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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES, CENTRAL DISTRICT

GH CAPITAL, LLC., a California limited liability company,

Petitioner and Plaintiff,

vs.

CITY OF LOS ANGELES; DEPARTMENT OF BUILDING AND SAFETY OF THE CITY OF LOS ANGELES, CITY OF LOS ANGELES DEPARTMENT OF CITY PLANNING; WEST LOS ANGELES AREA PLANNING COMMISSION OF THE CITY OF LOS ANGELES; AND DOES 1-25, inclusive,

Respondents and Defendants.

CASE NO. BS115661

INTERVENOR'S RESPONSE TO PETITIONER'S OPENING BRIEF; REQUEST FOR JUDICIAL NOTICE

Assigned to Hon. David Yaffe

Date: June 22, 2009
Time: 9:30 a.m.
Dept: 86

Complaint Filed: July 3, 2008
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I. INTRODUCTION

Petitioner GH Capital, LLC ("GH") operates the Hotel Angeleno, a 16-story hotel that towers above the surrounding residential neighborhoods in Brentwood, Bel Air and Westwood Hills. For the past 30-plus years, the residential neighbors of these communities have been forced on numerous occasions to oppose the efforts of various owners of this singular commercial high-rise property within a predominantly residential area when they have sought to intensify the commercial use of the property by installing neon signs or illuminating the structure itself. The obvious purpose of signage and illumination has been to promote the commercial interests of the hotel and now the restaurant and lounge businesses operated on the premises. The use of attention-getting signs or illumination, however, is grossly inconsistent with the residential nature of the surrounding communities and the Santa Monica Mountains – especially given the building's high-rise status, which dominates the views of all around it. As a result of the hotel structure's precarious placement within a predominantly residential area, the City of Los Angeles has conditioned the entitlements provided to GH and its predecessor by restricting signage and illumination, and by consistently denying variances to those conditions. Just as consistently, however, the hotel's operators have challenged those conditions, either directly, by seeking variances, or indirectly, by simply installing the desired illumination without seeking permission through the City's entitlement procedures. But the City has always denied those variance requests and, when unilateral action was taken, the City has ordered compliance with its conditions.

GH has been particularly aggressive and perhaps uniquely deceptive in its recent efforts to commercialize the hotel structure for promotional purposes. GH first went to the Brentwood community to generate support for its request to open its restaurant and lounge to the general public, an entitlement sought but never obtained by the prior owner. GH obtained community support by claiming during the environmental review process and in proceedings before the Zoning Administrator that its plan to open the restaurant to the public would *not* intensify its commercial use of the property and, specifically, that its project would have "no impact" on "the existing visual character or quality of the site or its surroundings" and would have no impact on "nighttime views in the area." *Administrative Record, Volume* ***14****, Page 2047* ("*AR* ***14****:2047*"). GH

then promised the community that it would seek community feedback on its *plans* for lighting, signage and landscaping as soon as its *plans* were ready to review, and assured the Zoning Administrator that it had made such a promise. *AR 12:2084, 2100.* As a result, GH received its entitlement to open the restaurant and lounge to the general public. *AR 12:2092.*

But GH, having obtained its coveted permit, chose *not* to seek community input when its lighting plans were formulated, despite its promise to the community and its representation to the Zoning Administrator. And, despite the permit conditions on signage and lighting and the historical precedent, GH chose to simply install a theatrical, state-of-the-art lighting system to illuminate the entire hotel structure, without seeking a variance from the Zoning Administrator. GH simply pulled electrical permits at the Building and Safety counter and installed its computerized, multi-colored lighting system – shocking the Brentwood, Bel Air and Westwood Hills communities by introducing an unprecedented commercial intensification of the property. Because GH bypassed the Zoning Administrator, the Brentwood community was forced to seek enforcement of GH's conditions. The Chief Zoning Administrator, the Zoning Administrator assigned to GH's appeal, and the Area Planning Commission all agreed that the intrusive lighting system constitutes a significant intensification of promotional illumination that is inconsistent with the residential character of the surrounding Brentwood, Bel Air and Westwood Hills neighborhoods.

The City's action in requiring GH to remove its non-permitted lighting system is subject to the deferential "substantial evidence" standard of review on writ of mandamus. The administrative record contains *undisputed* (not just substantial) evidence supporting the determination that GH's lighting system is grossly out of character with the surrounding residential communities and therefore violates restrictions stated in its conditional use permits. As a result, this Court must deny the petition and all other relief sought. While GH argues that this result would leave it without any exterior illumination whatsoever, creating safety risks, the proper forum for seeking permission to install a different lighting system is before the Zoning Administrator, not the judiciary. So far, GH has declined to seek such an entitlement.

II. FACTUAL STATEMENT

A. Zoning Administrators Have Consistently Restricted Advertising, Signage and Illumination To Protect The Residential Character Of The Community.

The hotel structure now operated by GH has *always* been "like a pig in the parlor instead of the barnyard." *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365, 388 (1926). Former Chief Zoning Administrator Robert Janovici observed, in April 1986, that the commercial use of the 16-story high-rise building within a predominantly residential area has continued, "virtually from its inception," to "be a source of concern to the neighboring area." *AR 24:3200.* Whenever the hotel's operators have installed or proposed to install attention-getting lights or signs that tower above the surrounding residential neighborhoods, the City's Zoning Administrators have found them to violate the terms of the hotel's conditional use permits.

1. The hotel has always been a "spot" commercial zone within a residential area, requiring strict regulation.

Before the hotel structure was constructed, the City's Planning Department sought to down-zone the area from R5-1, which then permitted high-rise hotels, to R3-1 or R4-1L, which did not permit high-rise structures. *AR 31:3821-3847; 3842.* This proposal to down zone the area was presented to the Planning Commission in November 1969, after the property owner submitted plans to construct a 16-story Holiday Inn hotel on the site. *AR 31:3823; 3833.* On November 25, 1969, more than 200 neighboring property owners and the Brentwood Homeowners Association testified in support of the zone change, which would have precluded construction of the 16-story structure. *AR 31:3822.* Residents complained that the proposed commercial structure would "devaluate property values and destroy residential amenities." *Id.* They asked for a zoning change to limit the structure's height to six stories, which was the maximum permitted under the R4-1 designation at the time. *AR 31:3823.* Residents testifying before the Planning Commission protested that "their view [would be] blocked by a neon-topped building." *Id.*

While the properties surrounding the future Holiday Inn site were down-zoned, the property on which the hotel now stands was not. The hotel property retained its R5 zoning because the Commission determined that it would be unfair and perhaps unconstitutional to down-zone

after Holiday Inn had detrimentally relied on the R5 designation. *AR **31**:3821-3825; 3845.* No other properties in the vicinity retained the R5 designation, not even the Bel-Air Sands Hotel (now the Luxe Summit Hotel), which was down-zoned to R4-1, making the Holiday Inn property "a spot zone of R5 zoning." *AR **19**:2719.* Under the R5 zoning designation, Holiday Inn not only had the right to build a *16-story structure* that towered over the neighborhood, it also had the right to operate a restaurant and cocktail lounge as incidental uses exclusively for guests of the hotel (but not the general public). *AR **24**:3196, 3200.* But in order to retain its R5 designation in face of vehement public opposition, Holiday Inn agreed that it would not install a "Holiday Inn" sign atop the hotel structure. *AR **19**:2792, 2808-2809, 2810, 2829, 2846; **20**:2892-2893.*

The nature of the hotel property as a "spot" R5 zone required Zoning Administrators to carefully circumscribe the scope of discretionary entitlements awarded to the hotel's owners because intensified commercial uses would degrade the residential character of the surrounding properties, in violation of the General Plan. *AR **19**:2718-2720.* This careful scrutiny was evident as early as February 1972, when Zoning Administrator Charles Cadwallader considered Holiday Inn's variance request to (1) open the restaurant and bar facilities to the general public; and (2) provide live entertainment. *AR **19**:2715.* While the hotel was granted a variance allowing live entertainment, the Zoning Administrator denied the request to open the facilities to the public: "[T]he recent zoning rollbacks on adjoining properties was an effort to reduce the intensity of land use in the area and will assist in the control of the amount of traffic in the area." *AR **19**:2720.* Opening the bar and restaurant to the public as a "commercial facility would seriously and adversely affect" not just traffic congestion but also the General Plan goal of reducing the intensity of land use within primarily residential areas. *AR **19**:2720.*

