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CITY OF ALAMEDA

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CITY ATTORNEY'S OFFICE

PETITION FOR APPEAL

Community Development • Planning & Building
2263 Santa Clara Ave., Rm. 190
Alameda, CA 94501-4477
alamedaca.gov
510.747.6800 • F: 510.865.4053 • TDD: 510.522.7538
Hours: 7:30 a.m.-3:30 p.m., M-Th

Please print clearly. This petition is hereby filed as an appeal of the decision of the:

Planning Board, which
(Community Development Director/Zoning Administrator/Planning Board/Historical Advisory Board)

Established Conditions for application
(Denied/Granted/Established Conditions)

Development Plan number PLN 15-0582
(Application Type) (Application Number)

at 2229-2235 Clement Avenue on July 25, 2016
(Street Address) (Date of Action)

State the reasons or justification for an appeal (attach additional sheets if needed):

See attached

Appellant

Name: Boatworks, LLC Phone: 510-653-6871
Address: 6050 Hellis Street, Emeryville, CA 94608
Email: francis@fdcollins.com

Alameda Municipal Code (AMC) 30-25, Appeals and Calls for Review, provides that within ten (10) days a decision of the Community Development Director or Zoning Administrator may be appealed to the Planning Board, and decisions of the Planning Board or the Historical Advisory Board may be appealed to the City Council. In addition to the appeal process, decisions of the Community Development Director or Zoning Administrator may be called for review within ten (10) days to the Planning Board by the Planning Board or by the City Council and decisions of the Planning Board or the Historical Advisory may be called for review by the City Council or a member of the City Council.

Fees (must accompany this petition)

Single-Family or Duplex Residence: \$250 plus time and materials cost up to \$500, max \$750.

Multi-Family Residential, Commercial, or Non-Residential: \$350, plus time and materials costs up to \$2,500, max \$2,850

[Signature]
Appellant Signature

Aug. 3, 2016
Date

Shona Armsborg, Attorney for Appellant
Print name

FOR OFFICE USE ONLY

Received by: _____ Receipt No.: _____ Date Received Stamp

Revised 11/6/2013

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HARPER & ARMSTRONG, LLP

1634 Telegraph Avenue, #3 • Oakland, CA 94612
Ph: (510) 420-8455 • Fax: (510) 858-5953 • shona.armstrong@gmail.com

August 3 2016

BY HAND DELIVERY

City Clerk Alameda City Hall 2263 Santa Clara Avenue Alameda, CA 94501	Andrew Thomas Planning Services Manager Alameda City Hall 2263 Santa Clara Avenue Alameda, CA 94501 athomas@alamedaca.gov
Winter King Shute, Mihaly & Weinberger LLP 396 Hayes Street San Francisco, CA 94102 (415) 552-7272 king@smwlaw.com	City Attorney Janet Kern Alameda City Hall 2263 Santa Clara Avenue Alameda, CA 94501 (510) 747-4700 manager@alamedaca.gov

Re: Boatworks Project – Appeal Pursuant to Alameda Municipal Code section 30-25 *et seq.* from Planning Board Actions Taken July 25, 2016:

- (1) Recommendation to Deny Request for Extension of Life of Tentative Map; and**
- (2) Imposition of New Conditions on Development Plan**

Dear Clerk and Members of the City Council:

I represent Boatworks, LLC, (“Boatworks”) Owner of the Property at 2229-2235 Clement Avenue in Alameda. On July 19, 2011, Alameda’s City Council approved Tentative Map 8060 (“Tentative Map”) and the accompanying Density Bonus (application PLN 10-0262) for a proposed development on the Property (“the Project”). (See City Council Resolution No. 14614.) Boatworks recently applied for extension of the life of the Tentative Map, Development Plan approval, and Open Space Design approval.

My client now appeals from the Planning Board decisions on July 25, 2016, to: (1) Recommend denial of Boatworks' request for extension of the life of the Tentative Map; and (2) Impose new conditions on Development Plan.

Boatworks includes the appeal fee of \$2850 under protest as it is being forced to appeal approval of conditions that came out of the blue and that Boatworks never requested or saw before the staff report was circulated.

The Planning staff's recommendations to the Planning Board appear to be driven by a desire to retaliate against Boatworks for litigation unrelated to the Development Plan application or Boatworks' Tentative Map. The Planning Board should act in compliance with the law and the Settlement Agreement, no matter the status of this unrelated litigation.

A. CITY COUNCIL SHOULD EXTEND THE LIFE OF THE TENTATIVE MAP

At the meeting on July 25, 2016, Planning Board recommended that the City Council deny Boatworks' application for an extension of the life of the existing Tentative Map. Boatworks appeals to the City Council to reverse this recommendation and to approve the extension.

1. Status of Tentative Map #8060 (PLN 10-0262) And Development Plan (PLN 15-0582).

If the extension City Council granted in 2015 was merited and in the City's own interest, an extension now is even more so. Between 2011 and 2015, a series of statewide blanket extensions responding to general economic conditions extended the life of the Tentative Map. During this time, the Environmental Protection Agency ("EPA") made shoreline improvements and alterations at the Property, and on September 15, 2015, the City Council approved an extension of the Tentative Map to July 19, 2016. In December 2015, Boatworks offered a new Development Plan to City staff for approval by the Planning Board. Neither the shoreline nor the Tentative Map has changed since the City Council extended the Tentative Map in September 2015.

Boatworks, LLC, is in contract to sell the Boatworks Project and the Property to Toll Brothers upon approval of the final map for the Property. Over the past year, Boatworks has worked hard to achieve compliance with the Tentative Map conditions while also incorporating into the Project changes

suggested by Planning Board members, and changes suggested by other interested agencies. But City staff has worked resolutely to prevent Boatworks from succeeding.

In response to Planning Board suggestions from a prior meeting, Boatworks submitted a new Development Plan in December 2015. Since then, Planning staff has kept Boatworks from making any progress by delaying and cancelling meetings, by throwing up new objections to the Development Plan at every juncture, and by aggressively disregarding the binding commitments the City made to Boatworks through the Settlement Agreement in 2010 and the Tentative Map in 2011.

Although staff deemed the application complete by letter dated March 8, 2016, staff nevertheless for months refused to acknowledge that the Project could still qualify for the 140 base units and a bonus of 42 units that the City Council approved when it approved the Density Bonus in 2011. In addition, Planning staff first began around March 2016 to assert that the City would go back on its binding commitment to Boatworks regarding the number and arrangement of affordable units it would require as part of the Project, regardless of the conditions of the Tentative Map.

The City Planning staff delayed consideration of the new Development Plan during April 2016, until staff finally agreed to agendaize the Development Plan for a study session on Monday, May 10, 2016. The City Planning Board at that meeting raised many design-review related issues and staff asserted that, despite the existing Tentative Map Conditions and Density Bonus, the City would impose new, more onerous conditions on the site plan and would not necessarily honor the existing Density Bonus. Boatworks could not then and cannot now consider last-minute modifications to a plan on which it was simultaneously preparing a final map.

City staff on approximately July 8, 2016, finally relented in its effort to retract Boatworks' Density Bonus, but staff doubled down on its commitment to impose other, more onerous "conditions" on the approval of the Development Plan. Staff appeared to operate on the assumption that the existing Tentative Map conditions were irrelevant. Staff recommended that the Planning Board approve the Development Plan, but with new conditions that contradict the conditions City Council has already imposed on the existing Tentative Map. These new conditions rob Boatworks of approximately \$45-60 million in investment-backed expectations that are based on the 2010 Settlement Agreement and the still-extant Tentative Map.

In the face of City staff's commitment to driving the existing Tentative Map into the ditch by refusing to satisfy certain conditions (e.g. signing an Owner Participation Agreement and an Affordable Housing Agreement), retracting existing rights, and delaying consensus on a specific site plan, Boatworks wrote a 45-day notice letter seeking resolution of the parties' disagreements. City refused to engage in the contractually required dispute resolution process. As a result, Boatworks has been forced to defend its rights in court. Boatworks filed a complaint for breach of contract and petition for writ of mandamus on July 14, 2016.

2. City Council Extension of Tentative Map Best Serves Alameda's own interests.

Instead of allowing staff to destroy Boatworks' rights under the Tentative Map through intransigence and noncooperation, City Council should give the parties time to find a path through to a final map that conforms to the Tentative Map and that pleases the Planning Board.

Lest the City Council forget, because of the 2010 Settlement Agreement, the existing Tentative Map and the slightly modified Development Plan proposed by Boatworks now both provide the City with:

1. Approximately two acres of open space *dedicated to public use*; and
2. A *reduced density* project (182 units instead of the 242-unit high density, high affordability project that would otherwise have been authorized by state law)

In addition, the City also stands poised to benefit from:

1. A site plan that incorporates an attractive waterfront design, that is supported by BCDC staff, and that incorporates modifications suggested by a Planning Board subcommittee;
2. A final map submittal based on this Development Plan (NB: Boatworks is also willing to revert to the *exact* lot lines of the Tentative Map if City insists this is necessary, although this does not seem to serve the City's own interests);

3. An experienced developer prepared to take on the project upon approval of the final map.

If the City commits now to robbing Boatworks of all the benefits of the existing Tentative Map, City also robs itself of all of this progress and all of these mutual benefits.

3. Tentative Map can provide the basis for a buildable final map.

Planning staff's new strategy for destroying Boatworks' rights under the Tentative Map is to declare preemptively that preparation of a final map based on this Tentative Map is impossible because the Tentative Map "requires" filling the Bay. Tentative Map Condition 94 specifically contemplates and pre-approves changes to the proposed shoreline improvements in light of anticipated necessary structural changes to the shoreline. Instead of Boatworks preparing a study and then implementing modifications to the shoreline embankments, EPA stepped in to clean up and improve the shoreline. EPA designed and installed infrastructure improvements. Now, while it is true that existing waterside improvements/structures shown on the Tentative Map "no longer support the proposed park and park access improvements [as shown on the Tentative Map] due to technical, regulatory, or financial infeasibility," nevertheless, the alternative provided in the Development Plan provide one option for laying out a buildable final map. And even if the final map lays lots out *exactly* as shown on the Tentative Map, filling the Bay is not necessary. Staff's assertions to the contrary are wrong.

4. Extension of Time is Legally Permissible.

The Planning Board erred when it recommended denying further extension of the life of the Tentative Map in reliance on Alameda Municipal Code section 30-81.1, which purports to restrict the City's ability to grant a second discretionary extension, because such extensions are limited to a maximum of one year. This restriction is illegal (even for charter cities) under the Subdivision Map Act. *Griffis v. County of Mono*, 163 Cal. App. 3d 414, 424-26 (1985) (relying on Government Code sections 66451, 66452.6(c)).

Furthermore, the Alameda Municipal Code permits exceptions to its own rules. Alameda Municipal Code section 30-76.3 states that any time limit "for reporting and acting on maps may be extended by mutual consent of the City and applicant."

Pursuant to Alameda Municipal Code section 87.1, an exception to any regulation in Article VI (Real Estate Subdivision Regulations) is permissible:

Planning Board may recommend that the City Council authorize conditional exceptions to any of the requirements and regulations set forth in this article unless the requirement or regulation would otherwise require a zoning variance or other zoning approval.

The Planning Board may recommend such an exception to any regulation if it can make the following findings:

1. That there are special circumstances or conditions affecting the property.

In this case, the unusual order of events that has affected the course of approval of the Tentative Map constitutes a special circumstance. The City has approved a Tentative Map prior to approval of a Development Plan or a Planned Development Permit. In addition, the City appears to have approved the Tentative Map along with Conditions of Approval that are not (and were not at the time of approval) in accord with the City's own inclusionary housing ordinance. This is an acceptable exception pursuant to AMC § 87-1, and this extremely unusual circumstance affects the parties' rights as described below. The disordered approval process has created delay and confusion and Boatworks should not be punished and denied its property rights due to this delay and confusion.

2. That the exception is necessary for the preservation and enjoyment of a substantial property right of the petitioner.

The exception requested by this letter is necessary for the preservation and enjoyment of a substantial property right of the petitioner inasmuch as (among other rights) the petitioner negotiated for and was granted by the City Council a right to develop the Property in accordance with the Tentative Map and its conditions, which right the City now threatens to revoke. In addition, petitioner is contracted to sell the Property and the approved Project to Toll Brothers. Much of the benefit of that contract rides on the success of the approvals now in process.

3. That the granting of the exception will not be detrimental to the public welfare or injurious to other property in the territory in which the property is situated.

