DANA DEAN SBN: 226083
LAW OFFICES OF DANA DEAN
283 East H Street
Benicia, California 94510
Telephone: (707) 747-5206
Facsimile: (707) 747-5209

MARK E. MCKEEN SBN: 130950
DEBORAH E. MCCRIMMON SBN: 229769
DLA PIPER LLP (US)
555 Mission Street, Suite 2400
San Francisco, California 94105-2933
Telephone: (415) 836-2500
Facsimile: (415) 836-2501

Attorneys for Petitioner and Plaintiff,
APS West Coast, Inc. dba Amports

ENDORSED FILED
Clerk of the Superior Court
JAN 03 2018
By G. Ureta
DEPUTY CLERK

ASSIGNED TO
JUDGE Wendy G. Getty
FOR ALL PURPOSES

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SOLANO

UNLIMITED CIVIL JURISDICTION

APS WEST COAST, INC. dba AMPORTS, Petitioner and Plaintiff, v. CITY OF BENICIA, CITY OF BENICIA CITY COUNCIL, SHAWNA BREKKE-READ, in her capacity as COMMUNITY DEVELOPMENT DIRECTOR, RACHEL O'SHEA, in her capacity as CHIEF BUILDING OFFICIAL, ROES 1-100, and DOES 1-100, inclusive, Respondents and Defendants.	Case No. **FCS050113** **PETITION FOR WRIT OF MANDATE AND PROHIBITION and COMPLAINT FOR:** **1. INVERSE CONDEMNATION;** **2. DECLARATORY RELIEF;** **3. TEMPORARY RESTRAINING ORDER; AND** **4. MANDATORY PRELIMINARY AND PERMANENT INJUNCTIONS** (Code of Civil Procedure, §§1085, 1086, 1094.5, 1102, 1103; California Constitution, article I, §19; Code of Civil Procedure, §§526, 527, 1060, 3422, and 3333)

Petitioner and Plaintiff APS West Coast, Inc. dba Amports ("Amports") alleges the following:

THE PARTIES

1. Amports is a corporation that is incorporated under the laws of the State of California.

2. Respondent and Defendant City of Benicia (the "City") is a municipal corporation that is

incorporated under the laws of the State of California.

3. Respondent and Defendant City of Benicia City Council (the "City Council") is an administrative entity of the City of Benicia.

4. Respondent and Defendant Shawna Brekke-Read is the Community Development Director (the "CDD") of the City of Benicia.

5. Respondent and Defendant Rachel O'Shea is the Chief Building Official (the "CBO") of the City of Benicia.

6. Amports is unaware of the true names and capacities of ROES 1-100, inclusive, and therefore sues these respondents by these fictitious names. Amports will amend the petition to allege their true names and capacities when ascertained. Amports is informed and believes and thereon alleges that each of the fictitiously named respondents is in some manner responsible for the injury and damage to Amports alleged in the petition for writ of mandate.

7. In reference to the petition for writ of mandate and prohibition, the City, the City Council, CDD, CBO, and ROES 1-100 are collectively referred to as the "Respondents."

8. Amports is unaware of the true names and capacities of DOES 1-100, inclusive, and therefore sues these defendants by these fictitious names. Amports will amend the petition to allege their true names and capacities when ascertained. Amports is informed and believes and thereon alleges that each of the fictitiously named defendants is in some manner responsible for the injury and damage to Amports alleged in the complaint for inverse condemnation.

9. In reference to the complaint for inverse condemnation, declaratory relief, and provisional relief, the City, the City Council, the CDD, the CBO, and DOES 1-100 are collectively referred to as the "Defendants."

10. The petition for writ of mandate and prohibition is brought pursuant to Code of Civil Procedure section 1085 to review the validity of the Respondents' conduct and compel the City and the CBO to issue an emergency demolition permit to remove unsafe structures located in Benicia, California, as described below.

//

//

VENUE

11. The proper venue for this proceeding is the County of Solano because the City of Benicia is a municipal corporation located within the County of Solano (Code Civ. Proc., §395, subd. (a)), and Shawna Brekke-Read in her capacity as the CDD, and Rachel O'Shea in her capacity as the CBO, are public officers of the City of Benicia (Code Civ. Proc., §393, subd. (b)).

PROCEDURAL BACKGROUND

12. Amports is the owner of the real property commonly known as 670 East H Street, Benicia, California (the "Property"). The legal description of the Property is attached as **Exhibit 1**. Two structures described as local historic resources are located on the Property (the "Structures"). Individually, the Structures are commonly referred to as the "Foundry" and the "Shipping Office."

13. Over the years, the Structures have been damaged by vandalism, fires, the elements, and gradual deterioration.

14. On or about December 2015, a large fire occurred at the Property. Subsequently, the CBO issued a red tag for the Structures prohibiting any entry or occupancy due to the dangerous condition of the Structures. At the time of the red tagging, the CBO informed Amports that it would have to demolish the Structures.

15. The CBO sought an expert opinion to confirm her own evaluation and instruction to Amports. The City hired Chris Gale, through the California Safety Assessment Program, to inspect the Structures. On or about December 17, 2015, Mr. Gale, who in his capacity as a chief building official is an expert, issued his detailed, seventeen-page written report (the "Gale Report"). Attached as **Exhibit 2** is a true and correct copy of the Gale Report.

16. The Gale Report notes at the beginning of the Executive Summary that the "concrete used for these buildings has a life span of 100 years . . . In the case of these buildings, if it [sic] had been built entirely out of concrete it [sic] would likely still be failing at this point in time." (Ex. 2, p. 114.) Mr. Gale was able to scrape away concrete with his foot "demonstrating a compressive concrete strength of less than 200 psi when the design would have been 3000 psi [which indicates that] the concrete has completely degraded back to its base constituents." (*Id.*) According to Mr. Gale, the current strength requirement for the wall system used in the structures is 1000 pounds per square inch,

but the material "inspected on site rarely would resist hand pressures of 60 psi." (*Id.*) Concerning one of the other material components of the structures, Mr. Gale found that "[d]ozens of bricks also crumbled into dust when touched." (*Id.*)

17. Mr. Gale determined that "[t]he current condition of the subject buildings are extremely poor and continual failure is anticipated due to site conditions and lack of appropriate strength of the materials that make up these buildings." (*Id.*) His inspection revealed the following hazardous conditions, which were obvious from the exterior of the structures (Ex. 2, pp. 115-116):

a. Both long walls made of brick and mortar on the large building are missing most of the grout that holds the brick work together as well as the bricks have no structural integrity left in them;

b. There are obvious and significant soil failures happening in the street, the sidewalk and under the building, likely caused by the weight of the structure accelerating soil subsidence;

c. The site has concrete remnants from several structures on site, all concrete viewed had significant degradation based on the highly corrosive environment. All steel on site was severely corroded and most all wood framing was rotted and decayed;

d. The parapet is falling off the entire building and it is my recommendation that the building be removed as the *extraordinary* measures in place to prevent unauthorized entry into the buildings are not sufficient to keep vandals out;

e. Both buildings have current major structural collapses happening. Floors and roofs are collapsed as are walls and many structural members;

f. The foundation/soil building interface has failed and will continue to degrade. This condition will accelerate if any additional loads such as seismic, wind or flood loads are encountered which is a given in this location;

g. The large building has burned at least once recently and the heat of the fires have significantly reduced the strength of the concrete, mortar, steel and wood;

h. The subject building also has some very eccentric lateral and gravity loads imposed on it as the pictures show. Each crack in each area viewed demonstrated building

movements not intended by the designer of the building. This has greatly decreased the ability of the building to even hold itself up;

i. The subject building is of wood roof framing which due to fires, pests and rot is generally less than 30% of its original design values. Under the Historic and Existing Building Codes this is unacceptable;

j. The subject building[s] . . . [have] exceeded [their] design life by over 60 years. . . . It [sic] the case of these buildings the testing required to engineer the buildings back into compliance could not be completed. In other words the materials are so degraded that they cannot be reused.

k. There are bricks falling from every location on the buildings, interior and exterior. Floors and roofs are collapsed and vital structural members have been seriously compromised. Both buildings are "Attractive Nuisances" under the code and all reasonable methods of keeping the public out have failed.

18. Given the above findings, Mr. Gale recommended that "emergency demolition and safety conditions be implemented *immediately*" and "*absolutely nobody should be allowed to enter the buildings under any circumstances* . . . [including] firefighters, police and paramedics as these buildings are not safe under any circumstance." (Ex. 2, p. 117 (emphasis added).)

19. On or about October 28, 2016, soon after receiving a copy of the Gale Report from Respondent CBO and after being specifically told to do so by the CBO, Amports applied to the City pursuant to Benicia Municipal Code, section 17.54.100, subdivision A for the issuance of an emergency demolition permit to remove the failing and hazardous Structures (the "Application"). Attached as **Exhibit 3** is a true and correct copy of the Application.