Also consistent with the careful scrutiny of this spot R5 Zone was the denial of a May 1981 variance request to install two illuminated "Holiday Inn" signs at the roofline. *AR **19**:2743.* Zoning Administrator James Crisp found that "[a]t an elevation of 200 ft. above ground level, the sign would not only be aesthetically unpleasing, but would have an adverse impact on adjacent properties when illuminated at night." *AR **19**:2744.* Thus, "granting the variance would be materially detrimental to the public welfare and injurious to the other properties in the same zone and

vicinity" because the "visual prominence of the proposed signs and their illumination during night-time hours would have an adverse effect on adjacent properties and improvements, which is almost incalculable." *AR 19:2745.* Additionally, "[a]esthetics of the area and property values would also be affected and the granting of the request would set a precedent of long-standing consequences which would not be in the best interests of the public welfare." *Id.* Granting the variance would therefore adversely affect the General Plan goal "to preserve and maintain residential areas." *Id.*

2. The property was down-zoned to R4 in 1983.

The hotel's site was finally down-zoned to "R4" in 1983, a zoning designation that does not permit hotels by right (except under limited circumstances not here applicable). *AR 24:3200.* The uses permitted within the R4 designation were also restricted by amendments to the Municipal Code at approximately the same time. *AR 24:3200.* Zoning Administrator Janovici observed in 1986 that the "clear intent and purpose of the zoning regulations reflected in the[se] changes was to severely restrict those instances in which hotels could be established by right in R4 and R5 Zones, thereby striving for greater neighborhood compatibility and prohibition of their establishment." *AR 24:3200.* The combined down-zoning and amendments to the Municipal Code thereby transformed the hotel into "a deemed approved" conditional use, with its incidental restaurant/cocktail lounge businesses becoming legal nonconforming uses. *AR 24:3196.* Moreover, the height limit within an R4 Zone is three stories or 45-feet high, rendering the building's 16-story height legal nonconforming. *AR 24:3203.*

3. Intensified exterior illumination of the hotel structure, drawing attention to the property's commercial usage, was prohibited.

In October 1985, Holiday Inn installed a "halo" of lights near the top of the hotel without seeking prior approval from the Zoning Administrator. *AR 24:3202.* Several months later, Holiday Inn applied for an extension of its expiring permit for live musical entertainment. *AR 24:3195.* Before the public hearing on the permit application, Brentwood Community Federation (a now-defunct association of eight Brentwood-area homeowner associations), Bel Air Association (the homeowner's association representing Bel Air residents), and many individual residents

in the area filed letters objecting to the lighting atop the hotel and opposing the live-music permit. *AR 24:3202; 12:1720.* Residents testified that the lighting was "offensive from their dwellings, by causing increased illumination on their property, which they perceive as an 'eyesore,' which would lead to degradation of the neighborhoods." *AR 24:3202.* The new lighting, in conjunction with the hotel's "dominant presence" high above the residential neighborhood, would spoil the non-commercial view and function as a "sign," which is not permitted in an R4 Zone and had been expressly denied in the 1981 Zoning Case. *AR 24:3203.*

On April 11, 1986, Zoning Administrator Janovici denied the request to continue providing musical entertainment on the premises because prior variances allowing such on-site entertainment had inadvertently perpetuated an intensification of commercial use "to the detriment of neighboring and surrounding properties" by attracting outsiders to patronize the bar/restaurant. *AR 24:3199.* Holiday Inn appealed that ruling to the Board of Zoning Appeals. *AR 24:3210.* The Board granted the appeal, thereby allowing continued musical entertainment. But in doing so it imposed *nine conditions* on the use of the property, including conditions (1) requiring the extinguishment of the newly-installed halo of lights (except during the last three weeks of December of each year); and (2) precluding the use of signs or other devices for advertising. *AR 24:3211.*

Holiday Inn appealed the Board of Zoning Appeals' determination with respect to these conditions. The City Council's Planning and Environment Committee held a public hearing on November 18, 1986. The Committee received an outpouring of letters from surrounding residents and associations testifying that the new lighting was an "eyesore;" they reflect a "crass commercialism" inconsistent with the residential character of the community; the lights rise high above the neighborhood, "in plain view" and in the "face" of the surrounding homes; they are destroying residents' "feelings of privacy;" the lights "cheapen the neighborhood;" they "represent a disguised form of advertising the hotel;" they create in effect "a huge advertising sign" for the hotel; the use of "very strong white lights" to illuminate the top floor "tend to obstruct the view beyond them and also reflect other amber lights upon the tower of the building;" the bright illumination is "out of place in our neighborhood;" destroying "the beauty of our neighborhood;" the lighting is an "inappropriate intensification of use" that functions as "a sign," which is "totally

inconsistent with the property, with the property zoning, and the neighborhood's general zoning;" the lighting is "too bright, commercial and attention getting (which is obviously its purpose) not to make a negative impact on this area;" the lights atop the hotel "dominate the skyline and turn a lovely residential neighborhood into a brightly lit distraction, even though it is a considerable distance away." *AR 12:1701-1719.* As the Bel Air Association aptly summarized, "the carnival-like string of horizontal lights circling the Holiday Inn structure should not be permitted because they constitute a surrogate sign advertising the bar, lounge and entertainment facilities," which cannot "be construed as security lighting for the parking area as claimed." *AR 12:1720.*

The Planning and Environmental Committee recommended that the City Council deny Holiday Inn's appeal of the Board of Zoning Appeals' conditions. *AR 24:3215.* The City Council denied the appeal and affirmed the nine conditions: The key conditions were: **Condition No. 2**, prohibiting advertising on the property through the use of "any signs, billboards, or other devices;" **Condition No. 6**, recognizing "that the authorized use shall be conducted at all times with due regard for the character of the surrounding district, and the right is reserved to the Zoning Administrator to impose additional corrective conditions, if, in his opinion, such conditions are proven necessary for the protection of persons in the neighborhood or occupants of adjacent property;" and **Condition No. 8**, requiring that "the existing horizontal lighting abutting the 16th floor shall be extinguished except that such lighting shall be permitted during the last three weeks of the month of December of each year." *AR 24:3217-3218.*[1]

Shortly after the Board of Zoning Appeals issued its ruling, but before the City Council affirmed that ruling, Holiday Inn installed a *second* row of lights, just above the first row. *AR 19:2787, 2789.* It contended that Condition No. 8 required only that "the *existing* horizontal lighting abutting the 16th floor shall be extinguished," not the *subsequently-installed* lighting above the existing row of lights. Then-Councilman Martin Braude wrote to Zoning Administrator Janovici on December 9, 1986, informing him of the new lights, which "appear to illuminate the building

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[1] Holiday Inn subsequently filed a petition for writ of mandamus challenging these conditions, but the Court of Appeal affirmed the City's imposition of the conditions. *AR 12:1785.*

to a greater degree than the existing tier of lights abutting the top of the 16th floor." *AR **19**:2789.* Councilman Braude observed that the new lights seemed inconsistent with "the spirit and intent of the [Board of Zoning Appeal's] decision in this case, which has now been affirmed by the City Council." *Id.* He asked that Mr. Janovici's office conduct an "investigation of the new issues involving the additional lighting" and, if Janovici finds that the lights violate the spirit and intent of the decision, to notify the Holiday Inn directly, without proceeding through the enforcement agency, the Department of Building and Safety. *Id.*