The extension of the life of the Project's Tentative Map will be beneficial to

the public welfare. It will constitute one more step toward approval of a Project that provides publicly accessible open space, coastal access, affordable housing, a substantial increase in the City's tax base, and development of a property that has, for many years, been sitting unused.

For all the reasons above, Boatworks requests an extension of the life of the existing Tentative Map (No. 8060) and looks forward to a resolution of any outstanding issues.

B. CITY COUNCIL SHOULD CONFIRM APPROVAL OF THE DEVELOPMENT PLAN (PLN 15-0582), BUT REVERSE THE IMPOSITION OF NEW CONDITIONS.

On July 25, 2016, the Planning Board approved the Development Plan proposed by Boatworks but added 80 new conditions and a series of "Setback Standards and Sections" (Exhibit 2 of the Staff Report for July 25, 2016, Planning Board meeting). It appears that staff attempted to write up a new set of Tentative Map conditions that undermine and contradict the existing conditions and erase all traces of the parties' 2010 Settlement Agreement. To the extent Planning Board purports to impose these new conditions on the Project, Boatworks appeals.

Boatworks has a right to develop its property pursuant to the conditions imposed in 2011. Imposition of new, contradictory conditions on the Project abrogates Boatworks' vested rights and is beyond the City's jurisdiction. *South Central Coast Regional Commission v. Charles A. Pratt Const. Co., Inc.*, 128 Cal. App. 3d 830, 843 (1982); see also Gov. Code §66474.1. Imposition of the new conditions the Planning Board has approved cost Boatworks a minimum of \$45 Million in square footage and market rate housing units.

The staff report for the July 25, 2016, Planning Board meeting and point five of the resolution proposed for that meeting aver that the Development Plan "is in substantial conformance with the General Plan and Zoning for this site. The development is consistent with the R-2/PD and Open Space General Plan and Zoning designations for the property."

Based on this, City Council can and should confirm approval of the Development Plan but reverse the imposition of illegal new conditions, thus paving the way for approval of a final map *based on the previously approved Tentative Map and conditions of approval and approved alterations thereto.*

I have fully explicated and supported Boatworks' objections to Planning

staff's recommendations and actions and to the Planning Board's actions in previous letters:

- A. May 10, 2016 (requesting extension of Tentative Map life);
- B. May 17, 2016 (45-day notice letter to City and CIC),
- C. June 7, 2016 (re binding nature of agreements on affordable housing percentages and deemed approval of Development Plan);
- D. June 21, 2016 (following up on meeting of June 15, 2016 and enclosing Affordable Housing Agreement);
- E. July 7, 2016 (response to staff report for July 11, 2016, Planning Board meeting);
- F. July 21, 2016 (requesting litigation stay).

All of these letters are attached hereto as Exhibits A-F.

Boatworks invites City Council members to contact me or any Boatworks representatives if you have questions or concerns. Such contacts are not prohibited and could prove productive.

Regards,



Shona L. Armstrong

Encl:

- A. LTR from SLA May 10, 2016 (requesting extension of Tentative Map life);
- B. LTR from SLA May 17, 2016 (45-day notice letter to City and CIC),
- C. LTR from SLA June 7, 2016 (re binding nature of agreements on affordable housing percentages and deemed approval of Development Plan);
- D. LTR from SLA June 21, 2016 (following up on meeting of June 15, 2016 and enclosing Affordable Housing Agreement);
- E. LTR from SLA July 7, 2016 (response to staff report for July 11, 2016, Planning Board meeting);
- F. LTR from SLA July 21, 2016 (requesting litigation stay).

Check for \$2850.00

Exhibit A

HARPER & ARMSTRONG, LLP

1634 Telegraph Avenue, #3 • Oakland, CA 94612
Ph: (510) 420-8455 • Fax: (510) 858-5953 • shona.armstrong@gmail.com

May 10, 2016

BY HAND DELIVERY

Andrew Thomas
Planning Services Manager
Alameda City Hall
2263 Santa Clara Avenue
Alameda, CA 94501
athomas@alamedaca.gov
(510) 747-6805

Re: Boatworks Project – Request for Extension of Up to 24 Months on Tentative Map #8060.

Dear Mr. Thomas:

I represent Boatworks, LLC, (“Boatworks”) Owner of the Property at 2229-2235 Clement Avenue in Alameda. On July 19, 2011, Alameda’s City Council approved Tentative Map 8060 and the accompanying Density Bonus (application PLN 10-0262) for a proposed development on the Property (“the Project”). (See City Council Resolution No. 14614.) Since then, there have been a series of statewide blanket extensions to tentative maps that extended the life of the map through the economic downturn.

1. Status of Tentative Map #8060 And Development Plan.

On September 15, 2015, the City Council approved an extension of the Tentative Map to July 19, 2016. As you know, Boatworks, LLC, is currently negotiating a sale of the Boatworks Project and the Property to Toll Brothers. Concurrently, Boatworks is in the process of achieving compliance with the Tentative Map conditions as well as incorporating into the Project changes suggested by Planning Board members, and changes required to satisfy

requirements imposed on the Project by the Alameda fire department, BCDC, and EPA.

Boatworks submitted a Development Plan that City staff deemed complete on March 8, 2016. We are confident that the Development Plan is in substantial conformance with the Tentative Map with the only modifications being changes that the Owner has made at the request of City, Fire Department, BCDC and/or EPA.

The City Planning Department held a study session on Monday, May 10, 2016, to discuss the Development Plan.

2. Reassurance on City Staff Questions Related to Affordable Housing Aspects of Development Plan.

Notably, *there has been no change in the number or ratio of affordable housing units included in the Development Plan as compared to the approved Tentative Map.* Generally, a Development Plan is approved *prior to* filing and approval of a Tentative Map. This case is atypical in that the Development Plan is being processed after approval of both the Tentative Map and the Density Bonus for the Project. But there is no reasonable or legal ground for using the Development Plan as a vehicle for now requiring any change in the number or ratio of affordable housing units or for requiring a new or changed Density Bonus application.

We are thus very hopeful that the sale and ultimate development of the Project as depicted on the Development Plan will proceed smoothly and expeditiously. In particular, we are relying on the following facts:

(1) Conditions of Approval of the Tentative Map permit and in fact require the development to incorporate the affordable housing ratios and numbers as proposed (see, e.g., Condition #10 and the following recital: "WHEREAS the application included a base project of 140 units with thirteen (13) housing units affordable to very low income households and eight (8) units affordable to moderate income households"); and

(2) City has already approved a Density Bonus for the Project that is in conformance with the Development Plan as proposed ("WHEREAS the project is eligible for a density bonus of 30% under California Government Code 65915 and City of Alameda Municipal Code section 30-17"); and

(3) Nobody made any timely challenge to the City's approvals of either the Conditions of Approval or the Density Bonus and so there is no need or basis for the City to go back on these approvals; and

(4) Alameda Municipal Code section 87-1 allows exceptions to map requirements; and

(5) City has already spot zoned (October 2010) the Property to accommodate the plan as currently proposed in order to take advantage of Owner's offer of open space to the City based on the Owner and City's agreement to the specific Conditions of Approval attached to Tentative Map #8060; and

(6) Boatworks submitted a Development Plan application in December 2015. City staff, in a letter dated February 22, 2016, pointed out that the Development Plan needed modification to remove some proposed housing from agreed-upon open space areas. In response, Boatworks promptly submitted a map that included the requested changes, the most recent of which Boatworks submitted on April 9, 2016. Although Boatworks believes the Development Plan is consistent with the Tentative Map in all material aspects and includes only minor changes requested or required by interested agencies, City Staff continues to express hesitation about approval of the Development Plan and is requesting study sessions and additional time to consider the affordable housing aspects of the Development Plan.

(7) Planning staff recently raised new issues. By letter of March 8, 2016, Andrew Thomas raised the issues of re-applying for a density bonus and changing the required inclusionary housing ratios for the first time. Until that date, the inclusionary housing included in the approved Tentative Map 8060 and the already approved Density Bonus Application (PLN 10-0262) were considered adequate and acceptable.

3. Additional Time is Necessary to Resolve These Issues and is Permissible under Alameda's Municipal Code.

The staff report of Thursday, April 28, 2016, makes clear that the Planning staff still has questions about the City's will and ability to approve the Development Plan based mainly on hesitations about affordable housing issues. The parties appear to be otherwise very close to positioning themselves to take the final steps to approve the Project, which will be of great benefit to the City.

In order to allow the Owner and the City time to figure out the best path to a mutually agreeable Project, Owner requests an extension of *up to two years (24 months) on the life of the Tentative Map*. Once the path forward is clear, Boatworks will require time to prepare a final map in conformance with any potential agreements.

Pursuant to Alameda Municipal Code section 30-76.3, any time limit "for reporting and acting on maps may be extended by mutual consent of the City and applicant."

Pursuant to Alameda Municipal Code section 30-81.1(a),

An extension of time, not to exceed an additional twelve (12) months, for filing of the final map may be granted by the City Council providing written application is made by the subdivider prior to the expiration of the approved or conditionally approved tentative map.

Pursuant to Alameda Municipal Code section 87.1, an exception to any regulation in Article VI (Real Estate Subdivision Regulations) is permissible:

Planning Board may recommend that the City Council authorize conditional exceptions to any of the requirements and regulations set forth in this article unless the requirement or regulation would otherwise require a zoning variance or other zoning approval.

The Planning Board may recommend such an exception to any regulation if it can make the following findings:

1. That there are special circumstances or conditions affecting the property.

In this case, the unusual order of events that has affected the course of approval of the Tentative Map constitutes a special circumstance. The City has approved a Tentative Map prior to approval of a Development Plan or a Planned Development Permit. In addition, the City appears to have approved the Tentative Map along with Conditions of Approval that are not (and were not at the time of approval) in accord with the City's own inclusionary housing ordinance. This is an acceptable exception pursuant to AMC § 87-1, and this extremely unusual circumstance affects the parties' rights as described below.

2. That the exception is necessary for the preservation and enjoyment of a substantial property right of the petitioner.

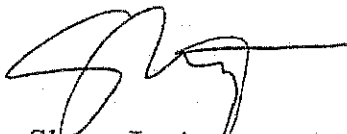
The exception requested by this letter is necessary for the preservation and enjoyment of a substantial property right of the petitioner inasmuch as (among other rights) the petitioner negotiated for and was granted by the City Council a right to develop the Property in accordance with the Tentative Map and its conditions, which right the City now threatens to revoke. In addition, petitioner is in the midst of contracting to sell the Property and the approved Project. Much of the benefit of that contract rides on the success of the approvals now in process.

3. That the granting of the exception will not be detrimental to the public welfare or injurious to other property in the territory in which the property is situated.

The extension of the life of the Project's Tentative Map will be beneficial to the public welfare. It will constitute one more step toward approval of a Project that provides open space, coastal access, affordable housing, a substantial increase in the City's tax base, and development of a property that has, up until now, been sitting unused.

For all the reasons above, Boatworks requests an extension of the life of the existing Tentative Map (No. 8060) and looks forward to a resolution of any outstanding issues.

