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VIA HAND DELIVERY AND UPS OVERNIGHT MAIL

Our File No.: 500003-000001

Benicia City Council  
City of Benicia  
250 East L Street  
Benicia, CA 94510

**Re: Notice of Potential Legal Claims and Foreseeable Damages against the City of Benicia Arising from the City's Refusal to Issue an Demolition Permit for Foundry and Office Buildings (the "Buildings") Located at 670 East H Street, Benicia, CA (the "Property")**

Dear City Council Members:

Please be advised that this firm has been retained as litigation counsel for APS West Coast, Inc. dba Amports, Inc. ("Amports") regarding the above-referenced matter, and specifically the commencement of legal claims and foreseeable damages against the City of Benicia (the "City") regarding the City's refusal, to date, to issue an emergency demolition permit to allow Amports to immediately remove the failing, hazardous and dangerous Buildings located at the Property.

As you know, on October 28, 2016, Amports applied to the City for the emergency demolition permit, and the City's Chief Building Official determined to issue such permit based on the hazardous condition of the Buildings as supported by experts contracted by the City itself. Despite the Chief Building Official's conclusion that the Buildings must be demolished, the City of Benicia has disregarded her detailed findings and thereby disregarded the significant risk to the public and the City's first responders (e.g., fire fighters, police officers and emergency medical technicians) who will respond to the extent that there is an emergency event at the Buildings, something the City's retained experts believe is just a matter of time. The City's disregard for the public's safety, and that of its own first responders, is not only egregious, but is actionable should injury (or death) occur as described below.

### **Evidence of danger**

Upon our review of the relevant safety reports, resolutions, correspondence, and City Council meetings and proceedings, the evidence is overwhelming that the Buildings at the Property constitute an existing, unsafe danger to the public. This point is undisputed by Amports, the City's Chief Building Official, experts retained by the City to evaluate the viability of the Buildings, and admitted even by members of the City Council.<sup>1</sup> It is precisely because of the undisputed safety risks the Buildings present that the Chief Building Officer required Amports to seek a permit to demolish the Buildings.

<sup>1</sup> As Council Member Campbell stated, "I have no argument granting that [the property] is a safety risk. That pretty much anyone would come to that conclusion looking at it." Hearing 4:14:00-4:14:14.



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By way of review, and as referenced in prior correspondence from Amports' land use counsel, Dana Dean, dated April 11, 2017, the California Building Code defines an unsafe structure as follows:

**116.1 Conditions.** Structures or existing equipment that are or hereafter become unsafe, insanitary or deficient because of inadequate means of egress facilities, inadequate light and ventilation, or which constitute a fire hazard, or are otherwise dangerous to human life or the public welfare, or that involve illegal or improper occupancy or inadequate maintenance, shall be deemed an unsafe condition. Unsafe structures shall be taken down and removed or made safe, as the building official deems necessary and as provided for in this section. A vacant structure that is not secured against entry shall be deemed unsafe.

Cal. Build. Code § 116.1. When a historical structure is unsafe, the California Historical Building Code is "applicable to the work necessary to correct the unsafe conditions." Cal. Hist. Build. Code § 8-102.1.5.

The California Building Code defines "dangerous" as follows:

**DANGEROUS.** Any building, structure or portion thereof that meets any of the conditions described below shall be deemed dangerous:

1. The building or structure has collapsed, has partially collapsed, has moved off its foundation or lacks the necessary support of the ground.
2. There exists a significant risk of collapse, detachment or dislodgement of any portion, member, appurtenance or ornamentation of the building or structure under service loads.

Cal. Build. Code § 202.

Further, the California Historical Building Code defines "imminent threat" as follows:

**IMMINENT THREAT.** Any condition within or affecting a qualified historical building or property which, in the opinion of the authority having jurisdiction, would qualify a building or property as dangerous to the extent that the life, health, property or safety of the public, its occupants or those performing necessary repair, stabilization or shoring work are in immediate peril due to conditions affecting the building or property...

Cal. Hist. Build. Code § 8-201.

