



July 20, 2022

SENT VIA EMAIL

Barry Fadem

[Bfadem1@aol.com](mailto:Bfadem1@aol.com)

Barry Fadem  
Fadem & Associates, LLC  
3527 Mt. Diablo Boulevard, No. 192  
Lafayette, California 94549

RE: Petition Against Livermore City Council Resolution No. 2022-085

Dear Mr. Fadem:

We are responding to your letter to the two of us dated July 18, 2022, and your separate letter of the same date sent only to the City Clerk.

In your letter to the two of us, you argue that the City Clerk has the ministerial duty to process the petition as a referendum. That is incorrect for the reasons set forth in the legal opinion that was provided to you and the public.

A City Clerk has a duty to process referendum petitions for actions that represent a lawful use of the referendum power. As the legal opinion stated, the petition was not a lawful use of the referendum power. Therefore, it would be illegal for the City Clerk to process it as a referendum.

As outlined in that legal opinion, it is well settled law that the constitutional rights of initiative and referendum are coextensive with the power of legislation. It is also well settled law that administrative and executive acts are not subject to referendum. Finally, it is well settled law that a City Clerk may refuse to process referenda that either are not a valid exercise of the referendum power or fail to comply with the technical provisions of the Elections Code. The legal opinion supplied to you and the public discusses these matters of law in detail.

Resolution 2022-085 was not new legislation. It was an administrative act. You are incorrect to assert "that is a dispute to be resolved at another time." That question must be answered after the prima facie review was completed to determine whether the petition was eligible to be processed as a referendum. If the act is not legislative, the

petition has no right to be processed as a referendum. Courts have consistently held that consideration must be given to the consequence of applying those referendum procedures and delays to a non-legislative act, because it could seriously impair essential governmental functions. To process an invalid referendum petition would allow proponents to block and delay the implementation of the City's legitimate policy decisions, made years ago. The pre-verification rejection of this petition is appropriate for exactly that reason.

Your letter concedes that Livermore's City Clerk declined to process the petition similar to the facts in the San Bruno case. In that case, the Court agreed the City Clerk did the right thing. In that case, the petitioner expressly asserted in its complaint that the City Clerk "has a ministerial duty to process the referendum petition," that she is "not empowered to decide the substantive legality of the measure," and that she "violated her mandatory duty and exceeded her authority." The petitioner asked the Court to order her to process the petition as a referendum. A copy of the complaint in the San Bruno case and its allegations that were litigated is attached. The trial court's judgment and the subsequent reported opinion by the Court of Appeals held that the City Clerk could not be compelled to process a petition illegally challenging an administrative act as a referendum, and that the City Clerk was not wrong when she declined to process the petition as a referendum. A copy of the trial court's judgment is also attached. Further, we note that a city clerk's authority to refuse to process referendum petitions that do not comply with the law have been upheld in other cases as well. *See, eg. Billiq v. Voges, (1990) 223 Cal.App.3d 962 (city clerk had a ministerial duty to refuse to process a referendum petition that did not comply with the Elections Code)*. So, based upon reported decisions, your blanket statement that the City Clerk "has no discretion or right" to reject referendum petitions that do not comply with the law is false.

Therefore, the Livermore City Clerk, in her capacity as a constitutional officer and Elections Official for the City of Livermore, stands by her decision to not process the petition as a referendum for the reasons set forth in her letter dated July 13, 2022. She also wants to ensure that her authority is not used by the proponent to mislead the voters into believing that the petition has been sanctioned as a valid use of the referendum power.

In your letter sent only to the City Clerk, you assert that the City's practice of counting all signatures visible on the petition, including those that have a black mark over them that did not obscure the signature, is inappropriate and a waste of government resources. It has been the Livermore City Clerk Office's longstanding practice to count every complete signature that can be seen, even when someone has tried to remove it. This always favors the voters who sign petitions. The City's practice is appropriate since no one provided any information identifying who attempted to remove those signatures,

Barry Fadem

RE: Petition Against Livermore City Council Resolution No. 2022-085

July 20, 2022

Page 3

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what process was used to determine if a signature should be removed, or what authority they relied on to remove a voter's signature.

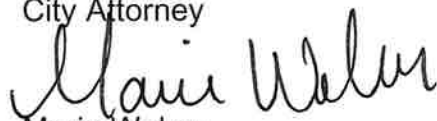
Without knowing how that decision was made, the City cannot rely on the black marks when a signature is visible. For example, using outdated voter information may result in a signature not being counted that should have been counted. Your letter does not state who actually made the black marks. However, a reporter from the Independent newspaper contacted the City shortly after your letter was received and informed the City that the Move Eden Housing group issued a press release stating the signatures had been blacked out by the "group's leaders because they were found to be invalid." Even though we now know who attempted to remove the signatures, no information was provided on how that determination was made. Therefore, the City Clerk stands by her decision to count all signatures visible on the petition.