Regards,



Shona L. Armstrong

cc: Members of Planning Board (hand delivered to members of Planning Board at meeting held evening of May 9, 2016)

Exhibit B

HARPER & ARMSTRONG, LLP

1634 Telegraph Avenue, #3 • Oakland, CA 94612
Ph: (510) 420-8455 • Fax: (510) 858-5953 • shona.armstrong@gmail.com

Tuesday, May 17, 2016

BY E MAIL and also by CERTIFIED MAIL, Return Receipt Requested, Postage Prepaid

Mayor Trish Herrera Spencer 2263 Santa Clara Avenue Alameda, CA 94501 (510) 747-4701 tspencer@alamedaca.gov	City Manager Jill Keimach Alameda City Hall 2263 Santa Clara Avenue Alameda, CA 94501 (510) 747-4700 manager@alamedaca.gov
Vice-Mayor Frank Matarrese Alameda City Hall 2263 Santa Clara Avenue Alameda, CA 94501 fmatarrese@alamedaca.gov	City Attorney Janet Kern Alameda City Hall 2263 Santa Clara Avenue, Rm 280 Alameda, CA 94501 (510) 747-4750 jkern@alamedacityattorney.org
Councilmember Tony Daysog Alameda City Hall 2263 Santa Clara Avenue Alameda, CA 94501 tdaysog@alamedaca.gov	Andrew Thomas Planning Services Manager Alameda City Hall 2263 Santa Clara Avenue Alameda, CA 94501 athomas@alamedaca.gov
Councilmember Marilyn Ezzy Ashcraft Alameda City Hall 2263 Santa Clara Avenue Alameda, CA 94501 mezzashcraft@alamedaca.gov	Robert S. Perlmutter Shute, Mihaly & Weinberger LLP 396 Hayes Street San Francisco, CA 94102 (415) 552-7272 perlmutter@smwlaw.com
Councilmember Jim Oddie Alameda City Hall 2263 Santa Clara Avenue Alameda, CA 94501 joddie@alamedaca.gov	City of Alameda Community Improvement Commission c/o Janet Kern Alameda City Hall 2263 Santa Clara Avenue, Rm 280 Alameda, CA 94501

Re: Tentative Map/Development Plan Proposals, 45-Day Demand to Cure, Change of
Address for Notice re 2010 Settlement Agreement

Dear Ladies and Gentlemen:

I represent Boatworks LLC ("Boatworks"), the owner of the Property at 2229-2235 Clement Avenue and the assignee of the October 5, 2010 Settlement Agreement ("Settlement Agreement") by and between Francis and Catherine Collins (assignors), the City Council of the City of Alameda ("City"), and the City of Alameda Community Improvement Commission ("CIC") regarding the residential development planned for the Property, known as the "Boatworks Project."

Section 5.1 of the Settlement Agreement requires a party to serve written demand to cure 45 days prior to pursuing any litigation arising out of or relating to the Settlement Agreement. Importantly, this notice requirement provides the parties with an opportunity to meet and confer in good faith in an effort to resolve the dispute.

A. Breach and Demand for Cure

On March 8, 2016, City Planner, Andrew Thomas sent Philip Banta, Project Architect, a letter stating that the City Council would reconsider Boatworks' rights to the Density Bonus (PLN 10-0262), which City approved in 2011 in furtherance of the Settlement Agreement. (See City Council Resolution No. 14614.) On Thursday, March 31, 2016, Janet Kern sent Francis Collins an email stating that the City declines to approve Toll Brothers as Boatworks' assignee in writing as required by Article 2.3 of the Settlement Agreement, because: "Pursuant to Article 3, Section 3.3.3 (d) of the October 5, 2010 Settlement Agreement ... the parties currently do not have any rights or obligations under the Settlement Agreement."

In addition, Boatworks has evidence that City Planner Andrew Thomas stated that the City will refuse to approve any Boatworks Project so long as separate unrelated litigation between Francis Collins and the City of Alameda is pending. Most recently, at the May 9, 2016, Planning Board meeting, City Attorney Farima Faiz stated repeatedly that Boatworks has no rights under the Settlement Agreement.

Boatworks continues to perform under the Settlement Agreement. The actions and statements of City staff constitute an anticipatory breach that threatens to derail the development of the Property pursuant to the Settlement Agreement, the approved Tentative Map, and the Development Plan that Boatworks submitted on December 1, 2016, and most recently revised (in response to comments from Planning Board members) on March 1, 2016. Pursuant to Article 5.1, therefore, Boatworks requests that City and CIC cure this default by affirming the Settlement Agreement and by acting on Boatworks' requests as listed below. If City and CIC refuse these requests, Boatworks also requests that City and CIC explain to Boatworks when and on what basis they contend the Settlement Agreement terminated.

B. Continued Performance Serves Everybody's Interests

As the City considers its position vis-a-vis the Settlement Agreement, Boatworks proposes that it also consider the ways in which continued performance pursuant to the Settlement Agreement serves all the parties' interests. The Boatworks Project as currently detailed in the "Development Plan" application (PLN 15-0582) will effectuate development of

the Boatworks site as approved through PLN 10-0262, but in a form the planning board members have indicated is a more attractive, desirable residential development that complies with all zoning laws, is consistent with the general plan, provides significant public coastal access, creates a previously approved distribution of affordable housing, supplies attractive open space areas, and establishes a more robust tax base for the City. Both parties have expended significant energy in getting the Project to the stage it is at now, and there is no apparent down side to the City in continuing to process Boatworks' approvals and to perform under the Settlement Agreement.

At this point, the City is poised to gain a quality residential development, and Boatworks stands to recover the \$4,580,550 that it is entitled to under the Settlement Agreement (as listed on the "Alameda City Recognized Obligation Payment Schedule" ("ROPS")), provided the City and CIC continue to perform. Boatworks is confident in its ability to obtain this money from the Redevelopment Fund. In fact, Boatworks is so confident that, provided the City and CIC proceed in good faith to perform according to the Settlement Agreement and provided the City and CIC agree to cooperate fully with Boatworks in collecting any amounts due from the Redevelopment Fund, *Boatworks will agree to hold City and CIC harmless with respect to the enforceable obligations the City has listed as items 33 and 34 on the "Alameda City Recognized Obligation Payment Schedule (ROPS 16-17) ROPS Detail."*

Proceeding pursuant to the Settlement Agreement (as modified by this proposed hold harmless agreement) leads to a win-win outcome. We welcome City and CIC's cooperation in choosing this path.

C. Specific Demands

In order to proceed with processing of the approvals necessary for realization of the Boatworks Project and in order to proceed in accordance with the Settlement Agreement, Boatworks demands that the City and/or CIC as appropriate:

1. Approve Toll Brothers as assignee as required by Article 2.3 of the Settlement Agreement.
2. Execute the Owner Participation Agreement sent to CIC Board and Janet Kern by e-mail on May 9, 2016, and delivered by hand on May 10, 2016 to Debbie Potter and Janet Kern.
3. Execute an Affordable Housing Agreement that incorporates the affordable housing numbers and distribution as approved through PLN 10-0262.
4. Process Boatworks' May 9, 2016, request for an extension to the expiration date of the Tentative Map.

Although approval of PLN 10-0262 constituted approval of a development plan and no new development plan approval is necessary at this point, Boatworks nevertheless requests that City expeditiously process and approve the "Development Plan" that Boatworks submitted on March 1, 2016, which approval will acknowledge and incorporate the modifications that have been requested or required by the Environmental Protection Agency, Bay Conservation and

Development Commission, Alameda Fire Department, and Alameda Planning Committee. If City cannot approve PLN 15-0582, Boatworks requests that City specify exactly which modifications to PLN 10-0262 it cannot accept and why.

D. City's Performance Is a Necessary Prerequisite to Boatworks Perfecting Its Tentative Map

City's assertion that it will not perform its obligations under the Settlement Agreement puts Boatworks in an obvious and paralyzing bind as the July 19, 2016, expiration of the approved Tentative Map approaches. Satisfaction of the Conditions of Approval on Boatworks' approved Tentative Map can only occur if both parties' proceed in good faith to perform under the Settlement Agreement. See, e.g., Conditions of Approval in Alameda City Council Resolution No. 14614 (Agenda Item #6-A CC) (07-19-2011), Conditions #9, 10, 21, 26, 27, 40, 45. If City and CIC refuse to cooperate, Boatworks will be absolutely unable to perfect its approved Tentative Map. The City and CIC's refusal will constitute a development moratorium extending the life of the Tentative Map (see *Native Sun/Lyon Communities v. City of Escondido*, 15 Cal. App. 4th 892 911-913 (1993); Gov. Code §66452.5(f)(1)) and a de facto bad faith arbitrary and capricious denial of any Final Map that could be based on that Tentative Map (see, e.g., *Sullivan v. Planning Bd. of Acton*, 38 Mass. App. Ct. 918, 920, 645 N.E.2d 703, 706 (1995) (holding approving agency may not "... impose a condition the performance of which lies entirely beyond the applicant's power.")).

1. Owner Participation Agreement

Condition 10 of the Tentative Map requires that Boatworks and the CIC enter into an Ownership Participation Agreement ("OPA") prior to approval of a final map. By requiring this condition, City specifically contemplated and approved execution of an OPA subsequent to the July 19, 2011, City Council meeting. This OPA will be critical to the success of the parties' efforts to recover the City's financial obligations under the Settlement Agreement through the state's Redevelopment Fund.

Satisfaction of Condition 10, which requires the CIC to execute an Owner Participation Agreement "consistent with the Settlement Agreement and the Alameda Municipal Code 30-17" is outside the control of Boatworks. Boatworks is dependent upon CIC acting in good faith to satisfy this condition.

As late as July 19, 2011, at the City Council meeting, City Council and City staff assumed that the parties would complete the OPA in furtherance of the Settlement Agreement and that spot zoning Boatworks' property in conformance with the Tentative Map and the Settlement Agreement was appropriate. As Jennifer Ott made clear at that meeting, the City at that time contemplated eventual execution of an OPA. As of July 19, 2011, Ms. Ott was sanguine about the prospects of executing an OPA, stating: "All we are doing with the OPA is implementing the obligation that we already created for the CIC back in October ..."

During 2011, the Parties negotiated the general terms of an OPA until the City and CIC broke off communication on the topic. In 2015, Boatworks offered again to present a proposed OPA, but Janet Kern informed Francis Collins that this would be fruitless, and the City would decline to consider it, because OPAs "no longer exist."

On May 9, 2016, Boatworks offered to CIC a simple OPA that complies with both the Settlement Agreement and the Alameda Municipal Code 30-17, as required by Condition of Approval #10. On May 10, 2016, Debbie Potter reiterated Janet Kern's position, informing me in person that CIC could not execute an OPA because City had no enforceable obligation under the Settlement Agreement.

2. Affordable Housing Requirements

In addition to an OPA, Condition #10 of the Tentative Map requires execution of an Affordable Housing Agreement and explicitly ties the required percentages and locations of affordable housing to the percentages and locations agreed to in the Settlement Agreement.

The parties have a disagreement about whether the percentages and locations approved in the Settlement Agreement and embedded in the Conditions of Approval can be retained. Andrew Thomas has stated that the City approved the affordable housing percentages contained in the Settlement Agreement and the Conditions of Approval in error and must now modify them. This is neither necessary nor possible.

Alameda's inclusionary Housing Requirements for Residential Projects require 4% very low income, 4% low income, and 7% moderate income. Alameda Municipal Code §30-16.4(c). The Settlement Agreement requires the same 15% total, but requires a different distribution across income levels: 9% very low income units and 6% moderate income units. The City has already approved Boatworks' Density Bonus Application based on a "base" project of 140 units and based on the percentages required by the Settlement Agreement. (See City Council Resolution No. 14614 (Agenda Item #6-A CC) (07-19-2011), approving Tentative Map - Tract 8060 and Density Bonus Application PLN 10-0262.)

The Alameda Municipal Code (with emphases added) supports Boatworks' position that the City can no longer modify the previously approved affordable housing numbers, distribution, or location at the Boatworks Project.

(1) Alameda Municipal Code section 30-16.3 defines a "*Residential Development*" as:

any planned development district, subdivision map, conditional use permit or other discretionary land use approval that authorizes the construction of residential dwelling units.

PLN 10-0262 was a subdivision map and discretionary land use approval that constituted a "Residential Development."

(2) Alameda Municipal Code section 30-16.4 provides:

The number of *Inclusionary Units required for a particular project will be determined only once*, at the time of project approval. If a change in the Residential Development design results in a change in the total number of units, the number of Inclusionary Units required will be recalculated to coincide with

the final approved project.

There have been no changes in the total number of units proposed for the Boatworks Project. As such, there is no justification for recalculating the number of inclusionary units required.

(3) Alameda Municipal Code section 30-16.8(b) provides:

As part of the application for a Residential Development, the applicant shall submit an Affordable Housing Plan demonstrating compliance with this section. The Affordable Housing Plan **must include**: (i) a description of the **number and size** of each Market-Rate Unit and each Inclusionary Unit, including the **income levels** to which each Inclusionary Unit will be made affordable, (ii) a narrative describing how the plan adheres to the Affordable Housing Guidelines adopted by the City Council, and (iii) a site map, with the **location** of the Inclusionary Units clearly marked.

The Alameda Municipal Code thus contemplates that, at the time Boatworks applied and received approval its Tentative Map, the number, size, income level distribution, and location of inclusionary/affordable housing was fixed.