20. Thereafter, the City hired another expert building inspector, Fred Cullum, through the California Safety Assessment Program, to further inspect the Structures. On or about December 20, 2016, Mr. Cullum, who is a chief building official, issued his detailed, eleven-page written report (the "Cullum Report"). Attached as **Exhibit 4** is a true and correct copy of the Cullum Report.

21. Mr. Cullum determined that since Mr. Gale's inspection, the "buildings continue to fail structurally" and the "failure now, due to recent fires, has markedly increased with more bricks falling

out for the full depth of the wall and much more brick loss above the lintel." (Ex. 4, p. 10.) Consistent with the Gale Report, Mr. Cullum found that complete failure of the Structures to be inevitable. Concerning the Foundry:

> The complete failure of this building may happen from many different causes: failure of the overstressed trusses; additional fire damage to the lintel; final total structural failure of the fire-damaged and rotted lintel; loss of all or a portion of the wood framed long wall, due to fire, termites, rot or simple vandalism; added differential settlement due to added soil moisture, or earthquake. The collapse of the building WILL happen without heroic and hazardous remedial work, and that work would only be a temporary Band-Aid.

(*Id.* (emphasis in original).) Moreover, Mr. Cullum determined that both buildings "lack an adequate foundation to survive a seismic event" and are "severe attractive nuisances" in various stages of collapse:

> 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 possibility of falling into the existing basement. (Ex. 4, p. 10.)

22. Mr. Cullum concluded that, although it is regrettable to lose the Structures, "they are economically impossible to save . . . [and] [e]xtending the poor existence of these buildings for an unknown, but short time, cannot justify the risk to the people of Benicia." (Ex. 4, p. 11.)

23. On December 22, 2016, unbeknownst to Amports, the previous City of Benicia Community Development Director, Christina Ratcliffe, informed the Historic Preservation Review Commission (the "HPRC") that the CBO would issue Amports an emergency demolition permit on December 23, 2016. However, the CBO did not issue the permit on that day.

24. On January 3, 2017, four members of HPRC, in their capacities as individuals, filed an appeal of the CBO's decision to issue an emergency demolition permit (the "Appeal"). On February

22, 2017, the Building Code Board of Appeals[1] heard the Appeal. One board member moved to deny the Appeal and one board member moved to grant the Appeal. This resulted in a denial of the Appeal by the Board. On February 23, 2017, Council Member Tom Campbell requested, pursuant to Benicia Municipal Code ("BMC"), section 1.44, that the City Council review the outcome of the hearing (the "Request for Review"). However, no one filed an appeal of the Board's denial. Attached as **Exhibit 5** is a true and correct copy of the Request for Review. The City Council scheduled the Review for March 28, 2017.

25. On March 6, 2017, at the City's suggestion, Amports retained a structural engineering firm to conduct an on-site field investigation of the Structures. The structural engineering firm, Owen O'Neil Associates, subsequently prepared a detailed, twenty-four-page written report (the "O'Neil Report"). Attached as **Exhibit 6** is a true and correct copy of the O'Neil Report.

26. The purpose of the on-site field investigation was to "evaluate strength capacities and render opinions concerning structural safety." Owen O'Neil Associates analyzed the Structures using life safety performance standards and found that the Foundry failed all life safety performance standards and the Shipping Office failed most life safety performance standards. The engineering firm found that "ASCE-41 Tier 1 Analysis have shown life threatening instabilities for both buildings," and that the Gale Report and Cullum Report "have convincingly shown that both buildings are hazardous and threaten public safety." As a result, Owen O'Neil and Associates recommended that "both structures be demolished immediately." The O'Neil report was provided to the City Council and incorporated into the administrative record for the March 28, 2017 City Council hearing. (Ex. 6, p. 2.)

PROCEEDINGS BEFORE THE CITY COUNCIL

27. On March 28, 2017, the City Council conducted a hearing to review the outcome of the February 22, 2017 Building Code Board of Appeals hearing, which resulted in the denial of the Appeal (the "March 28th Hearing"). Prior to the March 28th Hearing, the City Council was provided the Gale Report, Cullum Report, O'Neil Report, other evidence, legal arguments, and public comments. Prior to

---

[1] The Benicia Municipal Code refers to the administrative entity as the "Building Board of Appeals." (Benicia Mun. Code, § 2.96.) However, the Board refers to itself as the "Building Board of Appeals" and "Building Board Code of Appeals." (http://www.ci.benicia.ca.us/index.asp?SEC=BB6D42FE-B618-4F27-8924-C0F68F1DFBD2&Type=B_BASIC.)

the March 28th Hearing, Amports filed and served the City Council and the City of Benicia City Attorney with a request to disqualify Mayor Elizabeth Patterson and City Council Member Tom Campbell due to bias. The City Council did not decide the matter of disqualification and proceeded forward with the March 28th Hearing.

28. At the March 28th Hearing, the CBO again recommended issuance of an emergency demolition permit to Amports for the immediate removal of the Structures. Three City Council Members, including Mayor Patterson and Council Member Campbell, voted to overturn the CBO's decision to issue Amports an emergency demolition permit, and two City Council Members voted against overturning the CBO's decision.

29. On April 11, 2017, Amports filed an application for rehearing of the City Council's 3-2 decision overturning the CBO's decision to issue an emergency demolition permit to Amports (the "Rehearing Application").

30. On April 18, 2017, the City Council adopted Resolution 17-58 ("Resolution"). The Resolution overturned the CBO's decision to issue an emergency demolition permit to Amports for the removal of the Structures based on the following findings:

a. Notwithstanding the evidence demonstrating that the Structures are in a severe state of deterioration, actions may be taken to stabilize the buildings which will mitigate the potential of imminent danger of collapse;

b. Amports failed to properly secure the Property, which has contributed to the poor condition of the Structures; and

c. Amports has failed to maintain the Structures pursuant to Benicia Municipal Code, section 17.54.120.

31. Through the Resolution, the City Council directed staff to require Amports to undertake actions to secure the Structures and stabilize them pursuant to the Secretary of the Interior's Standards for the Treatment of Historic Properties. Attached as **Exhibit 7** is a true and correct copy of Resolution 17-58.

32. On April 18, 2017, the City Council also adopted Resolution 17-50, which approved the amendment of its contract with 4LEAF, Inc., whose building inspectors Mr. Cullum and Mr. Gale

recommended the immediate demolition of the Structures, to increase the contract amount $33,000 for the fiscal year 2016/2017. Resolution 17-50 states in part that "4LEAF, Inc. has demonstrated the expertise necessary to provide the required services for the [Building Department] division." Under its contract, 4LEAF, Inc. provides services to the City which include building inspection services like those conducted by Mr. Cullum and Mr. Gale. Attached as **Exhibit 8** is a true and correct copy of Resolution 17-50.

33. On September 19, 2017, the City Council granted Amports' Rehearing Application, limited the issues subject to rehearing, and scheduled the rehearing for October 17, 2017 (the "Rehearing"). The City Council limited the Rehearing issues to:

a. The City Council must determine whether Mayor Patterson and Council Member Campbell are biased against Amports;

b. Whether the City Council acquired information outside the record and used it in its decision-making process; and

c. Whether the City Council relied on inadmissible hearsay in making its decision.

34. The agenda for the September 19, 2017 City Council meeting included Amports' legal counsel's written notice of potential legal claims and foreseeable damages against the City arising from the City's refusal to issue Amports an emergency demolition permit to remove the Structures. Attached as **Exhibit 9** is a true and correct copy of Mark E. McKeen's September 5, 2017 letter.

35. Pursuant to BMC, section 1.44.050, the City Council was required to schedule the Rehearing "for the next regular meeting which allows sufficient time for the giving of notice as required by BMC 1.44.090." (BMC, §1.44.050, subd. D.)

36. On or about October 5, 2017, the then-Interim CDD, Shawna Brekke-Read, sent Amports' legal counsel a letter requesting that Amports permit the City access to the Property so it could prepare a Historic Structures Report and a Security and Risk Assessment Report (the "Additional Requested Reports"), and stating that Amports would be responsible for the costs of the Additional Requested Reports because they were necessary to assist the "City in making an environmental determination per the California Environmental Quality Act ("CEQA") associated with your client's request for a demolition permit." Attached as **Exhibit 10** is a true and correct copy of the October 5,

2017 Brekke-Read letter.

37. On October 17, 2017, the City's staff informed Amports that the City failed to give proper notice of the Rehearing to the public. On October 17, 2017, the City Council, over Amports' objection, indefinitely postponed the Rehearing so it could hire contractors to prepare the Additional Requested Reports. Through legal counsel, Amports informed the City Council that the City did not have permission to enter the Property. As a result of the City's alleged failure to provide notice of the Rehearing, the City Council did not conduct the Rehearing within the time required by BMC, section 1.44.050, subdivision D.

