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NANCY L. BRANDT  
LESLIE KALIM MCHUGH  
BRADLEY HEBERT

November 11, 2020

VIA E-MAIL & U.S. MAIL

Laurel Prevetti, Town Manager  
Town of Los Gatos  
110 E. Main Street  
Los Gatos, CA 95030  
manager@losgatosca.gov

Re: Notice of Government Claims Act claim – Unlawful denial of SummerHill Homes LLC’s application for modification (S-20-012) of North 40 Architecture and Site Approval (S-13-90)

Dear Ms. Prevetti:

This firm, along with the firm of Sheppard, Mullin, Richter & Hampton, represent SummerHill Homes LLC (“Applicant” or “SummerHill”), the applicant for the above-entitled modification (“Application”).

The purpose of this letter is to formally notify the Town that SummerHill is presenting a claim (the “Claim”) to the Town under the Government Claims Act for damages resulting from the unlawful denial by the Town Council of the Application (the “Denial”).

As will be explained more extensively in the Claim, the Denial was wrongful, in that it violated a number of laws, including the Housing Accountability Act, the Housing Element Law, State and Federal Constitutional requirements, and the Federal Civil Rights Act.

As a direct result of the Denial, the Applicant will suffer damages according to proof, but estimated now to be in excess of Five Million Dollars (\$5,000,000). These damages arise primarily

Laurel Prevetti, Town Manager  
November 11, 2020

from three sources: (a) the extra cost of construction of the garage with the unneeded basement level; (b) delays to the Project caused by the extra time that will be needed to construct the garage with the unneeded basement level; and (c) the delay that this extra construction will cause to the ability to complete the Market Hall part of the Project, and thus to comply with Architecture and Site Permit Condition of Approval Number 7, adopted by Council Resolution 2017-045 on August 1, 2017, stating: "The proposed BMP units must be available and/or occupied prior to final occupancy issuance for the 187th market rate unit." Because of this condition, a number of market rate units will not be able to be sold when completed due to the delay the Denial will cause in the completion of the Market Hall part of the Project.

Unfortunately, the Project is in the middle of construction at this time. In order to remain on schedule, I am informed that the Applicant must begin construction of the full garage, including the unneeded basement level, no later than January 4, 2021. There is not time to have this matter adjudicated in a court of law prior to that date. Thus, we are putting the Town on notice, that unless the Town is able to take some action to reverse the Denial and/or ameliorate the effect of Condition of Approval Number 7, these damages will begin to be incurred, and there will be no way to reduce or eliminate the damages as construction continues.

If the damages mentioned above and in the Claim are incurred, SummerHill intends to look to the Town for payment in full, plus attorneys' fees and costs and any other remedy allowed by law.

If you need further information or wish to discuss this matter further, please contact the undersigned.

Very Truly Yours,

BERLINER COHEN



ANDREW L. FABER

Email: [Andy.Faber@berliner.com](mailto:Andy.Faber@berliner.com)

ALF

cc: Mayor Jensen and Councilmembers  
Robert Schultz, Esq., Town Attorney  
Shelly Neis, Town Clerk  
Art Friedman, Esq.  
Robert Freed  
Mike Keaney

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**PROOF OF SERVICE**

I, Donna Olson, declare under penalty of perjury under the laws of the State of California that the following facts are true and correct:

I am a citizen of the United States, over the age of eighteen years, and not a party to the within action. I am an employee of Berliner Cohen, LLP, and my business address is Ten Almaden Boulevard, Eleventh Floor, San Jose, California 95113-2233. On November 11, 2020, I served the following document(s):

**LETTER TO LOS GATOS TOWN MANAGER, LAUREL PREVETTI**

in the following manner:

- by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at San Jose, California addressed as set forth below.
- by overnight mail by placing the document(s) listed above in a sealed overnight mail envelope with postage thereon fully prepaid, addressed as set forth below.
- by personally delivering the document(s) listed above to the person(s) at the address(es) set forth below.
- by e-mail or electronic transmission. Pursuant to Emergency Rule 12 of the CRC I caused the document(s) to be sent to the person(s) at the e-mail address(es) listed below.

***E-MAIL Manager@LosGatosCA.gov***

Laurel Prevetti  
Town Manager  
Town of Los Gatos  
110 East Main Street  
Los Gatos, CA 95030

I am readily familiar with my firm's practice for collection and processing of correspondence for mailing with the United States Postal Service/Express Mail, Federal Express and other overnight mail services, to wit, that correspondence will be deposited with the United States Postal Service/overnight mail service this same day in the ordinary course of business.