Sincerely,



Jason R. Alcala

City Attorney



Marie Weber

City Clerk/Elections Official

Attachments:

Complaint, *San Bruno Committee for Economic Justice v. City of San Bruno*, San Mateo Superior Court Case No. CIV 5398861

Judgment, *San Bruno Committee for Economic Justice v. City of San Bruno*, San Mateo Superior Court Case No. CIV 5398861

JUL - 6 2016

Clerk of the Superior Court  
By NIMA MOKHTABANI  
DEPUTY CLERK

1 PHILIP C. MONRAD (SBN 151073)  
2 ARTHUR LIOU (SBN 252690)  
3 LEONARD CARDER, LLP  
4 1330 Broadway, Suite 1450  
5 Oakland, CA 94612  
6 Tel: (510) 272-0169  
7 Fax: (510) 272-0174  
8 Email: [pmonrad@leonardcarder.com](mailto:pmonrad@leonardcarder.com)  
9 Email: [aliou@leonardcarder.com](mailto:aliou@leonardcarder.com)

10 Attorneys for Petitioners  
11 SAN BRUNO COMMITTEE FOR ECONOMIC JUSTICE;  
12 UNITE HERE LOCAL 2; MARY DOWDEN; LEIF  
13 PAULSEN; SHERAL MARSHALL; BEATRIZ  
14 JOHNSTON; KATHLEEN SEMENZA; LILIBETH  
15 BONIFACIO; MOLLY GOMEZ

16 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
17 FOR THE COUNTY OF SAN MATEO

18 SAN BRUNO COMMITTEE FOR ECONOMIC  
19 JUSTICE; UNITE HERE LOCAL 2; MARY  
20 DOWDEN; LEIF PAULSEN; SHERAL  
21 MARSHALL; BEATRIZ JOHNSTON;  
22 KATHLEEN SEMENZA; LILIBETH  
23 BONIFACIO; MOLLY GOMEZ,

24 Petitioners,

25 v.

26 CITY OF SAN BRUNO; CAROL BONNER, as  
27 City Clerk for the City of San Bruno,

28 Respondents,

SAN BRUNO HOTELS, LLC; OTO  
DEVELOPMENT, LLC,

Real Parties in Interest.

Case No. CIV538861

**FIRST AMENDED VERIFIED  
PETITION FOR PEREMPTORY WRIT  
OF MANDATE**

(Elec. Code, §§ 9237, 9239-9240; Code Civ.  
Proc., § 1085)

**INTRODUCTION**

1. Petitioners San Bruno Committee for Economic Justice, UNITE HERE Local 2 ("Local 2"), Mary Dowden, Leif Paulsen, Sister Sheral Marshall, Beatriz Johnston, Kathleen Semenza, Lilibeth Bonifacio, and Molly Gomez seek a writ of mandate and declaratory and injunctive relief commanding Respondents City of San Bruno (the "City") and Carol Bonner

(collectively, the “Respondents”), in her official capacity as City Clerk for the City of San Bruno, to comply with their nondiscretionary duty to process and certify the referendum petition submitted by Petitioners.

2. On April 27, 2016, Petitioners filed with the City Clerk approximately 3,250 signatures in support of a referendum petition to repeal San Bruno City Council Resolution No. 2016-26, titled “Resolution Authorizing the City Manager to Execute a Purchase and Sale Agreement for Sale of the Crossing Hotel Property, and Authorizing the City Manager and City Attorney to Execute All Documents Necessary to Close Escrow.” Resolution No. 2016-26 authorized the City Manager to enter into an agreement for the sale and development of City-owned property with OTO Development, LLC, a hotel developer, for a purchase price of \$3.97 million.

3. Although Petitioners submitted approximately 1,250 signatures beyond the number required by the Elections Code, Respondents informed Petitioners that they would not process the referendum petition. Because Respondents have a mandatory duty under the Elections Code to process the petition and certify that Petitioners have submitted a valid number of signatures, a writ of mandate is appropriate here.

### **PARTIES**

4. Petitioner San Bruno Committee for Economic Justice is an unincorporated association and a coalition of individuals concerned about issues of economic justice in the City. The Committee believes in advocating for workplace protections and family-sustaining jobs to create an equitable and vibrant community. The Committee and its members are the primary proponents of the referendum petition, and they were responsible for circulating the referendum petition and gathering signatures.

5. Petitioner Local 2 is an unincorporated labor union and is the recognized bargaining agent for employees who work in various hotels in the County of San Mateo. Approximately 300 Local 2 members are residents of the City. Local 2 is part of the San Bruno Committee for Economic Justice. As such, it is a proponent of the referendum and gathered signatures for the referendum petition, along with other Petitioners.

