

# GIBSON DUNN

Gibson, Dunn & Crutcher LLP  
555 Mission Street  
San Francisco, CA 94105-2933  
Tel 415.393.8200  
www.gibsondunn.com

Jim M. Abrams  
Direct: +1 415.393.8370  
Fax: +1 415.374.8405  
JAbrams@gibsondunn.com

October 3, 2012

Shawn Mason, Esq.  
City Attorney  
City of San Mateo  
330 West 20<sup>th</sup> Avenue  
San Mateo, CA 94403

Re: 7-Eleven Use of 501 North San Mateo Drive, San Mateo, California

Dear Mr. Mason:

This firm has been retained by Portfolio Development Partners (“Portfolio”) to represent its interests regarding 501 North San Mateo Drive (the “Property”), San Mateo, California (the “City”). I write with respect to the upcoming San Mateo Planning Commission and City Council hearings to consider termination of the present legal nonconforming convenience store/ market use (the “Existing Convenience Store/ Market Use”) of the Property, pursuant to the City of San Mateo’s Zoning Code (“the Zoning Code”) sections 27.72.050 and 27.72.052. Our understanding is that the Property has been used for a convenience store/ market for approximately 50 years.

For the reasons stated below, we respectfully submit that the termination and removal of the Existing Convenience Store/ Market Use would violate state law. Section 27.72.050 authorizes the termination and removal of a nonconforming use of land only when two conditions are met: first, the City Council must determine that the nonconforming use is “especially burdensome” and, if so, a termination must not be “unduly oppressive or constitute a denial of constitutionally guaranteed rights.” Section 27.72.052 sets forth the procedural requirements necessary before termination and removal of a nonconforming use.

We believe that termination and removal of the Existing Convenience Store/ Market Use fails to meet these requirements and is contrary to state law because: (1) there is a lack of evidence to support the conclusion that the continuation of the nonconforming use is “especially burdensome,” as that term is assessed under the Zoning Code, and (2) even if the nonconforming use could properly be characterized as “especially burdensome” in accordance with the Zoning Code, termination of the nonconforming use constitutes denial of Portfolio’s fundamental vested constitutional rights, particularly because (i) Portfolio

# GIBSON DUNN

Shawn Mason, Esq.  
October 3, 2012  
Page 2

relied on the City's approval of a continuation of the nonconforming use (ii) prior to Portfolio purchasing the Property and entering into a lease agreement.

The Property is located in an area that was originally zoned for residential use. The previous convenience store/ market obtained a legal variance and operated as a legal nonconforming use for several decades. Portfolio bought the Property with the intent to continue the Existing Convenience Store/ Market Use, only after receiving written confirmation from the City that the applicable permits for continued nonconforming use had been duly approved. Portfolio subsequently entered into a lease agreement with 7-Eleven, Inc. for use of the Property as a convenience store/ market. Improvements intended to ready the opening of the 7-Eleven pursuant to that lease agreement have been ongoing in light of the City's approval of the requisite building permits.

## **I. Substantial evidence does not support that the present nonconforming use is "especially burdensome."**

The City Council's decision to terminate a nonconforming use is subject to a significantly higher standard of judicial scrutiny than its typical legislative actions for two reasons.

First, when acting to terminate a nonconforming use, the City Council acts in an *administrative and quasi-judicial* capacity. See *Goat Hill Tavern v. City of Costa Mesa*, 6 Cal. App. 4th 1519, 1525 (App. Ct. 1992); *Topanga Ass'n for a Scenic Community v. City of Los Angeles*, 11 Cal. 3d 506, 517 (1974). In contrast, when adopting ordinances, such as a zoning ordinance, the City Council functions in a legislative capacity. *Id.* When serving in an administrative or quasi-judicial capacity (such as in the instant situation), the California Supreme Court has held that the City Council's decisions must be accompanied by factual findings that support the outcome and that facilitate meaningful judicial review. *Topanga Ass'n for a Scenic Community*, 11 Cal. 3d at 517 ("The availability of careful judicial review may help conduce [zoning] boards to insure that all parties have an opportunity fully to present their evidence and arguments . . . . Vigorous judicial review thus can serve to mitigate the effects of insufficiently independent decision-making.").

