

# CITY OF NEWARK CITY COUNCIL

37101 Newark Boulevard, Newark, CA 94560-3796 • 510-578-4266 • E-mail: [city.clerk@newark.org](mailto:city.clerk@newark.org)

**Various Virtual  
Teleconference Locations  
7:30 p.m.**

## **AGENDA**

**Thursday, May 28, 2020**

**THIS IS A MEETING BY TELECONFERENCE ONLY. THE CITY COUNCIL CHAMBERS WILL NOT BE OPEN. REFER TO THE END OF THE AGENDA TO REVIEW OPTIONS FOR PARTICIPATING IN THE MEETING REMOTELY OR TO SUBMIT PUBLIC COMMENTS VIA EMAIL. PLEASE NOTE THE START TIME FOR THIS SPECIAL MEETING.**

**A. ROLL CALL**

**B. MINUTES**

- B.1 Approval of Minutes of the City Council meetings of May 14, 2020. (MOTION)**

**C. PRESENTATIONS AND PROCLAMATIONS**

**D. WRITTEN COMMUNICATIONS**

**E. PUBLIC HEARINGS**

- E.1 Hearing to consider property owners' objections to the 2020 Weed Abatement Program and instruction to the Superintendent of Streets to abate the public nuisances - from Deputy Fire Marshal Lee and Assistant Maintenance Superintendent Hornbeck. (MOTION)**
- E. 2 Hearing to consider an Appeal of the Planning Commission's decision to approve a Conditional Use Permit to allow Fitness 19, a physical fitness center located at 6203 Jarvis Avenue (APN: 537-521-37) – from Deputy Community Development Director Interiano. (RESOLUTION)**

**F. CITY MANAGER REPORTS**

(It is recommended that Items F.1 through F.5 be acted on simultaneously unless separate discussion and/or action is requested by a Council Member or a member of the audience.)

**CONSENT**

- F.1 Removal of the voter registration requirement for City appointed Boards, Commissions, and Committees members – from City Clerk Harrington and Interim City Attorney Kokotaylo. (ORDINANCE INTRODUCTION) (RESOLUTION)**
- F.2 Award an Agreement and Authorization for the City Manager to execute an agreement with the *Tri-City Voice* for legal advertising services for Fiscal Year 2020-2021 – from City Clerk Harrington. (RESOLUTION)**
- F.3 Acceptance of work with Bond Blacktop, Inc. for the 2019 Street Slurry Seal Program, Project 1228 – from Assistant Engineer Carmen. (RESOLUTION)**
- F.4 Acceptance of work with Pavement Coatings Company for the 2018 Street Slurry Seal Program, Project 1180 – from Senior Civil Engineer Tran. (RESOLUTION)**
- F.5 Approval of partial release of security bonds for Tract 8208 (Continental Residential, Inc.) – from Public Works Director Fajeau. (RESOLUTION)**

**NONCONSENT**

- F.6 Presentation by Godbe Research on the results of public opinion research assessing community interest for an extension of the existing City of Newark Utility Users Tax and direction regarding same – from City Manager Benoun. (MOTION)**
- F.7 Adoption of a Resolution authorizing a one-time exception to the systematic decrease in the maximum allowable number of safe and sane fireworks booths permits as a result of the COVID-19 pandemic – from City Manager Benoun and Interim City Attorney Kokotaylo. (RESOLUTION)**

**F.8 Oral Update on the City’s response to the COVID-19 Local Emergency – from City Manager Benoun and Interim City Attorney Kokotaylo.**

**G. CITY ATTORNEY REPORTS**

**H. ECONOMIC DEVELOPMENT CORPORATION**

**I. CITY COUNCIL MATTERS**

**J. CITY COUNCIL ACTING AS THE SUCCESSOR AGENCY TO THE REDEVELOPMENT AGENCY**

**K. ORAL COMMUNICATIONS**

**L. APPROPRIATIONS**

**Approval of Audited Demands.**

**(MOTION)**

**M. CLOSED SESSION**

**N. ADJOURNMENT**

**IMPORTANT NOTICE REGARDING CITY COUNCIL MEETING**

Due to the COVID-19 pandemic, the City of Newark is making several changes related to City Council meetings to protect the public’s health and prevent the disease from spreading locally. As a result of the COVID-19 public health emergency, including the Alameda County Health Officer and Governor’s directives for everyone to shelter in place, **the City Council Chambers will be closed to the public.** Members of the public should attempt to observe and address the Council using the below technological processes.

This meeting is being conducted utilizing teleconferencing and electronic means consistent with State of California Executive Order N-29-20 dated March 17, 2020, regarding the COVID-19 pandemic. In accordance with Executive Order N-29-20, the public may only view the meeting on television and/or online.

Mayor Nagy, Vice Mayor Freitas, and Council Members Collazo, Hannon, and Bucci will be attending this meeting via teleconference. Teleconference locations are not open to the public. All votes conducted during the teleconferencing session will be conducted by roll call vote.

**How to view the meeting remotely:**

Live television broadcast - Comcast Channel 26

Livestream online at- <https://www.newark.org/departments/city-manager-s-office/agendas-minutes/live-streaming-meetings>

**How to participate in the meeting remotely:**

Provide live remote public comments, when called upon by the City Clerk:

From a PC, Mac, iPad, iPhone or Android device: <https://zoom.us/j/98073508956>

Webinar ID 980 7350 8956 (to supplement a device without audio, or to just call in, please also join by phone: US: +1 669 900 6833, same Webinar ID 980 7350 8956.)

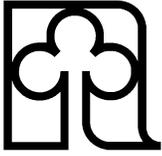
**Submission of Public Comments:**

Public comments received by 4:00 p.m. on the Council meeting date will be provided to the City Council and considered before Council action. Comments may be submitted by email to [City.clerk@newark.org](mailto:City.clerk@newark.org). Comments may also be submitted via e-mail to [city.clerk@newark.org](mailto:city.clerk@newark.org) at any time prior to closure of the public comment portion of the item(s) under consideration.

Reading of Public Comments: The City Clerk will read aloud email comments received during the meeting that include the subject line “FOR THE RECORD” as well as the item number for comment, provided that the reading shall not exceed five (5) minutes, or such other time as the Council may provide, consistent with the time limit for speakers at a Council meeting and consistent with all applicable laws.

Pursuant to Government Code 54957.5: Supplemental materials distributed less than 72 hours before this meeting, to a majority of the City Council, will be made available for public inspection at this meeting and at the City Clerk’s Office located at 37101 Newark Boulevard, 5<sup>th</sup> Floor, during normal business hours. Materials prepared by City staff and distributed during the meeting are available for public inspection at the meeting or after the meeting if prepared by some other person. Documents related to closed session items or are exempt from disclosure will not be made available for public inspection.

For those persons requiring hearing assistance, please make your request to the City Clerk two days prior to the meeting.



# CITY OF NEWARK CITY COUNCIL

Virtual Meeting, Newark, CA 94560-3796 • 510-578-4266 • E-mail: [city.clerk@Newark.org](mailto:city.clerk@Newark.org)

**Various Virtual  
Teleconference Locations  
7:30 p.m.**

## AGENDA

**Thursday, May 28, 2020**

### CITY COUNCIL:

*Alan L. Nagy, Mayor*  
*Luis L. Freitas, Vice Mayor*  
*Sucy Collazo*  
*Michael K. Hannon*  
*Mike Bucci*

### CITY STAFF:

*David J. Benoun*  
*City Manager*  
  
*Lenka Hovorka*  
*Assistant City Manager*  
  
*Gina Anderson*  
*Police Chief*  
  
*Soren Fajeau*  
*Public Works Director*  
  
*David Zehnder*  
*Recreation and Community  
Services Director*  
  
*Kristopher J. Kokotaylo*  
*Interim City Attorney*  
  
*Krysten Lee*  
*Finance Director*  
  
*Steven M. Turner*  
*Community Development Dir.*  
  
*Sheila Harrington*  
*City Clerk*

**Welcome** to the Newark City Council meeting. The following information will help you understand the City Council Agenda and what occurs during a City Council meeting. Your participation in your City government is encouraged, and we hope this information will enable you to become more involved. The Order of Business for Council meetings is as follows:

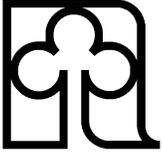
- |  |                                |
|--|--------------------------------|
| <b>A. ROLL CALL</b>                        | <b>I. COUNCIL MATTERS</b>      |
| <b>B. MINUTES</b>                          | <b>J. SUCCESSOR AGENCY</b>     |
| <b>C. PRESENTATIONS AND PROCLAMATIONS</b>  | <b>TO REDEVELOPMENT AGENCY</b> |
| <b>D. WRITTEN COMMUNICATIONS</b>           | <b>K. ORAL COMMUNICATIONS</b>  |
| <b>E. PUBLIC HEARINGS</b>                  | <b>L. APPROPRIATIONS</b>       |
| <b>F. CITY MANAGER REPORTS</b>             | <b>M. CLOSED SESSION</b>       |
| <b>G. CITY ATTORNEY REPORTS</b>            | <b>N. ADJOURNMENT</b>          |
| <b>H. ECONOMIC DEVELOPMENT CORPORATION</b> |                                |

Items listed on the agenda may be approved, disapproved, or continued to a future meeting. Many items require an action by motion or the adoption of a resolution or an ordinance. When this is required, the words **MOTION**, **RESOLUTION**, or **ORDINANCE** appear in parenthesis at the end of the item. If one of these words does not appear, the item is an informational item.

The attached **Agenda** gives the **Background/Discussion** of agenda items. Following this section is the word **Attachment**. Unless “none” follows **Attachment**, there is more documentation which is available for public review at the Newark Library, the City Clerk’s office or at [www.newark.org](http://www.newark.org). Those items on the Agenda which are coming from the Planning Commission will also include a section entitled **Update**, which will state what the Planning Commission’s action was on that particular item. **Action** indicates what staff’s recommendation is and what action(s) the Council may take.

**Addressing the City Council:** You may speak once and submit written materials on any listed item at the appropriate time. You may speak once and submit written materials on any item **not** on the agenda during **Oral Communications**. To address the Council, please seek the recognition of the Mayor by raising your hand. Once recognized, come forward to the lectern and you may, but you are not required to, state your name and address for the record. Public comments are limited to five (5) minutes per speaker, subject to adjustment by the Mayor. Matters brought before the Council which require an action may be either referred to staff or placed on a future Council agenda.

No question shall be asked of a council member, city staff, or an audience member except through the presiding officer. No person shall use vulgar, profane, loud or boisterous language that interrupts a meeting. Any person who refuses to carry out instructions given by the presiding officer for the purpose of maintaining order may be guilty of an infraction and may result in removal from the meeting.



# CITY OF NEWARK CITY COUNCIL

Various Locations, Newark, CA 94560-3796 • 510-578-4266 • E-mail: city.clerk@newark.org

**Various Virtual  
Teleconference Locations  
6:00 p.m.**

## Minutes

Thursday, May 14, 2020

### A. ROLL CALL

Mayor Nagy called the meeting to order, via teleconference, at 6:00 p.m. Present were Council Members Hannon, Collazo, Freitas, and Bucci (all via teleconference).

### B. CLOSED SESSION

- B.1 Closed session for conference with Labor Negotiators pursuant to California Government Code Section 54957.6. Agency designated representative: City Manager Benoun and Assistant City Manager Hovorka, Employee Groups: the Newark Police Association, the Newark Police Management Association, the Newark Association of Miscellaneous Employees; City Officials and the Management, Supervisory, and Professional Employee Group; and the Confidential Employee Group.**

City Clerk Harrington announced that there were no requests from the public to address the City Council before they convened in Closed Session.

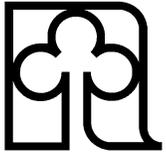
At 6:02 p.m. the City Council recessed to a closed session.

At 6:24 p.m. the City Council convened in closed session.

At 7:31 p.m. the City Council reconvened in open session with all Council Members present.

### C. ADJOURNMENT

Mayor Nagy adjourned the meeting at 7:31 p.m.



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**Various Teleconference  
Locations  
7:30 p.m.**

## MINUTES

Thursday, May 14, 2020

### A. ROLL CALL

Mayor Nagy called the meeting to order, via teleconference, at 7:46 p.m. Present were Council Members Hannon, Collazo, Freitas, and Bucci (all via teleconference).

### B. MINUTES

#### B.1 Approval of Minutes of the City Council meetings of April 23 and 30, 2020. **MOTION APPROVED**

Council Member Collazo moved, Council Member Freitas seconded, to approve the Minutes of the City Council meetings. The motion passed, 5 AYES.

### C. PRESENTATIONS AND PROCLAMATIONS

#### C.1 Introduction of employees.

Mayor Nagy introduced Assistant City Manager Lenka Hovorka, Police Chief Gina L. Anderson, and Senior Administrative Support Specialist Jennifer Tran.

### D. WRITTEN COMMUNICATIONS

### E. PUBLIC HEARINGS

### F. CITY MANAGER REPORTS

Council Member Hannon moved, Council Member Collazo seconded, to approve Consent Calendar Item F.1, that the resolution be numbered, and that reading of the title suffice for adoption of the resolution. The motion passed, 5 AYES.

**CONSENT**

- F.1 Acceptance of an Alameda County Fire Department Inspection Report showing compliance with Health and Safety Code Sections 13146.2 and 13146.3. RESOLUTION NO. 11047**

**NONCONSENT**

- F.2 Update on the Draft 2020-2022 Capital Improvement Plan with project funding recommendations.**

Assistant City Engineer Imai gave the presentation (on file with City Clerk).

Dante Williams, Verizon Wireless, requested that Council direct staff to meet with Verizon Wireless to discuss an agreement to allow Verizon access to street improvement projects.

Mayor Nagy stated that staff was planning a meeting with Verizon representatives and that Verizon should consider another tower at Jarvis Avenue.

This item was informational only, no action requested.

- F.3 Oral Update Regarding the City's Response to the COVID-19 Pandemic and Confirmation of the Continued Existence of a Local Emergency due to COVID-19. RESOLUTION NO. 11048**

City Manager Benoun stated that within Alameda County, COVID-19 cases per day have stabilized. There is sufficient health care capacity and a 30 day supply of personal protective equipment. The County needs more staffing for contact tracing and to increase the testing to 3,100 per day (currently 1,000). He anticipated an updated order from the Alameda County Health Officer to ease some restrictions. He recommended that the City Council confirm the continued existence of a Local Emergency due to COVID-19.

Council Member Bucci moved, Council Member Freitas seconded to, by resolution, confirm the continued existence of the local emergency due to COVID-19. The motion passed, 5 AYES.

- F.4 Approving and Authorizing the City Manager to execute Side Letters between the City of Newark and the Newark Association of Miscellaneous Employees (NAME), Newark Police Association (NPA), and Newark Police Management Association (NPMA) and to execute Compensation and Benefit Plan Modifications for Employees Compensation and Benefit Plans for City**

**Officials and the Management, Supervisory and Professional Employee Group and the Confidential Group to temporarily modify benefits as a result of changed conditions due to the COVID-19 Pandemic.**

**RESOLUTION NO. 11049 NAME  
RESOLUTION NO. 11050 NPA  
RESOLUTION NO. 11051 NPMA  
RESOLUTION NO. 11052 Confidential  
RESOLUTION NO. 11053 Officials**

City Manager Benoun gave the staff report outlining the various leaves that would be available to eligible employees and the parameters for use, alternative work assignments, suspension of certain leave accruals, and the extension of time to use certain leaves. He noted that none of the benefit modifications would apply to the City Manager position.

Council Member Bucci moved, Council Member Hannon seconded to , by resolutions, approve and authorize the City Manager to execute the Side Letter Agreements between the City of Newark and NAME, NPA and NPMA and approve and authorize the City Manager to execute the compensation and benefit plan modifications for the Confidential and City Officials and the Management, Supervisory, and Professional Employee Groups to temporarily modify benefits as a result of changed conditions due to the COVID-19 pandemic. The motion passed, 5 AYES.

**F.5 Approval of Annual Engineer’s Reports, intention to levy and collect assessments and setting date of public hearing on June 25, 2020 for Landscaping and Lighting District Nos. 1, 2, 4, 6, 7, 10, 11, 13, 15, 16, 17, 18 and 19 for fiscal year 2020-2021 in accordance with the provisions of the Landscaping and Lighting Act of 1972.**

**RESOLUTION NO. 11054 Annual Report  
RESOLUTION NO. 11055 Public Hearing**

Council Member Collazo recused herself because she owns property within Districts 10 and 11.

City Manager Benoun recused himself because he owns property in District 11.

City Clerk Harrington placed Council Member Collazo and City Manager Benoun on hold within the Zoom app which disabled their audio and video access.

Public Works Director Fajeau gave the staff report recommending approval.

Council Member Freitas moved, Council Member Bucci seconded to (1) by resolution, approve the Annual Engineer’s Reports; and, (2) by resolution, declare an intention to levy and collect assessments and set the date for the annual public hearings for June 25, 2020, for Landscaping and Lighting District Nos. 1, 2, 4, 6, 7, 10, 11, 13, 15, 16, 17, 18 and 19

for fiscal year 2020-2021 in accordance with the provisions of the Landscaping and Lighting Act of 1972. The motion passed, 4 AYES, 1 RECUSED.

Council Member Collazo and City Manager Benoun rejoined the meeting.

**G. CITY ATTORNEY REPORTS**

**H. ECONOMIC DEVELOPMENT CORPORATION**

**I. CITY COUNCIL MATTERS**

**I.1 Reappointing Senior Citizen Standing Advisory Committee members and appointment(s) to vacancy. RESOLUTION NO. 11056 re-appointments  
RESOLUTION NO. 11057 new appointments**

Mayor Nagy recommended two year reappointments for Elwood Ballard, Sandra Arellano, Rick Arellano, and Stanley Keiser. He further recommended appointing new members Susan Johnson and Olga Borjon for two year appointments.

Council Member Collazo moved, Council Member Bucci seconded to, by resolutions, 1) reappoint Elwood Ballard, Sandra Arellano, Rick Arellano, and Stanley Keiser to the Senior Citizen Standing Advisory Committee and 2) approve the appointment(s) to the vacancy on the Senior Citizen Standing Advisory Committee. The motion passed, 5 AYES.

Mayor Nagy stated that he would adjourn the meeting in memory of Dianne Richards Reese and Raul Valle, father of Alameda County Supervisor Richard Valle. The entire City Council extended their condolences.

Council Member Collazo stated that it was especially difficult to lose people during these times when funeral services were limited. Shop Newark.

Council Member Freitas commended staff for the recent food giveaway. He congratulated the re-appointees and new appointees to the Senior Citizen Standing Advisory Committee. He complimented Webcor on the construction progress of the civic center. He asked when the skate park would reopen.

City Manager Benoun stated that staff was working on a coordinated effort to reopen the skate park with other cities that have skate parks to ensure social distancing at these facilities.

Council Member Freitas welcomed the new employees who were introduced earlier.

Council Member Bucci commended Viola Blythe Community Services, The Tri-City Food Bank, and Newark Recreation employees for the food that has been distributed. He noted that O’Sullivan’s Sports Bar has provided free meals to local students.

Council Member Hannon thanked business and individual volunteers who have helped the less fortunate in the community. He thanked city staff for their efforts during this crisis

**J. CITY COUNCIL ACTING AS THE SUCCESSOR AGENCY TO THE REDEVELOPMENT AGENCY**

**K. ORAL COMMUNICATIONS**

No one requested to speak.

**L. APPROPRIATIONS**

**Approval of Audited Demands.**

**MOTION APPROVED**

City Clerk Harrington read the Register of Audited Demands: Check numbers 120851 through 120999.

Council Member Bucci moved, Council Member Collazo seconded, to approve the Register of Audited Demands. The motion passed, 5 AYES.

**M. CLOSED SESSION**

**N. ADJOURNMENT**

Mayor Nagy adjourned the meeting, in memory of Dianne Richards Reese and Raul Valle, at 9:23 p.m.

**E.1 Hearing to consider property owners' objections to the 2020 Weed Abatement Program and instruction to the Superintendent of Streets to abate the public nuisances - from Deputy Fire Marshal Lee and Assistant Maintenance Superintendent Hornbeck. (MOTION)**

**Background/Discussion** - On April 23, 2020, the City Council adopted Resolution No. 11,041 initiating the 2020 Weed Abatement Program and setting a public hearing for May 28, 2020. The annual weed abatement program abates weeds on vacant commercial and industrial properties not maintained by the property owners as directed by the Fire Marshal. Property owners may object in person by attending this hearing or by letter.

Notices were mailed to the property owners after the April 23 City Council meeting. The property owners were provided until May 29, 2020 to advise the City if they would abate the weeds themselves. The City enclosed a postage paid notice for the property owners to return to the City. As of May 21, 2020, no written objections have been received. Several owners have notified staff that they will perform the work themselves. If the weeds on these parcels are not abated in a timely manner, the City's contractor will perform the work later in June. This will provide these owners ample time to complete the abatement.

If objections are received prior to or during the public hearing, the Council should consider the objections; and then, by motion, allow or overrule the objections. The Council may then instruct the Superintendent of Streets to abate the public nuisance on the parcels remaining in the program.

**Attachment** – List of Properties

**Action** – Staff recommends that the City Council, by motion, act upon any objections by property owners to the 2020 Weed Abatement Program, and instruct the Superintendent of Streets to abate the public nuisances.

**SCHEDULE "A"**  
**LIST OF PROPERTIES - POTENTIAL WEED ABATEMENT**

MAP	APN	OWNER	LOCATION
1	92A-0720-005-10	PRESBYTERY OF SAN FRANCISCO	35450 NEWARK BOULEVARD
2	092-0005-029-09	JESSICA CHENG	6844 MAYHEWS LANDING RD.
3	092-0131-001-09	SRAJ DEVELOPMENT LLC	FILBERT STREET AT SNOW
3.1	092-0131-002-04	SRAJ DEVELOPMENT LLC	37243 FILBERT STREET
3.2	092-0131-003-00	SRAJ DEVELOPMENT LLC	37257 FILBERT STREET
4	092-0021-015-03	MERIDA PLACE LLC	SYCAMORE STREET NEAR GEORGE
5	092-0024-010-00	MARIA L. MARTINS	SYCAMORE STREET NEAR 7303 DAIRY
6	092-0029-022-00	RAO ROSJESH & DESHANDE VIDYASAYAR	36952 MULBERRY STREET
7	092-0045-011-00	ANITRA PRASAD	MAGNOLIA STREET NEAR RICH
8	092-0030-014-03	D & J MELVILLE & P & D CHANG	6717 THORNTON AVENUE
9	092-0030-018-04	LEPAKSHI HOMES LLC	6781 THORNTON AVENUE
9.1	092-0030-017-02	LEPAKSHI HOMES LLC	6765 THORNTON AVENUE
10	092-0032-003-00	ALAN L DANG	DAIRY AVENUE BETWEEN 36805 & 36926
11	092-0041-008-03	UNION PACIFIC - REAL ESTATE	SP RAILROAD R-O-W
11.1	092-0024-017-00	UNION PACIFIC - REAL ESTATE	SP RAILROAD R-O-W
11.10	537-0521-008-01	UNION PACIFIC - REAL ESTATE	SP RAILROAD R-O-W
11.11	537-0521-008-02	UNION PACIFIC - REAL ESTATE	SP RAILROAD R-O-W
11.12	537-0521-009-02	UNION PACIFIC - REAL ESTATE	SP RAILROAD R-O-W
11.13	092-0054-003-00	UNION PACIFIC - REAL ESTATE	SP RAILROAD R-O-W
11.14	092-0200-015-01	UNION PACIFIC - REAL ESTATE	SP RAILROAD R-O-W
11.15	092-0253-001-00	UNION PACIFIC - REAL ESTATE	SP RAILROAD R-O-W
11.16	92A-2165-006-00	UNION PACIFIC - REAL ESTATE	SP RAILROAD R-O-W
11.17	92A-2300-007-00	UNION PACIFIC - REAL ESTATE	SP RAILROAD R-O-W
11.18	92A-2300-006-14	UNION PACIFIC - REAL ESTATE	SP RAILROAD R-O-W
11.19	92A-2500-005-00	UNION PACIFIC - REAL ESTATE	SP RAILROAD R-O-W
11.2	092-0021-016-01	UNION PACIFIC - REAL ESTATE	SP RAILROAD R-O-W
11.20	92A-2500-004-00	UNION PACIFIC - REAL ESTATE	SP RAILROAD R-O-W
11.21	537-0850-021-00	UNION PACIFIC - REAL ESTATE	SP RAILROAD R-O-W
11.22	537-0850-020-00	UNION PACIFIC - REAL ESTATE	SP RAILROAD R-O-W
11.23	537-0850-019-00	UNION PACIFIC - REAL ESTATE	SP RAILROAD R-O-W
11.24	537-0850-018-00	UNION PACIFIC - REAL ESTATE	SP RAILROAD R-O-W
11.25	537-0850-017-00	UNION PACIFIC - REAL ESTATE	SP RAILROAD R-O-W

**SCHEDULE "A"**  
**LIST OF PROPERTIES - POTENTIAL WEED ABATEMENT**

11.26	092-0054-002-00	UNION PACIFIC - REAL ESTATE	SP RAILROAD R-O-W
11.27	092-0068-003-02	UNION PACIFIC - REAL ESTATE	SP RAILROAD R-O-W
11.28	092-0069-002-02	UNION PACIFIC - REAL ESTATE	SP RAILROAD R-O-W
11.29	092-0069-003-00	UNION PACIFIC - REAL ESTATE	SP RAILROAD R-O-W
11.3	092-0021-016-02	UNION PACIFIC - REAL ESTATE	SP RAILROAD R-O-W
11.30	092-0067-012-05	UNION PACIFIC - REAL ESTATE	SP RAILROAD R-O-W
11.31	092-0067-014-00	UNION PACIFIC - REAL ESTATE	SP RAILROAD R-O-W
11.32	092-0067-019-00	UNION PACIFIC - REAL ESTATE	SP RAILROAD R-O-W
11.33	092-0067-020-00	UNION PACIFIC - REAL ESTATE	SP RAILROAD R-O-W
11.34	092-0065-002-00	UNION PACIFIC - REAL ESTATE	SP RAILROAD R-O-W
11.35	092-0064-010-00	UNION PACIFIC - REAL ESTATE	SP RAILROAD R-O-W
11.36	92A-1095-129-00	UNION PACIFIC - REAL ESTATE	SP RAILROAD R-O-W
11.37	92A-1100-058-00	UNION PACIFIC - REAL ESTATE	SP RAILROAD R-O-W
11.38	92A-1105-014-00	UNION PACIFIC - REAL ESTATE	SP RAILROAD R-O-W
11.39	92A-2000-004-00	UNION PACIFIC - REAL ESTATE	SP RAILROAD R-O-W
11.4	092-0015-004-00	UNION PACIFIC - REAL ESTATE	SP RAILROAD R-O-W
11.40	92A-2010-002-00	UNION PACIFIC - REAL ESTATE	SP RAILROAD R-O-W
11.41	092-0127-021-00	UNION PACIFIC - REAL ESTATE	SP RAILROAD R-O-W
11.42	092-0127-020-00	UNION PACIFIC - REAL ESTATE	SP RAILROAD R-O-W
11.43	092-0067-012-05	UNION PACIFIC - REAL ESTATE	SP RAILROAD R-O-W
11.5	92A-0506-107-00	UNION PACIFIC - REAL ESTATE	SP RAILROAD R-O-W
11.6	92A-0506-106-00	UNION PACIFIC - REAL ESTATE	SP RAILROAD R-O-W
11.7	92A-0501-030-00	UNION PACIFIC - REAL ESTATE	SP RAILROAD R-O-W
11.8	92A-0502-090-00	UNION PACIFIC - REAL ESTATE	SP RAILROAD R-O-W
11.9	92A-0620-061-00	UNION PACIFIC - REAL ESTATE	SP RAILROAD R-O-W
12	92A-2143-041-00	AMELIA SILVEY	6163 ROBERTSON AVENUE
13	092 025501100	CHANG INCOME PROPERTY PARTNERSHIP LP	37200 SYCAMORE ST
14	537-0850-002-00	PICK-N-PULL AUTO DISMANTLERS	7400 MOWRY AVENUE
15	537-0460-007-25	H AZAD & B PIRGHIBI ETAL	6953 JARVIS AVENUE
16	092-0031-019-00	AHMAD ABRAR & NARGIS	6991 THORNTON AVE (primary address undetermined)
18	901-0111-009-00	A&P CHILDRENS INVESTMENTS LLC	CEDAR BOULEVARD (near Eucalyptus Grove)
19	092A-2165-009-04	PABCO BUILDING PRODUCTS	REDEKER PLACE AT CHERRY
20	92A-0501-034-13	SF BAY WILDLIFE REFUGE c/o J. Bradley	CEDAR BOULEVARD

**SCHEDULE "A"**  
**LIST OF PROPERTIES - POTENTIAL WEED ABATEMENT**

23	537 046001400	FULL BLOOM BAKING CO BUILDING FUND LLC	6500 OVERLAKE PL
23.1	537 046001300	PS NORTHERN CA NEWARK INC	6800 OVERLAKE PL
24	092-0075-004-02	SARWAT & COLETTE FAHMY TRS	CHERRY STREET
24.1	092-0075-005-02	SARWAT & COLETTE FAHMY TRS	CHERRY STREET
25	092-0210-002-01	NEWARK INDUSTRIAL PARTNERS LLC	CENTRAL AVENUE & MORTON
26	537-0460-007-28	FRANCISCAN GLASS COMPANY	35255 FIRCREST STREET
26.1	537-0460-021-01	FRANCISCAN GLASS COMPANY	FIRCREST STREET
27	092-0083-009-00	SUNITA & ANANDRA SINGH	36915 LOCUST STREET
28	92A-2300-006-12	SKW MBT OPERATIONS INC . ( BASF)	38403 CHERRY STREET
29	92A-0750-008-00	ALPHA & PRIVATE INVS LLC	35660 CEDAR BOULEVARD
29.1	92A-0750-008-00	ALPHA & PRIVATE INVS LLC	35588 CEDAR BOULEVARD
30	92A-2143-042-00	PO LAM CHEUNG	6179 ROBERTSON AVENUE
32	092-0061-011-00	GOLDSILVERISLAND HOMES LLC	6849 BAINE AVENUE
33	901-0188-006-00	LION NEWARK SHOPPING CNTR.	39055 CEDAR BOULEVARD
34	092-0126-019-00	SMCTD	SMCTD RAILROAD R-O-W LOCUST & ELM
34.1	092-0125-017-00	SMCTD	SMCTD RAILROAD R-O-W WALNUT & LOCUST
34.2	092-0124-022-00	SMCTD	SMCTD RAILROAD R-O-W SPRUCE & WALNUT
34.3	092-0119-099-00	SMCTD	SMCTD RAILROAD R-O-W SPRUCE
34.4	092-0100-008-02	SMCTD	SMCTD RAILROAD R-O-W WILLOW
34.5	092-0100-008-01	SMCTD	SMCTD RAILROAD R-O-W WEST OF WILLOW
35	537-0852-001-02	FMC CORPORATION	8787 ENTERPRISE DR.
36	092-0115-011-00	SHH PROJECT OWNER LLC	37445 WILLOW STREET
36.1	092-0100-004-02	HONEYWELL INTERNATIONAL INC	WILLOW STREET NORTH OF ENTERPRISE
38	92A-0720-025-00	MAURICE LADRECH LIVING TRUST	35178 NEWARK BOULEVARD
39	92A-2143-040-01	DAVID & ARBUTUS MILANI	ROBERTSON AVENUE AND HONEYSUCKLE
43.1	537-0850-004-00	NEWARK PARTNERS LLC	MOWRY AVENUE WEST OF TRACKS
44	092-0124-014-00	TOMAS & CONCEPCION M. SIERRA	RAILROAD AVENUE SPRUCE & WALNUT
45	092-0125-010-00	STANLEY R. CHERRY TRS	7843 RAILROAD AVE BETWEEN LOCUST & WALNUT
47	92A-1036-029-02	ASHIT JAIN	6214 THORNTON AVENUE
48	092-0134-002-00	VERN HARM (SON) FAY LOUIE TRUST Wayland Louie, Successor Trustee	RAILROAD AVE BETWEEN LOCUST & ELM
49	092-0135-023-00	SEAMONKEY LLC	WALNUT STREET CORNER LOT

**SCHEDULE "A"**  
**LIST OF PROPERTIES - POTENTIAL WEED ABATEMENT**

53	92A-1036-031-02	JOHN JR & SHIRLEY ELIZARREY TRS	6152 THORNTON AVENUE
54	092A-1036-041-00	JOSEPH & LILY AU TRS	NEWARK BOULEVARD AND CIVIC TERR
55	092-0252-001-00	NORDSTROM, INC.	37599 FILBERT STREET
57	092-0030-016-02	LEPAKSHI HOMES LLC	6749 THORNTON AVENUE
58	092-0041-002-01	SIMON TANIOS	36964 ASH STREET
61	92A-2586-076-00	YU-JEH L. WANG	BIRCH STREET ON CEDAR
62	092-0100-007-05	CITY & CO SF WATER DEPT	WILLOW STREET
62.1	092-0140-003-02	CITY & CO SF WATER DEPT	WILLOW STREET
62.10	92A-2357-031-00	CITY & CO SF WATER DEPT	WILLOW STREET
62.11	92A-2416-015-00	CITY & CO SF WATER DEPT	WILLOW STREET
62.12	92A-2416-013-00	CITY & CO SF WATER DEPT	WILLOW STREET
62.13	92A-2585-002-00	CITY & CO SF WATER DEPT	WILLOW STREET
62.14	92A-2585-027-00	CITY & CO SF WATER DEPT	WILLOW STREET
62.15	92A-2588-002-01	CITY & CO SF WATER DEPT	WILLOW STREET
62.2	092-0116-004-00	CITY & CO SF WATER DEPT	WILLOW STREET
62.3	092-0145-010-01	CITY & CO SF WATER DEPT	WILLOW STREET
62.4	092-0146-023-00	CITY & CO SF WATER DEPT	WILLOW STREET
62.5	092-0068-001-00	CITY & CO SF WATER DEPT	WILLOW STREET
62.6	092-0074-002-00	CITY & CO SF WATER DEPT	WILLOW STREET
62.7	092-0074-002-00	CITY & CO SF WATER DEPT	WILLOW STREET
62.8	092-0075-007-00	CITY & CO SF WATER DEPT	WILLOW STREET
62.9	92A-2141-002-00	CITY & CO SF WATER DEPT	WILLOW STREET
63	92A-0623-043-00	MAYHEWS PLACE LLC	36589 NEWARK BLVD
65	092-012701-300	PKA PHARMACEUTICAL INC.	37079 ASH ST.
68	920 14000600	TRUMARK HOMES	8333 ENTERPRISE DR.
70	092A258800704	COUNTY OF ALAMEDA	TIMBER ST. AT CEDAR CT.
71	092 010001103	UNITED STATES OF AMERICA	THORNTON AVE
	901 019501800	SHIVAM REAL ESTATE LLC	5600 JOHN MUIR

**E. 2 Hearing to consider an Appeal of the Planning Commission’s decision to approve a Conditional Use Permit to allow Fitness 19, a physical fitness center located at 6203 Jarvis Avenue (APN: 537-521-37) – from Deputy Community Development Director Interiano. (RESOLUTION)**

**Background/Discussion** –Mitch Gardner, on behalf of Fitness 19, applied for a Conditional Use Permit (CUP) to allow an “indoor sports and recreation” use at 6203 Jarvis Avenue (Fitness 19). A CUP is required for this use because it is located in the Community Commercial zoning district. The Planning Commission unanimously approved the CUP at a public hearing held on February 11, 2020. The adjacent property owner, VN Investment Group LLC, has appealed the decision of the Planning Commission.

Fitness 19 is a physical fitness center/health club, which offers free-weights and cardio and strength equipment. Fitness 19 offers classes such as aerobics, Zumba, yoga, and Pilates. Fitness 19 has over 100 locations nationally. The proposed location in Newark would employ approximately 35-40 employees, mostly part-time, with 5-6 full-time staff.

**Planning Commission and Appeal**

The application for Fitness 19 was originally heard by the Planning Commission on January 11, 2020 . Following the public hearing, the Planning Commission continued the matter to February 11, 2020 to allow staff time to research and address pertinent questions raised during the meeting. After considering the matter at the February 11<sup>th</sup> Planning Commission Meeting, the Planning Commission unanimously voted to approve the CUP.

The adjacent property owner, VN Investment Group LLC, opposes the application for three main reasons: a) the fitness use should not be exempt from CEQA as stated by the Community Development Department; and b) the parking study submitted by Fitness 19 did not take into account the peak use times of the shopping center; and c) there are Covenants, Conditions, and Restrictions (CC&R’s) which state that the adjacent property owner must approve the recreational use before it could be allowed at the location. The appellant also opposes the application on the grounds that it would seriously impact the viability of Anytime Fitness which is located on the appellant’s property. The following documents were submitted in support of the opposition to the project:

- The neighboring business owner, Matt Morales of Anytime Fitness, submitted a petition of neighboring businesses that recommend denial of the Fitness 19 application (Attachment #6).
- The adjacent property owner’s attorney, Nossaman LLP, submitted a letter in opposition of the application (Attachment #7).
- The adjacent property owner and appellant, Long V. Nguyen, also submitted an extensive list of business owners in the shopping center who were opposed to the application (Attachment #8).

## **Analysis**

In the past, the Community Development Department has been very reluctant to support any non-retail use at this location. Staff's earlier reluctance was premised on the concept that the nearby Sprouts would support cross-store spending opportunities that a non-retail use would not provide. The property owner has, over the past four years, made extensive efforts to attract a retail tenant to the existing space without success. It does not appear that a retail tenant is viable at this location at this time.

The Fitness 19 application is categorically exempt from CEQA as a Class 1 exemption (15301-Existing Facilities) as there are no exterior improvements proposed and the use will occupy an existing tenant space. Notably, the City has issued two other conditional use permits at this shopping center for both Anytime Fitness and Curves, with both projects also deemed exempt from CEQA on the same basis (15301 - Existing Facilities).

Additionally, an independent traffic engineer reviewed Fitness 19's parking analysis which resulted in the recommendation of an additional parking demand survey to be conducted during the lunch-time hours of 11:00AM to 1:00PM. The additional survey reveals that no additional parking impacts would occur.

As it relates to the CC&R's between the applicant and appellant, such provisions are not within the purview of the City and must be resolved by the property owners that are subject to the CC&R's.

In regards to the specific zoning standards, the proposed use is consistent with the site development regulations of the CC zoning district. The proposed use would not result in any exterior building modifications, with the exception of a future sign, which has not been requested at this time. In general, interior modifications as shown on the floor plans include the main gym area, exercise rooms, small retail area and reception area. Staff required a parking analysis to consider the parking demands of the proposed use and the applicant provided a parking analysis, which evaluated all existing businesses in conjunction with the proposed fitness center use. The analysis revealed that there is sufficient parking to support the proposed use. Based on the results of the study and the additional survey of mid-day hours, staff included a condition for Fitness 19 employees to park on those least-accessible parking spaces which are not convenient, readily visible or easily accessible, that are located on the north west and south of the subject building .

The following documents associated with this application (that were also distributed at both Planning Commission meetings) were submitted to support the applicant:

- The applicant submitted supporting documents which describe the operations and merits of having a Fitness 19 location (Attachment #2).
- The applicant submitted a parking analysis in support of the application completed by Abrams Associates dated June 21, 2019 (Attachment #3).
- The property owner submitted a petition in support of the application, which is signed by surrounding businesses (Attachment #4).
- The property owner's attorney, Bowles & Verna, have submitted three letters in support and justification for approving the Fitness 19 application (Attachment #5(a,b & c))

In addition to the above documents, the property owner's attorney submitted an additional letter after the Planning Commission meeting dated March 16, 2020 (Attachment 5.d). The letter further summarizes the merits of the project and furthers the arguments which include (1) The Fitness 19 project is Categorically Exempt from CEQA; (2) The Abrams Parking Analysis adequately addresses the impact of Fitness 19; (3) Substantial evidence supports the required CUP findings in favor of Fitness 19, and (4) Any restriction regarding the CC&R's and adjacent property owners is irrelevant to the consideration of the application.

Staff believes that the proposed business is complimentary to the shopping center and complies with the CUP findings described below and therefore recommends approval.

### **Required Findings**

- A. The proposed use is allowed within the applicable zoning district and complies with all other applicable provisions of this Ordinance and all other titles of the Municipal Code;  
*Response: The proposed use is allowed through the issuance of a CUP to be consistent with the existing zoning. The application for a fitness center has been evaluated and found to be consistent with the type of uses found in the Community Commercial zoning district and be compatible with the surrounding commercial uses in the shopping center. This finding can be made in the affirmative.*
- B. The proposed use is consistent with the General Plan and any applicable specific plan;  
*Response: The proposed use is consistent with the GP Policy LU-1.1 Balance of Uses that states, "Maintain a reasonable balance of land uses in the city so that residents can live close to where they work and satisfy their shopping, educational, personal, health, entertainment, and recreational needs close to home". The proposed use is also consistent with GP Policy LU-1.6 Strengthening the Retail Base that states "Diversify the retail base of the city to create jobs, generate tax revenue to support City services, and enable residents and workers to find the goods and services they need without leaving Newark." This finding can be made in the affirmative.*
- C. The proposed use will not be adverse to the public health, safety, or general welfare of the community, nor detrimental to surrounding properties or improvements;  
*Response: The proposed business would not have an adverse effect to public health, safety, or general welfare of the community or surrounding properties. Automobile parking, provided in the existing parking area at the shopping center, is sufficient for the proposed use and the other nearby uses. The proposed use would occupy a vacant commercial space in an existing shopping center that has complementary uses. Therefore, this finding can be made in the affirmative.*
- D. Tax revenue generated by the development will exceed the City's cost of the service demand as a result of the development or a compelling community benefit will be provided;  
*Response: The proposed use will occupy an existing commercial storefront that has been vacant for approximately four years within an existing shopping center and is not expected to result in a substantial change in the shopping center's cost of service to the City. A portion of the indoor sports and recreation use will contain a retail area, which is expected to generate sales-tax revenue. This finding can be made in the affirmative.*

- E. The proposed use complies with any design or development standards applicable to the zoning district or the use in question unless waived or modified pursuant to the provisions of this Ordinance;

*Response: There are no planned improvements to the exterior of the building, therefore no design or development standards apply to this application. This finding can be made in the affirmative.*

- F. The design, location, size, and operating characteristics of the proposed activity are compatible with the existing and reasonably foreseeable future land uses in the vicinity;

*Response: The operating characteristics of the proposed use are expected to be compatible with the existing commercial tenants and would provide additional services for the shopping center customers. This finding can be made in the affirmative.*

- G. The site is physically suitable for the type, density and intensity of use being proposed, including access, utilities, and the absence of physical constraints.

*Response: The proposed is physically suitable for the type, density, and intensity of use being proposed, in that it would occupy an existing vacant space in the existing Sprouts center that is accessible, is served by utilities, and is without physical constraints. This finding can be made in the affirmative.*

**CEQA** - This project is exempt from CEQA per 15301 Existing Facilities in that the proposed use would be located in an existing building where only minor alterations are proposed.

**Attachments –**

1. Planning Commission Resolution
2. Fitness 19 Site Plan & Supplemental Information (December 27, 2019)
3. Abrams Associates Parking Analysis (June 21, 2019)
4. Petition in Support from Surrounding Business Owners (submitted by Steven Mavromihalis) December 5, 2019
5. Letter in Support from property owner's Attorney, Bowles & Verna
  - a) December 5, 2019
  - b) January 3, 2020
  - c) February 4, 2020
  - d) March 16, 2020
6. Petition in Opposition from Matt Morales and surrounding businesses, October 5, 2019
7. Letter in Opposition from VN Investment Group LLC's attorney, Nossaman LLP, dated January 14, 2020.
8. Petition in Opposition Surrounding Business Owners (submitted by Long V. Nguyen), dated January 27-28, 2020

**Action** – Staff recommends that the City Council adopt a resolution upholding the decision of the Planning Commission approving Conditional Use Permit (U-20-1), subject to conditions of approval.

RESOLUTION NO.

RESOLUTION OF THE CITY COUNCIL OF THE CITY OF  
NEWARK DENYING AN APPEAL AND UPHOLDING THE  
PLANNING COMMISSION'S APPROVAL OF U-20-1, A  
CONDITIONAL USE PERMIT TO ALLOW A FITNESS GYM AT  
6203 JARVIS AVENUE. (APN: 537-521-37)

WHEREAS, Mitchell Gardner on behalf of Fitness 19, (the "Applicant") submitted an application to the City of Newark (the City") for approval of a Conditional Use Permit, to allow an indoor sports and recreation use, Fitness 19 at 6203 Jarvis Avenue ("Project"); and

WHEREAS, the property where the Project is located is designated Community Commercial in the City's General Plan and zoned Community Commercial Zoning District in the Newark Municipal Code (the "NMC"). The NMC requires a Conditional Use Permit for an Indoor Sports and Recreational Use (NMC § 17.08.020); and

WHEREAS, Conditional Use Permits are required for uses that are generally consistent with the purposes of the zoning district where they are proposed but require special consideration to ensure that they can be designed, located, and operated in a manner that will not interfere with the use and enjoyment of surrounding properties (NMC § 17.35.010.); and

WHEREAS, the Planning Commission held duly noticed public hearings regarding the Project on January 11, 2020 and continued the hearing to February 11, 2020, at which time all interested parties had the opportunity to be heard regarding the Project; and

WHEREAS, the staff reports presented to the Planning Commission, on file with the Community Development Department and incorporated herein by reference, reflects the City's independent judgment and analysis of the potential impacts from the Project; and

WHEREAS, the Planning Commission found the Project exempt from the California Environmental Quality Act ("CEQA") pursuant to CEQA Guidelines, Article 19, Section 15301; and

WHEREAS, the Planning Commission, after considering the Project and entitlements, the staff report and all public comments and testimony provided at or prior to the public hearings on the Project, adopted a resolution and approved the Project subject to the conditions of approval on February 11, 2020 by a 5-0 decision; and

WHEREAS, following the February 11, 2020 decision of the Planning Commission, Nossaman LLP on behalf of VN Investment Group LLC, filed an appeal with the City Council of the City of Newark of the Planning Commission's approval of the Project; and

WHEREAS, pursuant to NMC Section 17.31.060, a public hearing notice was published in the Tri City Voice on May 12, 2020 and mailed as required, and the City Council held a public hearing on said appeal at 7:30 p.m. on May 28, 2020 where the City Council had an opportunity to consider all arguments made by and on behalf of the Appellant, the staff report, and all other testimony and evidence presented at the public hearing; and

WHEREAS, pursuant to NMC Chapter 17.35 (Use Permits), the City Council has determined that it can make the below required findings pursuant to Newark pursuant to NMC Section 17.35.060 to grant the conditional use permit:

- A. The proposed use is allowed within the applicable zoning district and complies with all other applicable zoning district and complies with all other applicable provisions of this Ordinance and all other titles of the Municipal Code;

*Response: The proposed use is allowed through the issuance of a CUP to be consistent with the existing zoning. The application for a fitness center has been evaluated and found to be consistent with the type of uses found in the Community Commercial zoning district and be compatible with the surrounding commercial uses in the shopping center. This finding can be made in the affirmative.*

- B. The proposed use is consistent with the General Plan and any applicable specific plan;

*Response: The proposed use is consistent with the GP Policy LU-1.1 Balance of Uses that states, "Maintain a reasonable balance of land uses in the city so that residents can live close to where they work and satisfy their shopping, educational, personal, health, entertainment, and recreational needs close to home". The proposed use is also consistent with GP Policy LU-1.6 Strengthening the Retail Base that states "Diversify the retail base of the city to create jobs, generate tax revenue to support City services, and enable residents and workers to find the goods and services they need without leaving Newark." This finding can be made in the affirmative.*

- C. The proposed use will not be adverse to the public health, safety, or general welfare of the community, nor detrimental to surrounding properties or improvements;

*Response: The proposed business would not have an adverse effect to public health, safety, or general welfare of the community or surrounding properties. Automobile parking, provided in the existing parking area at the shopping center, is sufficient for the proposed use and the other nearby uses. The proposed use would occupy a vacant commercial space in an existing shopping center that has complementary uses. Therefore, this finding can be made in the affirmative.*

- D. Tax revenue generated by the development will exceed the City's cost of the service demand as a result of the development or a compelling community benefit will be provided.

*Response: The proposed use will occupy an existing commercial storefront that has been vacant for approximately four years within an existing shopping center and is not expected to result in a substantial change in the shopping center's cost of service to the City. A portion of the indoor sports and recreation use will contain a retail area, which is expected to generate sales-tax revenue. This finding can be made in the affirmative.*

- E. The proposed use complies with any design or development standards applicable to the zoning district or the use in question unless waived or modified pursuant to the provisions of this Ordinance;

*Response: There are no planned improvements to the exterior of the building, therefore no design or development standards apply to this application. This finding can be made in the affirmative.*

- F. The design, location, size, and operating characteristics of the proposed activity are compatible with the existing and reasonably foreseeable future land uses in the vicinity; and

*Response: The operating characteristics of the proposed use are expected to be compatible with the existing commercial tenants and would provide additional services for the shopping center customers. This finding can be made in the affirmative.*

- G. The site is physically suitable for the type, density, and intensity of use being proposed, including access, utilities, and the absence of physical constraints.

*Response: The proposed business is physically suitable for the type, density, and intensity of use being proposed, in that it would occupy an existing vacant space in the Sprouts center that is accessible, is served by utilities and without physical constraints. This finding can be made in the affirmative.*

NOW, THEREFORE, BE IT RESOLVED by the City Council of the City of Newark as follows:

Section 1. That the forgoing recitals are true and correct and made part of this Resolution.

Section 2. That the City Council has reviewed, considered and evaluated this Appeal based on the entirety of the record and following consideration of all materials and public comments received at the hearing.

Section 3: That the Project qualifies as categorically exempt from CEQA per CEQA Guidelines, Article 19, Section 15301, because it is an Existing Facility that involves minor alterations and negligible expansion of use; and

Section 4. That the City Council hereby denies the appeal and upholds the decision of the Planning Commission to approve an application for the CUP with the following conditions:

1. Fitness 19 shall require its employees to park in the rear sides (area #1, 22 & 23) as

shown in Abrams Associates parking analysis of the building.

2. A Sign Permit will be required for any future sign on the exterior of the building.
3. The site and its improvements shall be maintained in a neat and presentable condition, to the satisfaction of the Community Development Director. This shall include, but not be limited to, repainting surfaces damaged by graffiti and site clean-up. Graffiti removal/repainting and site clean-up shall occur on a continuing, as needed basis. Any vehicle or portable building brought on the site shall remain graffiti free.
4. Construction equipment, including compressors, generators and mobile equipment shall be fitted with heavy-duty mufflers designed to reduce noise impacts.
5. Planning inspection is required prior to occupancy.
6. All proposed changes from approved exhibits shall be submitted to the Community Development Director who shall decide if they warrant Planning Commission and City Council review and, if so decided, said changes shall be submitted for the Commission's and Council's review and decision. The applicant shall pay the prevailing fee for each additional separate submittal of project exhibits requiring Planning Commission and/or City Council review and approval.
7. If any condition of this conditional use permit be declared invalid or unenforceable by a court of competent jurisdiction, this conditional use permit shall terminate and be of no force and effect, at the election of the City Council on motion.
8. The applicant hereby agrees to defend, indemnify, and save harmless the City of Newark, its Council, boards, commissions, officers, employees and agents, from and against any and all claims, suits, actions, liability, loss, damage, expense, cost (including, without limitation, attorneys' fees, costs and fees of litigation) of every nature, kind or description, which may be brought by a third party against, or suffered or sustained by, the City of Newark, its Council, boards, commissions, officers, employees or agents to challenge or void the permit granted herein or any California Environmental Quality Act determinations related thereto.
9. In the event that any person should bring an action to attack, set aside, void or annul the City's approval of this project, the applicant shall defend, indemnify and hold harmless the City and/or its agents, officers and employees from any claim, action, or proceeding against the City and/or its agents, officers and employees with counsel selected by the applicant (which shall be the same counsel used by applicant) and reasonably approved by the City. Applicant's obligation to defend, indemnify and hold harmless the City and/or its agents, officers and employees shall be subject to the City's compliance with Government Code Section 66474.9.
10. The Conditions of Project Approval set forth herein may include certain fees, dedication requirements, reservation requirements and other exactions. Pursuant to Government Code Section 66020(d)(1), these Conditions constitute written notice of a statement of the amount of such fees, and a description of the dedications, reservations and other exactions. The applicant is hereby further notified that the 90-day approval period in which the applicant may protest these fees, dedications, reservations and other exactions, pursuant to Government Code Section 66020(a), has begun. If the applicant fails to file a protest within this 90-day period complying with all of the requirements of Section 66020, the applicant will be legally barred from later challenging such exactions.

BE IT FURTHER RESOLVED, that the City Council has determined that it could make the necessary findings pursuant to NMC Section 17.35.060 and directs that a copy of the Resolution be mailed to the applicant.

BE IT FURTHER RESOLVED, that this Resolution shall take effect immediately upon passage.

RESOLUTION 1985

RESOLUTION OF THE PLANNING COMMISSION OF THE CITY OF NEWARK APPROVING U-20-1, A CONDITIONAL USE PERMIT TO ALLOW A FITNESS GYM IN THE COMMUNITY COMMERCIAL ZONING DISTRICT AT 6203 JARVIS AVENUE. (APN: 537-521-37)

WHEREAS, Mr. Mitchell Gardner, has filed with the Planning Commission of the City of Newark an application for U-20-1, a conditional use permit, to allow for a indoor sports and recreation use, Fitness 19; and

PURSUANT to the Municipal Code Section 17.31.060, a public hearing notice was published in The Tri City Voice on December 31, 2019 and mailed as required, and the Planning Commission held a public hearing on said application at 7:30 p.m. on February 11, 2020 at the City Administration Building, 37101 Newark Boulevard, Newark, California; and

WHEREAS, pursuant to Chapter 17.35 (Use Permits), Section 17.35.060 (Required Findings), the Planning Commission hereby makes the following findings:

- A. The proposed use is allowed within the applicable zoning district and complies with all other applicable zoning district and complies with all other applicable provisions of this Ordinance and all other titles of the Municipal Code;

*Response: The proposed use is allowed through the issuance of a CUP to be consistent with the existing zoning. The application for a fitness center has been evaluated and found to be consistent with the type of uses found in the Community Commercial zoning district and be compatible with the surrounding commercial uses in the shopping center. This finding can be made in the affirmative.*

- B. The proposed use is consistent with the General Plan and any applicable specific plan;

*Response: The proposed use is consistent with the GP Policy LU-1.1 Balance of Uses. Maintain a reasonable balance of land uses in the city so that residents can live close to where they work and satisfy their shopping, educational, personal, health, entertainment, and recreational needs close to home. Also consistent with GP Policy LU-1.6 Strengthening the Retail Base. Diversify the retail base of the city to create jobs, generate tax revenue to support City services, and enable residents and workers to find the goods and services they need without leaving Newark. This finding can be made in the affirmative*

- C. The proposed use will not be adverse to the public health, safety, or general welfare of the community, nor detrimental to surrounding properties or improvements;

*Response: The proposed business would not have an adverse effect to public health, safety, or general welfare of the community or surrounding properties. Automobile parking, provided in the existing parking area at the shopping center, is sufficient for the proposed use and the other nearby uses. The use would occupy a vacant commercial space in an existing shopping center that has complementary uses. Therefore, this finding can be made in the affirmative.*

- D. Tax revenue generated by the development will exceed the City's cost of the service demand as a result of the development or a compelling community benefit will be provided.

*Response: The proposed use will occupy an existing commercial storefront that has been vacant for approximately four years within an existing shopping center and is not expected to result in a substantial change in the shopping center's cost of service to the City. A portion of the Indoor sports and recreation use will contain a retail area, which is expected to generate sales-tax revenue. This finding can be made in the affirmative.*

- E. The proposed use complies with any design or development standards applicable to the zoning district or the use in question unless waived or modified pursuant to the provisions of this Ordinance;

*Response: There are no planned improvements to the exterior of the building, therefore no design or development standards apply to this application. This finding can be made in the affirmative.*

- F. The design, location, size, and operating characteristics of the proposed activity are compatible with the existing and reasonably foreseeable future land uses in the vicinity; and

*Response: The operating characteristics of the proposed use are expected to be compatible with the existing commercial tenants and would provide additional services for the shopping center customers. This finding can be made in the affirmative.*

- G. The site is physically suitable for the type, density, and intensity of use being proposed, including access, utilities, and the absence of physical constraints.

*Response: The proposed business is physically suitable for the type, density, and intensity of use being proposed, in that it would occupy an existing vacant space in the Sprouts center that is accessible, is served by utilities and without physical constraints. This finding can be made in the affirmative.*

NOW, THEREFORE, BE IT RESOLVED that the Planning Commission hereby approves

this application with the following conditions:

1. Fitness 19 shall require its employees to park in the rear sides (area #1, 22 & 23) as shown in Abrams Associates parking analysis) of the building.
2. A Sign Permit will be required for any future sign on the exterior of the building.
3. The site and its improvements shall be maintained in a neat and presentable condition, to the satisfaction of the Community Development Director. This shall include, but not be limited to, repainting surfaces damaged by graffiti and site clean-up. Graffiti removal/repainting and site clean-up shall occur on a continuing, as needed basis. Any vehicle or portable building brought on the site shall remain graffiti free.
4. Construction equipment, including compressors, generators and mobile equipment shall be fitted with heavy-duty mufflers designed to reduce noise impacts.
5. Planning inspection is required prior to occupancy.
6. All proposed changes from approved exhibits shall be submitted to the Community Development Director who shall decide if they warrant Planning Commission and City Council review and, if so decided, said changes shall be submitted for the Commission's and Council's review and decision. The applicant shall pay the prevailing fee for each additional separate submittal of project exhibits requiring Planning Commission and/or City Council review and approval.
7. If any condition of this conditional use permit be declared invalid or unenforceable by a court of competent jurisdiction, this conditional use permit shall terminate and be of no force and effect, at the election of the City Council on motion.
8. The applicant hereby agrees to defend, indemnify, and save harmless the City of Newark, its Council, boards, commissions, officers, employees and agents, from and against any and all claims, suits, actions, liability, loss, damage, expense, cost (including, without limitation, attorneys' fees, costs and fees of litigation) of every nature, kind or description, which may be brought by a third party against, or suffered or sustained by, the City of Newark, its Council, boards, commissions, officers, employees or agents to challenge or void the permit granted herein or any California Environmental Quality Act determinations related thereto.
9. In the event that any person should bring an action to attack, set aside, void or annul the City's approval of this project, the applicant shall defend, indemnify and hold harmless the City and/or its agents, officers and employees from any claim, action, or proceeding against the City and/or its agents, officers and employees with counsel selected by the applicant (which shall be the same counsel used by applicant) and reasonably approved by the City. Applicant's obligation to defend, indemnify and hold harmless the City and/or its agents, officers and employees shall be subject to the City's compliance with Government Code Section 66474.9.
10. The Conditions of Project Approval set forth herein may include certain fees, dedication requirements, reservation requirements and other exactions. Pursuant to Government Code Section 66020(d)(1), these Conditions constitute written notice of a statement of the amount of such fees, and a description of the dedications, reservations and other exactions. The applicant is hereby further notified that the 90-day approval period in which the applicant may protest these fees, dedications, reservations and other exactions, pursuant to Government Code Section 66020(a), has begun. If the applicant fails to file a protest within

this 90-day period complying with all of the requirements of Section 66020, the applicant will be legally barred from later challenging such exactions.

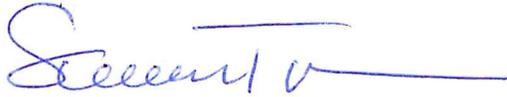
The Commission thereby makes the findings prescribed in Newark Municipal Code Section 17.35.060, and directs the Resolution be mailed to the applicant and filed with the City Clerk.

