

November 4, 2015

VIA EMAIL ONLY

[kathyb@ci.garden-grove.ca.us]

Garden Grove City Council
11222 Acacia Parkway
Garden Grove, CA 92840

Re: **Appeal of Planning Commission Approval of Variance No V-011-2015 –
Supplemental Letter**

Dear Mayor Nguyen and Honorable Members of the City Council:

As you are aware, this firm represents Hennessey Group, the owner of the property located at 11070 Garden Grove Boulevard ("Del Taco" parcel) in the City of Garden Grove (the "City"). The Del Taco parcel is one of the parcels in the shopping center ("Center") located at 11100 and 11102 Garden Grove Boulevard, where David Webber/Emerald Square II (the "applicant") is proposing to operate a new 14,300 square foot restaurant, East Seafood Buffet, in a newly created tenant space that occupies half of the existing Office Depot retail store space, which itself will operate in a newly modified smaller tenant space (the "Project"). On September 22, 2015, Hennessey Group submitted an appeal of the Planning Commission's approval of Variance No. V-011-2015, which, if allowed to proceed, would allow the Project to be developed and operated in a way materially detrimental to the Del Taco parcel owner's interests. Moreover, for the reasons set out below, the Planning Commission lacked the legal authority to grant the Variance.

In our September 22nd appeal letter, we noted the following reasons why the Variance application should have been denied by the Planning Commission:

- Since the Center is subject to a Reciprocal Easement Agreement that governs shared parking at the Center, including the Del Taco parcel, and since the variance affects the parking rights that are regulated by the Reciprocal Easement Agreement, the City should have required Hennessey Group's consent to the parking reduction. The applicant's representation to the Planning Commission that it had obtained Hennessey's consent, or that they were "working together" on the parking issue was untrue;

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- The number and size of the parking spaces approved through the Variance are inconsistent with the City's own Municipal Code requirements;
- A variance is not legally permitted in this situation, as variances are only permitted where, because of "special circumstances applicable to the *property*, including size, shape, topography, location or surroundings, the strict application of the zoning ordinance deprives such property of privileges enjoyed by other property in the vicinity and under identical zoning classification;"
- The City did not adequately make the legally required findings for the Variance, as: (1) there are not unique or special circumstances applicable to the applicant's property, (2) the Variance is not necessary for the preservation of a property right possessed by others in the same vicinity and zone, (3) the approval of a parking reduction would be detrimental to the Del Taco parcel, and (4) granting the Variance would allow the applicant a special privilege inconsistent with the limitations placed on other properties in the same vicinity and zone; and
- The hearing was not properly noticed. Hennessey Group, the property owner of record of the Del Taco parcel, did not receive proper notice of the hearing for the variance.

Hennessey would like to supplement its appeal with the following points:

- At the September 3, 2015 Planning Commission hearing, the applicant misrepresented to the Planning Commissioners that it had Del Taco's support for the parking variance, that all parties had been "working together" and that Del Taco had been "cooperating" with the applicant on a revision to Reciprocal Easement Agreement for the site; this is false – the applicant did not (and does not) have the support of Hennessey nor Del Taco for the Project, as currently proposed. To the contrary, the upshot of the Variance is that the value of the applicant's property will be increased at the expense of Hennessey and Costco.
- The parking analysis submitted by the applicant is seriously flawed and is not sufficient to support the Planning Commission's findings.
- The Variance approval was inconsistent with state and local laws.

Each of these issues is discussed in further detail below.

A. The Applicant Misrepresented that it Had Our Client's Support.

At the September 3rd Planning Commission hearing, after several Commissioners voiced concerns regarding whether Del Taco had "signed off" or was "on board" with the parking reduction, the applicant misrepresented to the Planning Commissioners that he had the support of both tenants in the Center. In fact, he noted that "everyone is working together on this" and that Del Taco had been "cooperating" with the applicant regarding an amended parking agreement. As evidenced in Del Taco's October 28, 2015 letter to the City Council, this was false. *See Exhibit A, Del Taco Letter* (Del Taco was "not given the benefit or courtesy of being contacted by the applicant so that [they] could weigh in on the request before it was heard by the Planning Commission.) In order to alleviate the Commission's concerns regarding Del Taco's position, the applicant stated that he believed obtaining Del Taco's final approval for the amendment to the Reciprocal Easement Agreement would not be an issue. However, the applicant never reached out prior to the Planning Commission meeting to Del Taco or our client to obtain support for the Project.