Zoning Administrator Janovici provided the requested interpretation of the land-use conditions on January 5, 1987: "As part of the resolution of the recent variance request, both the Board of Zoning Appeals and the City Council required that the original ring of lighting at the approximate 16th Floor level could not be illuminated except during the last three weeks of December. It seems clear that the Board of Zoning Appeals and Council certainly did not intend to allow additional lighting and therefore, use of such fixtures would be a violation of the spirit and intent of the Board's and Council's actions." *AR **19**:2787.* Janovici further clarified that the legal nonconforming building and the deemed approved conditional uses "may not be expanded or enlarged without authorization from this office." *AR **19**:2788.*

4. Illuminated signage atop the hotel was also prohibited.

Holiday Inn sought a variance in 1994 to allow the installation of an illuminated rooftop sign reading "Holiday Inn." *AR **20**:2892.* The Planning Department's Staff conducted in-house research revealing that "since 1972 the Holiday Inn has been occupying the subject premises under specific conditions, which were agreed upon at the time of approval in order to satisfy the tremendous opposition to the placement and construction of the hotel." *AR **20**:2893.* Staff reported that the hotel enjoys privileges not shared by other properties, including the architectural uniqueness of the structure and its nonconforming height, which causes it to "prevail over other structures in the surrounding area." *AR **20**:2895.* The addition of an illuminated sign atop the towering structure would "draw greater attention to the existence of the hotel," contrary to the intent of conditions designed to "preserve the integrity of the surrounding single-family neighborhood." *Id.* Staff therefore recommended that the request be denied as inconsistent with

"past discretionary approvals on the subject property," which reflected "an attempt to apply strict controls to prevent an over commercialization of the area." *Id.*

Zoning Administrator John J. Parker denied the variance request. *AR **20**:2933.* Prior to that ruling, a public hearing was attended by approximately 90 people, with 11 speaking against and 2 in favor of the request. *AR **20**: 2941.* Mr. Parker was presented with 52 letters in opposition to (and just 2 in favor of) the illuminated sign. *AR **20**: 2941; AR **19**:2792, 2807-2883.* He found that the illuminated sign "would have demonstrably negative effects upon surrounding properties." *Id.* "The intent of the prohibition on exterior signage and on general advertising is to limit the obvious commercial aspects of property development." *Id.* As shown at the public hearing, "the proposed signs would be very visible from many of the adjacent properties." *AR **20**:2941.* Moreover, since the hotel is "located adjacent to a major transportation corridor (the San Diego Freeway) with acknowledged scenic amenities [*i.e.*, the Santa Monica Mountains], the proposed signs would adversely impact the views of a large number of members of the general public." *Id.* Further, the area east of the Freeway and the area west of the hotel are developed with single-family residences and multi-residential users. The proposed illuminated sign would therefore be "out of character with the surrounding development." *Id.*

B. GH's 2005 Permit Requires It To Operate With Due Regard For The Residential Nature Of The Community.

1. GH obtained a variance subject to the ZA's power to impose conditions protecting the residential character of the community.

GH purchased the hotel in 2002. *Opening Brief ("OB"), p. 1.* Although Holiday Inn's restaurant and cocktail lounge could only serve hotel guests, GH filed a variance application in December 2004 seeking to open the restaurant and cocktail lounge to the general public. *AR **14**:2034.* In its application, GH characterized the requested variance as a mere formality: "There is no practical reason why the restaurant and lounge should not be able to serve the general public" because "any hypothetical increase in the 'intensity' of commercial use associated with operation of a publicly accessible restaurant/lounge on the Site is very unlikely to have any adverse impacts on the surrounding properties" due to "the small size of the restaurant/lounge," which

"limits the potential 'intensity' of public use," and the abundance of on-site parking. *AR* ***14****:2037.* The City filed a Negative Declaration under the California Environmental Quality Act, finding that (1) "no significant [environmental] impacts are apparent which might result from the project's implementation" and (2) the project would have *no impact whatsoever* on *aesthetic* matters. *AR* ***14****:2043, 2047.*

At no time during the variance process did GH indicate that it would install a compuerized, state-of-the-art, theatrical lighting system once the variance was granted. Indeed, GH's counsel, Benjamin Reznik, represented to Zoning Administrator Daniel Green that opening the bar/restaurant would have *no* intensifying impact on the community. *AR* ***14****:2076.* In doing so, Mr. Reznik acknowledged that the hotel's location was uniquely significant to Brentwood residents as it stands "at the Gateway to Brentwood." *Id.* In order to obtain community support for the variance, Mr. Reznik's colleague, Derek Jones, promised that GH "would invite community comments on its *plans* for signage, exterior lighting, exterior colors, and landscaping once such *plans* are available for review" – necessarily implying that community feedback on the "plans" would be sought *before* plans were finalized and the lighting and signage was installed. *AR* ***14****:2084* (emphasis added). As a result of GH's assurances, the Brentwood community supported its variance request, thereby conferring on GH a right of great value to its investors. *AR* ***14****:2076.*

On April 13, 2005, Mr. Green approved the request, noting that he had not received a single letter of opposition. *AR* ***14****:2092, 2102.* The zoning variance, however, did not provide GH *carte blanche* to conduct its operations in a manner that would harm the community. Zoning Administrator Green, who noted prior ZA Cases necessitating the imposition of conditions on lighting, signage and advertising (*AR* ***14****:2097-2099*), protected the community by *(1)* requiring that the Hotel's commercial use of the property "shall be conducted at all times with due regard for the character of the surrounding district;" and *(2)* reserving the right "to impose additional corrective Conditions if, in the Administrator's opinion, such Conditions are proven necessary for the protection of persons in the neighborhood or occupants of adjacent properties." *AR* ***14****:2093.*

2. GH chose to purchase and install its attention-getting lighting system without first seeking ZA approval.

Although GH promised to invite community input on its *plans* for exterior lighting "once such *plans* are available for review" (*AR 14:2084*), it broke that promise by installing an expensive theatrical lighting system without any community input and without seeking prior approval from the Zoning Administrator. *AR 12:1776; 32:3962.* GH's multi-colored lighting system dramatically bathed the "Jetsonesque circular building" in changing and vibrantly-colored lights, together with a halo of bright colored lights and spotlights ringing the top of the hotel and shining out into the surrounding residential neighborhoods. *AR 12:1796-1802.* This state-of-the-art, attention-getting illumination of the 16-story hotel was far more intense than anything ever attempted by Holiday Inn. *AR 32:4000,4010-4022; 12:1721-1795.*

Yet, instead of seeking prior approval from the Zoning Administrator and input from the community, GH went "under the radar" by obtaining over-the-counter electrical permits from the Department of Building and Safety and then installing its new lighting system. *AR 2:0162-0176.* While the Planning Department has a well-established entitlements procedure for determining whether and under what conditions intensified uses may be permitted (*AR 32:4016-4018*), GH chose instead to seek "forgiveness, not permission" (*AR 32:3993),* as realtor Fred Sands put it, by simply "pulling a permit" at the Building and Safety Counter. *AR32:4015-4019.* It did so even though (1) the property was subject to land-use conditions that precluded commercialization of the structure via attention-getting signs or lighting; (2) the Zoning Administrator, in granting the 2005 variance, expressly conditioned GH's new entitlement upon maintaining the property with due regard for the character of the surrounding residential community; and (3) retained jurisdiction "to impose additional corrective Conditions if, in the Administrator's opinion, such Conditions are proven necessary for the protection of persons in the neighborhood or occupants of adjacent properties." *AR 2:0213-0215; 14:2093.*

GH adopted the same "ask forgiveness, not permission" posture towards the community by failing to vet its lighting *plans* with the community before it purchased and installed its expensive lighting system. Thus, the community did not learn of GH's illumination plans until GH

flipped the "on" switch to its theatrical lighting system. *AR 32:3985-3987, 3991.* When the light show began, however, the community responded with an unprecedented outpouring of opposition, in response to an unprecedented transformation of the hotel structure into a Vegas-style architectural sign. *AR 12:1721-1795; Int. RJN, Exhs. A&B.*

C. The Zoning Administrator Found That The New Lighting Intensified The Commercial Use Of Property Within A Residential Zone.