Second, when, as in the instant case, termination of a nonconforming use would adversely affect a *vested property right* protected by the California constitution, the courts must use their independent judgment to consider the City Council's decision. *Goat Hill Tavern*, 6 Cal. App. 4th at 1525. In other words, in contrast to its typical consideration of a legislative action, the court *does not* defer to the City Council's interpretation of the facts. "If an administrative decision substantially affects a fundamental vested right, the trial court must exercise its independent judgment on the evidence and find an abuse of discretion if the findings are not supported by the weight of the evidence." *Id.*

# GIBSON DUNN

Shawn Mason, Esq.  
October 3, 2012  
Page 3

Although we believe that a decision to terminate the Existing Convenience Store/ Market Use would in fact improperly deprive Portfolio of its fundamental vested property rights, and thus be subject to the stricter independent judgment test on judicial review, for the reasons stated below we also believe that substantial evidence does not support a decision by the City Council to terminate the nonconforming use.

When determining whether a nonconforming use is especially burdensome, the City Council must consider five factors and must rely on *actual* evidence that shows that the presence of a convenience store/ market use is especially burdensome as defined by the Zoning Code. The fact-specific basis necessary to support an “especially burdensome” determination is similar to the fact-specific basis necessary to establish a public nuisance, discussed below, in which facts must be established in order to show an offense against, or interference with, the exercise of rights common to the public. *See, e.g., Beck Dev. Co. v S. Pac. Trans. Co.*, 44 Cal. App. 4<sup>th</sup> 1160, 1209-10 (App. Ct. 1996) (noting the lack of specific evidence necessary to support a nuisance finding).

As a preliminary matter, it is important to note that the five required findings discussed below must pertain to the *use* of the Property as a convenience store/ market, and not a *particular tenant* of the Property (in this case, 7-Eleven). Section 27.72.050 only permits the termination of a “nonconforming use of land” if the five factors are met, and does not permit the termination of a specific tenant. Therefore, the City cannot lawfully terminate the 7-Eleven use unless it finds that the general use of the Property as a convenience store/ market is particularly burdensome. Given that the Property is located in a mixed-use neighborhood that contains both residential and commercial uses, we respectfully suggest that the Existing Convenience Store/ Market Use cannot reasonably be said to represent a burden to the neighborhood.

First, the City Council must consider whether the nonconforming use impairs property values or the economic stability of the surrounding area. Zoning Code § 27.72.050. Here, there is no evidence that this is the case, and any such evidence is likely to be impossible to obtain. The Existing Convenience Store/ Market Use has operated on the Property for many decades, and no data have been presented showing that its presence and operation has had any negative impact on nearby property values. Moreover, as the Property is located in a mixed-use neighborhood that consists of both commercial and residential uses, the effect of a single retail use on property values in the neighborhood is likely to be insignificant or impossible to determine.

Second, the City Council must consider whether the nonconforming use inhibits the development of the surrounding area contemplated by the general plan and the Zoning Code.

# GIBSON DUNN

Shawn Mason, Esq.  
October 3, 2012  
Page 4

Zoning Code § 27.72.050. Again, no data have been proffered that suggest that the Existing Convenience Store/ Market Use has or would inhibit the residential development of the surrounding area. If anything, the data are more likely to reveal that the presence of the Existing Convenience Store/ Market Use had no negative effect on the residential growth in the surrounding area, which experienced a boom in residential development over the last several decades. Property values in the City are among the highest in the nation.