38. On or about December 11, 2017, Amports' legal counsel received another letter from Ms. Brekke-Read requesting access to the Property to inspect the Structures for the purpose of preparing the Additional Requested Reports. Attached as **Exhibit 11** is a true and correct copy of the December 7, 2017 Brekke-Read letter. In the letter, the CDD stated two potential courses of action the City will take if not granted permission to enter the Property: "(1) prepare and file pleadings to seek/secure a court-ordered administrative inspection warrant to enable the site visit needed to prepare an [Historic Structures Report]; or (2) prepare for and conduct the rehearing without the information requested by the City Council." (Ex. 11, p. 1.) The CDD further stated that unless the City is granted permission to enter the Property to prepare the Additional Requested Reports she is inclined to recommend to the City Council that it again deny Amports' application for an emergency demolition permit. (*Id.* at p. 2.)

39. As of the filing of this petition, the City Council has not conducted the Rehearing, nor has officially scheduled any date for the Rehearing.

I. ARGUMENT

A. Respondent City Council Lacked Jurisdiction to Review the Building Code Board of Appeals Hearing

40. On February 23, 2017, the day following the Building Code Board of Appeals hearing, Council Member Tom Campbell requested that the City Council review the outcome of the hearing. Council Member Campbell made his request pursuant to BMC, section 1.44.

41. BMC, section 1.44.030 states:

Within the time limits set forth in BMC 1.44.060, the city council or any council member may

request that a decision, *pertaining to BMC Title 17*, of any city employee, committee, or commission be reviewed by filing an application with the city clerk stating the reasons for the requested review. Said review will be conducted according to the procedures specified in BMC 1.44.040 and 1.44.100. The person or body to hear the review will be designated in the application by the person or body seeking such review and shall be as specified in BMC 1.44.100, unless the council as a whole specifies a higher level of review in the first instance. (BMC, §1.443.030 (emphasis added).)

42. The Request for Review sought to review a matter that does not pertain to BMC, Title 17, which is the City's zoning ordinance. Amports' Application concerned the California Building Code, and no issue concerning zoning was addressed or raised in the Application or adjudicated by the Building Code Board of Appeals, which lacks jurisdiction to adjudicate zoning issues.[2] Therefore, the City Council exceeded its authority, violated the municipal code, and lacked jurisdiction to review the outcome of the Building Code Board of Appeals hearing. Furthermore, no one appealed (timely or otherwise) the outcome of the February 22, 2017 Building Code Board of Appeals hearing, so the CBO's decision to issue an emergency demolition permit to Amports must stand. (BMC, §1.44.060, subd. A ("All applications for appeals, rehearings, and reviews must be filed, in writing, during regular business hours of 8:30 a.m. to 5:00 p.m., Monday through Friday, except holidays, and within 10 business days from the date of the final decision subject to appeal, rehearing or review.").)

B. Respondent CDD Is Requiring Entry onto Amports' Property Without Consent or Probable Cause

43. On September 19, 2017, the City Council scheduling of the Rehearing for October 17, 2017 expressly limited the Rehearing issues to:

---

[2] Pursuant to BMC, section 2.96.020, "Each member of the board shall be a qualified elector of the city and shall have the *experience and training to judge matters pertaining to building construction*." (Emphasis added.) BMC, section 2.96.070 states the powers and duties of the Building Code Board of Appeals: "*The primary duty of the building board of appeals is to hear appeals regarding the Uniform [Building] Code or California [Building] Code*. In addition to this duty and any duties, rights and powers imposed by state law and the Uniform or California Codes related to building construction or safety, the board shall perform the duties and has the rights, powers and privileges provided by ordinance or resolution of the city council." (Emphasis added.) There is no ordinance or resolution that expands the Building Code Board of Appeals' powers and duties to zoning issues.

a. The City Council must determine whether Mayor Patterson and Council Member Campbell are biased against Amports;

b. Whether the City Council acquired information outside the record and used it in its decision-making process; and

c. Whether the City Council relied on inadmissible hearsay in making its decision.

44. Pursuant to BMC, section 1.44.050, the City Council was required to schedule the Rehearing "for the next regular meeting which allows sufficient time for the giving of notice as required by BMC 1.44.090." (BMC, §1.44.050, subd. D.)

45. On or about October 5, 2017, the CDD sent Amports' legal counsel a letter requesting that Amports permit the City access to the Property so it could prepare the Additional Requested Reports, and stating that Amports would be responsible for the costs of the Additional Requested Reports because they were necessary to assist the "City in making an environmental determination per the California Environmental Quality Act ("CEQA") associated with your client's request for a demolition permit."

46. However, the issues potentially implicated by the Additional Requested Reports are not in any way relevant to the issues approved by the City Council for the Rehearing.

47. On October 17, 2017, the City's staff informed Amports that the City failed to give proper notice of the Rehearing, and thus the City Council would have to open and then continue the Rehearing. As a result of the City failing to provide notice of the Rehearing, the City Council did not conduct the Rehearing within the time period required by BMC, section 1.44.050, subdivision D.

48. On October 17, 2017, the City Council, over Amports' objection, indefinitely postponed the Rehearing so it could hire contractors to prepare the Additional Requested Reports. Amports informed the City Council that the City did not have permission to enter the Property.

49. On or about December 11, 2017, Amports' legal counsel received another letter from the CDD demanding access to the Property to inspect the Structures for the purpose of preparing the Additional Requested Reports. (Ex. 11.) In the letter, the CDD states two potential courses of action the City will take if not granted permission to enter the Property: "(1) prepare and file pleadings to seek/secure a court-ordered administrative inspection warrant to enable the site visit needed to prepare

an [Historic Structures Report]; or (2) prepare for and conduct the rehearing without the information requested by the City Council." (Ex. 11, p. 1.) The CDD stated that unless the City is granted permission to enter the Property to prepare the Additional Requested Reports she is inclined to recommend to the City Council that it again deny Amports' application for an emergency demolition permit. (*Id.* at p. 2.)

50. Because the Additional Requested Reports are not in any way relevant to the issues approved by the City Council for the Rehearing and would be unnecessarily duplicative concerning the safety of the Structures, Respondent's entry onto the Property would be illegal. Under these circumstances, the City's entry onto the Property would be a violation of Amports' Fourth Amendment right to be free from unreasonable searches. (*Gleaves v. Waters* (1985) 175 Cal.App.3d 413, 418 ("Entries onto private property by administrative functionaries of the government, like searches pursuant to a criminal investigation, are governed by the warrant requirement of the Fourth Amendment.").)

C. The City Council Committed a Prejudicial Abuse of Discretion by Not Following the Law

1. The City Council Is Bound by Its Own Laws

51. BMC, section 17.54.100 authorizes the issuance of a permit to demolish a historic structure, without design review, when the structure is unsafe and an emergency exists:

> Prior approval of the community development director or the historic preservation review commission is not required for permit applications of an emergency nature to rehabilitate an unsafe building or to demolish the structure for the same reasons.

(BMC, §17.54.100, subd. A.)

52. The City's Arsenal Historic Conservation Plan also exempts the issuance of a permit of an emergency nature to demolish an unsafe structure:

> Exceptions to the design review requirement may be granted for permit applications of an emergency nature to demolish a structure which has been deemed unsafe by the Building Division, subject to review, if required, by the State Office of Historic Preservation.

(Arsenal Historic Conservation Plan, p. 22.)

53. The City has informed Amports and Amports believes that the City attempted to contact the State Office of Historic Preservation ("OHP") regarding Amports' Application, but received no response from the OHP. Regardless, while a local agency such as the City may apply to the OHP for a determination as to whether a structure on any local public register of historic places shall be demolished, the City is not required to seek such determination with the OHP if such structure "presents an imminent threat to the public of bodily harm or of damage to adjacent property." (Pub. Res. Code, §5028.)

54. The BMC does not define "emergency," but Public Resources Code, section 21060.3 does as follows:

> "Emergency" means a sudden, unexpected occurrence, involving a clear and imminent danger, demanding immediate action to prevent or mitigate loss of, or damage to, life, health, property, or essential public services. "Emergency" includes such occurrences as fire, flood, earthquake, or other soil or geologic movements, as well as such occurrences as riot, accident, or sabotage.

55. The BMC incorporates the California Building Code and California Historical Building Code, which it expressly adopted in BMC, sections 15.04.010 (adopting California Building Code, 2013 edition) and 15.21.010 (adopting California Historical Building Code, 2013 edition). To determine whether a historical structure is unsafe, the California Historical Building Code relies on the "regulations that govern the design and construction or alteration of nonhistorical buildings and properties within the jurisdiction of the enforcing agency" to determine whether a structure is "unsafe." (Cal. Hist. Build. Code, §8-210, Regular Code; *see* §8-102.1.5, Unsafe buildings or properties (invoking "regular code" of enforcing agency).) The California Building Code defines an "unsafe condition" 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 (italics emphasis added).)

