

July 28, 2020

**VIA ELECTRONIC MAIL:**

Oakland City Council

Attn: Deidra Moss One Frank Ogawa Plaza

City of Oakland City Hall, 3rd Floor

One Frank Ogawa Plaza Oakland, CA 94612

City Hall, 6th Floor

Oakland, CA 94612

**Re: Supplemental Response Regarding Resolution Of Necessity**

Dear Members of the City Council:

The Piedmont Walk Homeowners Association (the “Association”) which is located at 70 Yosemite Avenue, Oakland, California requests that the Oakland City Council approve the resolution of necessity submitted for the July 21, 2020 city council hearing and attached hereto as Exhibit A. The Association is a 23 Unit condominium project (“Association Building”) originally constructed in 1982. The Association, pursuant to its recorded Declaration of Covenants, Conditions, and Restrictions (“CC&Rs”) is required to maintain, repair, and replace all elements of the common area, which includes the exterior siding and framing members. Over time, the building has sustained severe water intrusion to the structure which now requires the Association to perform necessary repair work to the exterior of the building, including the exterior wall on the north-side of the building which abuts the property line of 58 Yosemite Avenue, Oakland, California (“Payumo Property”).

The Payumo Property is a rental investment property owned by Bethoven and Dina Payumo, who reside in San Francisco. In order for the Association to perform repairs to the north exterior of the building, it needs to gain temporary access to portions of the Payumo Property.

For nearly five years, the Association has attempted to obtain permission from the Payumos for access to the property via a license agreement for a limited time period. The Payumos have persistently refused to provide the requested license.

Because the Association is required to perform repairs to the common area for the benefit of the 23 owners, the Association is requesting a Resolution from the City of Oakland pursuant to California Civil Code §1002 and Code of Civil Procedure §1245.310 et seq. which states that it is necessary for the Association to obtain a temporary right of access to the Payumo Property in order to complete necessary repairs to the Association Building. **If the city council approves the resolution, it will not grant the Association the requisite access, but the resolution is required as part of the petition to the superior court for an order for temporary and limited access to the Payumo Property.** **Upon issuance of the resolution, the city council will no longer be involved with the Association’s petition for a temporary right of access.**

 **I. Legal Discussion**

California Civil Code § 1002 provides as follows:

(a) Subject to the provisions of Article 3 (commencing with Section 1245.310) of Chapter 4 of Title 7 of Part 3 of the Code of Civil Procedure, the power of eminent domain may be exercised by an owner of real property to acquire a temporary right to enter upon adjacent or nearby property to repair or reconstruct land or improvements, if all of the following conditions are established or met:

(1) There is a necessity to do the repair or reconstruction work and there is a great necessity to enter upon the adjacent or nearby property to do the repair or reconstruction work because (A) the repair or reconstruction work cannot be done safely without entry, or the cost of performing the repair or reconstruction work without entry would be substantially higher; and (B) the property without repair or reconstruction adversely affects the surrounding community.

(2) The right to enter upon the adjacent or nearby land will be exercised in a manner which provides the least damage to the property and the least inconvenience or annoyance to the occupants or owners thereof consistent with satisfactory completion of the repair or reconstruction work.

(3) The hardship to the person seeking to exercise the power of eminent domain, if that power is not exercised, clearly outweighs any hardship to the owner or occupant of the adjacent or nearby property.

(b) No entry shall be made upon the property to be condemned until an eminent domain proceeding has been commenced and then only after a court order permitting entry is issued or after judgment is entered for the plaintiff.

A deposit of security, in the form of cash or a bond, shall be made to the court in an amount the court determines is necessary to permit the owner of the adjacent or nearby property to restore the property to the condition it was in prior to the entry, if the person exercising the power of eminent domain does not do so within a reasonable period of time as determined by the court.

(c) The court may order the person acquiring the temporary right to enter the land of another, pursuant to this section, to pay the owner of the land subject to that temporary right a reasonable amount of rent for the use of the land.