6. Petitioner Mary Dowden is a resident of the City and a member of the San Bruno Committee for Economic Justice. She is a proponent of the referendum and gathered signatures for the referendum petition, in addition to be a signer of the petition.

7. Petitioner Leif Paulsen is a resident of the City and a member of the San Bruno Committee for Economic Justice. He is a proponent of the referendum and gathered signatures for the referendum petition, in addition to being a signer of the petition.

8. Petitioner Sister Sheral Marshall is a sister of Saint Francis and is parish sister at St. Robert's Church in the City. She is a resident of the City and a member of the San Bruno Committee for Economic Justice. She is a proponent of the referendum and gathered signatures for the referendum petition, in addition to being a signer of the petition.

9. Petitioner Beatriz Johnston is a resident of the City and a member of the San Bruno Committee for Economic Justice. She is a proponent of the referendum and gathered signatures for the referendum petition, in addition to be a signer of the petition.

10. Petitioner Kathleen Semenza is a resident of the City and a member of the San Bruno Committee for Economic Justice. She is a proponent of the referendum and gathered signatures for the referendum petition, in addition to be a signer of the petition.

11. Petitioner Lilibeth Bonifacio is a resident of the City, and a member of the San Bruno Committee for Economic Justice and of Local 2. She is a proponent of the referendum and gathered signatures for the referendum petition, in addition to be a signer of the petition.

12. Petitioner Molly Gomez is a member of the San Bruno Committee for Economic Justice and of Local 2. She is a proponent of the referendum and gathered signatures for the referendum petition.

13. Respondent City is a general law city duly organized and operating in the County of San Mateo. The City is subject to the requirements of the Elections Code governing general law cities, including applicable referendum provisions.

14. Respondent Carol Bonner is the elected City Clerk for the City of San Bruno and is named in her official capacity. As the City Clerk, Bonner is the City's chief election official. She is responsible for administering all City elections and related election laws, including

1 receiving and processing referendum and initiative petitions in accordance with the Elections  
2 Code.

3 15. On information and belief, Real Party in Interest San Bruno Hotels, LLC is a  
4 California limited liability company established by OTO Development, LLC, with its principal  
5 place of business in California.

6 16. On information and belief, Real Party in Interest OTO Development, LLC  
7 (“OTO”) is a Delaware limited liability company, with its principal place of business in South  
8 Carolina.

9 **JURISDICTION AND VENUE**

10 17. This court has jurisdiction under Code of Civil Procedure sections 525, 1060,  
11 1085, and Article VI, section 10 of the California Constitution.

12 18. Venue is proper in this court because the acts at issue here occurred in San Mateo  
13 County, and because the City is located in San Mateo County.

14 **FACTUAL ALLEGATIONS**

15 19. The City owns approximately 1.5 acres of land, comprising two vacant lots with  
16 Assessor’s Parcel Numbers 020-013-250 and 020-013-260, located in the City at Admiral Court,  
17 next to El Camino Real and Interstate 380. It purchased the land in 2012 for \$1.4 million with the  
18 intent of developing a hotel on the site.

19 20. In October 2012, the City issued a request for proposals for the prospective hotel  
20 development.

21 21. Multiple developers submitted proposals, and in February 2013, the City Council  
22 authorized City staff to negotiate an exclusive negotiating rights agreement with OTO under  
23 which OTO and the City would negotiate over terms of a disposition and development agreement  
24 for development of a hotel on the site. The exclusive negotiating rights agreement was executed  
25 in August 2013 and a second exclusive negotiating rights agreement was entered into in 2015.

26 22. Under the terms of each exclusive negotiating rights agreement, the terms of any  
27 disposition and development agreement would be subject to final approval by the City Council.  
28

23. During the exclusive negotiating rights period, the City had an economic expert evaluate the project and its economic feasibility. The expert recommended that the City provide nearly \$4 million in subsidies to the developer. As late as May 2015, City staff reported that the contemplated terms of the agreement were that (1) the property would be transferred to OTO for \$1; (2) the City would waive or pay OTO's building and other permit fees, which were estimated at \$650,000; (3) the City would reimburse OTO for transient occupancy taxes for the hotel's first two years of operation, at a cost of approximately \$1.8 million.

24. Numerous San Bruno residents expressed concern over the potential subsidies that would be provided to OTO, and whether the development project would result in sustainable, living-wage jobs for the construction workers building the hotel and for the hotel employees who ultimately worked there.

25. On March 29, 2016, the City Council considered a resolution authorizing the sale and development of the subject property with San Bruno Hotels, LLC, an entity established by OTO, titled "Resolution Authorizing the City Manager to Execute a Purchase and Sale Agreement for Sale of the Crossing Hotel Property, and Authorizing the City Manager and City Attorney to Execute All Documents Necessary to Close Escrow." The resolution authorized the City Manager to execute a "Purchase and Sale Agreement" with San Bruno Hotels, LLC for the sale and development of the property, and authorized the City Manager and City Attorney to execute all documents necessary to close escrow on the transaction.

