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VIA E-MAIL

Honorable Commissioners
Bay Conservation and Development Commission
455 Golden Gate Avenue, Suite 10600
San Francisco, CA 94102-7019

Re: ***Marriott Hotel and Restaurant Project, 2900 Harbor Bay Parkway, Alameda***

Dear Chair Wasserman and Honorable Commissioners:

On behalf of Harbor Bay Hospitality, LLC ("HBH"), the owner and developer of the Marriott Hotel and Restaurant Project ("Marriott Project") located at 2900 Harbor Bay Parkway in Alameda, California, we write to concur with BCDC's staff that BCDC cannot require this Project to obtain a permit under the McAteer Petris Act ("Act"). This is because the Project is covered by a settlement agreement (known as the Third Supplementary Agreement or "TSA") that expressly exempts development covered by the agreement from the permitting process under the Act and establishes an alternative development and public review process. Consistent with the TSA, the Project consulted with staff on the project's design, made changes requested by staff and was thereafter determined to be consistent with the TSA.

We urge the Commission to adhere to its obligations under the TSA, just as the Project has. A well-established course of conduct over many years supports the conclusion that the TSA was intended to function as a covenant running with the land. Under the TSA, BCDC has a clear **legal obligation** to exempt the Marriott Project from the Act's permitting requirements. Should the Commission nonetheless attempt to impose a permit requirement on the Marriott Project, HBH would consider this to be a breach of the TSA. If litigated, we are confident a court would independently interpret the agreement, using standard rules for contract interpretation. Based on the nature of the contract, the language, and BCDC's well-established course of conduct, we are also confident a court would find that the Marriott Project is covered by the TSA and thus exempt.

The Commission has already received several analyses about why this project is exempt under the TSA. The first is your staff's thoughtful analysis dated December 21, 2018. Daniel Reidy, counsel for Harbor Bay Isle Associates ("HBIA") submitted another analysis dated January 11, 2019. Mr. Reidy's contemporaneous knowledge of the original intent of the TSA and the reasons for the various amendments over the years compellingly supports your staff's conclusion that this Project is exempt. We will not repeat those points but instead explain

further why the Marriott Project cannot, without its consent, be the only development within the Harbor Bay Business Park not afforded the contractual rights granted under the TSA.

The main conclusions of this letter are:

A. The TSA is an agreement about the use and development of *land*, not about the identity of the owners of that land. It expressed BCDC's "final determination of public access and development" on the land covered by the agreement and was recorded as a covenant on title to that land. As such, it was intended to, and does, "run with the land," providing benefits (and burdens) to HBIA's successors in interest. Section 19 of the Second Amendment to the TSA (the "Second Amendment") expressly says the TSA applies to future owners.

B. Course of conduct is persuasive evidence of the parties' intent in interpreting a contract. For years, BCDC has been exempting projects covered by the TSA from permitting requirements no matter who owns the land.

C. Mr. Sack (counsel to certain neighbors who oppose the Project) attempts to show that the TSA does not cover the land but only covers the land if it is developed *by HBIA*. These arguments run counter to standard rules of contract interpretation.

   1. Rules of contract interpretation call for harmonization between various sections of an agreement. Mr. Sack's interpretation of Sections 5 and 19 *creates* conflict between these sections when none exists. A harmonized reading of Sections 5 and 19 supports the conclusion that the term "HBIA" in Section 5 includes HBIA's successors because Section 19 expressly references "future owners."

   2. Mr. Sack's reliance on revisions to section 19 in the Third Amendment to the TSA (the "Third Amendment") is misplaced.

      - As explained further below, the Third Amendment (in which revisions to Section 19 on which Mr. Sack relies were made) does not apply to the property on which the Marriott is proposed. Because the Third Amendment applies only to the Shoreline Restaurant/Office parcel, the Third Amendment (and any revisions it made to the Second Amendment) are not relevant here.