As the Council knows, according to the reports of inspectors Chris Gale and Fred Cullum, the Buildings are clearly "unsafe" pursuant to California Building Code § 116.1, "dangerous" pursuant to California



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Building Code § 202, and constitute an “imminent threat” pursuant to California Historical Building Code § 8-201. The Gale and Cullum Reports detailed at length the numerous hazardous conditions of the Buildings including, but not limited to, the major structural collapses occurring, the failing of the foundation/soil building interface, the eccentric lateral and gravity loads imposed, concrete degradation, and more. In December 2015 – nearly 21 months ago – Mr. Gale recommended “emergency demolition and safety conditions be implemented immediately” and that “absolutely nobody should be allowed to enter the buildings under any circumstances...[including] firefighters, police and paramedic as these buildings are not safe under any circumstances.” Gale Report, p. 117. Similarly, a year later, Mr. Cullum concluded that although it is regrettable to lose the Buildings, “they are economically impossible to save and, as attractive nuisances, present a hazard to trespassers and first responders. **There is an obligation on the part of the city to protect all who may enter these buildings.** Extending the poor existence of these buildings for an unknown, but short time, cannot justify the risk [to] the people of Benicia.” *Id.* at p. 11 (emphasis added).

Indeed, there is a legal and health/safety obligation on the City to protect all those who may enter the Buildings, either unlawfully as trespassers, the first responders who may be responding to an emergency that occurred on the Property, and others. More specifically, Benicia Municipal Code § 15.04.010, which adopts the California Building Code, requires that “[u]nsafe structures...be taken down and removed” (Cal. Build Code § 116.1). Because the Buildings cannot be made safe or even preserved in their current condition in a manner that would not pose a substantial risk to human life, they must be demolished.

### **Liability of the City of Benicia**

The City of Benicia has been on affirmative notice since at least as early as February 2011 that the Buildings are unsafe structures.<sup>2</sup> At the City’s request, both Mr. Gale in December 2015 and Mr. Cullum in December 2016 inspected the Buildings and concluded they are unsafe, dangerous and an imminent threat and should be immediately demolished as described above and at length in their respective reports.

The Gale and Cullum Reports also expressly recognized what both Amports and the City of Benicia know well – that vandals enter the property without authorization and at significant risk to life or injury. In 2015, Mr. Gale recognized that the Buildings are “Attractive Nuisances” under the code and all reasonable methods of keeping the public out have failed. Gale Report, pps. 115-116. Similarly, Mr. Cullum also identified the Buildings as “attractive nuisances”: “Both buildings are severe attractive nuisances. The internal structures are all in various stages of collapse with a strong likelihood of failing completely while occupied by one or more trespassers, leading to the exposure of first responders to unacceptable levels of risk. The rotten floors in the Shipping Office expose both first responders and trespassers to the

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<sup>2</sup> *Historic Context Statement, City of Benicia*, dated February 2011 (prepared by Page & Turnbull), p. 34.



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possibility of falling into the existing basement." Cullum Report, p. 10. Mr. Cullum's Report also noted that unauthorized entry continues citing signs of human habitation, including a mattress, seating, bedding, a "great deal" of graffiti, and a ladder leading to the second floor of the office to a "sleeping loft." Cullum Report, p. 3. Mr. Cullum further noted that "a newly-placed ladder was found, tied to the structure, to provide access to a sleeping loft on the second floor; that floor has largely failed, but there was still a mattress being used on what little area was left." *Id.*

In an effort to prevent unauthorized entry onto the Property, Amports has undertaken what was described by Mr. Gale in his report as "extraordinary" efforts to secure the property, prevent unauthorized entry and reduce the risk of harm to the public. Gale Report, pps. 115-116. Such efforts have included the installation and on-going maintenance of barbed wire fencing<sup>3</sup> along the parameter of the Property and additional fencing along the entirety of both Buildings, as well as regular security patrols. However, as Mr. Cullum recognized in his Report,

The overall site is very large and difficult to secure. The "Bay Trail" on the Bay side provides easy covert access and the fencing has been cut frequently.

Cullum Report, p. 3. Despite these apparent obstacles, at significant expense, Amports currently fences off the Buildings with barbed razor topped fencing, and has placed security guards at the Property twenty-four (24) hours a day, seven (7) days a week – all in an effort to prevent unauthorized entry to the Buildings. Nevertheless, vandals still enter the Property despite Amports "extraordinary" efforts to keep them out.

Despite knowing full well the legal and health/safety risks the Buildings pose to the public and the fact that vandals continue to enter and/or use the Buildings, the City of Benicia has done nothing to abate the Buildings' known risks and has effectively prevented Amports from eliminating the risk the Buildings pose by preventing demolition to proceed immediately, consistent with the stated recommendations of the City's experts and Chief Building Officer. While Amports hopes that the issue of demolition is resolved in short order to minimize the potential risk to the public, this decision is entirely out of Amports' control and rests exclusively with the City.