1. Building & Safety ordered GH to remove its new lights based on the Chief Zoning Administrator's interpretation of permit conditions.

Intervenor Brentwood Community Council ("BCC") brought the Hotel's improper commercial lighting system to the attention of Michael LoGrande, the City's Chief Zoning Administrator. *AR 4:0456; 2:0177; 32:3959.* Mr. LoGrande issued a letter to the Department of Building and Safety advising that the hotel property is subject to zoning conditions that preclude the instillation of commercializing elements on the property, including signs, lights and advertising, without obtaining discretionary approval from the Zoning Administrator. *AR 2:0154.* He asked that the Department of Building and Safety, as the enforcement arm for the City, investigate its issuance of the electrical permits given the zoning restrictions on the property. *AR 2:0154-0155.*

The Department of Building and Safety investigated the matter and found that the lighting system violated the zoning restrictions as interpreted by Chief Zoning Administrator LoGrande. *AR 2:0156-0157.* On February 20, 2007, the Department issued an Order to Comply, stating that the electrical permits were issued in violation of conditional use permit conditions as interpreted by Mr. LoGrande and ordering that the lighting system be demolished. *AR 2:0156.* GH appealed the order to the Department of Building and Safety, which upheld the order. *AR 2:0162.* GH then appealed the decision to the Planning Department, which set up the latest of the many Zoning Administration cases involving the property since 1972.

2. The Zoning Administrator found GH's commercial lighting to violate conditions imposed on the property.

Zoning Administrator Eric Ritter issued a written determination denying GH's appeal. *AR 2:0212.* He concluded that the many Zoning Administration cases concerning the property

"are all connected by the common thread of prohibiting the unauthorized use of attention getting exterior night lighting and illumination of the building, which promote and advertise the hotel location." *AR 2:0223; 32:3960-3962.* "Concerning attention getting lighting, the viewpoint of former Chief Zoning Administrator Robert Janovici is as relevant today as in 1986, when he wrote, 'lighting in effect seemed as the functional equivalent of a sign, which is not permitted and which has been expressly denied.'" *AR 2:0223.* This commercial illumination is a form of "de facto signage," which is inconsistent with restrictions consistently imposed on the property given its residential location. *AR 2:0226*; **32**:3960, 4006-4007.

Mr. Ritter personally inspected the hotel's lighting on three separate occasions and considered public testimony, including the numerous letters and photographs filed in opposition to GH's administrative appeal. *AR 32:4006; 2:0225.* He emphasized that his then-recent drive-by inspections provided "a unique and educating visual experience," which led him to the inescapable conclusion that the illumination constitutes an intensification of commercial use within a residential zone for which no discretionary approval had been sought or obtained. *AR 2:0225.* He observed that, although the hotel's "vibrant, multi-colored" lighting presentation had recently been toned-down, he nevertheless "experienced a light presentation of dramatic visual effect and out of character with this residentially zoned location." *AR 2:0225.* He saw purple lights running up the entire vertical wall of the high rise, circular-shaped hotel structure. At night, "there was no mistaking the visual impact of this high rise beacon of light that visually confronts drivers on Sunset Boulevard and the San Diego Freeway (State Highway 405) after dark, as well as on neighboring residences." *AR 2:0225.* The "objective result of the Hotel's night lighting program" is a "lighting presentation which promotes the Hotel Angeleno and its accessory uses" with "dramatic" lighting that "beckons motorists and residents alike." *AR 2:0225.*

Mr. Ritter observed that the spotlights against the structure "project large fields of vibrant lights, which illuminate the building's surface with vertical shafts of colored lighting running from the base to the crown of the structure," standing as an "illuminated beacon of shimmering vertical lights which draw attention and promote and, therefore, advertise the presence of the Hotel Angeleno." *AR 2:0226.* The result is "a glowing promotional advertisement," which casts "un-

wished for illuminated light on surrounding residential neighborhoods." *AR 2:0226.* The lighting program is therefore a "visual communication device," employing "the bold use of light, color, shape, and space," for dramatic impact, to create "a de facto sign" bearing the unmistakable "message that this is the Hotel Angeleno." *AR 2:0226.*

The determination was also supported by evidence submitted by residents of the neighborhoods surrounding the Hotel Angeleno and the associations representing residents in those areas and throughout Brentwood. The Brentwood Glen Association, representing 450 households across Sunset Blvd. from the hotel, and the Westwood Hills Property Owners Association, on behalf of 610 households east of the freeway, submitted written testimony that *(1)* the hotel is visible from many homes in Brentwood Glen, other areas of Brentwood, Bel-Air and Westwood Hills; *(2)* the hotel "is illuminating the exterior of the building with computer-driven multi-colored lighting that change color frequently throughout the evening;" *(3)* the lighting display also "uses horizontal colored lights to simulate a 'crown' at the 16th Floor;" *(4)* this "lighting has the effect of a giant vertical neon billboard;" *(5)* "the effect is often garish" and "never suitable for a hotel operating in a residential neighborhood;" and *(6)* "this level of Las Vegas style lighting is clearly intended as advertising and is not needed to help patrons find the hotel." *AR 12:1721-1727.* A resident living three blocks from the hotel testified that she sees the garish lights from her front door and then contrasted "the quiet, secluded residential quality of our neighborhood" with the new illumination, which "looks like a ride at Disneyland, all neon and flash." *AR 12:1728.*

The Brentwood Homeowners Association, representing residents in 3,500 single family homes in Brentwood, likewise objected that the theatrical lighting display is like "putting a harbor lighthouse in the middle of a quiet residential neighborhood," where "it can be seen from miles away," except that unlike a lighthouse, which serves a protective purpose, "the only purpose of [the] Hotel lighting is to advertise from a much greater distance than would any sign." *AR 12:1777.* The Association submitted photographs illustrating the grossly commercial nature of the lighting. *AR 12:1788-1793; Int. RJN, Exh. B.*

The South Brentwood Homeowners Association provided written testimony on behalf of its members that *(1)* GH's "lighting is an aesthetic blight at the entrance to Brentwood on a scenic corridor with the backdrop of the Santa Monica Mountains;" *(2)* members have registered complaints about "glare, visual blight and reduced property values;" *(3)* the lighting functions as "signage or advertising," which has historically not been permitted on the property; *(4)* this "commercial lighting in a residential zone" is comparable to "the Staples Center, the colored Airport Columns, Las Vegas or a carnival," which is "inconsistent with the surrounding Brentwood residential community and out of character with the area's businesses." *AR 12:1739-1742.* Similarly, the Brentwood Park Property Owners Association provided testimony that GH's improper use of such "garish lights" is "demeaning to Brentwood as a whole;" it "gives a Las Vegas allure that is not the feeling that Brentwood exudes to attract residents," which "will hurt property values in the Park" and, "if allowed to stand, will set a negative precedent reversing the Brentwood quality of life." *AR 12:1743;* See also *AR 12:1746-1748* (realtor Fred Sands testifying that the lighting has damaged local property values).

Finally, the Museum Heights Housing Association, which represents 66 residents in the condominiums *directly across the street* from the hotel, submitted written testimony that its residents have been subjected to "an unwelcome continuous light show from shortly after sunset through early morning," which is not only inappropriate for a residential area, but has caused "interruptions to [the residents'] evening routines and sleep patterns." *AR 12:1795.*

3. The Area Planning Commission denied GH's appeal and its Commissioners made additional findings supporting the ZA's ruling.