- Even if the Third Amendment to the TSA did apply (which it cannot as a matter of law), the revision of the language in Section 19 was only intended to reflect that the TSA had been recorded against the property subject to the TSA; not to negate the applicability of the agreement to future owners.

D. If litigated, we are confident a court would apply independent judgment to the contract. It would not defer to the Commission's interpretation.

A. Read as a Whole, the TSA Applies to Development of Land, Not To Any Particular Owner of That Land.

A review of the language of the TSA supports the conclusion that the intent of the agreement was to govern development of land within Phase III of the Business Park, regardless of ownership.

- Recital B to the Second Amendment explains that the TSA sought to resolve was whether "HBI" [*Harbor Bay Isle*] – a geographic area -- is "exempt from BCDC controls and jurisdictions." It does not talk about whether HBIA, as an entity was individually exempt from BCDC jurisdiction. Instead, the stated purpose of the TSA was to "define the nature and extent of public access for the remaining area along the shoreline at HBI . . . ." The subject of the TSA is "the shoreline at HBI," a defined *land* area.

- Recital E helps cement the conclusion that the agreement was about land, not particular entities. This Recital states that "BCDC in no way waives any rights to controls or jurisdiction over the nature and extent of public access in the Shoreline Band for the remaining portion of the BFI [*Bay Farm Island*]." In other words, the TSA only addresses jurisdiction over the Phase III area and not areas of the BFI not subject to a supplementary agreement.

- Section 1 includes the mandate that BCDC "shall" rely on the TSA to ensure public access within Phase III. Again, this mandate applies to land, and does not terminate if the identity of the owner Phase III changes.

- Section 3 states that "the terms of the agreements concerning BCDC jurisdiction herein are *final determinations by these parties as to public access and private development and uses inland of Elevation 103 at the Project*. The Parties agree that any work, construction or uses in areas of the Project bayward of Elevation 103 contour line will require a BCDC permit." Section 3 likewise establishes that the agreement governs the need for a permit with respect to certain land areas, not just for HBIA.

- Section 4 is entitled "Applies to Project Area Only," meaning that lands within the BFI but outside of Phase III are not exempt from BCDC's permitting requirements under the TSA.

- Section 19 of the Second Amendment to the TSA requires that the agreement be recorded so that it would be "a binding agreement affecting general duties and obligations of present and future property owners of Parcels in the Project area within the Shoreline Band." *Section 19 expressly states that the TSA was intended to apply to future owners—i.e. run with the land.*

In summary, the plain language of the TSA strongly supports the conclusion that the TSA was intended to reflect the final determination of public access within Harbor Bay Business Park – Phase III and that this determination "runs with the land."

B. Course of Conduct Provides Persuasive Evidence of the Intent of the Parties.

"The acts of the parties done under a contract afford one of the most reliable means of arriving at their intention." *Skousen v. Herz* (1933) 135 Cal.App. 116, 120–121. Here, the parties course of action overwhelmingly supports the conclusion that BCDC intended the TSA to run with the land to HBIA's successors-in-interest, a course of conduct on which the Project has reasonably relied:

- Other Supplementary Agreements. BCDC has exempted private development subject to other supplementary agreements from its permitting requirements for years and years regardless of whether HBIA was the owner of such development. This includes homes built in Residential Villages Three and Four of HBI subject to the First Supplementary Agreement and in Residential Village Five subject to the Fourth Supplementary Agreement. There is no indication in the recitals to the TSA that the same approach would not be applied to Phase III.

- Stacey-Witbeck Building. In 2011, BCDC agreed this project could proceed under the TSA even though owned by a party other than HBIA.

- McQuire & Hester Building. In 2016, BCDC agreed this project could proceed under the TSA even though owned by a party other than HBIA.

- Westmont Living Senior Residential Facility. In 2016, BCDC agreed this project could proceed under the TSA even though owned by a party other than HBIA.