56. 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 (emphasis in original).)

57. According to the Gale Report and Cullum Report, the Structures at issue are "unsafe" pursuant to California Building Code, section 116.1 and "dangerous" pursuant to California Building Code, section 202.

58. After reviewing the Gale Report and Cullum Report, the CBO confirmed her original determination that the state of the Structures represented an emergency. Specifically, the CBO determined that the Structures were in imminent danger of collapse. (Attached as **Exhibit 12** is a true and correct copy of the February 14, 2017 staff report Chief Building Official Rachel O'Shea submitted to the Benicia Building Code Board of Appeals.)

59. Pursuant to California Building Code, section 116.1, the CBO properly exercised her discretion to authorize the removal of the Structures by deciding to grant the Application.

60. By the March 28th Hearing, the City Council had additional, supporting evidence of the unsafe and dangerous condition of the Structures. According to the O'Neil Report, which was considered by the City Council at the March 28th Hearing, "ASCE-41 Tier 1 Analysis have shown severe life threatening instabilities for both buildings." (Ex. 6, p. 2.)

61. At the March 28th Hearing, the City Council admitted that the Structures are a safety risk, and those who took the Appeal admitted that the Gale Report and Cullum Report "clearly indicate there was [sic] a severe danger on the site." (March 28th Hearing, 2:37:28-2:37:36.)

62. Throughout the March 28th Hearing, the City Council acknowledged the threat to life posed by the Structures, and the Resolution requires that Amports "immediately undertake actions to stabilize the buildings," thus acknowledging the clear and imminent danger and emergency nature of the situation. (Ex. 7, p. 3.)

63. The evidence presented at the March 28th Hearing demonstrated that the Structures represent a clear and imminent danger to loss of, or damage to, life or health, and no evidence was presented to the contrary.

64. The City Council, having determined that the Structures are unsafe and dangerous, thus acknowledging the propriety of the CBO's finding that the Structures are unsafe and dangerous, had a duty to follow the California Building Code and California Historical Building Code and approve the CBO's exercise of discretion to grant the Application and permit removal of the Structures as authorized by California Building Code, section 116.1. Simply stated, the California Building Code does not permit the City Council to substitute its judgment for that of the expertise and discretion of the CBO, and thus the City Council abused its discretion by not following the law.

D. The City Council Committed a Prejudicial Abuse of Discretion Because Its Findings Are Not Supported by the Evidence

65. The City Council's findings that the Structures are not in imminent danger of collapse and no emergency exists are not supported by the evidence presented at the March 28th Hearing.

66. The evidence presented at the March 28th Hearing demonstrates that the Structures are:

a. in varying states of collapse;

b. insanitary;

c. deficient because of inadequate means of egress facilities;

d. constitute a fire hazard;

e. vulnerable to illegal or improper occupancy; and

f. dangerous to human life or the public welfare.

67. The evidence presented at the March 28th Hearing demonstrates that the Structures meet the following conditions:

a. there is an imminent danger of collapse; and

b. there is an imminent danger of detachment or dislodgment of portions, members, appurtenances or ornamentation of the Structures under service loads.

68. The evidence presented at the March 28th Hearing demonstrates that the Structures are unsafe and dangerous.

69. The evidence presented at the March 28th Hearing demonstrates that an emergency exists, and no evidence was presented to the contrary.

70. The record demonstrates that the CBO's decision to grant Amports' Application is substantially supported by the evidence.

71. The City has ordered emergency personnel not to enter the Structures due to the danger they represent.

72. The City Council's finding that Amports has failed to properly secure the Structures is not supported by the evidence presented at the March 28th Hearing, and the issue is not relevant to the consideration of Amports' Application. The evidence presented at the March 28th Hearing demonstrates that Amports made appropriate, escalating attempts to secure the Property from trespassers and vandals.

73. The City Council's finding that Amports has failed to maintain the Structure pursuant to BMC, section 17.54.120 is not supported by the evidence presented at the March 28th Hearing and it is not relevant to the consideration of Amports' Application. However, according to the evidence presented at the March 28th Hearing, no level of maintenance could have ensured "the continued availability of the structure and premises for a lawfully permitted use" in part because the materials constituting the Structures have "exceeded [their] design life by over 60 years," and in some cases degraded to their base constituents. (Ex. 2, pp. 116, 117; Ex. 2 and Ex. 4 generally.) The Structures will fail and cannot be stabilized. (Ex. 2 and Ex. 4 generally.) Any remedial work would be "hazardous" and "only be a temporary Band-Aid." (Ex. 4, p. 10.) Due to the current condition of the Structures, they cannot be used for any lawful purpose and, therefore, are not subject to BMC, section 17.54.120's maintenance requirement.

//

//

E. The City Council Committed a Prejudicial Abuse of Discretion Because Its Decision Is Not Supported by the Findings

74. The City Council's decision to overturn the CBO's decision to grant the Application is not supported by its findings, including the findings that the Structures are:

a. in a severe state of deterioration;

b. vulnerable to trespass, illegal occupancy, and vandalism;

c. a risk to the life of anyone entering the Structures, including first responders; and

d. in need of immediate stabilization to mitigate the potential of imminent danger of collapse.

F. The City Council Denied Amports a Fair Hearing

1. The City Council's Request for Review Violated Amports' Right to Due Process of Law

75. BMC, section 1.44.030 requires any request for review to state the reasons for the request:

> Within the time limits set forth in BMC 1.44.060, the city council or any council member may request that a decision, pertaining to BMC Title 17, of any city employee, committee, or commission be reviewed by filing an application with the city clerk *stating the reasons for the requested review*. Said review will be conducted according to the procedures specified in BMC 1.44.040 and 1.44.100. The person or body to hear the review will be designated in the application by the person or body seeking such review and shall be as specified in BMC 1.44.100, unless the council as a whole specifies a higher level of review in the first instance.

(BMC, §1.443.030 (emphasis added).)

76. Council Member Campbell's Request for Review never stated a substantive reason for the Review, which is required by BMC, section 1.44.030. As a result, Amports was not given notice to address with specificity the maintenance history of the Structures, which was the primary factor upon which the 3-2 majority of the City Council based its decision. The City Council's lack of notice prejudiced Amports and deprived Amports of due process under the law.

//

2. The City Council Based Its Decision on Irrelevant Issues

77. As detailed above, the proper scope of review for the March 28th Hearing was whether an emergency existed and, if so, whether the CBO's decision was consistent with the California Building Code.

78. As further detailed above, the City Council considered irrelevant issues, relied on irrelevant opinions, and considered inadmissible statements in making its decision and passing the Resolution. These issues include: the alleged neglect of the maintenance of the Structures; the alleged insufficient securing of the Structures; the financial means available to Amports to stabilize or restore the Structures; and speculation on how Amports may develop the Property after removal of the Structures, despite evidence to the contrary.

79. None of these issues are permissible factors for the determination, pursuant to BMC, section 17.54.100, of whether the City Council should have granted Amports' Application.

3. Amports Was Denied an Unbiased Tribunal

80. On March 27, 2017, pursuant to BMC, section 4.20.040, Amports served the City Attorney for the City of Benicia and City Council with a request that Mayor Elizabeth Patterson and Council Member Tom Campbell be disqualified from the March 28th Hearing and taking any part in the review of the Building Code Board of Appeals February 22, 2017 hearing and any review of Amports' Application due to bias and ethical violations. BMC, section 4.20.040 requires the City Attorney to make "a determination as to whether there is a substantial likelihood that an ethics violation occurred." The City Attorney broached the issue of bias before the March 28th Hearing and conceded that Mayor Patterson and Council Member Campbell had a bias against Amports: " . . . I think neither of you seem to me to have a bias that's very strong . . . " (March 28th Hearing, 1:35:10.)

81. Despite conceding that Mayor Patterson and Council Member Campbell were biased, the City Attorney failed to fulfill her duty as an independent check on unethical conduct by not referring the matter to the City Council for determination as required by BMC, section 4.20.040. Furthermore, the City Attorney never made a determination as to whether there was a substantial likelihood that certain ethical violations alleged in the request for disqualification occurred. (BMC, §4.20.040.) As a result, the City Council was prevented from fulfilling the requirements of BMC,

section 4.20.040 and two biased City Council members, who voted to overturn the CBO's decision to issue Amports an emergency permit, were permitted to participate in the March 28th Hearing.