This Resolution was introduced at the Planning Commission's February 11, 2020 meeting by Commissioner Fitts, seconded by Commissioner Otterstetter, and passed as follows:

AYES: Aguilar, Fitts, Otterstetter

NOES: None

ABSENT: Bridges, Becker



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STEVEN TURNER, Secretary

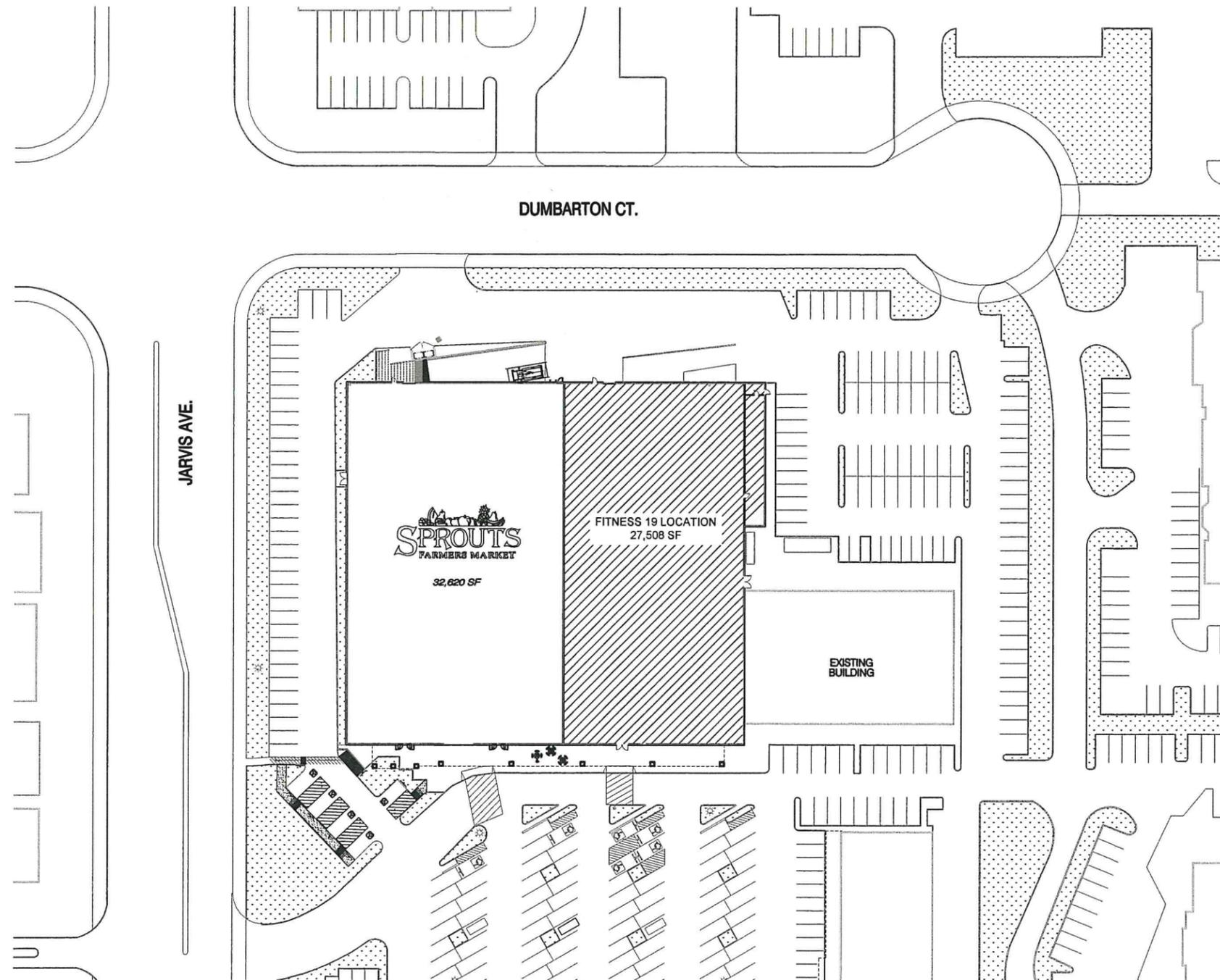


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JEFF AGUILAR, Chairperson







DUMBARTON CT.

JARVIS AVE.

**SPROUTS**  
FARMERS MARKET  
32,620 SF

FITNESS 19 LOCATION  
27,508 SF

EXISTING BUILDING

 **Site Plan**  
NTS

**FITNESS 19**  
CONDITIONAL USE PERMIT APP.  
6203 Jarvis Ave  
Newark, CA 94560

PROJECT NO. CA-418 NEWARK  
ARCHITECT



g2 design/build inc.  
mitchell wade gardner, architect/owner  
150 linda vista ave  
pasadena, ca 91105  
626-790-0328

ENGINEER

NOTES

INITIAL SUBMITTAL 07.22.19


NO.	DESCRIPTION	DATE

ISSUED

TITLE  
**SITE PLAN**

DRAWING NO.

**A-102**



27 December 2019

Art Interiano  
Deputy Community Development Director  
City of Newark  
37101 Newark Blvd.  
Newark, CA 94560

### **Supplemental Information in Support of Fitness 19 CUP Application**

Provided herein is supplemental information regarding the Fitness 19 CUP Application located at 6203 Jarvis Avenue, which is now tentatively set for hearing by the Newark Planning Commission on January 14, 2020. We respectfully request that this information be included in the Staff Report, and ultimately, that our letter and attachments be provided to all members of the Planning Commission.

### **History of Land Use Approvals**

Over the last 10 years working with Fitness 19, G2 Design Build Inc has processed 17 Land Use Applications/Discretionary Entitlements in California alone. Of these 17 applications, all were backed up by a positive staff report recommending approval, and all were approved at the planning commission without a single dissenting vote. The list of Fitness 19 cities is as follows: Covina, Oxnard, Rancho Cucamonga, Moreno Valley, Riverside, Dublin, Chatsworth and Eagle Rock in Los Angeles, Perris, Thousand Oaks, Claremont, Santa Barbara, Oakland, Hemet, Daly City, San Ramon, and Oceanside.

In these other cities much of the discussion at the various planning commissions pertained to bringing an active, lively, and destination-oriented tenant to the community and, specifically, to the retail centers where Fitness 19 has been a welcome addition. We would like to provide some additional perspective and information to the City of Newark on this subject.

### **Fitness 19 and Tax Generation**

Over a period of three weeks – we shut it down a few days before the prior December 10 hearing date – Fitness 19 posted an online poll asking Facebook users within a five mile radius of the Four Corners shopping center if they would like to see a new Fitness 19 in Newark. In only three weeks we collected over 400 names. The input received confirmed two things we already believed to be true:

- 1) Residents of Newark would love to see a high quality, family-friendly, affordable exercise offering like Fitness 19 in Newark; and
- 2) We also saw strong positive responses from residents in Fremont and Union City.

In addition to providing contact information, Facebook users had the ability to share their enthusiastic comments on bringing Fitness 19 to Newark. Here are examples from several people. J Farinacci: "I would leave Bay Club and join Fitness 19 instead." M. Cortes: "Yes, please open a fitness 19 in Newark CA." J. Piple: "Yes please." V. Prasad: "Newark please." R. Zamora: "Please pleas (sic) good for everybody." From the hundreds of responses, we saw particularly strong confirmation that Union City is under-served by fitness; and that the proximity of a new Fitness 19 gym to Highways 84 and 880 will attract commuters on the way to and from work.

We think it also important to put an end to the false narrative that Fitness 19 will not generate sales tax for the City of Newark. First, Fitness 19 does in fact sell taxable items. We have "ready-to-drink" energy drinks for before workout and protein drinks for after workout. We sell many varieties and brands of healthy snacks that members often purchase on the way in or out. We sell supplements in the form of powders and vitamins as well as apparel. We sell retail items that gym goers may need like gloves, heart rate monitors, headphones, etc. Lastly, our tanning facility charges sales tax for those members who want to use the service.

When the Fitness 19 CUP Application is approved and the club is opened, hundreds of visitors per day, many of them commuters from nearby communities, will visit the Four Corners shopping center ONLY because Fitness 19 is a tenant. The benefit of having Fitness 19 in the shopping center to other retail and restaurant tenants in the shopping center, and to the City of Newark, should not be ignored or discounted. With a 28,000 square foot vacancy you get nothing. With Fitness 19 you get hundreds of thousands of new and unique visits to the Four Corners center annually, with positive direct and indirect economic and sales tax benefits to Newark. Approval of the Fitness 19 application will bring real value to the City.

### **Retail in the News**

Provided below are links to various news articles from The Wall Street Journal to the Chicago Tribune that identify the trends in Retail as related to Fitness uses. We have included the headline and small blurb for reference.

<https://www.google.com/amp/s/www.cnbc.com/amp/2018/02/01/malls-hope-to-get-back-in-shape-by-adding-gyms.html>

**REAL ESTATE**

# **Malls hope to get back in shape by adding gyms**

**PUBLISHED THU, FEB 1 2018 10:53 AM EST UPDATED THU, FEB 1 2018 7:16 PM EST**

## KEY POINTS

- Malls are turning to health clubs to help boost foot traffic.
- The number of gym leases in malls has doubled in the last five years.
- Apparel has dropped from 70 percent of the mall space to close to 40 percent.



**WATCH NOW**

VIDEO 01:28

## Malls hope to get back in shape by adding gyms

The fitness industry is booming. The mall business is not. Put a gym in a mall, and boom, you suddenly have a busier mall. Anything to get foot traffic, even if they're sweaty feet.

<https://www.brookfieldpropertiesretail.com/about-us/news/fitness-is-revolutionizing-the-shopping-center.html>

<https://www.google.com/amp/s/www.wsj.com/amp/articles/malls-never-wanted-gyms-now-they-court-them-1511697600>

- HEALTH
- FITNESS

# Malls Never Wanted Gyms. Now They Court Them

Retailer woes, fitness industry boom turn former pariahs into anchor tenants

Todd Mullins and his wife, Julie, started going to a shopping center 15 minutes from their Palm Beach Gardens, Fla., home about a year ago—after they joined a gym inside of it. They work out at the Orangetheory Fitness there three to four times a week, and at least half the time visit a nearby juice shop, restaurant or Trader Joe’s, he says.

“There would be no other reason to go to that mall,” says Mr. Mullins, a senior pastor at a local church.

...

TO READ THE FULL STORY

<https://www.metrocommercial.com/news/the-growing-popularity-of-fitness-tenants-in-shopping-centers/>

Health and wellness are not just trends, they are a way of life for most people today, especially millennials who are highly influenced by how they appear in photos and social media. With society’s growing emphasis on healthy living and self-care, more people are getting themselves to the gym to exercise so that they look and feel their best. In fact, according to the International

Health, Racquet, and Sportsclub Association, the number of health club members grew [by 33.6 percent](#) from 2008 to 2017. People are more health-conscious than ever before, making fitness tenants large and small a staple at every community shopping center.

## **The rise in popularity of fitness tenants at shopping centers**

An increasing number of fitness tenants are popping up at shopping centers as consumers value having everything in one place. As a result, there are fewer freestanding gyms and stand-alone fitness studios. Rather, fitness tenants are moving into shopping centers alongside grocery, office, medical, fast-casual restaurants, and other traditional and non-traditional retail tenants to capitalize on the existing customer base and foot traffic.

Before or after working out, people are more likely to grab a quick bite to eat, shop for groceries, or pick up their dry cleaning from a neighboring business. Overall, the addition of a fitness tenant is a smart move for brokers and landlords when leasing a shopping center.

<https://www.google.com/amp/s/www.chicagotribune.com/business/ct-biz-malls-bringing-in-gyms-0610-story.html%3foutputType=amp>

# Rooftop pools, UFC gyms and cycling studios: Fitness centers filling retail void at Chicago-area malls

By LAUREN ZUMBACH

CHICAGO TRIBUNE |

JUN 08, 2018 | 2:51 PM

Mallgoers walk past an ad for fitness-related businesses at the Yorktown Center shopping mall, June 5, 2018, in Lombard. (John J. Kim / Chicago Tribune)

While mall walkers strolled Yorktown Center's quiet corridors before most shops opened Monday morning, a handful of visitors in search of a tougher workout strode straight from their cars to the fitness studios along the Lombard mall's western side.

Shopping centers used to shun gyms and workout studios, believing clients would clog parking lots without patronizing shops post-workout. But consumers' changing shopping habits left some mall-based chains foundering, from department stores like Carson's, which is in the process of shutting down all its stores, to smaller shops like Gymboree and Rue 21, which announced hundreds of closures last year. That's pushed mall operators to turn the empty stores they've left into places for customers to do more than just shop.

Increasingly, that can mean sweating through a workout. Consumers are growing more health-conscious, so "it's the perfect storm," said Jason Press, vice president at real estate firm JLL.

The trend isn't new — Chicago-based mall operator GGP says it has been working with fitness tenants for more than a decade — but it is growing. The amount of space leased by fitness centers and gyms in malls and upscale open-air shopping centers grew about 69 percent nationwide over the past five years, according to data firm CoStar Group, and the number of leases has nearly doubled.

## **The Eagle Rock Case Study**

Fitness 19 currently operates a successful health club inside the Eagle Rock Plaza. (Eagle Rock is part of the City of Los Angeles located between Glendale and Pasadena.) This is a fully enclosed typical “mall” property originally constructed in 1974. Fitness 19 does not have its own exterior entrance, and shoppers and customers must enter through the main mall; we are truly occupying 23,000 square feet of space meant for retailers.

Prior to the Fitness 19 tenancy the space was split into 4-5 different shop spaces. NONE of those tenants had executed leases with more than a one-year term; most were renting on a month-to-month basis. The mall had no long term offers from regional or national retailers and had been forced to settle for substantial vacancies and short term or transient, low value tenants. Furthermore, even when spaces were occupied the stores generated very little in the way of visitors bringing no benefits to their co-tenants.

Fitness 19 applied for and received entitlements including a zoning variance for the space and opened in May 2018. The positive impacts on the Eagle Rock Plaza since opening have been clear. Fitness 19 has attracted thousands of new members, hundreds of prospective new members each month, and hundreds of member workouts each day. The mall is receiving more in rent from a long-term tenant than previously received from multiple smaller and less appealing retailers. Most significantly, foot traffic and customer visits to the Eagle Rock Plaza, and resulting sales and tax revenues, are up substantially because Fitness 19 chose to invest. Mall management and our co-tenants have also expressed appreciation for all the foot traffic and attention the gym has brought to the mall. It is important to note that, due to the overwhelming success in the mall, a second application to expand the gym has been processed with great support from the mall owner and the Eagle Rock Neighborhood Council.

## **Fitness 19 Design and Construction**

With each new Fitness 19, we take a thoughtful approach in designing the health club experience. We strive to create a casual elegance and spa-like feel while maintaining the undeniable characteristics of a full-fledged fitness center. Durable, high quality materials are set against the open ceiling with the industrial look of exposed ducting and electrical conduits. The clubs have a clean, yet comfortable feel designed to encourage all members of the community to feel welcome. We have always believed that the member is at the core of our success. We draw our inspiration from the customer: What do they want from an exercise perspective? How do they want to feel when they are inside the gym? We believe this strategy and thoughtfulness have been one of the great contributing factors to Fitness 19’s success. Provided below are photos of recently finished facilities highlighting our joint commitments to exercise and member experience.

Fitness 19 Dublin Lobby Area



Fitness 19 Dublin – Cycle Room



**Fitness 19 Dublin – Cardio Area**



**Fitness 19 – Typical Locker Room**



**Fitness 19 Dublin - Bridge**



**Fitness 19 Covina – Group Classroom Entrances**



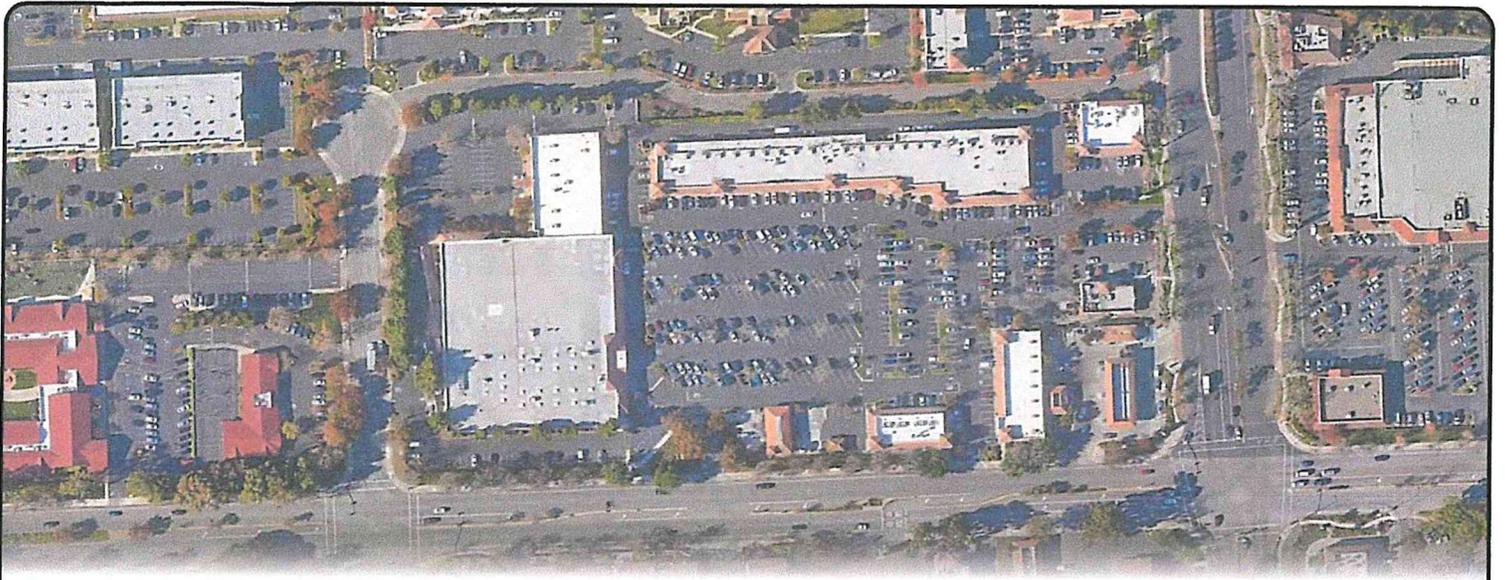
**Conclusion**

We would like to thank the Planning Commission, and City staff, for your consideration of this information. The Fitness 19 project is a great fit for Newark, and we ask that our CUP Application be approved. Please don't hesitate to contact us if there are any questions. Thank you.

Sincerely yours,

Mitchell Gardner  
g2 Design Build Inc.

Bob Rodger  
Fitness 19



*Parking Review*  
**6203 Jarvis Avenue**  
City of Newark

Prepared by:  
Abrams Associates  
1875 Olympic Boulevard, Suite 210  
Walnut Creek CA 94596

# 6203 Jarvis Avenue

## City of Newark

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### PARKING STUDY

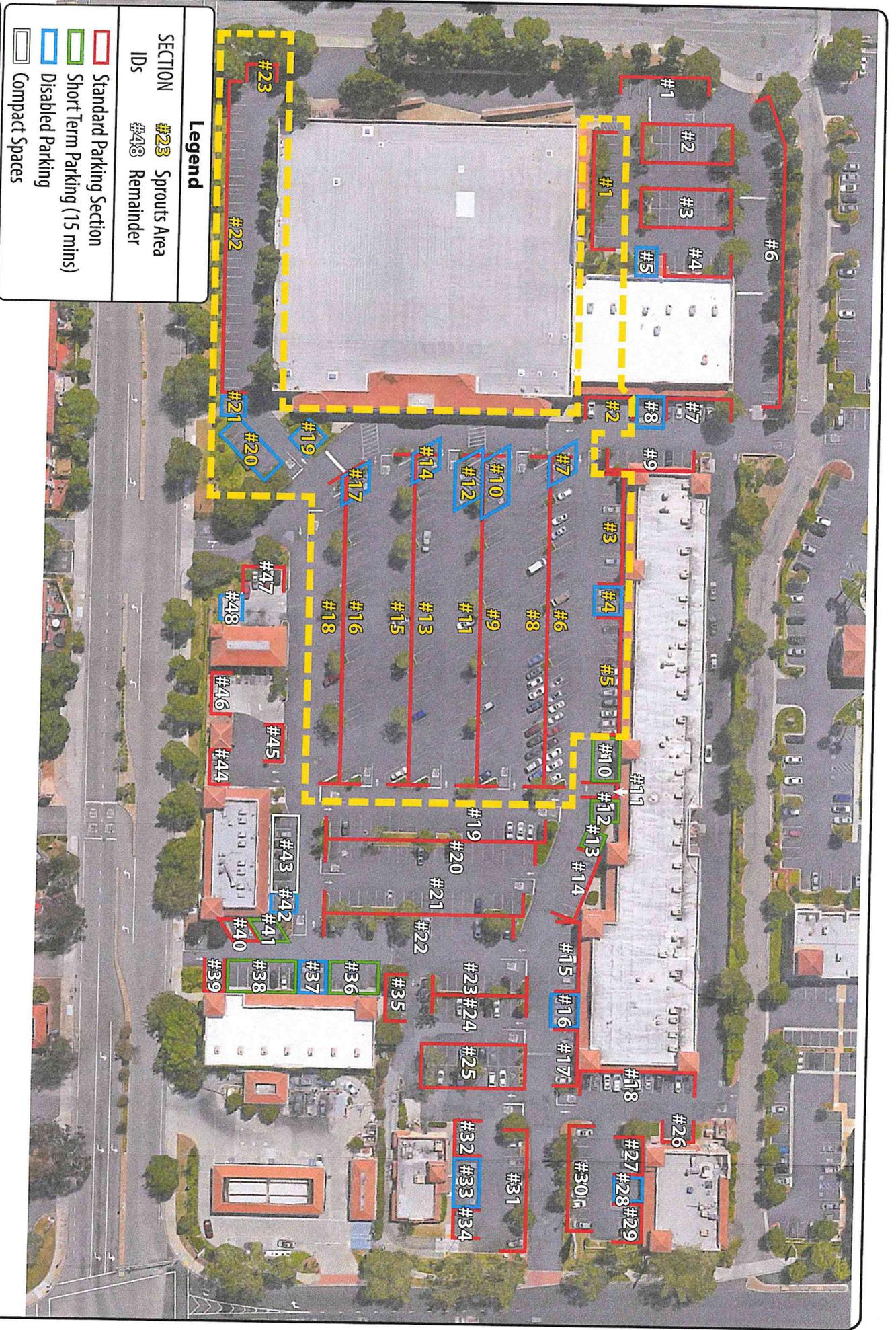
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#### 1) INTRODUCTION

The purpose of this report is to analyze the parking conditions and the current parking regulations for the shopping center at 6203 Jarvis Avenue that was formerly known as the Raleys Shopping Center. The building that includes Sprouts Market has an adjacent 28,242 square foot attached building that is currently occupied by Anytime Fitness, The Genius Kids Club, and some small offices. The entire 28,242 square foot space is proposed to be leased to Fitness 19 who would run a fitness center with a variety of exercise equipment, cardio machines, free weights. The study is intended to analyze the parking shared by the various users of the shopping center and provide a review of the potential effects on parking that might result from Fitness 19 being added to the center. **Figure 1** shows the parking survey areas and the subareas that were designated to present the parking supply and demand for various areas.

#### 2) PARKING ANALYSIS

The City strives to provide adequate parking for all shopping center patrons while also still encouraging the use of alternative modes of transportation. Most Cities try to maintain a balance between providing all of the parking necessary to meet the needs of various land uses while also promoting alternatives to automobiles that reduce parking demand (e.g., increased use of transit, ridesharing, cycling, and walking). For this study the first step was to analyze the current parking demand generated by the shopping center the area and document the existing supply.



**FIGURE 1 | PARKING SURVEY AREA INDEX**

PARKING REVIEW

**6203 Jarvis Avenue**

City of Newark

## 2.1 Existing Parking Supply

For the purposes of this study the parking in the shopping center was divided into four separate areas: 1) Sprouts front parking area which is the portion of the parking lot in front of Sprouts that is included in the “*maintenance area*” for that building, 2) Sprouts side parking area which is southeast of the building and is also part of the “*maintenance area*” for that building, 3) the southwest back corner of the parking lot which includes about 11 spaces that are part of the Sprout’s building parking “*maintenance area*” and 4) the remainder of the parking lot, outside the Sprouts Parking Area. The number of parking spaces in each area is shown in **Table 1**. There may be some minor discrepancies with the plans but based on our field review the survey area currently has a total of 631 parking spaces.

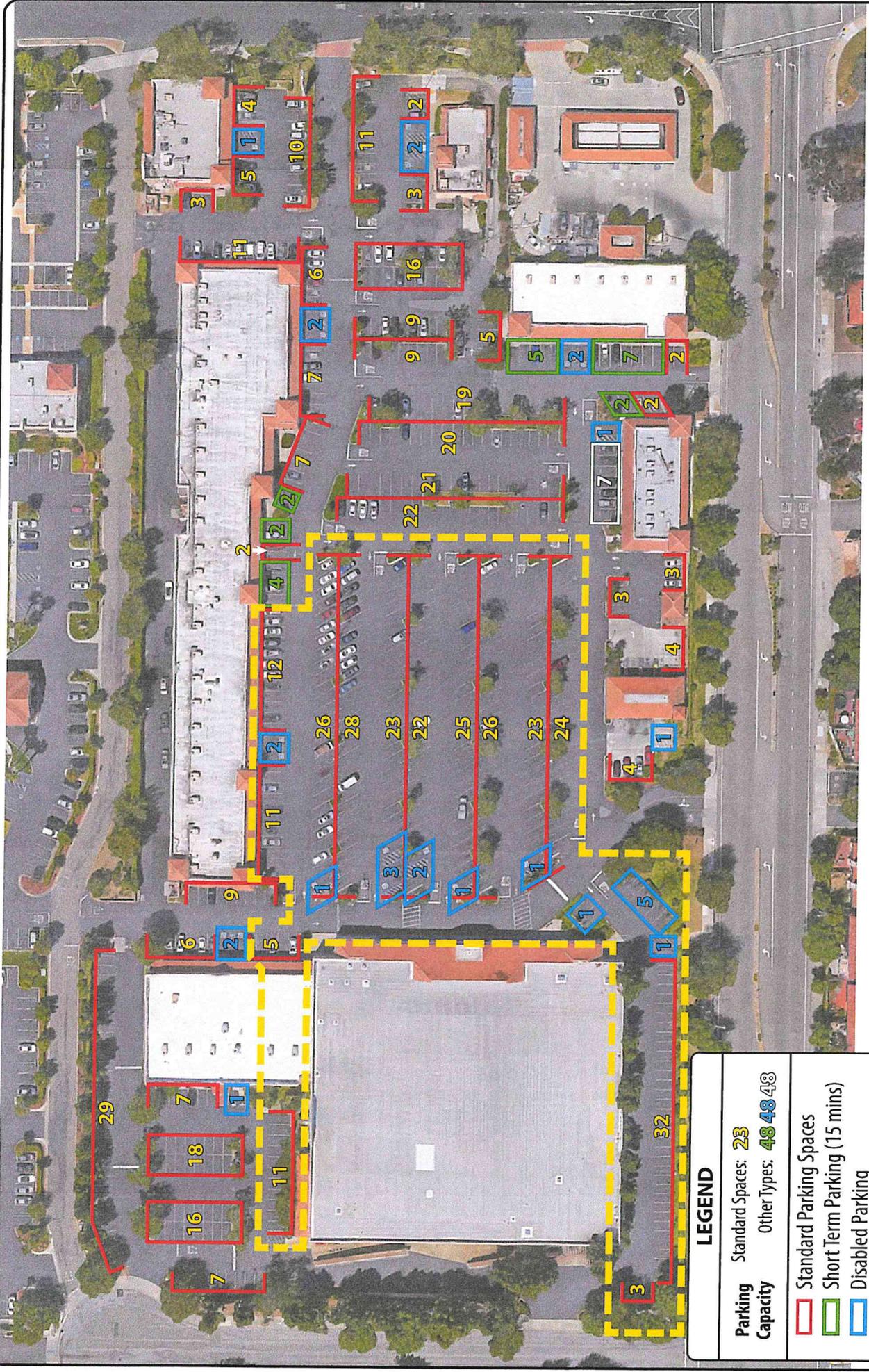
**Table 1**  
**6203 Jarvis Avenue Shopping Center**  
**Number of Parking Spaces**

<u>Location</u>	<u>Totals</u>
Sprouts Front Area	235
Sprouts SE Side Lot	42
SW Back Corner Lot	106
Remainder of Lot	248
<b>Total</b>	<b>631</b>

## 2.2 Parking Occupancy Surveys

The parking survey involved a survey of the number and types of spaces, and counts of the parking occupancy on both weekdays and weekends. In addition to extensive field observations, parking surveys were conducted on three different days, two weekdays and one Saturday. The parking occupancy surveys were conducted on Friday May 18, 2018, Saturday May 19, 2018, and Friday June 14, 2019. The surveys of parking occupancy were conducted at one-hour intervals for the time periods of 2-3 PM, 2-4 PM 4-5 PM, 5-6 PM, and 6-7 PM. The data sheets showing the complete survey results for the survey day with the highest occupancy (Friday May 18, 2018) are attached to this report. These data sheets show the number of vehicles parked in each part of the study area during each time period.

The study area and an index of the parking areas that are used to identify each area in the data tables are shown on **Figure 1**. **Figure 2** shows an inventory of the parking in the area with the



LEGEND	
Parking Capacity	Standard Spaces: <b>23</b> Other Types: <b>48 48 48</b>
	Standard Parking Spaces
	Short Term Parking (15 mins)
	Disabled Parking
	Compact Spaces

**FIGURE 2 | PARKING CAPACITY BY SECTION AND DESIGNATION**  
 PARKING REVIEW  
**6203 Jarvis Avenue**  
 City of Newark

number of spaces in each row of parking. **Figure 3** presents the peak capacity recorded in the four different study areas of the parking lot during the worst case conditions recorded during any of the surveys (from 6:00 to 7:00 PM on Friday May 18, 2018). As seen in **Figure 3**, the overall parking lot was never more than 50% occupied during any of the surveys although the northern portion of the lot near the restaurants was recorded to be 68% occupied during the peak period. However, during the same peak period the parking area in front of Sprouts was only 55% occupied and the parking lot on the southeast side of the Sprout's building was only 33% occupied.

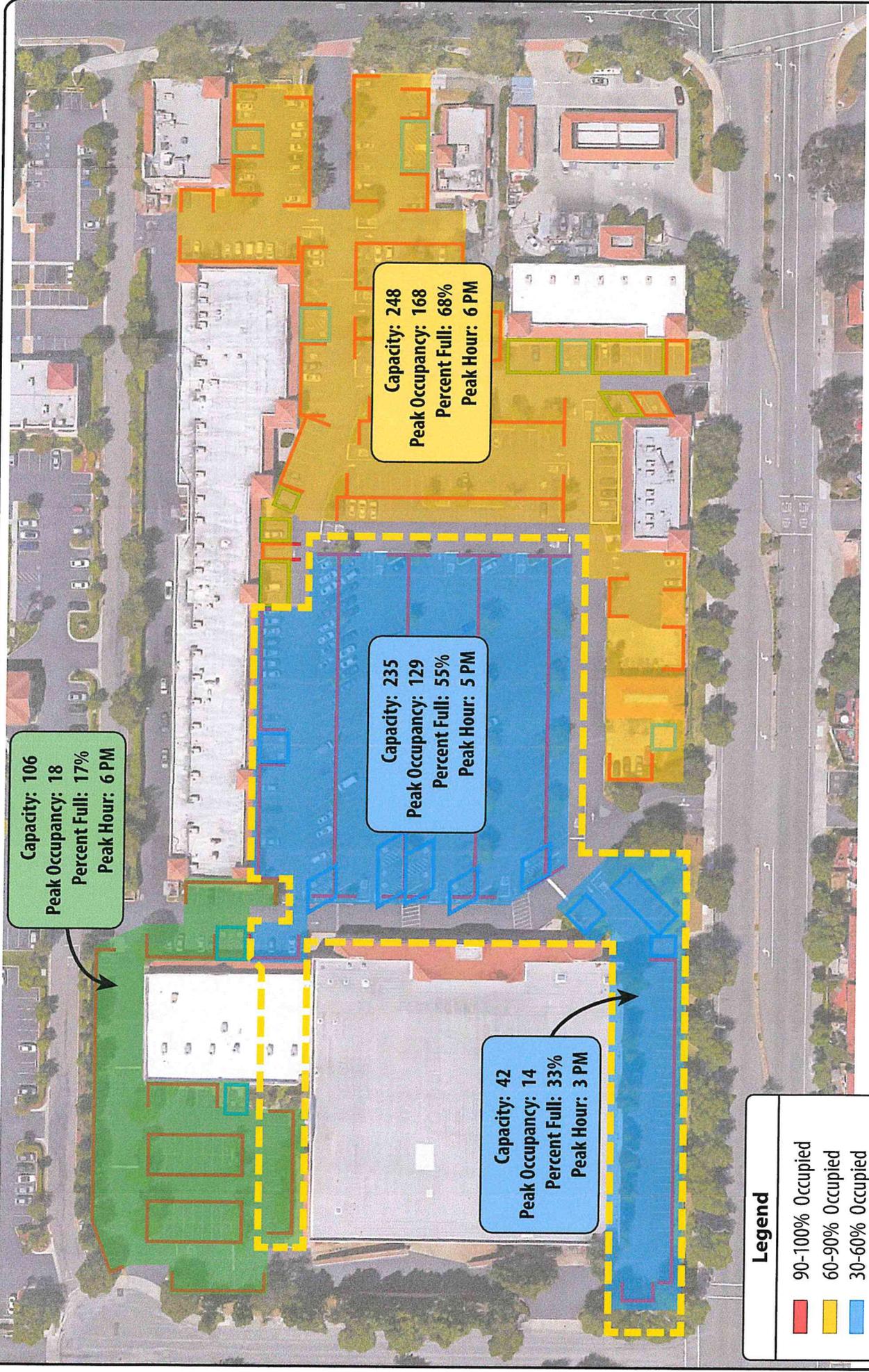
### ***Parking Survey Summary***

The results from the highest period of occupancy recorded the day with the highest occupancy levels are presented in **Tables 1 through 4**. As noted on these tables, there are 631 parking spaces in the shopping center. Of these, 343 are located within the Sprout's building parking maintenance area.

The highest occupancy levels recorded during the surveys on the peak Friday are presented in **Table 1**. The survey results indicated that for the overall shopping center a maximum of 315 of the 631 existing parking spaces were occupied at 6:00 PM. This equates to an occupancy rate of 50%. The highest occupancy recorded for the Sprouts Parking Maintenance Area was 49%. Please note the parking area in the back corner of was never observed to be more than about 20% occupied, with a minimum of about 90 parking spaces available in this area during each of the parking surveys.

### **2.3 Parking Demand**

This section discusses the City of Newark's zoning and estimated parking demand for the project. Section 17.13.0505 of the Newark Municipal Code specifies that for all uses in the commercial use classification parking shall be at three spaces per 1,000 square feet. For the overall shopping center (129,764 square feet) the 631 spaces provided equates to a ratio of 4.86 spaces per 1,000 square feet. Please note there is an area associated with the Sprouts Building identified as the parking "maintenance" area in the CCR's for the shopping center. For the Sprout's building (60,862 square feet) the 288 spaces provided within the parking "maintenance" area for this building equates to a ratio of 4.73 spaces per 1,000 square feet. The following is a summary of the potential parking demand from the project.



Capacity: 106  
 Peak Occupancy: 18  
 Percent Full: 17%  
 Peak Hour: 6 PM

Capacity: 235  
 Peak Occupancy: 129  
 Percent Full: 55%  
 Peak Hour: 5 PM

Capacity: 248  
 Peak Occupancy: 168  
 Percent Full: 68%  
 Peak Hour: 6 PM

Capacity: 42  
 Peak Occupancy: 14  
 Percent Full: 33%  
 Peak Hour: 3 PM

Legend	
	90-100% Occupied
	60-90% Occupied
	30-60% Occupied
	0-30% Occupied

**FIGURE 3 | PARKING SURVEY SUMMARY**  
 PARKING REVIEW  
**6203 Jarvis Avenue**  
 City of Newark

**Parking Demand Based on ITE Parking Generation Rates** - To provide additional information on parking demand, **Table 2** provides a summary of the parking demand results using the average ITE parking generation rates for the shopping center taken from the 5th Edition of the ITE Parking Generation Manual. As shown in **Table 2**, the unadjusted average peak parking demand that would be generated by the entire shopping center would be forecast to be for approximately 358 parking spaces based on the ITE data. As shown in **Table 3**, the unadjusted average peak parking demand that would be generated by the Sprouts portion of the shopping center would be forecast to be for approximately 168 parking spaces based on the ITE data. With the addition of Fitness 19 the peak parking demand of the shopping center is forecast to increase by about 58 spaces.

**Table 2**  
**Off-Street Parking Calculations For The Entire Shopping Center Using Parking Data from the Institute of Transportation Engineers**

Component	Data Source	Land Use	Size		Parking Rate	Peak Demand
Overall Shopping Center	ITE Parking Demand Rates	Shopping Center	129,764	sq. ft.	2.76	358

**Table 3**  
**Off-Street Parking Calculations for The Sprouts Parking Maintenance Area Using Parking Data from the Institute of Transportation Engineers**

Component	Data Source	Land Use	Size		Parking Rate	Peak Demand
<i>Sprout's Maintenance Area</i>	<i>ITE Parking Demand Rates</i>	<i>Shopping Center</i>	<i>60,862</i>	<i>sq. ft.</i>	<i>2.76</i>	<i>168</i>
Sprout's Farmer's Market	ITE Parking Demand Rates	Shopping Center	32,620	sq. ft.	2.76	90
Fitness 19	ITE Parking Demand Rates	Health/Fitness Club	28,242	sq. ft.	4.73	134
<i>Sprout's Maintenance Area With Fitness 19</i>			<i>60,862</i>	<i>sq. ft.</i>		<i>224</i>
<b>Net Increase in Forecast Demand with Fitness 19</b>						<b>56 vehicles</b>

### **3) CONCLUSIONS**

The 631 parking spaces in the survey area are generally no more than about 50% occupied at any time. Based on the parking occupancy surveys and the review of parking demand associated with the proposed Fitness 19 facility, it is our conclusion that there is more than sufficient parking in the overall shopping center to accommodate the potential for an increase parking demand from Fitness 19. The increase in parking demand from Fitness 19 is forecast to be for approximately 56 vehicles and our surveys indicated that there are always a minimum of about 300 parking spaces available in the center, even during the highest periods of parking occupancy in the evening. However, it must be acknowledged that a lot of this available parking is not necessarily located the most convenient areas of the parking lot.

The parking in the northern part of the shopping center can sometimes be frustrating for customers as the available parking referred to above is usually found farther away from the restaurants. It is important to note that parking in an area is generally perceived to be full at somewhat less than its capacity. As a result, it is likely the public's perception that the parking closest to the restaurants is often relatively full in the evening. The surveys show that even when this part of the lot is relatively full, the overall shopping center still has more than adequate parking. However, it must be acknowledged that some of parts of shopping center parking lot are not necessarily conveniently located for the restaurants.

**TABLE 1**  
**Summary of (5/18/2018) Survey**

<b>Sprouts' Parking Maintenance Area</b>						
	Capacity	3:00 PM	4:00 PM	5:00 PM	6:00 PM	7:00 PM
Total	288	129	129	141	129	134
Disabled	17	10	7	3	5	1
Standard	271	119	122	138	124	133
Standard Only %		44%	45%	51%	46%	49%
<b>Total %</b>		<b>45%</b>	<b>45%</b>	<b>49%</b>	<b>45%</b>	<b>47%</b>

<b>Remainder of Parking Lot</b>						
	Capacity	3:00 PM	4:00 PM	5:00 PM	6:00 PM	7:00 PM
Total	343	152	143	172	186	166
Disabled	12	1	2	5	3	3
Short Term(G)	22	11	8	19	19	11
Standard(S) + Compact (C)	302	138	129	142	160	146
G + S + C	331	151	141	167	183	163
Standard Only %		46%	43%	47%	53%	48%
G + S + C %		46%	43%	50%	55%	49%
<b>Total %</b>		<b>44%</b>	<b>42%</b>	<b>50%</b>	<b>54%</b>	<b>48%</b>

<b>Total Area</b>						
	Capacity	3:00 PM	4:00 PM	5:00 PM	6:00 PM	7:00 PM
Total	631	281	272	313	315	300
<b>Total %</b>		<b>45%</b>	<b>43%</b>	<b>50%</b>	<b>50%</b>	<b>48%</b>
Standard Spaces	573	257	251	280	284	279
Standard Spaces %		45%	44%	49%	50%	49%

**Table 2**  
**Sprouts' Parking Maintenance Area**

ID	Capacity Type	3:00 PM	4:00 PM	5:00 PM	6:00 PM	7:00 PM
1	11	0	1	0	0	0
2	5	5	1	5	4	5
3	11	3	5	9	8	11
4	2 H	0	1	0	0	0
5	12	12	10	12	11	12
6	26	18	21	26	26	26
7	1 H	0	0	0	0	0
8	28	8	12	13	9	14
9	23	5	6	8	8	9
10	3 H	1	0	0	1	0
11	22	9	5	7	4	7
12	2 H	2	0	1	0	0
13	25	5	9	9	12	12
14	1 H	1	1	0	1	0
15	26	18	18	13	14	9
16	23	13	12	13	13	7
17	1 H	1	0	1	1	0
18	24	14	14	12	10	10
19	1 H	1	1	0	0	0
20	5 H	3	3	0	1	1
21	1 H	1	1	1	1	0
22	32	8	8	10	5	10
23	3	1	0	1	0	1
<b>Total</b>	<b>288</b>	<b>129</b>	<b>129</b>	<b>141</b>	<b>129</b>	<b>134</b>
<b>Disabled</b>	<b>17</b>	<b>10</b>	<b>7</b>	<b>3</b>	<b>5</b>	<b>1</b>
<b>Standard</b>	<b>271</b>	<b>119</b>	<b>122</b>	<b>138</b>	<b>124</b>	<b>133</b>
<b>Total % Occupancy</b>		<b>45%</b>	<b>45%</b>	<b>49%</b>	<b>45%</b>	<b>47%</b>

**TABLE 3**  
**Remainder of Parking Lot**

ID	Capacity Type	3:00 PM	4:00 PM	5:00 PM	6:00 PM	7:00 PM
1	7	0	0	0	0	0
2	16	0	0	0	0	0
3	18	0	0	0	2	1
4	7	2	2	1	2	0
5	1 H	1	0	1	0	0
6	29	4	5	0	0	0
7	6	2	2	2	5	2
8	2 H	0	1	0	0	0
9	9	1	1	2	9	6
10	4 G	1	3	3	4	4
11	2	1	2	1	2	2
12	2 G	2	2	2	2	2
13	2 G	1	1	1	2	1
14	7	6	5	7	7	7
15	7	2	7	7	7	7
16	2 H	0	1	2	1	1
17	6	4	6	6	5	5
18	11	11	10	11	11	11
19	22	11	11	13	8	9
20	21	11	12	11	16	12
21	20	12	12	14	9	9
22	19	15	12	12	16	13
23	9	1	0	5	2	7
24	9	6	1	5	6	6
25	16	8	7	14	12	16
26	3	3	2	1	1	1
27	5	5	5	4	4	4
28	1 H	0	0	0	0	1
29	4	4	4	4	4	4
30	10	9	9	10	10	9
31	11	8	5	2	8	8
32	3	2	1	1	0	1
33	2 H	0	0	0	0	0
34	2	1	1	1	1	1
35	5	2	1	1	5	0
36	5 G	3	0	4	3	0
37	2 H	0	0	1	0	0
38	7 G	3	2	7	6	3
39	2	1	1	1	1	1
40	2	2	1	2	2	1
41	2 G	1	0	2	2	1
42	1 H	0	0	1	1	1
43	7 C	2	4	6	4	6
44	3	1	1	1	2	2
45	3	1	1	1	1	1
46	4	0	0	0	1	0
47	4	2	2	2	1	0
48	1 H	0	0	0	1	0
<b>Total</b>	<b>343</b>	<b>152</b>	<b>143</b>	<b>172</b>	<b>186</b>	<b>166</b>
Disabled	12	1	2	5	3	3
Short Term(G)	22	11	8	19	19	11
Compact (C)	7	2	4	6	4	6
Standard (S)	302	138	129	142	160	146
G + C + S	331	151	141	167	183	163
<b>Total % Occupancy</b>		<b>44%</b>	<b>42%</b>	<b>50%</b>	<b>54%</b>	<b>48%</b>

**TABLE 4**  
**Summary by Parking Area**

Section	Capacity	3:00 PM	4:00 PM	5:00 PM	6:00 PM	7:00 PM
Sprouts Front Area	235	115	115	129	122	122
Sprouts SE Side Lot	42	14	13	12	7	12
SW Back Corner	106	10	12	6	18	9
Remainder of Lot	248	142	132	166	168	157

Section	Capacity	3:00 PM	4:00 PM	5:00 PM	6:00 PM	7:00 PM
Sprouts Front Area	235	49%	49%	55%	52%	52%
Sprouts SE Side Lot	42	33%	31%	29%	17%	29%
SW Back Corner	106	9%	11%	6%	17%	8%
Remainder of Lot	248	57%	53%	67%	68%	63%

Dec 5, 2019

# FOUR CORNERS - SPROUTS SHOPPING CENTER

I support the approval of a Conditional Use Permit for a Health and Fitness tenant to occupy the 28,000 sq. ft. space next to Sprouts Farmers Market, which has been vacant for more than four years. This new tenant will bring hundreds more local citizens to our shopping center on a daily basis; benefitting our local neighbors, shop owners, managers and employees.

- Moissin Haniff (SUPERVISOR) [REDACTED] Jiffyube.
- HANT WIM [REDACTED] Fresh Look
- Michael TSE owner [REDACTED] Pure Water
- Alina Tse Owner [REDACTED] Pure Water
- Alex SANCHEZ WORKER [REDACTED] Salsbury
- ① Maria Filomena Manager [REDACTED] CHESE
- Tao Wang OWNER [REDACTED] Dagei after school
- ② Zengy Monastero [REDACTED] Receptionist Travel
- Byung Choi owner [REDACTED] NICOLE HAIR Design
- Wali Faizi owner [REDACTED] - husband - (Bert)
- Kevin Mai Owner [REDACTED] Tobacco on Sale
- ? JAY GARZA out [REDACTED] Tea
- Carolyn Garcia Manager [REDACTED] WAPR SHOP
- JITENDRA CHAND MGR [REDACTED] BK
- Heidi Yip Manager [REDACTED] PIZZA HUT
- David Chang owner [REDACTED] Pier 98
- JAN 8 2020 [REDACTED] Yang Venue cafe
- Judy Byrne sales [REDACTED] SETZ TIME
- Michael Tereo DC owner [REDACTED] Jennifer Syd Design
- Jenny Fan manager [REDACTED] Michael Tereo DC
- Lucy Lam owner [REDACTED] cheung Dental Group inc
- Ashley De Leon manager [REDACTED] Exte mak
- Whenny [REDACTED] Bella Eye Care optometry
- Trene Jim owner [REDACTED] Masateo Music
- [REDACTED] owner Masateo Music
- Cham Sai Bistrot

Ramon Palacios OWNER The Tutoring Club

R.P.M.

---

③ Camilo BAILON owner Newark Dental Care  
Camilo Bailon



Richard T. Bowles  
Michael P. Verna  
Robert I. Westerfield  
Richard A. Ergo  
K.P. Dean Harper  
Bradley R. Bowles  
Cathleen S. Huang  
Kenneth B. McKenzie  
Jason J. Granskog  
Lawrence D. Goldberg  
William T. Nagle  
Cheryl A. Noll  
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December 5, 2019

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**Re: Sprouts Center – Fitness 19 Conditional Use Permit Application  
6203 Jarvis Avenue, Newark**

Gentlepersons:

The Newark Planning Commission will be hearing the application of Fitness 19 for a conditional use permit (“CUP”) to operate a health and fitness facility in the currently vacant property located at 6203 Jarvis Avenue in the Four Corners shopping center in Newark. The property is owned by 6203 Jarvis, LLC, a family limited liability company owned by our clients, Steven and Vickie Mavromihalis, and Dean and Xenia Kuvelis.

We write to request that the City approve the Fitness 19 application, and to bring to your attention certain other factual circumstances and legal claims which may arise if that CUP application is denied.

The Four Corners development is now commonly referred to as the “Sprouts Center” inasmuch as our clients were successful, at the City’s request, in procuring Sprouts Farmers Market to open a new store in Newark in July 2017 occupying approximately one-half of the 60,000 square feet formerly occupied by Raley’s Market at 6399 Jarvis Avenue.

By way of history, Raley’s vacated the Four Corners in September 2015. Thereafter our clients retained highly effective commercial real estate brokers to seek to locate retail tenants pursuant to the City Manager’s request. From the outset of the broker’s efforts there was strong interest in the Raley’s space from potential health and fitness clubs. Our clients were informed by Assistant City Manager, Terrence Grindall, that the City’s top priority was to have that space

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filled by a “top-notch grocer.” In agreeing to address that City priority, our clients received assurances that if they were successful in attracting a grocer to the Four Corners, they could count on support of the City Manager’s office to fill the remainder of the vacant space with a health and fitness use. Illustrative of these assurances is a June 2, 2016 e-mail written by Assistant City Manager Grindall to Steve Mavromihalis after Sprouts had expressed interest in the Four Corners location:

“Steven, I just wanted to check in and see if all was well with the Sprout’s to Newark deal. If you are going to bring the Gym – I’d like to get that teed up!”

Based on the assurances from the City Manager’s Office, our clients went ahead and executed the Sprouts lease and invested millions of dollars in tenant improvements, including a demising wall necessary to enclose the new Sprouts premises so that this upscale market could be brought to the Newark community. It took 21 month, at enormous financial risk to our clients, to bring the Sprouts Market to Newark. Our clients took on this risk in reliance on the City’s promises that it would approve a CUP for a health and fitness facility next door after Sprouts opened for business.

In addition, our clients continued looking for other credit retail tenants who might come to the center to occupy the rest of the vacant space at 6203 Jarvis Avenue. We can provide you with exhaustive documentation from the commercial real estate brokers of their efforts to find someone else for this space.

While the construction work was going on for the Sprouts Market, our clients repeatedly requested authorization to proceed with the health and fitness center, but were asked by City officials to “be patient” and keep looking for a credit retail tenant. At our clients’ request, the brokers revisited their previous retail contacts to see if anyone had changed their mind. Nobody had.

Since the opening of Sprouts Market, our clients have continued to look for other retail credit tenants and have continued to stay in touch with the City Manager’s Office. They have continually been told that they need to “be patient.”

The City’s requests for “patience” have cost our clients hundreds of thousands of dollars. Our clients endured this in reliance on the assurance that we would receive the support of the City Manager, not only if they brought Sprouts, but later if they could not find a credit-worthy retail tenant. It is now time for the City to approve the health and fitness center so that we do not lose this tenant as well.

## LEGAL AUTHORITY

There can be no basis for the failure of the City to approve the conditional use permit for Fitness 19. This is an extremely appropriate family-friendly facility that will be an asset to the Newark community. There is nothing about the request for the conditional use that is contrary to other uses that the City has approved in this area. Indeed, the City has granted similar conditional uses for workout facilities in the immediate vicinity. The City granted a CUP to Anytime Fitness to operate a gym in the Four Corners center in 2012 – at a location right next door to Curves, another existing health and fitness facility.

### **Fifth Amendment Taking**

On these facts, the City’s denial of a conditional use permit in these circumstances would effect a taking of our client’s property. The U.S. Supreme Court has made clear as a categorical matter that “the Fifth Amendment is violated where regulation denies all economically beneficial or productive use of land.” *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (italics in original); see also, *Lingle v. Chevron USA Inc.*, 544 U.S. 528 (2005). Under *Lucas*, such a “total taking” is “compensable without case-specific inquiry into the public interest advanced in support of the restraint” by the government. *Lucas*, 447 U.S. at 1015. And the Court also pointedly observed that when governments prohibit or deny “a particular use [that] has long been engaged in by similarly situated owners”, and “the fact that other landowners, similarly situated, are permitted to continue the use denied to the claimant”, they are especially vulnerable to legal challenge. *Id.* at 1031.

The holding and reasoning in *Lucas* are applicable here. Despite strenuous marketing efforts by our clients and their brokers, the demised premises have been empty for more than four years since Raley’s closed. The City’s insistence that we “be patient” and leave the property empty, when it has approved other nearby health and fitness facilities sought by “similarly situated owners” (*id.*) in the same Community Commercial zoning district, is nothing more than a discriminatory denial of the proposed Fitness 19 use. To the contrary, “when the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave the property economically idle, he has suffered a taking.” *Lucas*, 447 at 1019 (italics in original).<sup>1</sup>

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<sup>1</sup> It is no longer necessary for a landowner owner who has suffered a taking of his property to first sue for just compensation under California law. He may now immediately seek relief in federal court under 42 U.S.C. § 1983 for the violation of his Fifth Amendment rights by the City. *Knick v. Township of Scott, Pennsylvania*, 588 U.S. \_\_\_, 139 S.Ct. 2162 (2019), overruling *Williamson County Regional Planning Comm’n v. Hamilton Bank of Johnson County*, 473 U.S. 172 (1985). *Knick* is consistent with the recent pro-property rights trend in the Supreme Court.

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Separate and apart from *Lucas*, the City's denial of a CUP for Fitness 19 would also effect a regulatory taking under the multi-factor analysis set forth in *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 125 (1978), including the "economic impact of the regulation on claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations." The Supreme Court has confirmed this is the "primary" factor and thus the *Penn Central* inquiry "turns in large part" on "the magnitude of a regulation's economic impact and the degree to which it interferes with legitimate property interests." *Lingle*, 544 U.S. at 538-540 (Justice O'Connor writing for a unanimous Court). It is crystal clear from the facts here that the economic impact and burden on our clients' property flowing from a denial of a use permit would be severe, with damages (and potential City exposure) of several million dollars based on the rent and other financial terms of the signed Fitness 19 lease.

### **Denial of Equal Protection**

The Supreme Court has repeatedly "recognized successful equal protection claims brought by a 'class of one,' where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000), and cases cited therein. This is in keeping with the purpose of the Equal Protection Clause of the Fourteenth Amendment "to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents." *Id.* The City may also wish to take note of the overlap between the Court's protection of "similarly situated" plaintiffs in both the equal protection and takings contexts, both deprivations of their property rights (e.g., *Lucas*). It is no coincidence and will be a central theme if litigation ensues here.

In *Olech* the Village conditioned the connection of the Olechs' property to the municipal water supply on their granting the Village a 33-foot easement over their property, despite having required only a 15-foot easement from other property owners seeking access. These facts, quite apart from the Village's subjective motivation for its differential treatment of the plaintiff, were held "sufficient to state a claim for relief under traditional equal protection analysis." *Id.* at 565; see also, *Fortress Bible Church v. Feiner*, 694 F.3d 208, 222-224 (2d Cir. 2012) (following *Olech* and affirming injunction requiring town to issue building permit, where plaintiff presented "overwhelming evidence that its [project] application was singled by the Town for disparate treatment" compared to other similarly situated property owners).

### **Equitable Estoppel**

The doctrine of equitable estoppel is codified in California Evidence Code § 623, which states:

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“When a party has, by his own statement or conduct, intentionally and deliberately led another to believe a particular thing true and to act upon such belief, he is not, in any litigation arising out of such statement or conduct, be permitted to contradict it.”

Four elements must be present to apply the doctrine: (1) the party to be estopped must be apprised of the facts; (2) he must intend that his conduct be acted upon, or must so act that the party asserting the estoppel had a right to believe it was so intended; (3) the other party must be ignorant of the true state of facts; and (4) he must rely on the conduct to his injury. *City of Long Beach v. Mansell* (1970) 3 Cal.3d 462, 489, citing *Driscoll v. City of Los Angeles* (1967) 67 Cal.3d 297, 305. *Mansell* is and remains the leading case upholding the application of equitable estoppel to public agencies.

Equitable estoppel “rests firmly upon a foundation of conscience and fair dealing.” *Mansell*, 3 Cal.3d at 488. Moreover, it is settled that the doctrine of equitable estoppel “may be applied against the government where justice and right require it.” *Id.* at 492, and see cases cited therein. In *Mansell* the California Supreme Court explained that “[t]he government may be bound by an equitable estoppel in the same manner as a private party when the elements requisite to such an estoppel against a private party are present, and in the considered view of a court of equity, the injustice which would result from a failure to uphold an estoppel is of sufficient dimension to justify any effect upon public interest or policy which would result from the raising of an estoppel.” *Id.* at 496-497; see also, *Kieffer v. Spencer* (1984) 153 Cal.App.3d 954, 958, 963-964 (applying estoppel doctrine to compel city to grant business license to operate videogame arcade, where petitioner incurred substantial expenses to their “immediate detriment”, including encumbering their property, in reliance on “affirmative representations” by city officials, and “no strong public policy other than ordinary considerations of the general welfare” justified the city’s actions in withholding the license).<sup>2</sup>

Each of these elements is present, and the City’s conduct gives rise to an estoppel in favor of our clients. Our clients acted in reasonable reliance on the City’s promise to approve the proposed health and fitness use if our clients delivered a “top-notch grocer” like Sprouts to the Four Corners center. Given that this was a “top priority”, the City clearly intended that the Mavromihalis family would act on its statement. Our clients changed their position, to their financial detriment, in reliance on the City’s assurances. They put off bringing a health and fitness facility to the shopping center. And not only that. Our clients made significant financial and other investments; proceeded to market half the building for the Sprouts Market and spend money on a demising wall to make that happen. They also configured and sized the empty space

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<sup>2</sup> The City may think that it is immune from such equitable estoppel claims, which are relatively uncommon. However, this law firm has litigated and successfully raised an estoppel against the City of Napa based on the conduct of city staff in that case – including an assistant city manager – on which our clients reasonably relied to their detriment.

*Of Counsel*  
Bruce C. Paltenghi

so that it could be marketed for the future health and fitness gym that the City had promised to get “teed up.”

In sum, while our clients dealt with the City in good faith, the same cannot be said of the City. On these facts, we believe a judge or jury will be sympathetic to our clients’ position if litigation becomes necessary for our clients to enforce their constitutional and private property rights. .

### CONCLUSION

It is our clients’ fervent hope that nothing more than this letter is required to move this matter forward. Our clients are not litigious but are prepared to move forward with litigation to recover the damage that the City has caused them to incur based on the representations and promises made. We look forward to hearing from you. Thank you.

Very truly yours,

  
RICHARD T. BOWLES

RTB:dja



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Richard A. Ergo  
Bradley R. Bowles  
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**Re: Sprouts Center – Fitness 19 Conditional Use Permit Application  
6203 Jarvis Avenue, Newark**

Gentlepersons:

The Newark Planning Commission is now scheduled to hear on January 14, 2020 the Fitness 19 application for a conditional use permit (“CUP”) to operate a health and fitness facility in the currently vacant property located at 6203 Jarvis Avenue in the Four Corners shopping center. That property is owned by 6203 Jarvis, LLC, a family limited liability company owned by our clients, Steven and Vickie Mavromihalis, and Dean and Xenia Kuvelis.

In our December 5, 2019 letter, we requested that the City approve the Fitness 19 application, along with bringing to the City’s attention certain other factual circumstances and legal claims which may arise if that CUP application is denied. We write now to provide additional information which strongly supports the granting of a CUP to Fitness 19.

We respectfully request that this letter and the attached information be made a part of the Planning Commission Staff Report on this matter. Further, please be sure it is given to all Planning Commissioners in advance of the January 14 hearing. Thank you.

**Seventeen Other California Cities in the Past Decade Have Approved New Use Permits for Fitness 19 Stores.**

**Those cities got it right.** They recognized that Fitness 19 does generate sales tax revenue from its own operations. Contrary to apparent perceptions of City of Newark staff, Fitness 19 sells taxable products and services to its patrons. See December 27, 2019 letter to Deputy Community Development Director Art Interiano from Mitch Gardner of G2 Design Build Inc. and Bob Rodger of Fitness 19 (“Interiano Letter”), at pp. 1 - 2.

And at least as important, Fitness 19 will draw hundreds of thousands of fitness customers annually to existing retail shopping centers and stores nearby. The result? Fitness 19 has a track record of stimulating increased, sales tax generating activities in nearby shopping centers, retail stores and restaurants where it operates. Other California cities over the past decade have had the vision to recognize this positive economic spillover from the impacts and value that Fitness 19 brings to the community, to local residents and to adjacent retail uses.