Because the City of Benicia is on notice of the risks the Buildings present and because the City of Benicia has prevented Amports from demolishing the Buildings (thereby abating the nuisance), in the unfortunate event that an injury or death occurs on the Property, the City of Benicia will face legal liability for such injury or death. While as of the date of this letter, no individual has suffered injury (or worse) on the

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<sup>3</sup> At one point, Amports installed razor topped wire fencing along H Street, but removed it at the City's insistence after neighbors complained about the view.



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Property, it is not difficult to imagine and/or foresee what could happen if the Buildings are not demolished immediately: injury to person, death, fire, sexual assault, and the list goes on.

It was not long ago that Northern California suffered a tremendous loss of life at a property called Ghost Ship in Oakland. The City Council, like most other Northern Californians, is very familiar with the tragedy at Ghost Ship on December 2, 2016: thirty-six (36) young people who were at Ghost Ship to attend a concert were tragically killed after they became trapped in the converted warehouse after a fire broke out. As the Council knows, litigation from victims' families commenced against the City of Oakland and Alameda County almost immediately after the tragedy and continues today, including claims for alleged failures to comply with mandatory duties imposed by various statutes.

#### ***Injury or Death to the Public***

Like the City of Oakland and Alameda County in the Ghost Ship tragedy, if injury occurs at the Property, the City of Benicia will be liable for damages for such injuries. California Government Code section 815.6 provides,

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 an 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 City of Benicia is under a mandatory duty to protect the public from harm pursuant to various municipal codes and statutes and was well aware of the risks posed by the Buildings but did nothing to abate those risks. The City of Benicia will be liable for, among other things, negligently failing to protect the public, negligently failing to abate an impending peril, negligently failing to warn the public of the dangerous and unsafe conditions, negligently failing to abate a public nuisance, and negligently failing to respond to complaints. The City of Benicia is aware of numerous violations of State and local statutes, ordinances and codes, including but not limited to the California Health and Safety Code, the California Building Code, the California Fire Code and the Benicia Municipal Code, but refuses to allow demolition of the Buildings, at substantial risk to the public. In addition, it is well established from the Reports of Messrs. Gale and Cullum that the Buildings cannot be repaired to abate the hazards they pose and that the only way to abate the risks is by demolition of the Buildings. By refusing to allow Amports to demolish the Buildings, after the recommendation of *two* experts retained by the City and the City's own Chief Building Officer, the City has failed to exercise reasonable diligence to discharge its mandatory duties.

The City's mandatory duties are plentiful and some of those that will be relevant to an analysis should injury occur depend on the type of emergency suffered (whether it be by fire, structural collapse, etc.). However, there are some mandatory duties currently relevant with which the City fails to comply. For



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example, Benicia Municipal Code § 15.04.010, which adopts the California Building Code, requires that “[u]nsafe structures...be taken down and removed or made safe, as the building official deems necessary.” Cal. Build Code § 116.1. Here, the Chief Building Official determined that the Buildings were unsafe, must be taken down and that they could not be made safe even with remediation by Amports. Thus, based on California Building Code Section 116.1 and the Chief Building Official’s recommendation, the City has a mandatory duty to allow demolition of the Buildings.

Similarly, California Health and Safety Code section 17980 provides in relevant part,

Whenever the enforcement agency has inspected or caused to be inspected a building and has determined that the building is a substandard building or a building described in Section 17920.10, the enforcement agency shall commence proceedings to abate the violation by repair, rehabilitation, vacation, or demolition of the building... The owner shall have the choice of repairing or demolishing.

The use of the term “shall” denotes a mandatory duty on the part of the City. In addition, the enforcement agency that inspected the Buildings, here the Chief Building Official (in addition to two experts retained by the City), recommended abatement of the nuisance by immediate demolition and noted that there is no other way to abate the nuisance the Buildings pose. Accordingly, the City has a mandatory duty to abate the nuisance by demolishing the Buildings consistent with the Chief Building Official’s expertise and recommendation.

By no means are the mandatory duties relevant to this inquiry limited to Benicia Municipal Code Section 15.04.010, California Building Code Section 116.1 and California Health and Safety Code Section 17980. Rather, Amports highlights these sections as examples of the mandatory duties the City has that it is currently failing to fulfill. By refusing to perform its mandatory duties, the City not only exposes the public to risk of injury, it also exposes itself to risk of liability.