(d) “Adjacent” or “nearby” for purposes of this section shall mean land contiguous with the property needing repair or reconstruction, or land through which the party granted temporary access must pass to reach adjacent land.

(e) The provisions of this section shall not apply to the temporary entry upon lands used primarily for the commercial production of agricultural commodities and forest products.

 Upon issuance of the resolution, the Association may petition the court for a grant of access under CCP section 1245.030. The court will determine the scope, nature, compensation involved with the grant of access. CCP section 1245.030 states:

 (a) The person seeking to enter upon the property may petition the court for an order permitting the entry and shall give such prior notice to the owner of the property as the court determines is appropriate under the circumstances of the particular case.

 (b) Upon such petition and after such notice has been given, the court shall determine the purpose for the entry, the nature and scope of the activities reasonably necessary to accomplish such purpose, and the probable amount of compensation to be paid to the owner of the property for the actual damage to the property and interference with its possession and use.

 (c) After such determination, the court may issue its order permitting the entry.  The order shall prescribe the purpose for the entry and the nature and scope of the activities to be undertaken and shall require the person seeking to enter to deposit with the court the probable amount of compensation.

**II. Discussion**

For the purposes of this resolution, the city council **only** needs to determine that the conditions required by Civil Code section 1002 are met. Those are: (1) the repairs are necessary, (2) Access to the Payumo Property is necessary to complete the repairs, (3) The repair work will be done in the least intrusive manner, and (4) the hardship of the Association if the access is not granted is outweighs that of the Payumos and their tenants if it is granted.

1. **Repairs to the Association Building are Absolutely Necessary**

As detailed in our presentation during the Oakland City Council hearing on July 21, 2020, the Association Building has suffered from substantial water intrusion and is in dire need of structural repairs. Previous repairs to the south side of the Association Building are similarly expected to be needed to the north side of the building. (See Exhibit C, Murray Inspection Report.) The delay in obtaining access to the Payumo Property has exacerbated the problem. Without repairs, the building could potentially collapse and endanger the building’s residents and those in neighboring properties. As the structure of the building continues to be compromised, there are questions as to its stability should a major natural disaster occur. Certainly, the surrounding community would be adversely affected if the structure collapses. Furthermore, without the repairs, the building resident’s health is adversely affected. The continued water intrusion increases the chance for severe mold growth and a reduction in indoor air quality.

1. **Necessary to Enter Upon Adjacent Property**

1. *Necessary Repair Work Not Feasible Without Requested Access*

Without accessing the Payumo Property, the necessary repair work on the Association Building cannot be accomplished. The building immediately abuts the common property line with the Payumo Property. The building has no side yard. Only the abutting Payumo Property has a side yard. As such, there is no place on the Association property to conduct the repair work. The stucco exterior, vapor barrier, and other aspects of the repairs cannot be completed from the interior of the Association Building and without accessing the Payumo Property. Scott Swinton of Unlimited Property Services, Inc., reports that testing and repairs to the exterior siding cannot be accomplished without placing ladders and scaffolding on the Payumo Property. Due to the sloped roof on the Association Building, it is not possible to use swing scaffolding suspended from above.

1. *Necessary Repair Work Cannot be Done Safely Without Requested Access*

Additionally, the repairs cannot be safely done from the interior of the building. Without supervision or control on the exterior of the building, there is a serious potential for loose or damaged portions of the exterior wall to fall uncontrollably and impact either persons or property. Furthermore, with a completely open wall cavity, the workers would be in danger of falling from the interior of the building without any support on the exterior of the building.