Even when a City acts improperly in requiring Tentative Map conditions, the conditions must be complied with. See, e.g. *Hazon-Iny Dev., Inc. v. City of Santa Monica*, 128 Cal. App. 3d 1, 11-12 (1982). The City has approved the affordable housing conditions as required by the Settlement Agreement – once in the Settlement Agreement, again in the Conditions of Approval. The City may not now deny any approval of the project based on a reinterpretation of Alameda's local ordinances. See Gov. Code §§ 67474.1 ("A legislative body shall not deny approval of a final or parcel map if it has previously approved a tentative map for the proposed subdivision and if it finds that the final or parcel map is in substantial compliance with the previously approved tentative map.") and 65961 ("Notwithstanding any other provision of law .. upon approval or conditional approval of a tentative map ... during the five-year period following recordation of the final map or parcel map for the subdivision, a city ... shall not require as a condition to the issuance of any building permit or equivalent permit ... conformance with or the performance of any conditions that the city ... lawfully imposed as a condition to the previously approved tentative or parcel map. Nor shall a city ... withhold or refuse to issue a building permit or equivalent permit for failure to conform with or perform any conditions that the city ... could have lawfully imposed as a condition to the previously approved tentative or parcel map.")

The time for a local agency to take action with respect to a proposed subdivision is when the tentative map is under consideration and, provided the final map is in substantial compliance with the tentative map and any conditions imposed on its approval, the approval of the final map becomes a ministerial act. *Beck Development Co. v. Southern Pacific Transportation Co.*, 44 Cal.App.4th 1160 (1996). Where, as here, a developer has relied on a tentative map approval with conditions and has produced a final tract map that satisfies conditions, the developer is entitled to acceptance and approval of that final map without imposition of new or altered conditions by local governing agency. *South Central Coast Regional Commission v. Charles A. Pratt Const. Co., Inc.*, 128 Cal.App.3d 830 (1982).

Furthermore, Alameda Municipal Code allows at 30-87.2 for the City to waive a technical error when approving a map. The City may wish to invoke this provision when it approves a Development Plan and/or PD Permit and/or Final Map.

But the City is safe from any challenge alleging error in approval of the affordable housing percentages, and in fact City is estopped from requiring a change in the affordable housing ratio at this point. See *Blue Chip Properties v. Permanent Rent Control Bd.*, 170 Cal. App. 3d 648, 658-59 (1985); *Griffis v. City of Mono*, 163 Cal. App. 3d 414, 422-23 (1985). A tentative tract map approval guarantees a developer who fulfills the conditions imposed upon it, final map approval. *El Patio v. Permanent Rent Bd.*, 110 Cal.App.3d 915, 927 (1980); *Youngblood v. Board of Supervisors*, 22 Cal.3d 644, 655-656 (1978); see also Gov't. Code, §§ 66473, 66474. The time for any challenge to the approval of the tentative map conditions has passed. Gov't Code 66499.37. "[T]he date when the tentative map comes before the governing body for approval is the crucial date when that body should decide whether to permit the proposed subdivision. Once the tentative map is approved, the developer often must expend substantial sums to comply with the conditions attached to that approval. These expenditures will result in the construction of improvements consistent with the proposed subdivision, but often inconsistent with alternative uses of the land." *Youngblood v. Board of Supervisors*, 22 Cal.3d 644, 655 (1978).

Boatworks has relied on the percentages required by the approved Tentative Map (Conditions of Approval) and by the Settlement Agreement. It has already received approval for a density bonus based on those conditions. City may not now modify these percentages to conform to Alameda Municipal Code §30-16.4(c). Were the City to insist on this and refuse to sign an affordable housing agreement substantially in the form of Exhibit 6 to the Settlement agreement (as required by Condition 10 of PLN 10-0262), incorporating and memorializing the approved affordable housing percentages, Boatworks would sustain potential damages of approximately \$13.63 Million.

E. Approval of Development Plan

Alameda Municipal Code section 30-4.13(j) discusses "Development Plans" as a prerequisite for zoning approval, and Municipal Code section 30-17.4(b) provides that a "Density Bonus Application *shall* include ... [a] *development plan* illustrating that the 'base' project meets all existing general plan and zoning development standards." (Emphasis added.) It thus appears that the site plan considered as part of the Tentative Map and Density Bonus approvals in 2011 constituted the "development plan" necessary for the Boatworks Project. That site plan was the basis for approval of the Boatworks Project zoning and Density Bonus.

Although it is not a prerequisite to perfection of the Tentative Map, Boatworks has nevertheless applied for approval of a "Development Plan" at the direction and insistence of Andrew Thomas. Andrew Thomas certified that this new "Development Plan" application was complete as of March 8, 2016. Planning Staff has also informed the Planning Board that the "Development Plan" complies with the Planned Development zoning laws and with the General Plan. Boatworks has provided the calculations necessary to explain how the plan conforms with the base density requirements as approved in PLN 10-0262. Planning Staff nevertheless now

seems intent on using this "Development Plan" to revoke Boatworks' rights under PLN 10-0262 and to impose new and different Tentative Map conditions.

The ways in which the proposed "Development Plan" differs from the approved Tentative Map are listed at page DP-8.1 of the application for PLN 15-0582. Each of the listed modifications was requested or required by either the Environmental Protection Agency ("EPA"), Bay Conservation and Development Commission ("BCDC"), Alameda Fire Department, or the Alameda Planning Board Sub-Committee with whom Boatworks representatives have met repeatedly in order to tweak the site plan design. Of course, Boatworks cannot remove any of the changes requested by EPA, BCDC, or the Fire Department, but if any of the changes incorporated at the request of the Planning Board Subcommittee are problematic for the City, Boatworks is happy to revert back to the Tentative Map with respect to those changes – i.e. changes listed as 5 (Central Green), 7 (moving of parking), 8 (modification of Blanding), 11 (increase in size of affordable units), 12 (paseo and roof decks) on page DP-8.1.

The Development Plan is in substantial conformance with the Tentative Map and differs only in respects requested by the City or other interested agencies, Boatworks requests that the City process approval of this "Development Plan" quickly and efficiently without further meetings and/or modifications.

F. Additional extension of the Tentative Map is appropriate in this case.

Boatworks requests that the City Approve its request for exception to the expiration date of the Tentative Map pursuant to Alameda Municipal Code section 30-87.1, sustaining the Tentative Map for two (2) more years.

As explained in Boatworks' application for the exception (submitted to the Planning Board and Planning Staff at the study session held on May 9, 2016), such an extension is justified and in the best interest of all parties. Without more time, Boatworks simply cannot accommodate more suggestions from the City regarding the layout of the Plan. An extension will allow Boatworks and City staff to come to a mutually acceptable understanding about how development approvals for the Boatworks Project will move forward and will allow for completion of the Tentative Map Conditions of Approval that City and CIC have been and are currently blocking.

G. Detrimental Reliance and Estimated Damages

Boatworks has reasonably relied to its detriment on City and CIC's representations in the Settlement Agreement, approval of PLN 10-0262, and City and CIC's subsequent actions, which, until March 31, 2016, manifested an intent to continue performing under the Settlement Agreement.

By entering into the Settlement Agreement in 2010, Francis Collins gave up an opportunity to develop 242 residential units on the Boatworks site, a proposal that would have included 48 units of very low income housing. From 2005 to 2010 Mr. Collins invested approximately \$1,500,000 to prepare that original 242 unit plan, yet he abandoned it in favor of the Settlement Agreement requirement that he develop a lower density project. In 2011, Mr. Collins invested approximately \$350,000 in negotiating, preparing, and securing a Tentative Map

45-Day Notice Letter – SLA to City and CIC, May 17, 2016

acceptable to the City and CIC. Following City's approval of the Tentative Map, Density Bonus, and Conditions of Approval, Boatworks invested approximately \$300,000 in demolition of existing buildings on the site. Between 2012 and the present, Boatworks invested approximately \$925,000 in pursuing development in reliance on the Settlement Agreement and the Tentative Map. City's repudiation of the Settlement Agreement will rob Boatworks of access to the \$4.58 million in state aid that City has listed on the ROPS as an enforceable obligation. Revoking Boatworks' rights under the existing Density Bonus approval and Tentative Map approval and forcing Boatworks to make eight (8) additional units affordable will cost Boatworks approximately \$5 Million. Boatworks is currently investing approximately \$1 Million to prepare a final map in reliance on the rights secured through the Tentative Map, which City now seems intent on revoking.

H. Change in Notification Addresses Under Settlement Agreement Paragraph 7.4

In accordance with Settlement Agreement ¶ 7.4, please note the following notice address changes:

In place of Thomas D. Roth, Esq., please substitute:

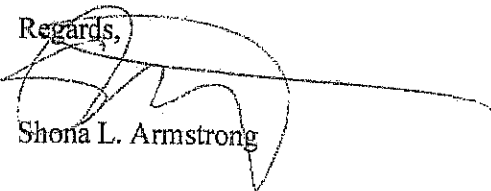
Shona Armstrong and Greg Harper
Harper & Armstrong, LLP
1634 Telegraph Ave., #3
Oakland, CA 94612
shona.armstrong@gmail.com
(510) 420-8455

I. Conclusion

Boatworks requests an immediate meeting with the City Attorney, City Manager, and a City Council Member, both to resolve the parties' disagreements about the Settlement Agreement and to discuss ways in which the parties can move forward cooperatively to ensure the Boatworks Project is approved and completed efficiently. Achieving a constructive resolution now will help Boatworks to avoid damages of approximately \$13,630,000. We are confident that there is a path forward in which the City, Toll Brothers, and Boatworks all achieve their goals. We hope that City will choose this path.

We look forward to meeting with you soon and will require a resolution by July 1, 2016.

Regards,



Shona L. Armstrong

cc: Francis Collins
Nicolet Collins
Alicia Guerra

Exhibit C

HARPER & ARMSTRONG, LLP

1634 Telegraph Avenue, #3 • Oakland, CA 94612
Ph: (510) 420-8455 • Fax: (510) 858-5953 • shona.armstrong@gmail.com

June 7, 2016

BY E MAIL and also by UNITED STATES MAIL

Andrew Thomas Planning Services Manager Alameda City Hall 2263 Santa Clara Avenue Alameda, CA 94501 athomas@alamedaca.gov	City Manager Jill Keimach Alameda City Hall 2263 Santa Clara Avenue Alameda, CA 94501 (510) 747-4700 manager@alamedaca.gov
Robert S. Perlmutter Shute, Mihaly & Weinberger LLP 396 Hayes Street San Francisco, CA 94102 (415) 552-7272 perlmutter@smwlaw.com	City Attorney Janet Kern Alameda City Hall 2263 Santa Clara Avenue, Rm 280 Alameda, CA 94501 (510) 747-4750 jkern@alamedacityattorney.org
City of Alameda Community Improvement Commission c/o Janet Kern Alameda City Hall 2263 Santa Clara Avenue, Rm 280 Alameda, CA 94501	

**Re: Open issues related to perfection of Tentative Map; Status of Development Plan
Application PLN 15-0582; Possible Spot Zoning**

Dear Ladies and Gentlemen:

Re: Boatworks Project – Affordable Housing Agreement

Dear Ladies and Gentlemen:

I represent Boatworks, LLC, ("Boatworks"), Owner of the Property at 2229-2235 Clement Avenue in Alameda. On July 19, 2011, Alameda's City Council approved a Tentative Map for Tract 8060 ("Tentative Map") and an accompanying Density Bonus (both approved per application PLN 10-0262) for a proposed development on the Property ("the Project"). (See City Council Resolution No. 14614.) The City unanimously approved PLN 10-0262 in furtherance of a Settlement Agreement ("2010 Settlement Agreement") entered into by the City of Alameda

("the City"), the Community Improvement Commission ("CIC"), and the then-owners of the Property, Francis and Catherine Collins to resolve a dispute arising from the denial of an earlier, higher density housing proposal.

As we have not yet heard anything back from the City or the CIC regarding my letter of May 17, 2016, I am writing to follow up. My client wishes to discuss how the parties can manoeuver themselves onto the same page with respect to the next steps necessary to enable successful processing of approvals for the Boatworks Project. Of particular concern is the fact that, given what we have heard from City employees recently, it appears that several of the conditions of the Tentative Map may be impossible to satisfy, and we would like to open a dialogue about how to address this problem.

1. Affordable Housing Agreement

Condition #10 of the approved Tentative Map requires Boatworks to execute an Affordable Housing Agreement consistent with the 2010 Settlement Agreement entered into by the City, CIC, and the owners of the Property.