GH appealed the Zoning Administrator's decision to the West Los Angeles Area Planning Commission, which denied the appeal. *AR 2:0228.* In doing so, three of the Commissioners stated that they had visited the site and agreed that the lighting functioned like advertising, drawing attention to Hotel Angeleno's commercial businesses, which operate in a predominantly residential area. *AR 32:4010-4012, 4014, 4019-4022.*

Commissioner Joyce Foster, who has lived in Westwood her entire life, found that "I've never seen that hotel lit like that;" "there might have been some vertical lighting but it … it never

stood out like it does." *AR 32:4010.* As it's now lit, "the hotel is extremely visible from almost every aspect of the neighborhood. You can drive on either side of the freeway. I mean, it's very visible," especially because "it stands up in an area where there isn't anything like it." *AR 32:4011-4012.* Commissioner Foster emphasized that "it's not just changing to a more efficient lighting," "it lights the building in a way it's never been lit before." *AR 32:4011.* This change, which is "a definite intensification," explains the "outcry from every homeowner's association." *AR 32:4011.* Similarly, Commissioner Marianne Brown found that the hotel is lit like the "LAX columns," which is out of keeping with the surrounding residences. *AR 32:4014; Int. RJN, Exh. A.* She noted that "we're all for energy efficiency, but it doesn't have to look like this." *AR 32:4022.* Commissioner Glenda Martinez concurred that the lighting functions as a commercial sign, which is out of character with the surrounding community and prohibited by prior rulings and conditions. *AR 32:4019-4022.*

III. STANDARD OF REVIEW

In an administrative mandamus action under Code of Civil Procedure §1094.5, where no trial *de novo* is authorized by law, the trial court exercises "the appellate function of determining whether the record is free from legal error." *Stolman v. City of Los Angeles*, 114 Cal.App.4th 916, 922 (2003). The trial court must determine whether there has been a prejudicial abuse of discretion. *Topanga Assoc. for a Scenic Community v. Co. of Los Angeles*, 11 Cal.3d 506, 514-515 (1974). An abuse of discretion is defined as an order or decision that "is not supported by the findings or findings that are not supported by the evidence." *Id.*, quoting CCP §1094.5(b). An abuse of discretion is established only if the reviewing court determines that the administrative findings are not supported by substantial evidence in light of the entire record. *Id.* The party seeking to reverse an administrative determination bears the burden of proving that it is not supported by substantial evidence. *Young v. Gannon*, 97 Cal.App.4th 209, 225 (2002).

Substantial evidence "is defined as evidence of merely "ponderable legal significance," which is "reasonable in nature, credible, and of solid value" and "relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *Young*, 97 Cal.App.4th at 225. Under this deferential standard, the reviewing court "may not interfere with the City's discretionary

judgments and must resolve reasonable doubts in favor of the administrative findings and decision." *Committee to Save Hollywoodland Specific Plan v. City of Los Angeles*, 161 Cal.App.4th 1168, 676 (2008), citing CCP §1094.5(b) and *Dore v. Co. of Ventura*, 23 Cal.App.4th 320, 326-327 (1994). Given the administrative agency's technical expertise (*Dore*, 23 Cal.App.4th at 326-327), the reviewing court "may not substitute [its] own judgment for the City's and reverse because [it] believe[s] a contrary finding would have been equally or more reasonable." *Save Hollywoodland*, 161 CalApp.4th at 676.

IV. LEGAL ARGUMENT

A. The Nonconforming Use Doctrine Does Not Confer On GH The Right To Illuminate Its 16-Story Building In Attention-Getting Colored Lights.

GH contends that it has a "fundamental vested right" to illuminate the hotel's exterior by using the theatrical lighting system that it installed without permission in 2006. *Opening Brief ("OB"), p.9.* The *source* of this alleged right is not articulated in the *Legal Argument* section of its brief, but GH asserts in its *Statement of Facts* that its "right to light the Hotel's exterior is part of its legal-nonconforming status pursuant to LAMC 12.23.C.2(a)." *OB, p. 7.* But whatever rights that the prior owner may have had under the nonconforming use doctrine as of the 1983 zone change were *relinquished* when Holiday Inn (and later GH) sought and obtained *conditional use permits* requiring that its operations be conducted "with due regard for the character of the surrounding district" and subject to the Zoning Administrator's continuing right to impose additional conditions as it deems necessary "for the protection of persons in the neighborhood or occupants of adjacent property."

However, even if the conditional use permits did not restrict GH's right to illuminate the hotel structure, which they do, GH would still not have a right to utilize its theatrical lighting system under the nonconforming use doctrine. Nonconforming uses are narrowly construed and the party claiming such rights bears the burden of proving that its desired usage would not expand, extend, intensify or enlarge upon the grandfathered right. GH has not met its burden, nor could it do so given the substantial (indeed, undisputed) evidence that its multi-colored lighting

system is far more disruptive to the residential character of the neighboring communities than its prior lighting system.

1. Rights under the nonconforming use doctrine are narrowly construed.

Los Angeles Municipal Code §12.23.C.2 provides that "the nonconforming use of land may be continued, subject to the following limitations: (a) use of land is *not expanded or extended in any way* either on the same or adjoining land beyond the limits of what was originally permitted;" and (b) the use is not changed. This ordinance codifies the nonconforming use doctrine, which recognizes the right to use a rezoned property as those rights existed at the time the zoning rules changed. *Edmonds v. Co. of Los Angeles*, 40 Cal.2d 642, 651 (1953). Nonconforming use provisions like Section 12.23.C.2 are "ordinarily included in zoning ordinances because of the hardship and doubtful constitutionality of compelling the immediate discontinuance of nonconforming uses." *Co. of San Diego v. McClurken*, 37 Cal. 2d 683, 686 (1951). When the continuance of a nonconforming use is permitted, however, (1) the continued nonconforming use must be similar to the use existing at the time the zoning change became effective; (2) it must be continuous and unchanged since the time of the zoning change; and (3)"Intensification or expansion of the existing nonconforming use . . . is not permitted." *Hansen Bros. Enterprises, Inc. v. Bd. of Supervisors*, 12 Cal.4th 533, 552 (1996).

These limitations on the nonconforming use doctrine reflect "the policy of the law [which] is for elimination of nonconforming uses." *Sabek, Inc. v. Co. of Sonoma*, 190 Cal. App. 3d 163, 166 (1987). "Given the objective of zoning to eliminate nonconforming uses, courts throughout the country generally follow a strict policy against their extension or enlargement." *Sabek,* 190 Cal. App. 3d at 167, quoting *McClurken*, 37 Cal. 2d at 686-687; *Stolman v. City of Los Angeles*, 114 Cal. App. 4th 916, 926 (2003) (holding that general zoning law prohibits discretionary permitting designed to "perpetuate" or "expand" a nonconforming use).

This strict policy against extension or enlargement of nonconforming uses "looks to the future and the eventual liquidation of nonconforming uses." *Sabek*, 190 Cal. App. 3d at 167, quoting N*ational Adv. Co. v. Co. of Monterey*, 1 Cal. 3d 875, 880 (1970). The doctrine narrowly protects property owners only against the risk of "immediate removal" of nonconforming struc-

tures/uses, but *not* against the "gradual elimination" of nonconforming uses over time, which typically occurs through "obsolescence." *Id.* Nonconforming uses become obsolete over time when the limited bundle of rights existing at the time of a zoning change become inadequate to satisfy subsequent business necessities or consumer demands. Strict and narrow construction of legal nonconforming uses thereby protect the purpose of zoning, which is "to crystallize present uses and conditions and eliminate nonconforming uses as rapidly" and "speedily as is consistent with proper safeguards for the interests of those affected." *Sabek,* 190 Cal. App. 3d at 167-168. By contrast, use intensification defeats zoning policy by "adding permanency to a nonconforming use, which the intent of the [zoning] ordinance seeks to eliminate." *Sabek*, 190 Cal. App. 3d at 168, quoting *Paramount Rock Co. v. Co. of San Diego*, 180 Cal. App. 2d 217, 231 (1960). The intensification of nonconforming uses is, therefore, strictly prohibited. *Id.* at 167-168.

2. Holiday Inn's (and therefore GH's) nonconforming-use rights were relinquished in exchange for rights conferred under conditional use permits.