Although at the time of the Planning Commission hearing Costco agreed not to oppose the variance application, it appears that Costco's support may have been obtained as a result of misrepresentations by the applicant. At the date of the Planning Commission hearing, Costco and the applicant had not yet agreed to final terms on the amended Reciprocal Easement Agreement. However, Costco noted that its support was "based upon assurances [it received] from [the applicant] that a Second Amendment to the Reciprocal Easement Agreement will be signed by all necessary parties and recorded before additional actions are taken to move forward with the proposed restaurant." However, at that point, the applicant had not even reached out to our client to discuss the Project and the amended Reciprocal Easement Agreement.

But for the applicant's misrepresentations regarding Del Taco's "cooperation," we believe that the Planning Commissioners would not have approved the Project on the grounds that it could not make one of the required findings, i.e., that the Variance would not be detrimental to surrounding properties. Had the Planning Commissioners been given accurate information, we believe they would not have approved the Project.

B. The Applicant's Traffic and Parking Analysis is Seriously Flawed.

Our client engaged Pirzadeh & Associates, a traffic engineering firm, to peer review the applicant's parking analysis, which was prepared by RK Engineering Group, Inc. See *Exhibit B, Pirzadeh & Associates Parking Analysis, dated November 3, 2015*. Pirzadeh's analysis revealed that the applicant's traffic and parking analysis is seriously flawed for the following reasons.

- First, the parking analysis only observed one site. In order to adequately estimate the expected parking demand for a use that is allegedly "unique," at least two or three similar uses should have been identified and studied. The applicant's approach is inappropriate and contrary to standard professional practice.
- Second, the site utilized for conducting the parking survey is not comparable to the Project's location. For example, not only was the site used for the applicant's survey located in Los Angeles County, but it was also a standalone location without any other adjacent commercial uses. To meet minimum professional standards, and unless there are compelling circumstances justifying a deviation from standard practice, the study sites should be located within the same or adjacent jurisdictions of the proposed use and in similar land use environments. The applicant's analysis is not an apples-to-apples comparison.
- Third, survey data should have been collected every 30 minutes, not every hour. Because the proposed restaurant is a high turnover restaurant, the parking utilization will change frequently. Pirzadeh also questions the accuracy of the report's conclusion that peak use occurred at 2:00 pm, which is very unusual for a restaurant.

Pirzadeh notes that this site is not a suitable location for consideration of reduced parking requirement. Parking demand studies are typically conducted for unique land uses that are not addressed in the City's adopted parking rates. To the contrary, the City of Garden Grove has an adopted parking rate for restaurants. The applicant has not provided substantial evidence to explain or justify why its proposed restaurant should be treated differently than other restaurants and be allowed a reduced parking rate. Accordingly, Pirzadeh concludes that the applicant's parking report is not reliable and does not accurately represent the potential parking needs at the proposed site in Garden Grove.

The proposed restaurant site is already impacted by significant overflow parking from the other uses in the center. In fact, at the September 3rd hearing, the applicant admitted parking issues at the center, and the applicant's parking study indicates that the future restaurant site parking is already being used by shoppers visiting other stores in the shopping center. This problem will just be further magnified with the addition of an underparked tenant.

Pirzadeh's parking analysis also concludes that the parking mitigation measures approved by the Planning Commission will not adequately address parking and traffic problems associated with the Project. For example, Pirzadeh notes that adding additional parking spaces by converting standard parking spaces to compact spaces is not always effective in busy shopping centers because patrons try to avoid these constrained spaces. Similarly, valet service is not an effective measure since patrons typically avoid using valet due to the wait time and perception of need for compensating the attendants. Valet could also impact the on-site circulation path because the site plan does not show any available areas for stacking and staging the valet vehicles. Therefore, these "parking mitigation measures" could potentially adversely impact parking and circulation. Finally, as noted by Commissioner Margolin, none of the parking mitigation measures changes the fact that the shopping center would still have a significant parking deficit.