Executed on November 11, 2020, at San Jose, California.

  
\_\_\_\_\_  
DONNA OLSON

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# GUIDELINES

## FILING A CLAIM AGAINST TOWN OF LOS GATOS

1. If this claim relates to the death or injury of a person, or damage to personal property or to growing crops, this claim must be presented to the Town of Los Gatos NOT LATER THAN SIX MONTHS after the accrual of the cause of action.
2. If this claim relates only to another cause of action, it must be presented NOT LATER THAN ONE YEAR after its accrual.
3. Complete the form as accurately and completely as possible and attach any invoices, photographs or estimates that support the claim for damages. This will assist the Town in processing the claim promptly. The Town will not return supporting documents or photographs, so it is recommended that you retain copies of everything sent to the Town in conjunction with the claim.
4. Filing a claim with the Town is accomplished by delivering or mailing the original of the claim, by the last day of the applicable time period to:

Clerk Administrator  
Town of Los Gatos  
110 E. Main Street  
Los Gatos, CA 95030

In order to protect your rights under state law, it is recommended that you have the claim delivered in person and obtain an endorsed copy, or mail the claim by certified mail, return receipt requested.

5. The Claim may be amended at any time before the Town takes action. Any amendment shall be considered a part of the original claim for all purposes.
6. These guidelines explain only a few of your rights and obligations under state law regarding claims against public agencies. The complete law is found in the Torts Claim Act (California Government Code section 810, *et. seq.*). Books in the Santa Clara Law Library, located at 360 N. First Street, San Jose may be helpful, or you may consult an attorney of your own choosing.



# TOWN OF LOS GATOS

## CLAIM FOR DAMAGES

Clerk Department

110 E. Main Street, Los Gatos, CA 95030

Type or print all information, adding additional sheets as necessary.

CLAIMANT NAME SummerHill Homes LLC		BIRTH DATE	
CLAIMANT ADDRESS 777 California Avenue	CITY Palo Alto	STATE CA	ZIP CODE 94304
HOME PHONE	WORK PHONE 650-842-2245	DRIVER'S LICENSE STATE AND NUMBER	
CLAIMANT EMAIL		OCCUPATION	
<p>SEND NOTICES REGARDING THIS CLAIM TO: (List name, mailing address, and phone number if different from above.) Arthur Friedman, Esq., Sheppard Mullin Richter Hampton, Four Embarcadero Center, 17th Floor San Francisco, CA 94111, (415) 434-9100, <a href="mailto:afriedman@sheppardmullin.com">afriedman@sheppardmullin.com</a> and Andrew Faber, Esq., Berliner Cohen LLP, Ten Almaden Blvd., 11th Floor, San Jose, CA 95113-2233, (408) 286-5800, <a href="mailto:Andy.Faber@berliner.com">Andy.Faber@berliner.com</a></p>			
DATE AND TIME OF INCIDENT October 20, 2020		LOCATION (Specific address of incident.) Town Council public hearing	
<p>CIRCUMSTANCES Please specify the occurrence, event, act, or omission which you claim caused the injury or damage for which you are submitting this claim.</p> <p>On October 20, 2020, the Town Council unlawfully affirmed the Planning Commission's denial of claimant's application for modification (S-20-012) of North 40 Architecture and Site Approval (S-13-90) to eliminate basement level garage parking attached to the Market Hall building ("Application"). Because the Town Council acted unreasonably in failing to comply with its mandatory duty to approve the Application, the Town is liable for claimant's resulting damages under Government Code section 815.6. Additionally, because the Town violated claimant's rights to substantive and procedural due process, the Town is liable for claimant's resulting damages pursuant to 42 U.S.C. section 1983. See attached claims notice letter dated November 11, 2020 for additional details.</p> <p>If your claim is the result of an act by a Town employee, please specify the employee's name:</p>			
<p>DESCRIPTION OF INJURY, PROPERTY DAMAGE, OR LOSS (If there were no injuries, state "NO INJURIES".)</p> <p>As a proximate result of the Town's unlawful denial of the Application, the Applicant will suffer damages according to proof, but estimated now to be in excess of Five Million Dollars. These damages arise primarily from three sources: (a) the extra cost of construction of the garage with the unneeded basement level; (b) delays to the Project caused by the extra time that will be needed to construct the garage with the unneeded basement level; and (c) the delay that this extra construction will cause to the ability to complete the Market Hall, and thus to comply with Architecture and Site permit condition of approval number 7. See attached claims notice letter dated November 11, 2020 for additional details.</p>			

OTHER INJURED PERSONS (List names and addresses.)