"A nonconforming use is a lawful use existing on the effective date of the zoning restriction and *continuing since that time in nonconformance* to the ordinance." *City of Los Angeles v. Gage*, 127 Cal.App.2d 442, 453 (1954) (emphasis added). If nonconforming rights are relinquished at any time after they attach, they cannot later be revived. *City of Los Angeles v. Wolfe*, 6 Cal.3d 326, 337 (1971). Here, Holiday Inn relinquished its right to illuminate the hotel structure under the nonconforming use doctrine in exchange for obtaining conditional use permits, which restricted its right to illuminate the hotel structure. That relinquishment terminated Holiday Inn's (and therefore GH's) right to illuminate under the nonconforming use doctrine, thereby subjecting the property to restrictions stated in the permitting documents.

A relinquishment of nonconforming rights is illustrated in *Wolfe*, where the defendants owned a commercial building that was constructed before municipal zoning laws were changed to require that parking be provided within 750 feet of any such commercial building. *Id.* at 332. While the zoning ordinance allowed pre-existing buildings to operate as nonconforming, such buildings could not be altered or enlarged without complying with the new parking requirements. *Id.* Thus, "the effect of the zoning ordinance was to require defendants to obtain additional park-

ing if they wished to avoid the status and economic restrictions of having a nonconforming building." *Id.* at 336. While defendants' building initially became nonconforming at the time the ordinance became effective, defendants eventually purchased a non-adjacent parcel within the 750 feet required by the ordinance to use as a parking lot, thereby rendering the commercial building compliant with the new zoning rules. *Id.* at 332. The City, however, subsequently condemned the parking lot property, which rendered the commercial building non-compliant for failure to provide the requisite parking within 750 feet. *Id.* at 332. As a result, the commercial building was no longer entitled to grandfathering because, "by complying with the zoning ordinance, defendants relinquished the status of nonconforming building." *Id.* at 337. This relinquishment of nonconforming status is necessitated because "the policy of the law is for elimination of nonconforming uses, and generally there can be no resumption of a nonconforming use which has been relinquished." *Id.*, citing 8A McQuillin, MUNICIPAL CORPORATIONS §§ 25.189-25.199 (3d ed).[2]

Here, the City granted Holiday Inn's request for a conditional permit allowing it to provide live musical entertainment on the premises of its restaurant/bar. In exchange for that discretionary entitlement, the Holiday Inn's use of the property was conditioned by *(1)* precluding the use of on-site signs, billboard, and other devices for advertising; *(2)* precluding the use of attention-getting lighting (except during the final three weeks of December); *(3)* requiring that it conduct its operations with due regard for the residential character of the neighboring communities; and *(4)* subjecting it to the Zoning Administrator's authority to apply conditions it deems necessary to protect the *residential* character of the neighboring properties. The conditional use permit thereby *enlarged* Holiday Inn's use of the property beyond that permitted as a nonconforming or deemed-approved use, but in doing so the permit also restricted use of the property to protect the residen-

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[2] The Court held that, because condemnation of the parking lot property rendered the commercial building noncompliant, and the commercial building was no longer protected by the nonconforming use doctrine because of the prior relinquishment, defendants may be entitled to "severance damages" despite the lack of physical continuity between the two properties. *Wolfe*, 6 Cal.3d at 3379-338.

tial character of the surrounding community. Holiday Inn thereby relinquished its legal nonconforming status in favor of a conditional use status.[3]

3. GH also failed to meet its burden of demonstrating that the new lighting system did not extend, expand, intensify, or enlarge its nonconforming use.

Even if Holiday Inn's right under the nonconforming use doctrine had not been relinquished, GH's administrative showing would not have been sufficient to establish a vested right under the nonconforming use doctrine to use its new lighting system. "The *burden of proof* is on the party asserting a right to a nonconforming use to establish the lawful and continuing existence of the use at the time of the enactment of the [zoning change] ordinance." *Hansen*, 12 Cal.4th at 564. While this standard imposes a heavy burden on the party claiming such a vested right, especially when "so much time has elapsed and city records are incomplete," that burden must remain on the party claiming the right because "a contrary rule shifting the burden to the city would mean, as a practical matter, that some older properties could never be brought into compliance with modern zoning standards." *City and County of San Francisco v. Bd. of Permit Appeals*, 207 Cal.App.3d 1099, 1107 (1989). And that would violate the code's purpose, "to bring nonconforming uses into code compliance as quickly as the fair interests of the parties will permit." *Id.*

GH's burden was to establish that, prior to the 1983 zoning change, it lawfully and continuously illuminated the hotel structure with the same intensity until the new lighting was installed, and to the same extent as with the new lighting system. *Hansen*, 12 Cal.4th at 564. "[I]in determining whether the nonconforming use was the same before and after passage of the zoning ordinance" – *i.e.*, whether the new use represents an intensification or expansion of the pre-zone change use – "each case must stand on its own facts." *Id.* at 552, quoting *Edmonds*, 40 Cal.2d at 651. In this case, the nonconforming use involves the claimed right to illuminate the hotel struc-

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[3] The Zoning Administrator likewise expanded GH's rights by permitting it to open its restaurant/bar to the public, in exchange for which GH agreed to act with due regard for the residential character of the neighboring communities, subject to the Zoning Administrator's authority to apply conditions it deems necessary to protect the residential character of the neighboring properties. *AR* ***14:2093.***

ture, which, as 30 years of Zoning Administrator determinations establish, has been conditioned to prevent signage or lighting that would cast a commercial pall over the residential neighborhoods. The question is whether the *new* system intensifies the structure's illumination and thereby commercializes it.

GH, however, has not even established the baseline against which the new lighting system must be compared. GH submitted *no* testimony or documentation establishing the level at which the building was lawfully and continuously lit from 1983 until 2006, when the new system was installed. The *only* evidence GH submitted during the administrative process was a Holiday Inn postcard/photograph that Mr. Reznik, who is not a percipient witness, claimed was taken sometime before the "mid-1980s," which could therefore have been taken *after* the 1983 zone change. *AR 32:4013; GH's Request for Jud. Notice ("GH's RJN"), Exh. 2, p. 1.* The postcard was unsupported by the testimony of any contemporaneous witnesses. Standing alone, without supporting testimony, the postcard does not establish the quality of the structure's illumination vis-à-vis the impacted neighborhoods. Moreover, the postcard could have been enhanced or staged for promotional purposes, raising doubt as to whether it depicts the structure as it was *continuously* illuminated from the time of the zone change in 1983 until the new lights were installed in 2006. And substantial evidence supports a finding that it is not representative. Commissioner Foster, who lived in the area and regularly saw the hotel structure over the years, observed that the postcard was not an accurate representation of the "the way the building looked for the last 20 years." *AR 32:4013.* Evelyn Stern, former Brentwood Homeowners' Association President and lifelong area resident, testified that GH's counsel's description of the Holiday Inn's illumination was a distortion and that "never in the entire history of the hotel has any but the most minimal illumination been allowed above ground level." *AR 32:4000-4001.* Further, as Commissioner Foster observed, the postcard appears to distort the hotel lighting due to lighting emanating from the freeway. *AR 32:4013.* Significantly, however, the new lighting is far more obtrusive than the lighting depicted in the postcard. The vertical lights in the postcard appear to illuminate only the *first few floors* of the hotel structure and they do so in a neutral white light. By contrast, the new lighting system bathes *the entire 16-story structure* in bold, multi-colored lights. In sum, GH has failed to

meet its burden of establishing a baseline from which to compare the 1983-2006 lighting with that of the new system.[4]

By contrast, the administrative record is replete with testimony from witnesses, including Brentwood, Bel Air and Westwood Hills residents, supporting the administrative finding that the new lighting system represents a substantial intensification, expansion and extension of the system used during the 1983-2006 time period. Because an assessment of the impact of the new lighting on the residential quality and character of the surrounding neighborhoods is necessarily subjective, *i.e.*, not capable of quantification, the testimony of local residents is especially significant. *Ocean View Estates Homeowners Ass'n, Inc.*, 116 Cal.App.4th 396, 402 (2004); *Dore v. Co. of Ventura,* 23 Cal.App.4th 320, 328-329 (1994). Courts recognize that the "relevant personal observations by area residents are properly considered" as admissible evidence supporting an administrative finding of adverse aesthetic impacts. *Pocket Protectors v. City of Sacramento*, 124 Cal.App.4th 903, 932 (2004); *Ocean View Estates,* 116 Cal.App.4th at 402. The area residents are critical witnesses because it is the quality and character of their residential neighborhoods that is being assessed. *Id.*; *Dore*, 23 Cal.App.4th at 328-329. This constitutes substantial evidence that the new lights represent a significant intensification of the structure's lighting.