C. The Variance Approval was Inconsistent with State and Local Laws and Regulations.

As noted in our September 22nd appeal letter, even assuming a stellar parking analysis, the Variance could not legally have been approved for the Project, as state law requires that there be "special circumstances applicable to the property," nor is the property deprived of "privileges enjoyed by other property in the vicinity and under identical zoning classification." Moreover, the required Variance findings cannot be adequately made for the Project. Finally, not only is the Project unable to meet the standard variance findings established by state and local law, but it also does not meet the limited requirements established by Government Code Section 65906.5 for parking variances. Government Code Section 65906.5 permits the granting of a parking variance to allow required parking spaces to be located off-site, or the payment of in-lieu fees if: (a) the variance will be an incentive to, and a benefit for, the nonresidential development, and (b) the variance will facilitate access to the nonresidential development by patrons of public transit facilities, particularly guideway facilities. Those requirements are clearly not met here. Accordingly, a variance to allow reduced parking for the Project should not be permitted.

Garden Grove City Council

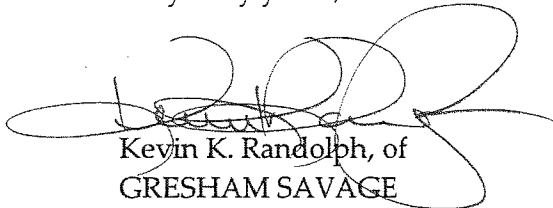
Re: *Appeal of Planning Commission Approval of Variance No V-011-2015*

November 4, 2015

Page 6

For all the reasons set forth above, as well as in our September 22nd appeal letter, we respectfully request that the City Council reverse the Planning Commission's approval of the issuance of the Variance. Moreover, since the Variance could not be approved under any circumstances based on any evidentiary record, we request that there is no good reason to return the Variance to the Planning Commission for further consideration.

Very truly yours,

A handwritten signature in black ink, appearing to read 'Kevin K. Randolph', is written over the typed name and company information.

Kevin K. Randolph, of
GRESHAM SAVAGE
NOLAN & TILDEN,
A Professional Corporation

KKR:LBK

EXHIBIT "A"
DEL TACO LETTER



NOV 02 2015

COMMUNITY DEVELOPMENT
PLANNING SERVICES

October 28, 2015

City Council
City of Garden Grove
11222 Acacia Parkway
Garden Grove, CA 92840

Re: Appeal of Planning Commission Approval of Variance No. V-011-2015

Dear Mayor Nguyen and Honorable Councilmembers:

Del Taco is writing to express its opposition to the Variance, No. V-011-2015, provided to the applicant, which is the subject of this appeal. Let us be clear, we have never been contacted by this applicant and our rights were never addressed or considered.

We operate our business, as we have for the last sixteen years in the City, on a parcel located in the shopping center in question. We have relied and continue to rely on the parking arrangements currently in place among the tenants. It is integral to our continued ability to do business profitably and provides a crucial part of our business operations in Garden Grove. If this variance is granted, our business will be severely impacted in a very negative way.

We were not given the benefit or courtesy of being contacted by the applicant so that we could weigh in on the request before it was heard by the Planning Commission or we would have expressed then, at the time of that hearing, what we are saying now in this letter. We suspect that the decision may well have been very different had we been given the chance to express our serious concerns. Our business will be negatively impacted in a way that we cannot sustain. We will be at a disadvantage to other tenants and, particularly, the applicant in the event this variance is granted. The variance is in their direct favor and at our direct expense. Our rights in the shopping center to ample and appropriate parking for our guests and customers will be changed – permanently. We will, moreover, be at disadvantage to other fast food restaurants in the City and surrounding area. That will negatively impact us, our employees, our landlord, and ultimately, the City itself.

We respectfully request that the appeal be granted, the variance approved by the Planning Commission be overturned, that we be treated fairly in this matter, and that our parking conditions, which we currently have and rely upon, be restored to us as they currently exist and the other tenants of the shopping center. Thank you.

Sincerely,

Jim Farley

Senior Asset Manager, Del Taco
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www.deltaco.com

EXHIBIT "B"

PIRZADEH & ASSOCIATES PARKING ANALYSIS
DATED NOVEMBER 3, 2015

MEMORANDUM

To: Kevin Randolph, Esq.

From: Peter K. Pirzadeh, P.E.

Date: November 4, 2015

Subject: Hennessey Development, Garden Grove, California

Pursuant to your request, we have reviewed the parking analysis conducted by RK Engineering Group, Inc., dated March 15, 2015, for the proposed King Buffet Restaurant at the Costco Center in the City of Garden Grove, California. As summarized below, there are several problems associated with the procedures utilized in this analysis. Accordingly, the conclusions of the study are unreliable and lacking as the basis for establishing a parking demand rate for the proposed restaurant.