DAMAGES CLAIMED

Items \_\_\_\_\_ \$ \_\_\_\_\_  
\_\_\_\_\_ \$ \_\_\_\_\_  
\_\_\_\_\_ \$ \_\_\_\_\_

Amount claimed as of this date: \$ \_\_\_\_\_

Estimated amount of future costs: \$ \_\_\_\_\_

Total amount claimed: \$ \_\_\_\_\_

Government code Section 910 requires that if the claim is for less than \$10,000, the amount of the claim shall be entered. If the claim is more than \$10,000, no dollar amount need be entered, but the claim must indicate whether the claim would be a \_\_\_ limited or X unlimited civil case.

Basis for computation of amounts claimed (Include copies of bills, invoices, estimates, etc.):

See Description of Injury above and attached claims notice letter dated November 11, 2020.

WITNESSES, HOSPITALS, DOCTORS, ETC. (List names and addresses.)

All persons who attended or observed the October 20, 2020 public hearing before the Town Council, including, without limitation: Mayor Jensen and the Town Council, the Planning Commission, Town Attorney Robert Schultz, the Town's Planning Staff, Town Manager Laurel Prevetti, Michael Keaney, Robert Freed, and Jason Biggs.

**WARNING! IT IS A CRIMINAL OFFENSE TO INTENTIONALLY FILE A FALSE CLAIM (Penal Code Section 72)**

I have read the matters and statements made in the above claim, and I know the same to be true of my own knowledge, except to those matters stated upon information or belief and as to such matters I believe the same to be true. I certify under penalty of perjury that the foregoing is TRUE and CORRECT.

Signed this 10<sup>th</sup> day of November, 2020

Claimant's Signature 

**Jason Biggs**  
**Sr. Vice President and Secretary**

Please submit this claim to Town of Los Gatos, Clerk Department, 110 East Main Street, Los Gatos, CA 95030

Claimant is advised to consult with an attorney concerning any questions regarding rights, duties, or pertaining to the manner or time of submitting a claim.

In compliance with the *Americans with Disabilities Act*, if you need special assistance to complete this form please call (408) 354-6880 or email [Clerk@LosGatosCa.gov](mailto:Clerk@LosGatosCa.gov).

November 11, 2020

File Number: 41WE-324686

**Via – U.S. MAIL and  
E-MAIL Clerk@LosGatosCA.gov**

Shelley Neis  
Town Clerk  
Town of Los Gatos  
110 East Main Street  
Los Gatos, CA 95030

Re: Government Claims Act claim – Unlawful denial of SummerHill Homes LLC’s application for modification (S-20-012) of North 40 Architecture and Site Approval (S-13-90)

Dear Ms. Neis:

This firm along with Berliner Cohen LLP represent SummerHill Homes LLC (“Applicant” or “SummerHill”), the applicant for the above-entitled modification (“Application”). On October 20, 2020, the Town Council unlawfully denied Applicant’s appeal of the Planning Commission’s unlawful denial of the Application. On behalf of the Applicant, we submit a claim pursuant to the Government Claims Act for damages against the Town arising from the Town’s unlawful denial of the Application.

Pursuant to Gov. Code section 910, the following is the required information regarding this claim.

Name and address of Claimant (Gov. Code § 910(a).)	SummerHill Homes LLC Attention: Jason Biggs Senior Vice President and General Counsel  777 California Avenue Palo Alto, CA 94304 Phone (650) 842-2245 Fax (650) 494-1400
Post office address to which the person presenting the claim desires notices to be sent. (Gov. Code § 910(b).)	Arthur Friedman, Esq. Sheppard Mullin Richter Hampton Four Embarcadero Center, 17 <sup>th</sup> Floor San Francisco, CA 94111 (415) 434-9100 afriedman@sheppardmullin.com