B. The Conditional Use Permits Restrict Illumination Of The Hotel Structure.

GH operates under conditional use permits allowing it to open its restaurant and cocktail lounge to the general public and provide live musical entertainment on the premises. In exchange for these entitlements, *(1)* GH is precluded from advertising with on-site signs or other devices; *(2)* it must maintain its operations with due regard for the character of the surrounding residential neighborhoods, subject to additional conditions protecting neighboring residents and properties;

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[4] GH submitted a second photograph, *GH's RJN, Exh. 2, p. 2*, which likewise appears in the record without any information on *when* it was taken. This photograph, however, is clearly *not* a depiction of the structure's continuous and lawful appearance during the 1983-2006 time period because *(1)* it shows horizontal lights glaring out from atop the hotel, which was expressly prohibited in 1986 and 1987(*AR* ***24****:3217-3218;* ***19****:2787*); and *(2)* it depicts an illuminated "Holiday Inn" sign on the structure, although requests to install such a sign were denied in both 1981 and 1994. *AR* ***19****:2743;* ***20****:2933.*

and *(3)* it may not illuminate the top portion of the structure with any lights. These three conditions, whether considered independently or collectively, empower the City to order the demolition of the theatrical lighting system that GH installed without ZA approval.

1. No advertising with signs, billboards or other devices.

Condition No. 2 of the 1986 live-music permit precludes the property owner from advertising through the use of "any signs, billboards or other devices maintained on or off the premises . . ." *AR 24:3217.* Zoning Administrator Ritter, like Zoning Administrator Janovici before him, interpreted this condition as precluding the use of exterior illumination to draw attention to the hotel structure, which functions as a form of advertising. *AR 2:0223; 32:3960.* Thus, any intensification or expansion of exterior illumination requires a Zoning Administrator determination as to whether the enhanced illumination amounts to a *de facto* sign in violation of Condition No. 2. *AR 2:0224.* This interpretation of Condition No. 2 was based on 30+ years of Zoning Administrator case precedent for the structure. *AR 32:3960-62, 4006-4007.* Mr. Ritter's interpretation of Condition No. 2, based on precedent from the Zoning Administrator cases and his expertise, is entitled to substantial judicial deference. *Dore*, 23 Cal.App.4th at 328-329.

The administrative interpretation that illumination of the structure may function as a form of advertising/signage that is precluded by the condition is supported by precedent from the 30-plus years of ZA regulation over hotel property. Zoning Administrators twice denied variance requests to install illuminated "Holiday Inn" signs atop the hotel structure because such attention-generating illumination was inconsistent with the residential character of the surrounding neighborhoods. And in 1986, when Holiday Inn unilaterally installed exterior lights that focused attention upon the hotel structure, the community, the Zoning Administrator, the Board of Zoning Appeals, and the City Council recognized that the use of such lighting on this unique structure, which rises above the surrounding residential communities, functioned as signage and was inconsistent with the character of the community. *AR* **12**:1690, 1701-1720; *19:2758, 24:3203.* The fact that the building itself functioned as a promotional sign was expressly recognized in the 1994 ruling, where the Zoning Administrator expressed his agreement "with those protestants at the hearing who observed that the very height of the hotel, which is unusual in this area, and the

circular shape of the building are in themselves logos, which abrogate the need for additional signage." *AR 20:2940.*

Illumination of this iconic structure thereby constitutes an intensification of the building's signage function. Indeed, the promotional purpose of the new illumination system was acknowledged by GH in its 2006 Press Release, which refers to "the hotel's iconic circular design" that has been "updated with a sleek, custom-designed exterior lighting display." *AR 12:1796.* The Hotel Angeleno thereby "struts its extreme makeover" through a "custom-designed exterior light display," which promotes the hotel's image as a "casual yet cool" hotel and nightspot. *AR 12:1799.* Thus, Condition No. 2, which prohibits on-site advertising by signs or "other devices" restricts the use of such attention-getting illumination.

2. Due regard for character of community.

The *second* condition that restricts the use of illumination is Condition No. 6 to the 1986 permit, which is repeated as Condition No. 3 to the 2005 conditional use permit. This condition requires that the permitted uses "shall be conducted at all times with due regard for the character of the surrounding [residential] district." *AR 24:3217; 14:2093.* Given the subjective nature of this condition, the Zoning Administrators have properly reserved continuing jurisdiction over the property "to impose additional corrective conditions, if, in [the Zoning Administrator's] opinion, such conditions are necessary for the protection of persons in the neighborhood or occupants of adjacent property." *AR 24:3217; 14:2093.*

This condition plainly authorizes Zoning Administrators to restrict the use of exterior illumination to protect the character of the surrounding neighborhoods. The property owner is expressly required to operate with due regard for the character of the surrounding residential community and, if it fails to do so, the Zoning Administrator is authorized to impose conditions necessary to protect the community. Zoning Administrators over the past 30-plus years have consistently protected the residential character of the surrounding neighborhoods by restricting illumination of or emanating from the over-in-height building. This condition therefore restricts the property owner's "right" to use exterior illumination and likewise empowers Zoning Administrators to compel the removal of offending lighting.

3. No lighting atop the building.

The *third* condition is Condition No. 8 to the 1986 permit, which requires the property owner to extinguish the halo of horizontal lighting atop the hotel structure (except during the final three weeks of the year). *AR 24:3218.* This condition likewise established precedent that authorizes the Zoning Administrator to protect the surrounding communities by regulating the use of exterior lighting on the property.

Condition No. 8 clearly authorizes the prohibition of horizontal illumination in general, not just the precise lighting fixtures in place at the time the Board of Zoning Appeals filed its determination. While the condition refers to "the existing horizontal lighting" as being subject to this condition, Chief Zoning Administrator Janovici clarified in 1987 that this condition applied to different, later-installed lighting fixtures positioned just above the lights existing at the time the conditional use permit was issued. *AR 19:2787.* Janovici, in rejecting Holiday Inn's hyper-technical interpretation of Condition No. 8 as applicable only to the "existing horizontal lighting abutting the 16th floor," stated that "it seems clear that the Board of Zoning Appeals and the [City] Council certainly *did not intend to allow additional lighting* and therefore, use of such fixtures would be a violation of the spirit and intent of the Board's and Council's actions." *AR 19:2787.*

GH has similarly argued that Condition No. 8 must be narrowly construed as applicable only to the row of horizontal lighting existing in 1986 – and not to the newly-installed horizontal lighting glaring into the surrounding residential neighborhood. *Int. RJN, Exhs. A &B.* But the *purpose* of Condition No. 8 is to protect the residential neighbors from the intrusive use of promotional lighting that illuminates or emanates from the over-in-height commercial structure.