1. *Cost to Conduct Repairs Substantially Higher Without Access*

Even if the repair would could be done safely without accessing the Payumo Property, the cost of conducting the repair work from the interior would be substantially greater than it would be from the Payumo Property. Since we have been unable to access the exterior wall to conduct testing because the Payumos have declined access, the only estimate we can base the cost of the repair work on is using the cost to complete the similar repairs on the south-side of the building. In 2014, Murray Construction made the repairs to the south-side at cost of approximately $115,000. The cost to complete the repairs on the north-side from the Payumo Property is likely to be to similar based. However, to conduct the repairs from the interior of the building would be substantially greater, in part, for the following reasons:

1. Displacement of five (5) households for the duration of the work. The cost of which would be the fair market value of temporary housing for the duration of the repairs.
2. Increased demolition, including interior walls, plumbing, electrical conduits located in the wall and fixtures and appliances located along the interior wall.
3. Increased repair costs caused by the necessity to repair interior walls, plumbing and furnishings demolished to conduct the repairs from the interior.
4. Furnishings and other items will need to be moved from the unit and stored offsite.
5. *Without Repairs the Surrounding Neighborhood is Adversely Affected*

The community deserves residential structures that are safe and help enhance the beauty of the neighborhood. As the Association Building continues to degrade, the chance of it suffering collapse and endangering its occupants and neighbors increases. The water intrusion has impacted the structural integrity of the building and will continue unabated without the repairs.

Additionally, degrading buildings lower property values in the surrounding community. As the exterior of the building continues to degrade, it increasingly becomes an eyesore and contributes to neighborhood blight.

1. **The Repair Work will be Conducted in a Manner Which Minimizes the Possibility of Damage to the Payumo Property and Inconvenience to the Building’s Residents**

The Association would only seek to use the Payumo Property in the most convenient way. The Association’s contractors will require minimal, if any, entries into the interior of the Payumo Property and will only need access to the side yard, portion of the Payumo Property parking lot, and potentially the roof. All work, to the extent feasible, will be conducted during normal business hours, Monday through Friday, 8:00a.m. to 5:00p.m. The Association’s contractor will ensure that the testing and repair work will be conducted in a manner which minimizes the possibility of damage and inconvenience to the residents of the Payumo Property.

The staging plan for the construction work will take into account the impact it may have on the ability for the tenants of the Payumo Property to park in the parking lot. It will be the intent to utilize as little space as possible in the parking lot to allow for the tenants to continue to use the parking lot. Any parking spaces unusable during the construction will be provided through reserving spaces on the street directly in front of either the Payumo Property or the Association Building. Particular care will be taken with respect to the Payumo’s handicapped tenant to minimally impact her ability to park near the building and she shall be provided with a reasonable accommodation in the event the repair work impacts her ability to park in her parking space at the Payumo Property.

1. **The Hardship of the Association Substantially Outweighs That of the Payumos or the Residents of the Payumo Property if Temporary Private Eminent Domain is not Exercised.**

If the Association does not obtain a temporary right to access the Payumo Property for the repairs, the hardship it will face substantially outweighs any hardship the Payumo or their tenants would face. Without the access, the Association Building will undoubtedly further degrade causing even costlier repairs in the future. All the while, the property value decreases and the residents of the building are at risk of loss of use of effected units, mold related illnesses and safety hazards.

In comparison, the Payumos likely would not experience any hardship because they do not reside in the building or anywhere in the City of Oakland. The repair work would be conducted in a manner that creates the least annoyance or intrusion for their tenants. The Association has already agreed to indemnify and hold the Payumos harmless in the event any damage to their property is caused by the repair work. Additionally, the Association has agreed to provide fair market value compensation to use their property.

The tenants of the Payumo Property may experience minimal hardship through a temporary increase in noise from construction and short-term loss of access to the side yard space of the building. Any impact to their parking would be remedied through the reservation of parking spots in front of either the Payumo Property or Association Building. **No occupants of the Payumo Property would need to be displaced to complete the testing or repair work.**

**City Council Concerns**

1. Timeline of Efforts to Obtain Access for Repairs

**2014:** The Association reached out to the Payumo requesting access to their property to investigate water intrusion and damage to the north-side of building. Payumos tentatively agreed to provide access for 60-days but demanded a right to stop work at any time. This was obviously problematic if work was in progress. After the Association requested to remove this provision, the Association was informed by the Payumos that their insurance carrier recommended not allowing access.