	<p>and</p> <p>Andrew Faber, Esq. Berliner Cohen LLP Ten Almaden Blvd., 11<sup>th</sup> Floor San Jose, CA 95113-2233 (408) 286-5800 Andy.Faber@berliner.com</p>
<p>Date, place and other circumstances of the occurrence or transaction which gave rise to the claim asserted. (Gov. Code § 910(c).)</p>	<p>October 20, 2020. The Town Council denied the Applicant's appeal of the Planning Commission's September 28, 2020 denial of the Application, thus confirming the Town's unlawful denial of the Application.</p>
<p>A general description of the indebtedness, obligation, injury, damage or loss incurred so far as it may be known at the time of the presentation of the claim. (Gov. Code § 910(d).)</p>	<p>The Town's review of the Application is subject to the requirements of California's Housing Accountability Act ("HAA"), "by-right" development under the Town's Housing Element, and other applicable land use policies and regulations. The Town therefore may only apply objective standards under the Town's General Plan, the North 40 Specific Plan and the Town's Code in determining whether to grant or deny the Application.</p> <p>The Town Council therefore had a mandatory duty to approve the Application because the Application is fully consistent with all applicable objective standards. Nonetheless, as set forth below, the Town Council knowingly and deliberately violated this mandatory legal duty by disregarding the legal and professional advice of its Town Attorney and Planning Staff in affirming the Planning Commission's denial of the application based on pretextual and legally erroneous claims.</p> <p>As the Town acted unreasonably in violating mandatory legal duties, Applicant may recover all resulting damages under Government Code section 815.6.</p>

	<p>Applicant may additionally recover damages under 42 U.S.C. § 1983 resulting from the Town’s knowing and deliberate violation of Applicant’s right to substantive and procedural due process as guaranteed under the United States and California Constitutions.</p> <p>See also details of Claim below.</p>
<p>The name or names of the public employee or employees causing the injury, damage, or loss, if known. (Gov. Code § 910(e).)</p>	<p>The Town Council. Councilmembers Marico Sayoc, Barbara Spector and Mayor Marcia Jensen.</p>
<p>Amount claimed if less than \$10,000, or identification of whether litigation would be limited or unlimited civil cases. (Gov. Code § 910(f).)</p>	<p>Unlimited. As a proximate result of the Town’s unlawful denial of the Application, the Applicant will suffer damages according to proof as described below, currently estimated to be well in excess of Five Million Dollars (5,000,000)</p>

**FACTUAL BACKGROUND**

On November 14, 2014, SummerHill, Grosvenor USA Limited and Eden Housing, Inc. (“Joint Applicants”) submitted an application to the Town for Architecture and Site (“A&S”) review and Vesting Tentative Map (“VTM”) approvals to develop as Phase 1, 20.7 acres of the 44-acre North 40 Specific Plan area (“Project”). The Project includes 320 (market and senior/affordable) residential units and neighborhood-serving retail stores and restaurants. It also includes a multi-level mixed use Market Hall building with senior/affordable residential units.

Following the Town Council’s denial of the Project on September 1, 2016, Joint Applicants filed a petition for writ of mandate with the Santa Clara County Superior Court to compel the Town to approve the Project pursuant to the mandates of the HAA, the Town’s Housing Element, and the Density Bonus Law (“Petition”). On June 9, 2017, the Court granted the Petition, directing the Town to set aside its Resolution denying the Project. The Court held in part that because the Project is subject to the mandates of the HAA, in the course of reconsideration the Town must make findings regarding the Project’s compliance with applicable, objective general plan and zoning standards and criteria.

On August 1, 2017, the Town Council approved the A & S (S-13-090) and VTM (M-13-014) applications for the Project. Relevant here, the Project includes a Market Hall building with 50 senior/affordable residential units constructed above the Market Hall. As

approved, the Market Hall building has an attached garage with 303 total parking spaces across four garage levels; three above ground with a combined 174 parking spaces, and one basement level containing 129 spaces. Grosvenor originally designed the basement level with the intent to use excess parking for Phase II of North 40. However, Grosvenor is no longer involved with the Project and the Applicant has no need nor interest in constructing excess parking spaces beyond what is required by the Town's Code and the Specific Plan.

In order to reduce the environmental impacts and the costs of the unneeded basement level for the garage, the Applicant submitted its Application to modify its Project approvals to remove the Market Hall building's basement level excess parking. As the Court previously held that the Project falls within the scope of the HAA, the same is true for any applications to modify the Project. Under the HAA, the Town must review the Application for consistency with *objective* general plan, zoning and subdivision standards and criteria in effect at the time the Application was deemed complete. Gov. Code § 65589.5(j)(1). The HAA clarifies the meaning of "objective" as follows:

'Objective' means involving no personal or subjective judgment by a public official and being uniformly verifiable by reference to an external and uniform benchmark or criterion available and knowable by both the development applicant or proponent and the public official.

(Gov. Code § 65589.5(h)(8).)

Section 2.5.8 of the Specific Plan specifies the following parking requirements for the Project.

Parking provided within the Specific Plan Area shall adhere to the standards provided in Division 4 of the Zoning Ordinance.