26. The resolution was accompanied by a staff report that attached a draft version of the Purchase and Sale Agreement. The proposed purchase price was \$3.97 million with no City subsidies, a significant increase from earlier contemplated terms, but OTO still provided no assurances about the jobs that would be created by the project.

27. The City Council approved the resolution 4 to 1, and it was certified by Bonner, as City Clerk, the next day on March 30, 2016. At the same time, she assigned the resolution number 2016-26. A true and correct copy of the resolution is attached as Exhibit A ("Resolution No. 2016-26").



1           28.     After the passage of Resolution No. 2016-26, the Petitioners began circulating a  
2 referendum petition to have the City Council's resolution put before a vote of San Bruno  
3 residents.

4           29.     The referendum petition circulated by Petitioners included a copy of the officially  
5 certified Resolution No. 2016-26, which was certified as a full, true, and correct copy of the  
6 original by San Bruno Deputy City Clerk Vicky Hasha. The petition also included a complete  
7 copy of the Purchase and Sale Agreement presented to the City Council as part of the staff report  
8 at the March 29 City Council meeting.

9           30.     Elections Code section 9237 states that if a referendum petition protesting the  
10 adoption of an ordinance or resolution is submitted to a city's legislative body within 30 days of  
11 the date the ordinance or resolution is "attested by the city clerk or secretary to the legislative  
12 body, and is signed by not less than 10 percent of the voters of the city according to the county  
13 elections official's last official report of registration to the Secretary of State," the effective date  
14 of the ordinance or resolution shall be suspended and the legislative body shall reconsider the  
15 ordinance or resolution.

16           31.     The San Mateo Chief Elections Officer last made an official report of voter  
17 registration to the Secretary of State on April 8, 2016. According to that report of registration,  
18 there were 19,957 registered voters in the City.

19           32.     On April 27, 2016, the Petitioners filed their referendum petition with  
20 Respondents, submitting approximately 3,250 signatures from registered San Bruno voters calling  
21 for the repeal of Resolution No. 2016-26. The referendum petition was filed within 30 days of  
22 the March 29 passage of Resolution No. 2016-26, and exceeded the 1,996 signatures by registered  
23 voters required by Elections Code section 9237—i.e., 10% of the registered voters—by more than  
24 1,250.

25           33.     As the chief elections official for the City, the City Clerk is required under  
26 Elections Code sections 9239 and 9240 to process the petition by determining whether the  
27 requisite number of voters have signed the petition, and if so, to certify the results to the City  
28 Council.

34. Upon certification that a sufficient number of voters have signed the referendum petition, the effective date of the resolution is suspended, and the City Council must reconsider the resolution and either repeal it or submit it to the voters at either the next regular municipal election occurring not less than 88 days after the order of the City Council or a special election occurring not less than 88 days after the City Council's order. (Elec. Code, §§ 9237, 9241.)

35. On May 17, 2016, Bonner emailed Laurel Fish, a community organizer for Local 2, stating that on advice of the City Attorney, "the City will not be taking further action on the referendum petition." Bonner attached to her email a letter from the City Attorney, Marc Zafferano, regarding the petition.

36. The letter from the City Attorney stated that "this petition is defective, and it would be contrary to law to place the petition on a City Council agenda for the Council either to repeal Resolution No. 2016-26 or submit the referendum to the voters." The letter continued:

Resolution 2016-26 is not subject to a referendum petition because it was not a legislative act.

In addition, the petitioners presented the voters with the draft of the Purchase and Sale Agreement (PSA) that was attached to the Staff Report from the March 29, 2016 City Council meeting, rather than the final version of the PSA, which included critical information such as the site plan and legal description of the property (Exhibits A-1 and A-2 to PSA).

For each of these reasons, the referendum petition does not comply with the law. Please inform the petitioners that their referendum petition will thus not be presented to the City Council or the voters.

37. Petitioners wrote to Zafferano and Bonner asking that they reconsider their decision not to process the petition and asking for an explanation of why Respondents considered Resolution No. 2016-26 to not be a "legislative act." However, Petitioners have yet to receive a response or further explanation from the Respondents.

### **FIRST CAUSE OF ACTION**

#### **(Against Respondents City of San Bruno, Bonner; For Writ of Mandate—Failure to Process the Petition)**

38. Petitioners incorporate by reference the allegations of paragraphs 1 through 37.

39. The referendum petition submitted to the City by Petitioners met all formatting requirements of the Elections Code and was timely filed.

9 (Quoting *Farley v. Healey* (1967) 67 Cal.2d 325, 327.)