82. Mayor Patterson's demonstrated bias against Amports includes the following:

a. In a February 19, 2017 e-mail widely distributed to the public,[3] Mayor Patterson stated that at the February 22, 2017 Building Code Board of Appeals ("BCBA") hearing ("BCBA Hearing") the Building Code Board of Appeals would consider certain issues, which it could not lawfully consider. The e-mail emphasized "false" issues and created a narrative that not only reflected negatively on Amports but also misled the public as to the pertinent issues to be considered. The "false" issues included the following:

i. Amports' alleged history of neglectfully maintaining the Structures;

ii. The eligibility of the Structures for designation as national landmarks; and

iii. The application of CEQA to the Application and the inference that Amports was circumventing CEQA.

b. In the February 19, 2017 e-mail, Mayor Patterson prejudicially characterized the issues to be considered at the BCBA Hearing. For example, she emphasized the irrelevant allegation that Amports had neglected to maintain the Structures while failing to state that the only issue properly before the Building Code Board of Appeals was whether the Structures were unsafe.

c. In a March 26, 2017 e-mail widely distributed to the public, Mayor Patterson stated that at the March 28th Hearing the City Council would consider certain issues, which issues (again) it could not lawfully consider. Mayor Patterson's "false" issues reflected negatively on Amports, and prejudiced Amports, including the following:

i. Amports' alleged history of neglectfully maintaining the Structures;

ii. Stating that there has not been "an historic building and structural engineer assessment" when none is required by law, thus indicating bias and violating

[3] Mayor Patterson has stated that her e-alerts are sent to approximately 5,000 recipients (December 17, 2017 Hearing.)

due process by creating a requirement for Amports that is not mandated by any law;

iii. Stating that "[t]here are not standards or performance measures [for protecting historical resources] provided in the demolition application" when no such requirement exists, thus indicating bias and violating due process by creating a requirement for Amports that is not mandated by any law; and

iv. Concluding her e-mail by characterizing Amports, which had been a member of the Benicia corporate community for at least fifty (50) years, as a "special interest" outsider, stating: "Do not **resist** being involved in these local issues. At the end of the day this is the place where individuals have the most impact and where special interests do not monopolize the agenda or decisions. Your participation is vital and important to achieving local control for what is best for Benicia." (Emphasis in original.)

d. At the March 28th Hearing, Mayor Patterson's demonstrated bias against Amports, including the following:

i. Mayor Patterson knowingly disregarded the City Council's own rules of procedure to the detriment of Amports and did not provide Amports an opportunity to respond to issues raised through those procedural violations;

ii. Mayor Patterson relied on irrelevant issues, including Amports' alleged revenue and the alleged maintenance history of the Structures, to overturn the CBO's decision to issue Amports an emergency permit;

iii. Mayor Patterson referenced her "outside the record" research on Wikipedia and/or Bloomberg News for information concerning the ownership of Amports and "billions of dollars of activity" conducted by Amports. (March 28th Hearing, 3:03:00-3:03:58.) The materials Mayor Patterson referenced were never provided to Amports or the public. The information Mayor Patterson presented was not only false, but also irrelevant, and Mayor Patterson relied on it to overturn the CBO's decision to issue Amports an emergency permit;

iv. Mayor Patterson discussed an "outside the record" thesis by Georgetown

student Anna Martin entitled, "Demolition by Neglect: Repairing Buildings by Repairing Legislation," which were never provided to Amports or the public. Mayor Patterson also discussed stabilization methods, which were neither part of the record nor within the scope of the March 28th Hearing (March 28th Hearing, 4:00:28-4:02:15);

v. Mayor Patterson referenced her own "outside the record" research of rising sea level issues concerning the Property and elicited information concerning rising sea levels from Building Code Board of Appeals proceeding appellant Tim Reynolds, after the City Council had ended public comment and argument by Amports' legal counsel. (March 28th Hearing, 4:04:35-4:04:54.) These issues were not within the scope of the March 28th Hearing and raising them prejudiced and prevented Amports from effectively responding to the issues; and

vi. Although Mayor Patterson's statements concede that the Structures are unsafe, she disregarded the findings and recommendations of four experts – three independent chief building officials and one structural engineer retained by Amports – whose detailed findings and conclusions were not refuted by any credible evidence. (See March 28th Hearing 4:29:30-4:33:55 and Ex. 7.)

e. At the April 18, 2017 City Council hearing (the "April 18th Hearing"), Mayor Patterson let Building Code Board of Appeals proceeding appellant Tim Reynolds speak for approximately five (5) minutes in opposition to Amports' application for rehearing and the economic benefits to the City of Benicia of restoring the Structures even though the issues were not agendized for the April 18th Hearing. (April 18th Hearing, 2:28:40-2:34:28.) When Mr. Reynolds ran out of time, Mayor Patterson asked him a question so he could complete his discussion of non-agendized issues.

83. Council Member Campbell's demonstrated bias against Amports includes the following:

a. At the January 3, 2017 City Council meeting (the "January 3rd Hearing"), Council Member Campbell acquired information and deliberated about Amports' Application when the issue was not agendized and Amports was not aware of the discussion or given notice to adequately respond:

i. At the January 3rd Hearing, Council Member Campbell's posing of a question to the Building Code Board of Appeals proceeding appellants present at the meeting concerning procedural history and the application of CEQA to the Application, which the decision to grant had been appealed, transformed commentary into discussion, and acquisition of preliminary information, of a non-agenda item;

ii. Council Member Campbell's statements during the January 3rd Hearing indicate that, aside from acquiring information, he was reflecting on Amports' prior demolition permit application, which he opined would have required the completion of an environmental impact report ("EIR"), and equating it with Amports' Application, which did not require the completion of an EIR. Thus, in the absence of Amports, he and the City Council engaged in a discussion of a non-agendized item, and his equating of the two demolition permit applications without sufficient facts indicates partiality; and

iii. As a result, at least part of the comment period constituted a hearing on January 3rd for which there was neither public notice nor an opportunity for Amports to comment, correct misperceptions, or provide factual or legal information. In essence, Council Member Campbell created a forum for ex parte communication between the Building Code Board of Appeals proceeding appellants and the City Council, thereby circumventing the "proper channels of government."[4]

b. On February 23, 2017, Council Member Campbell filed a request with the City Clerk that the City Council review the outcome of the February 22, 2017 Building Code Board of Appeals hearing concerning Amports' Application. The request for review evidenced Council Member Campbell's clear intent to decide the matter adversely to Amports. His request for review was not based in law, as detailed above, and failed to state any reason that could have provided Amports with notice of the issues to be addressed at the review. This

[4] "The proper operation of city government requires that: (1) public officials and employees be independent, impartial and responsible to the people; (2) government decisions and policy be made using the proper channels of government; and (3) that public office or employment not be used for personal gain." (BMC, section 4.16.101.)

violation of procedure created a conflict of interest and also is evidence of bias against Amports.

c. Amports operates a business at the Port of Benicia that involves the transportation and shipment of automobiles. Prior to the March 28th Hearing, Council Member Campbell requested that the City Council agendize a discussion of reviewing amendments to the business license tax to generate revenue based on port activities. (March 28th Hearing, Item 15.C.) The only party that would be affected adversely by such an amendment would be Amports. Council Member Campbell's stated intention is to tax Amports based on each automobile it transports through the Port of Benicia, even though the City Council has at least twice rejected imposing such a tax.

d. At the March 28th Hearing, Council Member Campbell's demonstrated bias against Amports, including the following:

i. Council Member Campbell was the first person to question Amports' legal counsel, was accusatory in his questioning, and spearheaded and set the tone of the discussion of irrelevant issues. In fact, in every City Council hearing pertaining to the Application, Council Member Campbell has proceeded toward Amports and its legal counsel in an accusatory and prosecutorial manner rather than as an objective fact finder;

ii. Council Member Campbell relied on irrelevant issues, including Amports' alleged maintenance history of the Structures, to overturn the CBO's decision to issue Amports an emergency permit;

iii. On various occasions, Council Member Campbell relied on Google Maps of the Property, which were either inaccurate or were accurate but applied to the incorrect time period; and

iv. Although Council Member Campbell found that the Structures are unsafe, he disregarded the findings and recommendations of four experts – three independent chief building officials and one structural engineer retained by Amports – whose detailed findings and conclusions were not refuted by any credible evidence.

e. Council Member Campbell also demonstrated bias against Amports in subsequent City Council meetings by, among other things, maintaining an accusatory and

prosecutorial role rather than being an objective fact finder, and interjecting irrelevant issues.