Boatworks is prepared to provide the CIC with an Affordable Housing Agreement that meets the 2010 Settlement Agreement requirements and the requirements of Alameda Municipal Code ("AMC") sections 30-17.6 and 30-17.16 for owner-occupied affordable housing units insofar as the Municipal Code is consistent with the 2010 Settlement Agreement, the Density Bonus, and the Conditions of Approval of the Tentative Map. Given the position taken by the City Planning staff at the May 9, 2016, Planning Board meeting (i.e. that the previously approved affordable housing plan is not binding), it appears that submission of such an agreement, which will incorporate the affordable housing ratios and distributions agreed to in 2010 and approved in 2011, would be futile.

We would appreciate any information you could share with us regarding the City's and CIC's intentions with respect to Condition #10.

2. BCDC Approvals

BCDC has twice written to Boatworks requesting an approved Final Map on which to base BCDC's own final approvals. Conditions 8(c), 38, and 94 of the Tentative Map, however, require BCDC approval prior to issuance of a Final Map.

How would the City staff suggest Boatworks handle this conundrum? Do we need to apply for a waiver of this condition, or will City waive this condition sua sponte? Is there something short of final BCDC approval that we can agree will satisfy these conditions? We look forward to working with you on a solution.

3. Development Moratoria

Pursuant to Government Code section 66452.6(f), the City's apparent intent to repudiate various provisions of the 2010 Settlement Agreement and the previously approved Tentative Map and Density Bonus creates a development moratorium with respect to the Boatworks' Tentative Map. As pointed out in the 45-day notice letter sent May 17, 2016, the terms of the

Settlement Agreement and the Conditions of Approval for the Tentative Map are inextricably intertwined. Boatworks anticipates that City's insistence upon changing the affordable housing ratios and distribution (which would effectively revoke Boatworks' Density Bonus), will mean City will now be unwilling to accept the proposed Affordable Housing Agreement, which is consistent with the Settlement Agreement and which satisfies the Conditions of Approval of the Tentative Map. This refusal, combined with the CIC's seeming refusal to acknowledge, discuss, or accept Boatworks' Owner Participation Agreement will make it impossible for Boatworks to satisfy the conditions of approval of the Tentative Map.

Please acknowledge that the life of the Tentative Map will necessarily be extended until a time when the City is ready and willing to allow satisfaction of all the conditions of approval.

4. Spot Zoning

On October 5, 2010, City Council voted to rezone approximately 2 acres of Boatworks' property as Open Space. See Agenda and Minutes of City Council Meeting (2016-10-05) re Unanimous Approval of Agenda Item (10-481B) [Introduction of Ordinance Amending Ordinance No. 1277, N.S., to Rezone Parcels Located at 2229 Through 2235 Clement Avenue, APNS 071-0289-05 and 071-0290-01 from M-2 General Industrial (Manufacturing) District and R-2/PD (Two Family Residence Planned Development District) to Open Space (O) and R-2/PD (Two Family Residence Planned Development District)]. We have not yet confirmed whether the rezoning was properly noticed pursuant to AMC § 30-22.4.

Pursuant to the 2010 Settlement Agreement, Boatworks and the City agreed that Boatworks would dedicate an approximately 2 acre area for public use through a public access easement. 2010 Settlement Agreement ¶¶ 1.2.3, 2.2.2. Absent the rationale of the 2010 Settlement Agreement, this rezoning to open space constitutes an arbitrary and capricious bar to all development on the rezoned land and constitutes a regulatory taking of Boatworks' property, which completely robs Boatworks of its investment backed expectations. See, e.g. *Avenida San Juan Partnership v. City of San Clemente*, 201 Cal. App. 4th 1256 (2011). So long as all parties were proceeding in reliance on the terms of the 2010 Settlement Agreement, this zoning reinforced the layout of the approved Tentative Map and development plan. See Letter SLA to City and CIC dated May 17, 2016 at §D.1. When and if the City (and not just the City Attorney) repudiates or breaches the Settlement Agreement, Boatworks will immediately petition for a writ to overturn the zoning and file a complaint to recover the value of that rezoned property. Boatworks has no intention or obligation to dedicate this land to public use except under the terms of the 2010 Settlement Agreement.

5. Status of Development Plan Application PLN15-0582

a. The City necessarily approved a Development Plan for the Boatworks Project in 2011.

Along with its Tentative Map and Density Bonus, Boatworks necessarily received approval of or exemption from approval of a "development plan." "No tentative map... shall be issued for any development that has been granted a density bonus under this section unless that map or permit is exempt from or in compliance with the terms of this section 30-17." AMC 30-

17.4. Furthermore, AMC section 30-17.4(b) provides that a "Density Bonus Application *shall* include ... [a] *development plan* illustrating that the 'base' project meets all existing general plan and zoning development standards." (Emphasis added.) Finally, AMC section 30-4.13(j), which deals with PD zoning, discusses "Development Plans" as a prerequisite for zoning approval in the Planned Development zone.

It thus appears that the site plan considered as part of the Tentative Map and Density Bonus approvals in 2011, along with the 2010 Settlement Agreement, constituted all the "development plan" necessary for the Boatworks Project, regardless of how it was labeled. Indeed, the application submitted by Francis Collins at that time included all the items required for a Development Plan application under AMC section 30-4.13(j) and necessarily demonstrated that the Project met all zoning development standards. (AMC §30-17.)

b. Boatworks has made more recent applications at the direction of City planners.

Despite the fact that the Tentative map and Density Bonus approvals necessarily incorporated approval of a Development Plan, Boatworks has, at the suggestion of Andrew Thomas, developed and processed subsequent Development Plans in an attempt to accommodate the City's concerns and suggestions. The City could consider these applications for modification of the existing Development Plan pursuant to AMC § 30-4.13(m), although none of the criteria under which such amendments are *required* are applicable to PLN 15-0582, see AMC 30-4.13(m)(2). Unfortunately, Boatworks can no longer afford this courtesy.

c. Planning Board is compelled by prior City decisions to approve PLN 15-0582.

(i) The City is bound to accept the proposed affordable housing numbers, ratios, and distributions, because it approved these Project characteristics when it approved the Conditions of the 2011 Tentative Map and the Density Bonus. In 2011, the City specifically approved the Boatworks project with 13 very low income units (9%) and 8 moderate income units (6%), specified at Condition 26 that these units were to be located in one multi-family building, and specifically concluded that these affordable units qualified Boatworks for a 30% Density Bonus per Government Code section 65915. (See Conditions of Approval at p. 1 and Condition 26 at p. 7.)

The City is estopped from objecting to its own prior Density Bonus approval not only because of its 2011 approvals, but also because the City has allowed and even encouraged Boatworks to continue pursuing, planning on, and investing in development of the Property for the last five years relying upon these affordable housing parameters. Neither City's Planning Board nor City staff raised the issue of affordable housing ratios when considering and rejecting PLN 12-0729 on June 22, 2015. To the contrary, the staff report for that meeting specifically noted:

The applicant requested a density bonus for a "base" project of 140 units. The project qualifies for a 30% density bonus (42 units for a total of 182 units) because the applicant proposes to provide 9% of the 140 units to households that qualify as very low-income. In addition to the 13 very low-income units, the

project is also providing 8 units for moderate income households.

Indeed, between 2011 and 2016, the City has never once questioned these affordable housing ratios. In its letter of March 8, 2016, the Planning Staff indicated *for the first time* that it intended to insist on imposing new affordable housing requirements different from those approved with the Density Bonus application 10-0262. According to the Planning Board staff report for the May 9, 2016, hearing, City intends now to require 13 very low-income units (9% of a base of 140 units); 6 low-income units (4%); and 10 moderate income units (7%).

City cannot now, just prior to expiration of the Tentative Map, seek to impose conditions that directly contradict the previously and repeatedly approved and accepted affordable housing scheme.

(ii) Government Code prohibits imposition of new conditions. The Housing Accountability Act (Government Code section 65589.5) and the Subdivision Map Act (Government Code section 65961) prohibit City from imposing new conditions on a qualified affordable housing development such as the Project, for which the City has already approved a Tentative Map and Density Bonus.

After approval of a tentative subdivision map and when a developer applies for a [subsequent] permit, a local agency may not impose conditions that could have been imposed on approval of the tentative map except that it may impose conditions that it finds necessary to prevent placing residents in a condition perilous to their health or safety. (Gov. Code, § 65961, subd. (a)(1).) This exception, like the bases for denial of approval of a tentative map, requires the local agency to make factual findings based on sufficient evidence rather than speculation or conjecture.

Beck Development Co., Inc. v. S. Pac. Transp. Co., 44 Cal. App. 4th 1160, 1201 (1996).

d. Boatworks' most recent application (PLN 15-0582) was deemed approved as of May 7, 2016.

The Planning Commission considered and rejected PLN 12-0729 (Boatworks Tentative Map 8060 Amendment and Density Bonus Application) for 2229-2241 Clement Street on June 22, 2015. At Planning staff request, in response to the concerns raised by Planning staff and the Planning Board members at that hearing as well as subsequent suggestions from a Planning Board subcommittee composed of John Knox White and David Burton, and in order to incorporate changes in site layout required by BCDC, EPA, and the Alameda Fire Department, Boatworks modified the proposed Development Plan and submitted another Development Plan application in December 2015. Staff deemed the new application complete in a letter dated March 8, 2016. The Planning Board reviewed and discussed this application at a publicly noticed study session held on May 9, 2016, but did not act. The Planning Board has apparently declined to agendize our matter for the June 13, 2016, Planning Board meeting and has not yet even committed to reconsidering it at the July 11, 2016, Planning Board meeting. See AMC § 2-91.5(a).

City had a maximum of sixty (60) days to act on Boatworks' application PLN 15-0582, because, as staff noted in its staff report for the Planning Board's consideration of PLN 12-0729 on June 22, 2015, and again in its proposed staff report for the meetings of April 25, 2016, and for the meeting of May 9, 2015, an environmental impact report for the project was prepared and certified on October 5, 2010. See Gov. Code § 65950(a)(4). Boatworks requested a hearing at the Planning Board meeting on April 25, 2016, but City Planning staff first changed the agenda item from a decision-making hearing on the application to a "study session" and then pulled the item from the Planning Board agenda for that evening. The City Planning Board subsequently held a publicly noticed hearing on the proposed Development Plan on May 9, 2016.

e. Deemed Approval is appropriate in this case.

Government Code section 65950(a)(4) requires that a lead agency "shall approve or disapprove" any project that is exempt from CEQA within sixty days. The Boatworks Project EIR was certified on October 5, 2010, prior to approval of the Tentative Map. As such, the Development Plan application requires no further environmental review. Lead agency "inaction will be deemed approval of a development project only if two conditions coincide: (1) the agency fails to take action – i.e., approve or disapprove the project – within §65950's time limit, and (2) the 'public notice required by law has occurred.'" *American Tower Corp. v. City of San Diego*, 763 F.3d 1035, 1045 (2014) (interpreting Gov. Code 65956(b)).

(i) PLN 15-0582 conforms to the City's existing General Plan and Zoning requirements for the Property.

The City's own ordinances allow approval of a Development Plan for the Boatworks Project that is in conformance with the General Plan and the applicable zoning (R2/PD). See AMC §§ 30-4.13(f); Gov. Code § 66473.5

Alameda Planning Department staff has already noted that PLN 15-0582 is consistent with the General Plan. (See staff report for May 9, 2016, hearing.) The staff report also makes clear that PLN 15-0582 is consistent with the applicable zoning. The only objections staff raised with respect to compliance with the zoning are related to the affordability scheme. Staff objected to the size of affordable units and Board members were concerned about locating the affordable units in the multi-family building. Smaller sized affordable units are specifically permitted pursuant to Alameda Municipal Code sections 30-17.8(a)(2). Locating the affordable units in the multi-family building is specifically permitted pursuant to Condition 26 of the Tentative Map and the Density Bonus application PLN 10-0262, which City approved in 2011. The ratios of proposed affordable housing units were also specifically contemplated and approved and incorporated into the Conditions of Approval and the Density Bonus application for PLN 10-0262 pursuant to the Settlement Agreement.

(ii) City has provided adequate notice and hearing to neighboring properties regarding any rights potentially impaired by approval of PLN 15-0582.

City or Developer must have satisfied both statutory and constitutional notice requirements before an application may be deemed approved. It is true that the due process protections rooted in Article I, section 7 of the California Constitution are, at times, broader than those of the Fourteenth Amendment of the United States Constitution. *Am. Tower*, 763 F.3d

1035, 1050 (2014). It is important to note that the City's level of discretion to approve or deny this Development Plan is not unfettered, and as such, Boatworks, itself, has a significant protected property interest that must be protected and balanced against the rights of its neighbors.