13 42. Petitioners have no plain, speedy or adequate remedy at law.

**(Against Respondents City of San Bruno, Bonner;**

**For Writ of Mandate—Failure to Repeal or Submit the Resolution to the Voters)**

17 43. Petitioners incorporate by reference the allegations of paragraphs 1 through 42.

44. In addition to meeting the formatting and procedural requirements, Petitioners filed with the City enough signatures to qualify the referendum for the ballot. They submitted approximately 3,250 signatures from registered San Bruno voters, well in excess of the 1,996 necessary to qualify the referendum for the ballot.

22           45.       Respondents have a mandatory duty under the Elections Code to certify that the  
23       Petitioners have submitted sufficient valid signatures, and either repeal Resolution No. 2016-26  
24       or submit the resolution to a vote of the people.

25 46. Respondents have refused to do so, violating their mandatory duty.

47. Petitioners have no plain, speedy or adequate remedy at law.

27 |||

28 |||

**THIRD CAUSE OF ACTION**

**(Against Respondents City of San Bruno, Bonner;**

**For Declaratory Relief)**

48. Petitioners incorporate by reference the allegations of paragraphs 1 through 47.

49. A present and actual controversy exists between the parties over whether Respondents must process the referendum petition and whether Resolution No. 2016-26 is subject to referendum.

50. Petitioners seek a declaration of their rights to have the referendum petition processed and to have Resolution No. 2016-26 either repealed by the City Council or else put before a vote of San Bruno residents.

**FOURTH CAUSE OF ACTION**

**(Against Respondents City of San Bruno, Bonner;**

**For Injunctive Relief)**

51. Petitioners incorporate by reference the allegations of paragraphs 1 through 50.

52. The City and San Bruno Hotels, LLC have executed a final Purchase and Sale Agreement.

53. Under the Purchase and Sale Agreement, the City and San Bruno Hotels, LLC may close escrow and transfer the property to San Bruno Hotels, LLC and/or OTO once the conditions in the agreement are met.

54. If the property is transferred to San Bruno Hotels, LLC and/or OTO before the claims in this lawsuit are resolved, Petitioners and San Bruno residents will be irreparably harmed. Once the property is transferred, Petitioners risk being unable to enforce their right to have Resolution No. 2016-26 put before a vote of San Bruno residents, because the City may claim that any vote on the resolution would be moot. Money damages cannot compensate Petitioners or San Bruno residents for the potential loss of their right to vote on whether to approve or reject Resolution No. 2016-26.

55. Petitioners have no other adequate or speedy remedy at law to correct the deprivation of their rights.

56. Injunctive relief is necessary to preserve the status quo pending the determination of the merits of this action.

**PRAYER FOR RELIEF**

Petitioners respectfully ask for the following relief:

1. For a peremptory writ of mandate directing Respondents to process the referendum petition, certify that Petitioners have submitted a sufficient number of signatures to qualify the referendum for the ballot, and either repeal Resolution No. 2016-26 or submit the resolution to the voters;

2. For a declaratory judgment that Respondents must process the referendum petition, certify that Petitioners have submitted a sufficient number of signatures to qualify for the ballot, and either repeal Resolution No. 2016-26 or submit the resolution to the voters;

3. For permanent injunctive relief directing Respondents to process the referendum petition, certify that Petitioners have submitted a sufficient number of signatures to qualify for the ballot, and either repeal Resolution No. 2016-26 or submit the resolution to the voters;

4. For a temporary restraining order and preliminary injunction prohibiting Respondents from closing on the sale of the subject property while this action is pending;

5. For reasonable attorneys' fees;

6. For costs of suit; and

7. For such other and further relief as the court deems just and proper.

Respectfully submitted,

Date: July 1, 2016

LEONARD CARDER, LLP

By:

Arthur Liou

Attorneys for Petitioners

San Bruno Committee for Economic Justice,  
UNITE HERE Local 2, Mary Dowden, Leif  
Paulsen, Sheral Marshall, Beatriz Johnston,  
Kathleen Semenza, Lilibeth Bonifacio, Molly  
Gomez

VERIFICATION

I, Laurel Fish, declare as follows:

I am employed by UNITE HERE Local 2 as a community organizer. I have reviewed the foregoing First Amended Verified Petition for Peremptory Writ of Mandate. I know the factual statements made therein to be true and correct based on my personal knowledge, except those facts alleged on information and belief.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on July 1, 2016 in San Francisco, California.