Number of Off-Street Spaces Required:

a. Non-Residential Use: The number of off-street parking spaces shall be consistent with parking required in Downtown as required within Division 4 of the Zoning Ordinance.

b. Residential Use: Parking provided within the Specific Plan Area shall be as follows:

[Table 2-4:  
Senior/affordable: .5 +.5 guest  
1 br: 1 + .5 guest  
2+ br: 2 + .5 guest]

On April 3, 2018, the Town Council adopted Ordinance 2272, amending Section 29.10.150(b) of the Town Code, which is the section contained in Division 4 of the Zoning Ordinance that is referred to in Specific Plan Section 2.5.8. This change reduced the amount of parking required for restaurants and commercial spaces in Downtown, and thus, because of the

requirement in in the Specific Plan, also in the North 40 Project. Under the Town's revised parking requirements, the Market Hall building requires 62 parking spaces for the Market Hall space, 7 spaces for the proposed bakery, 5 for the community room, and 50 for the Eden residential units, for a total of 124 parking spaces; or 179 fewer spaces than currently required by the Project's approval. Thus, even with the elimination of the 129 parking spaces from the basement level, the Market Hall building would retain 176 parking spaces, which is 52 spaces in excess of the Town's current parking requirements.

The Applicant submitted substantial evidence demonstrating that removal of the underground parking level would have numerous benefits. Construction of the underground parking level would require the off-haul, per the grading plans, of at least 18,200 cubic yards of soil, involving approximately 1,700 truck trips to remove material from the site and 400 inbound truck-loads of concrete. The current design additionally requires three additional months of construction, needlessly delaying completion and occupancy of the senior/affordable housing. Eden Housing additionally submitted evidence that construction of the garage basement would be detrimental to its senior citizen residents by adding unnecessary vehicular traffic. Eden further demonstrated that the requirement for excess parking spaces unnecessarily burdens it with higher property maintenance and upkeep expenses, diverting resources needed for its senior residents. Eden further objected to the substantial and unnecessary delay to the completion of its residential units resulting from construction of the garage basement.

The Planning Commission considered the Application on August 26, September 9, September 23 and September 28, 2020. In response to the Planning Commission's request during its September 9 meeting, Town Attorney Robert Schultz submitted a memorandum on September 18, 2020 clarifying that the HAA applies to the Application, and therefore the Town's review is limited to objective standards. Mr. Schultz advised the Planning Commission as follows:

Since the Decision and Judgment required the Town to consider the Phase 1 Project under the HAA, the HAA would certainly apply to any modifications to the Phase 1 Project. Therefore, in order to deny the Phase 1 Modification Application, the Planning Commission must cite to specific written objective identified Town Standards and Policies and cannot deny the Phase 1 Modification Application for subjective criteria.

Mr. Schultz additionally determined that the Town's Housing Element further constrains the Town's review of the Application to objective standards. He advised the Planning Commission in this regard as follows:

Based upon the Town's Housing Element, the approval of the Phase 1 Project and now this Phase 1 Modification Application are entitled to 'by right' development. This means that pursuant to our Housing Element, the Planning Commission must only apply objective standards in its review, analysis and determination on whether to approve or deny the Phase 1 Modification Application. These are the same legal principles that are set forth under the HAA and are adopted in the Court's Decision and Judgment and restrict the Planning

Commission from using subjective criteria and findings to condition or deny this Phase 1 Modification Application.

On September 28, 2020, the Planning Commission denied the Application based upon various subjective claims and criteria and an erroneous analysis of parking requirements prepared by Commissioner Matthew Hudes that was first disclosed after the close of the public hearing and without an opportunity for the Applicant to review or comment, in violation of Applicant's fundamental right to due process.

On October 1, 2020, Applicant appealed the Planning Commission's decision to the Town Council. Planning Commission Chair Melanie Hanssen and Vice-Chair Kathryn Janoff submitted an 8-page dissenting opinion to the Planning Commission's decision ("Dissent") which included detailed evidence supporting their conclusion that "the Planning Commission motion for denial was based on incorrect and misleading application of Town objective standards as well as confusing and incorrect analysis in the form of spreadsheet tables by the maker of the motion during the meeting after public discussion was closed."