Other cities have had the wisdom to approve Fitness 19’s CUP applications. **So should Newark.**

**Health and Fitness Gyms Are a Good “Fit” for Malls and Shopping Centers Seeking to Increase Customer Visits.**

We also refer the City to pages 2 – 7 of the Interiano Letter, where the findings and conclusions from several recent news articles are highlighted. A few quotes will suffice here. “Malls are turning to health clubs to help boost foot traffic.” “Put a gym in a mall, and boom, you suddenly have a busier mall.” “Malls never wanted gyms. Now they court them.” “Before or after working out, people are more likely to grab a quick bite to eat, shop for groceries, or pick up their dry cleaning from a neighboring business.” “Overall, the addition of a fitness tenant is a smart move for brokers and landlords when leasing a shopping center.”

Newark isn’t an island isolated from these nationwide retail trends. The experience in other communities is equally applicable here. Fitness 19 is and will be a good fit for the Four Corners center.

**The Exhaustive, Four-Plus Year Marketing Efforts by John Cumberlich & Associates to Bring a Credit Retail Tenant to Our Clients’ Vacant Property in the Four Corners Center**

John Cumberlich was the listing broker for the vacant premises at 6203 Jarvis Avenue in the Four Corners shopping center. We refer the City to the attached “Newark leasing summary” memorandum dated December 19, 2019, prepared by Mr. Cumberlich (the “Cumberlich Memo”). It describes and summarizes how, “over the past four+ years,” Mr. Cumberlich and his team “thoroughly and continuously marketed the property to the entire commercial real estate

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industry through multiple channels.” They also made direct outreach contacts with more than 120 first class Bay Area retailers, all of whom are listed in the three-page spreadsheet attached to the Cumberlich Memo.

The upshot of those efforts? The Comments section of the spreadsheet documents a litany of reasons why other retailers declined or weren’t interested in coming to the Four Corners location. It demonstrates that **the only potential tenants to express any interest in leasing our clients’ property, and who submitted offers to lease, were two health and fitness users – Fitness 19 and Crunch Fitness.** After determining that Fitness 19 had the stronger track record and was a better fit for the Newark community, our clients selected Fitness 19 as a leasing partner for the vacant premises.

The foregoing evidence – from the unanimous CUP approvals in other California cities, well-established retail trends and media reports on the synergy between retail and fitness uses in shopping centers, and the extensive, multi-year marketing efforts by Mr. Cumberlich – strongly support the Planning Commission’s approval of Fitness 19’s CUP application. Fitness 19 will bring an active, lively and family-friendly clientele to the Four Corners area. It will increase economic activity and retail sales, and will be a welcome addition to the center, and the City of Newark generally.

But that’s not the end of the story here. These and other facts also highlight the damages our clients will sustain, and the multi-million dollar legal and financial exposure the City will face, if it denies the proposed Fitness 19 use.

### **The City’s Liability for a Regulatory Taking**

The Fifth Amendment prohibition against the taking of private property without just compensation “is violated where regulation denies all economically beneficial or productive use of land.” *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992); see also, *Lingle v. Chevron USA Inc.*, 544 U.S. 528 (2005). Just such a taking will occur if the City denies the Fitness 19 CUP application now – after four-plus years and concerted and extensive efforts to market our clients’ Newark property to retail users have come up empty. The record and evidence in this case shows that the proposed health and fitness use is, in fact, the *only* viable “economically beneficial or productive use” (*id.*) of the vacant premises at 6203 Jarvis Avenue. The circumstances encountered by Mr. Cumberlich and his team, and amply documented in the Cumberlich Memo, will weigh strongly against the City in future litigation if a CUP is not granted to Fitness 19.

Moreover, our clients’ damages are easily proven. Fitness 19 was ready to occupy the property over two years ago. Fitness 19 has now signed a 15-year lease for the premises, plus two (2) five-year options. The lease calls for minimum annual rent payments of approximately \$400,000 - \$500,000 during the initial 15-year term – which are of course contingent on the

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City's approval of a CUP. To this must be added our clients' very substantial financing and carrying costs that they incurred to keep their property vacant since the Sprouts market opened in mid-July 2017 – in compliance with repeated requests from City staff that they be “patient” and keep looking for a non-existent retail tenant.

The City is looking at a potential damages verdict against it of several million dollars, plus a likely seven-figure award of attorneys' fees and costs in favor of our clients under 42 U.S.C. § 1988.

In these circumstances, the City and its elected officials should reasonably ask themselves: Is a denial of the beneficial use proposed by Fitness 19 really worth taking this risk? Will Newark residents – your constituents – praise you for putting the City's finances at risk, or for wasting their tax dollars on the needless litigation that will result from denial of a CUP? The clear answer to both questions is a resounding NO. The only rational and sensible decision here is approval of Fitness 19's application without further delay.

**The City of Newark Has Approved Other Health and Fitness Uses in the Four Corners Shopping Center. In These Circumstances, Denial of the Fitness 19 CUP Application Would Be Discriminatory and Unlawful.**

Here too, the facts support our clients' position and fatally undermine any lawful basis for denying a use permit to Fitness 19. It is beyond dispute that the City permitted Curves, a women's fitness club chain, to operate in the Four Corners center more than a decade ago. Then in 2012, the City granted a CUP to Anytime Fitness to open a fitness gym right next door to Curves. The Curves and Anytime Fitness properties share the same Community Commercial zoning designation as our clients' property. Moreover, that Anytime Fitness isn't “high sales tax” generating retail store was not put forward by the City as a basis for denying it a use permit. Nor did the City deny a permit to Anytime Fitness because of its close proximity to, or the potential “anti-competitive” impacts that Anytime Fitness's opening might or might not have on Curves.

These facts have constitutional significance under both the Fifth Amendment taking and Fourteenth Amendment equal protection clauses. The Supreme Court made clear that a city which prohibits or denies a particular use that has “long been engaged in by similarly situated owners”, and/or where” other landowners, similarly situated, are permitted to continue the use denied to the claimant”, is especially vulnerable to a Fifth Amendment taking claim. *Lucas, supra*, 505 U.S. at 1031. In the same vein, a city violates the Equal Protection Clause where it intentionally treats a property owner “differently from others similarly situated” and there is “no rational basis for the difference in treatment.” *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000). The City cannot deny this application because of “concern” for the impact on Anytime Fitness.

City of Newark  
January 3, 2020  
Page 5

Long story short: Our clients will have strong constitutional claims against the City on both taking and equal protection discrimination grounds if the Fitness 19 use permit is denied, in view of the City's past disparate and favorable treatment of adjacent property owners seeking permission for health and fitness uses in the Four Corners area. The City needs to face up to its exposure under *Lucas* and *Olech*, and not try to downplay it.

### **Equitable Estoppel**

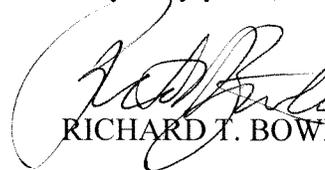
Finally, there is the matter of equitable estoppel, which "rests firmly upon a foundation of conscience and fair dealing" and "may be applied against the government where justice and right require it." *City of Long Beach v. Mansell* (1970) 3 Cal.3d 462, 488, 492. Our clients acted in reasonable reliance on the promise of City staff to get the proposed health and fitness use of their vacant property "teed up" for approval if and when our clients delivered a "top-notch grocer" like Sprouts to the Four Corners center. Our clients lived up to their side of the bargain. It is time for the City to do the same.

### **Conclusion**

It remains our clients' earnest desire and hope that the City will review carefully the information in the Interiano Letter, the Cumberlich Memo and our letters. We hope it will weigh carefully its legal and financial exposure; reconsider its previously expressed position; and approve the pending Fitness 19 CUP application at the January 14, 2020 hearing. While it is not their first choice, our clients are fully prepared to pursue litigation against the City for any and all damages that will result from a denial of the Fitness 19 use.

We are available to meet with the appropriate City officials prior to the Planning Commission hearing if that would be helpful, and look forward to hearing from you. Thank you.

Very truly yours,



RICHARD T. BOWLES

RTB:dja

Enclosure

cc: Anne Stedler  
Economic Development Manager  
Anne.stedlar@newark.org

MEMORANDUM

---

To: Steven Mavromihalis, et al.  
From: John Cumbelich  
Date: December 19, 2019  
Re: Newark leasing summary

---

Further to our ongoing discussions I have attached a spreadsheet that summarizes many of the retailers that our firm has been in dialogue with over the past four+ years in our efforts to lease the 28,000 SF co-anchor space at your Newark property.

In addition to our firm's direct outreach to the user community such as those noted on the spreadsheet, we have thoroughly and continuously marketed the property to the entire commercial real estate industry through multiple channels. These include:

- The property has been continuously posted at [www.LoopNet.com](http://www.LoopNet.com), which is the industry standard forum for exposing commercial real estate listings. We have received occasional responses through LoopNet inquiries from users such as banquet hall, night clubs and independent operators of martial arts, basketball courts or trampoline parks. None of these users generated offers.
- The property has been exposed for years at industry conventions of the International Council of Shopping Centers (ICSC), both regionally and nationally. ICSC is the largest trade organization in the shopping center industry.
- The property has been continuously marketed to the Northern California commercial real estate industry through our firm's daily marketing blasts sent to over 800 commercial real estate brokers and professionals.
- The property has been continuously posted to our firm's available properties website, [www.cumbelich.com](http://www.cumbelich.com)
- The property has been continuously exposed to each of our firm's 35 partner offices throughout North America (X Team Retail Advisors), each of whom are exclusively focused on the leasing of best in class properties and representing first class retailers, as we are.

Perhaps just as telling as all of the users that have declined interest, due to a lack of interest in Newark in general or to this location in particular, are all of the first-class retailers that we have successfully consummated lease transactions with. Our firm has developed deep roots in the Northern California shopping industry over the past 30+ years, during which time our elite firm has consummated several of the most notable retail leases in Northern California. A partial list of uses with whom we have successfully consummated Bay Area leases with include:

- 24 Hour Fitness
- Apple
- BevMo!
- Big Lots
- Burlington

- Circuit City
- Cost Plus
- Crunch Fitness
- CVS/Longs Drugs
- Dick's Sporting Goods
- Famsa
- Fitness 19
- Forever 21
- Golf Mart
- Golfsmith
- Hobby Lobby
- Home Expo
- Kroger
- Lowes
- Orchard Supply Hardware
- Party City
- Petco
- Petsmart
- Pottery Barn
- Restoration Hardware
- Ross Dress for Less
- Smart & Final
- Sport Chalet
- Sprouts
- Stein Mart
- Target
- Tiffany & Co.
- TJ Maxx
- ULTA
- Villa Sport
- Wal Mart
- Walgreens
- Yoga Works

The partial list above demonstrates that our firm has one of the largest and most extensive resumes in successfully attracting first class retailers to Northern California locations of any professional currently active in this market.

The list above clearly suggests that if there were a good credit, good quality retailer other than Fitness 19 or Crunch, which was a candidate for this location, we would have identified them long ago.

Feel free to contact me with any questions about the summary above. Thank you

Newark Sprouts Co-Anchor Contact List		
Retailer	Declined?	Comments
24 Hour Fitness	Yes	Staying near mall
99 Only	Yes	decline
99 Ranch Market	Yes	declined interest in relocating
Alamo Draft House	Yes	decline
Aldi	Yes	not ready for Bay Area
AMC Theaters	Yes	regional locations only
Andronico's	Yes	not actively expanding
Arteagas Market	Yes	wrong demographic
Ashley HomeStore	Yes	Territory already covered by multiple other stores
At Home	Yes	Too small. Decline.
Babies R Us	Yes	prefers malls
Bed Bath & Beyond	Yes	Territory already covered, need more soft good co-tenancy
Berkeley Bowl	Yes	decline
Pet CLub	Yes	Not interested.
Bevmo	Yes	Not interested in Newark
Big 5 Sporting Goods	Yes	Their space requirements make it impossible to fit two tenants in the space
Blink Fitness	Yes	not ready for Bay Area
Bob's Discount Furniture	Yes	not ready for Bay Area
Bowlmor	Yes	regional locations only
Burlington	Yes	decline
Buy Buy Baby	Yes	prefers malls
California Family Fitness	Yes	decline
Cash & Carry	Yes	Toured, declined
Chavez Supermarket	Yes	wrong demographic
Chuze Fitness	Yes	not ready for Bay Area
Cost Plus World Market	Yes	Territory already covered, need more soft good co-tenancy
<b>Crunch Fitness</b>	<b>No</b>	<b>submitted offer</b>
CVS	Yes	declined relocation, despite drive thru opportunity
DD's discounts	Yes	Initial interest was conditioned on Tenant's right to terminate. Later withdrew.
Daiso	Yes	decline
Dave & Busters	Yes	regional locations only
David's Bridal	Yes	No requirement here
db Shoes	Yes	regional locations only
Dick's Sporting Goods	Yes	Too close to Hayward
Diddam's	Yes	decline
Dollar Tree	Yes	decline
DSW	Yes	No requirement here
<b>Fitness 19</b>	<b>No</b>	<b>submitted offer</b>
Floor & Décor	Yes	Decline. Too small.
Fresco Market	Yes	wrong demographic
Friedman's Home Improvement	Yes	seeks North Bay only
Gold's Gym	Yes	decline
Golf Galaxy	Yes	not active
Golfsmith	Yes	stopped expanding
Goodwill	Yes	decline
Grocery Outlet	Yes	too close to other store
H Mart	Yes	reviewed, pursued South Bay instead
Hankook Market	Yes	decline
Harbor Freight	Yes	decline
Hobby Lobby	Yes	regional locations only
Home Depot	Yes	too small
HomeGoods	Yes	regional locations only
In Shape Fitness	Yes	reviewed, declined
iPic Theaters	Yes	decline
Island Pacific Market	Yes	decline
Joann Fabrics	Yes	Too close to Pacific Commons in Fremont
Kirkland's	Yes	regional locations only
LA Fitness	Yes	reviewed, declined

La Superior	Yes	wrong demographic
Las Montanas	Yes	wrong demographic
Lidl	Yes	not ready for Bay Area
Liesure Sports Inc.	Yes	prefers upscale trade areas
Lifetime Fitness	Yes	decline. Not a target market.
Lion Supermarket	Yes	decline
Living Spaces	Yes	deline. Too close to Fremont store.
Lowes	Yes	already in Fremont
Mancini's Sleepworld	Yes	decline
Marina Market	Yes	decline
Marshalls	Yes	regional locations only
Maya Cinema	Yes	decline
Metropolitan Theaters	Yes	not seeking this market
Mi Pueblo	Yes	declined interest in relocating
Michael's	Yes	already covered in market
New Seasons	Yes	decline
Nordstrom Rack	Yes	no soft good co-tenancy
Nugget Market	Yes	purchase only, not interested
Off Broadway shoes	Yes	prefers malls
Old Navy	Yes	Territory already covered, need more soft good co-tenancy
Orchard Supply Hardware	Yes	not interested in returning to Newark
Party City	Yes	already in Fremont
Pet Club	Yes	decline
Pet Food Express	Yes	Their space requirements make it impossible to fit two tenants in the space
Pet Supplies Plus	Yes	they are too small
Petco	Yes	Territory already covered, need more soft good co-tenancy
Petsmart	Yes	Territory already covered, too small of trade area
Pier 1 Imports	Yes	prefers malls
Pinstripes	Yes	prefers lifestyle centers
Planet Fitness	Yes	decline
Regal Cinema	Yes	prefers malls
REI	Yes	already in Fremont
Richard's Crafts	Yes	not expanding
Rite Aid	Yes	reviewed, declined
Ross	Yes	declined interest in relocating from across the street
Safeway	Yes	declined interest in relocating from across the street
Seafood City	Yes	decline
Shopko	Yes	not ready for Bay Area
Sierra Trading Post	Yes	not ready for Bay Area
Smart & Final	Yes	Toured, declined
Sport Chalet	Yes	stopped expanding
Stein Mart	Yes	prefers malls and regional locations
Strike	Yes	decline
Studio Movie Grill	Yes	regional locations only
Super Kyo Po	Yes	decline
Target	Yes	toured twice, declined
The Floor Store	Yes	decline
The Sports Authority	Yes	regional locations only
Thomasville	Yes	decline
TJ Maxx	Yes	regional locations only
Tokyo Central/Marukai	Yes	decline
Top Fit	Yes	decline
Total Wine	Yes	Too close to Pacific Commons in Fremont
Total Woman	Yes	prefers lifestyle centers
Toys R Us	Yes	staying at Newpark
Tractor Supply Hardware	Yes	prefers free-standing locations
ULTA	Yes	too small, decline
Villa Sport	Yes	too large, seeks 8 acres
Walgreens	Yes	reviewed, declined
West Marine	Yes	decline

Whole Foods	Yes	met at ICSC, toured, declined
Winco Foods	Yes	reviewed, declined
Zion Market	Yes	decline



Richard T. Bowles  
Michael P. Verna  
Richard A. Ergo  
Bradley R. Bowles  
Cathleen S. Huang  
Robert I. Westerfield  
K.P. Dean Harper  
Kenneth B. McKenzie  
Jason J. Granskog  
Lawrence D. Goldberg  
William T. Nagle  
Cheryl A. Noll  
Christopher D. Jew  
Jonathan W. Lee  
Jin Im-Saeteurn  
Christopher M. Wolcott  
David A. Goldstein  
Thomas V. McCarrick  
Andrea L. Tool  
Gerald C. Kipper  
Alexandrea M. Tomp

*Of Counsel*  
Bruce C. Paltenghi  
David F. Abele

February 4, 2020

**VIA E-MAIL AND U.S. MAIL**

Jeff Aguilar, Chair and  
Members of Planning Commission  
City of Newark  
37101 Newark Boulevard  
Newark, California 94560  
[Steven.Turner@newark.org](mailto:Steven.Turner@newark.org)  
[Art.Interiano@newark.org](mailto:Art.Interiano@newark.org)

**Re: Fitness 19 Conditional Use Permit Application  
6203 Jarvis Avenue, Newark**

Dear Chair Aguilar and Members of the Planning Commission:

This letter is written following the hearing before the Planning Commission on Tuesday, January 14, 2020. The letter covers three subjects. First, we want to address the questions that came up after the close of the public hearing regarding parking. Second, we wish to bring additional information and testimony to the Planning Commission's attention regarding the positive retail and sales tax benefits that bringing in a new Fitness 19 facility has had for adjacent retail stores in other California cities. Finally, we want to respond to the issues raised by the letter submitted for counsel for the adjoining landlord and the testimony of the representative of the adjoining landlord and his tenant, Anytime Fitness.

**Parking**

Please refer to the enclosed supplemental letter dated January 16, 2020 from Stephen Abrams, President of Abrams Associates Traffic Engineering, Inc.

In his letter, Mr. Abrams addresses and refutes the comments from counsel for VN Investment Group, LCC ("VN"), as well as addressing the questions of the highest usage periods by both Sprouts and Fitness 19. The key takeaways from Mr. Abrams' supplemental report are that (1) parking studies assess impacts and the availability of adequate parking based on the peak hour demand for different uses, such as the Sprouts supermarket as compared with a health and fitness facility such as Fitness 19; and (2) in this case, those high parking usage periods do not overlap. Contrary to the comments made by VN's counsel, Mr. Abrams makes clear that the "length of time" that people park "is not a factor as the analysis is based on the peak parking

Chair Jeff Aguilar and Members of the  
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available at various times during the week.” (See Abrams letter at p. 1.) The peak parking demand for supermarkets “occurs from about 2:00 PM to 5:00 PM. For a fitness center the data indicates the peak parking demand occurs from about 5:00 PM to 7:00 PM.” (*Id.* at p. 2.)

Hopefully this answers the questions of the Planning Commission regarding parking. If the Commissioners would like Mr. Abrams to attend the February 11 hearing, we would be happy to arrange that.

**Fitness 19 Will Bring More Shoppers, Retail Sales and  
Sales Tax Revenue to the Four Corners Center**

As we have previously discussed, Fitness 19 will bring vitality and increased retail shoppers to the Four Corners center after the Commission approves the use permit application as your City staff is recommending. In that regard, the positive impact of Fitness 19 on surrounding retail uses is documented.

Enclosed you will find a January 24, 2020 letter from Victor de Melo of Browman Development Company, Inc. (“BDC”). BDC is the owner of the Dublin shopping center and entered into a long-term lease with Fitness 19 to fill the premises vacated when CVS downsized at that location. Mr. de Melo reports that BDC’s retail center was “severely under-utilized” before Fitness 19’s arrival, and that since then:

“We’ve witnessed this first hand, as Dublin Fitness 19 patrons are shopping at CVS often before or after their work out, bringing new customers to CVS as well as repeat trips for existing customers. *The CVS manager has personally conveyed to me the nice benefit of Fitness 19 patrons constantly visiting their store and helping increase sales*” (emphasis added).

The same thing occurred when Fitness 19 opened a new facility at the Oakbrook Plaza shopping center in Thousand Oaks, leasing vacant space in the center from Gelson’s Markets. Much like Sprouts, Gelson’s operates 27 upscale grocery stores in Southern California. Please refer to the enclosed January 29, 2020 letter from Michael Smith, Director of Real Estate for Gelson’s, who describes how Fitness 19 has “been a meaningful traffic generator for the shopping center”:

“Fitness 19 has now been open for almost a year. The club is beautiful . . . . *Even better our sales and customer counts have improved. The new gym attracts hundreds of people each day to the shopping center and we see Fitness 19 member frequently cross-shopping at Gelson’s.* . . . [If we had other excess spaces in our company future I would not hesitate to reach out to Bob at Fitness 19 to co-tenant with our brand” (emphasis added).

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Given Fitness 19's track record in other California communities, the City of Newark will experience similar positive benefits by approving its use permit application.

Finally, the Planning Commission may wish to consider an article which appeared in the January 24, 2020 issue of USA Today, entitled "Store closings pile up: With 1,200 closures already announced, retailers face another grim year" (copy enclosed and link provided below), reporting on the severe difficulties facing nationwide retail chains including Macy's, J.C. Penney, Papyrus, Pier 1 Imports and many others:

<https://www.usatoday.com/story/money/2020/01/24/store-closings-2020-macys-jcpenney-bed-bath-beyond-express/4540886002/>

### **Response to January 14 Letter from VN's Counsel**

The letter from the attorney retained by VN Investment Group, LCC essentially raises three points. They are the parking issue, the CEQA exemption issue and the CC&R issue. Inasmuch as the parking is addressed above, I will not comment further.

As for the applicability of the CEQA exemption for Existing Facilities (19 CCR Section 15301(a)), this was addressed at the January 14 hearing by Mr. Trotter and, perhaps more importantly, was also thoroughly addressed by the City's planning staff. As noted, the staff found the exemption to be absolutely applicable. The Commission should follow the lead of its staff on this issue for the reasons discussed at the January 14 hearing. The resolution of this issue is clear.

### **CC&Rs**

Counsel for VN refers to Section 8.2 of the Agreement of Covenants, Conditions and Establishment of Restrictions dated October 4, 1989 (the "CC&Rs") as providing a basis for denial of the Fitness 19 CUP application. This is incorrect. In response to questions from Chair Aguilar and other Commissioners on this point, Community Development Director Steven Turner was unequivocal that enforcement of the CC&R's was not an issue for the City. He advised the Commission that Newark, like other cities, does not "get involved in enforcing CC&Rs." Speaking for the City's planning staff, Mr. Turner also stated: "We believe that is a private property owner issue that doesn't involve the City."

This is absolutely correct. We agree that neither the Planning Commission, the City Council nor anyone else from the City of Newark should become involved in the CC&Rs. This is between two landlords. It should not have been brought up by counsel VN, nor is it a proper concern of the Planning Commission. Whether or not the landlords can reach agreement on this

Chair Jeff Aguilar and Members of the  
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February 4, 2020  
Page 4

issue is irrelevant to the City's consideration of Fitness 19's entitlement to approval of the Conditional Use Permit.

Further, as was pointed out, one has to question whether Fitness 19 is actually a "recreational use" within the meaning of Section 8.2 of the CC&R's. The history in this matter, and well-settled principles of contract interpretation, strongly suggest that the Fitness 19 use is not. Both Anytime Fitness and Curves are in the same category as Fitness 19. If they were "recreational" uses, they should have been submitted for approval by the owner of "Parcel 1" (i.e., our clients and their predecessors in interest) in accordance with the CC&Rs. There is no evidence that VN or its predecessors ever did so. VN did not approach our clients or seek our consent before bringing Anytime Fitness to the Four Corners center in 2012. These facts and circumstances have a direct bearing, as it is a "cardinal rule of construction that when a contract is ambiguous or uncertain *the practical construction placed upon it by the parties before any controversy arises as to its meaning affords one of the most reliable means of determining the intent of the parties.*" *Bohman v. Berg* (1960) 54 Cal.2d 787, 795 (emphasis added; also noting that the "practical construction" is the "best evidence of what was intended").

And even if one assumes that Section 8.2 applies here – and it does not – the same evidence noted above prevents VN from enforcing it against Fitness 19. Inasmuch as the VN parties failed to comply with this provision of the CC&Rs, they have waived the provision and are estopped from asserting it against our clients.<sup>1</sup> It has been the law for over a century that a waiver of the right to enforce a covenant occurs where substantially all of the landowners have acquiesced in a violation of the covenant, resulting in its abandonment. *Bryant v. Whitney* (1918) 178 Cal. 640, 643. Put another way, "where a party has violated the restrictions in his own deed, he cannot enjoin violations by others . . ." *Diederichsen v. Sutch* (1941) 47 Cal.App.2d 646, 650. This legal principle applies with full force to VN here.

Moreover, a court would likely reject any purported attempt by VN to enforce Section 8.2 under the unclean hands doctrine. That doctrine "demands that a plaintiff act fairly in a matter for which he seeks a remedy. He must come into court with clean hands, keep them clean, or he will be denied relief, regardless of the merits of his claim." *Aguayo v Amaro* (2013) 213 Cal.App.4<sup>th</sup> 1102, 1110, quoting *Kendall-Jackson Winery, Ltd. v. Superior Court* (1999) 76 Cal.App.4<sup>th</sup> 970, 978. The unclean hands doctrine comes into play, and will bar relief here, because there is such a "direct relationship" between VN's misconduct in failing to seek our

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<sup>1</sup> It is worth noting that VN has likewise waived Section 8.2's purported exclusion of "educational" uses from the Four Corners center. It has leased portions of the center to three educational use tenants – The Tutoring Club, Masako Music Studio and Anqi Chinese School – without ever seeking or obtaining our clients' consent pursuant to the CC&Rs. And not only that. VN's pattern of conduct in advancing its own economic self-interests without complying with Section 8.2 is further evidence of its unclean hands with respect to the Fitness 19 CUP application.

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clients' consent to Anytime Fitness under Section 8.2, while now purporting to rely on the very same provision of the CC&Rs vision keep Fitness 19 out of the Four Corners center, that it "would be inequitable to" enforce that provision against our clients. *Kendall-Jackson, supra*, 76 Cal.App.4<sup>th</sup> at 979 (citing numerous cases applying the unclean hands doctrine to circumstances that "involve the very [same] subject matter and affect the equitable relations between the litigants").

The well-documented decline of bricks-and-mortar retail stores since the CC&Rs were prepared and recorded more than 30 years ago also has legal consequences. Specifically, these changed conditions in the retail marketplace fatally undermine VN's contention that Section 8.2 of the CC&Rs still applies to and may be enforced in the current circumstances. California has long recognized that a covenant imposing a building or use restriction "will not be enforced where changed circumstances in the neighborhood have rendered the purpose of the restrictions obsolete." *Marra v. Aetna Construction Co.* (1940) 15 Cal.2d 375, 378, citing *Downs v. Kroeger* (1927) 200 Cal.743; see also, *Wolff v. Fallon* (1955) 44 Cal.2d 695, 697-698 (affirming trial court judgment declaring covenant restricting property to residential purposes was not binding; citing numerous adverse changes in circumstances since subdivision was created in 1913, including that "there was no ready market for the lot as residential property").

For all of these reasons, the Planning Commission should follow the advice of City staff and approve the Fitness 19 CUP without involving itself further in this "private property owner issue."

### **Opposing Testimony**

A suggestion was made at the January 14 hearing that our clients should be bringing in a nonprofit medical facility to the center. Please see attached the list of prohibited use exclusions set forth in Exhibit G to the Sprouts Lease. You will note that Paragraph 1(ff) specifically precludes putting this sort of tenant into the vacant premises at 6203 Jarvis Avenue. (See Exhibit G at p.2.)

It is also noteworthy that Sprouts expressly agreed, in Exhibit G, that our clients could lease the vacant premises for "(ii) a gym or health club." (See Exhibit G at p. 4.) The question of whether Sprouts has approved having the Fitness 19 facility next door to its store was raised briefly at the January 12 Planning Commission meeting. The answer to that question is yes. As Exhibit G makes clear, Sprouts effectively granted that approval as part of the negotiations for its lease. And Sprouts reaffirmed that it has "no objections" to a fitness user in the shopping center in a September 19, 2019 letter to our clients (copy enclosed).

In order to get the upscale grocery store tenant that the City of Newark wanted, it was necessary for ownership to agree to this list of exclusions. This list of exclusions was made

Chair Jeff Aguilar and Members of the  
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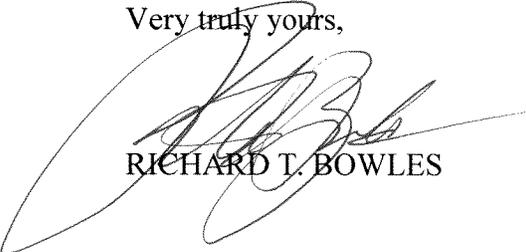
known to Assistant City Manager Terrence Grindall prior to the lease being executed and was implicitly, if not expressly, approved by the City. This occurred in conjunction with Mr. Grindall's earlier assurances to our clients that the City would approve Fitness 19 if we delivered Sprouts, as we have previously pointed out.

There was also concern raised by the owner of Anytime Fitness that Fitness 19 might impact his business. While we do not believe that Fitness 19 is directly competitive with Anytime Fitness, even if it is and even if it is predictable that Anytime Fitness' business would be impacted, these facts are not relevant considerations in determining whether to grant the CUP application. Indeed, the fact that Anytime Fitness is, and Curves was, at the Four Corners center after the City approved a CUP for Anytime Fitness, is confirmation that this CUP should be granted. As we have pointed out in prior letters, the City cannot selectively grant and deny CUP approvals in a manner which unlawfully discriminates against and takes away our clients' constitutional and legal property rights.

#### **Conclusion**

We appreciate the time the City and the Planning Commission have taken to address this matter. We believe it is time for the approval to be issued. There is no appropriate and sustainable basis for rejecting the Fitness 19 application. We look forward to prompt resolution. Thank you.

Very truly yours,



RICHARD T. BOWLES

RTB:dja

Enclosures

cc: David J. Benoun, City Manager (w/encls.) – via email  
Steven Turner, Community Development Director (w/encls.) – via email  
Art Interiano, Deputy Community Development Director (w/encls.) – via email

**EXHIBIT 1**



January 16, 2020

Mirchell Wade Gardner  
g2 design/build inc.  
150 Linda Vista Avenue  
Pasadena, CA 91105

**Re: Response to Comments on the Parking Review for 6203 Jarvis Avenue in the City of Newark**

Dear Mr. Gardner,

This letter was prepared to respond to comments on the Parking Review for 6203 Jarvis Avenue, dated June 21, 2019. The comments received on the Parking Review are incorrect in implying the length of time typically spent by a patron in a fitness center is a factor in the parking analysis. The fact is the parking analysis is based on the total parking demand at various times of the day and week combined with forecasts of the peak parking demand for the land uses. In other words, the length of time that people are parked is not a factor in the analysis, which is based on a snapshot of the peak parking occupancy that was recorded in the surveys combined with the forecast increase in the peak parking demand associated with the Fitness 19 proposal. The length of time that people park is not a factor as the analysis is based on the peak parking available at various times during the week.

The comments also incorrectly suggest that "*Assumptions were made about the availability of parking demand based, in part, on the typical time occupying a parking space spent by a patron of a supermarket.*" Again, this is simply not true as the assumptions are all based on the maximum parking demand and occupancy levels at various times of the day and week, not on the length of time that patrons spend at various specific land uses (i.e. supermarkets, fitness centers, restaurants, etc.) The assumptions on parking are from the 5th Edition of the Institute of Transportation Engineers Parking Generation Manual (dated January, 2019). The Parking Generation Manual states the following about the purpose of its parking demand data: "*The purpose of the Parking Generation Manual is to present data and information that will enable an analyst to forecast parking demand by time of day on a specific day of the week, at a specific land use.*"

Please note that when shared parking calculations are provided, time of day factors are normally derived from shared parking data provided by the Urban Land Institute (ULI).<sup>1</sup> For a

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<sup>1</sup> *Shared Parking*, Second Edition, Urban Land Institute, Washington D.C., 2005.

supermarket the data indicates the peak parking demand occurs from about 2:00 PM to 5:00 PM.<sup>2</sup> For a fitness center the data indicates the peak parking demand occurs from about 5:00 to 7:00 PM.

If you have any questions or need additional information please do not hesitate to contact me.

Sincerely,



Stephen C. Abrams  
President, Abrams Associates  
T.E. License No. 1852

---

<sup>2</sup> *Shared Parking*, Second Edition, Urban Land Institute, Washington D.C., 2005.

**EXHIBIT 2**



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**BROWMAN DEVELOPMENT COMPANY, INC.**  
Development • Leasing • Management

January 24, 2020

City of Newark Planning Commission  
37101 Newark Boulevard  
Newark, CA 94560

Re: Fitness 19 Application

Dear Chair Aguilar and Members of the Planning Commission:

Our company, Browman Development Company, Inc. (BDC) is the owner of the CVS, Fitness 19 and Daiso anchored property in downtown Dublin at 7201 Regional Street. BDC is a Walnut Creek based retail development company developing and acquiring shopping center properties since 1989 with over 4 million square feet of commercial properties in our portfolio. Our specialty is acquiring and re-developing retail development properties in strong bay area communities like Newark.

In 2014, our company acquired the CVS anchored Dublin property. Upon our acquisition of the property, CVS and its predecessors (Longs Drugs and Thrifty Payless) had occupied the 60,000 square foot property as a pharmacy since 1969. CVS was leasing the entire building but only occupying 50% of the space and it was severely under-utilized.

We worked diligently over the next couple years with the City of Dublin and our leasing team to downsize CVS (at their request) to 28,000 square feet, and attract quality alternate users to bring much needed customer traffic to the property and surrounding shopping center. After a 24-month marketing effort, we were very excited to secure a long-term commitment from Fitness 19 and Daiso to our retail center.

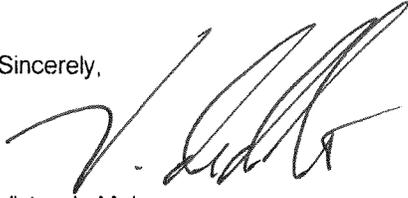
The retail industry has changed dramatically over the last 10 years, with thousands of store closures especially big box stores and the increasing strength of e-commerce retail replacing bricks and mortar retail. We've discovered, fitness is the ideal use to partner with traditional retailers like pharmacy, general merchandise and high-quality grocery users to attract critical customer traffic. We work with all the major neighborhood retailers (Target, Safeway, CVS, Walgreens, Kohl's) and they are supportive of fitness uses co-anchoring shopping centers because they bring daily trips to the shopping center, increase sales and drive traffic.

We've witnessed this first hand, as Dublin Fitness 19 patrons are shopping at CVS often before or after their work out, bringing new customers to CVS as well as repeat trips for existing customers. The CVS manager has personally conveyed to me the nice benefit of Fitness 19 patrons consistently visiting their store and helping increase sales.

As we are working on current and future retail development/redevelopments, quality fitness operators like Fitness 19 are one of our first marketing outreach efforts because they drive traffic to our shopping center which benefit all retailers. Fitness 19 has been a quality addition to our Dublin property and we look forward to partnering with them throughout the Bay Area on additional opportunities.

I would look forward to answering any questions about our experience working with Fitness 19 in our Dublin property and the positive benefits they've brought not only to our retail property but the surrounding shopping center and downtown Dublin.

Sincerely,

A handwritten signature in black ink, appearing to read 'V. de Melo', written in a cursive style.

Victor de Melo  
*Senior Vice President*  
Browman Development Company, Inc.  
(925) 588-2225 Direct  
(925) 588-2230 Fax  
[vdemelo@browmandevelopment.com](mailto:vdemelo@browmandevelopment.com)

**EXHIBIT 3**

# Gelson's

To whom it may concern:

January 29,2020

Re: Fitness 19

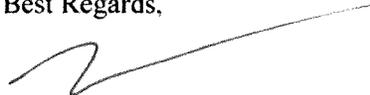
Hello, I am Michael Smith Director of Real Estate for Gelson's Markets. Let me provide some information for anyone unfamiliar with our company. We operate 27 upscale grocery stores throughout Southern California. The company is known as the premier grocery chain known for exceptional customer service, superior produce, highest quality meat, and unmatched selection of wine and liquor. We strive to provide value to our customers and many customers consider our shopping experience as the Nordstrom or grocers.

One of our recent store openings was in the Oakbrook Plaza in the upscale suburban community of Thousand Oaks, CA. We purchased the Lease out of the Haggens bankruptcy of a former Haggens / Alebertson's store. The center is owned by Regency Centers which controls hundreds of retail centers across the U.S. However, we leased this box with the intentions of demising the space to fit our prototype of 35,000 SF so we didn't need the excess space of approximately 9,000 SF. Fitness 19 was immediately interested in the space, but at that moment Gelson's didn't believe a "discount" gym would bring the customer base we felt was complimentary to the shopping center but especially an upscale grocer. We attempted to sublease the surplus space to various retailers for a couple years. We were never able to reach agreeable terms with any of traditional retailers. In the end, we visited a local Fitness 19 and actually one of our company executives worked out at Fitness 19 and I saw a first-class product that was not reflective of the discount price. The lack of interest from other retailers and the impressive tenant improvement we saw at Fitness 19 as a good fit.

Fitness 19 has now been open for almost a year. The club is beautiful – nicer than the other store we visited three years ago. Even better our sales and customer counts have improved. The new gym attracts hundreds of people each day to the shopping center and we see Fitness 19 members frequently cross-shopping at Gelson's. A Core Power yoga studio also opened recently on the other side of our space and we are seeing a benefit from their tenancy as well.

The takeaway; as a landlord of Fitness 19 is an first class company and we find it general benefits continuing and if we had other excess spaces in our company future I would not hesitate to reach out to Bob at Fitness 19 to co-tenant with our brand. They have been a meaningful traffic generator for the shopping center. Please don't hesitate to give me a call if you had any additional questions at 818.613.4118

Best Regards,



Michael Smith

Gelson's Markets

**EXHIBIT 4**



## MONEY

# Store closings pile up: With 1,200 closures already announced, retailers face another grim year

**Nathan Bomey** USA TODAY

Published 12:01 a.m. ET Jan. 24, 2020 | Updated 9:13 a.m. ET Jan. 24, 2020

*Corrections & Clarifications: An earlier version of this story misstated the percentage decline in Kohl's same-store sales for the period of November and December.*

The start of a new decade isn't offering much hope for beleaguered retailers.

Traditional chains are looking increasingly frail less than a month into 2020, with vacancies piling up and few near-term prospects for a turnaround.

National chains Macy's, J.C. Penney, Papyrus, Express and Pier 1 Imports, as well as other retailers, have collectively announced 1,218 store closures this year, according to global marketing research firm Coresight Research.

The fallout comes after a year in which retailers closed more than 9,200 stores, according to Coresight. Those included the liquidation of Payless ShoeSource, Fred's, Gymboree and Charlotte Russe and mass closures by Family Dollar, Forever 21, Charming Charlie, Sears, Kmart, A.C. Moore and GameStop.

**Save better, spend better:** Sign up for The Daily Money and get all the advice direct to your inbox

Retailers will likely announce plans to close more than 100 million square feet of space in 2020 for the fourth straight year, projected real estate data tracker CoStar. That's the equivalent of about 562 Walmart supercenters.

"This year will generally be more of the same," said Robin Trantham, a consultant for CoStar. "We expect many companies – and many sizable companies – to announce closures."

To be sure, it's common for the industry to face a reckoning of sorts early in the year following the do-or-die holiday shopping season. About half of closures are typically announced in the first quarter, according to CoStar.

But the cascading nature of the recent closure announcements reflects a deepening crisis for retail. Some recent closure announcements include:

- Home goods retailer Pier 1 Imports announced plans to close up to 450 locations, or nearly half of its stores.
- Schurman Retail Group announced the closure of its 246 stores, including stationery and greeting card chains Papyrus and American Greetings.
- Fashion retailer Express announced plans to close 91 locations, including 31 stores by the end of January and 35 by the end of January 2021.
- Department store chains Macy's and J.C. Penney are closing 29 and six stores, respectively.
- Bed Bath & Beyond is closing 60 locations, including 40 of its namesake locations.

With too many stores in the U.S. and chains trying to figure out the right approach, "the current decade will continue to see store closures and a repurposing of retail real estate as the retail landscape adapts to the digital era," Coresight Research analyst Marie Driscoll said in an email.

## Off to a bad start

As the new year starts, many stores are already looking ghostly. In the third week of the month, foot traffic to stores fell 4.9% compared with the same period last year. And it was down 1.4% compared with the previous week, according to Cowen retail analysts.

That came despite nice weather, which typically encourages shopping. Average temperatures were 3.8 degrees warmer last week than the same week a year earlier, and they were 6.8 degrees warmer than usual for this time of year.

Don't expect conditions to get much better for the retail sector later in the year, either.

The second half of 2020 poses particular challenges for the industry, according to Morgan Stanley research analyst Kimberly Greenberger, who tracks specialty retailers, department stores and footwear.

It will be "tricky with the election looming" for retailers to stand their ground, since the presidential election could cause consumers to get skittish about spending, Greenberger wrote Wednesday in a research note.

Although the "fundamental consumer backdrop is healthy," people's spending on discretionary items "is likely to be challenged," Greenberger wrote.

**Is your store on the list?:** J.C. Penney closing more stores and a call center

## **Mall foot traffic underwhelms: Express closing 91 stores as fashion retailer grapples with declining sales**

Even some chains that were recently thought to be on solid ground are encountering turbulence. The proposed split of Old Navy from its troubled counterpart, Gap, was called off last week amid a "lackluster performance" for Old Navy, Cowen retail analyst Oliver Chen wrote in a research note.

"The company has a lot of work ahead to drive consistent performance," and figure out the right number of stores to keep open," Chen said of Old Navy.

## **Department stores falter**

Of course, digital threats remain at the heart of the retail industry's crisis. E-commerce made up 11.2% of total retail in the third quarter of 2019, up from 4.2% during the same period in 2010, according to financial data firm Refinitiv.

Department stores, which historically set themselves apart with their wide variety of merchandise, are particularly threatened by Amazon and other digital marketplaces.

Sears and J.C. Penney, in particular, are facing the fight for their lives in 2020. Sears barely survived its recent bankruptcy filing but almost immediately resumed store closures after emerging from Chapter 11 last February.

Some retailers are taking an if-you-can't-beat-'em-join-'em approach. Department store chain Kohl's won praise last year when it announced a returns partnership with Amazon that was hailed as effective insulation from digital competition because of the foot traffic it would presumably create.

But the significance of that deal is being called into question after Kohl's surprised investors this month by reporting a same-store sales decrease of 0.2% in November and December. The company experienced what CEO Michelle Gass called "softness" in women's apparel, "which we are working with speed to address."

In an effort to lure shoppers into the store, department stores put an average of 74% of their merchandise on sale in 2019, according to Refinitiv.

## **Hases and have-nots**

It's not all doom and gloom for the retail sector. Retailers have announced about 500 more openings than closures so far this year, Coresight Research said.

And some retailers are capitalizing on the demise of others.

Makeup chain Ulta Beauty is projected to pick up sales as department stores continue to wither, according to Oppenheimer equity analyst Rupesh Parikh. Ulta could benefit if J.C. Penney accelerates store closures, which would affect the Sephora beauty shops located within the ailing department store.

In a world of haves and have-nots, the haves are still flourishing.

Namely, Walmart and Target are still in great shape, with sales growing and profits rising for discount chains. And specialty retailers like Five Below continue to lure shoppers with low prices and convenient options.

But even they're not immune. Target reported same-store sales growth of 1.4% in November and December, which was "below expectations," the company said earlier this month. And Five Below reported weaker-than-expected holiday season as same-store sales fell 2.6%.

For retailers to thrive in 2020, they'll have to place an emphasis on "building customer loyalty via authenticity and innovation through inspiring product, relevant marketing and customer-centric stores," Chen wrote.

And they need to place an emphasis on a smooth customer experience between their digital and physical operations, including options like buy-online-pick-up-in-store.

Customers who shop in a physical store become more likely to shop at the store online, and the other way around, according to a recent study by the International Council of Shopping Centers.

For every \$100 a customer spends online with a retailer, they spent \$131 in-store with the same retailer within a 15-day period, according to the ICSC report.

It also works in reverse. After spending \$100 in a physical store, the average customer spends \$167 online with the same retailer, according to the study.

"Though many are inclined to pit e-commerce against physical retail, those retailers that offer their customers both options – a choice of shopping online and in stores – tend to boost sales in both arenas," ICSC reported.

Follow USA TODAY reporter Nathan Bomey on Twitter @NathanBomey.

**EXHIBIT 5**

## EXHIBIT G

### PROHIBITED USES AND EXCLUSIVE RIGHTS

1. **Prohibited Uses.** The following uses (collectively, "**Prohibited Uses**") are prohibited in any portion of Parcel 1:

- a. any so-called single price point discount or discount dollar stores (such as Dollar Tree, 99 Cents and More, Family Dollar, Dollar General, or any stores with a similar business plan or similar operation);
- b. any use causing unreasonably loud noises (including any business using exterior loud speakers);
- c. manufacturing facility;
- d. dry cleaner (excluding, either (i) 1 dry cleaner which does not use perchloroethylene or any other Hazardous Substances or (ii) 1 facility for drop off and pick up of clothing cleaned at another location);
- e. any facility for the sale, lease or rental of automobiles, trucks, motorcycles, recreational vehicles, boats or other vehicles;
- f. car wash, tire store, automobile repair shop or service station or any facility storing or selling gasoline or diesel fuel in or from tanks;
- g. used clothing or thrift store, a "Salvation Army" or "Goodwill" type store or similar business, or a "second hand" store where principle business is selling used merchandise;
- h. a donation drop-off facility;
- i. a "surplus" store selling under stock or overstock merchandise or liquidation outlet;
- j. amusement center, carnival, virtual reality, laser tag, jump/trampoline facility, game arcade, or a children's recreational facility or play center of any kind, including, but not limited to, concepts such as "Boomerang's," "Funtastic," "Chuck E. Cheese," "Jump Zone" and "Peter Piper Pizza", or other stores operating under similar business plans and operations;
- k. spa or massage parlor (excluding (i) 1 "Massage Envy" or similar therapeutic massage retailer operating in a first-class manner, and (ii) 1 nail salon occupying no more than 2,500 square feet of Gross Floor Area);
- l. adult book shop or adult movie house;
- m. mortuary or funeral parlor;
- n. coin operated laundry;
- o. cocktail lounge, bar or tavern or sale of alcoholic beverages, whether or not packaged (excluding the sale of alcoholic beverages in conjunction with the operation of a

restaurant not prohibited under this Lease, provided such use may not be located within a 300 foot radius of the Premises);

- p. night club;
- q. cinema or theater;
- r. Intentionally deleted;
- s. bowling alley, pool hall, or skating rink;
- t. animal raising or storage facility (except incidental to a full-line retail pet supply store);
- u. pawn shop, auction house, flea market, swap meet, or junk yard;
- v. the drilling for and/or removal of subsurface substances, dumping, disposal, incineration or reduction of garbage or refuse, other than in enclosed receptacles intended for such purposes;
- w. hotels or lodging facilities intended for human use;
- x. church;
- y. gun range or shooting club;
- z. day-care facility, educational facility or School (defined below) (excluding 1 "Sylvan," "Kumon" or similar tenant operating in a first-class manner, provided such use may not occupy more than 2,500 square feet of Gross Floor Area); for purposes of this provision, "School" means a beauty school, barber college, reading room, place of instruction or any other operation serving primarily students or trainees rather than retail customers;
  - aa. drive-throughs except in the location(s) shown on Exhibit A;
  - bb. any restaurant;
  - cc. any facility related to the occult sciences, such as palm readers, astrologers, fortune tellers, tea leaf readers or prophets;
  - dd. frozen food locker or sales facility, or milk distribution center;
  - ee. nursing home, old age center, or governmental facility (other than a post office), recruiting center or employment center;
  - ff. any office, medical and/or professional uses; any office, medical, and/or professional uses occupying, collectively, more than 10% of the Gross Floor Area of the Shopping Center; and any single office, medical, and/or professional use occupying more than 2,500 square feet of Gross Floor Area; provided however, in no event shall Parcel 1 contain an urgent care facility or an abortions clinic;

gg. any tobacco store, lounge or electronic cigarette type store or medical or otherwise legalized marijuana dispensary.

To determine whether a use which is otherwise prohibited within a specified radius of the Premises is in fact in violation of such radius restriction, the measurement taken shall be the distance from the building (from the point nearest the Premises) from which such alleged Prohibited Use is occurring to the point of the Premises closest to such building. To the extent this Paragraph 1 expressly permits any of the Prohibited Uses to be conducted by a limited number of users, Existing Tenants shall count towards such limit.

Except as set forth in the last sentence of this Paragraph 1, the Prohibited Uses shall not apply to any Existing Tenant; provided that to the extent Landlord has the right to consent to a change in use, sublease or assignment, Landlord shall withhold such consent if the resulting use would violate a Prohibited Use. "Existing Tenant" means a Parcel 1 tenant listed on Exhibit G-3 (and its permitted subtenants, successors and assigns) which is party to an effective lease with Landlord (or Landlord's predecessor) signed prior to the Effective Date. Notwithstanding the foregoing, the prohibited uses set forth on Exhibit G-2 are also deemed "Prohibited Uses" and shall apply to all Parcel 1 tenants and occupants.

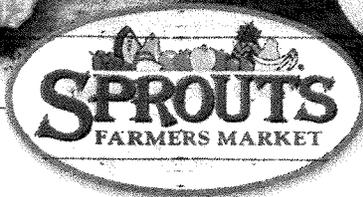
**2. Tenant's Exclusive Rights.** From and after the Effective Date, Tenant shall have the exclusive right in the Building to conduct the operation and sale, either singly or in any combination, of any of the following activities and/or merchandise: (i) the operation of a grocery store, meat or seafood market or produce market, or the sale of any such items; (ii) the sale of vitamins and supplements, ethnic foods, natural or health food, or packaged ice cream; (iii) the sale of natural cosmetics, natural health or beauty products; (iv) the sale of packaged beer and wine for off-premises consumption; and (v) the operation of a full service bakery and/or over-the-counter delicatessen offering sliced or butchered meats and cheeses for off-premises consumption (all of which are included in and referred to as "Tenant's Exclusive"), and all other Parcel 1 tenants or occupants are prohibited from engaging in Tenant's Exclusive except on an Incidental Basis (defined below), other than fresh meat, seafood and produce for which there is no exception. "Incidental Basis" means the area dedicated to the sale of such items occupies the lesser of: (a) 250 square feet of Gross Floor Area; or (b) 3% of the sales area of the subject premises; provided not more than 2 linear feet of retail selling space shall be dedicated to the display and sale of any one category of ancillary products. Tenant's Exclusive shall not apply to any Existing Tenant whose lease does not prohibit the use of its premises for the portion of Tenant's Exclusive at issue; provided that to the extent Landlord has the right to reasonably consent to a change in use, or assignment, Landlord agrees to withhold such consent if the resulting use would violate Tenant's Exclusive.

If Landlord fails to impose Tenant's Exclusive or any Prohibited Use pursuant to the lease or other occupancy agreement of any occupant of Parcel 1, and such violation continues for 30-days after Tenant remits written notice thereof to Landlord, then, as Tenant's sole remedy: (i) from and after the commencement of the violation until the violation is cured, pay the reduced sum of 50% of Base Rent in lieu of Rent otherwise due under this Lease for such period; or (ii) Tenant may terminate this Lease upon written notice to Landlord at any time prior to the cessation of such violation. If Tenant exercises its termination right, this Lease shall terminate as of the date set forth in such Notice.

Notwithstanding anything to the contrary contained in this Lease, neither Tenant's Exclusive nor the Prohibited Uses shall restrict or limit Landlord from leasing space on Parcel 1 for the following specific uses: (i) a full service pharmacy or drug store such as CVS or Walgreens; (ii) a gym or health club; and (iii) a discount apparel store such as Ross.

**3. Limitation on Tenant Remedies.** If Landlord properly imposes Tenant's Exclusive or any Prohibited Use by including it in an occupant's lease or other occupancy agreement for any portion of Parcel 1, and if such occupant violates Tenant's Exclusive or any Prohibited Use, Tenant may give Landlord written notice of such violation, and as long as Landlord diligently and in good faith attempts to cause the occupant to cease such violation, Tenant shall have no rights or remedies against Landlord based upon such violation, even if Landlord is unsuccessful in such lawsuit.

**EXHIBIT 6**



Theodore E. Frumkin II  
Chief Development Officer  
SFM, LLC  
5455 E. High Street, Suite 111  
Phoenix, Arizona 85054  
(602) 814-8016

September 12, 2019

Via Email (steven@teammavronmihalis.com)

6203 Jarvis LLC  
1021 Valle View Court  
Novato, CA 94945

Re: **PROPOSED FITNESS USE IN THE SHOPPING CENTER**  
Shopping Center Lease by and between 6203 Jarvis LLC ("Landlord"), and SFM, LLC ("Tenant") for Sprouts Farmers Market Store #424 located in Newark, CA ("Shopping Center")

Dear Mr. Mavronmihalis:

This letter is in response to Landlord's request for Tenant's consent to leasing space in the Shopping Center to a fitness user.

Tenant has no objections to the use of the Shopping Center for a fitness use.

Should you have any questions, please contact Janet Young at 602-682-1516 or [janetyoung@sprouts.com](mailto:janetyoung@sprouts.com).

Sincerely,

Theodore E. Frumkin II  
Chief Development Officer



Richard T. Bowles	William T. Nagle
Michael P. Verna	Cheryl A. Noll
Richard A. Ergo	Christopher D. Jew
Bradley R. Bowles	Jonathan W. Lee
Cathleen S. Huang	Jin Im-Saeteurn
Robert I. Westerfield	Christopher M. Wolcott
K. P. Dean Harper	David A. Goldstein
Kenneth B. McKenzie	Thomas V. McCarrick
Jason J. Granskog	Andrea L. Tool
Lawrence D. Goldberg	Gerald C. Kipper
	Alexandrea M. Tomp

Of Counsel  
Bruce C. Paltenghi  
David F. Abele

March 16, 2020

**VIA E-MAIL AND U.S. MAIL**

David J. Benoun  
City Manager  
Kristopher Kokotaylo  
City Attorney  
Steven M. Turner  
Community Development Director  
City of Newark  
37101 Newark Boulevard  
Newark, California 94560  
[City.manager@newark.org](mailto:City.manager@newark.org)  
[City.attorney@newark.org](mailto:City.attorney@newark.org)  
[Steven.Turner@newark.org](mailto:Steven.Turner@newark.org)

**Re: City Council Appeal Hearing – Fitness 19 Conditional Use Permit Application  
6203 Jarvis Avenue, Newark**

Dear Mssrs. Benoun, Kokotaylo and Turner:

This letter is written in advance of the upcoming hearing before the Newark City Council, on Thursday, March 26, 2020. At that time the City Council will consider the appeal of VN Investment Group, LCC (“VN”) from the decision of the Planning Commission to approve the granting of a Conditional Use Permit to Fitness 19.

For the reasons set forth below, VN’s appeal is without merit. Its appeal should be denied so that the Fitness 19 project can finally move forward.

Substantial evidence supports the recommendations of City staff, and the unanimous vote and findings of the Planning Commission, that (1) the Fitness 19 project is categorically exempt from CEQA; (2) there is ample parking in the Four Corners shopping center, even under peak hour demand conditions, to accommodate Fitness 19 and other uses in the center; and (3) the record in this case overwhelmingly supports all of the findings for granting of a CUP set forth in Section 17.35.060 of the Newark Municipal Code.

**We respectfully request that this letter, and all enclosures to this letter, be included in the Staff Report and provided to all members of the City Council. Thank you.**

David J. Benoun  
Kristopher Kokotaylo  
City of Newark  
March 16, 2020  
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### **1. The Fitness 19 Project Is Categorically Exempt From CEQA.**

The February 11, 2020 Staff Report to the Planning Commission states, correctly, that “[t]his project is exempt from CEQA per 15301 Existing Facilities in the proposed [Fitness 19] use is would be located in an existing building where only minor alterations are proposed.” See CEQA Guidelines at 19 CCR Section 15301.

Indeed the City, in previously approving CUPs for Anytime Fitness and Curves – both tenants **located on VN’s property** in the Four Corners center – determined that they were CEQA exempt. This fact was recently verified by the City’s Deputy Community Development Director, Art Interiano, in his March 12, 2020 e-mail to the applicant, Mitchell Gardner (copy enclosed as **Exhibit 1** hereto). As Mr. Interiano stated: “Yes, **both of those were exempt from CEQA when they were approved in the past with the same exemption classification**” (emphasis added).

Two observations are appropriate here. First, VN’s position in this appeal regarding CEQA is not only dead wrong; it is also extremely hypocritical in view of the exemptions previously sought and received on behalf of Anytime Fitness and Curves. Second, there is no basis in law or fact for the City to treat Fitness 19 differently, and deny it the CEQA exemption to which it is entitled. Such discriminatory treatment would be unjust. It would also be legally unsustainable and expose the City to substantial and unnecessary litigation risks.

### **2. The Abrams Parking Study Confirms There Is Ample Parking To Accommodate Fitness 19 In The Four Corner Shopping Center.**

Any questions regarding the availability of sufficient parking spaces in the shopping center were put to rest at the February 11, 2020 Planning Commission hearing. To assist the City Council on this point, we enclose copies of the following documents:

- (a) The supplemental letter report dated February 11, 2020 by Stephen C. Abrams of Abrams Associates Traffic Engineering, Inc. (**Exhibit 2** hereto); and
- (b) A verbatim transcript of Mr. Abrams’ testimony at the February 11, 2020 Planning Commission hearing (**Exhibit 3**).

The following excerpt from Mr. Abrams’ testimony is compelling and uncontradicted by VN, which has presented no evidence to the contrary:

Mr. Abrams: “**But what our latest data shows, and I want to make sure you know, is it essentially corroborates the several previous surveys days of previous weekday and weekend surveys we’ve done.** Which show the area closer to Newark

David J. Benoun  
Kristopher Kokotaylo  
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Blvd, were kind of next down the parking area, gets up to about 72% occupancy which is relatively high for a shopping center **but the remainder of the shopping center has significant excess capacity. Overall, the center, you know again, about 50%, generally has over 300 spaces available at any time of day.** But you wouldn't know that if you were over by the restaurants because the parking is further afield, you know, behind some buildings, alongside Sprouts. **Even the area in front of Sprouts, where Fitness 19 is located, generally has over 90 parking spaces available even during the peak time that we surveyed."**

See Abrams Transcript at pp. 2-3 (emphasis added). This evidence was highly persuasive to the Planning Commission. In follow-up questions to Mr. Abrams, Commission Chairman Jeff Aguilar referred to parking survey data showing that "we have 105 vacant spaces around 5:00 pm – i.e., during the peak hour demand for parking at Fitness 19 – and correctly observed "that's a lot of spaces" open to accommodate a future Fitness 19 gym at the Four Corners center. See Abrams Transcript at pp. 5-6.

### **3. Substantial Evidence Supports The CUP Findings In Favor of Fitness 19.**

The February 11, 2020 Staff Report to the Planning Commission, in recommending approval, states that "the proposed [Fitness 19] business is complimentary to the shopping center and complies with the CUP findings described below. . . ." The Planning Commission agreed and unanimously approved the granting of a CUP to Fitness 19.