Third, the City Council must consider whether the nonconforming use is detrimental to the public health, safety and general welfare. Zoning Code § 27.72.050. No data have been proffered to show that the Existing Convenience Store/ Market Use has been or will be detrimental to the public. Instead, the availability to the neighborhood of a convenience store that provides a larger variety of goods and services, including fresh food, is more properly characterized as a benefit to the public welfare and to the neighborhood. The location of a convenience store within walking distance to residences also reduces the necessity to drive to purchase groceries and other convenience items. For this reason, the Existing Convenience Store/ Market Use may actually serve to reduce automobile traffic in the neighborhood.

Fourth, the City Council must consider the usability of the land or the improvements for purposes permitted in the applicable zone. Zoning Code § 27.72.050. This Property has been used as a convenience store/ market for decades, and all improvements made to the Property have been geared toward this use and not for residential use. Accordingly, significant demolition and rehabilitation of the land would mostly likely be necessary before it would be suitable for use as presently permitted in the applicable zone.

Finally, the City Council must consider the amount of hardship caused to the present user by the termination, and we believe that this factor weighs heavily against termination of the nonconforming use. Zoning Code § 27.72.050. Portfolio, in reliance on the City's approval of the nonconforming use, purchased the Property and subsequently incurred a contractual obligation for the Property's use as a convenience store/ market. In addition, Portfolio has incurred significant construction costs in light of the City's prior approval of the building permits. In light of these facts, termination of the nonconforming use would result in significant hardship to Portfolio.

Accordingly, because the factors set forth in section 27.72.050 do not support termination of the nonconforming use, the City Council would likely have great difficulty issuing the requisite findings to support the legal termination of the nonconforming use. *See Topanga Ass'n for a Scenic Community*, 11 Cal. 3d at 509-10 ("We conclude that variance boards . . . must render findings to support their ultimate rulings.").

# GIBSON DUNN

Shawn Mason, Esq.  
October 3, 2012  
Page 5

## II. Even if the nonconforming use could be characterized as “especially burdensome,” termination by the City Council would constitute a denial of Portfolio’s constitutionally guaranteed rights.

When determining whether to terminate the Existing Convenience Store/ Market Use, the City Council must not only consider whether the factual findings support its decision, but must also consider additional standards imposed by the California state constitution with respect to property interests in nonconforming uses. *See Paramount Rock Co. v. San Diego Cty.*, 180 Cal. App. 2d 217, 234 (App. Ct. 1960) (“The nonconforming use protected by constitutional guarantees is limited to that use as it existed at the time of the adoption of the zoning ordinance.”). In order to terminate legally a property owner’s vested right to a nonconforming use, the City must establish that the use is a public nuisance or demonstrate a compelling public necessity requiring its termination. *Goat Hill Tavern v. City of Costa Mesa*, 6 Cal. App. 4th 1519, 1525 (App. Ct. 1992).

The courts will apply the independent judgment test, a *significantly less* deferential standard of review to this determination than to other local land use decisions. “If an administrative decision substantially affects a fundamental vested right, the trial court must exercise its independent judgment on the evidence and find an abuse of discretion if the findings are not supported by the weight of the evidence.” *Goat Hill Tavern*, 6 Cal. App. 4th at 1525; *see also Autopsy/Post Servs., Inc. v. City of Los Angeles*, 129 Cal. App. 4th 521, 526 (App. Ct. 2005) (“If the City’s grant of APS’s permit and if APS’s reliance on it created a fundamental vested right, the subsequent permit revocation would be subjected to judicial review under the independent judgment test.”).

We believe that Portfolio has acquired a fundamental vested right in the nonconforming use. “In determining whether a right is ‘fundamental’ and ‘vested,’ the question is whether the affected right is deemed to be of such significance that it should not be extinguished by a body lacking in judicial power.” *Malibu Mountains Recreation, Inc.*, 67 Cal. App. 4th at 367. Indeed, “[w]here a property owner has performed substantial work and incurred substantial liabilities in good faith reliance upon a permit issued by the government, he acquires a vested right to complete construction in accordance with the terms of the permit. The rule is founded upon the constitutional principle that property may not be taken without due process of law.” *Cty. of Sonoma v. Rex*, 231 Cal. App. 3d 1289, 1298 (App. Ct. 1991) (internal quotation marks and citations omitted).