**April 2015:** The Association through its counsel sent a letter to the Payumos again requesting access to conduct the repairs. The Association offered compensation, indemnification and to hold the Payumo harmless in the event any damage occurred to their property as a result of the repair work.

**August 2015:** The Association, through its council again sent a letter to the Payumo requesting access to their property to conduct the repairs. The Association again offered compensation, indemnification and to hold the Payumos harmless in the event any damage occurred to their property as a result of the repair work. Included with this letter was a draft license agreement. The Payumos declined the Association’s offer.

**May 2017:** The Association again approached the Payumos regarding a license to access their property in order to conduct the necessary repair work, but received no response.

**June 2017:** The Association, through its counsel sent another letter to the Payumos requesting access just to conduct testing and investigation of the damage. The Payumos declined.

**September 2017:** The Association reached out to the Payumos again requesting access to conduct testing and investigation of the water damage.

**January 2018:** The Payumos responding to the Association’s September 2017 request by declining to allow the Association the requested access.

**September 2019:** The Association’s council made a final request for access prior to proceeding with an action under Civil Code section 1002. The Payumos again declined.

**January 2020:** The Association began its efforts to obtain access under Civil Code section 1002.

**July 2020**: After receiving notice of the city council hearing, the Payumos engaged with the Association regarding the possibility of granting a license to conduct the testing and investigation only. They would not agree to provide access to conduct the repairs.

**July 2020:** Per the Payumos request, the Association provided them with a construction plan and license agreement for the testing and investigation only. The Payumos have not reviewed or agreed to provide this limited access.

**July 27, 2020:** The Association granted the Payumo access to the Association building so they could inspect for feasibility and cost to conduct the repairs from the interior of the Association Building.

For five years, the Association has attempted to obtain permission from the Payumos for access to the property via a license agreement to no avail. The Association has been left with no alternative except to seek temporary private eminent domain under California Civil Code section 1002.

After being notified of the city council hearing, the Payumos requested a superfluous construction plan to conduct the testing and a draft license agreement. While the Association does not believe they are negotiating in good faith, but are only feigning a desire to work with the Association in order to delay the adoption of the resolution or hope to have it denied, the Association provided both in an attempt to work with the Payumos.

It is the Association’s concern that the Payumos will not grant the needed access to conduct the repairs if the city council does not approve this resolution. **The Association has agreed to provide fair market compensation to the Payumos and their tenants in exchange for access to conduct the repairs. The Association has further agreed to indemnify and hold the Payumos harmless in the event of any damage occurs to their property.**

In order to keep the process moving forward, if the resolution is approved, the Association has agreed to delay petitioning the court for a temporary right of access under Code of Civil Procedure section 1245.030 until it has attempted in good faith to negotiate a full license with the Payumos. The Association does not want to find itself requesting another resolution from the city council when the Payumo ultimately deny access to their property.

**III. Conclusion**

The Association requests a resolution stating the necessity to access the Payumo Property to complete necessary repairs to the Association Building. The Association has attempted for over five years to obtain a license from the Payumos to complete the repairs. **Even after offering fair market value compensation, indemnification and the acceptance of full liability for all damage that may occur, the Payumos has still declined the Association’s offers.** The Association has no other choice but to proceed under Civil Code 1002. All measures will be taken to ensure no damage will occur to the Payumo Property and to limit any inconvenience to the residents of the property. No tenants of the Payumo Property will be required to relocate during the repair work.

If the City Council needs additional information, please contact us at your convenience.

Very truly yours,

**BERDING & WEIL LLP**

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Enclosures

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