For the benefit of the City Council, we also enclose as **Exhibit 4** to this letter a verbatim transcript of the salient remarks made by Commission Chairman Aguilar during deliberations on the project. Chair Aguilar first confirmed with staff that Curves was a tenant in the shopping center in 2012, when the City granted a CUP to Anytime Fitness. See Aguilar Transcript at pp. 1-2. He then went on, over the course of several minutes, to analyze the pertinent facts and circumstances in detail, ultimately concluding that:

"As it relates to the issuance of the CUP, I am in agreement with Staff and their required findings." Aguilar Transcript at p. 4.

Referring to the need to "check the boxes" in making the findings, Chair Aguilar noted that "we do have precedent of a CUP finding approved before, so it's not surprising that these boxes have been checked in the past" and have also been checked with respect to the Fitness 19 CUP application. *Ibid.*

With respect to parking, Chair Aguilar relied both on the Abrams study and his own observations, that the available parking is more than "adequate" and "there appears to be plenty of parking." Aguilar Transcript at p. 5.

David J. Benoun  
Kristopher Kokotaylo  
City of Newark  
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Page 4

Describing Fitness 19 as a “reputable tenant”, Chair Aguilar found that granting a CUP would clearly result in a “net benefit to the City.” He concluded: “**I think it [Fitness 19] creates vibrancy. . . . And I think we get additional foot traffic that in the end will benefit all of the businesses**” in the shopping center. “**It will benefit the City of Newark.**” Aguilar Transcript at pp. 5-6.

All of these statements and findings are clearly supported by substantial evidence. The same cannot be said for VN’s appeal.

**4. The CC&R’s Are Irrelevant. They Provide No Basis For VN’s Appeal.**

On appeal to the City Council, VN continues to assert that the CC&R’s for the shopping center require denial of a CUP to Fitness 19. VN’s position is utterly without merit.

The position of City staff here – that the CC&R’s have no bearing here – is correct and could not be clearer. Again, the February 11, 2020 Staff Report to the Planning Commission is plain: “The requirements of the CC&R’s are a private matter between the two parties” and “have no impact on staff recommendation.” The City’s position is also in line with Community Development Director Stephen Turner’s statement, at the January 14, 2020 Planning Commission hearing, that Newark, like other cities, does not “get involved in enforcing CC&R’s.”

The City Council need go no further in rejecting VN’s appeal on this ground. That said, we showed in our February 4, 2020 letter to the Planning Commission that the CC&R’s do not apply and are otherwise unenforceable against our clients on numerous grounds. For the benefit of the City Council a copy of our February 4, 2020 letter is enclosed as **Exhibit 5** hereto.

**5. The City’s Substantial Legal And Financial Exposure If The Fitness 19 CUP Application Is Denied.**

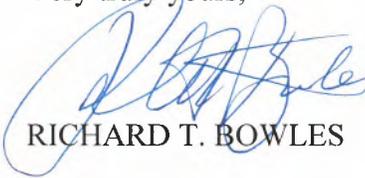
We do not wish to belabor this point, in view of Staff’s recent support for the Fitness 19 project and the unanimous Planning Commission approval. However, the fact remains that our clients will have strong, multi-million dollar claims against the City for a Fifth Amendment taking of their property, and under the Equal Protection Clause of the Fourteenth Amendment based on unlawful and discriminatory treatment, if the City Council overturns the Planning Commission approvals and denies this project. So that the City Council is fully apprised of the factual and legal basis for our clients’ potential claims, we also enclose copies of our December 5, 2019 (**Exhibit 6** hereto) and January 3, 2020 letter to the City (**Exhibit 7**).

David J. Benoun  
Kristopher Kokotaylo  
City of Newark  
March 16, 2020  
Page 5

**6. Conclusion.**

For all of the reasons stated herein, the City Council should do the right thing, deny VN's appeal and uphold the issuance of a CUP to Fitness 19. Thank you.

Very truly yours,



RICHARD T. BOWLES

RTB:dja

Enclosures

cc: Art Interiano, Deputy Community Development Director (w/encls.) – via email

**David Trotter**

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**From:** Mitchell Gardner <mitch@theg2co.com>  
**Sent:** Sunday, March 15, 2020 12:32 PM  
**To:** David Trotter  
**Subject:** FW: [External]Curves and Anytime CUPs

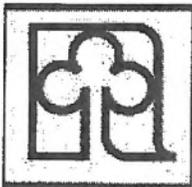
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**From:** ART INTERIANO <ART.INTERIANO@newark.org>  
**Sent:** Thursday, March 12, 2020 12:53 PM  
**To:** Mitchell Gardner <mitch@theg2co.com>  
**Subject:** RE: [External]Curves and Anytime CUPs

Mitchell,

Yes, both of those were exempt from CEQA when they were approved in the past with same exemption classification.

*Art Interiano*  
*Deputy Community Development Director*  
*City of Newark*  
*37101 Newark Blvd.*  
*Newark, CA 94560*  
*510-578-4331*



---

**From:** Mitchell Gardner <mitch@theg2co.com>  
**Sent:** Wednesday, March 11, 2020 2:23 PM  
**To:** ART INTERIANO <ART.INTERIANO@newark.org>  
**Subject:** [External]Curves and Anytime CUPs

Hi Art – Can you verify that both Curves and Anytime were CEQA exempt as part of their CUP process?

Thanks!



**g2 design/build inc**  
**mitchell wade gardner, architect/president**  
**150 linda vista avenue**  
**pasadena, ca 91105**  
**213.400.5358**

**February 11, 2020**

Mirchell Wade Gardner  
g2 design/build inc.  
150 Linda Vista Avenue  
Pasadena, CA 91105

**Re: Response to Comments on the Parking Review for 6203 Jarvis Avenue in the City of Newark**

Dear Mr. Gardner,

This letter was prepared to present a summary of the most recent parking surveys we conducted (which included the lunchtime hour) and also to respond to comments on the Parking Review we prepared for the shopping center at 6203 Jarvis Avenue, contained in a peer review letter from George Nickelson of GHD, dated February 6, 2020.

**Parking Occupancy Figure** – There was apparently some confusion about how we originally presented the results of the worst peak hour recorded for each subarea during our surveys. **Figure 1** has been improved and presents the results of our previous parking survey that had the highest occupancy we recorded during any of our surveys. Please note the aerial photo in the background is for reference purposes only, it is not intended to show parking conditions and was not used as part of the occupancy surveys. The revised **Figure 1** now identifies the space where Fitness 19 is proposed and we have removed the dashed line representing the parking ratio maintenance area from the CC&R's.

**Lunch Time Parking Analysis** – As per your request, we conducted additional surveys of parking occupancy at the shopping center with expanded hours last Friday February 7, 2020. The surveys of parking occupancy were conducted at one-hour intervals for the expanded time periods including 10-11 PM, 11-12 PM, 1-2 PM, 2-3 PM, 2-4 PM 4-5 PM, 5-6 PM, 6-7, 7-8 PM

and 8-9 PM. The attached **Table 1** presents the results from the latest parking surveys. The survey results indicated that the maximum occupancy rate for the *overall* shopping center was 51% between 12:00 and 1:00 PM (on Friday 2/7/20), when about 321 of the 630 existing parking spaces were occupied. It must be acknowledged that the new expanded surveys found the lunchtime hour was indeed just slightly higher than the surveys of the evening peak hours (51% versus 49%). The occupancy levels during the lunchtime surveys were also slightly higher than the highest occupancy levels recorded for the shopping center during the previous surveys (51% versus 50%). However, the latest surveys did fully corroborate the previous parking surveys, which showed at all times of the day (even during the lunchtime hour) the shopping center still typically has over 300 open parking spaces available for customers and employees.

**Shared Parking Considerations and Existing Vacancies** – Please note that additional analysis of shared parking has not been provided at this time because there is already more than sufficient parking available during all peak time (at least 300 spaces) based on multiple parking surveys. The only purpose of a shared parking analysis would be to show that the parking demand would be even lower than what was presented in our previous parking study. But again, that study already showed there is more than adequate parking for the shopping center (with Fitness 19) so additional shared parking calculations are not included, which also presents more a conservative review of the parking demand for the shopping center. It should also be noted that it is typically assumed there would normally be some turnover among shopping center tenants, so the occupancy levels are often below 100%. The parking demand calculations already account for the potential occupancy of the space next to Sprouts by Fitness 19. Beyond that, a parking study like this would typically only require additional adjustments if the shopping center had an unusually high level of vacancies, which our surveys found is not the case here.

**Peak Parking Occupancy for the Subareas** - The highest occupancy levels recorded for each of the parking lot subareas are presented in **Figure 2**. **Table 2** presents the latest surveys results for each subarea. As seen in this table, the highest occupancy recorded for the parking subarea in front of Sprouts and the proposed Fitness 19 was 59%, with 93 spaces available during the peak hour (12 – 1 PM). Please note the lesser used parking strip along the Jarvis Avenue side of Sprouts was never observed to be more than about 28% occupied, with at least 30 spaces available at all times during the parking surveys. Apparently the least popular

parking area is the area in the southwest corner of the shopping center, which was never observed to be more than about 17% occupied, with at least 85 spaces available at all times of the day during the parking surveys.

**Parking Occupancy Closest to the Restaurants** – It is important to note the surveys indicated the parking occupancy levels are highest in the areas closer to Newark Boulevard where most of the shopping center's restaurants are located. **Figure 3** presents the approximate locations of the shopping center's various restaurants, coffee shops, and desert shops. As shown in **Figure 2**, the subarea closer to Newark Boulevard has more parking spaces than the subarea in front of Sprouts, but it actually has a higher peak occupancy (72%) during its highest peak hour from the surveys, from 7-8 PM. But even though this area had the highest occupancy levels, there were still at least 68 spaces observed to be available at all times during the parking surveys. The Institute of Transportation Engineer's parking data indicates that restaurants typically have a higher parking demand (per square foot) than most other shopping center uses. Therefore, it is logical that the highest parking demand would occur in the areas of the parking lot closest (i.e. most convenient) to the existing restaurants. However, the parking supply for a shopping center is normally considered as a whole, and in this case there are still also well over 100 parking spaces in other areas of the parking lot. Of course these parking areas, shown in green in **Figure 2**, are a little less convenient (i.e. further away) to the various restaurants in the shopping center.

**Parking Occupancy by Ownership Area** – As requested, **Figure 4** and **Table 3** present the peak occupancy levels for the two different ownership areas of the shopping center, which we did our best to interpret from various documents. **Figure 4** shows the peak occupancy period recorded during any of the surveys (12-1 PM on 2/7/20). As seen in this figure, the parking for the ownership area associated with Sprouts and the proposed Fitness 19 was never recorded to be more than 40% full, with at least 237 of its 394 parking spaces available at all times of the day. Conversely, during the peak hour for the shopping center the ownership area that includes all the restaurants had a much higher parking occupancy than the other ownership area (69% versus 40%). However, it is important to note it still always had at least about 70 spaces of its 236 spaces available during peak times.

**Comments on the Duration of Parking** - Some previous comments received on the Parking Review are incorrect in implying the length of time typically spent by a patron in a fitness center is a factor in the parking analysis. The fact is the parking analysis is based on the total parking demand at various times of the day and week combined with forecasts of the peak parking demand for the land uses. In other words, the length of time that people are parked is not a factor in the analysis, which is based on a snapshot of the peak parking occupancy that was recorded in the surveys combined with the forecast increase in the peak parking demand associated with the Fitness 19 proposal. The length of time that people park is not a factor as the analysis is based on the peak parking available at various times during the week.

The comments also incorrectly suggest that "*Assumptions were made about the availability of parking demand based, in part, on the typical time occupying a parking space spent by a patron of a supermarket.*" Again, this is simply not true as the assumptions are all based on the maximum parking demand and occupancy levels at various times of the day and week, not on the length of time that patrons spend at various specific land uses (i.e. supermarkets, fitness centers, restaurants, etc.) The assumptions on parking are from the 5th Edition of the Institute of Transportation Engineers Parking Generation Manual (dated January, 2019). The Parking Generation Manual states the following about the purpose of its parking demand data: "*The purpose of the Parking Generation Manual is to present data and information that will enable an analyst to forecast parking demand by time of day on a specific day of the week, at a specific land use.*"

Please note that when shared parking calculations are provided, time of day factors are normally derived from shared parking data provided by the Urban Land Institute (ULI).<sup>1</sup> For a supermarket the data indicates the peak parking demand occurs from about 2:00 PM to 5:00 PM.<sup>2</sup> For a fitness center the data indicates the peak parking demand occurs from about 5:00 to 7:00 PM.

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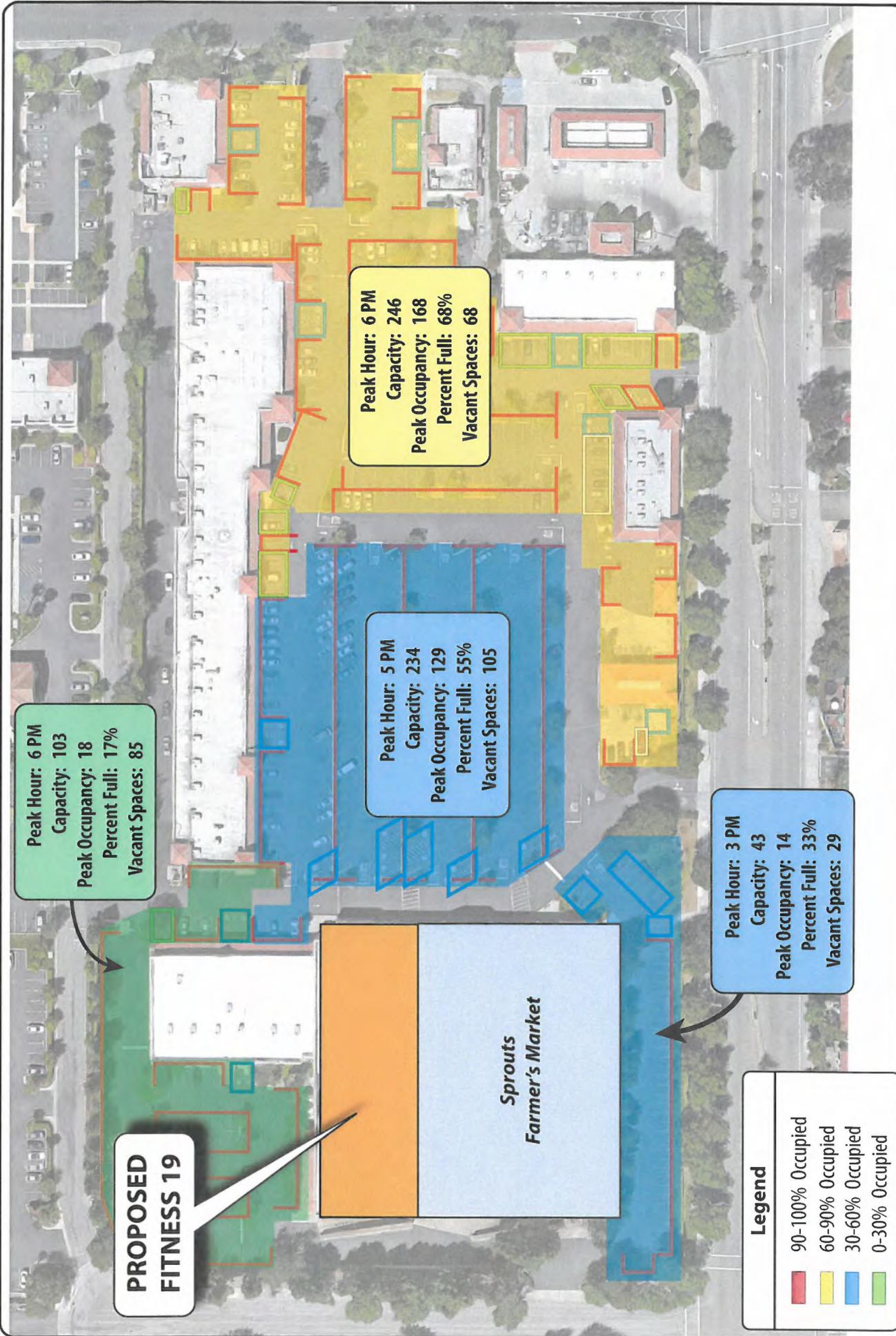
<sup>1</sup> *Shared Parking*, Second Edition, Urban Land Institute, Washington D.C., 2005.

If you have any questions or need additional information, please do not hesitate to contact me.

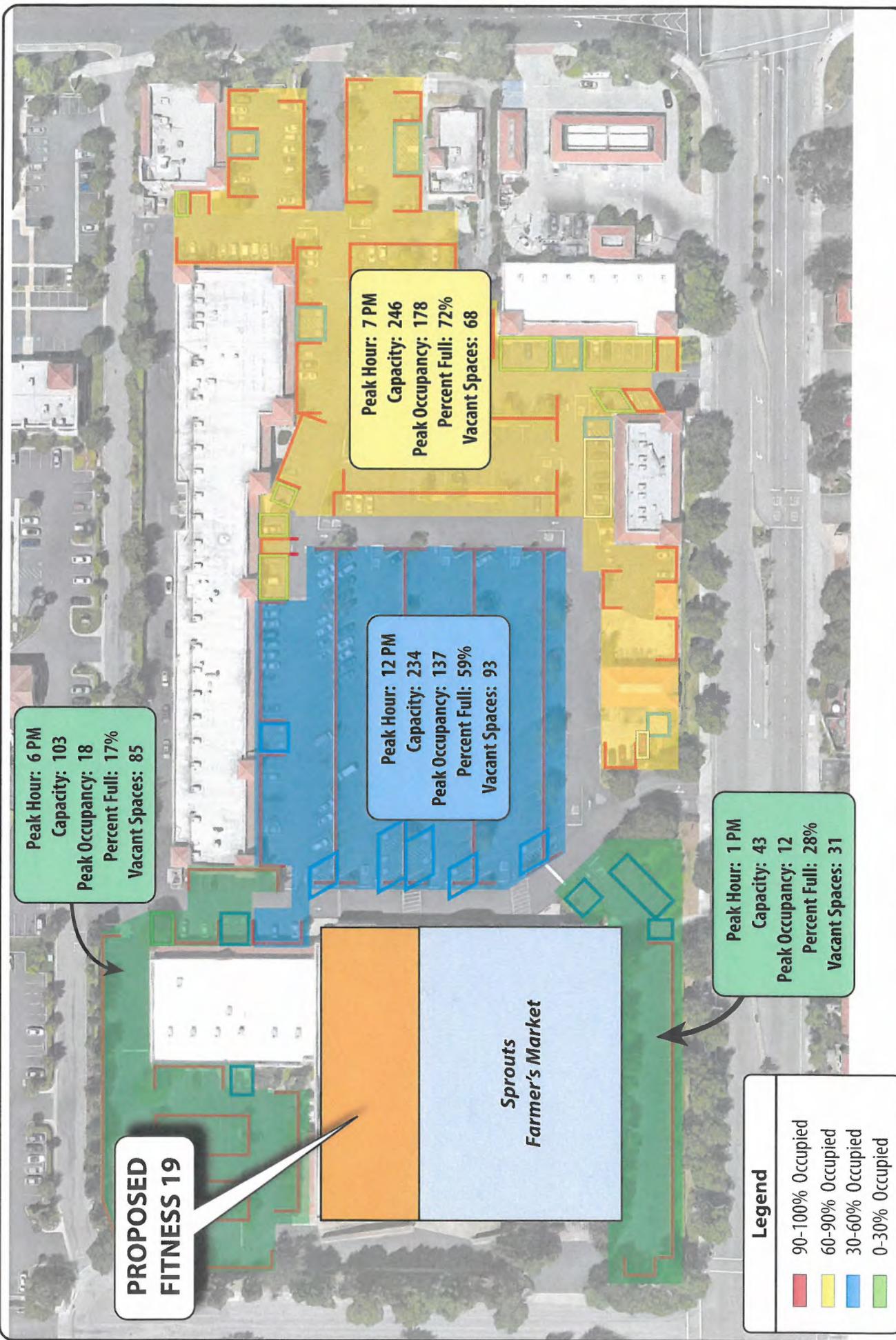
Sincerely,

A handwritten signature in black ink that reads "Stephen Abrams". The signature is written in a cursive style with a large, stylized 'S' and 'A'.

Stephen C. Abrams  
President, Abrams Associates  
T.E. License No. 1852



**FIGURE 1 | PARKING SURVEY SUMMARY - FRIDAY, MAY 18, 2018**  
**PARKING REVIEW**  
**6203 Jarvis Avenue**  
**City of Newark**



Peak Hour: 6 PM  
 Capacity: 103  
 Peak Occupancy: 18  
 Percent Full: 17%  
 Vacant Spaces: 85

Peak Hour: 7 PM  
 Capacity: 246  
 Peak Occupancy: 178  
 Percent Full: 72%  
 Vacant Spaces: 68

Peak Hour: 12 PM  
 Capacity: 234  
 Peak Occupancy: 137  
 Percent Full: 59%  
 Vacant Spaces: 93

Peak Hour: 1 PM  
 Capacity: 43  
 Peak Occupancy: 12  
 Percent Full: 28%  
 Vacant Spaces: 31

**PROPOSED  
 FITNESS 19**

**Sprouts  
 Farmer's Market**

Legend	
	90-100% Occupied
	60-90% Occupied
	30-60% Occupied
	0-30% Occupied

**FIGURE 2 | PARKING SURVEY SUMMARY - FRIDAY, FEBRUARY 7, 2020**  
 PARKING REVIEW  
**6203 Jarvis Avenue**  
 City of Newark

**PROPOSED  
FITNESS  
19**

*Sprouts  
Farmer's Market*



**FIGURE 3 | APPROXIMATE LOCATIONS OF RESTAURANTS (★)  
PARKING REVIEW**

**6203 Jarvis Avenue**  
City of Newark



**FIGURE 4 | PARKING SURVEY SUMMARY BY OWNERSHIP AREA - FRIDAY, FEBRUARY 7, 2020**  
 PARKING REVIEW  
**6203 Jarvis Avenue**  
 City of Newark

**TABLE 1**  
**Summary of the 2/7/2020 Survey**

<b>Overall Shopping Center</b>		Capacity	10:00 AM	11:00 AM	12:00 PM	1:00 PM	2:00 PM	3:00 PM	4:00 PM	5:00 PM	6:00 PM	7:00 PM	8:00 PM
			165	196	283	222	196	209	204	234	264	275	219
Standard* Spaces	563												
Vacant Spaces	398	367	280	341	367	354	359	329	299	288	344		
Standard Spaces % Occupied	29%	35%	50%	39%	35%	37%	36%	42%	47%	49%	39%		
Total Spaces	630	180	216	321	251	216	234	234	299	307	243		
Vacant Spaces	450	414	309	379	414	396	396	366	331	323	387		
<b>Total % Occupied</b>		<b>29%</b>	<b>34%</b>	<b>51%</b>	<b>40%</b>	<b>34%</b>	<b>37%</b>	<b>37%</b>	<b>42%</b>	<b>47%</b>	<b>49%</b>	<b>39%</b>	

\* Does not include Disabled or Short Term Parking

**TABLE 2**  
**Summary by Parking Area for the 2/7/2020 Survey**

Section	Capacity	10:00 AM	11:00 AM	12:00 PM	1:00 PM	2:00 PM	3:00 PM	4:00 PM	5:00 PM	6:00 PM	7:00 PM	8:00 PM
Sprouts Front Area	234	93	105	137	99	91	111	90	103	106	111	88
Sprouts SE Side Lot	43	10	8	9	12	10	9	7	6	9	4	3
SW Back Corner	105	4	5	13	15	9	12	15	15	18	14	10
Remainder of Lot	248	73	98	162	125	106	102	122	140	166	178	142
<b>Totals</b>	<b>630</b>	<b>180</b>	<b>216</b>	<b>321</b>	<b>251</b>	<b>216</b>	<b>234</b>	<b>234</b>	<b>264</b>	<b>299</b>	<b>307</b>	<b>243</b>

Section	Capacity	10:00 AM	11:00 AM	12:00 PM	1:00 PM	2:00 PM	3:00 PM	4:00 PM	5:00 PM	6:00 PM	7:00 PM	8:00 PM
Sprouts Front Area	234	40%	45%	59%	42%	39%	47%	38%	44%	45%	47%	38%
Sprouts SE Side Lot	43	23%	19%	21%	28%	23%	21%	16%	14%	21%	9%	7%
SW Back Corner	105	4%	5%	12%	14%	9%	11%	14%	14%	17%	13%	10%
Remainder of Lot	248	29%	40%	65%	50%	43%	41%	49%	56%	67%	72%	57%
<b>Entire Lot</b>	<b>630</b>	<b>29%</b>	<b>34%</b>	<b>51%</b>	<b>40%</b>	<b>34%</b>	<b>37%</b>	<b>37%</b>	<b>42%</b>	<b>47%</b>	<b>49%</b>	<b>39%</b>

**TABLE 3**  
**Summary by Ownership Area for the 2/7/2020 Survey**

Section	Capacity	10:00 AM	11:00 AM	12:00 PM	1:00 PM	2:00 PM	3:00 PM	4:00 PM	5:00 PM	6:00 PM	7:00 PM	8:00 PM
Sprouts Area	394	102	123	157	118	106	134	115	124	137	138	101
Other Owner's Area	236	78	93	164	133	110	100	119	140	162	169	142

Section	Capacity	10:00 AM	11:00 AM	12:00 PM	1:00 PM	2:00 PM	3:00 PM	4:00 PM	5:00 PM	6:00 PM	7:00 PM	8:00 PM
Sprouts Area	394	26%	31%	40%	30%	27%	34%	29%	31%	35%	35%	26%
Other Owner's Area	236	33%	39%	69%	56%	47%	42%	50%	59%	69%	72%	60%

**Transcription of Excerpts of Testimony by Steve Abrams from  
Livestream Video of 2/11/20 Newark Planning Commission Hearing**

Abrams Testimony at 23:06-30:52

**Steve Abrams:** “Good evening Chair and Commissioners, my name is Steven Abrams, from Abrams Associates of Traffic Engineering located in Walnut Creek, California, 1875 Olympic Blvd, Suite 210.

When the city has concerns about parking for a project, they don’t allow typically an applicant to do the surveys, for it to be considered substantial evidence for land use decisions or legal decisions. They are required to hire a traffic engineering firm to do the work, fortunately. We were hired to provide objective information on parking for this project because we’ve been in business for over thirty-four years. I’ve been doing it doing this for over 20 years and prepared hundreds of these parking studies.

I’ve got a letter here. But before I get into asking you to look at some figures, I just want to let you know that in response to comments received at the last meeting, we were asked to conduct additional surveys of lunchtime conditions. We did that last Friday. And in fact, expanded the hours, significantly,

from 10 am till 9 pm at night. We did those surveys and I'd like, if you have the letter available, I would like you to refer to Figure 2 of the letter that I gave you."

**Chairman Jeff Aguilar:** "The one from today?"

**Mr. Abrams:** "Yes."

**Chairman Aguilar:** "Okay."

**Mr. Abrams:** "And I also want to say I apologize for giving it today. It took us some time after the surveys to put together the graphics. We weren't trying to dump this on you at the last second. We would've given it to you earlier if we could."

The one thing I have to apologize for is there was an oversight on our part not doing a survey of lunchtime conditions. It turned out lunchtime was just slightly higher than its PM peak. I mean essentially the same. They'd be unperceptively different. The overall occupancy was 49% in our previous surveys. It was 50% during the lunchtime surveys last Friday. So, that was an oversight on our part not surveying the lunchtime hour. We had, for anecdotal reasons, thought we were confident we were catching the PM peak hour as the peak.

**But what our latest data shows, and I want to make sure you know, is it essentially corroborates the several previous surveys days of previous weekday**

**and weekend surveys we've done.** Which show the area closer to Newark Blvd, were kind of next down the parking area, gets up to about 72% occupancy which is relatively high for a shopping center **but the remainder of the shopping center has significant excess capacity. Overall, the center, you know again, about 50%, generally has over 300 spaces available at any time of day.** But you wouldn't know that if you were over by the restaurants because the parking is further afield, you know, behind some buildings, alongside Sprouts. **Even the area in front of Sprouts, where Fitness 19 is located, generally has over 90 parking spaces available even during the peak time that we surveyed.**

So, on the next page, I'd like you to look at Figure 3. This shows the location of all the restaurants within the shopping center. This is important because in the petition, they were pointing out that we had noted some of the parking is less convenient to parts of the shopping center and the restaurants and I define "less convenient" as further away. The parking area where, you know, there's over 100 parking spaces available shown as green on the previous one, are obviously the farthest from the restaurants and the area right in front of the restaurants is where the highest occupancy occurs, because there is less of a supply in that area. And again, that's just the nature of a shopping center normally, if that kind of

problem would occur, a shopping center would have its employees park in the back to try to free up more parking in that area.

I also work with other shopping centers. I'm studying one right now in Castro Valley where they're trying to figure out should the restaurants be on the other side of the shopping center because too many restaurants are on one side of the shopping center and it tends to cause high occupancy levels and some frustration among customers.

Lastly, I wanted to show you that on **Figure 4**, this is just the split. I was just asked to present the split of the ownership amongst the shopping center. This is my best estimate from the records of the two ownership areas and **it's important to note that during the peak period, the one that would include Fitness 19, it is only 40% full at the lunchtime hour on our highest survey with over 237 vacant spaces.**

But of course, the other remainder of the lot, where all the restaurants are located and closer to the restaurants was about 70% full. But it still had about 70 vacant spaces over there. Again, some of those are handicap and short-term also. But, obviously, you know, it's a lot tighter over near the restaurants.

But it's important to note that a shopping center like this doesn't just leave spaces vacant and give up parking in the back and maybe someone might say it's less secure. Well then, you put in better lighting, you put in cameras, you get security. You don't leave spaces vacant and hundreds of spaces empty in the back of your parking area, at least that's my experience in helping shopping centers manage their parking. I'm available for any questions you might have and I really appreciate your time."

**Chairman Aguilar:** "Thank you Mr. Abrams. Any questions?"

**Chairman Aguilar:** "I have a question. And it's more of a clarification point. So, I'm looking right now at figure.. **Figure 1**. And just to be clear, where Sprouts is located, this blue shaded parking lot where the peak hour is 5pm are also peak hour for gym goers is that accurate? 5:00 in the evening is the peak time for a Fitness 19 use?"

**Mr. Abrams:** "Well, you know, the actual, we only estimated based on data we have, it could vary obviously, but typically, the Sprouts would peak around 3:00-5:00 and the Fitness Center would peak around 5:00-7:00."

**Chairman Aguilar:** "And what you're stating is, we almost have ...so we have 105 vacant spaces around 5:00 pm."

**Mr. Abrams:** “Correct. And that is the highest occupancy that was recorded.”

**Chairman Aguilar:** “Okay. And just, well, in my eyes that’s a lot of spaces. How many on average in a day, I know we’re just kind of estimating here, in a peak hour, how many cars would a gym attract?”

**Mr. Abrams:** “According to the ITE data, could be about 130.”

**Chairman Aguilar:** “Okay, so that’s where we have additional vacant spaces in this green area and also in this other area shaded blue.”

**Mr. Abrams:** “Yes, between those two spaces. There’s generally more than 100 vacant spaces in addition.”

**Chairman Aguilar:** “Okay, thank you.”

**Mr. Abrams:** “Thank you. “

Abrams Rebuttal Testimony at 45:44-46:42

**Mr. Abrams:** “Steven Abrams, from Abrams Associates of Traffic Engineering, I’ll be very brief. Just wanted to address the duration issue.

We did address this in our latest letter. It’s on page 5.

The fact is, our analysis is based on the total parking demand at various times of day, which is how these studies are done. Basically, the Manual says the purpose of the parking demand data that we present is to forecast the data by the demand, by time of day, on a specific day of the week, and for a specific land use, and the only time we do duration studies is to determine parking restrictions.

We do, do parking duration studies for how long people park, but it's to determine, should you limit it to two hours, should you have more short-term parking. So, it's not necessary for this particular project.

Thank you."

## Transcription of Excerpts from Livestream Video of 2/11/20

### Newark Planning Commission Hearing

51:35-59:21

**Chairman Jeff Aguilar:** “Thank you Commissioner Fitts.

I have a few questions of Staff. And I kind of kick myself for not asking this the last go around. So, currently we have Anytime Fitness in the shopping center. Did they, and this was my time before the Planning Commission... was a CUP required at that time when they (Anytime Fitness) came into the shopping center? And what was the consensus then or the Staff feedback or the Staff findings?

**Art Interiano:** “At the previous meeting, I wasn’t able to find that because based on the Code at the time, it seemed like it was not required to do a CUP.

After a recent search, basically like last week, this week really, **I was able to find that Anytime Fitness did get a CUP and that was back in 2012.**

In addition, it looks like **Curves, which was next door, at the time, also got a Conditional Use Permit.”**

**Chairman Aguilar:** “So there’s history that even occurs before that. There’s history of a CUP being approved here in compliance with this shopping center. Do we ...actually the applicant had said about 7 years ago, so I presume somewhere with that time frame, maybe Commissioner Fitts you recall, for that, when that was? Ok.”

**Mr. Interiano:** “Well, Curves was approved in 2003.”

**Chairman Aguilar:** “2003?”

**Mr Interiano:** “And the Anytime Fitness was approved in 2012.”

**Chairman Aguilar** “Was ...was Curves a tenant at 2012? Do we know?”

**Mr. Interiano:** “It was adjacent to where the Anytime Fitness was going to go.”

**Chairman Aguilar:** “Was it an active business?”

**Mr. Interiano:** “Give me one second here.”

“It’s not necessarily clear on the staff report at the time.

“What it (the staff report) says is that it was going into a 5,852 sq ft tenant space, north of Raley’s Supermarket next to Curves Fitness Center, so I would assume, just by reading it, that it was there at the time.”

**Chairman Aguilar:** “And I guess one question as it relates to the resolutions. We have as a condition number one, this is the parking. That the employees will park in the rear and side areas of the building. How is that enforced from a City standpoint?”

**Mr. Interiano:** Well, we would ask them to identify that parking either by signage or striping on the spaces themselves. To designate them as employee parking.”

**Chairman Aguilar:** “Okay.”

**Mr. Interiano:** “Also we’ve had other businesses who will put it as part of their hiring contract.”

**Chairman Aguilar:** “I want to thank staff and everybody that came to speak, both tonight and our previous hearings. The fact of the matter is, when we have very difficult decisions like this, the more input we can have that equip us to make decisions, the better equipped we are to evaluate. So I do truly want to thank everybody that has had involvement tonight and in previous hearings. This has all been very, very detailed for us, and very good.

As it relates to the Application, I’ll go through some thoughts and comments, a little bit more detailed than I would typically go, but given just the sensitivity of the decision, I feel it’s necessary so bear with me.

**As it relates to the issuance of the CUP, I am in agreement with Staff and their required findings.**

When it comes to Conditional Use Permits, for us, as a Planning Commission, it's very objective, it's very black and white. **Meaning, we look to whether the use complies with our Zoning Code, and what's codified in our Zoning Ordinance.**

So it's a very black and white process. And there's a punch list of items that we have to go through and check. 'does it check this box?,' 'does it check this box?,' 'does it check this box?,' and in this circumstance, it does.

**And the fact of the matter, is we do have precedent of a CUP being approved before, so it's not surprising that these boxes have been checked in the past. So for that reason, I am in agreement that we do check and meet all of the findings here, especially when it comes to the issuance of the Conditional Use Permit.**

As it relates to the parking, very good analysis on both sides. After the last hearing, I made it a point to go through, to the parking in this center, a number of times. I've been frequenting this center for over 30 years, so I know it well. I still frequent the businesses there now. Go there all times of day.

**Outside of the analysis, there appears to be plenty of parking.** Here, I do agree with the Abram's analysis in the sense that there is **adequate parking.** Is there a circumstance where we may have a 90% full parking lot like what we experience over at the Safeway parking lot? Sure, it's a possibility, but right now it feels like there is adequate parking.

As it relates to, call it the last item that I'll hit on, for us, as a Commission, for myself at least, when it comes to difficult decisions like this, one of the things we look to, is this use or is this Application a net benefit to the City of Newark, is it a net benefit to the community.

And, and right now there are a few things, that come to mind. When I- when I weigh that out. **We have a space that's been vacant for multiple years, that's been very clear. Mr. Cumbelich, in the last hearing went through and exhaustive effort in explaining to us the number of tenants and provided a list of the types of tenants that he reached out to. So it's very clear from that standpoint that the market has spoken:** There's not a lot of tenants out there to fill this kind of void.

So then we look to, "okay, **if this space is leased by a Fitness 19, which, in my opinion, is a reputable tenant, what does that do to the retail center?"**

**I think it creates vibrancy. I think it activates it. And I think we get additional foot traffic that in the end will benefit all of the businesses.**

It will benefit the City of Newark.

**And so overall, I do think the use is a net benefit to the City of Newark and to the shopping center.** So for those reasons, it's not an easy decision, I am in support of the Application and I am in support of Staff's recommendation of approving the Conditional Use Permit."



Richard T. Bowles	William T. Nagle
Michael P. Verna	Cheryl A. Noll
Richard A. Ergo	Christopher D. Jew
Bradley R. Bowles	Jonathan W. Lee
Cathleen S. Huang	Jin Im-Saeteum
Robert I. Westerfield	Christopher M. Wolcott
K.P. Dean Harper	David A. Goldstein
Kenneth B. McKenzie	Thomas V. McCarrick
Jason J. Granskog	Andrea L. Tool
Lawrence D. Goldberg	Gerald C. Kipper
	Alexandrea M. Tomp

*Of Counsel*  
 Bruce C. Paltenghi  
 David F. Abele

February 4, 2020

**VIA E-MAIL AND U.S. MAIL**

Jeff Aguilar, Chair and  
 Members of Planning Commission  
 City of Newark  
 37101 Newark Boulevard  
 Newark, California 94560  
[Steven.Turner@newark.org](mailto:Steven.Turner@newark.org)  
[Art.Interiano@newark.org](mailto:Art.Interiano@newark.org)

**Re: Fitness 19 Conditional Use Permit Application  
 6203 Jarvis Avenue, Newark**

Dear Chair Aguilar and Members of the Planning Commission:

This letter is written following the hearing before the Planning Commission on Tuesday, January 14, 2020. The letter covers three subjects. First, we want to address the questions that came up after the close of the public hearing regarding parking. Second, we wish to bring additional information and testimony to the Planning Commission’s attention regarding the positive retail and sales tax benefits that bringing in a new Fitness 19 facility has had for adjacent retail stores in other California cities. Finally, we want to respond to the issues raised by the letter submitted for counsel for the adjoining landlord and the testimony of the representative of the adjoining landlord and his tenant, Anytime Fitness.

**Parking**

Please refer to the enclosed supplemental letter dated January 16, 2020 from Stephen Abrams, President of Abrams Associates Traffic Engineering, Inc.

In his letter, Mr. Abrams addresses and refutes the comments from counsel for VN Investment Group, LCC (“VN”), as well as addressing the questions of the highest usage periods by both Sprouts and Fitness 19. The key takeaways from Mr. Abrams’ supplemental report are that (1) parking studies assess impacts and the availability of adequate parking based on the peak hour demand for different uses, such as the Sprouts supermarket as compared with a health and fitness facility such as Fitness 19; and (2) in this case, those high parking usage periods do not overlap. Contrary to the comments made by VN’s counsel, Mr. Abrams makes clear that the “length of time” that people park “is not a factor as the analysis is based on the peak parking

Chair Jeff Aguilar and Members of the  
Newark Planning Commission  
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available at various times during the week.” (See Abrams letter at p. 1.) The peak parking demand for supermarkets “occurs from about 2:00 PM to 5:00 PM. For a fitness center the data indicates the peak parking demand occurs from about 5:00 PM to 7:00 PM.” (*Id.* at p. 2.)

Hopefully this answers the questions of the Planning Commission regarding parking. If the Commissioners would like Mr. Abrams to attend the February 11 hearing, we would be happy to arrange that.

**Fitness 19 Will Bring More Shoppers, Retail Sales and  
Sales Tax Revenue to the Four Corners Center**

As we have previously discussed, Fitness 19 will bring vitality and increased retail shoppers to the Four Corners center after the Commission approves the use permit application as your City staff is recommending. In that regard, the positive impact of Fitness 19 on surrounding retail uses is documented.

Enclosed you will find a January 24, 2020 letter from Victor de Melo of Browman Development Company, Inc. (“BDC”). BDC is the owner of the Dublin shopping center and entered into a long-term lease with Fitness 19 to fill the premises vacated when CVS downsized at that location. Mr. de Melo reports that BDC’s retail center was “severely under-utilized” before Fitness 19’s arrival, and that since then:

“We’ve witnessed this first hand, as Dublin Fitness 19 patrons are shopping at CVS often before or after their work out, bringing new customers to CVS as well as repeat trips for existing customers. *The CVS manager has personally conveyed to me the nice benefit of Fitness 19 patrons constantly visiting their store and helping increase sales*” (emphasis added).

The same thing occurred when Fitness 19 opened a new facility at the Oakbrook Plaza shopping center in Thousand Oaks, leasing vacant space in the center from Gelson’s Markets. Much like Sprouts, Gelson’s operates 27 upscale grocery stores in Southern California. Please refer to the enclosed January 29, 2020 letter from Michael Smith, Director of Real Estate for Gelson’s, who describes how Fitness 19 has “been a meaningful traffic generator for the shopping center”:

“Fitness 19 has now been open for almost a year. The club is beautiful . . . . *Even better our sales and customer counts have improved. The new gym attracts hundreds of people each day to the shopping center and we see Fitness 19 member frequently cross-shopping at Gelson’s. . . .* [If we had other excess spaces in our company future I would not hesitate to reach out to Bob at Fitness 19 to co-tenant with our brand” (emphasis added).

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Given Fitness 19's track record in other California communities, the City of Newark will experience similar positive benefits by approving its use permit application.

Finally, the Planning Commission may wish to consider an article which appeared in the January 24, 2020 issue of USA Today, entitled "Store closings pile up: With 1,200 closures already announced, retailers face another grim year" (copy enclosed and link provided below), reporting on the severe difficulties facing nationwide retail chains including Macy's, J.C. Penney, Papyrus, Pier 1 Imports and many others:

<https://www.usatoday.com/story/money/2020/01/24/store-closings-2020-macys-jcpenney-bed-bath-beyond-express/4540886002/>

### **Response to January 14 Letter from VN's Counsel**

The letter from the attorney retained by VN Investment Group, LCC essentially raises three points. They are the parking issue, the CEQA exemption issue and the CC&R issue. Inasmuch as the parking is addressed above, I will not comment further.

As for the applicability of the CEQA exemption for Existing Facilities (19 CCR Section 15301(a)), this was addressed at the January 14 hearing by Mr. Trotter and, perhaps more importantly, was also thoroughly addressed by the City's planning staff. As noted, the staff found the exemption to be absolutely applicable. The Commission should follow the lead of its staff on this issue for the reasons discussed at the January 14 hearing. The resolution of this issue is clear.

### **CC&Rs**

Counsel for VN refers to Section 8.2 of the Agreement of Covenants, Conditions and Establishment of Restrictions dated October 4, 1989 (the "CC&Rs") as providing a basis for denial of the Fitness 19 CUP application. This is incorrect. In response to questions from Chair Aguilar and other Commissioners on this point, Community Development Director Steven Turner was unequivocal that enforcement of the CC&R's was not an issue for the City. He advised the Commission that Newark, like other cities, does not "get involved in enforcing CC&Rs." Speaking for the City's planning staff, Mr. Turner also stated: "We believe that is a private property owner issue that doesn't involve the City."

This is absolutely correct. We agree that neither the Planning Commission, the City Council nor anyone else from the City of Newark should become involved in the CC&Rs. This is between two landlords. It should not have been brought up by counsel VN, nor is it a proper concern of the Planning Commission. Whether or not the landlords can reach agreement on this

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issue is irrelevant to the City's consideration of Fitness 19's entitlement to approval of the Conditional Use Permit.

Further, as was pointed out, one has to question whether Fitness 19 is actually a "recreational use" within the meaning of Section 8.2 of the CC&R's. The history in this matter, and well-settled principles of contract interpretation, strongly suggest that the Fitness 19 use is not. Both Anytime Fitness and Curves are in the same category as Fitness 19. If they were "recreational" uses, they should have been submitted for approval by the owner of "Parcel 1" (i.e., our clients and their predecessors in interest) in accordance with the CC&Rs. There is no evidence that VN or its predecessors ever did so. VN did not approach our clients or seek our consent before bringing Anytime Fitness to the Four Corners center in 2012. These facts and circumstances have a direct bearing, as it is a "cardinal rule of construction that when a contract is ambiguous or uncertain *the practical construction placed upon it by the parties before any controversy arises as to its meaning affords one of the most reliable means of determining the intent of the parties.*" *Bohman v. Berg* (1960) 54 Cal.2d 787, 795 (emphasis added; also noting that the "practical construction" is the "best evidence of what was intended").

And even if one assumes that Section 8.2 applies here – and it does not – the same evidence noted above prevents VN from enforcing it against Fitness 19. Inasmuch as the VN parties failed to comply with this provision of the CC&Rs, they have waived the provision and are estopped from asserting it against our clients.<sup>1</sup> It has been the law for over a century that a waiver of the right to enforce a covenant occurs where substantially all of the landowners have acquiesced in a violation of the covenant, resulting in its abandonment. *Bryant v. Whitney* (1918) 178 Cal. 640, 643. Put another way, "where a party has violated the restrictions in his own deed, he cannot enjoin violations by others . . ." *Diederichsen v. Sutch* (1941) 47 Cal.App.2d 646, 650. This legal principle applies with full force to VN here.

Moreover, a court would likely reject any purported attempt by VN to enforce Section 8.2 under the unclean hands doctrine. That doctrine "demands that a plaintiff act fairly in a matter for which he seeks a remedy. He must come into court with clean hands, keep them clean, or he will be denied relief, regardless of the merits of his claim." *Aguayo v Amaro* (2013) 213 Cal.App.4<sup>th</sup> 1102, 1110, quoting *Kendall-Jackson Winery, Ltd. v. Superior Court* (1999) 76 Cal.App.4<sup>th</sup> 970, 978. The unclean hands doctrine comes into play, and will bar relief here, because there is such a "direct relationship" between VN's misconduct in failing to seek our

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<sup>1</sup> It is worth noting that VN has likewise waived Section 8.2's purported exclusion of "educational" uses from the Four Corners center. It has leased portions of the center to three educational use tenants – The Tutoring Club, Masako Music Studio and Anqi Chinese School – without ever seeking or obtaining our clients' consent pursuant to the CC&Rs. And not only that. VN's pattern of conduct in advancing its own economic self-interests without complying with Section 8.2 is further evidence of its unclean hands with respect to the Fitness 19 CUP application.

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clients' consent to Anytime Fitness under Section 8.2, while now purporting to rely on the very same provision of the CC&Rs vision keep Fitness 19 out of the Four Corners center, that it "would be inequitable to" enforce that provision against our clients. *Kendall-Jackson, supra*, 76 Cal.App.4<sup>th</sup> at 979 (citing numerous cases applying the unclean hands doctrine to circumstances that "involve the very [same] subject matter and affect the equitable relations between the litigants").

The well-documented decline of bricks-and-mortar retail stores since the CC&Rs were prepared and recorded more than 30 years ago also has legal consequences. Specifically, these changed conditions in the retail marketplace fatally undermine VN's contention that Section 8.2 of the CC&Rs still applies to and may be enforced in the current circumstances. California has long recognized that a covenant imposing a building or use restriction "will not be enforced where changed circumstances in the neighborhood have rendered the purpose of the restrictions obsolete." *Marra v. Aetna Construction Co.* (1940) 15 Cal.2d 375, 378, citing *Downs v. Kroeger* (1927) 200 Cal.743; see also, *Wolff v. Fallon* (1955) 44 Cal.2d 695, 697-698 (affirming trial court judgment declaring covenant restricting property to residential purposes was not binding; citing numerous adverse changes in circumstances since subdivision was created in 1913, including that "there was no ready market for the lot as residential property").

For all of these reasons, the Planning Commission should follow the advice of City staff and approve the Fitness 19 CUP without involving itself further in this "private property owner issue."

### **Opposing Testimony**

A suggestion was made at the January 14 hearing that our clients should be bringing in a nonprofit medical facility to the center. Please see attached the list of prohibited use exclusions set forth in Exhibit G to the Sprouts Lease. You will note that Paragraph 1(ff) specifically precludes putting this sort of tenant into the vacant premises at 6203 Jarvis Avenue. (See Exhibit G at p.2.)

It is also noteworthy that Sprouts expressly agreed, in Exhibit G, that our clients could lease the vacant premises for "(ii) a gym or health club." (See Exhibit G at p. 4.) The question of whether Sprouts has approved having the Fitness 19 facility next door to its store was raised briefly at the January 12 Planning Commission meeting. The answer to that question is yes. As Exhibit G makes clear, Sprouts effectively granted that approval as part of the negotiations for its lease. And Sprouts reaffirmed that it has "no objections" to a fitness user in the shopping center in a September 19, 2019 letter to our clients (copy enclosed).

In order to get the upscale grocery store tenant that the City of Newark wanted, it was necessary for ownership to agree to this list of exclusions. This list of exclusions was made

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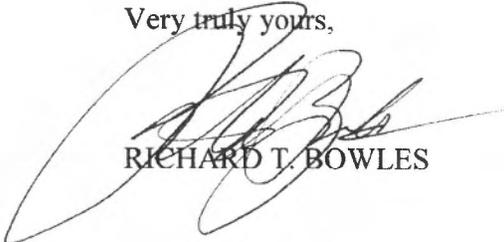
known to Assistant City Manager Terrence Grindall prior to the lease being executed and was implicitly, if not expressly, approved by the City. This occurred in conjunction with Mr. Grindall's earlier assurances to our clients that the City would approve Fitness 19 if we delivered Sprouts, as we have previously pointed out.

There was also concern raised by the owner of Anytime Fitness that Fitness 19 might impact his business. While we do not believe that Fitness 19 is directly competitive with Anytime Fitness, even if it is and even if it is predictable that Anytime Fitness' business would be impacted, these facts are not relevant considerations in determining whether to grant the CUP application. Indeed, the fact that Anytime Fitness is, and Curves was, at the Four Corners center after the City approved a CUP for Anytime Fitness, is confirmation that this CUP should be granted. As we have pointed out in prior letters, the City cannot selectively grant and deny CUP approvals in a manner which unlawfully discriminates against and takes away our clients' constitutional and legal property rights.

#### **Conclusion**

We appreciate the time the City and the Planning Commission have taken to address this matter. We believe it is time for the approval to be issued. There is no appropriate and sustainable basis for rejecting the Fitness 19 application. We look forward to prompt resolution. Thank you.

Very truly yours,



RICHARD T. BOWLES

RTB:dja

Enclosures

cc: David J. Benoun, City Manager (w/encls.) – via email  
Steven Turner, Community Development Director (w/encls.) – via email  
Art Interiano, Deputy Community Development Director (w/encls.) – via email

**EXHIBIT 1**

**January 16, 2020**

Mirchell Wade Gardner  
g2 design/build inc.  
150 Linda Vista Avenue  
Pasadena, CA 91105

**Re: Response to Comments on the Parking Review for 6203 Jarvis Avenue in the City of Newark**

Dear Mr. Gardner,

This letter was prepared to respond to comments on the Parking Review for 6203 Jarvis Avenue, dated June 21, 2019. The comments received on the Parking Review are incorrect in implying the length of time typically spent by a patron in a fitness center is a factor in the parking analysis. The fact is the parking analysis is based on the total parking demand at various times of the day and week combined with forecasts of the peak parking demand for the land uses. In other words, the length of time that people are parked is not a factor in the analysis, which is based on a snapshot of the peak parking occupancy that was recorded in the surveys combined with the forecast increase in the peak parking demand associated with the Fitness 19 proposal. The length of time that people park is not a factor as the analysis is based on the peak parking available at various times during the week.

The comments also incorrectly suggest that "*Assumptions were made about the availability of parking demand based, in part, on the typical time occupying a parking space spent by a patron of a supermarket.*" Again, this is simply not true as the assumptions are all based on the maximum parking demand and occupancy levels at various times of the day and week, not on the length of time that patrons spend at various specific land uses (i.e. supermarkets, fitness centers, restaurants, etc.) The assumptions on parking are from the 5th Edition of the Institute of Transportation Engineers Parking Generation Manual (dated January, 2019). The Parking Generation Manual states the following about the purpose of its parking demand data: "*The purpose of the Parking Generation Manual is to present data and information that will enable an analyst to forecast parking demand by time of day on a specific day of the week, at a specific land use.*"

Please note that when shared parking calculations are provided, time of day factors are normally derived from shared parking data provided by the Urban Land Institute (ULI).<sup>1</sup> For a

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<sup>1</sup> *Shared Parking*, Second Edition, Urban Land Institute, Washington D.C., 2005.

supermarket the data indicates the peak parking demand occurs from about 2:00 PM to 5:00 PM.<sup>2</sup> For a fitness center the data indicates the peak parking demand occurs from about 5:00 to 7:00 PM.

If you have any questions or need additional information please do not hesitate to contact me.

Sincerely,



Stephen C. Abrams  
President, Abrams Associates  
T.E. License No. 1852

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<sup>2</sup> *Shared Parking*, Second Edition, Urban Land Institute, Washington D.C., 2005.

**EXHIBIT 2**



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**BROWMAN DEVELOPMENT COMPANY, INC.**  
Development • Leasing • Management

January 24, 2020

City of Newark Planning Commission  
37101 Newark Boulevard  
Newark, CA 94560

Re: Fitness 19 Application

Dear Chair Aguilar and Members of the Planning Commission:

Our company, Browman Development Company, Inc. (BDC) is the owner of the CVS, Fitness 19 and Daiso anchored property in downtown Dublin at 7201 Regional Street. BDC is a Walnut Creek based retail development company developing and acquiring shopping center properties since 1989 with over 4 million square feet of commercial properties in our portfolio. Our specialty is acquiring and re-developing retail development properties in strong bay area communities like Newark.

In 2014, our company acquired the CVS anchored Dublin property. Upon our acquisition of the property, CVS and its predecessors (Longs Drugs and Thrifty Payless) had occupied the 60,000 square foot property as a pharmacy since 1969. CVS was leasing the entire building but only occupying 50% of the space and it was severely under-utilized.

We worked diligently over the next couple years with the City of Dublin and our leasing team to downsize CVS (at their request) to 28,000 square feet, and attract quality alternate users to bring much needed customer traffic to the property and surrounding shopping center. After a 24-month marketing effort, we were very excited to secure a long-term commitment from Fitness 19 and Daiso to our retail center.

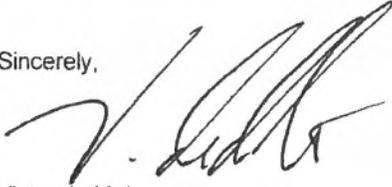
The retail industry has changed dramatically over the last 10 years, with thousands of store closures especially big box stores and the increasing strength of e-commerce retail replacing bricks and mortar retail. We've discovered, fitness is the ideal use to partner with traditional retailers like pharmacy, general merchandise and high-quality grocery users to attract critical customer traffic. We work with all the major neighborhood retailers (Target, Safeway, CVS, Walgreens, Kohl's) and they are supportive of fitness uses co-anchoring shopping centers because they bring daily trips to the shopping center, increase sales and drive traffic.

We've witnessed this first hand, as Dublin Fitness 19 patrons are shopping at CVS often before or after their work out, bringing new customers to CVS as well as repeat trips for existing customers. The CVS manager has personally conveyed to me the nice benefit of Fitness 19 patrons consistently visiting their store and helping increase sales.

As we are working on current and future retail development/redevelopments, quality fitness operators like Fitness 19 are one of our first marketing outreach efforts because they drive traffic to our shopping center which benefit all retailers. Fitness 19 has been a quality addition to our Dublin property and we look forward to partnering with them throughout the Bay Area on additional opportunities.

I would look forward to answering any questions about our experience working with Fitness 19 in our Dublin property and the positive benefits they've brought not only to our retail property but the surrounding shopping center and downtown Dublin.

Sincerely,

A handwritten signature in black ink, appearing to read 'V. de Melo', written in a cursive style.

Victor de Melo  
*Senior Vice President*  
Browman Development Company, Inc.  
(925) 588-2225 Direct  
(925) 588-2230 Fax  
[vdemelo@browmandevelopment.com](mailto:vdemelo@browmandevelopment.com)

**EXHIBIT 3**

# Gelson's

To whom it may concern:

January 29,2020

Re: Fitness 19

Hello, I am Michael Smith Director of Real Estate for Gelson's Markets. Let me provide some information for anyone unfamiliar with our company. We operate 27 upscale grocery stores throughout Southern California. The company is known as the premier grocery chain known for exceptional customer service, superior produce, highest quality meat, and unmatched selection of wine and liquor. We strive to provide value to our customers and many customers consider our shopping experience as the Nordstrom or grocers.

One of our recent store openings was in the Oakbrook Plaza in the upscale suburban community of Thousand Oaks, CA. We purchased the Lease out of the Haggens bankruptcy of a former Haggens / Alebertson's store. The center is owned by Regency Centers which controls hundreds of retail centers across the U.S. However, we leased this box with the intentions of demising the space to fit our prototype of 35,000 SF so we didn't need the excess space of approximately 9,000 SF. Fitness 19 was immediately interested in the space, but at that moment Gelson's didn't believe a "discount" gym would bring the customer base we felt was complimentary to the shopping center but especially an upscale grocer. We attempted to sublease the surplus space to various retailers for a couple years. We were never able to reach agreeable terms with any of traditional retailers. In the end, we visited a local Fitness 19 and actually one of our company executives worked out at Fitness 19 and I saw a first-class product that was not reflective of the discount price. The lack of interest from other retailers and the impressive tenant improvement we saw at Fitness 19 as a good fit.

Fitness 19 has now been open for almost a year. The club is beautiful – nicer than the other store we visited three years ago. Even better our sales and customer counts have improved. The new gym attracts hundreds of people each day to the shopping center and we see Fitness 19 members frequently cross-shopping at Gelson's. A Core Power yoga studio also opened recently on the other side of our space and we are seeing a benefit from their tenancy as well.

The takeaway; as a landlord of Fitness 19 is an first class company and we find it general benefits continuing and if we had other excess spaces in our company future I would not hesitate to reach out to Bob at Fitness 19 to co-tenant with our brand. They have been a meaningful traffic generator for the shopping center. Please don't hesitate to give me a call if you had any additional questions at 818.613.4118

Best Regards,



Michael Smith

Gelson's Markets

P.O. Box 1802 Encino, CA 91426-1802  
16400 Ventura Blvd., Suite 240, Encino, CA 91436  
p: (818) 906-5700 f: (818) 906-7877  
[www.gelsons.com](http://www.gelsons.com)

**EXHIBIT 4**



## MONEY

# Store closings pile up: With 1,200 closures already announced, retailers face another grim year

**Nathan Bomey** USA TODAY

Published 12:01 a.m. ET Jan. 24, 2020 | Updated 9:13 a.m. ET Jan. 24, 2020

*Corrections & Clarifications: An earlier version of this story misstated the percentage decline in Kohl's same-store sales for the period of November and December.*

The start of a new decade isn't offering much hope for beleaguered retailers.

Traditional chains are looking increasingly frail less than a month into 2020, with vacancies piling up and few near-term prospects for a turnaround.

National chains Macy's, J.C. Penney, Papyrus, Express and Pier 1 Imports, as well as other retailers, have collectively announced 1,218 store closures this year, according to global marketing research firm Coresight Research.

The fallout comes after a year in which retailers closed more than 9,200 stores, according to Coresight. Those included the liquidation of Payless ShoeSource, Fred's, Gymboree and Charlotte Russe and mass closures by Family Dollar, Forever 21, Charming Charlie, Sears, Kmart, A.C. Moore and GameStop.

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Retailers will likely announce plans to close more than 100 million square feet of space in 2020 for the fourth straight year, projected real estate data tracker CoStar. That's the equivalent of about 562 Walmart supercenters.

"This year will generally be more of the same," said Robin Trantham, a consultant for CoStar. "We expect many companies – and many sizable companies – to announce closures."

To be sure, it's common for the industry to face a reckoning of sorts early in the year following the do-or-die holiday shopping season. About half of closures are typically announced in the first quarter, according to CoStar.

