit set by the HSPB or the guidelines.

It is important to note that when the Planning Commission considered the Project and recommended approval, Staff told the Commission that the Project would be approved "subject to the conditions of approval," which included the height limits imposed by the HSBP. Accordingly, the Planning Commission **never** considered the project the City eventually approved, which did not include the height limits that HSPB had concluded were necessary to maintain the integrity of the historic district.

Likewise, the City Council never asked the HSPB to consider whether the minimal changes to the Project adequately addressed the HSPB's concerns about the height of the project. As such, the City Council should refer the Project back to both the HSPB and the Planning Commission for consideration and recommendation.

Even if the City Council wishes to approve the Project without input from the HSPB or the Planning Commission, the City Council must adopt new resolutions, supported by appropriate findings. Of the five members of the Council, four are essentially new to the Project. Mayor Moon and council member Kors were not on the Council when this project came up. Councilmember JR Roberts considered the Project when he was on the Planning Commission, but has never considered the height issue or whether the Project, as modified, is compatible with the Las Palmas Historic Business District. Finally, Councilmember Foats had recused herself from considering the Project when it came before the City in 2015, and therefore did not participate in the City Council's consideration of the Project. Councilmembers, particularly those new to the Project who did not participate in the administrative review, must study the Project and conduct a robust discussion of the issues posed by the Project before they are able to consider the merits of the Project and make appropriate findings.

Nor can the Council simply "ratify" the resolutions and findings the previous council adopted. At the Council's previous meeting, it was suggested that because the rescission of the previous resolutions was accomplished by a simple vote and pursuant to a resolution, the City Council may now ratify the rescinded Resolutions without making the requisite findings. In order to avoid further litigation, we respectfully urge the City Council to adopt proper resolutions that are supported by adequate findings.

In sum, the Project as currently presented has never been adequately considered by the HSPB, Planning Commission, or current City Council, particularly in regards to its height and compatibility with the historic district. As such, it would be an abuse of discretion to simply 'rubber stamp' the Project's previous approvals.

Finally, it should be noted that contrary to what the City Council was led to believe at the previous hearing, it is not essential that the City take final action on this project at this time in order to comply with the Court's Writ of Mandate. The City can essentially comply with the Writ by rescinding all Project approvals at this time, and filing a return to the Writ explaining same. In fact, the City has no obligation to take any other action at this time, but should the City decide to re-approve the Project, with or without any modifications, the City may subsequently file a supplemental return to the writ explaining its actions and how the re-approval complies with the Court's direction. Accordingly, there is no urgent need to consider re-approving the Project at this time. See, for example, Ballona Wetlands Land Trust v. City of Los Angeles (2011) 201 Cal.App.4th 455 where in response to a writ of mandate in a CEQA litigation, the City of Los Angeles first "vacated its certification of the EIR and its project approvals" (*id.*, at 463), and after preparing and certifying a revised EIR, the City "filed a supplemental return to the writ of mandate in April 2010 stating that it had complied with the writ by taking the actions described above." *Id.*, at 464. Likewise, here, the City can file a return explaining that it has rescinded all Project approvals as required by the Writ of Mandate, and then file a supplemental return if and when it decides to re-approve the Project.

Sincerely,

Babak Naficy
BABAK NAFICY
Attorney for ABCD

cc: Edward Kotkin (Edward.Kotkin@palmsprings-ca.gov)
Diane Blasdel (diane@bgdesertlaw.com)