City here has satisfied the statutory component of "public notice required by law." See, e.g., *Am. Tower Corp. v. City of San Diego*, 763 F.3d 1035, 1049 (2014); *Mahon v. San Mateo County*, 139 Cal. App. 4th 812; *Palmer v. City of Ojai*, 178 Cal. App. 3d 280 (1986). In this case, there has already been not only notice, but also repeated public hearings regarding any potential impairment of the substantial rights of neighboring property owners.

Neighboring property owners in this case have already enjoyed more process than they would normally be entitled to with respect to approval of this Development Plan. When an adjudicatory land use decision constitutes "a substantial or significant deprivation of the property rights of other landowners, the affected persons are entitled to a reasonable notice and an opportunity to be heard before the approval occurs." *Am. Tower Corp. v. City of San Diego*, 763 F.3d 1035, 1049 (2014) (quoting *Horn v. County of Ventura*, 24 Cal. 3d 605 (1979)). In *Horn*, a neighboring property owner alleged that a proposed subdivision would detrimentally affect his interests by hindering access to his property and generating traffic, parking congestion, and air pollution. *Horn*, 24 Cal. 3d 605, 611. The court found these allegations sufficiently "substantial" to trigger procedural due process protections. *Horn*, 24 Cal. 3d 605, 615.

Approval of Boatworks' PLN 15-0582 does not, however, constitute a substantial or significant deprivation of other landowners' property interests. Boatworks already obtained approval to develop 182 units on the Property with the affordable housing plan approved as part of its prior Density Bonus approval. The minor modifications proposed in PLN 15-0582 work no further significant or substantial deprivation beyond the effects created in 2011, just as they trigger no further environmental review.

Furthermore, all potentially affected landowners already had publicly noticed and meaningful pre-deprivation hearings. *Am. Tower corp. v. City of San Diego*, 763 F. 3d 1035, 1051 (2014). Neighboring property owners have had at least three publicly noticed hearings at which they had the opportunity to either support the Project or object regarding any rights they might have felt were threatened by approval of the Boatworks Project – Planning Board and City Council hearings in 2011 and another Planning Board hearing again this year. The Alameda Municipal Code at section 30-4.13 requires at least one hearing on a Development Plan application. The Planning Department held the most recent such noticed hearing on May 9, 2015.

The notices and hearings provided prior to approval of the Tentative Map and Density Bonus and again prior to deemed approval of the Development Plan proposed as PLN 15-0582 satisfied statutory and constitutional due process requirements. As such, Boatworks will proceed under the assumption that the site plan proposed as PLN 15-0582 has been approved. The modifications to the already-approved Tentative Map are minor and can be considered "approved alterations" thereto.

6. Possibilities for further discussion and modification of the Boatworks Project.

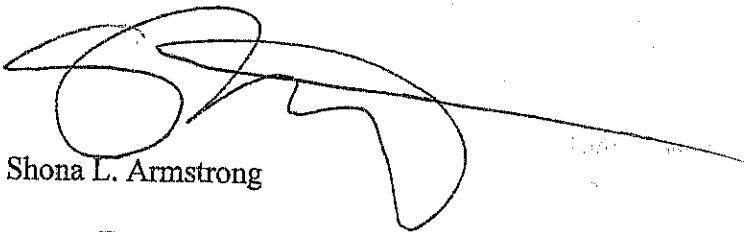
Boatworks is willing to discuss and address the current Planning Board suggestions about the Development Plan further, but it cannot afford to do so in the face of the pending expiration of the Tentative Map. Boatworks must focus its energy on preparation of a Final Map based on the Boatworks Project as it has already been approved. See *Youngblood v. Bd of Supervisors of San Diego County*, 22 Cal.3d 644, 656 (1978).

Section 3.1 of the 2010 Settlement Agreement obliges the City and CIC to "cooperate in good faith with Collins [now Boatworks] in processing the Reduced Density Applications and any other approvals or applications required by the City Parties for the Reduced Density Alternative." See also section 3.1.6. The City and CIC have refused to engage on the preparation of the Owner Participation Agreement, have laid down insurmountable road blocks to achieving an Affordable Housing Agreement, and have put off and delayed numerous hearings and meetings with Boatworks. In addition, Boatworks was held in a kind of limbo between July 2015, when it applied for its most recent Tentative Map extension and September 2015, when the City Council finally approved the extension.

If City grants Boatworks' request for an extension of the Tentative Map, this will give both parties an opportunity to explore more options in a less constrained environment. Otherwise, we hope that any outstanding design issues that continue to trouble the Planning Board can be addressed at the Design Review (subject, of course to constraints imposed by the Housing Accountability Act and Subdivision Map Acts at Government Code sections 65589.5 and 65961).

We look forward to meeting with you soon.

Regards,

A handwritten signature in black ink, appearing to be "Shona L. Armstrong", with a long horizontal line extending to the right.

Shona L. Armstrong

cc: Francis Collins
Nicoley Collins
Phil Banta
Robert McGillis
Greg Harper

Exhibit D

HARPER & ARMSTRONG, LLP

1634 Telegraph Avenue, #3 • Oakland, CA 94612
Ph: (510) 420-8455 • Fax: (510) 858-5953 • shona.armstrong@gmail.com

June 21, 2016

BY E MAIL and also by HAND DELIVERY

Andrew Thomas Planning Services Manager Alameda City Hall 2263 Santa Clara Avenue Alameda, CA 94501 athomas@alamedaca.gov	City Manager Jill Keimach Alameda City Hall 2263 Santa Clara Avenue Alameda, CA 94501 (510) 747-4700 manager@alamedaca.gov
Robert S. Perlmutter and Winter King Shute, Mihaly & Weinberger LLP 396 Hayes Street San Francisco, CA 94102 (415) 552-7272 perlmutt@smwlaw.com	City Attorneys Janet Kern and Farima Faiz Alameda City Hall 2263 Santa Clara Avenue, Rm 280 Alameda, CA 94501 (510) 747-4750 jkern@alamedacityattorney.org
City of Alameda Community Improvement Commission c/o Janet Kern Debbie Pether Alameda City Hall 2263 Santa Clara Avenue, Rm 280 PO Alameda, CA 94501	

Re: Meeting of June 15, 2016

Dear Ladies and Gentlemen:

Thank you for meeting with us last week regarding Boatworks, LLC's, ("Boatworks'") options for moving forward with entitlements pursuant to PLN 10-0262 and the Settlement Agreement ("Settlement Agreement") entered into by the City of Alameda ("the City"), the Community Improvement Commission ("CIC"), and the then-owners of the Property, Francis and Catherine Collins on October 10, 2010.

As Mr. Perlmutter communicated clearly ^{at the meeting} today, the City Parties (CIC and City) are continuing to take the position that was first stated in Janet Kern's e-mail dated March 31, 2016, that the 2010 Settlement Agreement was automatically terminated on the Final Action Date (July

19, 2011) for lack of an agreement regarding the Ownership Participation Agreement, and, as Ms. Kern stated in her email dated June 15, 2016, the City does not consider the meeting held yesterday to have been a meeting intended to satisfy the meet and confer dispute resolution requirements of the Settlement Agreement.

At the meeting, the City Parties proposed that Boatworks:

(1) Give up its rights under the Settlement Agreement (most notably ~ \$4.5 Million in tax credits and a specifically defined number of units and affordable housing ratios);

(2) Give up its rights under the Tentative Map and Density Bonus approved as PLN 10-0262 (i.e. give up ~\$5 Million worth of housing by converting market rate units to affordable housing units and ~\$5 Million of time and effort invested over the past five years); and

(3) Proceed on the unsecured hope that the City Planning Board and Council will approve a new site plan with an as-yet-unknown number of market rate and affordable housing units that will be proposed by Planning Staff at some point between now and the July 11, 2016 Planning Board meeting.

It should not surprise the City Parties' representatives that this proposal, which offers Boatworks nothing at all that it can count on and instead strips Boatworks of existing rights, is very unattractive.

Boatworks has invested five years of time and labor into developing a project based on representations made by the City Parties in the Settlement Agreement, in the conditions of approval to the 2011 Tentative Map, and then in numerous subsequent e-mail and oral exchanges and staff reports following the Final Action Date, all of which indicated that the parties mutually understood that the Settlement Agreement remained in effect. The City Parties' decision to renege on its prior agreements and its imposition of new and changed conditions on the Tentative Map just four months before the Tentative Map expires without recommending an extension of the existing Tentative Map demonstrates breathtakingly blatant bad faith.

Furthermore, the City's steadfast refusal to discuss, let alone sign, an Ownership Participation Agreement as well as its commitment to rescinding Boatworks' rights to the affordable housing numbers, ratios and locations approved as part of the Density Bonus in PLN 10-0262 makes it impossible for Boatworks to satisfy Condition #10 of the Tentative Map. Besides constituting a breach of the Settlement Agreement, this creates a moratorium that will extend the life of the Tentative Map.

Boatworks intends to submit a Final Map based on the approvals the City granted in 2011. The Final Map will contain the same number of market rate and affordable units and the same amount of open space as PLN 10-0262 and will arrange those elements as shown on PLN 15-0582. The Development Plan PLN 15-0582 incorporates only minor changes to the Tentative Map as necessitated or requested by EPA, Army Corps of Engineers, Cal Recycle, California Water Board, BCDC, Alameda Fire, and the City Planning Board members themselves. The City's failure to act on PLN 15-0582 has already rendered those changes "deemed approved." The final map Boatworks submits will be in substantial conformance with

the Tentative Map and approved alterations thereto from any fair professional engineer's point of view.

Toll Brothers has indicated that it is prepared to develop the Project as proposed in PLN 15-0582 if Boatworks can deliver an approved final map. Instead of working with us to bring this project to fruition, the City seems poised to send Boatworks back to square one. It appears that the City's goal since at least March of this year has been to delay and confuse Boatworks until it became impossible for Boatworks to file a Final Map. As I stated repeatedly at the meeting today, we cannot understand what up side this strategy presents to the City.

At any rate, Boatworks submitted a proposed Open Space/Park design for review on May 20, 2016. City staff has thus far declined to comment on the proposal or to schedule it for consideration by the Planning Board at either its June 13 or June 22 meetings. Boatworks requests that the Planning Board consider and approve this design as soon as possible and that City again consider the up side of extending the life of the Tentative Map as opposed to forcing the parties into immediate litigation.

Although City staff has, since March 8, 2016, made it clear that this effort is futile, Boatworks also encloses an executed Affordable Housing Agreement pursuant to its obligations under the Settlement Agreement and the Conditions of Approval.

Regards,

A handwritten signature in black ink, appearing to read 'Shona L. Armstrong', with a long horizontal line extending to the right.

Shona L. Armstrong

cc: Francis Collins
Nicoley Collins
Phil Banta
Robert McGillis
Greg Harper

Exhibit E

HARPER & ARMSTRONG, LLP

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Ph: (510) 420-8455 • Fax: (510) 858-5953 • shona.armstrong@gmail.com

Thursday, July 7, 2016

BY HAND DELIVERY

Mayor Trish Herrera Spencer 2263 Santa Clara Avenue Alameda, CA 94501 (510) 747-4701 tspencer@alamedaca.gov	City Manager Jill Keimach Alameda City Hall 2263 Santa Clara Avenue Alameda, CA 94501 (510) 747-4700 manager@alamedaca.gov
Vice-Mayor Frank Matarrese Alameda City Hall 2263 Santa Clara Avenue Alameda, CA 94501 fmatarrese@alamedaca.gov	City Attorney Janet Kern Alameda City Hall 2263 Santa Clara Avenue, Rm 280 Alameda, CA 94501 (510) 747-4750 jkern@alamedacityattorney.org
Councilmember Tony Daysog Alameda City Hall 2263 Santa Clara Avenue Alameda, CA 94501 tdaysog@alamedaca.gov	Andrew Thomas Planning Services Manager Alameda City Hall 2263 Santa Clara Avenue Alameda, CA 94501 athomas@alamedaca.gov
Councilmember Marilyn Ezzy Ashcraft Alameda City Hall 2263 Santa Clara Avenue Alameda, CA 94501 mezzyashcraft@alamedaca.gov	Winter King Shute, Mihaly & Weinberger LLP 396 Hayes Street San Francisco, CA 94102 (415) 552-7272 wking@smwlaw.com
Councilmember Jim Oddie Alameda City Hall 2263 Santa Clara Avenue Alameda, CA 94501 joddie@alamedaca.gov	City of Alameda Community Improvement Commission c/o Debbie Potter Alameda City Hall 2263 Santa Clara Avenue Alameda, CA 94501
David Burton Planning Board Member 2263 Santa Clara Avenue Alameda, CA 94501	Ronald Curtis Planning Board Member 2263 Santa Clara Avenue Alameda, CA 94501

John Knox White Planning Board Member 2263 Santa Clara Avenue Alameda, CA 94501	Kristoffer Koster Planning Board Member 2263 Santa Clara Avenue Alameda, CA 94501
David Mitchell Planning Board Member 2263 Santa Clara Avenue Alameda, CA 94501	Sandy Sullivan Planning Board Member 2263 Santa Clara Avenue Alameda, CA 94501
Sandy Sullivan Planning Board Member 2263 Santa Clara Avenue Alameda, CA 94501	Lorre Zuppan Planning Board Member 2263 Santa Clara Avenue Alameda, CA 94501

Re: Boatworks Open Space Design Review/Development Plan/Tentative Map Extension

Dear Ladies and Gentlemen:

I represent Boatworks LLC ("Boatworks"), the owner of the Property at 2229-2235 Clement Avenue and the assignee of the October 5, 2010 Settlement Agreement ("Settlement Agreement") by and between Francis and Catherine Collins ("Assignors"), the City Council of the City of Alameda ("City"), and the City of Alameda Community Improvement Commission ("CIC") regarding the residential development planned for the Property, known as the "Boatworks Project."