But the cascading nature of the recent closure announcements reflects a deepening crisis for retail. Some recent closure announcements include:

- Home goods retailer Pier 1 Imports announced plans to close up to 450 locations, or nearly half of its stores.
- Schurman Retail Group announced the closure of its 246 stores, including stationery and greeting card chains Papyrus and American Greetings.
- Fashion retailer Express announced plans to close 91 locations, including 31 stores by the end of January and 35 by the end of January 2021.
- Department store chains Macy's and J.C. Penney are closing 29 and six stores, respectively.
- Bed Bath & Beyond is closing 60 locations, including 40 of its namesake locations.

With too many stores in the U.S. and chains trying to figure out the right approach, "the current decade will continue to see store closures and a repurposing of retail real estate as the retail landscape adapts to the digital era," Coresight Research analyst Marie Driscoll said in an email.

## Off to a bad start

As the new year starts, many stores are already looking ghostly. In the third week of the month, foot traffic to stores fell 4.9% compared with the same period last year. And it was down 1.4% compared with the previous week, according to Cowen retail analysts.

That came despite nice weather, which typically encourages shopping. Average temperatures were 3.8 degrees warmer last week than the same week a year earlier, and they were 6.8 degrees warmer than usual for this time of year.

Don't expect conditions to get much better for the retail sector later in the year, either.

The second half of 2020 poses particular challenges for the industry, according to Morgan Stanley research analyst Kimberly Greenberger, who tracks specialty retailers, department stores and footwear.

It will be "tricky with the election looming" for retailers to stand their ground, since the presidential election could cause consumers to get skittish about spending, Greenberger wrote Wednesday in a research note.

Although the "fundamental consumer backdrop is healthy," people's spending on discretionary items "is likely to be challenged," Greenberger wrote.

**Is your store on the list?: J.C. Penney closing more stores and a call center**

## **Mall foot traffic underwhelms:** Express closing 91 stores as fashion retailer grapples with declining sales

Even some chains that were recently thought to be on solid ground are encountering turbulence. The proposed split of Old Navy from its troubled counterpart, Gap, was called off last week amid a "lackluster performance" for Old Navy, Cowen retail analyst Oliver Chen wrote in a research note.

"The company has a lot of work ahead to drive consistent performance," and figure out the right number of stores to keep open," Chen said of Old Navy.

## **Department stores falter**

Of course, digital threats remain at the heart of the retail industry's crisis. E-commerce made up 11.2% of total retail in the third quarter of 2019, up from 4.2% during the same period in 2010, according to financial data firm Refinitiv.

Department stores, which historically set themselves apart with their wide variety of merchandise, are particularly threatened by Amazon and other digital marketplaces.

Sears and J.C. Penney, in particular, are facing the fight for their lives in 2020. Sears barely survived its recent bankruptcy filing but almost immediately resumed store closures after emerging from Chapter 11 last February.

Some retailers are taking an if-you-can't-beat-'em-join-'em approach. Department store chain Kohl's won praise last year when it announced a returns partnership with Amazon that was hailed as effective insulation from digital competition because of the foot traffic it would presumably create.

But the significance of that deal is being called into question after Kohl's surprised investors this month by reporting a same-store sales decrease of 0.2% in November and December. The company experienced what CEO Michelle Gass called "softness" in women's apparel, "which we are working with speed to address."

In an effort to lure shoppers into the store, department stores put an average of 74% of their merchandise on sale in 2019, according to Refinitiv.

## **Haves and have-nots**

It's not all doom and gloom for the retail sector. Retailers have announced about 500 more openings than closures so far this year, Coresight Research said.

And some retailers are capitalizing on the demise of others.

Makeup chain Ulta Beauty is projected to pick up sales as department stores continue to wither, according to Oppenheimer equity analyst Rupesh Parikh. Ulta could benefit if J.C. Penney accelerates store closures, which would affect the Sephora beauty shops located within the ailing department store.

In a world of haves and have-nots, the haves are still flourishing.

Namely, Walmart and Target are still in great shape, with sales growing and profits rising for discount chains. And specialty retailers like Five Below continue to lure shoppers with low prices and convenient options.

But even they're not immune. Target reported same-store sales growth of 1.4% in November and December, which was "below expectations," the company said earlier this month. And Five Below reported weaker-than-expected holiday season as same-store sales fell 2.6%.

For retailers to thrive in 2020, they'll have to place an emphasis on "building customer loyalty via authenticity and innovation through inspiring product, relevant marketing and customer-centric stores," Chen wrote.

And they need to place an emphasis on a smooth customer experience between their digital and physical operations, including options like buy-online-pick-up-in-store.

Customers who shop in a physical store become more likely to shop at the store online, and the other way around, according to a recent study by the International Council of Shopping Centers.

For every \$100 a customer spends online with a retailer, they spent \$131 in-store with the same retailer within a 15-day period, according to the ICSC report.

It also works in reverse. After spending \$100 in a physical store, the average customer spends \$167 online with the same retailer, according to the study.

"Though many are inclined to pit e-commerce against physical retail, those retailers that offer their customers both options – a choice of shopping online and in stores – tend to boost sales in both arenas," ICSC reported.

Follow USA TODAY reporter Nathan Bomey on Twitter @NathanBomey.

**EXHIBIT 5**

## EXHIBIT G

### PROHIBITED USES AND EXCLUSIVE RIGHTS

**1. Prohibited Uses.** The following uses (collectively, "Prohibited Uses") are prohibited in any portion of Parcel 1:

- a. any so-called single price point discount or discount dollar stores (such as Dollar Tree, 99 Cents and More, Family Dollar, Dollar General, or any stores with a similar business plan or similar operation);
- b. any use causing unreasonably loud noises (including any business using exterior loud speakers);
- c. manufacturing facility;
- d. dry cleaner (excluding, either (i) 1 dry cleaner which does not use perchloroethylene or any other Hazardous Substances or (ii) 1 facility for drop off and pick up of clothing cleaned at another location);
- e. any facility for the sale, lease or rental of automobiles, trucks, motorcycles, recreational vehicles, boats or other vehicles;
- f. car wash, tire store, automobile repair shop or service station or any facility storing or selling gasoline or diesel fuel in or from tanks;
- g. used clothing or thrift store, a "Salvation Army" or "Goodwill" type store or similar business, or a "second hand" store where principle business is selling used merchandise;
- h. a donation drop-off facility;
- i. a "surplus" store selling under stock or overstock merchandise or liquidation outlet;
- j. amusement center, carnival, virtual reality, laser tag, jump/trampoline facility, game arcade, or a children's recreational facility or play center of any kind, including, but not limited to, concepts such as "Boomerang's," "Funtastic," "Chuck E. Cheese," "Jump Zone" and "Peter Piper Pizza", or other stores operating under similar business plans and operations;
- k. spa or massage parlor (excluding (i) 1 "Massage Envy" or similar therapeutic massage retailer operating in a first-class manner, and (ii) 1 nail salon occupying no more than 2,500 square feet of Gross Floor Area);
- l. adult book shop or adult movie house;
- m. mortuary or funeral parlor;
- n. coin operated laundry;
- o. cocktail lounge, bar or tavern or sale of alcoholic beverages, whether or not packaged (excluding the sale of alcoholic beverages in conjunction with the operation of a

restaurant not prohibited under this Lease, provided such use may not be located within a 300 foot radius of the Premises);

- p. night club;
- q. cinema or theater;
- r. Intentionally deleted;
- s. bowling alley, pool hall, or skating rink;
- t. animal raising or storage facility (except incidental to a full-line retail pet supply store);
- u. pawn shop, auction house, flea market, swap meet, or junk yard;
- v. the drilling for and/or removal of subsurface substances, dumping, disposal, incineration or reduction of garbage or refuse, other than in enclosed receptacles intended for such purposes;
- w. hotels or lodging facilities intended for human use;
- x. church;
- y. gun range or shooting club;
- z. day-care facility, educational facility or School (defined below) (excluding 1 "Sylvan," "Kumon" or similar tenant operating in a first-class manner, provided such use may not occupy more than 2,500 square feet of Gross Floor Area); for purposes of this provision, "School" means a beauty school, barber college, reading room, place of instruction or any other operation serving primarily students or trainees rather than retail customers;
  - aa. drive-throughs except in the location(s) shown on **Exhibit A**;
  - bb. any restaurant;
  - cc. any facility related to the occult sciences, such as palm readers, astrologers, fortune tellers, tea leaf readers or prophets;
  - dd. frozen food locker or sales facility, or milk distribution center;
  - ee. nursing home, old age center, or governmental facility (other than a post office), recruiting center or employment center;
  - ff. any office, medical and/or professional uses; any office, medical, and/or professional uses occupying, collectively, more than 10% of the Gross Floor Area of the Shopping Center; and any single office, medical, and/or professional use occupying more than 2,500 square feet of Gross Floor Area; provided however, in no event shall Parcel 1 contain an urgent care facility or an abortions clinic;

gg. any tobacco store, lounge or electronic cigarette type store or medical or otherwise legalized marijuana dispensary.

To determine whether a use which is otherwise prohibited within a specified radius of the Premises is in fact in violation of such radius restriction, the measurement taken shall be the distance from the building (from the point nearest the Premises) from which such alleged Prohibited Use is occurring to the point of the Premises closest to such building. To the extent this Paragraph 1 expressly permits any of the Prohibited Uses to be conducted by a limited number of users, Existing Tenants shall count towards such limit.

Except as set forth in the last sentence of this Paragraph 1, the Prohibited Uses shall not apply to any Existing Tenant; provided that to the extent Landlord has the right to consent to a change in use, sublease or assignment, Landlord shall withhold such consent if the resulting use would violate a Prohibited Use. "Existing Tenant" means a Parcel 1 tenant listed on Exhibit G-3 (and its permitted subtenants, successors and assigns) which is party to an effective lease with Landlord (or Landlord's predecessor) signed prior to the Effective Date. Notwithstanding the foregoing, the prohibited uses set forth on Exhibit G-2 are also deemed "Prohibited Uses" and shall apply to all Parcel 1 tenants and occupants.

2. **Tenant's Exclusive Rights.** From and after the Effective Date, Tenant shall have the exclusive right in the Building to conduct the operation and sale, either singly or in any combination, of any of the following activities and/or merchandise: (i) the operation of a grocery store, meat or seafood market or produce market, or the sale of any such items; (ii) the sale of vitamins and supplements, ethnic foods, natural or health food, or packaged ice cream; (iii) the sale of natural cosmetics, natural health or beauty products; (iv) the sale of packaged beer and wine for off-premises consumption; and (v) the operation of a full service bakery and/or over-the-counter delicatessen offering sliced or butchered meats and cheeses for off-premises consumption (all of which are included in and referred to as "Tenant's Exclusive"), and all other Parcel 1 tenants or occupants are prohibited from engaging in Tenant's Exclusive except on an Incidental Basis (defined below), other than fresh meat, seafood and produce for which there is no exception. "Incidental Basis" means the area dedicated to the sale of such items occupies the lesser of: (a) 250 square feet of Gross Floor Area; or (b) 3% of the sales area of the subject premises; provided not more than 2 linear feet of retail selling space shall be dedicated to the display and sale of any one category of ancillary products. Tenant's Exclusive shall not apply to any Existing Tenant whose lease does not prohibit the use of its premises for the portion of Tenant's Exclusive at issue; provided that to the extent Landlord has the right to reasonably consent to a change in use, or assignment, Landlord agrees to withhold such consent if the resulting use would violate Tenant's Exclusive.

If Landlord fails to impose Tenant's Exclusive or any Prohibited Use pursuant to the lease or other occupancy agreement of any occupant of Parcel 1, and such violation continues for 30-days after Tenant remits written notice thereof to Landlord, then, as Tenant's sole remedy: (i) from and after the commencement of the violation until the violation is cured, pay the reduced sum of 50% of Base Rent in lieu of Rent otherwise due under this Lease for such period; or (ii) Tenant may terminate this Lease upon written notice to Landlord at any time prior to the cessation of such violation. If Tenant exercises its termination right, this Lease shall terminate as of the date set forth in such Notice.

Notwithstanding anything to the contrary contained in this Lease, neither Tenant's Exclusive nor the Prohibited Uses shall restrict or limit Landlord from leasing space on Parcel 1 for the following specific uses: (i) a full service pharmacy or drug store such as CVS or Walgreens; (ii) a gym or health club; and (iii) a discount apparel store such as Ross.

**3. Limitation on Tenant Remedies.** If Landlord properly imposes Tenant's Exclusive or any Prohibited Use by including it in an occupant's lease or other occupancy agreement for any portion of Parcel 1, and if such occupant violates Tenant's Exclusive or any Prohibited Use, Tenant may give Landlord written notice of such violation, and as long as Landlord diligently and in good faith attempts to cause the occupant to cease such violation, Tenant shall have no rights or remedies against Landlord based upon such violation, even if Landlord is unsuccessful in such lawsuit.

**EXHIBIT 6**



Theodore E. Frumkin II  
Chief Development Officer  
SFM, LLC  
5455 E. High Street, Suite 111  
Phoenix, Arizona 85054  
(602) 814-8016

September 12, 2019

Via Email [steven@teammavronmihalis.com]

6203 Jarvis LLC  
1021 Valle View Court  
Novato, CA 94945

Re: **PROPOSED FITNESS USE IN THE SHOPPING CENTER**  
Shopping Center Lease by and between 6203 Jarvis LLC ("Landlord"), and SFM,  
LLC ("Tenant") for Sprouts Farmers Market Store #424 located in Newark, CA  
("Shopping Center")

Dear Mr. Mavronmihalis:

This letter is in response to Landlord's request for Tenant's consent to leasing space in  
the Shopping Center to a fitness user.

Tenant has no objections to the use of the Shopping Center for a fitness use.

Should you have any questions, please contact Janet Young at 602-682-1516 or  
[janeyoung@sprouts.com](mailto:janeyoung@sprouts.com).

Sincerely,

A handwritten signature in black ink, appearing to read "Theodore E. Frumkin II".

Theodore E. Frumkin II  
Chief Development Officer



Richard T. Bowles	William T. Nagle
Michael P. Verna	Cheryl A. Noll
Robert I. Westerfield	Christopher D. Jew
Richard A. Ergo	Jonathan W. Lee
K.P. Dean Harper	Daniel J. Zarchy
Bradley R. Bowles	David A. Goldstein
Cathleen S. Huang	Thomas V. McCarrick
Kenneth B. McKenzie	Andrea L. Tool
Jason J. Granskog	Gerald C. Kipper
Lawrence D. Goldberg	Alexandrea M. Tomp

Of Counsel  
Bruce C. Paltenghi

December 5, 2019

Kristopher Kokotaylo  
City Attorney  
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Newark, California 94560  
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[City.manager@newark.org](mailto:City.manager@newark.org)

**Re: Sprouts Center – Fitness 19 Conditional Use Permit Application  
6203 Jarvis Avenue, Newark**

Gentlepersons:

The Newark Planning Commission will be hearing the application of Fitness 19 for a conditional use permit (“CUP”) to operate a health and fitness facility in the currently vacant property located at 6203 Jarvis Avenue in the Four Corners shopping center in Newark. The property is owned by 6203 Jarvis, LLC, a family limited liability company owned by our clients, Steven and Vickie Mavromihalis, and Dean and Xenia Kuvelis.

We write to request that the City approve the Fitness 19 application, and to bring to your attention certain other factual circumstances and legal claims which may arise if that CUP application is denied.

The Four Corners development is now commonly referred to as the “Sprouts Center” inasmuch as our clients were successful, at the City’s request, in procuring Sprouts Farmers Market to open a new store in Newark in July 2017 occupying approximately one-half of the 60,000 square feet formerly occupied by Raley’s Market at 6399 Jarvis Avenue.

By way of history, Raley’s vacated the Four Corners in September 2015. Thereafter our clients retained highly effective commercial real estate brokers to seek to locate retail tenants pursuant to the City Manager’s request. From the outset of the broker’s efforts there was strong interest in the Raley’s space from potential health and fitness clubs. Our clients were informed by Assistant City Manager, Terrence Grindall, that the City’s top priority was to have that space

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December 5, 2019  
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filled by a “top-notch grocer.” In agreeing to address that City priority, our clients received assurances that if they were successful in attracting a grocer to the Four Corners, they could count on support of the City Manager’s office to fill the remainder of the vacant space with a health and fitness use. Illustrative of these assurances is a June 2, 2016 e-mail written by Assistant City Manager Grindall to Steve Mavromihalis after Sprouts had expressed interest in the Four Corners location:

“Steven, I just wanted to check in and see if all was well with the Sprout’s to Newark deal. If you are going to bring the Gym – I’d like to get that teed up!”

Based on the assurances from the City Manager’s Office, our clients went ahead and executed the Sprouts lease and invested millions of dollars in tenant improvements, including a demising wall necessary to enclose the new Sprouts premises so that this upscale market could be brought to the Newark community. It took 21 month, at enormous financial risk to our clients, to bring the Sprouts Market to Newark. Our clients took on this risk in reliance on the City’s promises that it would approve a CUP for a health and fitness facility next door after Sprouts opened for business.

In addition, our clients continued looking for other credit retail tenants who might come to the center to occupy the rest of the vacant space at 6203 Jarvis Avenue. We can provide you with exhaustive documentation from the commercial real estate brokers of their efforts to find someone else for this space.

While the construction work was going on for the Sprouts Market, our clients repeatedly requested authorization to proceed with the health and fitness center, but were asked by City officials to “be patient” and keep looking for a credit retail tenant. At our clients’ request, the brokers revisited their previous retail contacts to see if anyone had changed their mind. Nobody had.

Since the opening of Sprouts Market, our clients have continued to look for other retail credit tenants and have continued to stay in touch with the City Manager’s Office. They have continually been told that they need to “be patient.”

The City’s requests for “patience” have cost our clients hundreds of thousands of dollars. Our clients endured this in reliance on the assurance that we would receive the support of the City Manager, not only if they brought Sprouts, but later if they could not find a credit-worthy retail tenant. It is now time for the City to approve the health and fitness center so that we do not lose this tenant as well.

## LEGAL AUTHORITY

There can be no basis for the failure of the City to approve the conditional use permit for Fitness 19. This is an extremely appropriate family-friendly facility that will be an asset to the Newark community. There is nothing about the request for the conditional use that is contrary to other uses that the City has approved in this area. Indeed, the City has granted similar conditional uses for workout facilities in the immediate vicinity. The City granted a CUP to Anytime Fitness to operate a gym in the Four Corners center in 2012 – at a location right next door to Curves, another existing health and fitness facility.

### **Fifth Amendment Taking**

On these facts, the City's denial of a conditional use permit in these circumstances would effect a taking of our client's property. The U.S. Supreme Court has made clear as a categorical matter that "the Fifth Amendment is violated where regulation denies all economically beneficial or productive use of land." *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (italics in original); see also, *Lingle v. Chevron USA Inc.*, 544 U.S. 528 (2005). Under *Lucas*, such a "total taking" is "compensable without case-specific inquiry into the public interest advanced in support of the restraint" by the government. *Lucas*, 447 U.S. at 1015. And the Court also pointedly observed that when governments prohibit or deny "a particular use [that] has long been engaged in by similarly situated owners", and "the fact that other landowners, similarly situated, are permitted to continue the use denied to the claimant", they are especially vulnerable to legal challenge. *Id.* at 1031.

The holding and reasoning in *Lucas* are applicable here. Despite strenuous marketing efforts by our clients and their brokers, the demised premises have been empty for more than four years since Raley's closed. The City's insistence that we "be patient" and leave the property empty, when it has approved other nearby health and fitness facilities sought by "similarly situated owners" (*id.*) in the same Community Commercial zoning district, is nothing more than a discriminatory denial of the proposed Fitness 19 use. To the contrary, "when the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave the property economically idle, he has suffered a taking." *Lucas*, 447 at 1019 (italics in original).<sup>1</sup>

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<sup>1</sup> It is no longer necessary for a landowner owner who has suffered a taking of his property to first sue for just compensation under California law. He may now immediately seek relief in federal court under 42 U.S.C. § 1983 for the violation of his Fifth Amendment rights by the City. *Knick v. Township of Scott, Pennsylvania*, 588 U.S. \_\_\_, 139 S.Ct. 2162 (2019), overruling *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson County*, 473 U.S. 172 (1985). *Knick* is consistent with the recent pro-property rights trend in the Supreme Court.

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Separate and apart from *Lucas*, the City's denial of a CUP for Fitness 19 would also effect a regulatory taking under the multi-factor analysis set forth in *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 125 (1978), including the "economic impact of the regulation on claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations." The Supreme Court has confirmed this is the "primary" factor and thus the *Penn Central* inquiry "turns in large part" on "the magnitude of a regulation's economic impact and the degree to which it interferes with legitimate property interests." *Lingle*, 544 U.S. at 538-540 (Justice O'Connor writing for a unanimous Court). It is crystal clear from the facts here that the economic impact and burden on our clients' property flowing from a denial of a use permit would be severe, with damages (and potential City exposure) of several million dollars based on the rent and other financial terms of the signed Fitness 19 lease.

### **Denial of Equal Protection**

The Supreme Court has repeatedly "recognized successful equal protection claims brought by a 'class of one,' where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000), and cases cited therein. This is in keeping with the purpose of the Equal Protection Clause of the Fourteenth Amendment "to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents." *Id.* The City may also wish to take note of the overlap between the Court's protection of "similarly situated" plaintiffs in both the equal protection and takings contexts, both deprivations of their property rights (e.g., *Lucas*). It is no coincidence and will be a central theme if litigation ensues here.

In *Olech* the Village conditioned the connection of the Olechs' property to the municipal water supply on their granting the Village a 33-foot easement over their property, despite having required only a 15-foot easement from other property owners seeking access. These facts, quite apart from the Village's subjective motivation for its differential treatment of the plaintiff, were held "sufficient to state a claim for relief under traditional equal protection analysis." *Id.* at 565; see also, *Fortress Bible Church v. Feiner*, 694 F.3d 208, 222-224 (2d Cir. 2012) (following *Olech* and affirming injunction requiring town to issue building permit, where plaintiff presented "overwhelming evidence that its [project] application was singled by the Town for disparate treatment" compared to other similarly situated property owners).

### **Equitable Estoppel**

The doctrine of equitable estoppel is codified in California Evidence Code § 623, which states:

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“When a party has, by his own statement or conduct, intentionally and deliberately led another to believe a particular thing true and to act upon such belief, he is not, in any litigation arising out of such statement or conduct, be permitted to contradict it.”

Four elements must be present to apply the doctrine: (1) the party to be estopped must be apprised of the facts; (2) he must intend that his conduct be acted upon, or must so act that the party asserting the estoppel had a right to believe it was so intended; (3) the other party must be ignorant of the true state of facts; and (4) he must rely on the conduct to his injury. *City of Long Beach v. Mansell* (1970) 3 Cal.3d 462, 489, citing *Driscoll v. City of Los Angeles* (1967) 67 Cal.3d 297, 305. *Mansell* is and remains the leading case upholding the application of equitable estoppel to public agencies.

Equitable estoppel “rests firmly upon a foundation of conscience and fair dealing.” *Mansell*, 3 Cal.3d at 488. Moreover, it is settled that the doctrine of equitable estoppel “may be applied against the government where justice and right require it.” *Id.* at 492, and see cases cited therein. In *Mansell* the California Supreme Court explained that “[t]he government may be bound by an equitable estoppel in the same manner as a private party when the elements requisite to such an estoppel against a private party are present, and in the considered view of a court of equity, the injustice which would result from a failure to uphold an estoppel is of sufficient dimension to justify any effect upon public interest or policy which would result from the raising of an estoppel.” *Id.* at 496-497; see also, *Kieffer v. Spencer* (1984) 153 Cal.App.3d 954, 958, 963-964 (applying estoppel doctrine to compel city to grant business license to operate videogame arcade, where petitioner incurred substantial expenses to their “immediate detriment”, including encumbering their property, in reliance on “affirmative representations” by city officials, and “no strong public policy other than ordinary considerations of the general welfare” justified the city’s actions in withholding the license).<sup>2</sup>

Each of these elements is present, and the City’s conduct gives rise to an estoppel in favor of our clients. Our clients acted in reasonable reliance on the City’s promise to approve the proposed health and fitness use if our clients delivered a “top-notch grocer” like Sprouts to the Four Corners center. Given that this was a “top priority”, the City clearly intended that the Mavromihalis family would act on its statement. Our clients changed their position, to their financial detriment, in reliance on the City’s assurances. They put off bringing a health and fitness facility to the shopping center. And not only that. Our clients made significant financial and other investments; proceeded to market half the building for the Sprouts Market and spend money on a demising wall to make that happen. They also configured and sized the empty space

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<sup>2</sup> The City may think that it is immune from such equitable estoppel claims, which are relatively uncommon. However, this law firm has litigated and successfully raised an estoppel against the City of Napa based on the conduct of city staff in that case – including an assistant city manager – on which our clients reasonably relied to their detriment.

*Of Counsel*  
Bruce C. Paltenghi

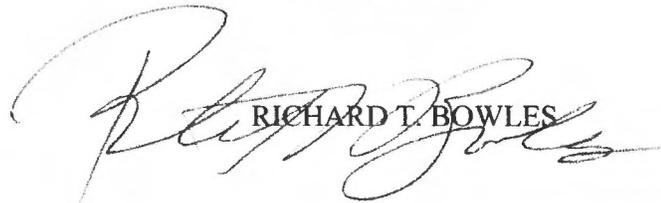
so that it could be marketed for the future health and fitness gym that the City had promised to get "teed up."

In sum, while our clients dealt with the City in good faith, the same cannot be said of the City. On these facts, we believe a judge or jury will be sympathetic to our clients' position if litigation becomes necessary for our clients to enforce their constitutional and private property rights. .

### CONCLUSION

It is our clients' fervent hope that nothing more than this letter is required to move this matter forward. Our clients are not litigious but are prepared to move forward with litigation to recover the damage that the City has caused them to incur based on the representations and promises made. We look forward to hearing from you. Thank you.

Very truly yours,

  
RICHARD T. BOWLES

RTB:dja



Richard T. Bowles  
Michael P. Verna  
Richard A. Ergo  
Bradley R. Bowles  
Cathleen S. Huang  
Robert I. Westerfield  
K. P. Dean Harper  
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January 3, 2020

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**Re: Sprouts Center – Fitness 19 Conditional Use Permit Application  
6203 Jarvis Avenue, Newark**

Gentlepersons:

The Newark Planning Commission is now scheduled to hear on January 14, 2020 the Fitness 19 application for a conditional use permit (“CUP”) to operate a health and fitness facility in the currently vacant property located at 6203 Jarvis Avenue in the Four Corners shopping center. That property is owned by 6203 Jarvis, LLC, a family limited liability company owned by our clients, Steven and Vickie Mavromihalis, and Dean and Xenia Kuvelis.

In our December 5, 2019 letter, we requested that the City approve the Fitness 19 application, along with bringing to the City’s attention certain other factual circumstances and legal claims which may arise if that CUP application is denied. We write now to provide additional information which strongly supports the granting of a CUP to Fitness 19.

We respectfully request that this letter and the attached information be made a part of the Planning Commission Staff Report on this matter. Further, please be sure it is given to all Planning Commissioners in advance of the January 14 hearing. Thank you.

**Seventeen Other California Cities in the Past Decade Have Approved New Use Permits for Fitness 19 Stores.**

**Those cities got it right.** They recognized that Fitness 19 does generate sales tax revenue from its own operations. Contrary to apparent perceptions of City of Newark staff, Fitness 19 sells taxable products and services to its patrons. See December 27, 2019 letter to Deputy Community Development Director Art Interiano from Mitch Gardner of G2 Design Build Inc. and Bob Rodger of Fitness 19 (“Interiano Letter”), at pp. 1 - 2.

And at least as important, Fitness 19 will draw hundreds of thousands of fitness customers annually to existing retail shopping centers and stores nearby. The result? Fitness 19 has a track record of stimulating increased, sales tax generating activities in nearby shopping centers, retail stores and restaurants where it operates. Other California cities over the past decade have had the vision to recognize this positive economic spillover from the impacts and value that Fitness 19 brings to the community, to local residents and to adjacent retail uses.

Other cities have had the wisdom to approve Fitness 19’s CUP applications. **So should Newark.**

**Health and Fitness Gyms Are a Good “Fit” for Malls and Shopping Centers Seeking to Increase Customer Visits.**

We also refer the City to pages 2 – 7 of the Interiano Letter, where the findings and conclusions from several recent news articles are highlighted. A few quotes will suffice here. “Malls are turning to health clubs to help boost foot traffic.” “Put a gym in a mall, and boom, you suddenly have a busier mall.” “Malls never wanted gyms. Now they court them.” “Before or after working out, people are more likely to grab a quick bite to eat, shop for groceries, or pick up their dry cleaning from a neighboring business.” “Overall, the addition of a fitness tenant is a smart move for brokers and landlords when leasing a shopping center.”

Newark isn’t an island isolated from these nationwide retail trends. The experience in other communities is equally applicable here. Fitness 19 is and will be a good fit for the Four Corners center.

**The Exhaustive, Four-Plus Year Marketing Efforts by John Cumberlich & Associates to Bring a Credit Retail Tenant to Our Clients’ Vacant Property in the Four Corners Center**

John Cumberlich was the listing broker for the vacant premises at 6203 Jarvis Avenue in the Four Corners shopping center. We refer the City to the attached “Newark leasing summary” memorandum dated December 19, 2019, prepared by Mr. Cumberlich (the “Cumberlich Memo”). It describes and summarizes how, “over the past four+ years,” Mr. Cumberlich and his team “thoroughly and continuously marketed the property to the entire commercial real estate

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industry through multiple channels.” They also made direct outreach contacts with more than 120 first class Bay Area retailers, all of whom are listed in the three-page spreadsheet attached to the Cumberlich Memo.

The upshot of those efforts? The Comments section of the spreadsheet documents a litany of reasons why other retailers declined or weren’t interested in coming to the Four Corners location. It demonstrates that **the only potential tenants to express any interest in leasing our clients’ property, and who submitted offers to lease, were two health and fitness users – Fitness 19 and Crunch Fitness.** After determining that Fitness 19 had the stronger track record and was a better fit for the Newark community, our clients selected Fitness 19 as a leasing partner for the vacant premises.

The foregoing evidence – from the unanimous CUP approvals in other California cities, well-established retail trends and media reports on the synergy between retail and fitness uses in shopping centers, and the extensive, multi-year marketing efforts by Mr. Cumberlich – strongly support the Planning Commission’s approval of Fitness 19’s CUP application. Fitness 19 will bring an active, lively and family-friendly clientele to the Four Corners area. It will increase economic activity and retail sales, and will be a welcome addition to the center, and the City of Newark generally.

But that’s not the end of the story here. These and other facts also highlight the damages our clients will sustain, and the multi-million dollar legal and financial exposure the City will face, if it denies the proposed Fitness 19 use.

### **The City’s Liability for a Regulatory Taking**

The Fifth Amendment prohibition against the taking of private property without just compensation “is violated where regulation denies all economically beneficial or productive use of land.” *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992); see also, *Lingle v. Chevron USA Inc.*, 544 U.S. 528 (2005). Just such a taking will occur if the City denies the Fitness 19 CUP application now – after four-plus years and concerted and extensive efforts to market our clients’ Newark property to retail users have come up empty. The record and evidence in this case shows that the proposed health and fitness use is, in fact, the *only* viable “economically beneficial or productive use” (*id.*) of the vacant premises at 6203 Jarvis Avenue. The circumstances encountered by Mr. Cumberlich and his team, and amply documented in the Cumberlich Memo, will weigh strongly against the City in future litigation if a CUP is not granted to Fitness 19.

Moreover, our clients’ damages are easily proven. Fitness 19 was ready to occupy the property over two years ago. Fitness 19 has now signed a 15-year lease for the premises, plus two (2) five-year options. The lease calls for minimum annual rent payments of approximately \$400,000 - \$500,000 during the initial 15-year term – which are of course contingent on the

City of Newark  
January 3, 2020  
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City's approval of a CUP. To this must be added our clients' very substantial financing and carrying costs that they incurred to keep their property vacant since the Sprouts market opened in mid-July 2017 – in compliance with repeated requests from City staff that they be “patient” and keep looking for a non-existent retail tenant.

The City is looking at a potential damages verdict against it of several million dollars, plus a likely seven-figure award of attorneys' fees and costs in favor of our clients under 42 U.S.C. § 1988.

In these circumstances, the City and its elected officials should reasonably ask themselves: Is a denial of the beneficial use proposed by Fitness 19 really worth taking this risk? Will Newark residents – your constituents – praise you for putting the City's finances at risk, or for wasting their tax dollars on the needless litigation that will result from denial of a CUP? The clear answer to both questions is a resounding NO. The only rational and sensible decision here is approval of Fitness 19's application without further delay.

**The City of Newark Has Approved Other Health and Fitness Uses in the Four Corners Shopping Center. In These Circumstances, Denial of the Fitness 19 CUP Application Would Be Discriminatory and Unlawful.**

Here too, the facts support our clients' position and fatally undermine any lawful basis for denying a use permit to Fitness 19. It is beyond dispute that the City permitted Curves, a women's fitness club chain, to operate in the Four Corners center more than a decade ago. Then in 2012, the City granted a CUP to Anytime Fitness to open a fitness gym right next door to Curves. The Curves and Anytime Fitness properties share the same Community Commercial zoning designation as our clients' property. Moreover, that Anytime Fitness isn't “high sales tax” generating retail store was not put forward by the City as a basis for denying it a use permit. Nor did the City deny a permit to Anytime Fitness because of its close proximity to, or the potential “anti-competitive” impacts that Anytime Fitness's opening might or might not have on Curves.

These facts have constitutional significance under both the Fifth Amendment taking and Fourteenth Amendment equal protection clauses. The Supreme Court made clear that a city which prohibits or denies a particular use that has “long been engaged in by similarly situated owners”, and/or where “other landowners, similarly situated, are permitted to continue the use denied to the claimant”, is especially vulnerable to a Fifth Amendment taking claim. *Lucas, supra*, 505 U.S. at 1031. In the same vein, a city violates the Equal Protection Clause where it intentionally treats a property owner “differently from others similarly situated” and there is “no rational basis for the difference in treatment.” *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000). The City cannot deny this application because of “concern” for the impact on Anytime Fitness.

City of Newark  
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Long story short: Our clients will have strong constitutional claims against the City on both taking and equal protection discrimination grounds if the Fitness 19 use permit is denied, in view of the City's past disparate and favorable treatment of adjacent property owners seeking permission for health and fitness uses in the Four Corners area. The City needs to face up to its exposure under *Lucas* and *Olech*, and not try to downplay it.

### **Equitable Estoppel**

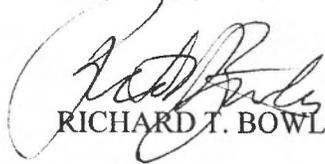
Finally, there is the matter of equitable estoppel, which "rests firmly upon a foundation of conscience and fair dealing" and "may be applied against the government where justice and right require it." *City of Long Beach v. Mansell* (1970) 3 Cal.3d 462, 488, 492. Our clients acted in reasonable reliance on the promise of City staff to get the proposed health and fitness use of their vacant property "teed up" for approval if and when our clients delivered a "top-notch grocer" like Sprouts to the Four Corners center. Our clients lived up to their side of the bargain. It is time for the City to do the same.

### **Conclusion**

It remains our clients' earnest desire and hope that the City will review carefully the information in the Interiano Letter, the Cumberlich Memo and our letters. We hope it will weigh carefully its legal and financial exposure; reconsider its previously expressed position; and approve the pending Fitness 19 CUP application at the January 14, 2020 hearing. While it is not their first choice, our clients are fully prepared to pursue litigation against the City for any and all damages that will result from a denial of the Fitness 19 use.

We are available to meet with the appropriate City officials prior to the Planning Commission hearing if that would be helpful, and look forward to hearing from you. Thank you.

Very truly yours,

  
RICHARD T. BOWLES

RTB:dja  
Enclosure

cc: Anne Stedler  
Economic Development Manager  
Anne.stedlar@newark.org



COMMERCIAL REAL ESTATE BROKERAGE

## MEMORANDUM

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To: Steven Mavromihalis, et al.

From: John Cumbelich

Date: December 19, 2019

Re: Newark leasing summary

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Further to our ongoing discussions I have attached a spreadsheet that summarizes many of the retailers that our firm has been in dialogue with over the past four+ years in our efforts to lease the 28,000 SF co-anchor space at your Newark property.

In addition to our firm's direct outreach to the user community such as those noted on the spreadsheet, we have thoroughly and continuously marketed the property to the entire commercial real estate industry through multiple channels. These include:

- The property has been continuously posted at [www.LoopNet.com](http://www.LoopNet.com), which is the industry standard forum for exposing commercial real estate listings. We have received occasional responses through LoopNet inquiries from uses such as banquet hall, night clubs and independent operators of martial arts, basketball courts or trampoline parks. None of these users generated offers.
- The property has been exposed for years at industry conventions of the International Council of Shopping Centers (ICSC), both regionally and nationally. ICSC is the largest trade organization in the shopping center industry.
- The property has been continuously marketed to the Northern California commercial real estate industry through our firm's daily marketing blasts send to over 800 commercial real estate brokers and professionals.
- The property has been continuously posted to our firm's available properties website, [www.cumbelich.com](http://www.cumbelich.com)
- The property has been continuously exposed to each of our firm's 35 partner offices throughout North America (X Team Retail Advisors), each of whom are exclusively focused on the leasing of best in class properties and representing first class retailers, as we are.

Perhaps just as telling as all of the users that have declined interest, due to a lack of interest in Newark in general or to this location in particular, are all of the first-class retailers that we have successfully consummated lease transactions with. Our firm has developed deep roots in the Northern California shopping industry over the past 30+ years, during which time our elite firm has consummated several of the most notable retail leases in Northern California. A partial list of uses with whom we have successfully consummated Bay Area leases with include:

- 24 Hour Fitness
- Apple
- BevMo!
- Big Lots
- Burlington

- Circuit City
- Cost Plus
- Crunch Fitness
- CVS/Longs Drugs
- Dick's Sporting Goods
- Famsa
- Fitness 19
- Forever 21
- Golf Mart
- Golfsmith
- Hobby Lobby
- Home Expo
- Kroger
- Lowes
- Orchard Supply Hardware
- Party City
- Petco
- Petsmart
- Pottery Barn
- Restoration Hardware
- Ross Dress for Less
- Smart & Final
- Sport Chalet
- Sprouts
- Stein Mart
- Target
- Tiffany & Co.
- TJ Maxx
- ULTA
- Villa Sport
- Wal Mart
- Walgreens
- Yoga Works

The partial list above demonstrates that our firm has one of the largest and most extensive resumes in successfully attracting first class retailers to Northern California locations of any professional currently active in this market.

The list above clearly suggests that if there were a good credit, good quality retailer other than Fitness 19 or Crunch, which was a candidate for this location, we would have identified them long ago.

Feel free to contact me with any questions about the summary above. Thank you

Newark Sprouts Co-Anchor Contact List		
Retailer	Declined?	Comments
24 Hour Fitness	Yes	Staying near mall
99 Only	Yes	decline
99 Ranch Market	Yes	declined interest in relocating
Alamo Draft House	Yes	decline
Aldi	Yes	not ready for Bay Area
AMC Theaters	Yes	regional locations only
Andronico's	Yes	not actively expanding
Arteagas Market	Yes	wrong demographic
Ashley HomeStore	Yes	Territory already covered by multiple other stores
At Home	Yes	Too small. Decline.
Babies R Us	Yes	prefers malls
Bed Bath & Beyond	Yes	Territory already covered, need more soft good co-tenancy
Berkeley Bowl	Yes	decline
Pet CLUB	Yes	Not interested.
Bevmo	Yes	Not interested in Newark
Big 5 Sporting Goods	Yes	Their space requirements make it impossible to fit two tenants in the space
Blink Fitness	Yes	not ready for Bay Area
Bob's Discount Furniture	Yes	not ready for Bay Area
Bowlmor	Yes	regional locations only
Burlington	Yes	decline
Buy Buy Baby	Yes	prefers malls
California Family Fitness	Yes	decline
Cash & Carry	Yes	Toured, declined
Chavez Supermarket	Yes	wrong demographic
Chuze Fitness	Yes	not ready for Bay Area
Cost Plus World Market	Yes	Territory already covered, need more soft good co-tenancy
<b>Crunch Fitness</b>	<b>No</b>	<b>submitted offer</b>
CVS	Yes	declined relocation, despite drive thru opportunity
DD's discounts	Yes	Initial interest was conditioned on Tenant's right to terminate. Later withdrew.
Daiso	Yes	decline
Dave & Busters	Yes	regional locations only
David's Bridal	Yes	No requirement here
db Shoes	Yes	regional locations only
Dick's Sporting Goods	Yes	Too close to Hayward
Diddam's	Yes	decline
Dollar Tree	Yes	decline
DSW	Yes	No requirement here
<b>Fitness 19</b>	<b>No</b>	<b>submitted offer</b>
Floor & Décor	Yes	Decline. Too small.
Fresco Market	Yes	wrong demographic
Friedman's Home Improvement	Yes	seeks North Bay only
Gold's Gym	Yes	decline
Golf Galaxy	Yes	not active
Golfsmith	Yes	stopped expanding
Goodwill	Yes	decline
Grocery Outlet	Yes	too close to other store
H Mart	Yes	reviewed, pursued South Bay instead
Hankook Market	Yes	decline
Harbor Freight	Yes	decline
Hobby Lobby	Yes	regional locations only
Home Depot	Yes	too small
HomeGoods	Yes	regional locations only
In Shape Fitness	Yes	reviewed, declined
iPic Theaters	Yes	decline
Island Pacific Market	Yes	decline
Joann Fabrics	Yes	Too close to Pacific Commons in Fremont
Kirkland's	Yes	regional locations only
LA Fitness	Yes	reviewed, declined

La Superior	Yes	wrong demographic
Las Montanas	Yes	wrong demographic
Lidl	Yes	not ready for Bay Area
Liesure Sports Inc.	Yes	prefers upscale trade areas
Lifetime Fitness	Yes	decline. Not a target market.
Lion Supermarket	Yes	decline
Living Spaces	Yes	decline. Too close to Fremont store.
Lowes	Yes	already in Fremont
Mancini's Sleepworld	Yes	decline
Marina Market	Yes	decline
Marshalls	Yes	regional locations only
Maya Cinema	Yes	decline
Metropolitan Theaters	Yes	not seeking this market
Mi Pueblo	Yes	declined interest in relocating
Michael's	Yes	already covered in market
New Seasons	Yes	decline
Nordstrom Rack	Yes	no soft good co-tenancy
Nugget Market	Yes	purchase only, not interested
Off Broadway shoes	Yes	prefers malls
Old Navy	Yes	Territory already covered, need more soft good co-tenancy
Orchard Supply Hardware	Yes	not interested in returning to Newark
Party City	Yes	already in Fremont
Pet Club	Yes	decline
Pet Food Express	Yes	Their space requirements make it impossible to fit two tenants in the space
Pet Supplies Plus	Yes	they are too small
Petco	Yes	Territory already covered, need more soft good co-tenancy
Petsmart	Yes	Territory already covered, too small of trade area
Pier 1 Imports	Yes	prefers malls
Pinstripes	Yes	prefers lifestyle centers
Planet Fitness	Yes	decline
Regal Cinema	Yes	prefers malls
REI	Yes	already in Fremont
Richard's Crafts	Yes	not expanding
Rite Aid	Yes	reviewed, declined
Ross	Yes	declined interest in relocating from across the street
Safeway	Yes	declined interest in relocating from across the street
Seafood City	Yes	decline
Shopko	Yes	not ready for Bay Area
Sierra Trading Post	Yes	not ready for Bay Area
Smart & Final	Yes	Toured, declined
Sport Chalet	Yes	stopped expanding
Stein Mart	Yes	prefers malls and regional locations
Strike	Yes	decline
Studio Movie Grill	Yes	regional locations only
Super Kyo Po	Yes	decline
Target	Yes	toured twice, declined
The Floor Store	Yes	decline
The Sports Authority	Yes	regional locations only
Thomasville	Yes	decline
TJ Maxx	Yes	regional locations only
Tokyo Central/Marukai	Yes	decline
Top Fit	Yes	decline
Total Wine	Yes	Too close to Pacific Commons in Fremont
Total Woman	Yes	prefers lifestyle centers
Toys R Us	Yes	staying at Newpark
Tractor Supply Hardware	Yes	prefers free-standing locations
ULTA	Yes	too small, decline
Villa Sport	Yes	too large, seeks 8 acres
Walgreens	Yes	reviewed, declined
West Marine	Yes	decline

Whole Foods	Yes	met at ICSC, toured, declined
Winco Foods	Yes	reviewed, declined
Zion Market	Yes	decline

October 2, 2019

Matt Morales  
Anytime Fitness (Owner)  
6347 Jarvis Ave  
Newark, CA 94560  
707-484-2200

**RE: Requesting City of Newark deny Conditional Use Permit for Fitness 19**

Dear Art Interiano,

It has come to the attention of business owners in the Sprouts Shopping Center that Fitness 19 has applied for a Conditional Use Permit to open a gym between Sprouts and Anytime Fitness (also a gym). We, business owners in the Sprouts Shopping center, are opposed to another gym opening in the center. Among the primary concerns, there is already an existing and well established gym in the center and across the street. In addition, the increased traffic and parking needs of a large gym during busy peak hours would be detrimental and negatively impact the many restaurants and other businesses.

We would kindly request that the City of Newark deny this permit.

Kind Regards,

Matt Morales (owner)  
Anytime Fitness

GEORGE REID (OWNER)  
JEWELRY BY DESIGN

*[Signature]*  
SIMPLY TRAI

Pier 98  
Bill

*[Signature]*  
Daany Parikh

*[Signature]* (owner)

*[Signature]* owners  
of  
Pure water ice

BELLA EYE CARE OPTOMETRY  
*[Signature]*

THE NATION  
CALVIN *[Signature]*



ATTORNEYS AT LAW

18101 Von Karman Avenue  
Suite 1800  
Irvine, CA 92612  
T 949.833.7800  
F 949.833.7878

Gregory W. Sanders  
D 949.477.7669  
gsanders@nossaman.com

Refer To File # -

VIA HAND DELIVERY

January 14, 2020

William Fitts, Chairperson and  
Members of the Planning Commission  
City of Newark  
37101 Newark Boulevard  
Newark, CA 94560-4330

Re: Opposition to Proposed Conditional Use Permit U-19-9 to Allow Fitness 19 at  
6203 Jarvis Avenue

Dear Chairperson Fitts and Members of the Planning Commission:

We represent VN Investment Group, LCC, the owners of the shopping center adjacent to the proposed location of the Fitness 19 physical fitness center. The purpose of this letter is to inform you of our objections to the proposed Fitness 19 conditional use permit and the bases for our client's objections.

By way of background, the proposed location of the Fitness 19 physical fitness center and the adjacent shopping center were developed as an integrated facility. The proposed location and the adjacent shopping center are governed by an Agreement of Covenants, Conditions and Establishment of Restrictions and Grants of Easements, dated October 4, 1989 and recorded in the records of the Alameda County Recorder as Instrument no. 89-273594 ("Agreement"). A copy of the Agreement is attached.

VN Investment Group, LLC is the successor in interest to Newark C&C Associates, a California limited Partnership, defined as "Developer" in the Agreement. The current owner of the location of the proposed Fitness 19 physical fitness center is the successor in interest to Ozark Investments, LTD., a California limited partnership, defined as "Ozark" in the Agreement. By its terms, the Agreement binds the successors in interest to Developer and Ozark. Accordingly, the terms of the Agreement are binding on the current owner of the proposed Fitness 19 location and the adjacent shopping center.

Following is a discussion of the bases of VN Investment Group's opposition to the proposed Fitness 19 conditional use permit:

**I. Contrary to the city staff's assertion, the proposed conditional use permit is not eligible for a CEQA exemption.**

In the Staff Report to the Planning Commission on the proposed conditional use permit (incorporated into the Planning Commission agenda and marked as a draft dated November 12,

2019), the staff asserts that the proposed conditional use permit is “exempt from CEQA per 15301.” The staff’s assertion is completely misplaced. The proposed conditional use permit is not eligible for exemption under the California Environmental Quality Act (Pub. Res. Code sec. 21000, et seq.) (“CEQA”).

By its terms, CEQA Guidelines section 15301 applies only to minor alterations and minor additions to existing structures, restoration or rehabilitation of deteriorated or damaged structures, etc. Section 15301 does NOT apply to uses to which existing structures will be put. It is patently clear that a change in use that is greater in intensity than a previous use of an existing structure may produce significantly greater environmental impacts. That is the case with regard to the proposed Fitness 19 use with regard to parking and traffic circulation impacts as further discussed below.

Inasmuch as the proposed Fitness 19 conditional use permit is not eligible for an exemption from the requirements of CEQA, an initial study must be undertaken by the city pursuant to CEQA Guidelines section 15063 to determine whether, for example, an environmental impact report must be prepared to assess the impacts associated with the proposed conditional use permit.

## **II. The “Parking Review” for the proposed Fitness 19 conditional use permit is not adequate.**

A “Parking Review” for the proposed Fitness 19 conditional use permit dated June 21, 2019, was undertaken for the city by Abrams Associates. The study simply measures the amount of parking that will be necessary to accommodate the Fitness 19 use and compares the parking demand against the number of spaces available at the proposed Fitness 19 location and adjacent shopping center. The “Parking Review” does not measure the amount of time that patrons of the proposed Fitness 19 facility will occupy parking spaces.

When the proposed location for the Fitness 19 facility and adjacent shopping center were developed, the proposed Fitness 19 location was intended to be used as a supermarket. Assumptions were made about the availability of parking based, in part, on the typical time occupying a parking space is spent by a patron of a supermarket. That amount of time is much shorter than the time typically spent by a patron of a physical fitness center. Inasmuch as the “Parking Review” does not take the parking time differential into account, it presents a skewed analysis and conclusion that creates a false illusion that there is sufficient existing parking to accommodate the Fitness 19 use. Accordingly, the “Parking Review” is inadequate and cannot be relied on by the Planning Commission. Before considering the proposed Fitness 19 conditional use permit, the city must undertake an adequate parking study that takes the foregoing into account.

## **III. The proposed Fitness 19 use has not been approved by VN Investment Group, LLC, as required by the Agreement.**

Section 8 (General Use Restrictions) of the Agreement provides at Section 8.2 that no portion of the Entire Property, defined in the Agreement to include the proposed location of the Fitness 19 facility and the adjacent shopping center, may be used for a recreational use without

the prior written consent of Developer (now VN Investment Group, LLC). VN Investment Group, LLC has not approved the proposed Fitness 19 use in writing as required by the Agreement.

There is no doubt that the proposed Fitness 19 use is a recreational use. The aforementioned Staff Report provides that the Fitness 19 use is a permitted use in the Community Commercial (CC) zone because a "physical fitness center falls under the use category of 'Indoor sports and recreation'" use. (Emphasis added.) If the proposed Fitness 19 use is not a recreational use, then it is not a use permitted by the Community Commercial zoning of the property and the conditional use permit must be denied.

VN Investment Group, LLC has not approved the proposed Fitness 19 use in writing as required by the Agreement. Unless and until such approval occurs, Fitness 19 cannot use the proposed location for the intended use.

For all of the foregoing reasons, we respectfully request that the Fitness 19 conditional use permit application be denied.

Sincerely,



Gregory W. Sanders  
Nossaman LLP

GWS:jg

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RECORDING REQUESTED BY AND  
WHEN RECORDED RETURN TO:

89-273594

013 087

DOWNEY, BRAND, SEYMOUR & ROHWER  
555 Capitol Mall, Suite 1000  
Sacramento, California 95814-4686

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/49

RECORDED IN OFFICIAL RECORDS  
OF ALAMEDA COUNTY, CALIF.  
RENE S. DAVIDSON, CO. RECORDER

AGREEMENT OF COVENANTS, CONDITIONS AND  
ESTABLISHMENT OF RESTRICTIONS AND GRANTS  
OF EASEMENTS

'89 OCT 5 PM 12 58

THIS AGREEMENT OF COVENANTS, CONDITIONS AND  
ESTABLISHMENT OF RESTRICTIONS AND GRANTS OF EASEMENTS  
("Agreement") is made as of the 4<sup>th</sup> day of October, 1989,  
by and between NEWARK C&C ASSOCIATES, A CALIFORNIA LIMITED  
PARTNERSHIP ("Developer"), located at 1771 Stockton Boulevard,  
Sacramento, California 95816, and OZARK INVESTMENTS, LTD., A California  
Limited Partnership ("Ozark"), located at 500 West Capitol  
Avenue, West Sacramento, California 95605.

R E C I T A L S

1. The property subject to this Agreement  
(hereinafter referred to as the "Entire Property") is situated in  
the City of Newark, County of Alameda, State of California, and  
is legally described as follows:  
The Entire Property is shown on the Parcel Map attached hereto as  
Exhibit A, which by this reference is made a part hereof ("Parcel  
Map").
2. Developer is the owner of the parcels of land  
shown as Parcels 2, 3, 4, 5, 6, 7 and 8 on the Parcel Map.
3. Ozark is the owner of the parcel of land shown as  
Parcel 1 ("Ozark Parcel") on the Parcel Map.

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4. Developer and Ozark intend that the Entire Property be developed as an integrated commercial-retail shopping center ("Shopping Center"), substantially as shown on the "Site Plan", attached hereto and incorporated herein as Exhibit B, and for such purposes do hereby fix and establish, for the benefit of each other and their respective heirs, assigns, successors, mortgagees and tenants, certain easements, covenants, restrictions, liens and charges (hereinafter collectively referred to as the "Restrictions"): upon and subject to which the Shopping Center, and any part thereof, shall be improved, maintained, held, leased, sold or conveyed. Such Restrictions shall be covenants running with the land pursuant to applicable law, including without limitation Section 1468 of the California Civil Code, and shall run with each and every portion of the real property comprising the Shopping Center and shall inure to and pass with each and every such portion, and shall apply and bind the respective successors in interest thereof, and all and each of the restrictions are imposed upon the Shopping Center as mutual and reciprocal equitable servitude in favor of the Shopping Center, and any portion thereof. Each covenant to do or refrain from doing some act on a Parcel (i) is a burden upon such Parcel for the benefit of the other Parcels, (ii) runs with each Parcel and (iii) shall benefit or bind each owner of a Parcel during its ownership of a Parcel or any portion thereof or any interest therein derived in any manner. References to an "owner" shall be defined as a fee simple owner of any Parcel within the

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Shopping Center and their successors and assigns. As long as Developer or Ozark has an interest (fee or leasehold) in the Entire Property, all approval rights and obligations of each party in this Agreement shall remain with Developer or Ozark, as the case may be. In the event Developer and Ozark no longer have any interest (fee or leasehold) in the Entire Property, all rights and obligations of each party shall transfer to their respective successors in interest.

SECTION 1. USE IN GENERAL

1.1 The Entire Property may be used for any lawful purpose not specifically prohibited herein, all as more specifically described hereinafter.

1.2 For the purpose of this Agreement, the Entire Property is divided into two (2) categories which relate to use, each of which is delineated on the Site Plan, and are hereinafter referred to respectively as "Building Area" and "Common Area." The buildings and improvements to be constructed on the Entire Property and the Entire Property are sometimes collectively referred to herein as the "Shopping Center."

SECTION 2. BUILDING AREA

2.1 The construction, establishment and maintenance of buildings upon the Entire Property shall be specifically confined and limited to the Building Areas, and any deviations shall require the prior written consent of Developer and Ozark, which consent shall not be unreasonably withheld or delayed.

2.2 (a) No building or other structure shall be erected, placed, maintained or substantially altered on any part of the Entire Property until or unless the exterior appearance and coloring thereof, specifically including, but not limited to, elevations, height, canopy design and dimensions and location of other building projections, shall have been approved by Developer and Ozark which approval may be delegated; provided, however, that such approval shall not be unreasonably withheld or delayed, and any such approval is not a warranty or guaranty of governmental approval or compliance, and Developer or Ozark shall not be liable to each other or any other party whatsoever by reason of mistake in judgment, negligence or non-feasance arising out of or in connection with, or for any action or non-action in connection with the approval or disapproval of or failure to approve any such plans. Any failure of Developer or Ozark to respond in writing to any written request for such approval within twenty (20) days of its receipt shall constitute an unqualified and irrevocable approval by such party of the specifications and drawings submitted. Developer and Ozark shall, upon giving such approval, evidence the same by endorsing such approval upon a copy of the final specifications and the elevations sheets of the working drawings for such building.

(b) All buildings in the Shopping Center shall be limited to a single story in height (not considering mezzanines), not to exceed thirty-two (32) feet (except improvements on Shops 6 and 7 and Pads A, B and C as shown on the

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Site Plan shall not exceed twenty-eight (28) feet), excluding any roof equipment and reasonable screening for such equipment.

2.3 Notwithstanding the provisions of Paragraphs 2.1 and Developer's and Ozark approval pursuant to Paragraph 2.2(a), portions of the Common Area adjacent to Building Areas may be used for, and reciprocal nonexclusive easements are hereby granted for:

(a) The installation, removal, repair, replacement and maintenance of building canopies over pedestrian sidewalks, over Common Areas and Building Areas, together with canopy support columns upon and over such sidewalks and Common Areas;

(b) Pedestrian sidewalks and flower boxes, planting containers, and other decorative and landscaping features thereon;

(c) Such advertising or identification signs of building occupants as may be desired to be attached to or erected upon the Building Area, including building canopies; provided, however, said signs shall be consistent with a sign criteria prepared by a licensed architect and approved by Developer and Ozark, which approval shall not be unreasonably withheld or delayed and provided, any sign on the Building Area of an occupant thereof shall only identify or advertise the business of the occupant being conducted in such Building Area;

(d) The installation, removal, replacement, repair, use and maintenance of fire hose connections, downspouts,

hose bibbs, standpipes, yard or floodlights, subsurface building foundations, and such signs or shadow boxes of building occupants as may be attached to or form an integral part of a building at any time situated upon any portion of a Building Area;

(e) The construction and operation of a loading ramp and dock on the Ozark Parcel for the exclusive use of Ozark; provided, however, that any exclusive loading ramp and dock shall not be considered a part of the Common Area;

(f) The construction and operation of trash enclosures or trash bins;

(g) The opening thereunto of doors from contiguous Building Areas which open outward;

(h) The temporary erection of ladders, scaffolding and storefront barricades during periods of construction, remodeling or repair of buildings and building appurtenances, upon the condition, however, that such construction, remodeling or repair is diligently performed and such ladders, scaffolding and barricades are thereupon promptly removed.

Any owner wishing to use the Common Area or its Parcel in a manner set forth in this Section 2.3 may do so at its own expense and shall be responsible for the proper maintenance of such use to the extent such maintenance is not within the general scope of Common Area maintenance, or is extraordinary to the Common Area maintenance generally provided by the Maintenance Director, as set forth in Section 5, below.

SECTION 3. COMMON AREA

3.1 The Common Area shall be used for "Access and Parking" and for "Services and Activities" (as each term is hereinafter defined) and for no other purposes except those specifically described herein, without the prior written consent of Developer and Ozark which consent shall not be unreasonably withheld or delayed. No changes in the number of parking spaces, or in the configuration of the Common Area from that shown on the Site Plan shall be made without the prior written consent of Developer and Ozark which consent shall not be unreasonably withheld or delayed; provided Developer or Ozark may withhold its consent to any change that would result in the number of the parking spaces available for standard size American cars in the area designated in Exhibit C attached hereto being reduced below 300.

3.2 The term "Access and Parking" as used herein shall mean and be deemed to include and permit the following:

(a) The parking of passenger vehicles and the pedestrian and vehicular traffic of the owners and their respective heirs, successors, assigns, grantees, mortgagees, tenants, subtenants, licensees and concessionaires, and the officers, directors, agents, employees, customers, visitors and licensees and invitees of any of them (hereinafter called "permitted users"), of any and all portions of the Building Area within the Entire Property;

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(b) The ingress and egress of any of the above-designated persons and the vehicles thereof, to any and from any portion of the Common Area and the public streets adjacent to the Common Area;

(c) The movement of pedestrians and passenger vehicles between mercantile, business and professional establishments and occupants located or to be located within the Building Area;

(d) Subject to Section 3.1, the construction, maintenance, repair, replacement, rearrangement and reconstruction of parking sites or stalls, including bumpers, private streets, sidewalks, ramps, driveways, lanes, curbs, gutters, traffic control areas, signals, directional signs, traffic islands, traffic and parking lighting facilities;

(e) The ingress and egress of delivery and service trucks and vehicles to and from Building Areas or any portion thereof and the public streets adjacent to the Entire Property for the delivery of goods, wares or merchandise and the rendition of services to the owners and their respective permitted users. The Common Area shall not at any time be used for the parking of trucks, or the loading or unloading thereof, except for the parking, loading or unloading of trucks during and in connection with the construction or demolition of buildings upon a Building Area, the servicing and supplying of a Building Area which cannot be serviced and supplied from areas designated as loading areas, the delivery or removal of trade fixtures

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(including signs) or the construction, repair or maintenance of parking area and improvements and facilities herein permitted, upon the condition, however, that any such use shall be confined to that which is reasonably necessary in connection with the matters herein specified and shall be diligently and promptly performed;

(f) The temporary parking or standing of trucks, tractors, trailers and other delivery vehicles used in conjunction with the exercise of any of the activities described in subparagraph 3.3 below.