- Marriott Hotel. BCDC has already taken several actions consistent with the interpretation of the TSA supported by staff:

- Staff Correspondence. Through email correspondence and a letter dated September 25, 2018, BCDC staff confirms in writing that the Marriott project could proceed under the TSA.

- Project Plans. Staff also requested the project plans be revised to reflect the 103' contour line established under the TSA to ensure the setbacks required under the TSA were complied with. The Project complied with this request.

- Draft Assumption Agreement. BCDC legal counsel requested that HBH and HBIA execute a new agreement stating that "HBH has recognized and acknowledges that the Subject Property is subject to the provisions of the [TSA]" and that the Marriott project is generally consistent with the TSA. The draft agreement also contemplates the termination of the exemption going forward, such that project revisions would be subject to the Commission's regular permitting jurisdiction in the future. If the Project were not currently exempt, there would be no need for a prospective termination of the exemption.

- Staff Report. BCDC's Executive Director and Staff Counsel issued a staff report on December 21, 2018 recommending that "that the Commission not require a permit of HBH to develop the project in question."

Mr. Sack argues that because (in his view), there is no ambiguity on the face of contract, BCDC's course of conduct is irrelevant. This is incorrect. Whether evidence is admissible to construe an ambiguity is not based on whether the contract language is plain and unambiguous on its face, but instead on whether the evidence presented is relevant to prove a meaning to which the language is reasonably susceptible. *PG&E v G.W. Thomas Drayage & Rigging Co., Inc.* (1968) 69 Cal.2d 33 (Where the meaning of the words used in a contract is disputed, the trial court must provisionally receive any proffered extrinsic evidence which is relevant to show whether the contract is reasonably susceptible of a particular meaning). Thus, "[a]n ambiguity exists when a party can identify an alternative, semantically reasonable, candidate of meaning of a writing." *Solis v Kirkwood Resort Co.* (2001) 94 Cal.App.4th 354, 360. Here, BCDC's course of conduct provides evidence which is relevant to the question of whether the TSA is reasonably susceptible of being interpreted as running with the land.

C. Opponent's Arguments About the Interpretation of the TSA Run Counter To Standard Rules of Contract Interpretation.

Mr. Sack advances two primary arguments for why BCDC should deviate from its long standing interpretation of the TSA: (i) A conflict exists between Section 5 and Section 19 of the TSA and Section 5 should control; and (ii) the revisions to Section 19 in the Third

Amendment evidence an intent that the TSA should not run with the land. Both arguments are unavailing.

1. *Mr. Sack's interpretation makes no attempt to harmonize the contract as required by rules of contract interpretation.*

- An interpretation which gives effect to all provisions of the contract is preferred to one which renders part of the writing superfluous, useless or inexplicable. *Carson v. Mercury Ins. Co.* (2012) 210 Cal.App.4th 409, 420; *see also* Civil Code § 1643 (contract should "receive such interpretation as will make it . . . operative . . . and capable of being carried into effect, if it can be done without violating the intention of the parties").

- Instead of harmonizing the agreement, Mr. Sack attempts to manufacture a conflict between Section 5 and Section 19 in order to deny HBH the benefits of the TSA. No such conflict exists. Section 5 grants exemptions from BCDC permitting requirements to "HBIA." Section 19 extends those benefits to HBIA's successor in interest within the Phase III. The purported conflict can be avoided by interpreting the term "HBIA" to include HBIA's successors as supported by Section 19 and the contract as a whole.

- Mr. Sack's interpretation would read the statement in Section 19 that the TSA binds future owners completely out of the agreement. BCDC Staff, Mr. Reidy, and HBH's interpretation would give effect to both Section 5 and Section 19 and is therefore the preferred interpretation under standard rules of contract interpretation requiring harmonization.