Moreover, the purpose of this condition is not properly limited to the use of "horizontal" as opposed to "vertical" lighting. The purpose of the condition is to restrict the use of attention-generating lighting that can be seen throughout the surrounding neighborhoods, a purpose that cannot be limited to "horizontal" lighting. This purpose is evidenced by the Zoning Administrator's 1986 determination, the testimony of residents and neighborhood associations in 1986 in opposition to the lighting, the conditions imposed by the Board of Zoning Appeals and the City Council in response to such opposition, the 1986 Braude letter, and the 1987 Janovici clarification

letter. *AR* ***12****:1701-1719, 1720;* ***19****:2757-2758; 2787-2788, 2789-2790;* ***24****:3202-3203.* This protective purpose is also evident from the denial of Holiday Inn's 1981 and 1994 requests to place illuminated signs atop the 16-story structure. *AR* ***19****:2744-2745;* ***20****:2941.* These rulings establish that Condition No. 8, whether considered alone or in conjunction with the two other conditions, was designed to protect against the harm that would be suffered by attention-getting illumination within view of the residential neighbors. *AR* ***2****:0223-0226.*

C. The Finding That GH's Lighting Violates Its Permit Conditions Is Supported By Substantial Evidence.

Given the propriety of Zoning Administrator Ritter's interpretation of the 1986 and 2005 conditions, it is clear that his *factual finding* that the new lighting system violates these conditions is supported by substantial evidence. First, the testimony of the residential neighbors, which is consistent with the testimony of protesters in 1986 and 1994, is, in itself, sufficient to constitute substantial evidence. *Ocean View Estates,* 116 Cal.App.4th at 402 (holding that consideration of aesthetic impacts is subjective and therefore "personal observations of [such] nontechnical issues can constitute substantial evidence"). Moreover, Mr. Ritter's factual findings of intensification and *de facto* signage are also supported by his own on-site inspection, which is the type of subjective aesthetic determination that merits judicial deference under the substantial evidence standard. *Dore,* 23 Cal.App.4th at 328-329.

D. The 2005 Permit Does Not Eviscerate The 1986 Conditions.

GH argues that the *only* justification for prior Zoning Administrator restrictions on lighting is that they were "imposed based upon the fact that at the time, the Hotel's restaurant and lounge were limited under the zoning to serve Hotel guests and patrons only and not the general public." *OB, p. 4.* Now that the restaurant and lounge are open to the public, GH argues, it makes no sense to restrict illumination that functions as *de facto* signage. GH therefore argues that the conditions on GH's variance to provide live music were implicitly "supplanted" by the permit to open the facilities to the general public. *OB, p. 5.*

But GH's theory that the rationale for illumination and sign restrictions was based solely upon the fact that the restaurant and lounge were not open to the public is not supported by any

administrative evidence whatsoever. As described above, the Zoning Administrators have consistently recognized that restrictions on illumination – whether of signs or the structure – were imposed to protect the residential character of the surrounding neighborhoods and for aesthetic reasons, not just because the incidental facilities were closed to the public. Moreover, it would make no sense for the Zoning Administrator to have considered hotel illumination in 2005 because he was assured by GH's counsel that (1) GH had not developed plans for illumination at the time; (2) GH would work with the community to develop its lighting plans; and (3) the requested permit would have no adverse impacts on the community and, as stated in the environmental report, it would have "no impact" on "the existing visual character or quality of the site or its surroundings" and would have no impact on "nighttime views in the area." *AR 14:2047, 2100.* Far from implicitly "supplanting" the nine conditions from the live-music permit, the Zoning Administrator expressly referenced that those nine conditions were imposed by the Board of Zoning Appeals and the City Council in 1986 (*AR 14:2099*) and stated that "[p]revious limitations on live musical entertainment and seating remain intact." *AR 14:2102.* Further, GH never requested or received a deviation from the 1986 permit conditions, so they necessarily remain intact. *AR 2:0155.*

Finally, the Zoning Administrator broadly restricted GH's entitlement through Condition No. 3, which, like Condition No. 6 to the 1986 permit, required GH to act with due regard for the residential nature of the community and subjected it to conditions deemed necessary by the Zoning Administrator to protect the surrounding residents and properties. Thus, (1) the 2005 permit did nothing to "supplant" the conditions imposed by the permit to provide musical entertainment; and (2) the 2005 permit includes an express condition that broadly authorizes the Zoning Administrator to protect the community against GH's commercial illumination.

E. GH Raises No Viable First Amendment Defense.

GH asserts that under the First Amendment to the United Stated Constitution, the City lacks "a governmental interest sufficient to impinge on the Hotel's commercial speech rights," which are allegedly impaired by a restriction on attention-getting illumination of the hotel structure rising above the surrounding residential neighborhoods. *OB, p. 11.*

The Supreme Court, however, has expressly held that municipalities have a substantial governmental interest in pursing aesthetic goals through restrictions on signage. *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 507-508 (1981). "Community aesthetics and preservation of the character of a neighborhood are valid bases for a regulation" restricting signage. *Outdoor Graphics, inc. v. City of Burlington, Iowa*, 103 F.3d 690, 695 (8th Cir. 1996); *Metro Lights, LLC v. City of Los Angeles*, 551 F.3d 898, 904 (9th Cir. 2008); *Showing Animals Respect And Kindness v. City of West Hollywood*, 166 Cal.App.4th 815, 823-824 (2008). Thus, content-neutral restrictions on speech that directly advance substantial governmental interests – including aesthetic interests – are constitutional as long as the means employed reach no further than necessary to accomplish the given objective. *Metromedia*, 453 U.S. at 507.

GH does *not* argue that the restrictions on illumination reach further than necessary to accomplish the City's aesthetic objectives – nor could it do so. The City's concern is with the aesthetic impact of illuminating an over-in-height commercial structure towering above the neighboring residential communities. The conditions imposed on GH, in exchange for its conditional use permits, are narrowly tailored to protect the surrounding neighborhoods. Thus, the conditions imposed on illumination do not raise constitutional concerns.

F. The Order To Comply Was Properly Issued.

GH contends that the Order to Comply was improperly issued by the Department of Building and Safety because *(1)* it is based on Chief Zoning Administrator LoGrande's interpretation of precedent for the site, which does not constitute "an actual ZA determination;" and *(2)* Mr. LoGrande asked Building and Safety to "investigate" and, instead, it issued an order to comply based on Mr. LoGrande's interpretation of the permit conditions. *OB, p. 9.*

GH's argument is frivolous. Chief Zoning Administrator LoGrande interpreted the ZA cases and entitlements history to distill the principle that existing conditions precluded intensification of exterior lighting or signage based on adverse impacts on the surrounding residents. *AR 2:1054.* He asked Building and Safety to investigate whether the lighting system violated the conditions as he interpreted them. *AR 2:0155.* Building and Safety then conducted a field inspection of the site and determined that the new lighting system violated the conditions as interpreted by

Mr. LoGrande. *AR 2:1056; 32:4007-4008.* Significantly, both Mr. LoGrande's interpretation of the applicable ZA precedent and Building and Safety's finding of noncompliance were subject to "an actual ZA determination" before Zoning Administrator Ritter, complete with the requisite notice, opportunity to be heard, public comment, and appeal to the Area Planning Commission. *AR 2:0218-0221, 0227*, 0228, **32**:4006.

V. CONCLUSION

For these reasons, GH's petition for writ of mandate and other relief must be denied.

DATED: May 29, 2009

Thomas R. Freeman
BIRD, MARELLA, BOXER, WOLPERT,
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By: _____
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REQUEST FOR JUDICIAL NOTICE

Pursuant to Section 452 of the California Evidence Code, Intervenor Brentwood Community Council ("BCC) requests that the Court take Judicial Notice of color copies of photographs that appear in the Administrative Record.

MEMORANDUM OF POINTS AND AUTHORITIES

Section 452(h) of the Evidence Code authorizes courts to take judicial notice of "facts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy." Thus, as GH concedes, "Courts may take judicial notice of the color copies of pictures that are in the Administrative record as they are not reasonably subject to dispute." *GH's Request for Judicial Notice, p. 2.*

BCC requests that the Court take judicial notice of the color photographs attached as Exhibits A and B. **Exhibit A** is comprised of color copies of photographs in the Administrative Record, at *AR 12:1661-1670, 1736-1738, 1802*, which were submitted to the administrative decision-makers by BCC. **Exhibit B** is comprised of color copies of photographs in the Administrative Record, at *AR 12:1788-1793*, which were submitted to the administrative decision-makers by the Brentwood Homeowners Association.

DATED: May 29, 2009

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