On October 15, 2020, the Town's Planning Staff, which normally would recommend that the Council affirm the Planning Commission's determination, recommended that the Town Council grant Applicant's appeal based on the Planning Commission's failure to comply with governing objective standards as required under the HAA and the Town's Housing Element. Planning Staff's recommendation to the City Council stated as follows:

Staff originally recommended approval of the application to the Planning Commission because the proposal is consistent with the objective standards of the North 40 Specific Plan. As Secretary to the Commission, staff would typically recommend that the Town Council uphold the decision of the Planning Commission and adopt a resolution denying the appeal and denying the application (Attachment 18). However, given the applicability of the HAA and Housing Element Law requirements to rely on objective standards and by-right findings, respectively, staff recommends that the Town Council take the following action:

Adopt a resolution granting the appeal and approving the application with the required Findings and Considerations (Attachment 20, Exhibit A) and recommended Conditions of Approval (Attachment 20, Exhibit B), determining that the Planning Commissions' decision should be reversed or modified, and finding one or more of the following in accordance with Town Code Section 29.20.275:

- a. There was an error or abuse of discretion by the Planning Commission; or
- b. The Planning Commission's decision is not supported by substantial evidence in the record.

On October 19, 2020, the Planning Staff responded to a Council Member's request for an analysis of the Dissent with regards to the interpretation of the Town Code as relates to the Application. Planning Staff informed the Council that it concurs with the Dissent and rejects the Planning Commission's determinations as inconsistent with the Town's current and governing objective parking code requirements.

The Applicant's appeal came before the Town Council on October 20, 2020. During that public hearing, Town Attorney Schulz and the Planning Staff strongly recommended that the Council grant the appeal and approve the Application based on the Town's current and governing objective parking code requirements. Both the Town's Attorney and its Planning Staff reiterated that the Planning Commission's denial of the Application violated governing legal requirements mandating the Town to approve the Application. Unfortunately, the Town Council by a 3-1 vote disregarded the advice of its professional staff and denied Applicant's appeal. The sole basis for the majority's decision is the claim that the parking requirements in existence under the zoning code at the time of the Project's original approval on August 1, 2017 remain in effect. Mayor Jensen and Councilmember Spector announced after the close of the public hearing, and without providing the Applicant an opportunity to respond, that they rejected the legal and professional advice of the Town's Attorney and the Planning Staff based on their own independent "research." However, neither Mayor Jensen nor Councilmember Spector explained their findings or the basis for rejecting the advice of the Town's Attorney and Planning Staff. Councilmember Sayoc likewise joined with Mayor Jensen and Councilmember Spector in denying the appeal, without explanation or stated justification. The Town Council majority's decision, however, is legally erroneous and arbitrary and capricious for several reasons.

First, as there is no dispute that the Project as initially approved was subject to the HAA and by right development under the Town's Housing Element, any application to modify those approvals, which necessarily "opens up" the initial approvals for further consideration and conditions of approval, likewise must be subject to the HAA and the Town's Housing Element. The Town therefore must review the Application for consistency with the objective standards and criteria in effect at the time the Application was deemed complete. Gov. Code § 65589.5(j)(1). The Specific Plan states that the commercial space within Phase 1 shall comply with the Downtown parking requirements contained in the Zoning Ordinance, i.e., in Town Code section 29.10.150(b). There is no dispute that the Application is consistent with the Town's parking requirements under Section 29.10.150(b) at the time the Application was deemed complete and at the time of the Council's denial of the Application.

Second, the Town Council implicitly conceded that the Application is governed by the Town's current objective standards. During the Town Council's October 20 hearing, the Town Council, Town Attorney and Planning Staff repeatedly acknowledged that the Application "opened up" the entire Project, and thus authorized the Town Council to apply new conditions regarding any aspect of Phase 1 if supported by current objective standards, subject to the Applicant's vested rights based on its commencement of construction. Consistent with this view, the Council considered but rejected a motion by Councilman Rennie to grant the Application, but also to add a new requirement that the Applicant replace three market-based residential units with three affordable residential units, in accordance with the Town's current

Below Market Price (“BMP”) standards that were amended subsequent to the Town’s initial approval of the Project.

Third, the Town waived its claim that the Application was not consistent with governing objective standards under the Specific Plan or Town Code by failing to timely notify Applicant of any such alleged inconsistency or nonconformity as required under section 65589.5(j)(2)(A)(ii) of the HAA.

Finally, the Town Council’s Resolution denying the appeal contains no findings that bridge the analytical gap between the raw evidence and ultimate decision, in violation of the legal requirements set forth in *Topanga Assn. for a Scenic Community v. County of Los Angeles*, (1974) 11 Cal. 3d 506, 516. For example, the Town’s Resolution does not address the Town’s compliance with the HAA or its Housing Element, and provides no explanation for the Town Council’s rejection of the legal and professional advice of its Town Attorney and Planning Staff.