Boatworks' requests for: (1) Open Space Design Review; (2) Extension of Tentative Map; and (3) Development Plan approval are on the agenda for your meeting scheduled for July 11, 2016. We understand that staff is recommending approval of the Open Space Design and of the Development Plan site plan, but that the staff is recommending denial of the application for extension of time as well as addition of new conditions to the Development Plan. Boatworks urges the Planning Board to approve the Open Space Design and Development Plan without conditions and to approve the extension of the Tentative Map.

Boatworks has reviewed the Staff Report and feels it must correct some of the rampant misrepresentations that it contains. A more detailed rebuttal will follow. At the outset, however, Boatworks also wishes to be sure that the Planning Board members are aware of the following:

1. Settlement Agreement is still binding. Despite the protestations of the Community Development Department and the City Attorney's office (whose opinions do not bind the City or CIC), no party to the Settlement Agreement has yet taken any official action contrary to or declared any termination of the Settlement Agreement, and no party to the Settlement Agreement initiated any dispute resolution procedures until, in response to mounting City obstructionism, Boatworks did so in May 2016. To the contrary, the City and the CIC continued to act and perform in conformance with the Settlement Agreement until this year.

2. Tentative Map Extension is possible. As Boatworks pointed out in its application for an extension of the Tentative Map life (attached hereto as **Exhibit A**), section 30-87.1 of Alameda Municipal Code Article VI (Development Regulation) provides that the City may allow exceptions to any of the regulations in Article VI, including section 30-81.1's restriction to a one-year extension:

The Planning Board may recommend that the City Council authorize conditional exceptions to any of the requirements and regulations set forth in this article unless the requirement or regulation would otherwise require a zoning variance or other zoning approval. Application for any such exception shall be made by a petition of the subdivider, stating fully the grounds of the application and the facts relied upon by the petitioner. Such petition shall be submitted to the Planning Board with the tentative map or the parcel map. In order for the property referred to in the petition to come within the provisions of this subsection, it shall be necessary that the Planning Board find the following facts with respect thereto:

- 1. That there are special circumstances or conditions affecting the property.*
- 2. That the exception is necessary for the preservation and enjoyment of a substantial property right of the petitioner.*
- 3. That the granting of the exception will not be detrimental to the public welfare or injurious to other property in the territory in which the property is situated.*

Furthermore, the validity of Alameda Municipal Code section 30-81.1 is questionable. As the court of appeals decided in *Griffis v. County of Mono*, 163 Cal. App. 3d 414, 424-26 (1985), the maximum extension of a tentative map is governed by the Subdivision Map Act (Government Code sections 66451, 66452.6(c)). Cities (even charter cities) are not entitled to more severely restrict potential extension periods:

To the extent [Alameda Municipal Code section 30-81.1] purport[s] to divest the [City] of authority to grant a tentative map extension or purported to limit the maximum duration of an extension to one year, the ordinance attempted to modify the Map Act without statutory authority and [i]s therefore unlawful and void.

3. Boatworks is NOT applying for a new Density Bonus. As Boatworks made clear at the last Planning Board meeting on May 9, 2016, Boatworks' existing Density Bonus remains valid and Boatworks has withdrawn any portion of its application that purportedly requested a new Density Bonus.

4. Boatworks possesses valuable rights in the existing Tentative Map, which the City now proposes to abrogate.

Existing Tentative Map PLN 12-0262 (along with the associated Density Bonus) does not expire until September 17, 2016. While a vesting tentative map would afford Boatworks additional protections from zoning ordinance changes, the existing tentative map nevertheless does impose conditions that bind both the City and Boatworks. The approving agency may not

impose new conditions on a tentative map. *South Central Coast Regional Commission v. Charles A. Pratt Const. Co., Inc.*, 128 Cal. App. 3d 830, 843 (1982); see also Gov. Code §66474.1. What the planning staff and Planning Board currently propose is that the Planning Board act illegally beyond their jurisdiction to abrogate Boatworks' rights under both an existing Settlement Agreement and an existing Tentative Map. City Planning Staff therefore proposes that the Planning Board rob Boatworks of at least \$15 Million worth of bargained-for, vested rights. In particular, the staff report is misleading when it suggests that there are insurmountable hurdles to preparation of a final map. In fact, it is City staff's lack of cooperation that presents an insurmountable hurdle at this point.

a. BCDC approval is entirely possible and likely. BCDC staff has worked with Boatworks to modify the site plan of the Tentative Map as currently proposed in PLN 15-0582 and generally favors the project as currently laid out. Boatworks anticipates support from BCDC staff for its application following the design review board meeting on Monday, July 11, 2016. Neither PLN 12-0262 nor PLN 15-0582 propose any fill in the Bay and BCDC approval is not a barrier to preparation of a final map based on the site plan of PLN 15-0582.

b. Substantial conformance is not something the Planning Staff decides. It is beyond the City planning staff or board's powers to determine substantial conformance. "Substantial Conformance" is a professional engineering decision (Gov Code §§ 66442, 66450), and the City Planning staff has, in the past, supported urging a finding that a modified map is in substantial conformance with the Tentative Map.

c. Conditions of Approval Specifically Contemplate Modification. Condition 94 of the Tentative Map specifically contemplates modification of the site plan and development of alternatives with respect to waterside improvement/structures and proposed park and park access improvements that may be necessary "due to technical, regulatory, or financial infeasibility."

5. The Subdivision Map Act contemplates modifications between Tentative Map approval and Final Map approval. The differences between the site plan of PLN 15-0582 and the 2011 Tentative Map are exactly the kinds of differences contemplated and allowed by the Subdivision Map Act:

The tentative map process gives the staff and the approving body (usually the planning commission) flexibility in suggesting acceptable changes to the subdivision before it is finally mapped." (Curtin & Merritt, Cal. Subdivision Map Act and the Development Process (Cont.Ed.Bar 2d ed. 2001) Determining Which Map is Required, § 3.1, p. 54.)

Friends of Westhaven & Trinidad v. Cty. of Humboldt, 107 Cal. App. 4th 878, 882 (2003).

6. Planning Staff's proposed project is not financially feasible.

The Planning Staff proposes that Boatworks both increase the number of affordable units and change the square footage of allowable freestanding single-family homes, which would reduce the maximum saleable square footage by approximately 100,000 square feet. The current sale price is estimated at \$450/square foot. The conditions and limitations the Planning Board now seeks to impose on Boatworks therefore proposes to rob Boatworks of at least \$45,000,000.

The Planning Staff proposes that Boatworks both increase the number of affordable units and change the square footage of allowable freestanding single-family homes, which would reduce the maximum saleable square footage by approximately 100,000 square feet. The current sale price is estimated at \$450/square foot. The conditions and limitations the Planning Board now seeks to impose on Boatworks therefore proposes to rob Boatworks of at least \$45,000,000.

7. Boatworks filed a final map on Thursday, July 7, 2016.

Boatworks is working hard to finalize the existing Tentative Map in the face of City staff's intransigent efforts to thwart completion of this project pursuant to the terms of the Settlement Agreement. All parties to the Settlement Agreement in 2010 made valuable compromises, and the City planning staff is now recommending repudiation of that mutually beneficial agreement.

In light of this information, we hope the Planning Board will reconsider the benefits of granting an extension of the existing Tentative Map, as such an extension will allow the City to make a good faith effort to cooperate with Boatworks on completion of the mutually beneficial project contemplated by the 2010 Settlement Agreement.

Regards,

A handwritten signature in black ink, appearing to be "Shona L. Armstrong", written over a horizontal line.

Shona L. Armstrong

cc: Francis Collins
Nicoley Collins

Exhibit A

RECEIVED

MAY 10 2016

PERMIT CENTER

PLANNING PERMIT APPLICATION

Community Development • Planning Division

2263 Santa Clara Ave., Rm. 190

Alameda, CA 94501-4477

alamedaca.gov

510.747.6805 • F: 510.865.4053 • TDD: 510.522.7538

Project Address: 2229-2235 46th Ave., Alameda APN: 071-02900100
071-028900500Property on the Alameda Historical Buildings Study List? ☒ No / Yes - Designation: _____Property subject to a Business/Homeowners Association? ☒ No / Yes - Association Name: _____

Check all applicable permits: (* indicates supplemental forms/materials required)

☐ Design Review*☐ Density Bonus Application*☐ Certificate of Approval*☐ Planned Development*☐ Rezoning☐ Second Unit Application*☐ Sign Permit*☐ Subdivision*☐ Use Permit*☐ Variance*☐ Zoning Compliance Determination☒ Other: Tentative Map Extension

Project Description: (attach additional sheets if necessary)

Please see attached letter dated May 9, 2016, from Shona L.ArmstrongProperty Owner(s): Boatworks, LLCAddress: 6050 Hollis Street City: Emeryville State: CA Zip: 94608

Email: _____ Phone: _____ (mobile): _____

Applicant(s): (if different from owner) Shona Armstrong, AttorneyAddress: 1634 Telegraph Ave #3 City: Oakland State: CA Zip: 94612Email: Shona.armstrong@gmail.com Phone: 510-720-8455 (mobile): 510-508-5017Hazardous Materials: Pursuant to CA Gov't Code Section 56962.5 regarding notifying the City of hazardous waste and/or hazardous substance sites, the project site: ☐ IS / ☒ IS NOT (check one) included on any of the hazardous waste or substances lists consolidated by the State of California. If on a list, provide the following information: 071-028900500 - Former Ciba treatment site 3/29/04Enviro 071-028900500 / 01240036 Reg. ID # 071-028900500 / 01390022 Problem: 071-029000100 - Cleanup completed Date of List: 3/29/04Fee Refunds shall be issued to: ☒ OWNER ☐ APPLICANT ☐ OTHER (provide contact information below)

Name: _____ Address: _____

Phone: _____ Email: _____

Property Owner: I hereby certify under penalty of perjury, that I am the owner of record of the property described herein and that I consent to the action requested herein. Further, I hereby authorize the City of Alameda employees and officers to enter upon the subject property as necessary to inspect the premises and process this application.

X McColley
Property Owner(s) Signature RequiredMay 9, 2016
Date

Property Owner/Applicant: I hereby certify that I have read this application form and that information in this application and all the exhibits are true and correct. I understand that any misstatement or omission of the requested information or of any information subsequently requested may be grounds for rejecting the application, deeming the application incomplete, denying the application, suspending or revoking a permit issued on the basis of this or subsequent representation, or for the seeking of such other and further relief as may seem proper to the City of Alameda. For applications subject to a time and materials charge, I hereby agree to pay the City of Alameda all incurred costs for staff time and materials associated with review and processing of this application, even if the application is withdrawn or not approved. I understand that one or more deposits may be required to cover the cost noted herein at such time as required by the Community Development Director to ensure there are adequate funds to cover anticipated time and material costs. I expressly acknowledge and agree that failure to pay a written invoice for additional funds within 14 days of date of invoice shall constitute the applicant's withdrawal of the application. I further acknowledge that some application fees are non-refundable and payment does not guarantee approval of the application.