3.3 The term "Services and Activities" as used herein shall mean and be deemed to include and permit the following:

(a) The installation, maintenance and operation, within the confines of the Common Area, of underground public utilities serving Building Areas, together with and including vaults, manholes, meters, pipelines, valves, hydrants, sprinkler controls, conduits and related facilities, and sewage facilities, all of which shall be even with or below the surface, except hydrants, transformers, risers and other facilities which by their nature must be installed, maintained or operated above ground;

(b) The provision of other facilities such as mailboxes, public telephones and benches for the comfort and convenience of customers, visitors, invitees, licensees and patrons of the mercantile, business and professional establishments and occupants located or to be located upon the

Building Area or any portion thereof, as the owners may from time to time deem appropriate;

(c) The seasonal or periodic sale of merchandise from sidewalks which are immediately adjacent to Building Areas (provided the owners of such Building Areas have approved said sale, which approval shall not be unreasonably withheld or delayed), which sale shall not unreasonably impair pedestrian access along said sidewalks, impede vehicular traffic flow within the Shopping Center nor diminish the number of the parking spaces as shown on the Site Plan;

(d) The construction, maintenance, repair, replacement, rearrangement and reconstruction of underground public utilities, underground sewage facilities, and all other common facilities.

(e) Subject to governmental approval, Developer shall erect a pylon sign structure in the location indicated on the Site Plan. The Shopping Center pylon structure and identification sign thereon and all monument signs for the Shopping Center shall conform to the sign criteria prepared by a licensed architect mutually approved by Developer and Ozark. The cost and expense of erecting any Shopping Center monument signs and said pylon structure, and of installing the electrical system for the operation of the identification signs thereon (including underground conduit and electrical panels) and maintaining all such signs shall be borne in the same ratio as each user's square feet of sign identification bears to the total

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square feet available on the sign. The available identification space on the pylon shall be allocated as follows: the top one-third (1/3) of available sign space to Developer for Shopping Center identification; the middle one-third (1/3) of available sign space to Ozark; and the bottom one-third (1/3) of available sign space to Developer for use by no more than two (2) occupants, each either occupying more than 15,000 square feet of floorspace in the Shopping Center or being the single occupant of a free-standing pad building. Ozark shall have a right of first refusal for one-third (1/3) of the available sign space on any Shopping Center monument as it may become available from time to time, which monument signs may only be used to identify the Shopping Center and/or to identify occupants of the Shopping Center occupying more than 15,000 square feet of floor space in the Shopping Center or being the single occupant of a free-standing pad building. No more than two (2) occupants shall appear on any one monument sign, with or without the Shopping Center identification;

(f) The construction, maintenance, repair, replacement and reconstruction of any wall or landscaped area including plants, planting boxes, edgers, decorative walls, and sprinklers and valves, all as may be required by any governmental authority having jurisdiction;

(g) The installation, operation, repair, replacement and maintenance of public utilities, together with vaults, manholes, meters, pipelines, valves, hydrants, conduits,

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poles and related facilities, and sewage services, serving any Building Area; provided, however, that any poles or other above-surface installations shall be located so that there shall be an unimpeded access for vehicles and trucks to and from the public streets from and to the loading areas of any Building Area and all crossarms and pole racks and the like attached thereto shall be in compliance with all applicable laws;

(h) Subject to the provisions of Sections 3.2, above, rearrangement and reconstruction of truck loading and unloading areas including ramps, docks and similar facilities; trash, refuse and garbage container storage areas; visible recycle bins in the area(s) shown on the Site Plan; and other incidental and related facilities;

(i) With respect to the Ozark Parcel, the storage of shopping carts and the operation of vending machines on the sidewalks immediately adjacent to its Building Area, provided such storage and operation does not unreasonably impair pedestrian access along said sidewalks;

(j) All the Services and Activities permitted within the Common Area shall be performed with reason and judgment so as not to unreasonably interfere with the serving and supplying of the loading areas of the Building Areas.

SECTION 4. COMMON AREA IMPROVEMENT

4.1 Developer shall, on behalf of Developer and pursuant to that certain "Development Agreement" between Developer and Ozark of even date herewith (the "Development

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Agreement"), improve or cause to be improved, for Access and Parking and Services and Activities, as herein contemplated, all portions of the Common Area herein established and as shown on the Site Plan.

4.2 All sidewalks adjacent to a Building Area shall be of concrete construction and not exceed fifteen (15) feet in width. All areas for vehicular use shall be paved with a suitable base and surfaced with a bituminous or asphaltic wearing surface at least four (4) inches in depth or as recommended by the soils engineer approved by Developer and Ozark for the Shopping Center, provided, if such engineer makes more than one recommendation for a particular area of the Shopping Center, the recommendation suggesting a surface of the strongest durability for such designated area shall be used, or, as to portions of the loading areas, if all parties hereto approve, in the alternative, with concrete or such other heavy-duty paving material suitable to withstand heavy truck traffic and which is reasonably acceptable to Developer and Ozark.

4.3 Subject to the foregoing limitations and restrictions, during the course of construction of any buildings which may hereafter be constructed upon a Building Area, portions of the Common Area may be used by the owner thereof for the temporary storage of construction materials and equipment used and to be used in connection therewith, provided that such use does not damage existing improvements (unless repaired by and at the expense of the owner causing such damage within ten (10) days

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from the date that such damage occurs) nor unreasonably interfere with the normal use of such Common Area or any other portion of any Building Area.

4.4 The movement of pedestrians and vehicles between the establishments located and to be located upon the Entire Property (and to and from the public streets) shall be unimpeded; accordingly, no building, fence, wall, hedge or barricade shall be erected or maintained over or upon the Common Area, except:

- (a) Such as may be necessary to protect members of the public from construction or excavation activities;
- (b) Light standards and appropriate landscaping, including hedges, walls, planters and planting boxes and edgers;
- (c) The sign pylon as set forth in Paragraph 3.3(e) above;
- (d) Such fences on the perimeter of the Entire Property as may be agreed upon by Ozark and Developer;
- (e) Monument signs approved by Developer, Ozark and the applicable governmental authorities.

4.5 Except as specifically depicted on the Site Plan, no fence, division, rail or obstruction of any type or kind shall ever be placed, kept, permitted or maintained between the properties of any owners of any portions of the Entire Property, or between any subsequent division thereof, or upon or along any of the common property lines of any portion thereof, except within the confines of the Building Area.

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4.6 No charge, fee, toll, levy or expense shall ever be required, assessed or made of or received (unless imposed by a governmental agency having jurisdiction) from any business guest, invitee, licensee, visitor, customer or patron of any of said mercantile, business and professional establishments. The cost and expense of the operation, management, maintenance, replacement and repair of the Common Area shall be borne and discharged only as provided for in this Agreement.

4.7 All construction and alterations to the Common Area shall be made in accordance with plans and specifications approved by Developer and Ozark prior to the commencement of any such work thereto. Such approval shall not be unreasonably withheld or delayed.

4.8 The improvement and/or use of any portion of a Building Area for Access and Parking or Services and Activities shall not be construed as an inclusion of such portion within the Common Area and such portions may, at any time thereafter, be improved with buildings and appurtenances as herein contemplated.

SECTION 5. COMMON AREA OPERATIONS AND MAINTENANCE

5.1 Upon completion of improvements pursuant to the Development Agreement referenced in Section 4.1 hereof, Developer shall be appointed as the initial maintenance director of the Common Area ("Maintenance Director"). The Maintenance Director shall maintain or cause to be maintained the Common Area in first-class condition and repair, said maintenance to include without limitation, the provision of adequate lighting, water,

electricity, sweeping, gardening, security (including without limitation, the control of loitering, vandalism, malicious mischief and unauthorized use of the Common Area), janitorial services, repairs to and replacing of asphalt paving so as to maintain a smooth and level surface, bumpers, striping, light bulbs, light standards and sprinkler systems and planting areas, and any other items of repair, replacement or maintenance that may be needed from time to time to properly maintain the Common Area.

5.2 As a part of said maintenance and operation, the Maintenance Director shall obtain and maintain insurance as required by Paragraph 10.4.

5.3 The Maintenance Director shall have (and is hereby given) the full right and authority of operation, control and maintenance of the entire Common Area (except exclusive loading ramps and docks for use by an owner or occupant), such authority to also include the right to enact rules and regulations subject to the reasonable approval of Developer and Ozark for the use and operation of the Common Area, including without limitation employee parking. Such right and authority of the Maintenance Director shall continue until the Maintenance Director shall resign by giving ninety (90) days' notice in writing to Developer, Ozark and subsequent owners, if any, or, in the event that Developer or Ozark, as the case may be, shall at any time, be reasonably dissatisfied with the Maintenance Director's performance of its obligations under this Section 5,

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or cost thereof, then Ozark or Developer shall have the right to give the Maintenance Director thirty (30) days' written notice of such dissatisfaction, specifying the particulars in respect of which the Maintenance Director's performance is deemed unsatisfactory. If at the end of the thirty (30) day period from the date of such notice such performance shall continue to be unsatisfactory and not reasonably cured, the notifying party shall have the right to cause to be taken over from the Maintenance Director by a new individual or entity approved by Developer, Ozark and, if applicable, any other owners so that owners of more than fifty percent (50%) of the Entire Property approve, effective on the first day of the next succeeding calendar month, the duties of the Maintenance Director hereunder. In the event that the Maintenance Director resigns or is removed as provided in this Section, the Maintenance Director shall, within sixty (60) days after the effective date of its termination as Maintenance Director, provide to all of the owners a written statement of all costs, fees and expenses which are to be reimbursed to the Maintenance Director pursuant to the terms hereof. Such sums shall be payable by the owners to the Maintenance Director within fifteen (15) days after the delivery of such statement; provided that any such owner may, at such owner's expense, conduct an audit of the Maintenance Director's book and records to verify the sums due so long as such audit is commenced and completed within ninety (90) days after the delivery of the statement. Any new Maintenance Director will,

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after its appointment in accordance with the terms hereof, perform the maintenance, management and operation obligations of the Maintenance Director set forth in this Agreement throughout the remainder of the term of this Agreement, or until resignation or removal in accordance with the terms of this Agreement.

5.4 Notwithstanding any provisions of this Section 5 which may be to the contrary:

(a) The Maintenance Director may cause an affiliate or an independent party or entity to perform some or all of the obligations of the Maintenance Director provided for in this Agreement; provided that if an affiliate is hired, it shall be at a fair market price for the local area.

(b) Each Maintenance Director shall save and hold harmless the preceding Maintenance Director of and from any and all claims, demands, costs, fees, expenses, liabilities and damages arising or occurring subsequent to the date said new Maintenance Director assumes its duties, except for the intentional misconduct or negligence of said preceding Maintenance Director or that of its employees or agents. Said preceding Maintenance Director shall save and hold harmless the new Maintenance Director of and from any and all claims, demands, costs, fees, expenses, liabilities and damages arising or occurring prior to the date the new Maintenance Director assumes its duties, except for the intentional or negligent misconduct of said new Maintenance Director or that of its employees or agents.

(c) In any event, at such times as any Maintenance Director ceases to have an obligation to perform the duties and obligations described herein, said Maintenance Director shall cease to have any liability or responsibility for any acts, events or circumstances occurring subsequent to and not as a result of its performance or non-performance of its duties or obligations while Maintenance Director.

(d) The Maintenance Director may make and shall use its best efforts to enforce or cause to be enforced, reasonable rules and regulations of general application for the supervision, control and use of the Common Area. Any rules and regulations promulgated by the Maintenance Director shall be submitted to the owners for their approval and/or amendment prior to the effective date of such rules and regulations. All rules and regulations must be approved and/or amended by Developer, Ozark and, if applicable, any other owners so that owners of more than fifty percent (50%) of the Entire Property approve. Such approval shall not be unreasonably withheld or delayed.

(e) During any period of time when no person is obligated to perform the duties of Maintenance Director, each owner of a Parcel of the Entire Property shall have the obligation to maintain its Parcel or Parcels in a manner consistent with the provisions of this Agreement.

5.5 The Maintenance Director is hereby authorized to contract for periods not in excess of one (1) year containing provision for the Maintenance Director or its successor to cancel

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such contract upon sixty (60) days' notice and is authorized to pay for, on behalf of the owners of the Entire Property, all of the Common Area operating and maintenance expenses incurred to comply with this Agreement, plus, provided the Maintenance Director has not contracted another person to perform its management or administrative duties, a service charge of ten percent (10%) of such expenses, excluding the cost of insurance, taxes, non-recurring single expenditures in excess of Five Thousand Dollars (\$5,000.00) per item and utilities, including without limitation water, electricity, gas, sewer and telephone. The Maintenance Director shall keep accurate books and records in the State of California, and agrees to allow Developer or Ozark to audit, at no expense to the Maintenance Director, all records pertaining to the Common Area. The Maintenance Director also agrees to hold expenses to a reasonable level consistent with the operation and maintenance of a first-class shopping center.

5.6 The owners of the Shopping Center shall pay the Maintenance Director monthly, on an estimated basis for their pro rata share as provided in Paragraph 5.7, for repairs and maintenance costs (including service charge) with the first payment date being the first day of the month following fifteen (15) days after the date said Common Area is open for use to the general public. The Maintenance Director shall reasonably estimate such expenses in advance for a given calendar year and bill the owners for such expenses (including service charge) in

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equal monthly amounts. The owners shall pay the estimated monthly payment on the first day of each calendar month until the Maintenance Director makes the annual adjustment referred to below. Said annual adjustment shall contain detailed invoices and itemized evidence with respect to all costs and expenses for Common Area charges. An annual adjustment based on actual expenses in such calendar year shall be made by the Maintenance Director within sixty (60) days following the close of each calendar year whereby an owner shall receive a refund or pay any additional amount, both within ten (10) days of notice thereof.

5.7 (a) For the purposes of this Agreement, the Building Area of the Entire Property is calculated and agreed to be 129,764 square feet. The proportionate share of the cost of operation, management, control and maintenance of the entire Common Area is to be borne and paid monthly in accordance with Paragraph 5.6, above, by the owner of any part of the Entire Property, in the same ratio that the number of square feet of Building Area located within an owner's Parcel(s) bears to the total number of Building Area in the Entire Property.

(b) Developer and Ozark hereby agree that the fraction of the total amount of said costs and expenses to be paid by the owner of each Parcel shall be as follows:

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Parcel 1	240,000	<u>46.68%</u>
Parcel 2	143,300	<u>27.87%</u>
Parcel 3	22,800	<u>4.43%</u>
Parcel 4	19,600	<u>3.81%</u>
Parcel 5	20,400	<u>3.97%</u>
Parcel 6	17,700	<u>3.44%</u>
Parcel 7	20,300	<u>3.95%</u>
Parcel 8	30,100	<u>5.85%</u>
Total		100.00%

5.8 If any owner sells a Parcel owned by it, then such owner shall have no further obligation under this Agreement with respect to the Parcel thus sold after the date of the conveyance, other than obligations arising prior to the date of the conveyance.

5.9 In the event that any owner fails or refuses at any time to pay its share of any of the maintenance expenses when due, then, after written demand and failure to pay within ten (10) days after receipt of such demand, legal action may be instituted by any owner against the defaulting owner for reimbursement, plus interest at the lesser of either two (2) percentage points over the then current reference rate of interest as announced from time to time by the Bank of America, N.T. & S.A., main office, San Francisco, California, computed annually, but adjusted quarterly or the maximum rate permitted by law. If any owner defaults under this Agreement, any other owner may institute legal action against the defaulting owner for

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specific performance, declaratory relief, damages or other available remedy. In addition to recovery of the sum or sums expended on behalf of the defaulting owner, the prevailing owner shall be entitled to receive from the defaulting owner such amount as the court may adjudge to be reasonable attorney fees, including without limitation, attorney fees incurred in executing upon any judgment. Any and all delinquent amounts together with said interest shall be a lien and charge upon all of the Parcel or Parcels of such owner subject to, and junior to, and shall in no way impair or defeat the lien or charge of any bona fide mortgage or deed of trust upon the same or any part hereof at any time given or made.

5.10 Notwithstanding anything contained herein to the contrary, in the event that the provisions of a particular lease between an owner and its tenant with respect to the calculation, time and method of billing and payment of Common Area operating and maintenance expenses are different from the provisions of this Agreement, the lease provisions shall prevail among said owners and its tenants, but as among the owners, this Agreement shall prevail.

SECTION 6. TAXES AND ASSESSMENTS

6.1 As to any portion of the Entire Property, it is intended and agreed that all real estate taxes and assessments which may be levied, assessed, or charged by any public authority against its Parcel or any part thereof, shall be paid prior to delinquency by the respective owner of said Parcel (or if the

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tenant of any Parcel is obligated to make said payments, by the tenant).

6.2 In the event that any respective owner shall deem any real estate tax or assessment (including the rate thereof or the assessed valuation of the property in question or any other aspect thereof) to be paid by said owner to be excessive or illegal, said owner shall have the right, at its own cost and expense, to contest the same by appropriate proceedings, and nothing contained in this Section 6.2 shall require the owner to pay any such real estate tax or assessment as long as (a) no other owner's Parcel could be affected by such failure to pay, and (b) the amount or validity thereof shall be contested in good faith. If the failure to pay such tax would affect any other owner's Parcel, such other owner shall have the right to pay such tax and shall have a lien on the non-paying owner's Parcel for the amount so paid. Any such lien shall be subject to, and junior to, and shall in no way impair or defeat the lien or charge of any bona fide mortgage or deed of trust upon the same or any part thereof at any time given or made.

6.3 Any assessment for public improvements levied against the Entire Property shall be paid by the Maintenance Director on behalf of all of the owners and shall be reimbursed by all of the owners in the ratio that the land area of each owner's Parcel bears to the land area of the Entire Property; provided, however, that any such assessment initiated by any one or more of the owners hereto for the exclusive benefit of that

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owner's Parcel(s) shall be borne solely by the owner or owners initiating same; and provided further, however, that any such assessment (except one initiated by one or more of the owners) benefiting less than all owners shall be borne solely by the owner or owners so benefiting.

SECTION 7. RESTRICTIONS

7.1 No Parcel or part of any Parcel other than Ozark's Parcel, nor any building or other improvement at any time situated on any Parcel or part of any Parcel other than Ozark's Parcel, shall ever be used to open and operate a supermarket, pharmacy or travel agency or to sell in the Shopping Center (for off-premises consumption) the following items: groceries, meats, meat products, fish, poultry, fruits, vegetables, alcoholic beverages (including beer and wine), bakery products and pharmaceuticals or to provide travel agency services. Such exclusives, however, shall not prohibit (a) take out sales of prepared food or alcoholic beverages by others whose business is substantially all prepared food sales which would be subject to California sales tax as of the date hereof; (b) incidental sales of bakery products (e.g., such products are used to make sandwiches or are "side orders" (e.g., individual pies or cookies) where the sales of such products are not a substantial portion of the business (i.e., the business is not considered to be, e.g., a donut shop, croissant shop, cookie shop or cinnamon roll shop), and (c) with respect to Pad 8 as shown on the Site Plan, the sale of any items other than alcoholic beverages

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(excluding beer and wine), pharmaceuticals and travel agency services, provided such sales are only from a building area with five hundred (500) or less square feet of floor area and provided such sales are in conjunction with a gasoline station business. Ozark shall have the specific exclusives set forth herein for supermarket, liquor (off-site consumption), pharmaceuticals, bakery and travel operations and each specific use; however, if any use is not operated for a period in excess of one (1) year and, thereafter, remains unused for one hundred eighty (180) days (excluding reasonable time periods for reconstruction or remodeling and extended by the period of any and each occurrence of any strikes, labor difficulties, governmental restrictions upon building activity or delays caused by or resulting from fire, casualty, war or acts of God) following notice by owner of the Shopping Center specifying that one or more specific uses has not been operated, and if such use is not resumed within such one hundred eighty (180) day period, then Ozark's exclusive right to such use will discontinue and become a non-exclusive use on the Ozark Parcel. Except as set forth in this Agreement, it is further recognized and agreed that Ozark shall have the nonexclusive right to use the property for any other lawful retail purpose.

7.2 Ozark covenants that it shall cause a Raley's Superstore to operate on the Ozark Parcel for the first ten (10) years Ozark opens to the public its supermarket building on the Ozark Parcel; provided, however, if Raley's, a California

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corporation, is acquired by or merged into another entity, Ozark shall ~~only be required to use good faith efforts to~~ cause the purchaser or surviving entity to assume this covenant for its remaining term by operating a comparable supermarket. *the*

7.3 If, any time after Ozark opens to the public its supermarket building on the Ozark Parcel, Ozark ceases to operate the Ozark Parcel with a use consistent with a first-class shopping center for twelve (12) consecutive months, for a period of ninety (90) days ("Option Period") beginning after the end of said twelve (12) month period the owner of Parcel 2 ("Optionee") shall have an option to purchase the Ozark Parcel from Ozark by delivering to Ozark within the Option Period written notice of Optionee's election to exercise said option. Within thirty (30) days after Ozark's receipt of such election, the parties shall negotiate and agree on a purchase price for the Ozark Parcel or an appraiser to determine such price. If Ozark and Optionee agree upon a purchase price Optionee shall pay Ozark such price in cash within ninety (90) days after the end of said thirty (30) day period. If Ozark and Optionee agree on an appraiser, the appraiser shall determine the purchase price within thirty (30) days of said thirty (30) day period and Optionee shall pay Ozark such price in cash within ninety (90) days after said appraiser's determination of such price.

If Ozark and Optionee are unable to agree upon a purchase price or an appraiser on or before the expiration of the initial thirty (30) day period, then each will have ten (10)

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days after the expiration of said thirty (30) day period to appoint an appraiser and the two so appointed appraisers shall select a third appraiser within ten (10) days after the expiration of the previous said ten (10) day period. Within twenty (20) days after the expiration of the second ten (10) day period the three appraisers shall provide Optionee and Ozark with their appraisals of the Ozark Parcel and the average of the two closest appraisals shall be the purchase price for the Ozark Parcel. Optionee shall pay Ozark such purchase price in cash within ninety (90) days after the determination of such purchase price.

Any appraiser to be appointed must have at least five (5) years experience in appraising commercial real property in Napa County. If one appraiser is used, Ozark and Optionee shall split equally the cost of such appraiser. If three appraisers are used, each party shall pay for its own appraiser and split equally the cost of the third appraiser.

Time is of the essence of the option granted hereunder. Failure by Optionee to timely exercise its option or make payment of the purchase price as determined hereunder shall result in a termination of the option granted to Optionee and Optionee shall thereafter have no further rights to or interest in the Ozark Parcel.

7.4 If within the first ten (10) years after the opening of a supermarket building on the Ozark Parcel such building is damaged or destroyed and Ozark does not elect to

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rebuild or repair such building within the two (2) year period noted in Section 11 below, Optionee shall have a right of first refusal to purchase the Ozark Parcel after expiration of said two (2) year period. Upon Ozark's election to sell the Ozark Parcel, it shall provide Optionee with written notice of its intention to sell stating the name of the potential transferee, the purchase price and the terms of such sale. Optionee shall have thirty (30) days after receipt of said written election from Ozark within which to exercise its right of first refusal. If Optionee wishes to exercise such right, it must purchase the Ozark Parcel pursuant to the same terms and price contained in Ozark's notice to Developer within thirty (30) days after expiration of the first said thirty (30) day period. If Optionee fails to purchase the Ozark Parcel pursuant to such terms and price within the second said thirty (30) day period, or elects in writing delivered to Ozark not to exercise its right of first refusal, Ozark shall be allowed to sell the Ozark Parcel to the person at the terms and price noted in its notice to Developer within sixty (60) days after Optionee's failure to purchase, or Ozark's receipt of Optionee's decision not to exercise its right of first refusal, whichever occurs first. If Ozark fails to so sell the Ozark Parcel, Ozark shall be required to again give Optionee a right of first refusal pursuant to the terms of this Section 7.4 prior to any sale of the Ozark Parcel by Ozark.

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SECTION 8. GENERAL USE RESTRICTIONS

8.1 Except as otherwise set forth in this Agreement, the Shopping Center shall be used for commercial-retail purposes including service offices (e.g., medical, dental, optical, real estate, financial and insurance) for the construction, operation and maintenance of mercantile, business and professional establishments and related facilities, including vehicular parking areas, all as more specifically described in this Agreement.

8.2 No portion of the Entire Property shall be used during the term of this Agreement for any movie theater, nightclub, bar (unless operated in conjunction with a restaurant and does not exceed thirty-five percent (35%) of the total floor area), tavern, dance hall, bowling alley, skating rink, massage parlor, pornographic shop, adult bookstore, pawn shop, educational, industrial or recreational use or for an auction or for the sale or display of motor vehicles, boats, trailers, motor homes and establishments, the primary business of which is the sale of second hand property, without the prior written consent of Ozark and Developer.

SECTION 9. EXPRESS GRANTS OF EASEMENT

9.1 Each owner, as grantor, hereby grants to the other owners for the benefit of the other owners, their respective successors, assigns, tenants, subtenants, licensees, concessionaires, employees, agents, customers, visitors and invitees, and the customers, employees and invitees of such

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tenants and subtenants and each Parcel belonging to the other owners, as grantees, reciprocal non-exclusive easements for vehicular and pedestrian ingress and egress and vehicular parking upon, over and across the portion of the Common Area within the grantor's Parcels.

9.2 Each owner, as grantor, does hereby grant to the other owners, for the benefit of the other owners, their respective successors, assigns, tenants, subtenants, licensees, concessionaires, employees, agents, customers, visitors and invitees non-exclusive easements appurtenant to each of the Parcels of the Entire Property over, across, upon, in, under and through the portion of the Common Area within such grantor's Parcel, for the purposes set forth in this Agreement.

SECTION 10. INSURANCE

10.1 At all times during the term of this Agreement, each owner shall, at its sole expense, continuously maintain or cause to be continuously maintained standard fire and standard extended coverage insurance on all buildings and all the other improvements located on its Parcel. Said insurance shall be in amounts at least sufficient to avoid the effects of co-insurance provisions of the policies, that is, not less than ninety percent (90%) of the actual replacement costs of said buildings and improvements, but excluding foundations, excavation costs and the costs of underground flues, pipes and drains if such costs are properly under co-insurance requirements.

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10.2 Each owner hereby waives any and every claim which arises or may arise, in its favor and against any other owner during the term of this Agreement for any and all loss of, or damage to, any of its property located within or upon, or constituting a part of, the Entire Property, which loss or damage is covered by valid and collectible fire and extended coverage insurance policies, to the extent that such loss or damage is recoverable under said insurance policies. Said mutual waivers shall be in addition to, and not in limitation or derogation of, any other waiver or release regarding any loss of, or damage to, the said property of any owner. Inasmuch as the said mutual waivers will preclude the assignment of any such claim by way of subrogation (or otherwise) to an insurance company (or any other person, firm or corporation), each owner shall give to each insurance company which has issued to it policies of fire and extended coverage insurance, written notice of the terms of said mutual waivers, and shall have said insurance policies properly endorsed, if necessary, to prevent invalidation of said insurance coverages by reason of said waivers.

10.3 (a) At all times during the term of this Agreement, each owner shall, at its sole expense, continuously maintain or cause to be continuously maintained Comprehensive General Liability Insurance, affording "single occurrence" protection to at least a limit of Two Million and 00/100 Dollars (\$2,000,000.00), endorsed to cover personal injury (including false arrest), covering the building, or buildings, on its

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Parcel. Said policy limit may be adjusted from time to time to reflect commercial standards then in effect with the approval of Developer, Owner and, if applicable, other owners, so that the owner of more than fifty percent (50%) of the Entire Property approve of such adjustment.

(b) Each owner shall, upon written request of any other owner, furnish certificates of such insurance or other satisfactory written evidence of such insurance at any time during the term hereof.

10.4 (a) At all times during the term hereof, the Maintenance Director shall continuously maintain or cause to be maintained Comprehensive General Liability Insurance, including Contractual Liability coverage, endorsed to cover personal injury (including false arrest), covering the Common Area. Such insurance shall afford protection to the owners, Ozark and Developer, as named insureds, to the limit of not less than:

(i) Two Million and 00/100 Dollars (\$2,000,000.00) for death of, or bodily injury to, or personal injury to, one or more persons;

(ii) Property damage to the limit of not less than One Million Dollars (\$1,000,000) for each occurrence.

Said policy limits may be adjusted from time to time to reflect commercial standards then in effect with the approval of Developer, Ozark and, if applicable any other owner so that owners of more than fifty percent (50%) of the Entire Property approve of such adjustments.

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(b) The Maintenance Director is hereby designated the agent of each owner for the purpose of obtaining such insurance. The premiums for said policy shall be apportioned among the others in the proportion set forth in Section 5.7. Any policy required hereunder shall provide that said policy shall not be cancelled without at least ten (10) days' prior notice to each owner. If it shall be hereafter determined that it would be beneficial to all owners, the insurance coverage herein required by this Section 10.4 may (a) be placed in separate policies, each for the amounts indicated, from the same insurance company, to avoid a conflict of claims, and each owner shall be named as an additional insured on the other owners' policies or (b) obtained through a blanket policy held by the Maintenance Director showing each owner as an additional insured.

SECTION 11. IMPROVEMENT DESTRUCTION

11.1 If an owner rebuilds or restores improvements on its Parcel or Parcels after an event of destruction of, or damage to, the building(s) of such owner, the Common Area or other improvements upon such owner's Parcel(s), or any part thereof, said owner shall rebuild, repair and restore such buildings and improvements in the same location as presently shown on the Site Plan, and of the same general appearance and condition, and consistent with an integrated, first-class shopping center located in Northern California, as existed prior to the damage or destruction.

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11.2 Any building, Common Area, or other improvements rebuilt, repaired or restored by an owner pursuant to this Agreement, shall be rebuilt, repaired and restored and ready for occupancy within two (2) years (except for Common Area improvements which shall be completed within six (6) months) from the time when the loss or destruction occurred, subject, however, to delays caused by strikes, labor difficulties, governmental restrictions on building activity, fire, war or acts of God. Notwithstanding the provisions of Paragraphs 11.1 and 11.2, in the event that the provisions of a particular lease between an owner and its tenant are different from the provisions of Paragraphs 11.1 and 11.2, then (a) as between such owner and its tenant, the lease provisions shall prevail, and (b) as among the owners, this Agreement shall prevail.

11.3 Any repair, reconstruction or replacement of any building, or Common Area, or other improvements performed by any owner, pursuant to this Section, shall be performed in accordance with the following requirements:

(a) Plans and specifications therefore not previously approved for the original construction of any building shall be approved by Developer and Ozark as to exterior architectural design, exterior construction and location of improvements being restored, prior to the commencement of the work of such repair, reconstruction and replacement, which approvals shall not be withheld without good and valid reason and notice thereof made in writing.

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(b) Any building, Common Area or other improvements being restored shall be at least of equal quality and similar square footage at least as usable for its intended purpose, as such building, Common Area, or other improvements were just prior to the happening of such casualty.

11.4 In the event any owner does not rebuild and restore its damaged buildings, Common Area, or other improvements under the provisions of this Section, such owner shall clear its vacant parcel of all debris and hazardous conditions, and shall maintain its vacant parcel in a clean, safe and sightly condition; provided, however, that in no event shall any owner have the right to withdraw its vacant parcel or portion thereof from the Common Area, or from any easements created and provided for hereunder, at any time during the term of this Agreement and in the event of any such damage or destruction each owner shall cause that portion of its parcel which is devoted to use as part of the Common Area to be repaired and restored to the condition the same was in immediately prior to the occurrence of such damage or destruction, and thereafter to be maintained in such condition and as part of the Common Area during the remaining term of this Agreement in accordance with the terms hereof.

SECTION 12. MISCELLANEOUS PROVISIONS

12.1 Each and all of the foregoing covenants, conditions and restrictions:

(a) Shall apply to and bind each and all of the

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owners and each and all of their respective heirs, successors, assigns, grantees, mortgagees, tenants and subtenants;

(b) Are hereby imposed pursuant to a general plan for the improvement and use of the Entire Property and each Parcel thereof and shall obligate and benefit each such Parcel and the owners, tenants and occupants of any and all portions thereof; and,

(c) Shall obligate, inure to and pass with each and every portion of the Entire Property and shall remain in force and effect as hereinafter provided.

12.2 Breach of any of the covenants or restrictions contained in this Agreement shall not defeat or render invalid the lien of any mortgage or deed of trust made in good faith, but all of the foregoing provisions, restrictions and covenants shall be binding and effective against any owner of any portion of the Entire Property, or any part thereof, whose title is acquired by foreclosure or trustee's sale or by deed in lieu of foreclosure or trustee's sale; provided, however, any such owner whose title is acquired by foreclosure or trustee's sale or by deed in lieu of foreclosure or trustee's sale shall take title free of any liens created or provided for hereunder, though otherwise subject to the provisions hereof.

12.3 The term "mortgagee", wherever used herein, shall be construed to include beneficiaries and trustees under deeds of trust. Notwithstanding any other provisions in this Agreement for notices of default, the mortgagee of any party in

default hereunder shall be entitled to notice of said default, in the same manner that other notices are required to be given under this Agreement; provided, however, that said mortgagees shall have, prior to the time of the default, notified the party hereto giving said notice of default of the mortgagee's mailing address.

12.4 It shall be lawful for any owner to prosecute any proceedings at law or in equity, including injunctive relief, against any person violating, or attempting to violate, any of the covenants, conditions and restrictions herein, and either to prevent it, him or them from so doing or to recover damages from or on account of such violation. All such remedies shall be cumulative.

12.5 In the event of any violation or threatened violation by any party hereto or its successor, tenant or occupant of any portion of the Shopping Center owned by it, of any of the terms, covenants and conditions contained herein, the owners agree that irreparable damage shall have occurred to the other party and in addition to the other remedies provided herein, any owner shall have the right to enjoin such violation or threatened violation in a court of competent jurisdiction.

12.6 Invalidation of any one of the covenants, conditions, restrictions or other provisions herein contained by judgment or court order shall in no way affect any of the other covenants, conditions, restrictions or provisions hereof, and the same shall remain in full force and effect.

12.7 This Agreement shall create privity of contract and estate with and among all grantees of all or any part of the Entire Property and their respective heirs, executors, administrators, successors and assigns.

12.8 Any assignment, conveyance or provision in any lease or contract made in violation of this Agreement shall be void and may be set aside upon petition of one or more of the owners. All costs and expenses of any such suit or proceeding, including attorney fees as hereinafter provided, shall be assessed against the defaulting owner and shall constitute a lien against its real property or the interest therein wrongfully deeded, leased, assigned, conveyed or contracted for until paid such lien to be effective upon the recording of notice in the office of the county recorder for the county in which the Entire Property is located, though any such lien shall be subordinate to any bona fide mortgage or deed of trust covering any portion of the Entire Property, and any purchaser at any foreclosure or trustee's sale (as well as any grantee by a deed in lieu of foreclosure or trustee's sale) under any such mortgage or deed of trust shall take title free from any such lien, though otherwise subject to the provisions hereof.

12.9 If this Agreement provides that a consent or approval shall not be unreasonably withheld, such consent or approval shall be granted or withheld without unreasonable delay, and, if consent is withheld or approval not granted, the reasons

for withholding consent or approval shall be stated with reasonable detail.

12.10 In the event that suit is brought for the enforcement of this Agreement or as the result of any alleged breach, the prevailing party or parties shall be entitled to be paid court costs, including reasonable attorney fees, by the losing party or parties including any attorney fees incurred in executing upon any judgement.

12.11 In the event of any condemnation (by any duly constituted authority for a public or quasi-public use) of all or any part of the Entire Property, the portion of the award attributable to the value of any land within the Common Area shall be payable only to the owner(s) thereof, and no claim therefor shall be made by other owners of any other portion of the Entire Property; provided, however, that all other owners of the Entire Property may file collateral claims with the condemning authority over and above the value of the land taken, and provided further, however, that the owner of any portion of the area so condemned shall promptly repair and restore the remaining portion of the area owned by such owner as nearly as practicable to its condition immediately prior to the condemnation without contributions from any other owner.

12.12 The captions heading the various sections of this Agreement are for convenience and identification only, and shall not be deemed to limit or define the contents of their respective sections.

12.13 Subject to the provisions of Section 11 above, each owner shall keep, maintain, repair, manage and operate their respective buildings, whether occupied or unoccupied, located on its respective Parcel(s) in good and clean order, operation, condition and repair in conformity with first-class shopping center standards, and in such manner to establish, maintain and present, at all times, the appearance of a clean, well-managed, attractive, well coordinated and unified operation.

12.14 Except as herein specifically provided, no rights, privileges or immunities conferred upon owners by this Agreement shall inure to the benefit of any tenant, customer, employee or invitee or the Entire Property or any other third party; nor shall any tenant, customer, employee or invitee of the Entire Property or any other third party be deemed to be a third party beneficiary of any of the provisions contained herein.

12.15 This Agreement and the application or interpretation thereof shall be governed exclusively by its terms and by the laws of the State of California.

12.16 This Agreement may be executed in any number of counterparts to the same effect as if each party hereto had signed the same document. All counterparts shall be construed together, and shall constitute one Agreement.

12.17 Each party hereto shall execute such other and further documents and instruments reasonably requested by the other party to more clearly evidence and carry out the provisions of this Agreement.

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12.18 Nothing contained in this Agreement shall be deemed or construed, either by the parties hereto or by any third party, to create the relationship of principal and agent or create any partnership, joint venture or other association between Developer and Ozark or any of the owners.

12.19 Nothing in this Agreement will be deemed to be a gift or dedication of any portion of the Entire Property to the general public or for the general public or for any public purpose whatsoever. It is the intention of the parties hereto that this Agreement will be strictly limited to and for the purposes expressed herein.

SECTION 13. NOTICES

All notices, consents, requests, demands, approvals, waivers and other communications desired or required to be given hereunder (referred to collectively as "notices") shall be in writing and signed by the party so giving the notice, and shall be deemed effectively given or served as of the date hereinafter specified: (i) on the date of personal service upon the person to whom the notice is addressed or if such person is not available the date such notice is left at the address of the person to whom it is directed, (ii) on the date the notice is received or rejected provided it is sent prepaid, registered or certified mail, return receipt requested, and (iii) on the date the notice is delivered by a courier service (including Federal Express, Express Mail, Emery or similar operation) to the address of the person to whom it is directed provided it is sent

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prepaid, return receipt requested (if available). The address of the signatories to this Agreement is set forth below:

If to Developer: 1771 Stockton Boulevard  
Sacramento, California 95816

If to Ozark: 500 West Capitol Avenue  
West Sacramento, California 95605-2696

Anyone entitled to receive notice hereunder may, from time to time, change his or its address for receiving notices by giving written notice thereof in the manner outlined above. In the event any notice using an address provided in accordance with this Section 13 is returned undeliverable, such notice shall be effective five (5) days after being mailed to the address as shown on the most recent records of the County Tax Assessor for the owner's parcel.

SECTION 14. TERM AND TERMINATION

14.1 The covenants, conditions and restrictions contained in this Agreement shall be recorded and run with the land and be binding upon each and all of the owners for a period of sixty (60) years from the recording date hereof.

14.2 This Agreement may only be amended or terminated by the written agreement of (a) Ozark, or his successors, and Developer, provided both have a legal interest in the Entire Property, or (b) owners of seventy-five percent (75%) of the Entire Property, if Ozark or his successors or Developer no longer have any legal interest in the Entire Property. Any document shall be duly acknowledged and recorded in the office of

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the county recorder for the county in which the Entire Property is situated.

14.3 This Agreement, though executed on the date above written, shall only be effective upon, from and after its recording in the office of the county recorder for the county in which the Entire Property is situated.

IN WITNESS WHEREOF, this Agreement is executed by the parties hereto as of the day and year first above written.

"Developer"

NEWARK CFC ASSOCIATES,  
A CALIFORNIA LIMITED PARTNERSHIP

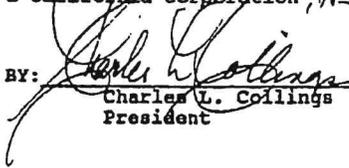
BY: CONNOLLY DEVELOPMENT, INC.,  
a California corporation and  
general partner

BY:

  
Sean J. Hogan  
President

*Ozark Investments LTD, a California Limited Partnership*  
BY: OZARK INVESTMENTS, INC.,  
a California corporation, its G.P.

BY:

  
Charles L. Collins  
President

SGS80089.1  
03/07/89

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ACKNOWLEDGEMENTS

STATE OF CALIFORNIA )  
 ) SS.  
COUNTY OF SACRAMENTO )

On April 4, 1989, before me, the undersigned, a Notary Public in and for said County and State, personally appeared SEAN J. BOGAN, personally known to me (or proved to me to be the person that

STATE OF CALIFORNIA )  
COUNTY OF Alameda ) SS.  
On this 4 day of April, 1989, in the year of 1989, before me, the undersigned, a Notary Public in and for said County and State, personally appeared Sean J. Bogan personally known to me (or proved to me on the basis of satisfactory evidence) to be the \_\_\_\_\_ President, and

personally known to me (or proved to me on the basis of satisfactory evidence) to be the \_\_\_\_\_ Secretary of Cowally Developers Inc the corporation that executed the within instrument and known to me to be the persons who executed the within instrument on behalf of said corporation, said corporation being known to me to be one of the partners of \_\_\_\_\_ the partnership that executed the within instrument, and acknowledged to me that such corporation executed the same as such partner and that such partnership executed the same.

Sean J. Bogan  
Name (Typed or Printed)  
Notary Public in and for said County and State



FOR NOTARY SEAL OR STAMP

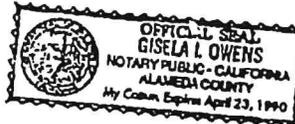
CHICAGO TITLE INSURANCE COMPANY CORPORATION PARTNERSHIP  
Staple

F. 2469 R. 11/82

STATE OF CALIFORNIA )  
COUNTY OF Alameda ) SS.  
On this 4 day of April, 1989, in the year of 1989, before me, the undersigned, a Notary Public in and for said County and State, personally appeared Collins personally known to me (or proved to me on the basis of satisfactory evidence) to be the \_\_\_\_\_ President, and

personally known to me (or proved in me on the basis of satisfactory evidence) to be the \_\_\_\_\_ Secretary of Oak Investments Inc the corporation that executed the within instrument and known to me to be the persons who executed the within instrument on behalf of said corporation, said corporation being known to me to be one of the partners of \_\_\_\_\_ the partnership that executed the within instrument and acknowledged to me that such corporation executed the same as such partner and that such partnership executed the same.

Collins  
Name (Typed or Printed)  
Notary Public in and for said County and State



FOR NOTARY SEAL OR STAMP

CHICAGO TITLE INSURANCE COMPANY CORPORATION PARTNERSHIP  
Staple

F. 2469 R. 11/82

EXHIBIT "A"

89273594

**OPERATING PARCELS MAP**  
**1889.273594**  
 This map shows the operating parcels within the subject property. The parcels are shown as outlined areas with their respective parcel numbers and descriptions. The map is based on the information provided in the accompanying schedule of parcels.

Parcel No.	Description	Area (sq. ft.)
Parcel 1	14,000 sq. ft. lot	14,000
Parcel 2	14,000 sq. ft. lot	14,000
Parcel 3	14,000 sq. ft. lot	14,000
Parcel 4	14,000 sq. ft. lot	14,000
Parcel 5	14,000 sq. ft. lot	14,000
Parcel 6	14,000 sq. ft. lot	14,000
Parcel 7	14,000 sq. ft. lot	14,000
Parcel 8	14,000 sq. ft. lot	14,000
Parcel 9	14,000 sq. ft. lot	14,000

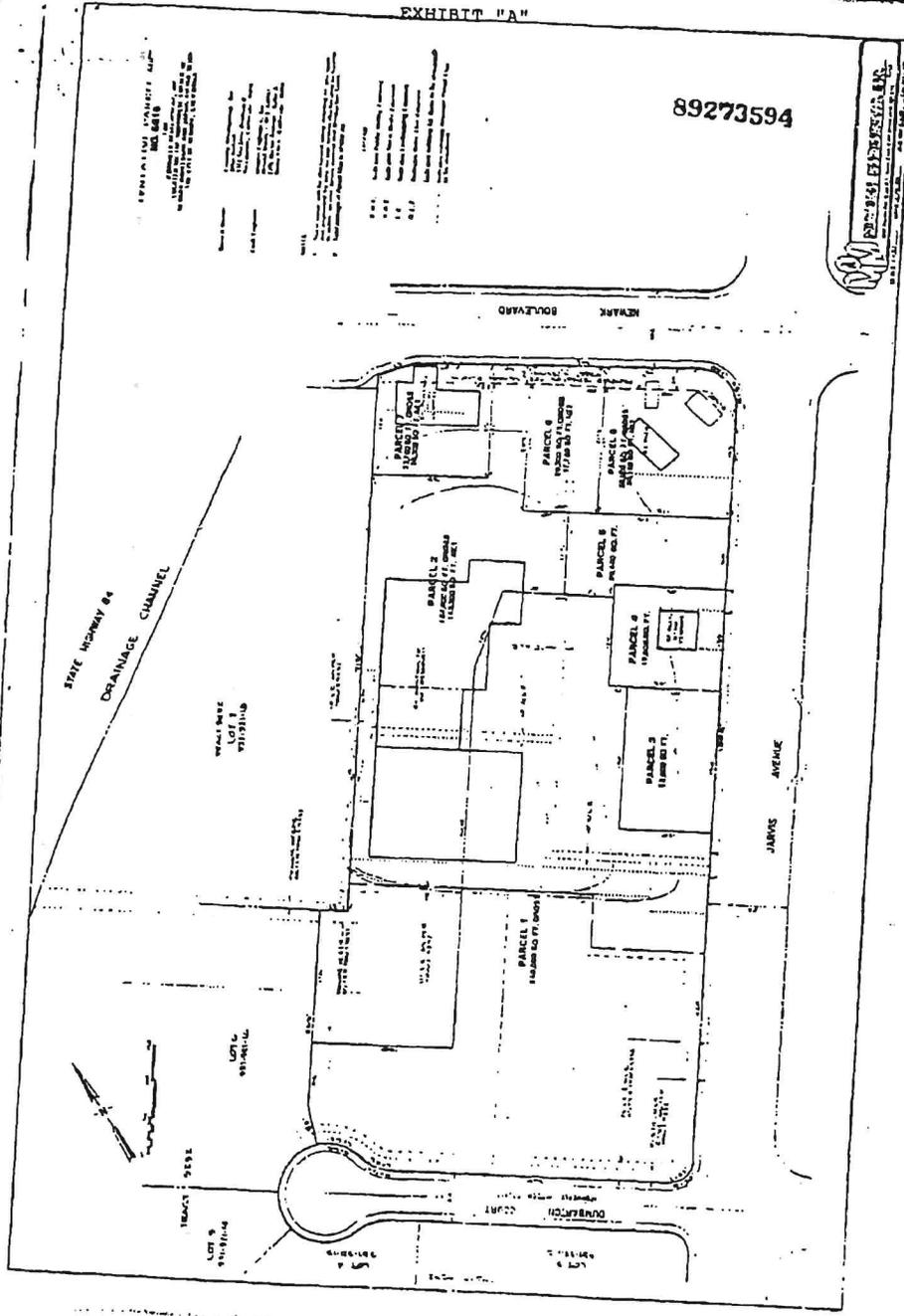
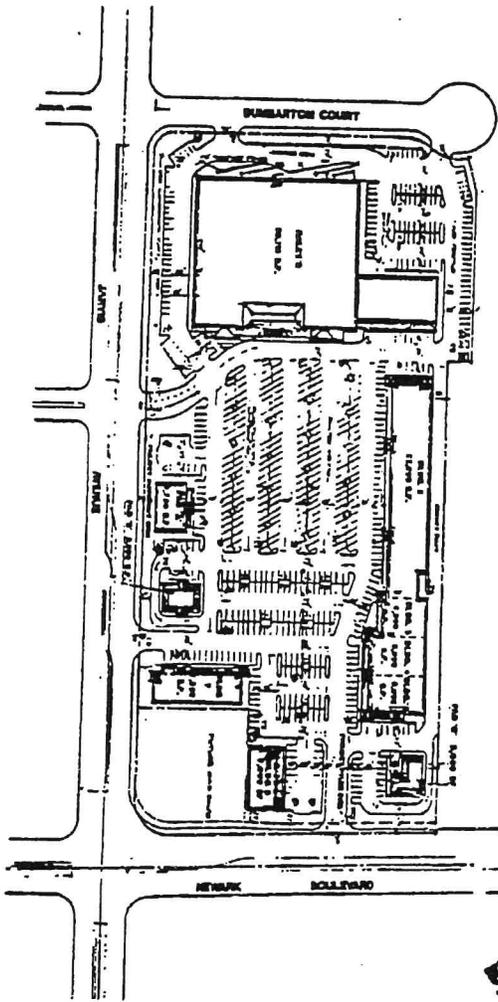


EXHIBIT D

89273594



**Summary**  
 Land/Use as shown  
 Building 128,100 sq ft  
 Land/Use 128,100 sq ft  
 Park's Pond per state  
 Park's Pond 8,117,000  
 Parking Space 448

	<b>SITE PLAN</b>	<b>NEWARK SHOPPING CENTER</b> NEWARK, CA	<b>CONRELLY DEVELOPMENT INC.</b> 1718 464-5118		<b>Nadel</b>
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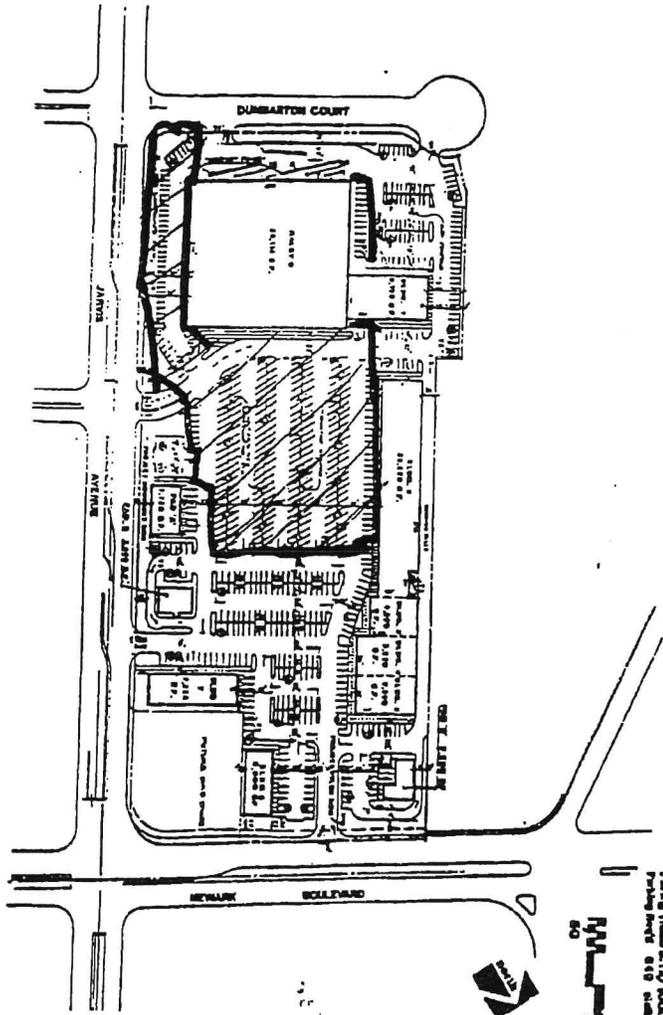


EXHIBIT "C"  
Parking Ratio Maintenance Area

**Summary**  
 Land-use to square ft  
 Building 150,000 sq ft  
 Land/Building 2.0/1  
 Daily Front end auto  
 Parking Ratio 2.1/1,000  
 Parking level 600 stalls



<p>SITE PLAN</p>	<p>SEAWALL SHOPPING CENTER SEAWALL, CA</p>	<p>CONSOLE DEVELOPMENT INC. 978 488-1418</p>	
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PETITION OPPOSING F-19 FITNESS CENTER

CONDITIONAL USE PERMIT

FOUR CORNERS – SPROUTS SHOPPING CENTER

For the reasons stated below, we oppose approval of the F-19 Fitness Center conditional use permit:

We were only recently made aware of a "6203 Jarvis Ave Parking Study" which purports to demonstrate that there are no impacts to parking that may affect the customers of the shopping center in which we are tenants. We are very concerned with the acknowledgements contained in the conclusion of the Parking Study that state:

- 1.) "However, it must be acknowledged that a lot of this available parking is not necessarily located the most convenient areas of the parking lot"
- 2.) "However, it must be acknowledged that some of parts of shopping center parking lot are not necessarily conveniently located for the restaurants."

Because of the conclusion of the Parking Study with these acknowledgements, we currently DO NOT support approval of a conditional use permit for the F-19 Fitness Center to occupy the 28,242 vacant space at the Four Corners – Sprouts Shopping Center.

Print Name	Tenant Name	Signature	Date
1. Vimal Patel	Burger King (owner)	[Redacted]	1/27/20
2. John Yu	Tasbi Pot Manager	[Redacted]	1/27/20
3. Karim Hotaki	Vaporation (owner)	[Redacted]	1/27/20
4. Kristy Wang	ITera (For owner)	[Redacted]	1/27/20
5. Shital Patel	UBS store (Manager)	[Redacted]	1/27/20
6. Hany-Chang Hsu	Cham See Bistro (owner)	[Redacted]	1/27/20
7. NIT DO	DHC. NATION (owner)	[Redacted]	1/27/20
8. Vansin Hanff	3. P. Love	[Redacted]	1/27/20
9. AMIL BAILON	Comet (owner)	[Redacted]	1/27/2020
10. LANCE SINGH	Grandma Lobby Hair	[Redacted]	1/27/2020
11. Jessica Veb	R & S Business Services	[Redacted]	1/27/20
12. PETER KWONG	Venas (MFE owner)	[Redacted]	1/27/2020
13. Tao Wang	Biter owner	[Redacted]	1/27/2020
14. Tenny Fung	Alan Cheng Dental Group	[Redacted]	1/27/2020
15. Rama Pakias	Tutoring Club owner	[Redacted]	1/27/20
16. Waki Zai	Tobacco on Sale owner	[Redacted]	1/27/20
17. Lynette Maria	Dollar Cleaning	[Redacted]	1/27/20
18. Christine Atchison	Forever Beauty & Skinning	[Redacted]	1/27/20

19. DEBBIE JIN SIMPLY EBBE PLAN/PAGE (OWNER) [REDACTED] 1/27/2020
20. VANESSA LAM EXOTIC NAILS (PART OWNER) [REDACTED] 1/27/2020
21. ZHI BIAO HUANG P/FER Q2 SUSHI (OWNER) [REDACTED] 1/27/2020
22. KERRY TEE Pure Water Flor (OWNER) [REDACTED] 1/27/2020
23. MICHAEL TEE Pure Water Flor (OWNER) [REDACTED] 1/27/2020
24. CORA KIMMILL West Coast World Martial Arts Academy [REDACTED] 1/27/2020
25. BELINDA MALONEY Jewelry by Design [REDACTED] 1-27-2020
26. JUDY BYRNE [REDACTED] 1-28-2020
27. GEORGE FEI JEWELRY FOR DESIGN (OWNER) [REDACTED] 1-28-2020
28. LATH LIMSUMALEE SIMPLY THAI [REDACTED] 1-28-2020
29. HOANG NAO [REDACTED] 1-28-2020
30. MIRIAM PRESTON World Hair Design [REDACTED] 1/28/2020
31. K.C. HOAY World Hair Design [REDACTED] 1/28/2020
32. LANE SAILORS World Hair Design [REDACTED] 1-28/2020
33. MARAHDA DECIERDO Bella Eye Care Optometry (for owner) [REDACTED] 1/28/2020
34. GEORGIE PISCO Uti Time (For owner) [REDACTED] 1/28/20
35. MINAL PATEL Subway [REDACTED] 1/28/20
36. VIRENDRA CHAND PIZZA HUT [REDACTED] 01/28/2020
37. [REDACTED] [REDACTED] [REDACTED]
38. MASAKO YAMAMOTO Masako's Music Studio (owner) [REDACTED] 1/28/2020
39. [REDACTED]
40. [REDACTED]

**F.1 Removal of the voter registration requirement for City appointed Boards, Commissions, and Committees members – from City Clerk Harrington and Interim City Attorney Kokotaylo. (ORDINANCE INTRODUCTION)(RESOLUTION)**

**Background/Discussion** – On October 12, 2019, Governor Newsom signed into law Senate Bill 225 (SB 225) providing that a person, regardless of citizenship or immigration status, is eligible to hold an appointed civil office if the person is 18 years of age and a resident of the state. The bill also provides that a person appointed to civil office, regardless of citizenship or immigration status, may receive any form of compensation that the person is not otherwise prohibited from receiving pursuant to federal law, including but not limited to, any stipend, grant, or reimbursement of personal expenses that is associated with carrying out the duties of that office. Under the new law, for residents to qualify to serve on a local board, commission, or committee, they must be 18 and a resident of the City of Newark, they do not have to be a United States citizen. SB 225 does not apply to the City Council; voter registration is still required for elected office.

The City of Newark Local Appointments currently consists of the Planning Commission, Senior Citizen Standing Advisory Committee, Community Development Advisory Committee, and the Measure GG Tax Oversight Committee. Staff has reviewed the formation of these Committees and Commission. Voter registration requirements were found in The Guidelines and Procedures for the Senior Citizen Standing Advisory Committee and Newark Municipal Code Section 2.12.020 Qualifications for Planning Commissioners. The remaining committees did not require voter registration.

The Guidelines and Procedures for the Senior Citizen Standing Advisory Committee (Guidelines) has been revised to remove the voter registration requirement. Staff is recommending a few additional revisions to the Guidelines since they were last reviewed in 2011. Section VIII Brown Act Compliance, Paragraph B, should be updated to reflect that the Senior Citizen Standing Advisory Committee Agendas are posted at the Clark W. Redeker Newark Senior Center, in addition to the postings at City Hall, the Silliman Center, and the Newark Library. The Affidavits of Postings will also be kept within the timeframe established by the City of Newark Citywide Records Retention Schedule (two years). Redlined copies of the proposed revisions are attached.

An ordinance has been prepared removing the voter registration requirement for Planning Commissioners from Newark Municipal Code Section 2.12.020 Qualifications.

**Attachments** – Resolution, Ordinance, Senate Bill 225

**Action** – Staff recommends that the City Council introduce an ordinance amending Section 2.12.020, “Qualifications” of the Newark Municipal Code amending the qualification requirements for Planning Commissioners and, by resolution, approve the revised Guidelines and Procedures for the Senior Citizen Standing Advisory Committee.

## RESOLUTION NO.

### RESOLUTION OF THE CITY COUNCIL OF THE CITY OF NEWARK APPROVING THE REVISED GUIDELINES AND PROCEDURES FOR THE SENIOR CITIZEN STANDING ADVISORY COMMITTEE

WHEREAS, on October 12, 2019, Governor Newsom signed into law providing that a person, regardless of citizenship or immigration status, is eligible to hold an appointed civil office if the person is 18 years of age and a resident of the state; and

WHEREAS, staff has reviewed the formation of the current City Committees and Commission and finds a need to revise the Senior Citizen Standing Advisory Committee Guidelines to remove the voter registration requirement; and

WHEREAS, staff also recommends revising the Senior Citizen Standing Advisory Committee Guidelines to reflect the current agenda posting locations and retention of the Affidavits of Postings for the agendas will be in compliance with the City of Newark Citywide Records Retention Schedule.