Here, Portfolio purchased the Property *after* the City Council approved the building permits facilitating continuation of the nonconforming use. Moreover, relying on the City Council’s approval of the continued nonconforming use, Portfolio entered into a lease agreement with 7-Eleven, Inc. which requires the Property to continue to function as a convenience store/

# GIBSON DUNN

Shawn Mason, Esq.  
October 3, 2012  
Page 6

market, and preparation of the premises for the execution of this agreement has begun. “[W]here a permit or license has been granted and the successful applicant has thereafter acted upon the grant to his or her detriment. In such instance, the applicant has acquired a vested right.” *Malibu Mountains Recreation, Inc.*, 67 Cal. App. 4<sup>th</sup> at 367.

*Goat Hill Tavern v. City of Costa Mesa* is illustrative. In that case, a tavern in the City of Costa Mesa that had been in-existence for 35 years and operated as a legal nonconforming use under the local zoning ordinance was denied a renewal of a conditional use permit that allowed the tavern to use an adjoining space as a game room. *Goat Hill Tavern*, 6 Cal. App. 4<sup>th</sup> at 1522-23. The tavern sought a writ of administrative mandamus under section 1094.5, and the trial court concluded that the tavern had a fundamental vested right. *Id.* at 1525. In affirming the trial court’s decision that the tavern had a fundamental vested right, the appellate court noted that “the rights affected by the city’s refusal to renew Goat Hill Tavern’s permit [we]re sufficiently vested and important to preclude their extinction by a nonjudicial body,” in part because the termination of the right would force the tavern to close. *Id.* at 1527-28. Here, a termination of the nonconforming use would force the end of the preparations to open the 7-Eleven, jeopardizing Portfolio’s ability to perform its contractual obligations. For these reasons, we believe that Portfolio has acquired a fundamental vested right in the present nonconforming use which cannot be terminated without due process of law.

*Goat Hill Tavern v. City of Costa Mesa* is again illustrative with respect to what due process requires here. In that case, the trial court stated that because the tavern has a fundamental vested right in the nonconforming use, the city had to “establish [that] Goat Hill Tavern was a public nuisance or demonstrate a compelling public necessity” in order to terminate the use. *Id.* at 1525. The trial court then concluded that the evidence did not support the city’s decision to deny the renewal. *Id.* The appellate court declined to address the city’s argument on appeal that it was not required to prove that the tavern was a public nuisance or demonstrate a compelling public necessity weighing in favor of termination. *Id.* at 1531. Consequently the trial court’s reasoning with respect to what due process requires remains good law. In other words, because Portfolio has a fundamental vested right in the nonconforming use, the City Council may only terminate that right if the nonconforming use constitutes a public nuisance or by demonstrating a compelling public necessity. We respectfully believe that the City Council can show neither.

California law characterizes nuisances as either public or private in nature. California Civil Code section 3480 defines a public nuisance as “one which affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal.” Cal. Civ. Code § 3480. “[P]ublic nuisances are offenses against, or interferences with, the exercise of rights common

# GIBSON DUNN

Shawn Mason, Esq.  
October 3, 2012  
Page 7

to the public . . . [N]ot every interference with collective social interests constitutes a public nuisance. To qualify, and thus be enjoined [or abatable], the interference must be both substantial and unreasonable. It is substantial if it causes significant harm and unreasonable if its social utility is outweighed by the gravity of the harm inflicted.” *Cty. of Santa Clara v. Atlantic Richfield Co.*, 137 Cal. App. 4<sup>th</sup> 292, 305 (App. Ct. 2006) (internal citation omitted). Simply put, there is no evidence to support the characterization of the Existing Convenience Store/ Market Use at issue here as rising to the level of a public nuisance. Some residents may strongly dislike the presence of the Existing Convenience Store/ Market Use, but such a use does not cause “substantial and unreasonable” interference, particularly because the Property is located in a mixed-use neighborhood.