  
Laurel Fish

# **EXHIBIT A**

**To Verified Petition For  
Peremptory Writ Of Mandate**

**RESOLUTION AUTHORIZING THE CITY MANAGER TO EXECUTE A PURCHASE AND  
SALE AGREEMENT FOR SALE OF THE CROSSING HOTEL PROPERTY, AND  
AUTHORIZING THE CITY MANAGER AND CITY ATTORNEY TO EXECUTE ALL  
DOCUMENTS NECESSARY TO CLOSE ESCROW**

**WHEREAS**, the development of a high-quality hotel on The Crossing Hotel Site has long been a high priority of the City Council and the community; and

**WHEREAS**, In 2001, the City Council certified a companion environmental impact report (EIR) and approved the original U.S. Navy Site and its Environs Specific Plan, which called for development of a seven story, 500-room full service hotel with up to 15,000 square feet of meeting and retail space on what was, at that time, a 5.5 acre site; and

**WHEREAS**, the City Council has amended the Specific Plan to adapt to changing economic conditions: in 2001 to allow for "flex" office/residential sites, which allowed more multi-family housing to be built if the office market remained weak, and again in 2005 for development of the El Camino Real Commercial project, which brought several businesses to the area, including a thriving full-service sit-down restaurant (Jack's); and

**WHEREAS**, the changes reduced the size of the original hotel property to 1.5 acres, which in turn resulted in the need to reduce the size of a potential hotel to approximately five stories and 152 rooms with 3,000 square feet of meeting space served by underground parking; and

**WHEREAS**, on August 15, 2012, the City closed escrow to purchase the property from Martin/Regis, The Crossing developer, for \$1.4 million; and

**WHEREAS**, on October 12, 2012, the City issued a Request for Qualifications/Proposals inviting written proposals from qualified developers to design, finance and build a high-quality, select-service hotel at The Crossing; and

**WHEREAS**, following an extensive selection process, the City Council unanimously selected OTO Development, LLC on February 26, 2013, and authorized the City Manager to enter into an Exclusive Negotiating Rights Agreement (ENRA) with OTO. At that time, OTO suggested that a subsidy from the City of approximately \$3.9 million would be needed, citing the small parcel size that necessitated constructing an expensive underground parking garage and limited the number of rooms, and the City's desire for a significant amount of community meeting space, an unusually large amount for a select service hotel; and

**WHEREAS**, while negotiations were ongoing, the City engaged in a public process to further amend the Specific Plan to be consistent with the 1.5 acre parcel size and smaller potential hotel development of approximately 152 rooms, and to prepare the necessary new environmental document to evaluate that amendment;

**WHEREAS**, on August 18, 2015, the Planning Commission held a public hearing and reviewed the proposed Specific Plan Amendment and Supplemental Environmental Impact Report (SEIR), and recommended them to the City Council, which approved them on September 8, 2015 following another public hearing; and

**WHEREAS**, the City Council finds this action to be consistent with the project evaluated in the SEIR in that the property is being sold for the select service hotel development that was analyzed and evaluated in the SEIR; and

**WHEREAS**, on March 15, 2016, the Planning Commission adopted a resolution finding that the sale of the property for a select service hotel use is consistent with the City's General Plan; and

**WHEREAS**, the City has obtained an independent appraisal from a qualified appraiser indicating that the fair market value of the property is \$3.97 million; and



**WHEREAS**, the buyer has agreed to a sale price of \$3.97 million, with no subsidy or public funds payable to the buyer, as reflected in the Purchase and Sale Agreement attached to the Staff Report dated March 29, 2016.

**NOW, THEREFORE, BE IT RESOLVED** that the San Bruno City Council authorizes the City Manager to execute the Purchase and Sale Agreement, subject to any minor or non-substantive edits necessary to effectuate the intent and direction of the City Council, and authorizes the City Manager and City Attorney to execute all documents necessary for the close of escrow.

---oOo---

I hereby certify that foregoing **Resolution No. 2016 - 26**  
was introduced and adopted by the San Bruno City Council at a Special meeting on  
March 29, 2016, by the following vote:

AYES: Councilmembers: Ibarra, R. Medina, O'Connell, Mayor Ruane

NOES: Councilmembers: M. Medina

ABSENT: Councilmembers: None

**I hereby certify this to be a full, true and correct  
copy of the document it puports to be, the  
original of which is on file in my office.**

**Dated:** March 30, 2016

Vickie S. Haskin, Deputy City Clerk  
**City Clerk of the City of San Bruno**

Carol Bonner  
Carol Bonner, City Clerk



1 Kevin D. Siegel (SBN 194787)  
E-mail: ksiegel@bwslaw.com  
2 Christopher M. Long (SBN 305674)  
Email: clong@bwslaw.com  
3 BURKE, WILLIAMS & SORENSEN, LLP  
1901 Harrison Street, Suite 900  
4 Oakland, CA 94612-3501  
Tel: 510.273.8780  
5 Fax: 510.839.9104

6 Marc Zafferano (SBN 112262)  
Email: mzafferano@sanbruno.ca.gov  
7 City Attorney  
City of San Bruno  
8 567 El Camino Real  
San Bruno, CA 94066  
9 Tel: 650-616-7057  
Fax: 650-742-6515