NOW, THEREFORE, BE IT RESOLVED by the City Council of the City of Newark that the Senior Citizen Standing Advisory Committee bylaws be amended as follows:

#### **II. INTRODUCTION**

B. The City Council appoints citizens to serve on committees. Any person interested in serving on a City advisory body is invited to complete an application form and submit it to the City Clerk. Applications remain on file for one year. When a committee is formed or vacancy occurs, it is publicized and applications of persons interested in serving on a particular body are forwarded to the City Council. The City Council makes the appointment. Applicants are required to ~~be registered voters who~~ reside within the City.

#### **VIII. BROWN ACT COMPLIANCE**

The agenda for each regular Committee meeting and each adjourned regular meeting will be posted in three places visible to the public at least 72 hours prior to the meeting.

These three places, as designated by the City Council, are as follows:

1. City Administration Building
2. Newark Library
3. Silliman Center

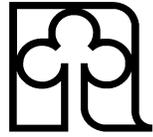
[The Senior Citizen Standing Advisory Committee agenda will also be posted at the Clark W. Redeker Newark Senior Center.](#)

A record of these postings will be maintained, per the Citywide Record Retention Schedule. It will include a declaration of the time and place of each posting. (2/94, 1/2011)

GUIDELINES  
AND  
PROCEDURES  
FOR THE  
SENIOR CITIZEN  
STANDING  
ADVISORY  
COMMITTEE

2020

Deleted: 2011¶



**City of Newark, California**

**GUIDELINES AND PROCEDURES  
FOR CITIZEN ADVISORY COMMITTEES  
(Revised 1/13/2011)**

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  - B. Appointment of Committees
  - C. Term of Office
  
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  - B. Appointment of Chairperson and Vice Chairperson
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## **SENIOR CITIZEN STANDING ADVISORY COMMITTEE**

### **I. ASSIGNMENT**

The Senior Citizen Standing Advisory Committee will research senior citizen needs in the City of Newark and identify those needs which require assistance. The recommendations should be limited to areas that are not provided for or are not being met by other Federal, State, County, or private agency programs available to Newark residents. (2/94)

#### **A. *Process***

The City Council shall appoint a Council Member to serve as the City Council representative and Chairperson to the Committee. Committee members will represent Newark senior citizens.

In developing recommendations to the City Council, a vote of the Committee may be required. In the event the Chairperson considers a vote of the Committee is necessary, Committee members will each have one vote. Any recommendations will be submitted to the City Council as representative of the Committee as a whole.

Meetings will be held monthly at the Newark Senior Center. If a member is unable to attend a meeting, he/she should advise the Chairperson or City staff assigned to the Committee. (2/94)

#### **B. *Product***

The Committee will recommend policies for the City Council; members will be expected to provide any information which they feel is pertinent to the well being of Newark's senior citizens.

The Committee is not a decision-making body. The final decisions on meeting the needs of senior citizens in the City of Newark are the responsibility of the City Council.

#### **C. *Deadline***

The Committee is a permanent and standing committee.

### **II. INTRODUCTION**

#### **A. *Use of Citizen Advisory Committees***

Citizen Advisory Committees play an important role in City government by assisting and advising the City Council in formulating policy. The process, the end product(s), and the deadline will be set forth in the Assignment at the front of this handbook and

will vary for different committees. Committees are formed by City Council resolution to handle specific projects or areas of concern.

This handbook describes the guidelines and procedures to be observed in the conduct of committees of the City of Newark.

**B. *Appointment of Committees***

The City Council appoints citizens to serve on committees. Any person interested in serving on a City advisory body is invited to complete an application form and submit it to the City Clerk. Applications remain on file for one year. When a committee is formed or vacancy occurs, it is publicized and applications of persons interested in serving on a particular body are forwarded to the City Council. The City Council makes the appointment. Applicants are required to reside within the City. (2/94)

Deleted: be registered voters who

The Senior Citizen Standing Advisory Committee shall be made up of no less than eight (8) Committee members and no more than twelve (12) Committee members plus a City Council representative. The Committee members must be 55 years or older. (2/94, 1/2011)

**C. *Term of Office***

The term of office of Committee members shall be for two years. The committee will be made up of no less than eight (8) Committee members and no more than twelve (12) Committee members plus a City Council representative. (2/94, 3/98, 1/2011)

**III. ASSIGNMENT TO THE COMMITTEE**

The City Council will make a formal written assignment to the Committee. The assignment will include the process, the end product(s), and a proposed time deadline for completing the assignment. The City Council will further clarify the assignment and extend time deadlines if requested by the Committee. This assignment and the deadline are set forth in the Assignment at the front of this handbook. Any change or expansion of the assignment or deadline will occur only with the approval of the City Council. (2/94)

**IV. MEETINGS**

**A. *Meeting Schedule***

The committee needs to establish its regular meeting schedule at the first meeting. Attendance of Committee members is critical to the effective completion of the Assignment.

Committees meet on a regular basis, usually once or twice a month. City Council policy requires that meetings be held at the City Administration Building or at other City facilities. In compliance with state open-meetings laws (Brown Act), the

meetings of these bodies are open to the public. A member who is unable to attend a meeting is responsible for notifying the Committee Chairperson or City staff assigned to assist the committee at the earliest possible time. Attendance at Committee meetings is critical; thus, members may be removed for failure to meet attendance requirements. (See Attendance)

**B. *Appointment of Chairperson and Vice Chairperson***

Where the assignment requires, the City Council may name a Chairperson and Vice Chairperson or permit election of these officers by the Committee. Normally, if a City Council Member sits on a Committee, the Council Member will chair the Committee. The Chairperson and Vice Chairperson will serve in that capacity for the duration of the Committee. A Committee member may qualify to be elected as Vice Chairperson only after he/she has served on the Committee six months or longer. (2/94)

**C. *Procedural Rules***

The Chairperson shall oversee the Committee's performance. The Chairperson will be directly responsible to the City Council.

The Chairperson shall also be responsible for:

- Calling meetings, preparing agendas, and presiding at same;
- Providing ample opportunity for members to express themselves by engendering an atmosphere conducive to frank and open discussions;
- Keeping Committee members well informed of their mandated purpose and on target regarding time requirements;
- Attending City Council and Planning Commission meetings on request to report progress and coordinate efforts with other committees; and
- Setting deadlines for work to be completed and checking from time to time with members who have been assigned work to see that work is progressing toward completion.

The Vice Chairperson of the Committee shall act in the absence of the Chairperson and generally conduct meetings and perform functions as listed herein. In the absence of both Chairperson and Vice Chairperson, a City staff person will conduct the meeting. (2/94)

A majority of the total appointed Committee membership shall constitute a quorum. In the event the assignment requires a vote, a quorum is necessary to vote on any action. A simple democratic majority vote of those voting shall decide a question before the Committee. City staff will not vote on Committee recommendations. The

Committee shall strive to reach a consensus of the Committee's entire membership rather than a bare majority of the quorum present when making a recommendation to the City Council or Planning Commission. (1/2011)

***D. Committee Records***

Committee agendas, minutes, and other necessary records will be maintained by the City staff assigned to assist the Committee.

**V. ATTENDANCE**

***A. Attendance Expectations***

Attendance of Committee members is essential for adequate consideration of the material before the Committee. Reading minutes and preparatory material cannot replace participation in Committee meetings. Committee members must commit themselves to meeting attendance. If during the Committee assignment circumstances arise which make attendance difficult, the Committee member should resign from the Committee. (If a member resigns early, his/her concern about attendance will be respected in future applications for Committee assignments.)

Committee members are asked to contact the Committee Chairperson or City staff assigned to assist the Committee before the meeting if they must miss a meeting.

***B. Termination from Committee Membership***

If a Committee member misses two consecutive meetings or three meetings within a six month period, he/she may be dropped from Committee membership. (10/2010)

**VI. CITY STAFF ASSISTANCE**

The Committee will have available such assistance of City staff as may be required to perform its assignment. The staff assignments and administrative procedures will be under the general direction and supervision of the City Manager.

**VII. COMMITTEE REPORT**

When the Assignment requires a report, this report should reflect a consensus of the Committee. A consensus means willingness to go along with the recommendation although it does not meet all of the members' desires. If a minority of the Committee remains strenuously opposed to the Committee recommendation, they may present a minority report on the recommendation. City staff may also submit an independent report.

## VIII. BROWN ACT COMPLIANCE

### A. *Policy*

It is the policy of the Brown Act that public boards, commissions, committees, task forces, and other multi-member bodies created by local agencies in this State exist to aid in the conduct of the people's business. It is the intent of the law that their actions be taken openly and that deliberations be conducted openly.

The agenda will bear a brief general description of each item of business to be transacted or discussed at the meeting. The description will be of sufficient detail to inform the public of the general nature of the subject matter of the item so that the public may seek further information on items of interest. The description will focus on the substance of the matter rather than the contemplated action.

If a Committee member or staff member intends to bring up an item for discussion or action, it is to be included on the posted agenda unless the item qualifies as an exception as outlined below:

- a. The Committee makes a determination that "the need to take action" arose after the agenda was posted. This determination requires the affirmative votes of at least two-thirds of the members or an unanimous vote if less than two-thirds of the members are present. If the Committee is able to make such a determination, a motion will be made, seconded, and voted upon, and that action along with a brief explanation will state the need for action and the reason that the need arose after the agenda was posted.

In general, if either the members or staff knew of the need for action before the agenda was posted and the item was not included on the agenda for reasons of scheduling convenience or oversight, then the member could not properly determine that the need arose after the agenda was posted.

- b. The Committee determines that an emergency situation exists. A motion will be made, seconded, and the vote and action taken, along with a brief explanation of the emergency, will be included in the minutes of that meeting. This determination requires the affirmative vote of a majority of the members.

Any matter not on the agenda and brought up by a member of the public during a Committee meeting, may be placed on a future Committee agenda if appropriate to the Committee's Assignment. The Committee will defer discussion and action on such matters while providing a procedure for responding to the public.

Any questions regarding the application of the Brown Act should be directed to the City Clerk or the City Attorney.

**B. Meetings Generally**

The Brown Act requires that a Committee, by formal minute action, provide the time for holding regular meetings.

A Committee may adjourn or continue any regular or adjourned regular meeting to a time and place specified in the order of adjournment or continuance. A copy of Notice of Adjournment or Continuance shall be conspicuously posted on or near the place where the regular or adjourned regular meeting was held.

When a regular or adjourned regular meeting is adjourned, the resulting adjourned regular meeting is a regular meeting for all purposes.

The agenda for each regular Committee meeting and each adjourned regular meeting will be posted in three places visible to the public at least 72 hours prior to the meeting.

These three places, as designated by the City Council, are as follows:

1. City Administration Building
2. Newark Library
3. Silliman Center

The Senior Citizen Standing Advisory Committee agenda will also be posted at the Clark W. Redeker Newark Senior Center.

A record of these postings will be maintained, per the Citywide Record Retention Schedule. It will include a declaration of the time and place of each posting. (2/94, 1/2011)

ORDINANCE NO.

ORDINANCE OF THE CITY COUNCIL OF THE CITY OF  
NEWARK AMENDING SECTION 2.12.020,  
“QUALIFICATIONS,” OF THE NEWARK MUNICIPAL  
CODE AMENDING THE QUALIFICATION  
REQUIREMENTS FOR PLANNING COMMISSIONERS

WHEREAS, Section 2.12.020, “Qualifications,” of the Newark Municipal Code requires that Planning Commissioners be registered voters residing within the City of Newark; and

WHEREAS, on October 12, 2019, Governor Newsom signed into law Senate Bill 225 which provides that a person, regardless of citizenship or immigration status, is eligible to hold an appointed civil office if the person is 18 years of age and a resident of the state; and

WHEREAS, Senate Bill 225 also provides that a person appointed to civil office, regardless of citizenship or immigration status, may receive any form of compensation that the person is not otherwise prohibited from receiving pursuant to federal law, including, but not limited to, any stipend, grant, or reimbursement of personal expenses that is associated with carrying out the duties of that office; and

WHEREAS, by enacting this Ordinance, the City Council intends to require that its Planning Commissioners be residents of the City that are 18 years of age while removing the requirement that Planning Commissioners be registered voters.

NOW, THEREFORE, the City Council of the City of Newark does ordain as follows:

**Section 1. Recitals Made Findings.** The above recitals are hereby declared to be true and correct and findings of the City Council of the City of Newark.

**Section 2. CEQA.** Approval of the amendments is exempt from further environmental review under the general rule in California Environmental Quality Act (CEQA) Guidelines Section 15061(b)(3) that CEQA only applies to projects that have the potential for causing a significant effect on the environment. As a series of text amendments and additions, it can be seen with certainty that there is no possibility that the ordinance will have a significant effect on the environment.

**Section 3. Amendment.** Section 2.12.020, “Qualifications,” of Chapter 12.12 of Title 2 of the Newark Municipal Code is hereby amended as follows (with text in ~~strikeout~~ indicating deletion and double underline indicating addition):

#### **2.12.020 - Qualifications.**

Five members of the commission, that shall be registered voters residing reside within the city and be at least 18 years of age, ~~and~~ shall be appointed by the mayor, with the approval of the city council.

**Section 4. Severability.** If any provision of this Ordinance or the application thereof to any person or circumstance is held invalid, the remainder of the Ordinance, including the application of such part or provision to other persons or circumstances shall not be affected thereby and shall continue in full force and effect. To this end, provisions of this Ordinance are severable. The City Council of the City of Newark hereby declares that it would have passed each section, subsection, subdivision, paragraph, sentence, clause, or phrase hereof irrespective of the fact that any one or more sections, subsections, subdivisions, paragraphs, sentences, clauses, or phrases be held unconstitutional, invalid, or unenforceable.

**Section 5. Effective Date and Publication.** This Ordinance shall take effect thirty (30) days from the date of its adoption. Before expiration of fifteen (15) days after its adoption, this Ordinance shall be published in The Tri-City Voice, a newspaper of general circulation published and printed in the County of Alameda and circulated in the City of Newark.



## Senate Bill No. 225

### CHAPTER 790

An act to amend Sections 241 and 1020 of the Government Code, relating to citizens of the state.

[Approved by Governor October 12, 2019. Filed with Secretary of State October 12, 2019.]

#### LEGISLATIVE COUNSEL'S DIGEST

SB 225, Durazo. Citizens of the state.

Existing law provides that citizens of the state are all persons born in the state and residing in it, except the children of transient aliens and of alien public ministers and consuls, and all persons born out of the state who are citizens of the United States and residing within the state.

This bill would instead provide that citizens of the state are all persons born in the state and residing in it, except the children of alien public ministers and consuls, and all persons born out of the state who are citizens of the United States and residing within the state.

Existing law prohibits a person from holding a civil office if, at the time of election or appointment, the person is not 18 years of age and a citizen of the state, as defined.

This bill would instead provide that a person is eligible to hold an elective civil office if, at the time of election, the person is 18 years of age and a citizen of the state. The bill would also provide that a person, regardless of citizenship or immigration status, is eligible to hold an appointed civil office if the person is 18 years of age and a resident of the state. The bill would provide that a person appointed to civil office, regardless of citizenship or immigration status, may receive any form of compensation that the person is not otherwise prohibited from receiving pursuant to federal law, including, but not limited to, any stipend, grant, or reimbursement of personal expenses that is associated with carrying out the duties of that office.

*The people of the State of California do enact as follows:*

SECTION 1. The Legislature finds and declares all of the following:

(a) The State of California is the largest and most diverse state in the nation, with a total population of almost 40 million people, and a total immigrant population of about 10 million people from over 60 different countries.

(b) California prides itself on its great racial, ethnic, and cultural diversity, and acknowledges that diverse backgrounds benefit the state through providing a diversity of experiences and expertise, and this diversity is

especially beneficial in creating public policy that supports and protects all people.

(c) California has made great strides in integrating our immigrant population in all aspects, including passing laws that authorize health care for all children, professional licenses, driver's licenses, college grants, loans, and in-state tuition for eligible residents, regardless of their immigration status.

(d) Californians are served by numerous local and state boards and commissions that, together, cover a broad range of issues and policy topics and oversee many of the programs and services provided by the state, and these boards and commissions are comprised of highly experienced, qualified individuals with a desire to uphold the values and advance the work of the institutions they serve.

(e) California's democratic values of equal representation are upheld when our local and state government is diverse and representative of the people who reside in the state, and access to positions on governmental boards and commissions creates an avenue for people from multiple backgrounds and different experiences to serve the communities in which they live and beyond.

(f) It is the intent of the Legislature to remove barriers to service and authorize all California residents, including those without lawful immigration status, to serve on California's diverse local and state boards and commissions so that their perspectives and voices are heard.

SEC. 2. Section 241 of the Government Code is amended to read:

241. The citizens of the state are:

(a) All persons born in the state and residing within it, except the children of alien public ministers and consuls.

(b) All persons born out of the state who are citizens of the United States and residing within the state.

SEC. 3. Section 1020 of the Government Code is amended to read:

1020. (a) A person is eligible to hold an elective civil office if, at the time of election, the person is 18 years of age and a citizen of the state.

(b) Notwithstanding any other law, a person, regardless of citizenship or immigration status, is eligible to hold an appointed civil office if the person is 18 years of age and a resident of the state.

(c) Notwithstanding any other law, a person appointed to civil office, regardless of citizenship or immigration status, may receive any form of compensation that the person is not otherwise prohibited from receiving pursuant to federal law, including, but not limited to, any stipend, grant, or reimbursement of personal expenses that is associated with carrying out the duties of that office.

**F.2 Award an Agreement and Authorization for the City Manager to execute an agreement with the *Tri-City Voice* for legal advertising services for Fiscal Year 2020-2021 – from City Clerk Harrington. (RESOLUTION)**

**Background/Discussion** – The California Government Code requires the City of Newark (City) to print legal notices in an adjudicated newspaper of general circulation. The Argus and Tri-City Voice are the only newspapers that currently meet the legal requirements for publishing legal notices. Quotes were requested and received from each newspaper for Fiscal Year 2020-2021.

Both newspapers presented a quote for the same typical public hearing notice with rates that would apply for the next fiscal year. The Argus quoted \$63.24 per typical ad size and The Tri-City Voice quoted \$67.50 per typical ad size. For the current fiscal year, the City has spent approximately \$3,000 on legally mandated advertising. Based on the quotes, the 6 percent price difference is a nominal amount of approximately \$180.

Although cost is one of the evaluating factors, the City is not bound to award the contract based on price alone as held by California case law: "In a given city, there may be two newspapers of general circulation, one a daily with a tremendous circulation, the other a weekly with a very small circulation. While the latter might be able to publish legal notices much cheaper than the former, it would be far more in the interests of the public that the city's legal notices be published in the paper of larger circulation. At least, in awarding a contract, the City Council should be permitted to weigh the consideration against the matter of cost, and unless the council abuses its discretion, its determination should stand." (Cyr v. White (1947) 83 Cal.App. 2d 22, 27) The same case also holds that the City Council has the discretion to determine which bid is better, taking into account "other matters affecting the value to the public".

The Tri-City Voice has a circulation of 4,500 newspapers within the City of Newark. These are distributed mainly through free stacks/racks placed around the City and paid subscriptions. The Argus has 1,097 paid subscriptions within the City of Newark.

The Tri-City Voice has been awarded the agreement for the last five fiscal years and has provided excellent service. The last time the Argus submitted a bid was for the 2016-2017 fiscal year. Although the Argus provided a lower bid, the City Council awarded the agreement to the Tri-City Voice due to the larger circulation numbers.

The City has a strong desire to provide easy and transparent access to matters affecting the community and the price difference between the quotes is nominal. For the reasons explained above, staff recommends that the City Council award the legal advertising agreement to the Tri-City Voice for fiscal year 2020-2021.

**Attachments** – Resolution, Contractual Services Agreement

**Action** – Staff recommends that the City Council, by resolution, award an agreement to, and authorize the City Manager to execute an agreement with, *What's Happening's Tri-City Voice* For Legal Advertising Services for Fiscal Year 2020-2021.

RESOLUTION NO.

RESOLUTION OF THE CITY COUNCIL OF THE CITY OF NEWARK AWARDING AN AGREEMENT TO, AND AUTHORIZING THE CITY MANAGER TO EXECUTE AN AGREEMENT WITH, *WHAT'S HAPPENING'S TRI-CITY VOICE* FOR LEGAL ADVERTISING SERVICES FOR FISCAL YEAR 2020-2021

WHEREAS, the California Government Code requires that the City of Newark print legal notices in an adjudicated newspaper of general circulation or an adjudicated newspaper that is published nearest to the City; and

WHEREAS, the City solicited bids for legal advertising and received responses from the *What's Happening's Tri-City Voice* and the *Bay Area News Group/The Argus*; and

WHEREAS, the bid from the *What's Happening's Tri-City Voice* was slightly more than the bid from the *Bay Area News Group/The Argus*; however the *What's Happening's Tri-City Voice* has a larger circulation rate and has provided excellent service for the past five fiscal years; and

WHEREAS, the City has a strong desire to provide easy and transparent access to matters affecting the community and staff recommends awarding the legal advertising agreement to the *What's Happening's Tri-City Voice* for fiscal year 2020-2021.

NOW, THEREFORE, BE IT RESOLVED that the City Council of the City of Newark hereby awards the agreement for legal advertising services for Fiscal Year 2020-2021 to *What's Happening's Tri-City Voice* and authorizes the City Manager to execute the agreement, on file with the City Clerk, and incorporated herein by reference.

BE IT FURTHER RESOLVED that this resolution supersedes previous resolutions awarding legal advertising services.

3527060.1

**CONTRACTUAL SERVICES AGREEMENT  
CONSULTANTS**

This Service Agreement (hereinafter “Agreement”) is made and entered into this 28TH day of MAY, 2020 by and between the **CITY OF NEWARK**, a municipal corporation (“City”), and WHAT’S HAPPENING TRI-CITY VOICE, a (“Consultant”), collectively the “Parties”.

**WITNESSETH:**

**WHEREAS**, City requested proposals to perform the services generally including: **LEGAL ADVERTISING SERVICES FOR FISCALY YEAR 2020-2021.**

**WHEREAS**, in response to City’s request, Consultant submitted a proposal and, after negotiations, Consultant agreed to perform the Services more particularly described in Exhibit “A” (“Services”), in return for the compensation described in this Agreement and Exhibit “B”.

**WHEREAS**, in reliance upon Consultant’s documentation of its qualifications, as set forth in Exhibit “C”, City finds that Consultant has demonstrated the requisite qualifications, experience, training, and expertise to perform the requested Services.

**NOW, THEREFORE**, the Parties hereto agree as follows:

**1. CONSULTANT’S SERVICES.** Consultant shall perform Services described, and in the time, place, and manner specified in Exhibit “A” in accordance with the terms and conditions of this Agreement. In the event of a conflict in or inconsistency between the terms of this Agreement and Exhibit “A”, the Agreement shall control.

**2. TIME FOR PERFORMANCE.** Time is of the essence in the performance of Services under this Agreement and Consultant shall generally adhere to the schedule set forth in Exhibit “A”; provided, that City shall grant reasonable extensions of time for the performance of such Services occasioned by governmental reviews of Consultant’s work product or other unavoidable delays occasioned by circumstances, provided, further, that such unavoidable delays shall not include strikes, lockouts, work stoppages, or other labor disturbances conducted by, or on behalf of, Consultant’s officers or employees. Any Services for which times for performance are not specified in this Agreement shall be commenced and completed by Consultant in a reasonably prompt and timely manner based upon the circumstances and direction communicated to Consultant.

Consultant acknowledges the importance to City of City’s performance schedule and agrees to put forth its best professional efforts to perform its Services under this Agreement in a manner consistent with that schedule. City understands, however, that Consultant’s performance must be governed by sound professional practices.

**3. COMPENSATION.**

**A. “Not to Exceed” Compensation.** City shall compensate Consultant for all Services performed by Consultant hereunder in an amount based upon Consultant’s hourly or other rates set forth in Exhibit “B”. The payments specified in Exhibit “B” shall be the only payments to be made to Consultant for Services rendered pursuant to this Agreement.

**B. Method of Billing.** To request payment, Consultant shall submit monthly invoices to City identifying Services performed and the charges therefore (including an identification of personnel who performed Services, hours worked, hourly rates, and reimbursable expenses), based upon Consultant’s billing rates (set forth on Exhibit “B” hereto).

Consultant shall submit all billings for said Services to City in the manner specified in Exhibit “B”; or, if no manner is specified in Exhibit “B”, then according to the usual and customary procedures and practices which Consultant uses for billing clients similar to City.

Invoices shall be sent to:

City of Newark  
Attn: Finance Department  
37101 Newark Blvd.  
Newark, CA 94560

Upon completion of Services, City shall sign off and acknowledge that all terms and conditions have been satisfactorily met; upon which, unless waived by City in writing, Consultant shall prepare an itemized statement, briefly describing by task and/or labor category the items billed.

**C. Payment.** Upon receipt of an invoice, City shall make payments to Consultant on a monthly basis, or at such other times as may be specified in Exhibit “B”, for Services, which are performed in accordance with this Agreement to the satisfaction of City.

**D. Consultant’s Failure to Perform.** In the event that Consultant performs Services that do not comply with the requirements of this Agreement, Consultant shall, upon receipt of written notice from City, re-perform the services (without additional compensation to Consultant). If Consultant’s failure to perform in accordance with this Agreement causes damages to City, Consultant shall reimburse City for the damages incurred (which may be charged as an offset to Consultant’s payment).

**4. ADDITIONAL SERVICES.** In the event City desires the performance of additional services not otherwise included within Services, such services shall be authorized by written task order approved in advance of the performance thereof. Such task order shall include a description of the services to be performed thereunder, the maximum compensation and reimbursement of costs and expenses payable therefore, the time of performance thereof, and such other matters as the Parties deem appropriate for the accomplishment of such services. Except to the extent modified by a task order, all other terms and conditions of this Agreement shall be deemed incorporated in each such task order.

**5. INDEPENDENT CONSULTANT.** At all times during the term of this Agreement, Consultant shall be, and is an independent consultant and shall not be an employee or agent of City. Consultant shall not be entitled to any benefit, right, or compensation other than that provided in this Agreement. City shall have the right to control Consultant only insofar as the results of Consultant's Services; however, City shall not have the right to control the means by which Consultant accomplishes Services rendered pursuant to this Agreement.

Except as City may specify in writing, Consultant shall have no authority, express or implied, to act on behalf of City in any capacity whatsoever as an agent. Consultant shall have no authority, express or implied, pursuant to this Agreement to bind City to any obligation whatsoever.

**6. PERSONNEL.** Consultant understands that, in entering into this Agreement, City has relied upon Consultant's ability to perform in accordance with its representations regarding the qualifications of Consultant, including the qualifications of its Authorized Representative, its designated personnel, and its Subconsultants, if any, identified in Exhibit "C". Therefore, Consultant shall not replace its Authorized Representative, or any of the designated personnel or Subconsultants identified in Exhibit "C", without the prior written consent of City. All Services shall be performed by, or under, the direct supervision of Consultant's Authorized Representative.

Consultant agrees to include with all Subconsultants in their subcontract the same requirements and provisions of this Agreement including the indemnity and Insurance requirements to the extent they apply to the scope of the Subconsultant's work. Subconsultants hired by Consultant agree to be bound to Consultant and City in the same manner and to the same extent as Consultant is bound to City under this Agreement. Subconsultant further agrees to include these same provisions with any Sub-subconsultant. A copy of this Agreement's Indemnity and Insurance provisions will be furnished to the Subconsultant upon request. The Consultant shall require all Sub-subconsultants to provide a valid certificate of insurance and the required endorsements included in this Agreement prior to commencement of any Services and will provide proof of compliance to the City.

In the event that City, in its sole discretion, at any time during the term of this Agreement, desires the removal of any of Consultant's designated personnel or Subconsultants, Consultant shall, immediately upon receiving notice from City of such desire of City, cause the removal of such person or persons.

**7. FACILITIES AND EQUIPMENT.** Consultant shall, at its sole cost and expense, furnish all facilities and equipment which may be required for furnishing Services.

**8. INFORMATION AND DOCUMENTATION.**

**A. Information from City.** City has made an effort to provide Consultant with all information necessary for Consultant's performance of Services. If Consultant believes additional information is required, Consultant shall promptly notify City and City will provide to Consultant all relevant non-privileged information in City's possession.

**B. Consultant's Accounting Records.** Consultant shall maintain all accounting records related to this Agreement in accordance with generally accepted accounting principles and state law requirements, and in no event for less than four (4) years. Consultant's accounting records shall include, at a minimum, all documents which support Consultant's costs and expenses related to this Agreement, including personnel, subconsultants' invoices and payments, and reimbursable expenses. Consultant's accounting records shall be made available to City within a reasonable time after City's request, during normal business hours.

**C. Ownership of Work Product.** All original documents prepared by Consultant (including its employees and subconsultants) for this Agreement ("Work Product"), whether complete or in progress, are the property of City and shall be given to City at the completion of Consultant's Services, or upon demand of City. Consultant shall have a right to make and keep copies of the Work Product except for any confidential information. Consultant shall not reveal the Work Product or the confidential information contained in the Work Product, or make it available, to any third party without the prior written consent of City.

**9. CONFLICTS OF INTEREST PROHIBITED.** Consultant (including its employees, agents, and subconsultants) shall not maintain or acquire any direct or indirect interest that conflicts with the performance of this Agreement. Consultant shall comply with all requirements of the Political Reform Act (California Government Code Section 81000, *et seq.*) and other laws relating to conflicts of interest, including: (a) Consultant shall not make or participate in a decision made by City if it is reasonably foreseeable that the decision may have a material effect on Consultant's economic interest, and (b) if required by law, Consultant shall file financial disclosure forms with the City Clerk. If Consultant maintains or acquires a conflicting interest, any contract with City (including this Agreement) involving Consultant's conflicting interest may be terminated by City.

**10. NONDISCRIMINATION.** Consultant shall comply with all applicable federal, state, and local laws regarding nondiscriminatory employment practices, whether or not said laws are expressly stated in this Agreement. Consultant shall not discriminate against any employee or applicant because of race, color, religious creed, national origin, physical disability, mental disability, medical condition, marital status, sexual orientation, sex, age, or any other basis, as defined in California Civil Code Section 51.

**11. COMPLIANCE WITH LAW AND STANDARD OF CARE.** Consultant shall comply with all applicable legal requirements including all federal, state, and local laws (including ordinances and resolutions), whether or not said laws are expressly stated in this Agreement. Consultant shall perform Services using a standard of care equal to, or greater than, the degree of skill and diligence ordinarily used by reputable professionals, with a level of experience and training similar to Consultant, performing under circumstances similar to those required by this Agreement.

**12. INSURANCE.** Consultant shall procure and maintain for the duration of this Agreement insurance against claims for injuries to persons or damages to property which may arise from or in connection with the performance of the work hereunder by the Consultant, his agents, representatives, subconsultants, or employees.

**A. Verification of Coverage.**

Consultant shall furnish City with original certificates of insurance and amendatory endorsements or copies of the applicable policy language effecting coverage required by this clause. The certificates and endorsements for each insurance policy are to be signed by a person authorized by that insurer to bind coverage on its behalf. All certificates and endorsements are to be received and approved by City before work commences.

Proof of Insurance shall be mailed to the following address or any subsequent address as may be directed in writing by the City Risk Manager:

CITY OF NEWARK  
Attn: Risk Manager  
37101 Newark Boulevard  
Newark, CA 94560

City reserves the right to require and obtain complete, certified copies of all required insurance policies and endorsements at any time. Failure to exercise this right at any time shall not constitute a waiver of right to exercise later. Consultant shall immediately furnish City with certificates of renewal for each policy that is renewed during the term of this Agreement.

**B. Minimum Scope of Insurance.**

Coverage shall be at least as broad as:

1. Insurance Services Office Form Number CG 00 01 covering Commercial General Liability on an occurrence basis, including products and completed operations, property damage, bodily injury, and personal and advertising injury; and
2. Insurance Services Office Form Number CA 00 01 covering Code 1, (any auto), or Code 8 (hired) and Code 9 (non-owned) if consultant has no owned autos; and
3. Workers' Compensation insurance as required by the State of California, with Statutory Limits, and Employer's Liability Insurance; and
4. Errors and Omissions Liability insurance appropriate to the Consultant's profession. Architects' and Engineers' coverage is to be endorsed to include contractual liability.

**C. Minimum Limits of Insurance.**

It shall be a requirement under this Agreement that any available insurance proceeds broader than or in excess of the specified minimum Insurance coverage requirements and/or limits shall be available to the

Additional Insured. Furthermore, the requirements for coverage and limits shall be (1) the minimum coverage and limits specified in this Agreement; or (2) the broader coverage and maximum limits of coverage of and Insurance policy or proceeds available to the named Insured; whichever is greater.

Consultant shall maintain limits no less than:

1. General Liability: **\$2,000,000** per occurrence for bodily injury, personal injury, and property damage. If a general aggregate limit applies, either the general aggregate limit shall apply separately to this project/location or the general aggregate limit shall be twice the required occurrence limit.  
(including products and completed operations, property damage, bodily injury, and personal and advertising injury)
2. Automobile Liability: **\$1,000,000** per accident for bodily injury and property damage.
3. Employer's Liability: **\$1,000,000** per accident for bodily injury or disease.
4. Errors and Omissions Liability: **\$1,000,000** per occurrence or claim; **\$2,000,000** aggregate.

**D. Deductibles and Self-Insured Retentions.**

Any deductibles or self-insured retentions must be declared to and approved by the City Risk Manager. At the option of City, either: (1) the insurer shall reduce or eliminate such deductibles or self-insured retentions as respects to City, its officers, officials, directors, employees, contractors, agents, and volunteers, or (2) Consultant shall provide a financial guarantee satisfactory to City guaranteeing payment of losses and related investigations, claim administration, and defense expenses in an amount specified by the City Risk Manager or designee.

**E. Claims Made Policies.**

For all "claims made" coverage, in the event that Consultant changes insurance carriers Consultant shall purchase "tail" coverage or otherwise provide for continuous coverage covering the Term of this Agreement and not less than five (5) years thereafter. Proof of such "tail" or other continuous coverage shall be required at any time that the Consultant changes to a new carrier.

**F. Wasting Policies.**

No policy required by this paragraph 12 shall include a "wasting" policy limit (ie. limit that is eroded by the cost of defense).

**G. Remedies.**

In addition to any other remedies City may have if Consultant fails to provide or maintain any insurance policies or policy endorsements to the extent and within the time herein required, City may, at its sole option exercise any of the following remedies, which are alternatives to other remedies City may have and are not the exclusive remedy for Consultant's breach:

1. Obtain such insurance and deduct and retain the amount of the premiums for such insurance from any sums due under the Agreement;
2. Order Consultant to stop work under this Agreement or withhold any payment that becomes due to Consultant hereunder, or both stop work and withhold any payment, until Consultant demonstrates compliance with the requirements hereof; and/or
3. Terminate this Agreement.

**H. Acceptability of Insurers.**

Insurance is to be placed with insurers with a current A.M. Best's rating of no less than A:VII, unless otherwise acceptable to the City Risk Manager. All insurance companies providing coverage to Consultant shall be insurance organizations authorized by the Insurance Commissioner of the State of California to transact the business of insurance in the State of California.

**I. Other Insurance Provisions.**

The general liability and automobile liability policies are to contain, or be endorsed to contain, the following provisions:

1. Additional Insureds. City, its officers, officials, directors, employees and volunteers ("Additional Insureds") are to be covered as insureds with respect to liability arising out of work or operations performed by or on behalf of Consultant; including materials, parts or equipment furnished in connection with such work or operations.

2. Primary Coverage. For any claims related to Services, Consultant's insurance coverage shall be primary insurance as respects City, its officers, officials, directors, employees, and volunteers. Any insurance or self-insurance maintained by City, its officers, officials, directors, employees, or volunteers shall be excess of Consultant's insurance and shall not be contribute with it. Consultant's policy will not seek contribution from the City's insurance or self insurance.

3. Notice of Cancellation. Each insurance policy required above shall provide that coverage shall not be canceled during the term of this Agreement without notice to City.

4. Civil Code § 2782. Coverage shall not extend to any indemnity coverage for the active negligence of the additional insured in any case where an agreement to

indemnify the additional insured would be invalid under Subdivision (b) of Section 2782 of the California Civil Code.

5. Deductibles and Self-Insured Retentions (SIR). All deductibles and self-insured retentions must be disclosed to the City Risk Manager for approval and shall not reduce the limits of liability. Policies containing any SIR provision shall provide or be endorsed to provide that the SIR may be satisfied by either the named Insured or the City.

6. Subconsultants. Consultant shall include all subconsultants as insureds under its policies or shall require and verify separate certificates and endorsements have been obtained for each subconsultant. All coverages for subconsultants shall be subject to all of the requirements stated herein.

7. Waiver of Subrogation. With respect to Workers' Compensation and Employer's Liability Coverage, the insurer shall agree to waive all rights of subrogation against City, its officers, officials, directors, employees, and volunteers for losses arising from work performed by Consultant for City.

8. Coverage is Material Element. Maintenance of proper insurance coverage in conformity with the provision of this paragraph 12 is a material element of this Agreement and failure to maintain or renew coverage or to provide evidence of coverage or renewal may be treated by City as a material breach of this Agreement.

9. Variation. The City Risk Manager may approve a variation in these insurance requirements upon a determination that the coverage, scope, limits, and form of such insurance are either not commercially available or that City's interests are otherwise fully protected. Any variation granted shall be done in writing and shall be made a part of this Agreement as Appendix "A".

**13. REPORTING DAMAGES**. If any damage (including but not limited to death, personal injury or property damage) occurs in connection with the performance of this Agreement, Consultant shall immediately notify the City Risk Manager's office by telephone at 510-578-4428, and Consultant shall promptly submit to the City's Risk Manager and the City's Administrator (see paragraph 18, hereinbelow) a written report (in a form acceptable to City) with the following information: (a) name(s) and address(es) of the injured or deceased person(s), (b) name(s) and address(es) of witnesses, (c) name(s) and address(es) of Consultant's insurance company(ies), and (d) a detailed description of the damage(s) and whether any City property was involved.

**14. INDEMNIFICATION/SAVE HARMLESS**. To the fullest extent permitted by law, the Consultant shall: (1) immediately defend, and (2) indemnify City, its, officers, officials, directors, employees, and volunteers from and against all liabilities regardless of nature or type arising out of or resulting from Consultant's performance of Services, or any negligent or wrongful act or omission of Consultant or Consultant's officers, employees, agents, or subconsultants. Liabilities subject to the duties to defend and indemnify include, without limitation all claims, losses, damages, penalties, fines, and judgments; associated investigation and administrative expenses; defense costs, including but not limited to reasonable attorneys' fees; court costs; and costs of alternative dispute resolution. Consultant's obligation to

indemnify applies unless it is adjudicated that its liability was caused by the sole active negligence or sole willful misconduct of an indemnified party. If it is finally adjudicated that liability is caused by the comparative active negligence or willful misconduct of an indemnified party, Consultant's indemnification obligation shall be reduced in proportion to the established comparative liability of the indemnified party.

The duty to defend is a separate and distinct obligation from Consultant's duty to indemnify. Consultant shall be obligated to defend, in all legal, equitable, administrative, or special proceedings, with counsel approved by City immediately upon tender to Consultant of the claim in any form or at any stage of an action or proceeding, whether or not liability is established. An allegation or determination of comparative active negligence or willful misconduct by an indemnified party does not relieve the Consultant from its separate and distinct obligation to defend City. The obligation to defend extends through final judgment, including exhaustion of any appeals. The defense obligation includes an obligation to provide independent defense counsel if Consultant asserts that liability is caused in whole or in part by the negligence or willful misconduct of the indemnified party. If it is finally adjudicated that liability was caused by the sole active negligence or sole willful misconduct of an indemnified party, Consultant may submit a claim to City for reimbursement of reasonable attorneys' fees and defense costs.

The review, acceptance or approval of Consultant's work or work product by any indemnified party shall not affect, relieve or reduce Consultant's indemnification or defense obligations. This paragraph survives completion of Services or the termination of this contract. The provisions of this paragraph are not limited by and do not affect the provisions of this contract relating to insurance.

Consultant/Subconsultant's responsibility for such defense and indemnity obligations shall survive the termination or completion of this Agreement for the full period of time allowed by law. The defense and indemnification obligations of this Agreement are undertaken in addition to, and shall not in any way be limited by, the insurance obligations contained in this Agreement.

**15. LICENSES, PERMITS, ETC.** Consultant represents and warrants to City that it has all licenses, permits, qualifications, and approvals of whatsoever nature that are legally required for Consultant to practice its profession. Consultant represents and warrants to City that Consultant shall, at its sole cost and expense, keep in effect at all times during the term of this Agreement any licenses, permits, and approvals which are legally required for Consultant to practice its profession. In addition to the foregoing, Consultant shall obtain and maintain during the term hereof a valid City of Newark Business License.

**16. TERM/TERMINATION.**

**A.** The term of this Agreement shall commence upon the date first hereinabove written and shall expire upon completion of performance of Services hereunder by Consultant.

**B.** Notwithstanding the provisions of paragraph 16 Section A above, either party may terminate this Agreement without cause by giving written notice thereof not less than ten (10) days prior to the effective date of termination, which date shall be included in said notice. In the event of such termination, City shall compensate Consultant for Services rendered and reimburse Consultant for costs and expenses incurred, to the date of termination, calculated in accordance with the provisions of paragraph 3. In ascertaining the Services actually rendered to the date of termination, consideration shall be given both to completed work and work in process of completion. Nothing herein contained shall be deemed a limitation upon the right of City to terminate this Agreement for cause, or otherwise to exercise such rights or pursue such remedies as may accrue to City hereunder.

**17. CONTRACT ADMINISTRATION.** This Agreement shall be administered by **SHEILA HARRINGTON, CITY CLERK** of the City of Newark (“Administrator”). All correspondence shall be directed to or through the Administrator or his/her designee.

**18. NOTICES.** Written notices required or convenient hereunder shall be delivered personally or by depositing the same with the United States Postal Service, first class (or equivalent) postage prepaid and addressed, in the case of Consultant, to:

TRI-CITY VOICE

**CITY OF NEWARK**

WILLIAM MARSHAK

SHEILA HARRINGTON

**Consultant**

**Administrator**

What’s Happening, Inc./

City of Newark

What’s Happening’s Tri-City Voice

Attn: CITY CLERK

39737 Paseo Padre Parkway, Suite B

37101 Newark Boulevard

Fremont, CA 94538

Newark, CA 94560

**19. PARAGRAPH HEADINGS.** Paragraph headings used herein are for convenience only and shall not be deemed to be a part of such paragraphs and shall not be construed to change the meaning thereof.

**20. EXHIBITS.** All exhibits referred to herein are attached hereto and are by this reference incorporated herein.

**21. SEVERABILITY.** If any term of this Agreement (including any phrase, provision, covenant, or condition) is held by a court of competent jurisdiction to be invalid or unenforceable, the Agreement shall be construed as not containing that term, and the remainder of this Agreement shall remain in full force and effect; provided, however, this paragraph shall not be applied to the extent that it would result in a frustration of the Parties’ intent under this Agreement.

**22. GOVERNING LAW, JURISDICTION, AND VENUE.** The interpretation, validity, and enforcement of this Agreement shall be governed by and interpreted in accordance with the laws of the State of California. Any suit, claim, or legal proceeding of any kind related to this Agreement shall be filed and heard in a court of competent jurisdiction in the County of Alameda.

**23. ATTORNEY'S FEES.** In the event any legal action is commenced to enforce this Agreement, the prevailing party is entitled to reasonable attorney's fees, costs, and expenses incurred.

**24. ASSIGNABILITY.** Neither Consultant nor City shall subconsult, assign, sell, mortgage, hypothecate, or otherwise transfer their respective interests or obligations in this Agreement without the express prior written consent of the non-transferring party.

**25. MODIFICATIONS.** This Agreement may not be modified orally or in any manner other than by an agreement in writing signed by both Parties.

**26. WAIVERS.** Waiver of breach or default under this Agreement shall not constitute a continuing waiver of a subsequent breach of the same or any other provision of this Agreement.

**27. ENTIRE AGREEMENT.** This Agreement, including all documents incorporated herein by reference, comprises the entire integrated understanding between the Parties concerning the Services. This Agreement supersedes all prior negotiations, agreements, and understandings regarding this matter, whether written or oral. The documents incorporated by reference into this Agreement are complementary; what is called for in one is binding as if called for in all.

**28. SIGNATURES.** The individuals executing this Agreement represent and warrant that they have the right, power, legal capacity, and authority to enter into and to execute this Agreement on behalf of the respective legal entities of Consultant and City. This Agreement shall inure to the benefit of and be binding upon the Parties hereto and their respective successors and assigns.

**29. COVENANT AGAINST CONTINGENT FEES.** Consultant hereby warrants that Consultant has not employed or retained any company or person, other than a *bona fide* employee working for Consultant, to solicit or secure this Agreement, and Consultant has not paid or agreed to pay any company or person, other than a *bona fide* employee, any fee, commission, percentage, brokerage fee, gift, or any other consideration contingent upon or resulting from the award or formation of this Agreement. For breach or violation of this warranty, City shall have the right to annul this Agreement without liability or, at City's discretion, to deduct from the Agreement price or consideration, or otherwise recover, the full amount of such fee, commission, percentage, brokerage fee, gift or contingent fee.

IN WITNESS WHEREOF, the Parties hereto have executed this Agreement the day and year first hereinabove written.

CITY OF NEWARK,  
a municipal corporation

What's Happening, Inc  
What's Happening, Tri-City Voice

By \_\_\_\_\_  
City of Newark

  
By \_\_\_\_\_  
Consultant

Date \_\_\_\_\_

Date 4/24/2020

William Marshak \_\_\_\_\_  
Printed Name

Attest:  
  
\_\_\_\_\_  
City Clerk

Date \_\_\_\_\_

Approved as to form:  
  
\_\_\_\_\_  
Interim City Attorney

Date \_\_\_\_\_

**EXHIBIT A**

***SCOPE OF SERVICES***

**Services provided by What's Happening's Tri-City Voice (TCV) and, by extension, its subcontractor The Daily Journal Corporation include:**

- 1. Assistance and training of city personnel to become comfortable and utilize the ADTECH electronic submission and filing system.**
- 2. Typeset all submissions for legal advertising in a timely and accurate manner.**
- 3. Proofread all submissions.**
- 4. Print and distribute approved city public notices weekly in TCV.**
- 5. Allow timely retrieval and filing of submissions through ADTECH or local TCV office personnel.**
- 6. Provide accurate billing and accounting of legal notice submissions.**

**All listed major components of service shall be completed in a timely manner to complement work flow requirements of City of Newark personnel.**

## **EXHIBIT B**

### ***PAYMENT***

**Billing by What's Happening's Tri-City Voice (TCV) and, by extension, its subcontractor The Daily Journal Corporation include:**

- 1. Accurate and itemized billing through The Daily Journal Corporation.**
- 2. Instant access to billing information of all submissions through ADTECH system.**
- 3. Services related to acceptance, assemblage, typesetting, publishing and distribution of public notices included in contract rate of \$1.25 per line per column. Refer to Information Summary for column size. This is a "not to exceed" cost for performance of these services.**

**Billing services shall be completed in a timely manner to complement work flow requirements of City of Newark personnel.**

## EXHIBIT C

### *QUALIFICATIONS*

#### **What's Happening, Inc.**

What's Happening, Inc. was established March 1998 and began publication of What's Happening Magazine, a full-color local monthly guide for the Tri-City Area. In January of 2002, Tri-City Voice newspaper (TCV) began distribution.

TCV has grown rapidly to include local news and information for the Greater Tri-Cities of Hayward and its environs, Fremont, Newark, Union City, Sunol and Milpitas. A unique distribution system assures wide availability through stack and rack at over 1,500 locations as well as paid subscriptions. In addition, [www.tricityvoice.com](http://www.tricityvoice.com) offers the complete newspaper – including legal notices – online for review at no cost. Currently, this website receives over 18,000 hits per day and the number is increasing. Complete newspaper is also available on the TCV News mobile app.

What's Happening, Inc. is a local company, owned and operated by Fremont residents which seeks to employ local residents as well. Currently, What's Happening, Inc. employs 22 people plus contract writers and photographers, the majority are Tri-City residents. Our office at 39737 Paseo Padre Parkway, Suite B in Fremont is the sole office of TCV and houses three trained employees to handle legal notice issues.

Since adjudication, public notices have been published without serious incident. Use of The Daily Journal Corporation ADTECH system has proven to be an efficient and accurate process to submit and publish legal notices.

#### **The Daily Journal Corporation**

The Daily Journal has long experience managing media buying services similar to those identified in the IFB's Scope of Work. Established in 1888, the company was reincorporated in 1987. As a specialist in the niche of "Government Advertising", the Daily Journal places legal advertising to meet the legal publishing requirements. It holds over 800 adjudication decrees for California newspapers and has an extensive database of newspaper contract and other specifications for immediate and efficient ad identification, ad placement and follow-up.

The Daily Journal employs 260 full-time staff members. Approximately 40 full-time staff is assigned to handling over 5,000 advertisements per month for government agencies.



THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

## BUSINESSOWNERS LIABILITY SPECIAL BROADENING ENDORSEMENT

This endorsement modifies insurance provided under the following:

BUSINESSOWNERS COVERAGE FORM

SUMMARY OF COVERAGES	Limits	Page
1. Additional Insured by Contract, Agreement or Permit	Included	1
2. Additional Insured - Broad Form Vendors	Included	2
3. Alienated Premises	Included	3
4. Broad Form Property Damage - Borrowed Equipment, Customers Goods and Use of Elevators	Included	3
5. Incidental Malpractice (Employed Nurses, EMT's and Paramedics)	Included	3
6. Personal and Advertising Injury - Broad Form	Included	4
7. Product Recall Expense	Included	4
Product Recall Expense Each Occurrence Limit	\$25,000 Occurrence	5
Product Recall Expense Aggregate Limit	\$50,000 Aggregate	5
Product Recall Deductible	\$500	5
8. Unintentional Failure to Disclose Hazards	Included	6
9. Unintentional Failure to Notify	Included	6

This endorsement amends coverages provided under the Businessowners Coverage Form through new coverages and broader coverage grants. This coverage is subject to the provisions applicable to the Businessowners Coverage Form, except as provided below.

The following changes are made to **SECTION II - LIABILITY**:

**1. Additional Insured by Contract, Agreement or Permit**

The following is added to **SECTION II - LIABILITY, C. Who Is An Insured**:

**Additional Insured by Contract, Agreement or Permit**

a. Any person or organization with whom you agreed in a written contract, written agreement or permit to add such person or organization as an additional insured on your policy is an additional insured only with respect to liability for "bodily injury", "property damage", or "personal and advertising injury" caused, in whole or in part, by your acts or omissions, or the acts or omissions of those acting on your behalf, but only with respect to:

- (1) "Your work" for the additional insured(s) designated in the contract, agreement or permit;

- (2) Premises you own, rent, lease or occupy; or

- (3) Your maintenance, operation or use of equipment leased to you.

b. The insurance afforded to such additional insured described above:

- (1) Only applies to the extent permitted by law; and

- (2) Will not be broader than the insurance which you are required by the contract, agreement or permit to provide for such additional insured.

- (3) Applies on a primary basis if that is required by the written contract, written agreement or permit.

- (4) Will not be broader than coverage provided to any other insured.

- (5) Does not apply if the "bodily injury", "property damage" or "personal and advertising injury" is otherwise excluded from coverage under this Coverage Part, including any endorsements thereto.

- c. This provision does not apply:
- (1) Unless the written contract or written agreement was executed or permit was issued prior to the "bodily injury", "property damage", or "personal injury and advertising injury".
  - (2) To any person or organization included as an insured by another endorsement issued by us and made part of this Coverage Part.
  - (3) To any lessor of equipment:
    - (a) After the equipment lease expires; or
    - (b) If the "bodily injury", "property damage", "personal and advertising injury" arises out of sole negligence of the lessor.
  - (4) To any:
    - (a) Owners or other interests from whom land has been leased if the "occurrence" takes place or the offense is committed after the lease for the land expires; or
    - (b) Managers or lessors of premises if:
      - (i) The "occurrence" takes place or the offense is committed after you cease to be a tenant in that premises; or
      - (ii) The "bodily injury", "property damage", "personal injury" or "advertising injury" arises out of structural alterations, new construction or demolition operations performed by or on behalf of the manager or lessor.
  - (5) To "bodily injury", "property damage" or "personal and advertising injury" arising out of the rendering of or the failure to render any professional services.  
This exclusion applies even if the claims against any insured allege negligence or other wrongdoing in the supervision, hiring, employment, training or monitoring of others by that insured, if the "occurrence" which caused the "bodily injury" or "property damage" or the offense which caused the "personal and advertising injury" involved the rendering of or failure to render any professional services by or for you.
- d. With respect to the insurance afforded to these additional insureds, the following is added to **SECTION II - LIABILITY, D. Liability and Medical Expense Limits of Insurance** :

The most we will pay on behalf of the additional insured for a covered claim is the lesser of the amount of insurance:

1. Required by the contract, agreement or permit described in Paragraph a.; or
2. Available under the applicable Limits of Insurance shown in the Declarations.

This endorsement shall not increase the applicable Limits of Insurance shown in the Declarations

e. All other insuring agreements, exclusions, and conditions of the policy apply.

**2. Additional Insured - Broad Form Vendors**

The following is added to **SECTION II - LIABILITY, C. Who Is An Insured:**

**Additional Insured - Broad Form Vendors**

- a. Any person or organization that is a vendor with whom you agreed in a written contract or written agreement to include as an additional insured under this Coverage Part is an insured, but only with respect to liability for "bodily injury" or "property damage" arising out of "your products" which are distributed or sold in the regular course of the vendor's business.
- b. The insurance afforded to such vendor described above:
  - (1) Only applies to the extent permitted by law;
  - (2) Will not be broader than the insurance which you are required by the contract or agreement to provide for such vendor;
  - (3) Will not be broader than coverage provided to any other insured; and
  - (4) Does not apply if the "bodily injury", "property damage" or "personal and advertising injury" is otherwise excluded from coverage under this Coverage Part, including any endorsements thereto
- c. With respect to insurance afforded to such vendors, the following additional exclusions apply:  
The insurance afforded to the vendor does not apply to:
  - (1) "Bodily injury" or "property damage" for which the vendor is obligated to pay damages by reasons of the assumption of liability in a contract or agreement. This exclusion does not apply to liability for damages that the insured would have in the absence of the contract or agreement;
  - (2) Any express warranty unauthorized by you;

- (3) Any physical or chemical change in the product made intentionally by the vendor;
  - (4) Repackaging, unless unpacked solely for the purpose of inspection, demonstration, testing, or the substitution of parts under instruction from the manufacturer, and then repackaged in the original container;
  - (5) Any failure to make such inspection, adjustments, tests or servicing as the vendor has agreed to make or normally undertakes to make in the usual course of business in connection with the sale of the product;
  - (6) Demonstration, installation, servicing or repair operations, except such operations performed at the vendor's premises in connection with the sale of the product;
  - (7) Products which, after distribution or sale by you, have been labeled or relabeled or used as a container, part or ingredient of any other thing or substance by or for the vendor;
  - (8) "Bodily injury" or "property damage" arising out of the sole negligence of the vendor for its own acts or omissions or those of its employees or anyone else acting on its behalf. However, this exclusion does not apply to:
    - (a) The exceptions contained within the exclusion in subparagraphs (4) or (6) above; or
    - (b) Such inspections, adjustments, tests or servicing as the vendor has agreed to make or normally undertakes to make in the usual course of business, in connection with the distribution or sale of the products.
  - (9) "Bodily injury" or "property damage" arising out of an "occurrence" that took place before you have signed the contract or agreement with the vendor.
  - (10) To any person or organization included as an insured by another endorsement issued by us and made part of this Coverage Part.
  - (11) Any insured person or organization, from whom you have acquired such products, or any ingredient, part or container, entering into, accompanying or containing such products.
- d. With respect to the insurance afforded to these vendors, the following is added to **SECTION II - LIABILITY, D. Liability and Medical Expense Limits of Insurance:**

The most we will pay on behalf of the vendor for a covered claim is the lesser of the amount of insurance:

- 1. Required by the contract or agreement described in Paragraph a.; or
- 2. Available under the applicable Limits of Insurance shown in the Declarations;

This endorsement shall not increase the applicable Limits of Insurance shown in the Declarations.

### 3. Alienated Premises

**SECTION II - LIABILITY, B. Exclusions, 1. Applicable To Business Liability Coverage k. Damage to Property,** paragraph (2) is replaced by the following:

- (2) Premises you sell, give away or abandon, if the "property damage" arises out of any part of those premises and occurred from hazards that were known by you, or should have reasonably been known by you, at the time the property was transferred or abandoned.

### 4. Broad Form Property Damage - Borrowed Equipment, Customers Goods, Use of Elevators

- a. The following is added to **SECTION II - LIABILITY, B. Exclusions, 1. Applicable To Business Liability Coverage, k. Damage to Property:**

Paragraph (4) does not apply to "property damage" to borrowed equipment while at a jobsite and not being used to perform operations.

Paragraph (3), (4) and (6) do not apply to "property damage" to "customers goods" while on your premises nor to the use of elevators.

- b. For the purposes of this endorsement, the following definition is added to **SECTION II - LIABILITY, F. Liability and Medical Expenses Definitions:**

1. "Customers goods" means property of your customer on your premises for the purpose of being:

- a. Worked on; or
- b. Used in your manufacturing process.

- c. The insurance afforded under this provision is excess over any other valid and collectible property insurance (including deductible) available to the insured whether primary, excess, contingent or on any other basis.

### 5. Incidental Malpractice - Employed Nurses, EMT's and Paramedics

**SECTION II - LIABILITY, C. Who Is An Insured,** paragraph 2.a.(1)(d) does not apply to a nurse,

emergency medical technician or paramedic employed by you if you are not engaged in the business or occupation of providing medical, paramedical, surgical, dental, x-ray or nursing services.

**6. Personal Injury - Broad Form**

a. **SECTION II - LIABILITY, B. Exclusions, 2. Additional Exclusions Applicable only to "Personal and Advertising Injury"**, paragraph e. is deleted.

b. **SECTION II - LIABILITY, F. Liability and Medical Expenses Definitions, 14.** "Personal and advertising injury", paragraph b. is replaced by the following:

b. Malicious prosecution or abuse of process.

c. The following is added to **SECTION II - LIABILITY, F. Liability and Medical Expenses Definitions, Definition 14.** "Personal and advertising injury":

"Discrimination" (unless insurance thereof is prohibited by law) that results in injury to the feelings or reputation of a natural person, but only if such "discrimination" is:

(1) Not done intentionally by or at the direction of:

(a) The insured;

(b) Any officer of the corporation, director, stockholder, partner or member of the insured; and

(2) Not directly or indirectly related to an "employee", not to the employment, prospective employment or termination of any person or persons by an insured.

d. For purposes of this endorsement, the following definition is added to **SECTION II - LIABILITY, F. Liability and Medical Expenses Definitions:**

1. "Discrimination" means the unlawful treatment of individuals based upon race, color, ethnic origin, gender, religion, age, or sexual preference. "Discrimination" does not include the unlawful treatment of individuals based upon developmental, physical, cognitive, mental, sensory or emotional impairment or any combination of these.

e. This coverage does not apply if liability coverage for "personal and advertising injury" is excluded either by the provisions of the Coverage Form or any endorsement thereto.

**7. Product Recall Expense**

a. **SECTION II - LIABILITY, B. Exclusions, 1. Applicable To Business Liability Coverage,**

**o. Recall of Products, Work or Impaired Property** is replaced by the following:

**o. Recall of Products, Work or Impaired Property**

Damages claimed for any loss, cost or expense incurred by you or others for the loss of use, withdrawal, recall, inspection, repair, replacement, adjustment, removal or disposal of:

(1) "Your product";

(2) "Your work"; or

(3) "Impaired property";

If such product, work or property is withdrawn or recalled from the market or from use by any person or organization because of a known or suspected defect, deficiency, inadequacy or dangerous condition in it, but this exclusion does not apply to "product recall expenses" that you incur for the "covered recall" of "your product".

However, the exception to the exclusion does not apply to "product recall expenses" resulting from:

(4) Failure of any products to accomplish their intended purpose;

(5) Breach of warranties of fitness, quality, durability or performance;

(6) Loss of customer approval, or any cost incurred to regain customer approval;

(7) Redistribution or replacement of "your product" which has been recalled by like products or substitutes;

(8) Caprice or whim of the insured;

(9) A condition likely to cause loss of which any insured knew or had reason to know at the inception of this insurance;

(10) Asbestos, including loss, damage or clean up resulting from asbestos or asbestos containing materials; or

(11) Recall of "your products" that have no known or suspected defect solely because a known or suspected defect in another of "your products" has been found.

b. The following is added to **SECTION II - LIABILITY, C. Who Is An Insured, paragraph 3.b.:**

"Product recall expense" arising out of any withdrawal or recall that occurred before you acquired or formed the organization.