Moreover, where there is no public nuisance it follows that there is no compelling public necessity to terminate the legal nonconforming use. *See O’Hagen v. Bd. of Zoning Adjustment*, 19 Cal. App. 3d 151, 160-61 (App. Ct. 1971) (“compelling public necessity” . . . must be viewed in the context of a public nuisance”).

The requisite findings for private nuisance also cannot be met. State law provides that “[a] private person may maintain an action for a public nuisance if it is specifically injurious to himself, but not otherwise.” *Oliver v. AT&T Servs.*, 76 Cal. App. 4<sup>th</sup> 521, 533 n.8 (App. Ct. 1999) (quoting Cal. Civ. Code § 3493). “The damage suffered [in order for a private party to maintain an action for a public nuisance] must be different in kind and not merely in degree from that suffered by other members of the public.” *Id.* (quoting *Koll-Irvine Ctr. Property Owners Ass’n. v. Cty. of Orange*, 24 Cal. App. 4<sup>th</sup> 1036, 1040 (App. Ct. 1994)). Here, the primary concern identified is the purported negative effect of the nonconforming use on property values. Even if there was actual evidence to show such a result, “[a] diminution in value does not interfere with the present use of property and cannot alone constitute a [private] nuisance.” *Id.* at 534. Moreover, where “plaintiffs cannot make out a claim for injury from a private nuisance . . . , it follows that they cannot show special injury for purposes of maintaining an action for public nuisance.” *Id.* at 533 n.8

# GIBSON DUNN

Shawn Mason, Esq.  
October 3, 2012  
Page 8

In sum, should the City Council terminate the nonconforming use, we believe that a reviewing court would apply the independent judgment test to conclude that such a termination constitutes a denial of Portfolio's fundamental vested right in the nonconforming use because the weight of the evidence does not support that the legal nonconforming use is either especially burdensome or a public nuisance whose termination is compelled by public necessity.

Sincerely,

GIBSON, DUNN & CRUTCHER LLP

A handwritten signature in black ink, appearing to read "Jim M. Abrams", with a long horizontal line extending to the right.

Jim M. Abrams

JMA/lcr

October 23, 2012

Gabrielle Whelan, Esq.  
Assistant City Attorney  
City of San Mateo  
330 West 20<sup>th</sup> Avenue  
San Mateo, CA 94403

Re: Economic Hardship/Damages Associated with Potential Termination of Existing Grocery Use of 501 North San Mateo Drive, San Mateo, California

Dear Ms. Whelan:

This firm represents Portfolio Development Partners (“Portfolio”), owners of the property located at 501 North San Mateo Drive (the “Property”), San Mateo, California (the “City”). This is intended to provide further information to the City regarding the economic hardship that would be experienced by Portfolio if the City terminates the existing grocery store use (the “Existing Grocery Use”) of the Property, pursuant to the City’s Zoning Code (“the Zoning Code”) sections 27.72.050 and 27.72.052.

Section 27.72.050 only permits the termination of a “nonconforming use of land” if five specified findings are met.<sup>1</sup> This letter is intended to provide additional information regarding the fifth required finding, which is the “*amount of hardship caused to the present user by the termination.*” If the City terminates the Existing Grocery Use, Portfolio would experience severe hardship for a variety of reasons. As the existing building on the Property has been used as a grocery store for approximately 70 years, and is not suitable for residential use, the City’s termination of this use could arguably deprive Portfolio of any meaningful income from the Property.