10 Attorneys for Respondents  
11 CITY OF SAN BRUNO;  
12 CAROL BONNER, City Clerk

13 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
14 COUNTY OF SAN MATEO  
15

16 SAN BRUNO COMMITTEE FOR  
ECONOMIC JUSTICE; UNITE HERE  
17 LOCAL 2; MARY DOWDEN; LEIF  
PAULSEN; SHERAL MARSHALL;  
18 BEATRIZ JOHNSTON; KATHLEEN  
SEMENZA; LILIBETH BONIFACIO;  
19 MOLLY GOMEZ,

20 Petitioners,

21 v.

22 CITY OF SAN BRUNO;  
23 CAROL BONNER, as City Clerk,

24 Respondents

25 SAN BRUNO HOTELS, LLC; OTO  
DEVELOPMENT, LLC

26 Real Parties in Interest.  
27  
28

FILING FEE EXEMPT PURSUANT TO  
GOVERNMENT CODE § 6103

**FILED**  
**SAN MATEO COUNTY**

SEP 28 2016

by *[Signature]*  
DEPUTY CLERK

Case No. CIV538861

~~[PROPOSED]~~ JUDGMENT

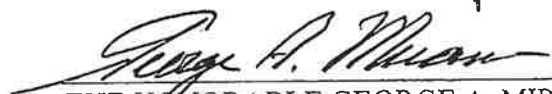
CIV538861  
JUD  
Judgment Filed  
201797



1 This Court having, on August 26, 2016, entered an Order Denying Motion for Peremptory  
2 Writ of Mandate, attached hereto as Exhibit A, which denied Petitioners relief with respect to  
3 each cause of action alleged in their First Amended Verified Petition for Peremptory Writ of  
4 Mandate, and good cause appearing, the Court hereby enters judgment against Petitioners and in  
5 favor of (1) Respondents, City of San Bruno and Carol Bonner, City Clerk for the City of San  
6 Bruno, and (2) Real Parties-in-Interest, San Bruno Hotels, LLC, and OTO Development, LLC.

7 Respondents and Real Parties-in-Interest shall be entitled to recover their costs from  
8 Petitioners.

9  
10 SEP 23 2016

  
11 THE HONORABLE GEORGE A. MIRAM  
12 Judge of the Superior Court

13 APPROVED AS TO FORM:

14 By: \_\_\_\_\_  
15 Arthur Liou  
16 Counsel for Petitioners  
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# EXHIBIT A

**FILED**  
**SAN MATEO COUNTY**

AUG 26 2016

Clerk of the Superior Court

By

DEPUTY CLERK

SUPERIOR COURT OF THE STATE OF CALIFORNIA  
IN AND FOR THE COUNTY OF SAN MATEO

SAN BRUNO COMMITTEE FOR  
ECONOMIC JUSTICE, et al.,

Petitioners,

v.

CITY OF SAN BRUNO; CAROL BONNER  
as City Clerk for the City of San Bruno,  
Respondents.

Case No.: CIV 538861

**ORDER DENYING MOTION FOR  
PEREMPTORY WRIT OF MANDATE**

Date: July 28, 2016  
Time: 2:00  
Dept: 28

Petitioners' Motion for Peremptory Writ of Mandate came on regularly for hearing on July 28, 2016 at 2:00 p.m. in Department 28 of the San Mateo Superior Court, the Hon. George A. Miram, presiding. Arthur Liou, Esq. of the law offices of Leonard Carder, LLP appeared on behalf of Petitioners, San Bruno Committee for Economic Justice, Unite Here Local 2, Mary Dowden, Leif Paulsen, Sheral Marshall, Beatriz Johnston, Kathleen Semenza, Lilibeth Bonifacio and Molly Gomez. Kevin D. Siegel, Esq. of the law offices of Burke, Williams & Sorensen, LLP and Marc Zafferano, Esq., City Attorney for the City of San Bruno appeared for Respondents, City of San Bruno and Carol Bonner, City Clerk. David H. Blackwell, Esq. of the law offices of Allen, Matkins, Leck, Gamble, Mallory & Natsis, LLP appeared on behalf of the Real Parties in Interest.

CIV538861  
ORD  
Order  
184676



1 After reviewing the documents filed by the parties and hearing the arguments of counsel,  
2 the matter was submitted. The Court now makes the following order:

3 Respondents' requests for Judicial Notice are granted pursuant to Evidence Code sections  
4 451(a) and 452(a), (b) and (c).