X McColley
Owner/Applicant SignatureMay 9, 2016
Date

FOR OFFICE USE ONLY

File #: PLN10-0262 Date Received: 5/10/16 Received By: YBZZoning: R-2-PD GP: MDR / R-2-PD



CITY OF ALAMEDA
2263 SANTA CLARA AVENUE, ROOM 190
ALAMEDA, CA 94501

(510) 747-6800
FAX (510) 865-4053

Entitlement: PLN10-0262

465040	Other	ESA	02/23/2011	\$-349.42
Cashier: EGARCIA				
465042	Cash	ESA	02/23/2011	\$-3,971.00
Cashier: EGARCIA				
465043	Cash	Dowling	03/16/2011	\$-2,780.00
Cashier: EGARCIA				
465044	Cash	Dowling	03/16/2011	\$-1,236.00
Cashier: EGARCIA				
475001	Internal Transfer	TR TO DIRECT COST	06/22/2011	\$-3,843.75
Cashier: EGARCIA				
475002	Internal Transfer	TR FROM DEPOSIT	06/22/2011	\$3,843.75
Cashier: EGARCIA				
475003	Internal Transfer	TR TO DIRECT COST	02/08/2012	\$-2,222.50
Cashier: EGARCIA				
475004	Internal Transfer	TR FROM DEPOSIT	02/08/2012	\$2,222.50
Cashier: EGARCIA				
485007	Internal Transfer	TR TO DIRECT COST	02/05/2013	\$-3,628.75
Cashier: EGARCIA				
485008	Internal Transfer	TR FROM DEPOSIT	02/05/2013	\$3,628.75
Cashier: EGARCIA				
507170	Check	50032 BOATWORKS LLC	05/10/2016	\$3,000.00
Cashier: LBARRENA				
Total Payments:				\$12,798.00
Balance Due:				\$0.00

HARPER & ARMSTRONG, LLP

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Ph: (510) 420-8455 • Fax: (510) 858-5953 • shona.armstrong@gmail.com

May 10, 2016

BY HAND DELIVERY

Andrew Thomas
Planning Services Manager
Alameda City Hall
2263 Santa Clara Avenue
Alameda, CA 94501
athomas@alamedaca.gov
(510) 747-6805

**Re: Boatworks Project – Request for Extension of Up to 24 Months on
Tentative Map #8060.**

Dear Mr. Thomas:

I represent Boatworks, LLC, (“Boatworks”) Owner of the Property at 2229-2235 Clement Avenue in Alameda. On July 19, 2011, Alameda’s City Council approved Tentative Map 8060 and the accompanying Density Bonus (application PLN 10-0262) for a proposed development on the Property (“the Project”). (See City Council Resolution No. 14614.) Since then, there have been a series of statewide blanket extensions to tentative maps that extended the life of the map through the economic downturn.

1. Status of Tentative Map #8060 And Development Plan.

On September 15, 2015, the City Council approved an extension of the Tentative Map to July 19, 2016. As you know, Boatworks, LLC, is currently negotiating a sale of the Boatworks Project and the Property to Toll Brothers. Concurrently, Boatworks is in the process of achieving compliance with the Tentative Map conditions as well as incorporating into the Project changes suggested by Planning Board members, and changes required to satisfy

requirements imposed on the Project by the Alameda fire department, BCDC, and EPA.

Boatworks submitted a Development Plan that City staff deemed complete on March 8, 2016. We are confident that the Development Plan is in substantial conformance with the Tentative Map with the only modifications being changes that the Owner has made at the request of City, Fire Department, BCDC and/or EPA.

The City Planning Department held a study session on Monday, May 10, 2016, to discuss the Development Plan.

2. Reassurance on City Staff Questions Related to Affordable Housing Aspects of Development Plan.

Notably, *there has been no change in the number or ratio of affordable housing units included in the Development Plan as compared to the approved Tentative Map.* Generally, a Development Plan is approved *prior to* filing and approval of a Tentative Map. This case is atypical in that the Development Plan is being processed after approval of both the Tentative Map and the Density Bonus for the Project. But there is no reasonable or legal ground for using the Development Plan as a vehicle for now requiring any change in the number or ratio of affordable housing units or for requiring a new or changed Density Bonus application.

We are thus very hopeful that the sale and ultimate development of the Project as depicted on the Development Plan will proceed smoothly and expeditiously. In particular, we are relying on the following facts:

(1) Conditions of Approval of the Tentative Map permit and in fact require the development to incorporate the affordable housing ratios and numbers as proposed (see, e.g., Condition #10 and the following recital: "WHEREAS the application included a base project of 140 units with thirteen (13) housing units affordable to very low income households and eight (8) units affordable to moderate income households"); and

(2) City has already approved a Density Bonus for the Project that is in conformance with the Development Plan as proposed ("WHEREAS the project is eligible for a density bonus of 30% under California Government Code 65915 and City of Alameda Municipal Code section 30-17"); and

(3) Nobody made any timely challenge to the City's approvals of either the Conditions of Approval or the Density Bonus and so there is no need or basis for the City to go back on these approvals; and

(4) Alameda Municipal Code section 87-1 allows exceptions to map requirements; and

(5) City has already spot zoned (October 2010) the Property to accommodate the plan as currently proposed in order to take advantage of Owner's offer of open space to the City based on the Owner and City's agreement to the specific Conditions of Approval attached to Tentative Map #8060; and

(6) Boatworks submitted a Development Plan application in December 2015. City staff, in a letter dated February 22, 2016, pointed out that the Development Plan needed modification to remove some proposed housing from agreed-upon open space areas. In response, Boatworks promptly submitted a map that included the requested changes, the most recent of which Boatworks submitted on April 9, 2016. Although Boatworks believes the Development Plan is consistent with the Tentative Map in all material aspects and includes only minor changes requested or required by interested agencies, City Staff continues to express hesitation about approval of the Development Plan and is requesting study sessions and additional time to consider the affordable housing aspects of the Development Plan.

(7) Planning staff recently raised new issues. By letter of March 8, 2016, Andrew Thomas raised the issues of re-applying for a density bonus and changing the required inclusionary housing ratios for the first time. Until that date, the inclusionary housing included in the approved Tentative Map 8060 and the already approved Density Bonus Application (PLN 10-0262) were considered adequate and acceptable.

3. Additional Time is Necessary to Resolve These Issues and is Permissible under Alameda's Municipal Code.

The staff report of Thursday, April 28, 2016, makes clear that the Planning staff still has questions about the City's will and ability to approve the Development Plan based mainly on hesitations about affordable housing issues. The parties appear to be otherwise very close to positioning themselves to take the final steps to approve the Project, which will be of great benefit to the City.

In order to allow the Owner and the City time to figure out the best path to a mutually agreeable Project, Owner requests an extension of *up to two years (24 months) on the life of the Tentative Map*. Once the path forward is clear, Boatworks will require time to prepare a final map in conformance with any potential agreements.

Pursuant to Alameda Municipal Code section 30-76.3, any time limit "for reporting and acting on maps may be extended by mutual consent of the City and applicant."

Pursuant to Alameda Municipal Code section 30-81.1(a),

An extension of time, not to exceed an additional twelve (12) months, for filing of the final map may be granted by the City Council providing written application is made by the subdivider prior to the expiration of the approved or conditionally approved tentative map.

Pursuant to Alameda Municipal Code section 87.1, an exception to any regulation in Article VI (Real Estate Subdivision Regulations) is permissible:

Planning Board may recommend that the City Council authorize conditional exceptions to any of the requirements and regulations set forth in this article unless the requirement or regulation would otherwise require a zoning variance or other zoning approval.

The Planning Board may recommend such an exception to any regulation if it can make the following findings:

1. That there are special circumstances or conditions affecting the property.

In this case, the unusual order of events that has affected the course of approval of the Tentative Map constitutes a special circumstance. The City has approved a Tentative Map prior to approval of a Development Plan or a Planned Development Permit. In addition, the City appears to have approved the Tentative Map along with Conditions of Approval that are not (and were not at the time of approval) in accord with the City's own inclusionary housing ordinance. This is an acceptable exception pursuant to AMC § 87-1, and this extremely unusual circumstance affects the parties' rights as described below.

2. That the exception is necessary for the preservation and enjoyment of a substantial property right of the petitioner.


The exception requested by this letter is necessary for the preservation and enjoyment of a substantial property right of the petitioner inasmuch as (among other rights) the petitioner negotiated for and was granted by the City Council a right to develop the Property in accordance with the Tentative Map and its conditions, which right the City now threatens to revoke. In addition, petitioner is in the midst of contracting to sell the Property and the approved Project. Much of the benefit of that contract rides on the success of the approvals now in process.

3. That the granting of the exception will not be detrimental to the public welfare or injurious to other property in the territory in which the property is situated.

The extension of the life of the Project's Tentative Map will be beneficial to the public welfare. It will constitute one more step toward approval of a Project that provides open space, coastal access, affordable housing, a substantial increase in the City's tax base, and development of a property that has, up until now, been sitting unused.

For all the reasons above, Boatworks requests an extension of the life of the existing Tentative Map (No. 8060) and looks forward to a resolution of any outstanding issues.

Regards,



Shona L. Armstrong

cc: Members of Planning Board (hand delivered to members of Planning Board at meeting held evening of May 9, 2016)

Exhibit F

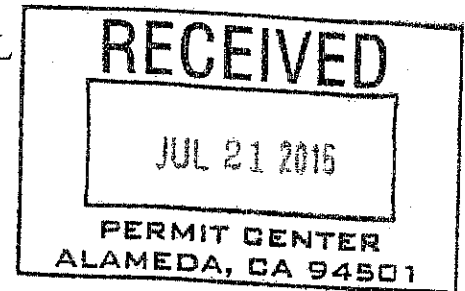
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July 21, 2016

BY HAND DELIVERY and E-MAIL

Janet Kern
City Attorney
Alameda City Hall
2263 Santa Clara Avenue
Alameda, CA 94501
jkern@alamedacityattorney.org



**Re: Boatworks Project – Request for Litigation Stay on Boatworks
Tentative Map (PLN 10-0262)**

Dear Ms. Kern:

I represent Boatworks, LLC, (“Boatworks”) Owner of the Property at 2229-2235 Clement Avenue in Alameda. On July 19, 2011, Alameda’s City Council approved Tentative Map 8060 and the accompanying Density Bonus (application PLN 10-0262) (“Tentative Map”) for a proposed development on the Property (“the Project”). (See City Council Resolution No. 14614.)

The City has agreed that, absent any further action, the current Tentative Map remains valid until September 19, 2016.

On Thursday, July 14, 2016, Boatworks filed a Complaint and Petition for Writ of Mandate demanding that the City and City Council as Successor Agency to the Community Improvement Commission (“CIC”) comply with the parties’ 2010 Settlement Agreement in order to facilitate satisfying the conditions of the Tentative Map. Boatworks served this Complaint on the City Parties on Tuesday, July 19, 2016.

Boatworks now requests that the City grant a litigation stay extending the

LTR SLA to Kern – Application for Litigation Stay (Gov. Code 66463.5) July 21, 2016

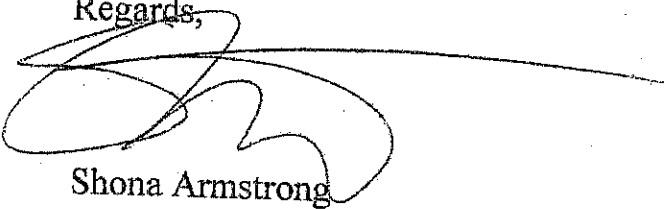
life of the existing Tentative Map pursuant to Government Code section 66463.5(e), which states:

After service of the initial petition or complaint in the lawsuit upon the local agency, the subdivider may apply to the local agency for a stay pursuant to the local agency's adopted procedures. Within 40 days after receiving the application, the local agency shall either stay the time period for up to five years or deny the requested stay.

As we have repeatedly stated, Boatworks wishes to work with the City on completing its final map. The engineers are currently working on completing the map and satisfying the engineering requirements, but the positions the City is currently taking promise to push the development plans Boatworks has worked so hard to develop (along with Boatworks' contract with Toll Brothers to purchase the Property) into the ditch.

Boatworks requests that you place this request on the agenda for a City Council meeting at the earliest opportunity.

Regards,



Shona Armstrong

cc: Nicoley Collins
Managing Member of Boatworks

Winter King
Outside Counsel to City of Alameda