As explained in Andrew Faber’s letter of even date herewith to the Town Manager, as a result of Architecture and Site Condition of Approval Number 7, coupled with internal and external loan conditions and equity investor obligations requiring diligent adherence to Project construction schedules, Applicant must commence construction of the Market Hall by no later than January 4, 2021.

Consequently, as a proximate result of the Town’s unlawful denial of the Application, the Applicant will suffer damages according to proof, but estimated now to be in excess of Five Million Dollars (\$5,000,000). These damages arise primarily from three sources: (a) the extra cost of construction of the garage with the unneeded basement level; (b) delays to the Project caused by the extra time that will be needed to construct the garage with the unneeded basement level; and (c) the delay that this extra construction will cause to the ability to complete the Market Hall part of the Project, and thus to comply with A & S Permit Condition of Approval Number 7, adopted by Council Resolution 2017-045 on August 1, 2017, stating: “The proposed BMP units must be available and/or occupied prior to the final occupancy issuance for the 187<sup>th</sup> market rate unit.” Because of this condition, a number of market rate units will not be able to be sold when completed due to the delay the denial of the Application will cause in the completion of the Market Hall part of the Project.

Applicant additionally will seek to recover against the Town all attorneys’ fees and costs incurred to enforce its rights as authorized under the HAA and Code of Civil Procedure section 1021.5, along with any other damages allowed by law.

**APPLICANT'S CLAIMS FOR DAMAGES**

FIRST CAUSE OF ACTION

(Violation of Mandatory Duties  
Government Code § 815.6, the HAA and Housing Element)

The Town denied the Application based on legally erroneous, pretextual and other subjective considerations, in knowing and deliberate disregard of the Town's governing objective parking requirements under the Specific Plan and Town Code. The Town therefore once again violated its mandatory duty to apply only objective standards in reviewing the Project under the HAA and by-right development under the Town's Housing Element. (Gov. Code §§ 65589.5(h)(8) and (j); 65589.6, 65583, Housing Element, (Action Item- HOU-1.7).)

The Applicant may recover all damages resulting from the Town's violation of its mandatory duties under Government Code section 815.6, which states as follows:

Where a public entity is under a mandatory duty imposed by an enactment that is designed to protect against the risk of a particular kind of injury, the public entity is liable for any injury of that kind proximately caused by its failure to discharge the duty unless the public entity establishes that it exercised reasonable diligence to discharge the duty.

Here, the Town cannot satisfy its burden of proving that it exercised "reasonable diligence" to discharge its duty. The Planning Commission and Town Council knowingly and deliberately disregarded the consistent legal and planning advice of its Town Attorney and Planning Staff in denying the Application, in violation of clear mandatory legal duties. As summarized above, the Planning Commission denied the Application based on an erroneous analysis of parking requirements prepared by Commissioner Hudes, first disclosed after the close of the public hearing and without providing the Applicant an opportunity to review or comment, in violation of the Applicant's fundamental right to due process.

The Planning Staff thereafter, which normally would recommend that the Town Council affirm the decision of the Planning Commission, recommended that the Town Council grant the Applicant's appeal on the grounds that the Planning Commission's decision was legally erroneous and unsupported by substantial evidence. The Town Council majority, however, likewise knowingly violated its mandatory legal duty to approve the Application by disregarding the advice of its Town Attorney and Planning Staff. The Town Council affirmed the Planning Commission's denial of the Application in clear violation of the Town's governing objective parking requirement and its mandatory duty under the HAA and Housing Element to apply only objective standards in considering the Application.



SECOND CAUSE OF ACTION

(Violation of Substantive Due Process  
42 U.S.C. § 1983)

The Town's actions additionally violated Applicant's right to substantive due process as guaranteed under the United States and California Constitutions, subjecting the Town to liability for the Applicant's damages under 42 U.S.C. section 1983. "The Due Process clause is intended, in part, to protect the individual against 'the exercise of power without any reasonable justification in the exercise of a legitimate governmental objective.'" (*Lingle v. Chevron*, 54 U.S. 528, 542 (2005)). To state a due process claim, a party must demonstrate the existence of a property interest along with facts showing that the agency's action was arbitrary and capricious. Both elements exist here.

First, the mandatory conditions under the HAA limiting a City's discretion to deny a permit create a reasonable expectation of entitlement sufficient to support a property interest for purposes of a substantive due process claim. (*North Pacifica LLC v. City of Pacifica*, 214 F. Supp. 2d 1053, 1059-1061 (N.D. Cal. 2002.)) Applicant's reasonable expectation of a property interest are even greater than the facts in *North Pacifica* in light of Applicant's "by-right" development under the Town Housing Element, the Court's previous Judgment and Writ of Mandate confirming that the Town may only apply objective standards in reviewing the Project, and because of Applicant's vested rights obtained through substantial on-site and off-site Project construction.