4. The City Council Improperly Ascertained Information and Relied on Information Outside the Record

84. The Brown Act intends that deliberation, as well as action, occur openly and publicly. (*Sacramento Newspaper Guild v. Sacramento County Board of Supervisors* (1968) 263 Cal.App.2d 41, 47.) Both deliberation and action are deemed essential elements of the collective decision-making process. "Deliberation" is the process of examining, weighing, and reflecting on the reasons for or against a choice, and includes a public agency's *ascertainment of facts* preliminary to an ultimate decision. (*Sacramento Newspaper Guild v. Sacramento County Board of Supervisors* (1968) 263 Cal.App.2d 41, 47-48.) While action and deliberation can occur separately, both must be taken in public view.

85. During the March 28th Hearing, it became evident that the City Council had ascertained information outside the public meeting. This information includes the following and was not provided to the public or Amports:

a. Council Member Campbell on various occasions referred to Google Maps of the Property and dated news articles, which were either inaccurate or accurate but not applicable to the relevant time period;

b. Mayor Patterson searched Wikipedia and/or Bloomberg News for information concerning the ownership of Amports and alleged "billions of dollars of activity" conducted by Amports (March 28th Hearing, 3:03:00-3:03:58);

c. Mayor Patterson discussed a thesis by Georgetown student Anna Martin entitled, "Demolition by Neglect: Repairing Buildings by Repairing Legislation," which was not provided to the public or Amports. She also discussed stabilization methods, which were not within the scope of the March 28th Hearing, thus preventing Amports from effectively responding to the methods (March 28th Hearing, 4:00:28-4:02:15); and

d. Mayor Patterson researched rising sea level issues concerning the Property and elicited information concerning rising sea levels from Building Code Board of Appeals proceeding appellant Tim Reynolds. These issues were not within the scope of the March 28th Hearing and raising them prevented Amports from effectively responding to the issues (March

28th Hearing, 4:04:35-4:04:54).

86. This "private" ascertainment of information violated the Brown Act and prejudiced Amports from properly responding to the issues raised.

5. The City Council Committed Prejudicial Procedural Errors

87. During public comment at the March 28th Hearing, Steven Austin Welch addressed the City Council. After his comments, Council Member Young asked him about a conversation he had told Council Member Young about prior to the March 28th Hearing. In response, Mr. Welch stated that Jim Triplett of Amports, told him: "We'll probably put more parking lots [on the Property] . . . and they'll be some lights, there, and they'll be some, you know, transport trucks there . . . " (March 28th Hearing, 3:52:15-3:52:45.) Mr. Welch offered this purported statement made by Mr. Triplett, who was not present to refute the statement, for the purpose of proving that Amports intended to develop parking lots on the Property. Amports' counsel timely objected to Mr. Welch's hearsay statement, but the City Council still relied on it.

88. The City Council's reliance on the hearsay statement was improper and prejudicial because no other "evidence" was offered to prove that Amports intends to develop a parking lot on the Property and relying on such evidence prevented Amports from refuting it. Had he been present, Mr. Triplett would have refuted Mr. Welch's statement.

89. The City Council violated its own rules of procedure during the March 28th Hearing to the prejudice and detriment of Amports. For example, in violation of rule III.E.3, after he had already spoken, the City Council, specifically Council Member Campbell, solicited additional comments from Jerry Hayes concerning Amports' prior intentions concerning the historical classification of the structures at the Property; and Amports was not given the opportunity to refute anything said by Mr. Hayes. (City Council Rules of Procedure, July 17, 2012, rule III.E.3.) In violation of rule III.E.3 and the City Council's argument schedule and time limitations, after the rebuttal period, the City Council solicited comments from Tim Reynolds, who was a Building Code Board of Appeals proceeding appellant, concerning securing the Property without providing Amports any opportunity to respond or address the issue. Had the City Council provided Amports the opportunity to respond, Amports would have informed the City Council that the standards discussed by Mr. Reynolds are inapplicable to the

current situation. As a result of Mr. Reynolds' comments, Respondent adopted the standards referred to by Mr. Reynolds in the Resolution.

6. The City Council Did Not Disclose the Substance of Numerous Ex Parte Communications

90. BMC, section 4.08.160 codifies the City of Benicia's discouragement of ex parte communications and requirements for revealing them:

> While it is the city's policy to encourage communications between the public and officials, the city recognizes that Constitutional due process protections may limit communications with council members or board or commission members outside of a public meeting. Therefore, the city's policy on ex-parte communications discourages officials from discussing appeals or enforcement matters with members of the public except during the body's formal consideration of the matters. These matters should not be discussed during site inspections or field trips that are not part of an agendized meeting. If such discussions take place, officials must publicly disclose at the start of the agendized presentation of the item, the substance of any such discussions they have had with anyone other than another member of the body or staff member. This policy applies to any appeal or enforcement matter which is pending, or is reasonably expected to come before the body on which the official sits.

91. At the beginning of the March 28th Hearing, several City Council members revealed that they had *ex parte* communications concerning the CBO's decision to issue an emergency demolition permit to Amports. Council Member Young stated that he had *ex parte* communications with Steven Welch, Jerry Hayes, and Bobbie Coleman, yet he failed to disclose the substance of the communications. (March 28th Hearing, 1:47:21-1:47:37.) Council Member Campbell stated that he had *ex parte* communications with his spouse, Jon Van Landschoot, who was an appellant in the Building Code Board of Appeals proceeding, Leann Taagepera, Jerry Hayes, and Steve Young, yet he failed to disclose the substance of the communications. (March 28th Hearing, 1:47:37-1:48:01.) Mayor Patterson stated that she had *ex parte* communications with Toni Haughey, who was an appellant in the Building Code Board of Appeals proceeding, and Donell Rubay, yet she failed to disclose the substance of the communication with Donell Rubay. (March 28th Hearing, 1:48:10-

1:48:32.)

92. Rather than state the substance of the communication with Ms. Rubay, which apparently was an e-mail, Mayor Patterson said it was included in the Agenda Packet. However, the *ex parte* email communication with Ms. Rubay was not included in the Agenda Packet, and Respondents failed to produce the entirety of the communication from Ms. Rubay despite a Public Records Act request until well after the March 28th Hearing. The *ex parte* communications and the failure of the members to disclose their substance violate the open government provisions of the BMC and the Brown Act (Gov. Code, §54950 et seq.).

G. The City Council Exceeded its Jurisdiction by Making Findings of Neglect and Lack of Security

93. Aside from the fact that the City Council had no jurisdiction to review the outcome of the Building Code Board of Appeals proceeding, as discussed above, the issues of property maintenance and security were outside the scope of the March 28th Hearing. The Fourteenth Amendment and the California Constitution prohibit the government from depriving any person of life, liberty, or property without due process of law. (U.S. Const., amend. XIV, §1; Cal. Const., art. I, §7.) Every administrative agency must use certain procedures to protect the interests of the parties involved in the administrative proceeding. (See *Goldberg v. Kelly* (1970) 397 U.S. 254, 255 (state and local agency procedures must satisfy Fourteenth Amendment due process requirements).) The California Supreme Court holds that, for any statutorily created benefit (in this case, the issuance of a permit), even if the interest being terminated does not itself rise to the level of a protected property or liberty interest, the individual has an independent liberty interest in being free from arbitrary adjudicative action. (*People v. Ramirez* (1979) 25 Cal.3d 260, 267-268.) By exceeding its authority and raising these improper issues at the March 28th Hearing, the City Council conducted a hearing on the issues without providing Amports of prior notice and enabling Amports to effectively address the issues. Thus, Respondent exceeded its authority and violated Amports' right to due process of law.

H. Amports Has Performed all Conditions Precedent

94. Amports has performed all conditions precedent to the filing of the petition for writ of mandate by opposing the Appeal in the Building Code Board of Appeals proceeding, arguing its

position in the City Council review proceeding, submitting the rehearing application, and, after the City Council granted a rehearing, being prepared to argue its position at the Rehearing. However, the City Council has prevented Amports from exhausting its final administrative remedy, the Rehearing, by indefinitely postponing the Rehearing without any legal or factual basis and in violation of BMC, section 1.44.050, subdivision D.

95. Although the CDD recently informed Amports' legal counsel that "we have *tentatively* scheduled the rehearing for January 16, 2018" (Ex. 11, p. 2 (emphasis added)), Amports has no reason to believe the Rehearing will proceed at that time because the City, City Council, and CDD have demanded Amports' consent to the City accessing the Property to prepare the Additional Requested Reports for the Rehearing and Amports will not consent because the Additional Requested Reports are irrelevant to limited issues that the City Council chose to review when granting Amports application for rehearing. A party is not required to exhaust administrative remedies when the agency proceeding is not progressing or the agency is unreasonably delaying the resolution of the issue. (*In re Hudson* (2006) 143 Cal.App.4th 1, 7-8 (agency took no action on administrative appeal, so remedy treated as having been exhausted; *Hollon v. Pierce* (1967) 257 Cal.App.2d 468, 476 (exhaustion excused because agency proceedings had come to a halt); *Kirkpatrick v. City of Oceanside* (1991) 232 Cal.App.3d 267, 277-278 (rent control board's stonewalling on landlords' application for a permissive rent increase adjustment excused further compliance with the board's administrative process).)