Our justification for the above stated opinion is based on the following problems found with the RK Engineering Parking Study:

- 1- The parking analysis should have been based on observations at more than one site. In order to project the expected parking demand for a use that may be unique, standard industry practice dictates that at least two to three similar uses should be identified and studied so that a meaningful and reliable representative database can be established. To the contrary, the RK Parking Analysis utilized observations of parking usage at a single site,
- 2- The site utilized for conducting the parking survey should have been located within Orange County, not Los Angeles County. Standard industry practice requires that, when possible, study sites must be located within the same or adjacent jurisdictions of the proposed use. This is because socio-economic and demographic characteristics of different areas influence the use of similar businesses. There are many restaurants in the City of Garden Grove or in adjacent cities and certainly in Orange County that offer similar menus/buffets that could have been used for the parking utilization analysis. These sites would provide a more reliable and representative parking demand rate than the standalone Los Angeles County site used in the RK Parking Analysis.
- 3- The study sites should be comparable in location and site usage, i.e., they must be located in a similar land use environment. This is important because uses in different land use settings have different use characteristics. The proposed restaurant is located in a busy shopping center while the parking observation site utilized in the RK Parking Analysis is located in a stand alone location without any

other adjacent commercial retail uses. This does not constitute a substantially similar land use environment, and therefore was not an appropriate comparison.

- 4- The parking observation frequency should have been analyzed on a ½ hourly basis, not hourly, in order to provide a more detailed use pattern. As indicated in the RK Parking Analysis, the proposed restaurant is characterized as high turn-over. Therefore, the parking utilization will change frequently. However, the RK Parking Analysis utilized hourly data, which precludes the ability to adequately analyze the potential variations in the parking utilization.
- 5- The RK Parking Analysis' data showing that peak parking demand occurred at 2:00 PM for both the weekday and the weekend observation days requires further review because it is unusual for a restaurant to have its peak outside of typical meal hours. Due to the fact that this peak hour is unexpected for a restaurant use, the RK Parking Analysis should have provided additional data for as other similar restaurant comparisons to substantiate its findings.

Based upon the above, it is our opinion that the RK Parking Analysis's findings are unreliable and not representative of the potential parking needs at the proposed site in Garden Grove. Accordingly, we recommend that a new parking demand study analyzing at least two similar restaurants in Garden Grove or an adjacent jurisdiction be conducted to establish the expected parking demand at the proposed King Buffet Restaurant.

Parking demand studies are typically conducted for unique land uses that are not addressed in the City's adopted parking rates. City of Garden Grove has an adopted parking rate for restaurants which should be applied to the proposed use. The RK Parking Analysis does not provide any information to explain or justify why this restaurant should be treated differently from other food service establishments. Furthermore, the information provided in the RK Parking Analysis indicates that the proposed restaurant site is already impacted by significant overflow parking from other uses within the shopping center. This seems to further indicate that the site would not be a suitable location for consideration of a reduced parking rate.

Finally, the City's proposed conditions of approval for the parking variance will be unlikely to provide sufficient mitigation for the lack of parking provided. The City's Staff Report includes several conditions of approval to remedy potential future parking demand problems. However, based on our experience, there is no certainty that these conditions would address future problems. As noted above, even the RK Parking Analysis shows that the future restaurant site parking is already being used by shoppers visiting other stores in the Center. The anticipated parking deficiency for the restaurant and the existing parking encroachment will further impact other parking areas and business within the Center once the proposed restaurant is open. Adding additional parking spaces by converting full size spaces to compact spaces often is not effective in busy shopping centers since patrons try to avoid these constrained spaces. Moreover, the valet service may also not be effective since many patrons will avoid using valet due to the wait time and perception of need for compensating the attendants. It should be noted that, valet service could negatively impact

Mr. Kevin Randolph, Esq.
Page 3
November 4, 2015

parking and the on-site circulation path since the site plan does not show any available areas for stacking and staging the valet vehicles.

Based on the information presented above, it is our professional opinion that the RK Engineering Parking Analysis does not provide reliable data to be used as the basis for the parking variance. Also, the proposed conditions of approval will likely not significantly mitigate the parking impacts of the proposed project.

Please call with any questions regarding our findings or if you need any further information regarding the parking analysis.

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