Second, the Town's denial of the Application was arbitrary and capricious in violation of controlling objective legal requirements. Here, the Town's Attorney and Planning Staff specifically advised the Town Council that it must apply the Town's current objective standards in deciding whether to approve or deny the Application. The Town Council therefore knowingly and deliberately violated mandatory legal duties in denying the Application based on clearly pretextual and legally erroneous invented claims. Courts have recognized the following conduct in the context of an agency's denial of land use approvals as supportive of a claim for violation of substantive due process: (1) disregard of professional planning staff advice; (2) pretext; (3) invention of an illegitimate basis for denial. (*Del Monte Dunes at Monterey Ltd. v. City of Monterey*, 920 F.2d 1496 (9<sup>th</sup> Cir. 1990); *Shanks v. Dressel*, 540 F.3d 1082 (9<sup>th</sup> Cir. 2008); *Simi Inv. Co. v. Harris County, Tex.*, 236 F.3d 240 (5<sup>th</sup> Cir. 2000)). As summarized above, each of these factors support Applicant's due process claims here.

THIRD CAUSE OF ACTION

(Violation of Procedural Due Process  
42 U.S.C. § 1983)

The Town's actions additionally violated the Applicant's fundamental right to procedural due process as guaranteed under the United States and California Constitutions. "The base requirement of the Due Process Clause is that a person deprived of property be given an opportunity to be heard 'at a meaningful time and in a meaningful manner.'" (*Armstrong v.*

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*Manzo*, 380 U.S. 545, 552 (1965).) Procedural due process under the California Constitution is much more inclusive and protects a broader range of interests than under the federal constitution, focusing instead on an individual's due process liberty interest to free from arbitrary adjudicative procedures. (*Ryan v. California Interscholastic Federation – San Diego Section* (2001) 94 Cal. App. 4th 1048, 1068). As explained above, both the Planning Commission and the Town Council violated Applicant's fundamental right to procedural due process in first disclosing their basis for denying the Application after the close of public comment period and without first providing the Applicant the opportunity to respond.

## CONCLUSION

Applicant requests that the Town grant this claim and unconditionally agree to compensate Applicant for all resulting damages, including all attorney's fees and costs Applicant incurred to enforce its legal rights as authorized under the HAA and Code of Civil Procedure section 1021.5, along with any other damages allowed by law.

Sincerely,



Arthur J. Friedman  
SHEPPARD, MULLIN, RICHTER & HAMPTON LLP  
SMRH:4821-4373-6272.1



Andrew Faber, Esq.  
BERLINER COHEN LLP

cc: Mayor Jensen and Town Council  
Laurel Prevetti – Town Manager  
Joel Paulson – Community Development Director  
Robert Schultz, Esq. – Town Attorney  
Robert Freed  
Mike Keaney

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**PROOF OF SERVICE**

I, Donna Olson, declare under penalty of perjury under the laws of the State of California that the following facts are true and correct:

I am a citizen of the United States, over the age of eighteen years, and not a party to the within action. I am an employee of Berliner Cohen, LLP, and my business address is Ten Almaden Boulevard, Eleventh Floor, San Jose, California 95113-2233. On November 11, 2020, I served the following document(s):

**PROOF OF CLAIM OF SUMMERHILL HOMES, LLC and  
LETTER TO LOS GATOS TOWN CLERK**

in the following manner:

- by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at San Jose, California addressed as set forth below.
- by overnight mail by placing the document(s) listed above in a sealed overnight mail envelope with postage thereon fully prepaid, addressed as set forth below.
- by personally delivering the document(s) listed above to the person(s) at the address(es) set forth below.
- by e-mail or electronic transmission. Pursuant to Emergency Rule 12 of the CRC I caused the document(s) to be sent to the person(s) at the e-mail address(es) listed below.

***E-MAIL Clerk@LosGatosCA.gov***

Shelley Neis  
Town Clerk  
Town of Los Gatos  
110 East Main Street  
Los Gatos, CA 95030

I am readily familiar with my firm’s practice for collection and processing of correspondence for mailing with the United States Postal Service/Express Mail, Federal Express and other overnight mail services, to wit, that correspondence will be deposited with the United States Postal Service/overnight mail service this same day in the ordinary course of business.

Executed on November 11, 2020, at San Jose, California.

  
\_\_\_\_\_  
DONNA OLSON