96. Furthermore, proceeding with the Rehearing would be futile. Despite the fact that the Additional Requested Reports are irrelevant to the issues that the City Council itself chose to review when granting Amports' application for a rehearing, the City Council has stated that it wants the Additional Requested Reports prepared before proceeding with the Rehearing, and the CDD has stated her intention to recommend to the City Council that it again deny Amports' application for an emergency demolition permit to remove the Structures unless Amports consents to the City accessing the Property to prepare the Additional Requested Reports. (Ex. 11, pp. 1-2.) When the administrative remedy is inadequate or unavailable, or it would be futile to pursue the remedy, failure to exhaust administrative remedies does not preclude judicial review. (*Jonathan Neil & Associates, Inc. v. Jones* (2004) 33 Cal.4th 917, 936; *Joel v. Valley Surgical Center* (1998) 68 Cal.App.4th 360, 365-371.)

97. At all times herein mentioned, the Respondents have been able to perform the duty mentioned above and issue an emergency demolition permit to Amports for the removal of the Structures. Notwithstanding such ability and despite Amports' demand for the performance of the duty and the issuance of an emergency demolition permit to Amports for the removal of the Structures, the Respondents continue to fail and refuse to do so.

98. Amports has no plain, speedy, and adequate remedy in the ordinary course of law, other than the relief sought in the petition for writ of mandate, because Amports has pursued every remedy in the administrative proceeding and has no recourse other than petitioning the Court to make the Respondents conform their conduct to the requirements of the law.

99. The Respondents' failure to perform the duty herein mentioned and its abuse of discretion have damaged Amports in the sum of at least Two Hundred and Eleven Thousand Dollars ($211,000.00), which represents the cost to Amports, exclusive of legal fees and ordinary site maintenance, of having to secure the Structures since December 23, 2016, which is when the CBO intended to issue Amports an emergency demolition permit.

II. COMPLAINT

FIRST CAUSE OF ACTION – INVERSE CONDEMNATION
(As against all DEFENDANTS and DOES 1 through 40)

1. The City Council Took Amports' Property by Acting in Excess of Its Jurisdiction

100. Amports incorporates all previous paragraphs into this cause of action.

101. On February 23, 2017, the day following the Building Code Board of Appeals hearing, Council Member Tom Campbell requested that the City Council review the outcome of the hearing. Council Member Campbell made his request pursuant to BMC, section 1.44.

102. BMC, section 1.44.030 states:

> Within the time limits set forth in BMC 1.44.060, the city council or any council member may request that a decision, *pertaining to BMC Title 17*, of any city employee, committee, or commission be reviewed by filing an application with the city clerk stating the reasons for the requested review. Said review will be conducted according to the procedures specified in BMC 1.44.040 and 1.44.100. The person or body to hear the review will be designated in the

application by the person or body seeking such review and shall be as specified in BMC 1.44.100, unless the council as a whole specifies a higher level of review in the first instance. (BMC, §1.443.030 (emphasis added).)

103. The Request for Review sought to review a matter that does not pertain to BMC, Title 17, which is the City's zoning ordinance. Amports' Application concerns the California Building Code, and no issue concerning zoning was addressed or raised in the Application or was adjudicated by the Building Code Board of Appeals, which lacks jurisdiction to adjudicate zoning issues.[5] Therefore, the City Council exceeded its authority, violated the municipal code, and lacked jurisdiction to review the outcome of the Building Code Board of Appeals hearing. Furthermore, no one appealed the outcome of the February 22, 2017 Building Code Board of Appeals hearing, so the CBO's decision to issue an emergency demolition permit to Amports must stand.

104. The City's and the CBO's refusal to issue the permit and the City Council's extra-jurisdictional exercise of authority resulting in Amports having to station a guard and a trailer for the guard on the Property 24 hours a day, seven days a week at substantial expense to ensure no one enters the Structures are unconstitutional takings of property that subject the Defendants to damages.

2. The City Council Took Amports' Property by Violating the Benicia Municipal Code

105. BMC, section 17.54.100 authorizes the issuance of a permit to demolish a historic structure, without design review, when the structure is unsafe and an emergency exists:

> Prior approval of the community development director or the historic preservation review commission is not required for permit applications of an emergency nature to rehabilitate an unsafe building or to demolish the structure for the same reasons. (BMC, §17.54.100, subd. A.)

106. The City's Arsenal Historic Conservation Plan also exempts the issuance of a permit of an emergency nature to demolish an unsafe structure:

> Exceptions to the design review requirement may be granted for permit applications of an emergency nature to demolish a structure which has been deemed unsafe by the Building Division, subject to review, if required, by the State Office of Historic Preservation.

---

[5] See footnote 2.

(Arsenal Historic Conservation Plan, p. 22.)

107. The City has informed Amports and Amports believes that the City attempted to contact the State Office of Historic Preservation ("OHP") regarding Amports' Application but received no response from the OHP. Regardless, while a local agency such as the City may apply to the OHP for a determination as to whether a structure on any local public register of historic places shall be demolished, the City is not required to seek such determination with the OHP if such structure "presents an imminent threat to the public of bodily harm or of damage to adjacent property." (Pub. Res. Code, §5028.)

108. The BMC does not define "emergency," but Public Resources Code, section 21060.3 does as follows:

> "Emergency" means a sudden, unexpected occurrence, involving a clear and imminent danger, demanding immediate action to prevent or mitigate loss of, or damage to, life, health, property, or essential public services. "Emergency" includes such occurrences as fire, flood, earthquake, or other soil or geologic movements, as well as such occurrences as riot, accident, or sabotage.

109. The BMC incorporates the California Building Code and California Historical Building Code, which it adopted in BMC, sections 15.04.010 (adopting California Building Code, 2013 edition) and 15.21.010 (adopting California Historical Building Code, 2013 edition). To determine whether a historical structure is unsafe, the California Historical Building Code relies on the "regulations that govern the design and construction or alteration of nonhistorical buildings and properties within the jurisdiction of the enforcing agency" to determine whether a structure is "unsafe." (Cal. Hist. Build. Code, §8-210, Regular Code; *see* §8-102.1.5, Unsafe buildings or properties (invoking "regular code" of enforcing agency).) The California Building Code defines an "unsafe condition" 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 (italics emphasis added).)

110. 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 (emphasis in original).)

111. According to the Gale Report and Cullum Report, the Structures are "unsafe" pursuant to California Building Code, section 116.1 and "dangerous" pursuant to California Building Code, section 202.

112. After reviewing the Gale Report and Cullum Report, the CBO confirmed her original determination that the state of the Structures represented an emergency. Specifically, the CBO determined that the Structures were in imminent danger of collapse. (Ex. 12.)

113. Pursuant to California Building Code, section 116.1, the CBO used her discretion to authorize the removal of the Structures by deciding to grant the Application.

114. By the March 28th Hearing, the City Council had additional evidence of the unsafe and dangerous condition of the Structures. According to the O'Neil Report, which was considered by the City Council at the March 28th Hearing, "ASCE-41 Tier 1 Analysis have shown life threatening instabilities for both buildings." (Ex. 6, p. 2.)

115. The City Council has admitted that the Structures are a safety risk, and those who took the Appeal have admitted that the Gale Report and Cullum Report "clearly indicate there was [sic] a severe danger on the site." (March 28th Hearing, 2:37:28-2:37:36.)

116. Throughout the March 28th Hearing, the City Council acknowledged the threat to life posed by the Structures, and the Resolution requires that Amports "immediately undertake actions to

stabilize the buildings," thus acknowledging the clear and imminent danger and emergency nature of the situation. (Ex. 7, p. 3.)

117. The evidence presented at the March 28th Hearing demonstrated that the Structures represent a clear and imminent danger to loss of, or damage to, life or health, and no evidence to the contrary was presented.

118. Amports has satisfied all requirements at this time for the issuance of an emergency demolition permit to remove the Structures.

119. The City Council, having determined that the Structures are unsafe and dangerous, thus acknowledging the propriety of the CBO's finding that the Structures are unsafe and dangerous, had a duty to follow the California Building Code and California Historical Building Code and approve the CBO's exercise of discretion to grant the Application and permit removal of the Structures as authorized by California Building Code, section 116.1. In other words, the California Building Code does not permit the City Council to substitute its judgment for that of the expertise and discretion of the CBO.

120. Therefore, the City Council's overturning of the CBO's decision to issue an emergency demolition permit to Amports is contrary to law and has, among other things, required Amports to station a guard and a trailer for the guard on the Property 24 hours a day, seven days a week, at substantial expense to ensure no one enters the Structures.