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<sup>1</sup> Importantly, Section 27.72.050 does not permit the termination of a specific tenant. Therefore, the City cannot lawfully terminate the existing tenancy of 7-Eleven unless it finds that the general use of the Property as a grocery store is particularly burdensome. Given that the Property is located in a mixed-use neighborhood that contains both residential and commercial uses, as indicated for the reasons explained in our prior correspondence, we respectfully suggest that the Existing Grocery Use cannot reasonably be said to represent a burden to the neighborhood and that evidence does not support the five findings required to under Zoning Code Section 27.72.050 to terminate the use. The location of a grocery store within walking distance to residences also reduces the necessity to drive to purchase groceries and other convenience items. For this reason, the Existing Grocery Use may actually serve to reduce automobile traffic in the neighborhood.

# GIBSON DUNN

Gabrielle Whelan, Esq.

October 23, 2012

Page 2

Termination of the Existing Grocery Use would also create the following monetary damages for Portfolio. First, Portfolio would lose approximately \$3,400,000 in rent from its existing tenant 7-Eleven, which would be paid under its existing lease. Second, Portfolio would lose approximately \$775,000 in payments from 7-Eleven required under its existing lease for taxes, insurance, and maintenance of the Property. Third, as Portfolio decided to purchase the Property only after the City approved legally valid building permits for 7-Eleven, termination of the use would result in a loss of the purchase price of the Property of \$1,009,000 (subtracted by any potential future value of the Property if redeveloped as a residential use).<sup>2</sup> In sum, therefore, Portfolio's losses over the next 30 years would be approximately:

Rental Income	\$3,400,000
Triple Net Expenses	\$775,000
Land/Building Basis	\$1,009,000
Leasing Commission	\$37,245
Residual Land Value as Residential	(\$300,000)
<b>Total</b>	<b>\$4,921,245</b>

In addition to these damages, 7-Eleven has estimated that it would lose \$475,000 in building costs related to the improvement of the building interior and exterior, and the soft costs required to design and obtain approval of these improvements. 7-Eleven would lose \$320,115 in equipment costs (subtracted by any resale value of that equipment). 7-Eleven would lose the opportunity to franchise the location, which would cost an additional \$500,000. 7-Eleven also indicates that it would lose approximately \$80,000 of net income per year, which, calculated over a period of 30 years, amounts to \$2,400,000 million. Therefore, the overall damages to Portfolio and 7-Eleven created by the termination of the Existing Grocery Use would approximate \$8,600,000.

As our prior correspondence has indicated, we respectfully submit that the termination and removal of the Existing Grocery Use would violate state law because: (1) there is a lack of evidence to support the conclusion that the continuation of the nonconforming use is "especially burdensome," as required by the Zoning Code section 27.72.050, and (2) even if the nonconforming use could properly be characterized as "especially burdensome" in accordance with the Zoning Code, termination of the nonconforming use constitutes denial of Portfolio's constitutional rights to its vested use of the Property, particularly because (i) Portfolio relied on the City's approval of a continuation of the nonconforming use (ii) prior

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<sup>2</sup> Given the size and location of the Property, Portfolio has indicated that recent comparable sales suggest that the Property could be sold for approximately \$300,000, to be redeveloped for residential use.

# GIBSON DUNN

Gabrielle Whelan, Esq.  
October 23, 2012  
Page 3

to Portfolio purchasing the Property and entering into a lease agreement. *Goat Hill Tavern v. City of Costa Mesa*, 6 Cal. App. 4th 1519, 1525 (App. Ct. 1992).

Finally, as underscored in our prior correspondence, we do not believe that evidence could be obtained to supports the other four findings required to terminate the Existing Grocery Use. In particular, there is no evidence that the Existing Grocery Use "impairs property values or the economic stability of the surrounding area" (Zoning Code § 27.72.050), because the Property has been used in this manner for the past 70 years. Due to the long and continuous operation of the Property as a grocery store, any effect of the Existing Grocery Use would already be factored into the property values in the surrounding area.

Sincerely,

GIBSON, DUNN & CRUTCHER LLP

A handwritten signature in black ink, appearing to be "Jim M. Abrams", with a long horizontal line extending to the right.

Jim M. Abrams

JMA/lcr