2. *Reliance on revisions made to Section 19 by the Third Amendment is misplaced.*

Mr. Sack makes much of revisions to Section 19 made in the Third Amendment to the TSA. These revisions fail to support Mr. Sack's interpretation for the following reasons:

- The Third Amendment has no relevance to HBH's rights under the TSA because it was made after HBIA had already conveyed the Marriott Project parcel to a third-party. The Third Amendment was executed without the Marriott Project parcel owner's involvement or consent and in all events was recorded against a different property altogether and not the Marriott Project parcel.

    - The Third Amendment is only recorded against the Shoreline Restaurant/Office Site and not the Marriott Project site. *See* Third

Amendment -- Legal Description for Shoreline Restaurant/Office Site. On its face, the Third Amendment doesn't apply to Marriott Project site.

- The Third Amendment was executed by HBIA and BCDC in 2013, approximately nine years after HBIA no longer had title to the Marriott Project site. For the Third Amendment to have applied to the new owners of Marriott Project parcel, those new owners would have had to consent to the Third Amendment. Since HBH's predecessor in interest was neither a party to the Third Amendment nor was it recorded against their land, ***the TSA covenants applicable to the Marriott Project land are those in the Second Amendment to the TSA, not the Third Amendment.*** Section 19 in the Second Amendment remains unamended and is clear that the agreement binds future owners.

- In any event, even if applicable, the Third Amendment did not "*delete*" Section 19, contrary to Mr. Sack's assertion. As explained by Mr. Reidy, the revision merely confirmed that HBIA had undertaken all actions necessary to make the Second Amendment "a binding agreement affecting general duties and obligations of present and future property owners of Parcels in the Project area within the Shoreline Band."

  - The Third Amendment's references to satisfaction of the Second Amendment's recordation obligation cannot reasonably be interpreted to reflect an intent to have the Second Amendment no longer run with the land. There is no language in either the Third Amendment's recitals or revisions that support such a dramatic change that would deny future property owners of the benefits of *already constructed and dedicated public access*.

  - The recitals to the Third Amendment reveal that BCDC was well aware that parties other than HBIA would be potential developers within the Project subject to the TSA. Introductory Recital G is clear that since 1990, HBIA contemplated a new owner developing the Shoreline Restaurant/Office Site. This Recital is inconsistent with Mr. Sack's position that the parties intended that HBIA alone should benefit from the TSA.

For all of the above reasons, the contract should be interpreted as applying to future owners. If BCDC attempts to strip HBH of the benefits of the TSA to appease project opponents, it will be in breach of its clear legal obligations.

D. A Court Would Give No Deference to BCDC in a Breach of Contract Claim.

HBH would like to avoid litigation but is prepared to protect its rights if BCDC veers from its contractual obligations. If there were litigation related to the meaning of the TSA, we are confident a court would apply its own independent judgment as to the intent of the parties and would grant the Commission no deference as to what it thinks the contracts means. See *Mammoth Lakes Land Acquisition, LLC v. Town of Mammoth Lakes* (2010) 191 Cal.App.4th 435, 461 (in action between city and developer over the meaning of a Development Agreement, court owed city no deference as to its interpretation of the agreement). Thus, the Commission would be on an equal footing with HBH in any contract dispute and would need to explain why BCDC's multi-year course of action should not be considered persuasive evidence of the parties' intent. *C.f. Vermeer Manufacturing Company v. RDO Equipment Company* (Cal. Ct. App., Feb. 27, 2018, No. B280400) 2018 WL 1062684, at *4–5 ("there is no evidence to suggest or reason to believe that their understanding in 2015 about their 2012 agreement was any different than their understanding at the time they entered into the earlier agreement").

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For the forgoing reasons, HBH respectfully requests that the Commission honor HBH's rights under the Second Amendment and to not request staff attempt to require HBH to obtain a BCDC permit for the Marriott Project.

Sincerely,

Anne E. Mudge and
Christian H. Cebrian

AEM/CHC/mlh

cc: City Council, City of Alameda
Celena Chen, Asst. City Attorney

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