SECOND CAUSE OF ACTION – DECLARATORY RELIEF
(As against all DEFENDANTS and DOES 20 through 60)

121. Amports incorporates all previous paragraphs into this cause of action.

122. An actual controversy exists between Amports and the Defendants concerning their rights and duties.

123. Amports contends that the Defendants have no right to enter or inspect the Property and the Structures to prepare the Additional Requested Reports and make Amports pay for the Additional Requested Reports because: (a) the issues potentially implicated by the Additional Requested Reports are not relevant to the issues approved by the City Council for the Rehearing; (b) the CBO has determined that CEQA does not apply to the Application; (c) the City has twice inspected the Structures to assess their condition and safety issues and there is no indication circumstances have

changed; (d) the City has "red tagged" the Structures, which constitutes the greatest restriction on the Structures that the City can impose; and (e) the Application is exempt from CEQA.

124. The Defendants contend that they have the right to enter and inspect the Property and the Structures to prepare the Additional Requested Reports and make Amports pay for the Additional Requested Reports because the Additional Requested Reports will assist the Defendants in making an environmental determination pursuant to CEQA.

125. Amports seeks a judicial determination of its rights and duties, and a declaration as to whether it has the right to exclude the Defendants from the Property and be free from unreasonable searches and seizures by the Defendants.

126. A judicial declaration is necessary and appropriate at this time so Amports may ascertain its rights and duties concerning the exclusion of the Defendants from the Property and Structures. Declaratory relief would have the practical effect of preventing unlawful entry onto the Property, preserving Amports' right to be free from unreasonable searches and seizures, and preventing the Defendants from imposing an unlawful financial burden on Amports in the form of the costs of the Additional Requested Reports.

THIRD CAUSE OF ACTION – TEMPORARY RESTRAINING ORDER
(As against all DEFENDANTS and DOES 30 through 80)

127. Amports incorporates all previous paragraphs into this cause of action.

128. Amports has informed the Defendants that they may not enter the Property to prepare the Additional Requested Reports.

129. The City and the CDD have demanded access to the Property, and Amports is informed and believes that the City has retained architectural firm Paige & Turnball to prepare both or part of the Additional Requested Reports and therefore is preparing to enter Amports' Property despite Amports' denial of consent.

130. The Defendants' threatened wrongful conduct, unless and until enjoined and restrained by order of the Court, will cause great and irreparable injury to Amports because Amports would suffer a violation of its right to privacy, right to exclude others from its property, and right to be free from unreasonable searches and seizures.

131. Amports does not have an adequate remedy at law for the injuries that are threatened because it is impossible to calculate the monetary values of Amports' right to privacy, right to exclude others from its property, and right to be free from unreasonable searches and seizures, and no remedy could undo the violation of these rights.

FOURTH CAUSE OF ACTION – MANDATORY PRELIMINARY AND PERMANENT INJUNCTIONS
(As against all DEFENDANTS and DOES 40 through 100)

132. Amports incorporates all previous paragraphs into this cause of action.

133. The BMC requires the City and the CBO to issue a building permit regardless of whether the CBO's decision to issue the permit has been appealed:

> A. Where a permit is sought and its issuance is contingent upon obtaining a prerequisite permit, the permit sought shall not be issued until the expiration of the time limit for seeking an appeal, rehearing, or review specified in BMC 1.44.060 applied to the prerequisite permit; provided, however, that if an application for appeal, rehearing, or review of the prerequisite permit is filed within the specified time limits, the permit sought shall not be issued until seven days following the final decision on the appeal, rehearing, or review. Any permit issued in violation of the provisions of this section shall be void.
>
> B. This section does not apply to building, electrical, mechanical, and plumbing permits. An applicant, however, proceeds at his or her own risk prior to the expiration of any appeal, rehearing or review time.

(BMC, §1.44.070.)

134. At the latest, the CBO previously determined on December 22, 2016 to grant the Application and issue Amports an emergency demolition permit on December 23, 2016.

135. Amports has satisfied the requirements for the issuance of the emergency demolition permit.

136. The City's withholding of the emergency demolition permit, unless and until enjoined by order of the Court, will continue to cause great injury to Amports, who is securing the Structures with the presence of a 24-hour guard, and could result in the serious bodily injury or death to any

trespasser.

137. Amports does not have an adequate remedy at law for the City's failure to abide by its own law and issue the emergency demolition permit because monetary compensation from the City cannot eliminate the risk to safety and life posed by the Structures.

138. The City's and the CBO's refusal to issue Amports an emergency demolition permit to remove the Structures and the City Council's extra-jurisdictional exercise of authority resulting in Amports having to station a guard and a trailer for the guard on the Property 24 hours a day, seven days a week at substantial expense to ensure no one enters the Structures are unconstitutional takings of property that subject the Defendants to damages in an amount according to proof.

139. Subsequent to the denial of Amports' Application and the adoption of Resolution 17-58, Amports has not been able to maintain the Property as Amports desires, and thus the City's and the City Council's denial of Amports' Application has deprived Amports of all economic value of the Property and required Amports to expend sums to safeguard the Structures from trespassers.

140. Subsequent to the denial of Amports' Application and the adoption of Resolution 17-58, Amports would not be able to sell or develop the Property, and thus the City's and the City Council's denial of Amports' Application has deprived Amports of all economic value of the Property and required Amports to expend substantial sums to safeguard the Structures from trespassers.

141. As a result, Amports has been damaged in an amount in excess of $210,000.

142. Amports has not received any compensation for the deprivation of economic value of the Property or sums expended to safeguard the Structures.

143. Amports has incurred and will incur attorney's, appraisal, and engineering fees because of this proceeding, in amounts that cannot yet be ascertained, which are recoverable in this action pursuant to Code of Civil Procedure, section 1036.

WHEREFORE, Petitioner and Plaintiff Amports requests:

1. That the Court issue a peremptory writ in the first instance prohibiting the Defendants from entering the Property, prohibiting Mayor Patterson and Council Member Campbell from participating in any review of Amports' Application or future application for a permit to remove the Structures, and commanding the City and the CBO to issue an emergency demolition permit to

Amports for the removal of the Structures; or

2. That the Court, alternatively, first issue an alternative writ prohibiting Mayor Patterson and Council Member Campbell from participating in any review of Amports' Application or future application for a permit to remove the Structures, and commanding the City and the CBO to issue an emergency demolition permit to Amports for the removal of the Structures, or, in the alternative, show cause why it should not do so, and thereafter issue a peremptory writ prohibiting Mayor Patterson and Council Member Campbell from participating in any review of Amports' Application or future application for a permit to remove the Structures, and commanding the City and the CBO to issue an emergency demolition permit to Amports for the removal of the Structures.

3. A declaration that Amports has the right to exclude the Defendants from the Property and the Structures for the purpose of preparing the Additional Requested Reports, and Amports is not legally bound to pay for the preparation of the Additional Requested Reports;

4. Issuance of a temporary restraining order, preliminary injunction, and permanent injunction restraining and enjoining the Defendants from entering the Property and the Structures for the purpose of preparing the Additional Requested Reports;

5. A temporary restraining order, a preliminary injunction, and a permanent injunction, all enjoining the Defendants and their agents and employees, including the CDD, and all persons acting under, in concert with, or for the Defendants from:

a. Entering onto the Property for the purpose of preparing the Additional Requested Reports;

b. Entering the Structures for the purpose of preparing the Additional Requested Reports; and

c. Requiring payment from Amports for the preparation of the Additional Requested Reports.

6. A mandatory preliminary injunction and a mandatory permanent injunction commanding the City and the CBO to issue an emergency demolition permit to Amports for the removal of the Structures;

7. An order requiring the Defendants to show cause why they should not be enjoined as set forth in this complaint, during the pendency of this action;

8. Damages in an amount according to proof with interest at the legal rate from the date of the damages;

9. Reasonable attorney's, appraisal, and engineering fees according to proof;

10. The costs incurred in this action; and

11. Such other relief as the Court deems just and proper.

Date: January 3, 2018

LAW OFFICES OF DANA DEAN

By: Dana Dean
Attorney for Petitioner and Plaintiff,
APS West Coast Inc. dba Amports

DLA PIPER LLP (US)

By: Mark E. McKeen
Attorney for Petitioner and Plaintiff,
APS West Coast Inc. dba Amports

VERIFICATION

I, Jimmy Triplett, am the Senior Vice President of Amports in this proceeding. I have read the petition and know its contents. The facts stated therein are true and are within my personal knowledge, except as to those matters alleged on information and belief, which I believe to be true.

I declare under penalty of perjury pursuant to the laws of the State of California that the foregoing is true and correct.

Date: January 02, 2018

Jimmy Triplett, Senior Vice President
APS West Coast Inc. dba Amports