### ***Injury or Death to First Responders***

If there is an emergency at the Buildings, presumably the upstanding first responders of the City of Benicia will be called to assist and, in order to assist, will likely be required to enter a Building that the City knows is not code compliant, is unsafe, hazardous and at risk of imminent collapse in order to perform their duties. At a minimum, any first responder injured while responding to an emergency at the Property will be entitled to extra compensation from the City pursuant to California Labor Code Section 4553, which provides that “[t]he amount of compensation otherwise recoverable shall be increased one-half, together with costs and expenses not to exceed two hundred fifty dollars (\$250), where the employee is injured by reason of the serious and willful misconduct of...[t]he employer.” An injured first responder may also bring a civil action against the City, alleging that the City’s willful disregard of the known risks of



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the Buildings and its refusal to allow abatement of such risks willfully disregarded the safety of its first responders and falls beyond the boundaries of the compensation bargain. First responders expect that the City will ensure compliance with relevant codes like the Building and Fire Standards and laws to abate hazardous conditions to minimize risks to first responders. The City's refusal to ensure compliance with relevant codes renders the City's actions beyond the boundaries of the compensation bargain and therefore actionable in civil court.

#### ***Cross-Complaint by Amports***

The City of Benicia should not only anticipate lawsuits from injured individuals and/or their families, but also Amports. Should injury (or death) occur on the Property as a result of the City's refusal to allow Amports to demolish the Buildings, and should an injured party file suit against Amports, Amports will vigorously pursue claims for equitable indemnity against the City of Benicia pursuant to Government Code section 900, et seq. As Amports has made clear over the last many months, if not years, Amports seeks to demolish the Buildings to reduce the risks of injury to the people of Benicia. It is the City – and the City alone – that prevents the elimination of the risks posed and bears sole responsibility should someone get injured or killed on the Property.

#### ***Recovery of Costs to Secure the Property***

Setting aside the potential injury to the public that may occur if the Buildings are not demolished, Amports intends to seek from the City the costs it has had to incur since December 23, 2016 (the date the Building Official intended to issue Amports the emergency demolition permit) which, as of the date of this letter, total over \$143,000.00 exclusive of Amports' related legal fees, mediation costs, and ordinary site maintenance expenses. The "extraordinary" lengths Amports has gone to secure the Buildings to prevent unauthorized entry are detailed above. Had the City followed the recommendation of the Chief Building Official and issued a permit for demolition, Amports would have demolished the Buildings immediately upon receipt of the permit. However, the City Council improperly substituted its judgment for that of the Chief Building Official's expertise and has refused to issue such a permit, thereby requiring Amports to continue to secure the Buildings and incur the concomitant costs associated with that security. Because Amports only incurred these concomitant costs as a result of the City's refusal to follow the Chief Building Official's recommendation, and in violation of its mandatory duties as described above, Amports will seek to recover its total costs of security from the City until such time as the demolition permit is issued. See e.g., *Ali v. City of Los Angeles*, 77 Cal. App. 4th 246, 249 (1999) (Court ruled that defendant city had to pay costs assessed against property owner attributable to security measures the city contracted [\$399,000 plus interest] after city improperly denied plaintiff's request to demolish building on his property).



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**Conclusion**

Without question, the City of Benicia is fully aware of the existing and/or foreseeable risks the Buildings pose to the public and Benicia's first responders. Nevertheless, the City Council has, to date, chosen to disregard the recommendations of multiple experts and its own Chief Building Official, substituting in its own judgment in place of these individuals' substantial expertise, thereby allowing the hazardous Buildings to remain standing. The Buildings cannot be salvaged and refusing to permit demolition negligently exposes the public to danger and runs afoul of the City's mandatory duties. The City Council's conduct risks not only public safety, but also significant liability should someone be injured, or worse killed, due to the City's refusal to abate a well-documented health/safety danger. Amports has taken every step it can take to ensure that the people of Benicia are safe. It is high time the City do the same.

Should the City choose not to do so, in the event of injury on the Property, Amports will vigorously pursue all avenues of recovery against the City for its negligence and decisions to date, as likely will every individual injured on the Property.

Sincerely,

**DLA Piper LLP (US)**

A handwritten signature in black ink that reads 'Mark E. McKeen'.

Mark E. McKeen  
Partner

cc: Dana Dean, Esq.