5 The Motion for Peremptory Writ of Mandate is DENIED.

6 The duty of the courts is to jealously guard the referendum power of the People.  
7 Associated Home Builders v City of Livermore (1976) 18 Cal 3d 582, 591. Thus, the Courts  
8 apply a liberal construction to this power whenever it is challenged and doubts are reasonably  
9 resolved in favor of the use of this power. *supra.*, p.591. This broad principle does not, however,  
10 entitle parties to infringe on administrative powers reserved to duly elected officials.

11 Here, respondents properly identify several reasons the present referendum is not  
12 available in the present circumstances.

13 First, Petitioner has failed to demonstrate exhaustion of its administrative remedies. The  
14 demonstration of an appeal is deficient. While petitioner belatedly contends that appeal would  
15 be futile or that the letter urging the city to process the referendum should constitute an appeal,  
16 neither contention is persuasive. Failure to exhaust administrative remedies precludes suit even  
17 if it is highly unlikely that the decision makers would reverse the decision. See South Coast  
18 Regional Com. v. Gordon (1977) 18 Cal 3d 832, 838. Further, unlike the footnoted letter in  
19 Lindelli v Town of San Anselmo (2003) 111 Cal App 4<sup>th</sup> 1099, 1106, the May 23, 2016 letter  
20 here (Exhibit 22 to the Fish declaration), fails to comport with an existing San Bruno mechanism  
21 for appeal. Absent in Lindelli, but present here, San Bruno Municipal Code Chapter 1.32  
22 specifically provides for a mechanism of appeal to be initiated by filing a notice of appeal. The  
23 Fish letter, Petitioner's Exhibit 22, cannot fairly be read to constitute the written notice of appeal  
24 filed with the City Clerk referenced in the San Bruno Municipal Code. Petitioners contentions  
25 regarding the adequacy of the appellate process addressed for the first time in their reply brief,  
26 are similarly unpersuasive. Petitioner bears the burden in the first instance of demonstrating  
27 exhaustion of administrative remedies. Petitioner fails to meet that burden. Further, by failing to  
28

1 raise the issue until their reply brief, plaintiff has given respondent little opportunity to  
2 demonstrate through evidence the adequacy of the appellate process.

3 On a substantive level, Petitioner argues that the Purchase and Sale Agreement (PSA) is  
4 tantamount to a Development Agreement. Development Agreements are generally legislative  
5 acts subject to referendum. In contrast, a PSA merely pursues a plan already adopted and is  
6 considered an administrative act. See Worthington v City Council of City of Rohnert Park  
7 (2005) 130 Cal App 4<sup>th</sup> 1132, 1140-41. Legislative acts may be appropriate for review by  
8 referendum. However, administrative acts are reserved for the city's council's determination.  
9 See City of San Diego v Dunkl (2001) 86 Cal App 4<sup>th</sup> 384, 399.

10 The plan here was previously adopted by the City. San Bruno Municipal Code Chapter  
11 1.32, 2.20, 2.32; City of San Bruno Resolutions number 2015-81, 2015-82.

12 Government Code section 65865.2 prescribes necessary terms for a Development  
13 Agreement including the duration of the agreement, the permitted uses of the property, the  
14 density or intensity of the use, maximum height and size of the proposed building and provisions  
15 for preservation or dedication of land for public purposes. Most, if not all, such requirements  
16 are absent from the present PSA in question. Moreover, procedural prerequisites for a  
17 Development Agreement such as adoption by ordinance and a second reading are entirely absent  
18 here.

19 The subject Purchase and Sale Agreement (PSA) in question is not the same as, nor  
20 tantamount to, a Development Agreement.

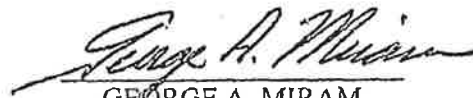
21 Next, Petitioner contends that even if the Resolution is not a Development Agreement, it  
22 nonetheless should be regarded as a legislative act. This contention fails for the some of the same  
23 reasons as the argument regarding Development Agreements. The power to sell property which  
24 implements prior legislative decisions regarding the development of property is an  
25 administrative, not legislative act. The power to be exercised is legislative in its nature if it  
26 prescribes a new policy or plan; whereas it is administrative in its nature if it merely pursues a  
27 plan already adopted by the legislative body or some other power superior to it. Worthington,  
28 *supra* p. 1140-1141. Here this Court finds the latter characterization applies, not the former. The

1 resolution pursues an existing plan. Therein, the present resolution differs in significant detail  
2 from the legislative acts described in the authorities cited by Petitioner.

3 This Court finds that contrary to Petitioner's contention, adoption of the resolution in question  
4 does not constitute a legislative act. Resolution 2016-26 is not a legislative act subject to  
5 referendum. The City Clerk's failure to process the referendum to which petitioners' lacked a  
6 right is unavailing.

7  
8 IT IS SO ORDERED.

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10 AUG 25 2016

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12 GEORGE A. MIRAM  
13 Judge of the Superior Court  
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