- c. The following is added to **SECTION II - LIABILITY, D. Liability and Medical Expenses Limits of Insurance:**

**Product Recall Expense Limits of Insurance**

- a. The Limits of Insurance shown in the SUMMARY OF COVERAGES of this endorsement and the rules stated below fix the most that we will pay under this Product Recall Expense Coverage regardless of the number of:
- (1) Insureds;
  - (2) "Covered Recalls" initiated; or
  - (3) Number of "your products" withdrawn.
- b. The Product Recall Expense Aggregate Limit is the most that we will reimburse you for the sum of all "product recall expenses" incurred for all "covered recalls" initiated during the policy period.
- c. The Product Recall Each Occurrence Limit is the most we will pay in connection with any one defect or deficiency.
- d. All "product recall expenses" in connection with substantially the same general harmful condition will be deemed to arise out of the same defect or deficiency and considered one "occurrence".
- e. Any amount reimbursed for "product recall expenses" in connection with any one "occurrence" will reduce the amount of the Product Recall Expense Aggregate Limit available for reimbursement of "product recall expenses" in connection with any other defect or deficiency.
- f. If the Product Recall Expense Aggregate Limit has been reduced by reimbursement of "product recall expenses" to an amount that is less than the Product Recall Expense Each Occurrence Limit, the remaining Aggregate Limit is the most that will be available for reimbursement of "product recall expenses" in connection with any other defect or deficiency.
- g. **Product Recall Deductible**

We will only pay for the amount of "product recall expenses" which are in excess of the \$500 Product Recall Deductible. The Product Recall Deductible applies separately to each "covered recall". The limits of insurance will not be reduced by the amount of this deductible.

We may, or will if required by law, pay all or any part of any deductible amount, if applicable. Upon notice of our payment

of a deductible amount, you shall promptly reimburse us for the part of the deductible amount we paid.

The Product Recall Expense Limits of Insurance apply separately to each consecutive annual period and to any remaining period of less than 12 months, starting with the beginning of the policy period shown in the Declarations, unless the policy period is extended after issuance for an additional period of less than 12 months. In that case, the additional period will be deemed part of the last preceding period for the purposes of determining the Limits of Insurance.

- d. The following is added to **SECTION II - LIABILITY, E. Liability and Medical Expense General Conditions, 2. Duties in the Event of Occurrence, Offense, Claim or Suit:**

You must see to it that the following are done in the event of an actual or anticipated "covered recall" that may result in "product recall expense":

- (1) Give us prompt notice of any discovery or notification that "your product" must be withdrawn or recalled. Include a description of "your product" and the reason for the withdrawal or recall;
  - (2) Cease any further release, shipment, consignment or any other method of distribution of like or similar products until it has been determined that all such products are free from defects that could be a cause of loss under this insurance.
- e. For the purpose of this endorsement, the following definitions are added to **SECTION II - LIABILITY, F. Liability and Medical Expenses Definitions:**
1. "Covered recall" means a recall made necessary because you or a government body has determined that a known or suspected defect, deficiency, inadequacy, or dangerous condition in "your product" has resulted or will result in "bodily injury" or "property damage".
  2. "Product recall expense(s)" means:
    - a. Necessary and reasonable expenses for:
      - (1) Communications, including radio or television announcements or printed advertisements including stationary, envelopes and postage;

- (2) Shipping the recalled products from any purchaser, distributor or user to the place or places designated by you;
  - (3) Remuneration paid to your regular "employees" for necessary overtime;
  - (4) Hiring additional persons, other than your regular "employees";
  - (5) Expenses incurred by "employees" including transportation and accommodations;
  - (6) Expenses to rent additional warehouse or storage space;
  - (7) Disposal of "your product", but only to the extent that specific methods of destruction other than those employed for trash discarding or disposal are required to avoid "bodily injury" or "property damage" as a result of such disposal,  
you incur exclusively for the purpose of recalling "your product"; and
- b. Your lost profit resulting from such "covered recall".
- f. This Product Recall Expense Coverage does not apply:
- (1) If the "products - completed operations hazard" is excluded from coverage under this Coverage Part including any endorsement thereto; or
  - (2) To "product recall expense" arising out of any of "your products" that are otherwise excluded from coverage under this Coverage Part including endorsements thereto.
- 8. Unintentional Failure to Disclose Hazards**  
The following is added to **SECTION II - LIABILITY, E. Liability and Medical Expenses General Conditions:**  
**Representations**  
We will not disclaim coverage under this Coverage Part if you fail to disclose all hazards existing as of the inception date of the policy provided such failure is not intentional.
- 9. Unintentional Failure to Notify**  
The following is added to **SECTION II - LIABILITY, E. Liability and Medical Expenses General Conditions, 2. Duties in the Event of Occurrence, Offense, Claim or Suit:**  
Your rights afforded under this Coverage Part shall not be prejudiced if you fail to give us notice of an "occurrence", offense, claim or "suit", solely due to your reasonable and documented belief that the "bodily injury", "property damage" or "personal and advertising injury" is not covered under this Policy.

ALL OTHER TERMS, CONDITIONS, AND EXCLUSIONS REMAIN UNCHANGED.

**F.3 Acceptance of work with Bond Blacktop, Inc. for the 2019 Street Slurry Seal Program, Project 1228 – from Assistant Engineer Carmen. (RESOLUTION)**

**Background/Discussion** – On August 5, 2019, the City Manager, acting on behalf of the City Council during the August recess, awarded a contract to Bond Blacktop, Inc. for the 2019 Street Slurry Seal Program, Project 1228. The project included the application of a sand, aggregate and asphalt emulsion mixture, and pavement restriping on various streets throughout the City, including Biddle Avenue, Braidburn Avenue, Conestoga Place, Dalewood Drive, Flanders Place, Lafayette Avenue (Newark Boulevard to Cherry Street), Locust Street (Thornton Avenue to Sunset Avenue and the segment south of the Union Pacific Railroad near Wells Avenue), Mayhews Landing Road (Newark Boulevard to Cherry Street and the Union Pacific Railroad to Spruce Street), Ravenwood Avenue, Robertson Avenue (Cedar Boulevard to Birch Street), and Vinewood Street.

This project was completed within the original budget using Vehicle Registration Fee funds. Staff has reviewed and inspected the entire scope of work which has now been satisfactorily completed in accordance with the approved project plans and specifications and all applicable standards. Pursuant to the State of California Public Contract Code, formal acceptance of the work by the City Council is now recommended.

**Attachment** – Resolution

**Action** – Staff recommends that the City Council, by resolution, accept the work with Bond Blacktop, Inc. for the 2019 Street Slurry Seal Program, Project 1228.

RESOLUTION NO.

RESOLUTION OF THE CITY COUNCIL OF THE CITY OF  
NEWARK ACCEPTING THE WORK WITH BOND  
BLACKTOP, INC. FOR THE 2019 SLURRY SEAL PROGRAM,  
PROJECT 1228

WHEREAS, the City of Newark entered into a contract with Bond Blacktop, Inc., pursuant to Resolution No. 10,935, adopted June 13, 2019, authorizing the City Manager or his designee to act upon certain administrative matters on behalf of the City during the City Council summer recess of August 2019, for the 2019 Slurry Seal Program, Project 1228, in the City of Newark, in accordance with plans and specifications for the contract; and

WHEREAS, said work has been completed in conformance with the plans and specifications of the contract hereinabove referred to and the conditions thereof.

NOW, THEREFORE, BE IT RESOLVED that said work is hereby accepted and the City Council does hereby authorize the release of bonds guaranteeing completion of the work, the filing of a Notice of Completion, and payment to the contractor pursuant to the contract.

**F.4 Acceptance of work with Pavement Coatings Company for the 2018 Street Slurry Seal Program, Project 1180 – from Senior Civil Engineer Tran. (RESOLUTION)**

**Background/Discussion** – On August 14, 2018, the City Manager, acting on behalf of the City Council during the August recess, awarded a contract to Pavement Coatings Company for the 2018 Street Slurry Seal Program, Project 1180. This project provided an application of a sand, aggregate and asphalt emulsion mixture, and pavement restriping on various City streets, including Chapman Drive, Gateway Boulevard, Hebrides Court, Lundy Drive, Magnolia Street (Dairy Avenue to Thornton Avenue), Mayhews Landing Road (Cherry Street to the Union Pacific Railroad crossing), Mulberry Street, Oak Street, Olive Street, and Orkney Court. The project punch list items included restoration of the staging area which had to be deferred for an extended period of time to ensure that the contractor’s method of restoration was acceptable to staff.

This project was completed within the original budget using a combination of Alameda County Measure B/BB Sales Tax funds, Vehicle Registration Fee funds, SB1 Road Maintenance and Rehabilitation Account funds, and Highway Users Tax funds. Staff has reviewed and inspected the entire scope of work which has now been satisfactorily completed in accordance with the approved project plans and specifications and all applicable standards. Pursuant to the State of California Public Contract Code, formal acceptance of the work by the City Council is now recommended.

**Attachment** – Resolution

**Action** – Staff recommends that the City Council, by resolution, accept the work with Pavement Coatings Company for the 2018 Street Slurry Seal Program, Project 1180.

RESOLUTION NO.

RESOLUTION OF THE CITY COUNCIL OF THE CITY OF  
NEWARK ACCEPTING THE WORK WITH PAVEMENT  
COATINGS COMPANY FOR 2018 SLURRY SEAL  
PROGRAM, PROJECT 1180

WHEREAS, the City of Newark entered into a contract with Pavement Coatings Company, pursuant to Resolution No. 10,777, adopted April 26, 2018, authorizing the City Manager or his designee to act upon certain administrative matters on behalf of the City during the City Council summer recess of August 2018, for the 2018 Slurry Seal Program, Project 1180, in the City of Newark, in accordance with plans and specifications for the contract; and

WHEREAS, said work has been completed in conformance with the plans and specifications of the contract hereinabove referred to and the conditions thereof.

NOW, THEREFORE, BE IT RESOLVED that said work is hereby accepted and the City Council does hereby authorize the release of bonds guaranteeing completion of the work, the filing of a Notice of Completion, and payment to the contractor pursuant to the contract.

**F.5 Approval of partial release of security bonds for Tract 8208 (Continental Residential, Inc.) – from Public Works Director Fajeau. (RESOLUTION)**

**Background/Discussion** – Continental Residential, Inc. entered into a Subdivision Agreement with the City of Newark to construct improvements associated with Tract 8208, the Prima residential project. Continental Residential, Inc. provided a Performance Bond in the amount of \$8,875,000 and a Materials Bond in the amount of \$4,438,000 to guarantee completion of the tract improvements. This includes in-tract improvements on the private streets and all improvements within the adjoining public rights-of-way.

The collective improvements are more than 80% complete and, in accordance with authority contained in §66499.7 of the Government Code, these bonds may be reduced upon receipt of bond riders sufficient to guarantee the completion of the remaining improvements. The amounts of the bond riders will be equal to twenty percent (20%) of the original bond amounts.

The replacement bonds will be adequate to guarantee the construction of the remaining improvements of Tract 8208, which are limited to landscaping improvements on Cedar Boulevard north of the San Francisco Public Utilities Commission (SFPUC) right-of-way, pavement resurfacing on Cedar Court and Cedar Boulevard, and other minor punchlist items. The final phase of work on Cedar Court and Cedar Boulevard requires formal approval from the SFPUC. This approval is pending and is expected to be confirmed in June 2020. All in-tract improvements in common areas and all other traffic signal, underground utility, and landscaping working within the public right-of-way has been satisfactorily completed in accordance with the approved plans and all applicable standards.

Ownership of all tract improvements will remain with Continental Residential, Inc. until formal acceptance of the improvements by the City.

**Attachment** – Resolution, Subdivision Improvement Agreement

**Action** – Staff recommends that the City Council, by resolution, approve the partial release of security bonds for Tract 8208 (Continental Residential, Inc.).

RESOLUTION NO.

RESOLUTION OF THE CITY COUNCIL OF THE CITY  
OF NEWARK APPROVING THE PARTIAL RELEASE  
OF SECURITY BONDS FOR TRACT 8208  
(CONTINENTAL RESIDENTIAL, INC.)

WHEREAS, Continental Residential, Inc., the developer of Tract 8208, previously entered into a Subdivision Agreement with the City of Newark (Resolution No. 10,426) to improve said Tract in accordance with plans on file with the City Engineer; and

WHEREAS, the improvements for Tract 8208 are more than 80% complete in accordance with said plans, and any approved modifications thereto, to the satisfaction of the City Engineer; and

WHEREAS, the Performance Bonds and the Materials Bonds for Tract 8208 can be partially released, in accordance with the authority contained in §66499.7 of the Government Code of the State of California;

NOW THEREFORE, BE IT RESOLVED BY THE City Council of the City of Newark that the City Council does hereby approve the release and replacement of the original Performance Bond in the amount of \$8,875,000 to guarantee tract improvements for Tract 8208, upon bond rider issued in the amount of \$1,775,000.

BE IT FURTHER RESOLVED that the City Council does hereby approve the release and replacement of the original Materials Bond in the amount of \$4,438,000 to guarantee labor and materials for Tract 8208, upon receipt of a bond rider issued in the amount of \$888,000.

**CITY OF NEWARK  
SUBDIVISION IMPROVEMENT AGREEMENT  
TRACT 8208**

This Subdivision Improvement Agreement (hereinafter "Agreement") is made and entered into by and between the CITY OF NEWARK, a municipal corporation (hereinafter "City"), and CONTINENTAL RESIDENTIAL, INC., a California corporation (hereinafter "Developer"). City and Developer may be collectively referred to herein as the "parties."

**RECITALS**

- A.** In accordance with the Subdivision Map Act (California Government Code Sections 66410, *et seq.*), and the Subdivision Ordinance (Newark Municipal Code, Title 16, Chapters 16.04, 16.08, 16.12, 16.16, 16.20, and 16.32), and the Street Ordinance (Newark Municipal Code, Title 12, Chapters 12.04 and 12.08), the Developer has submitted to the City a Final Map (hereinafter "Final Map") for the Project known as Tract 8208 on Cedar Boulevard near Cedar Court, Newark (hereinafter "Project").
- B.** The Project is geographically located within the boundaries of the Vesting Tentative Tract Map known as "Vesting Tentative Map 8208". The Vesting Tentative Map is on file with the City Engineer, and is incorporated herein by reference.
- C.** The City's approval of the Vesting Tentative Map was subject to specified conditions of approval (hereinafter "Conditions"). The Conditions are on file with the City Engineer, and are incorporated herein by reference.
- D.** Improvement Plans and Specifications have been prepared on behalf of the Developer, and approved by the City Engineer, which describe the improvements which are required to be constructed by the Developer. The term "Plans and Specifications" shall include the entire improvement plans titled Tract 8208 Newark Prima Improvement Plans," approved by the City Engineer of the City of Newark. The Plans and Specifications are on file with the City Engineer, and are incorporated herein by reference.

**NOW, THEREFORE, IN CONSIDERATION OF THE MUTUAL COVENANTS AND CONDITIONS IDENTIFIED HEREIN, THE PARTIES HEREBY AGREE AS FOLLOWS:**

- 1. SCOPE OF WORK.** The Developer shall perform, or cause to be performed, the Work described in the Plans and Specifications and the Conditions (hereinafter "Work"), to the satisfaction of the City Engineer. The Work shall be performed, and all materials and labor shall be provided, at the Developer's sole cost and expense. No change shall be

**CITY OF NEWARK – SUBDIVISION IMPROVEMENT AGREEMENT  
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made to the Scope of Work unless authorized in writing by the City Engineer.

2. **PERMITS, LICENSES, AND COMPLIANCE WITH LAW.** The Developer shall, at the Developer's expense, obtain and maintain all necessary permits and licenses for the performance of the Work. The Developer shall comply with all local, state, and federal laws, whether or not said laws are expressly stated in this Agreement.
3. **DEVELOPER'S AUTHORIZED REPRESENTATIVE.** At all times during the progress of the Work, Developer shall have a competent foreperson or superintendent (hereinafter "Authorized Representative") on site with authority to act on behalf of the Developer. The Developer shall, at all times, keep the City Engineer informed in writing of the name and telephone number of the Authorized Representative. The Developer shall, at all times, keep the City Engineer informed in writing of the names and telephone numbers of all contractors and subcontractors performing the Work.
4. **IMPROVEMENT SECURITY.** The Developer shall furnish faithful performance and labor and material security concurrently with the execution of this Agreement by the Developer, and prior to the commencement of any Work. The Developer shall furnish warranty security prior to the City's acceptance of the Work. The form of the security shall be as authorized by the Subdivision Map Act (including Government Code Sections 66499, *et seq.*) and the Newark Municipal Code, and as set forth below:
  5. **4(a). Faithful Performance.** Security in the amount of \$8,875,000 to secure faithful performance of this Agreement (until the date on which the City Council accepts the Work as complete) pursuant to Government Code Sections 66499.1, 66499.4, and 66499.9.
  - 4(b). Labor and Material.** Security in the amount of \$4,438,000 to secure payment by the Developer to laborers and materialmen pursuant to Government Code Sections 66499.2, 66499.3, and 66499.4.
  - 4(c). Warranty.** Security in the amount of \$890,000 to secure faithful performance of this Agreement (from the date on which the City accepts the Work as complete until one year thereafter) pursuant to Government Code Sections 66499.1, 66499.4, and 66499.9.
5. **BUSINESS LICENSE.** The Developer shall apply for and pay the business license fees, in accordance with Newark Municipal Code Title 5, Chapter 5.04.

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**6. INSURANCE.** Developer shall, throughout the duration of this Agreement, maintain insurance to cover Developer (including its agents, representatives, contractors, subcontractors, and employees) in connection with the performance of services under this Agreement. This Agreement identifies the minimum insurance levels with which Developer shall comply; however, the minimum insurance levels shall not relieve Developer of any other performance responsibilities under this Agreement (including the indemnity requirements), and Developer may carry, at its own expense, any additional insurance it deems necessary or prudent. Concurrently with the execution of this Agreement by the Developer, and prior to the commencement of any services, the Developer shall furnish written proof of insurance (certificates and endorsements), in a form acceptable to the City. Developer shall provide substitute written proof of insurance no later than 30 days prior to the expiration date of any insurance policy required by this Agreement.

**6(a). Minimum Insurance Levels.** Developer shall maintain insurance at the following minimum levels:

**6(a)(1). Commercial General Liability** (with coverage at least as broad as ISO form CG 00 01 01 96) coverage in an amount not less than \$5,000,000 general aggregate and \$2,000,000 per occurrence for general liability, bodily injury, personal injury, and property damage.

**6(a)(2). Automobile Liability** (with coverage at least as broad as ISO form CA 00 01 07 97, for “any auto”) coverage in an amount not less than \$1,000,000 per accident for bodily injury and property damage.

**6(a)(3). Workers’ Compensation** coverage as required by the State of California.

**6(b). Minimum Limits of Insurance.** It shall be a requirement under this Agreement that any available insurance proceeds broader than or in excess of the specified minimum Insurance coverage requirements and/or limits shall be available to the Additional Insured. Furthermore, the requirements for coverage and limits shall be (1) the minimum coverage and limits specified in this Agreement; or (2) the broader coverage and maximum limits of coverage of any Insurance policy or proceeds available to the named Insured; whichever is greater.

**6(c). Endorsements.** The insurance policies shall be endorsed as follows:

**6(c)(1).** For the commercial general liability insurance, the City (including its elected officials, employees, volunteers, and agents) shall be named as additional insured, and the policy shall be

**CITY OF NEWARK – SUBDIVISION IMPROVEMENT AGREEMENT  
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endorsed with a form at least as broad as ISO form CG 20 10 11 85.

**6(c)(2).** Developer's insurance is primary to any other insurance available to the City with respect to any claim arising out of this Agreement. Any insurance maintained by the City shall be excess of the Developer's insurance and shall not contribute with it.

**6(c)(3).** Developer's insurance will not be canceled, limited, or allowed to expire without renewal until after 30 days written notice has been given to the City. During the term of this Agreement, Consultant will not materially alter any of the policies or reduce any of the levels of coverage afforded by its insurance policies.

**6(c)(4).** Maintenance of proper insurance coverage in conformity with this Section 6 is a material element of this Agreement and failure to maintain or renew coverage or to provide evidence of coverage or renewal may be treated by City as a material breach of this Agreement.

**6(d). Qualifications of Insurers.** All insurance companies providing coverage to Developer shall be insurance organizations authorized by the Insurance Commissioner of the State of California to transact the business of insurance in the State of California, and shall have an A.M Best's rating of not less than "A:VII."

**7. REPORTING DAMAGES.** If any damage (including death, personal injury or property damage) occurs in connection with the performance of this Agreement, Developer shall immediately notify the City Engineer's office by telephone at 510-578-4290, and Developer shall promptly submit to the City Engineer and the Risk Manager, a written report (in a form acceptable to the City) with the following information: (a) a detailed description of the damage (including the name and address of the injured or deceased person(s), and a description of the damaged property), (b) name and address of witnesses, and (c) name and address of any potential insurance companies.

**8. INDEMNIFICATION.** To the fullest extent permitted by law, Developer shall indemnify, hold harmless, and defend the City (including its elected officials, officers, volunteers, agents and employees) from and against any and all claims (including all litigation, demands, damages, liabilities, costs, and expenses, and including court costs and attorney's fees) resulting or arising from performance, or failure to perform, under this Agreement (with the exception of the sole negligence or willful misconduct of the City).

**9. TIME OF PERFORMANCE.** Time is of the essence in the performance of the Work, and the timing requirements set forth herein shall be strictly

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adhered to unless otherwise modified in writing in accordance with this Agreement. The Developer shall submit all requests for extensions of time to the City, in writing, no later than ten (10) days after the start of the condition which purportedly caused the delay, and not later than the date on which performance is due.

**9(a). Commencement of Work.** No later than fifteen (15) days prior to the commencement of Work, the Developer shall provide written notice to the City Engineer of the date on which the Developer shall commence Work. The Developer shall not commence Work until after the notice required by this section is properly provided, and the Developer shall not commence Work prior to the date specified in the written notice.

**9(b). Schedule of Work.** Concurrently with the written notice of commencement of Work, the Developer shall provide the City with a written schedule of Work, which shall be updated in writing as necessary to accurately reflect the Developer's prosecution of the Work.

**9(c). Completion of Work.** The Developer shall complete all Work by no later than three hundred sixty-five (365) days after the City's execution of this Agreement, unless otherwise agreed to in writing by the City Engineer.

**10. INSPECTION BY THE CITY.** In order to permit the City to inspect the Work, the Developer shall, at all times, provide to the City proper and safe access to the Project site, and all portions of the Work, and to all shops wherein portions of the Work are in preparation. The Developer shall provide third party compaction testing in accordance with City standards for all applicable public and private improvements. Testing results are subject to review and approval by City.

**11. DEFAULT.** If either party ("demanding party") has a good faith belief that the other party ("defaulting party") is not complying with the terms of this Agreement, the demanding party shall give written notice of the default (with reasonable specificity) to the defaulting party, and demand the default to be cured within ten days of the notice. If: (a) the defaulting party fails to cure the default within ten days of the notice, or, (b) if more than ten days are reasonably required to cure the default and the defaulting party fails to give adequate written assurance of due performance within ten days of the notice, then (c) the demanding party may terminate this Agreement upon written notice to the defaulting party.

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**11(a).** The Developer shall be in default of this Agreement if the City Engineer determines that any one of the following conditions exist:

**11(a)(1).** The Developer is insolvent, bankrupt, or makes a general assignment for the benefit of its creditors.

**11(a)(2).** The Developer abandons the Project site.

**11(a)(3).** The Developer fails to perform one or more requirements of this Agreement.

**11(a)(4).** The Developer fails to replace or repair any damage caused by Developer or its agents, representatives, contractors, subcontractors, or employees in connection with performance of the Work.

**11(a)(5).** The Developer violates any legal requirement related to the Work.

**11(b).** In the event that the Developer fails to cure the default, the City may, in its sole discretion and through the City Engineer, take any or all of the following actions:

**11(b)(1).** Cure the default and charge the Developer for the costs therefor, including administrative costs and interest in an amount equal to seven percent (7 %) per annum from the date of default.

**11(b)(2).** Demand the Developer to complete performance of the Work.

**11(b)(3).** Demand the Developer's surety (if any) to complete performance of the Work.

**12. ACCEPTANCE OF WORK.** Prior to acceptance of the Work by the City Engineer, the Developer shall be solely responsible for maintaining the quality of the Work, and maintaining safety at the Project site. The Developer's obligation to perform the Work shall not be satisfied until after the City Engineer has made a written determination that all obligations of the Agreement have been satisfied and all outstanding fees and charges have been paid, and the City Engineer has accepted the Work as complete.

**13. WARRANTY PERIOD.** The Developer shall warrant the quality of the Work, in accordance with the terms of the Plans and Specifications, for a period of one year after acceptance of the Work by the City. In the event that (during the one year warranty period) any portion of the Work is determined by the City Engineer to be defective as a result of an obligation of the Developer under this Agreement, the Developer shall be in default.

**14. RELATIONSHIP BETWEEN THE PARTIES.** Developer is, and at all times shall remain, an independent contractor solely responsible for all acts of its employees, agents, contractors, or subcontractors, including

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any negligent acts or omissions. Developer is not City's agent, and shall have no authority to act on behalf of the City, or to bind the City to any obligation whatsoever, unless the City provides prior written authorization to Developer.

- 15. **CONFLICTS OF INTEREST PROHIBITED.** Developer (including its employees, agents, contractors, and subcontractors) shall not maintain or acquire any direct or indirect interest that conflicts with the performance of this Agreement. If Developer maintains or acquires a conflicting interest, any contract with the City (including this Agreement) involving Developer's conflicting interest may be terminated by the City.
  
- 16. **NONDISCRIMINATION.** Developer shall comply with all applicable federal, state, and local laws regarding nondiscriminatory employment practices, whether or not said laws are expressly stated in this Agreement. Developer shall not discriminate against any employee or applicant because of race, color, religious creed, national origin, physical disability, mental disability, medical condition, marital status, sexual orientation, or sex.
  
- 17. **NOTICES.** All notices required or contemplated by this Agreement shall be in writing and shall be delivered to the respective party as set forth in this section. Communications shall be deemed to be effective upon the first to occur of: (a) actual receipt by a party's Authorized Representative, or (b) actual receipt at the address designated below, or (c) three working days following deposit in the United States Mail of registered or certified mail sent to the address designated below. The Authorized Representative of either party may modify their respective contact information identified in this section by providing notice to the other party.

**City's Authorized Representative      Developer's Authorized Representative**

City of Newark  
Attn: City Engineer  
37101 Newark Boulevard  
Newark, CA 94560

Continental Residential, Inc.  
Attn: Julie A. Nebozuk  
5050 Hopyard Road, Suite 180  
Pleasanton, CA 94588

- 18. **HEADINGS.** The heading titles for each paragraph of this Agreement are included only as a guide to the contents and are not to be considered as controlling, enlarging, or restricting the interpretation of the Agreement.
  
- 19. **SEVERABILITY.** If any term of this Agreement (including any phrase, provision, covenant, or condition) is held by a court of competent

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jurisdiction to be invalid or unenforceable, the Agreement shall be construed as not containing that term, and the remainder of this Agreement shall remain in full force and effect; provided, however, this paragraph shall not be applied to the extent that it would result in a frustration of the parties' intent under this Agreement.

- 20. GOVERNING LAW, JURISDICTION, AND VENUE.** The interpretation, validity, and enforcement of this Agreement shall be governed by and interpreted in accordance with the laws of the State of California. Any suit, claim, or legal proceeding of any kind related to this Agreement shall be filed and heard in a court of competent jurisdiction in the County of Alameda.
- 21. ATTORNEY'S FEES.** In the event any legal action is commenced to enforce this Agreement, the prevailing party is entitled to reasonable attorney's fees, costs, and expenses incurred.
- 22. ASSIGNMENT AND DELEGATION.** This Agreement, and any portion thereof, shall not be assigned or transferred, nor shall any of the Developer's duties be delegated, without the written consent of the City. Any attempt to assign or delegate this Agreement without the written consent of the City shall be void and of no force or effect. A consent by the City to one assignment shall not be deemed to be a consent to any subsequent assignment.
- 23. MODIFICATIONS.** This Agreement may not be modified orally or in any manner other than by an agreement in writing signed by both parties.
- 24. WAIVERS.** Waiver of a breach or default under this Agreement shall not constitute a continuing waiver or a waiver of a subsequent breach of the same or any other provision of this Agreement.
- 25. CONFLICTS.** If any conflicts arise between the terms and conditions of this Agreement and the terms and conditions of the attached exhibits or any documents expressly incorporated, the terms and conditions of this Agreement shall control.
- 26. ENTIRE AGREEMENT.** This Agreement, including all documents incorporated herein by reference, comprises the entire integrated understanding between the parties concerning the Work described herein. This Agreement supersedes all prior negotiations, agreements, and understandings regarding this matter, whether written or oral. The documents incorporated by reference into this Agreement are complementary; what is called for in one is binding as if called for in all.

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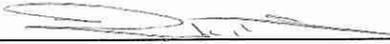
**27. SIGNATURES.** The individuals executing this Agreement represent and warrant that they have the right, power, legal capacity, and authority to enter into and to execute this Agreement on behalf of the respective legal entities of the Developer and the City. This Agreement shall inure to the benefit of and be binding upon the parties hereto and their respective successors and assigns.

**28. SITE OWNERSHIP CONTINGENCY.** Prior to the commencement of any portion of the Work on an individual lot or parcel within the exterior boundary of the Final Map, Developer shall obtain ownership of said lot or parcel and provide City with each associated Grant Deed, or Developer shall provide written evidence of approval of the Work from the record property owner.

**IN WITNESS WHEREOF,** the City and Developer do hereby agree to the full performance of the terms set forth herein.

**CONTINENTAL RESIDENTIAL, INC.**  
a California corporation

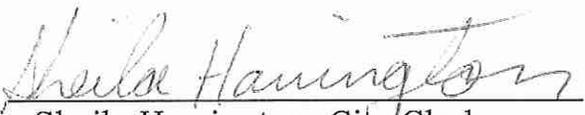
**CITY OF NEWARK,**  
a municipal corporation

By:  \_\_\_\_\_

By:  \_\_\_\_\_  
Alan L. Nagy, Mayor

Name: Frank Mills

Title: Vice President

ATTEST:  
  
Sheila Harrington, City Clerk

APPROVED AS TO FORM:  
  
David J. Benoun, City Attorney

**CALIFORNIA ALL-PURPOSE CERTIFICATE OF  
ACKNOWLEDGEMENT**

A notary public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not the truthfulness, accuracy, or validity of that document.

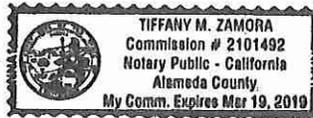
State of CA

County of Alameda

On 10/07/15, before me, Tiffany M. Zamora \_\_\_\_\_ (notary public) personally appeared **Dean K. Mills** \_\_\_\_\_, who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the law of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.



Signature *Dean K. Mills* (seal)

**F.6 Presentation by Godbe Research on the results of public opinion research assessing community interest for an extension of the existing City of Newark Utility Users Tax and direction regarding same – from City Manager Benoun.**

**(MOTION)**

**Summary** – The City of Newark has a Utility Users Tax (“UUT”) that is set to expire at the end of December, 2020. The tax rate is 3.25% and currently generates between \$2.7 million to \$3 million per year. Earlier this year, the Council directed the City Manager to retain a consulting firm to conduct a public opinion poll to gauge community interest in a ballot measure that would extend the UUT without raising rates in order to maintain funding for local critical services. The firm, Godbe Research, will provide the results of the public opinion poll to the Council. After the presentation, staff will solicit direction from the Council on whether the City should proceed with taking necessary steps to place a UUT extension measure on the ballot in the November General Election for voter consideration.

**Background/Discussion** – On February 13, 2020 – approximately one month before the Local Emergency due to the COVID-19 pandemic was declared – the Council held a City Council Work Session to discuss the 2020-2022 Biennial Budget, including a review of budget projections for subsequent fiscal years. At that time, budget projections for a baseline forecast (which assumed a steady and slow growth) showed a \$1.5 million operating *deficit* prior to making contributions to various reserves for the second year of the upcoming budget cycle if the City stopped receiving revenue from the City of Newark Utility Users Tax (“UUT”).

After receiving this information, the City Council directed staff to commission independent public opinion research to evaluate community interest for extending the UUT to address the projected operating budget deficits. Shortly thereafter, the City signed an agreement with Godbe Research, a recognized leader in revenue measure feasibility public opinion research and previous consultant of the City, to conduct research to gauge the community’s interest and priorities for local funding.

Godbe Research conducted the public opinion and collected data via landline, cell phone, and with text messages and emails containing links to online interviews. Godbe Research will present the results of the survey to the City Council during the meeting.

At the end of the presentation, staff will be asking the City Council for direction on whether to return at a future City Council meeting with the necessary actions to place a measure on the November 3, 2020, ballot to extend the City of Newark Utility Users Tax beyond this year.

The UUT funding supports a number of critical programs and services in the City including public safety staffing, parks and street maintenance, programs for at-risk youth and seniors, community preservation, and school crossing guards. This was true prior to the COVID-19 pandemic and certainly remains true now.

Prior to the pandemic, the UUT generated \$3.29 million in revenue in fiscal year 2018-2019, which reflected approximately four and nine-tenths percent (4.9%) of the City’s total operating revenue.

After the COVID-19 pandemic, the need for renewing the UUT appears to be even more critical. On April 23, 2020 – over a month after the declaration of the Local Emergency – City staff provided to the Council an overview of budget projections for Fiscal Year 2019-2020. That report showed significant declines in general fund revenues as a result of the COVID-19 pandemic, including reductions in sales tax and Transient Occupancy Tax (“TOT”) revenue and a reduction in charges for services, licenses, and permits. Together, these revenues total an estimated \$6.3 million in revenues less than what were projected at the work session held on February 13, 2020.

At a special budget work session scheduled to occur on May 28, 2020 (and immediately before the regular Council meeting in which the Council receives this report), staff will present to the Council updated forecasts to plan for the 2020-2022 Biennial Budget. These forecasts show multi-million deficits, regardless of whether the UUT is renewed.

Based on information presented to the Council in the recent budget work sessions, it appears there is a continued need for UUT revenue in order to avoid a long-term deficit without additional and significant cuts in services to the community.

**Attachment** – none (presentation will be provided at the City Council meeting)

**Action** - Staff recommends that the City Council, by motion, accept the results of the public opinion polling and provide direction to staff regarding an extension of the existing City of Newark Utility User Tax to address the projected operating budget deficit.

**F.7 Adoption of a Resolution authorizing a one-time exception to the systematic decrease in the maximum allowable number of safe and sane fireworks booths permits as a result of the COVID-19 pandemic – from City Manager Benoun and Interim City Attorney Kokotaylo. (RESOLUTION)**

**Background/Discussion** – The City of Newark is one of three cities in Alameda County that allows the sale and use of safe and sane fireworks to celebrate the Fourth of July holiday. The Newark Municipal Code contains regulations that govern the sale and use of fireworks including the dates that fireworks booths can sell and when individuals can use fireworks.

In the early 2000's, in response to increasing illegal fireworks activity that was taking place within Newark at the time, the City Council directed the formation of a Fireworks Task Force. The Task Force developed an Action Plan that included several measures aimed at reducing the use of illegal fireworks, including closing parks on July 4<sup>th</sup> after 7:30 p.m., activating a Firework's hotline, increased police staffing levels, and adopting a Zero Tolerance policy. Despite these efforts, illegal fireworks use persisted in the 2000's, which prompted the Council to adopt a resolution in 2007 establishing a process whereby the total number of fireworks booth permits would decrease through attrition. Specifically, the rules in the resolution provide that the total number of fireworks booths permits decrease whenever an organization chooses to not renew a previously issued permit, is deemed ineligible for a fireworks booth permit, or no longer meets the requirements for issuance of a fireworks booth permit. This action was taken in order to reduce the use of illegal fireworks and eliminate the possibility of additional nonprofit organizations from becoming reliant upon fireworks sales as a revenue source. At the time there were 13 booths selling fireworks in the City. Now there are 10 fireworks booth permits authorized within the City.

As a result of the COVID-19 pandemic, the following governmental agencies and officials have declared an emergency: the United States Department of Public Health and Human Services Secretary, the Governor of the State of California, the Alameda County Health Officer, the President of the United States, and the Newark Director of Emergency Services.

Both the Alameda County Health Officer and the Governor of California have issued orders directing the public to shelter at their place of residence except under certain limited circumstances. It is still unclear as to whether the sale of safe and sane fireworks will be permitted under these two orders. Additionally, organizations with a fireworks booth permit may not feel comfortable selling safe and sane fireworks depending on how the circumstances surrounding the COVID-19 pandemic evolve.

In light of the uncertainty surrounding the COVID-19 pandemic and the shelter in place orders, some organizations may wish to not sell safe and sane fireworks in 2020.

Establishing a one-time exception to the requirement that the total number of fireworks booth permits decrease where an organization chooses to not renew a permit in 2020 will allow to avoid the uncertainty surrounding the COVID-19 pandemic and shelter in place orders without

the risk of losing a permit. This will give permitted organizations the option of cancelling sales for this year in the event that the shelter in place orders prohibit this activity come the end of June or in the event that members of the organization are not comfortable with sales this year due to the health risks associated with the COVID-19 pandemic.

**Attachments** – Proposed Resolution  
Resolutions 7106 and 9269

**Action** – Staff recommends that the City Council, by resolution, authorize a one-time exception to the systematic decrease in the maximum allowable number of safe and sane fireworks booth permits as a result of the COVID-19 pandemic.

RESOLUTION NO.

RESOLUTION OF THE CITY COUNCIL OF THE CITY OF  
NEWARK AUTHORIZING A ONE-TIME EXCEPTION TO  
THE SYSTEMATIC DECREASE IN THE MAXIMUM  
ALLOWABLE NUMBER OF SAFE AND SANE  
FIREWORKS BOOTHS AS A RESULT OF THE COVID-19  
PANDEMIC

WHEREAS, Newark Municipal Code Section 15.17.050 establishes requirements related to safe and sane fireworks within the City of Newark; and

WHEREAS, the City Council of the City of Newark previously adopted Resolution No. 9269, which amended Resolution No. 7016 to limit the number of fireworks booths and establish a process by which the City would reduce the number of fireworks booths through attrition (the “Resolutions”); and

WHEREAS, under the Resolutions, the number of fireworks booths is decreased where a permitted organization chooses to not renew a previously issued permit; and

WHEREAS, as a result of the COVID-19 pandemic, the following governmental agencies and officials have declared an emergency: the United States Department of Public Health and Human Services Secretary, the Governor of the State of California, the Alameda County Health Officer and the President of the United States, and the Newark Director of Emergency Services; and

WHEREAS, the Alameda County Health Officer and Governor of California have issued orders directing individuals in the City to shelter at their place of residence; and

WHEREAS, it is unclear whether these orders may prohibit the sale and/or use of safe and sane fireworks during the Fourth of July holiday in 2020; and

WHEREAS, as a result of the COVID-19 pandemic, fireworks booth permittees may not wish to operate in 2020; and

WHEREAS, the City Council desires to allow existing fireworks booth permittees to continue to operate after 2020 should the permittees choose not to operate in 2020 as a result of the COVID-19 pandemic, either as a result of being prohibited to operate under either of the two above referenced orders or as a result of permittees having concerns over contracting COVID-19 while selling fireworks.

NOW, THEREFORE, BE IT RESOLVED by the Council of the City of Newark as follows:

1. The provision that the number of fireworks booths allowed in the City shall be “12 or a lower number” in the event that an organization chooses not to renew a previously issued permit, as provided for in paragraph “e” of Resolution No. 7106, as amended by Resolution No. 9269, is suspended for 2020 Fourth of July fireworks sales in the event that an organization does not renew its fireworks booth permit in 2020 due to the COVID-19 pandemic and that organization shall be permitted to operate in 2021 consistent with all other applicable laws, regulations and requirements.
2. The Fire Chief or his or her designee is authorized to take all actions to effectuate the intent of this resolution.

## RESOLUTION NO. 7016

### RESOLUTION OF THE CITY COUNCIL OF THE CITY OF NEWARK ESTABLISHING GENERAL REQUIREMENTS REGARDING THE SALE OF SAFE AND SANE FIREWORKS

BE IT RESOLVED by the City Council of the City of Newark that pursuant to Newark Municipal Code Section 15.32.100 the following general requirements regarding the sale of safe and sane fireworks in the City of Newark are hereby established:

- a. The sale of fireworks shall not begin before 12:00 o'clock Noon on the 28th day of June and shall not continue after 12:00 o'clock Noon on the 6th day of July.
- b. All unsold stock and accompanying litter shall be removed from the location by 12:00 Noon on the 6th day of July.
- c. The fireworks stand shall be removed from the location by the 12th of July.
- d. The sale of fireworks shall not be made to any person or persons under the age of 18. Any applicant that sells safe and sane fireworks to any person under the age of 18 shall have their license revoked for the remainder of the term, and the organization will not be eligible for a fireworks booth permit in subsequent years.
- e. The number of fireworks booths allowed in the City shall be based on a formula of one booth per 3,000 Newark residents.
- f. Fireworks booths shall close by 9:00 p.m. daily.
- g. The responsibility for trash and debris cleanup of the City's shopping centers after the Fourth of July celebration shall be the responsibility of the non-profit Newark organizations.
- h. The non-profit organizations shall be responsible for complying with Newark Municipal Code Section 15.32.100 and all regulations promulgated thereunder.
- i. The fireworks supplier shall provide public education programs regarding the safe and sane use of fireworks.
- j. The fireworks supplier shall provide a public liability policy naming the City of Newark and its employees as additional insured for an amount between a minimum of \$3 million and a maximum of \$5 million.

I HEREBY CERTIFY the foregoing resolution was introduced at a regular meeting of the City Council of the City of Newark held on February 9, 1995, by Councilmember Nagy who moved its adoption and passage, which motion was carried after being duly seconded, and passed by the following vote:

AYES: Councilmembers Boggs, Johnson, Nagy, Salinas, and Mayor Smith

NOES: None

ABSENT: None

SECONDED: Councilmember Boggs

APPROVED:



s/DAVID W. SMITH

Mayor

ATTEST:



s/THELMA METCALF

City Clerk

APPROVED AS TO FORM:

  
s/GARY T. GALLIANO

City Attorney

RESOLUTION NO. 9269

RESOLUTION OF THE CITY COUNCIL OF THE CITY OF  
NEWARK REPEALING RESOLUTION NO. 8168 AND  
AMENDING RESOLUTION NO. 7016 AUTHORIZING THE  
FIRE CHIEF TO, UNDER CERTAIN CIRCUMSTANCES,  
SYSTEMATICALLY DECREASE THE MAXIMUM  
ALLOWABLE NUMBER OF SAFE AND SANE  
FIREWORKS PERMITS

WHEREAS, on April 12, 2001, the City Council of the City of Newark adopted Resolution No. 8168, which amended Resolution No. 7016 to limit the number of fireworks booths to thirteen;

NOW, THEREFORE, BE IT RESOLVED that the City Council of the City of Newark hereby finds, declares, and resolves as follows:

1. Resolution No. 8168 that amended Paragraph "e" of Resolution 7016 to limit the number of fireworks stands to thirteen (13) is hereby repealed.
2. Paragraph "e" of Resolution No. 7016 is hereby amended to read as follows:
  - e. The number of fireworks booths allowed in the City shall be 12 or a lower number in the event that: (1) An organization chooses not to renew a previously issued permit; or (2) an organization is deemed ineligible for a Safe and Sane fireworks booth by the procedure set forth in Newark Municipal Code Section 15.32.100; or (3) an organization no longer meets the minimum qualifications set forth in Newark Municipal Code Section 15.32.100 or Resolution No. 7016 for issuance of a Safe and Sane fireworks permit.

I HEREBY CERTIFY the foregoing resolution was introduced at a regular meeting of the City Council of the City of Newark held on March 8, 2007, by Council Member Nagy, who moved its adoption and passage, which motion was carried after being duly seconded, and passed by the following vote:

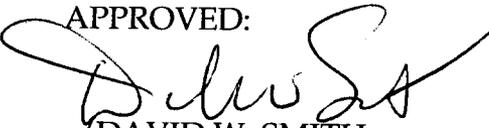
YES: Council Members Apodaca, Freitas, Nagy, Vice Mayor Johnson, and Mayor Smith

NOES: None

ABSENT: None

SECONDED: Council Member Apodaca

APPROVED:



s/DAVID W. SMITH  
Mayor

ATTEST:



s/SHEILA HARRINGTON  
City Clerk

APPROVED AS TO FORM:



s/GARY J. GALLIANO  
City Attorney



**City of Newark**

**MEMO**

**DATE:** May 18, 2020  
**TO:** City Council  
**FROM:** Sheila Harrington, City Clerk  
**SUBJECT:** Approval of Audited Demands for the City Council Meeting of May 28, 2020.

**REGISTER OF AUDITED DEMANDS**

US Bank General Checking Account

<u>Check Date</u>		<u>Check Numbers</u>	
May 08, 2020	Page 1-2	121000 to 121079	Inclusive
May 14, 2020	Page 1-2	121080 to 121152	Inclusive



**City of Newark**

**MEMO**

**DATE:** May 18, 2020  
**TO:** Sheila Harrington, City Clerk  
**FROM:** Krysten Lee, Finance Director  
**SUBJECT:** Approval of Audited Demands for the City Council Meeting of May 28, 2020.

The attached list of Audited Demands is accurate and there are sufficient funds for payment.

*ML* 05/18/20

Final Disbursement List. Check Date 05/08/20, Due Date 05/18/20, Discount Date 05/18/20. Computer Checks.  
 Bank 1001 US BANK

MICR Check#	Vendor Number	Payee	Check Date	Check Amount	Description
21000	10449	AFLAC ATTN: REMITTANCE PROCESSING SERVIC	05/08/20	1,363.24	SHORT TERM DISABILITY PREMIUM
21001	11201	JEFF AGUILAR	05/08/20	476.50	PLANNING COMMISSION ACADEMY
21002	1774	AIRGAS USA, LLC	05/08/20	68.20	RENTAL TANKS AND EQUIPMENT
21003	344	ALAMEDA COUNTY WATER DISTRICT	05/08/20	21.84	CITY WATER USE
21004	14	ALPINE AWARDS	05/08/20	665.38	TSHIRTS AND UNIFORMS
21005	348	AT&T	05/08/20	290.09	CIRCUITS, WHITE PAGES
21006	11491	JASON AVERY	05/08/20	163.86	EXPENSE REIMBURSEMENT
21007	9680	BAY CENTRAL PRINTING	05/08/20	6,676.00	PUBLISH CITY NEWSLETTER
21008	9888	BUREAU VERITAS NORTH AMERICA INC	05/08/20	21,380.69	PLAN REVIEW SERVICES
21009	1816	CA SURVEYING & DRAFTING SUPPLY	05/08/20	1,115.00	2 YEAR SERVICE WARRANTY FOR PLOTTER Z540
21010	9150	CAL-WEST LIGHTING & SIGNAL MAINTENANCE I	05/08/20	32,723.63	TRAFFIC SIGNAL MAINTENANCE
21011	11769	JADA CHIU	05/08/20	363.79	EXPENSE REIMBURSEMENT
21012	10060	COMCAST	05/08/20	79.33	CABLE SVCS
21013	11076	CRIME SCENE CLEANERS INC	05/08/20	280.00	CRIME SCENE CLEANERS
21014	10650	ORORA PACKAGING SOLUTIONS ATTN: NELY MIC	05/08/20	34.00	BUSINESS LICENSE REIMBURSEMENT
21015	10793	KRISTEIN VIDAD	05/08/20	85.00	CLASS REFUND
21016	10793	CHEN YAO	05/08/20	94.00	CLASS REFUND
21017	10793	PATRICIA FAGUNDES	05/08/20	85.00	CLASS REFUND
21018	10793	YASIN CETINDIL	05/08/20	85.00	CLASS REFUND
21019	10793	YI SUN	05/08/20	94.00	CLASS REFUND
21020	10793	GUY HORNBECK	05/08/20	85.00	CLASS REFUND
21021	10793	VARA NAMBURU	05/08/20	94.00	CLASS REFUND
21022	10793	DANDAN LIU	05/08/20	85.00	CLASS REFUND
21023	10793	JASMINE PUNIA	05/08/20	94.00	CLASS REFUND
21024	10793	MAHIMA UPADHYAYULA	05/08/20	85.00	CLASS REFUND
21025	10793	SYED MOOSA	05/08/20	85.00	CLASS REFUND
21026	10793	HALEY HAWTHORNE	05/08/20	85.00	CLASS REFUND
21027	10793	ROSEMARIE RUIZ	05/08/20	85.00	CLASS REFUND
21028	10793	IRENE MADRID	05/08/20	85.00	CLASS REFUND
21029	10793	FAN YEUNG	05/08/20	20.40	CLASS REFUND
21030	10793	KIMBERLY LONGMAN	05/08/20	40.00	CLASS REFUND
21031	10793	LOAN LUONG	05/08/20	390.00	CLASS REFUND
21032	10793	RENATTO M SILVA	05/08/20	507.00	CLASS REFUND
21033	10793	TIFFANY LASH	05/08/20	507.00	CLASS REFUND
21034	10793	CHRISTINE CLINTON	05/08/20	507.00	CLASS REFUND
21035	10793	KIM MACK	05/08/20	390.00	CLASS REFUND
21036	10793	ANTHONY TANG	05/08/20	390.00	CLASS REFUND
21037	10793	JUAN SORIANO	05/08/20	390.00	CLASS REFUND
21038	10793	LINDA SERRANO	05/08/20	390.00	CLASS REFUND
21039	10793	JENNA J LYNN	05/08/20	390.00	CLASS REFUND
21040	10793	HYUN LEE	05/08/20	390.00	CLASS REFUND
21041	10793	GARY LEE	05/08/20	390.00	CLASS REFUND
21042	10793	LISA LEDEZMA	05/08/20	390.00	CLASS REFUND
21043	10793	CRISTINA ALMEIDA	05/08/20	390.00	CLASS REFUND
21044	10793	ALZBETA BARBA	05/08/20	390.00	CLASS REFUND
21045	10793	STEPHANIE ALVES	05/08/20	390.00	CLASS REFUND
21046	10794	DUKE DE LEON	05/08/20	285.00	VIDEO SERVICES
21047	7631	DELTA DENTAL OF CALIFORNIA ATTN: ACCOUNT	05/08/20	16,770.64	DENTAL PREMIUM - MAY'20
21048	7641	DELTA DENTAL INSURANCE COMPANY ATTN: ACC	05/08/20	175.98	DENTAL PREMIUM - MAY'20
21049	3728	DEPARTMENT OF JUSTICE ACCOUNTING OFFICE	05/08/20	260.00	FINGERPRINTING FEES
21050	7663	FIDELITY SECURITY LIFE INSURANCE/EYEMED	05/08/20	2,261.37	VISION PREMIUM

Final Disbursement List. Check Date 05/08/20, Due Date 05/18/20, Discount Date 05/18/20. Computer Checks.

Bank 1001 US BANK

MICR Check#	Vendor Number	Payee	Check Date	Check Amount	Description
21051	1733	FIRST BAPTIST CHURCH	05/08/20	80.00	DONATION - APR'20
21052	11848	OUR LUCKY GROCERY INC. GROCERY OUTLET OF	05/08/20	2,692.04	COVID-19 COMMUNITY FOOD DISTRIBUTION PRO
21053	3642	IMAGE SALES, INC.	05/08/20	180.19	ID BADGING SUPPLIES AND MAINTENANCE
21054	11806	JOHN KAPU	05/08/20	679.15	EXPENSE REIMBURSEMENT
21055	11681	KBA DOCUMENT SOLUTIONS, LLC.	05/08/20	704.79	COPIER LEASE AGREEMENT
21056	11681	KBA DOCUMENT SOLUTIONS, LLC.	05/08/20	2,958.31	COPIER LEASE AGREEMENT
21057	7189	LINCOLN AQUATICS	05/08/20	385.41	POOL CHEMICALS-PULSAR CLEANER, CALCIUM,
21058	10298	MANAGED HEALTH NETWORK BANK OF AMERICA	05/08/20	376.96	EMPLOYEE ASSISTANCE PROGRAM
21059	11736	MANAGEMENT PARTNERS INC.	05/08/20	12,280.00	CONSULTING SERVICES
21060	9029	MEYERS NAVE RIBACK SILVER & WILSON	05/08/20	49,841.22	LEGAL CONSULTING SRVCS PURSUANT TO C1902
21061	11357	MISSION UNIFORM SERVICE	05/08/20	1,112.71	MATS TOWELS AND UNIFORMS
21062	10947	NET TRANSCRIPTS	05/08/20	609.19	TRANSCRIPTION SVC
21063	11272	NICHOLAS CUEVAS	05/08/20	2,375.00	EDUCATION REIMBURSEMENT
21064	10766	PEAK SOFTWARE SYSTEMS, INC	05/08/20	3,273.75	PROGRAM LICENSE AND MTC
21065	78	PERFORMANCE PEST MANAGEMENT LPC SERVICES	05/08/20	142.00	PEST CONTROL SERVICES
21066	11789	KAILEY PETERSON	05/08/20	246.10	EXPENSE REIMBURSEMENT
21067	329	PHOENIX GROUP INFORMATION SYSTEMS	05/08/20	533.30	PARKING CITATION PROGRAM
21068	11690	QUADIENT FINANCE USA, INC.	05/08/20	1,000.00	NEOPOST POSTAGE
21069	11074	RUTAN & TUCKER LLP 611 ANTON BLVD. SUITE	05/08/20	27,005.80	LEGAL CONSULTING SRVCS
21070	11847	SIGNATURE PROMOTIONAL GROUP SIGNATURE PI	05/08/20	468.00	UB GOLD BADGE PINS
21071	11098	SILVER & WRIGHT LLP	05/08/20	9,094.25	LITIGATION & LEGAL CONSULTING SRVCS
21072	11706	SNG & ASSOCIATES, INC.	05/08/20	14,287.50	ENGINEERING PLAN CHECK AND CONSULTANT SE
21073	40	STAPLES	05/08/20	478.53	OFFICE SUPPLIES
21074	2778	STATE OF CALIFORNIA FRANCHISE TAX BOARD	05/08/20	250.00	PAYROLL DEDUCTION - GARNISHMENT
21075	7744	T-MOBILE	05/08/20	583.06	TMOBILE CELL SERVICE
21076	5246	TURF STAR, INC.	05/08/20	131,393.25	PROJECT 2020-16 PURCHASE OF TORO
21077	8751	PROVIDENT LIFE & ACCIDENT INSURANCE COMP	05/08/20	261.24	PAYROLL PREMIUM - E0246926
21078	10968	UTILITY TELECOM GROUP, LLC	05/08/20	18,193.01	UTILITY TELEPHONE YEARLY VOIP/WAN SERVIC
21079	5623	VERIZON WIRELESS	05/08/20	6,379.66	IPHONE SVC
Total				380,806.36	

Final Disbursement List. Check Date 05/14/20, Due Date 05/25/20, Discount Date 05/25/20. Computer Checks.  
 Bank 1001 US BANK

MICR check#	Vendor Number	Payee	Check Date	Check Amount	Description
21080	11800	NATIONAL AUTO FLEET GROUP	05/14/20	90,364.44	PROJECT 2020-15: 2 TAHOE PURCHASE
21081	10	ABC FIRE PROTECTION INC	05/14/20	1,036.67	ANSUL CERTIFICATION
21082	344	ALAMEDA COUNTY WATER DISTRICT	05/14/20	42,380.96	CITY WATER USE
21083	12	ALLIED AUTO STORES INC	05/14/20	457.50	PARTS
21084	348	AT&T	05/14/20	176.14	CIRCUITS, WHITE PAGES
21085	9680	BAY CENTRAL PRINTING	05/14/20	3,338.00	PRINT CITY NEWSLETTER
21086	4603	CENTER FOR SPECIALIZED VETERINARY CARE B	05/14/20	150.00	VET SVCS
21087	11717	GVP VENTURES INC. DBA BOB MURRAY & ASSOC	05/14/20	148.44	EXECUTIVE RECRUITMENT
21088	6630	BOUND TREE MEDICAL LLC	05/14/20	419.78	MEDICAL SUPPLIES
21089	11801	BUTTERFLY PROPERTY, LP	05/14/20	1,800.00	PARKING LICENSE AGREEMENT
21090	11541	CEL CONSULTING, INC.	05/14/20	20,969.42	SPECIAL INSPECTION SERVICES FOR CIVIC CE
21091	214	CENTRAL VETERINARY HOSPITAL	05/14/20	544.25	VET SVCS
21092	6304	CLASSIC GRAPHICS T & J LEWIS INC	05/14/20	11,421.51	PROJECT 2020-03 OUTFITTING OF F-250'S
21093	10060	COMCAST	05/14/20	31.49	CABLE FOR THE YARD
21094	11554	CORODATA SHREDDING INC.	05/14/20	227.87	BOXES FOR DESTRUCTION
21095	10793	MONICA BARBEAU JONES	05/14/20	507.00	CLASS REFUND
21096	10793	MIRIAM EUGENIO	05/14/20	71.50	CLASS REFUND
21097	10793	RHODA VEJBY	05/14/20	65.00	CLASS REFUND
21098	10793	SARAH IZANT	05/14/20	81.33	CLASS REFUND
21099	10793	VANESSA CRAVAL	05/14/20	65.00	CLASS REFUND
21100	10793	ANGELICA ARTEAGA	05/14/20	65.00	CLASS REFUND
21101	10793	DAVANA T WATSON	05/14/20	65.00	CLASS REFUND
21102	10793	HEATHER L HOWARD	05/14/20	90.00	CLASS REFUND
21103	10793	DIANE CRAWFORD	05/14/20	189.54	CLASS REFUND
21104	10793	AMY WILHELM	05/14/20	378.27	CLASS REFUND
21105	10793	JULIA TUNG	05/14/20	90.00	CLASS REFUND
21106	10793	RHODA VEJBY	05/14/20	90.00	CLASS REFUND
21107	10793	RAMYA SATISH	05/14/20	90.00	CLASS REFUND
21108	10793	NORA KOROYAN	05/14/20	189.54	CLASS REFUND
21109	10793	GLORIA HOM	05/14/20	94.77	CLASS REFUND
21110	10793	JULIE HILL	05/14/20	94.77	CLASS REFUND
21111	10793	CHRISTINE SCARBROUGH	05/14/20	270.00	CLASS REFUND
21112	10793	SARAH RUANE	05/14/20	94.77	CLASS REFUND
21113	10793	TRACY MASSING	05/14/20	94.77	CLASS REFUND
21114	10793	LINDA KOWALSKI	05/14/20	284.04	CLASS REFUND
21115	10793	HAROLD COLON	05/14/20	450.00	CLASS REFUND
21116	10677	DAILY JOURNAL CORPORATION CALIFORNIA NEW	05/14/20	515.00	LEGAL ADS
21117	41	DALE HARDWARE 3700 THORNTON AVE.	05/14/20	21.83	SUPPLIES
21118	11015	EAST BAY LAWN MOWER	05/14/20	776.11	FLEET SUPPLIES
21119	10478	STEVE G. HOOS EUGENE'S HOME APPLIANCE SE	05/14/20	96.38	APPLIANCE REPAIRS
21120	5137	FOUR SEASONS POOL SERVICE	05/14/20	250.00	POOL SUPPLIES AND REPAIRS
21121	5106	CITY OF FREMONT REVENUE DIVISION	05/14/20	1,250.00	FY CASE MANAGEMENT SERVICES
21122	11112	FREMONT DEL GRANDE INC	05/14/20	34.35	PARTS
21123	60	FREMONT FORD/AUTOBODY OF FREMONT ATTN: T	05/14/20	805.40	FORD SUPPLIES
21124	3416	GAMETIME	05/14/20	4,583.81	REPLACEMENT PLATFORM FOR MAYHEWS
21125	4845	HINDERLITER DELLAMAS & ASSOCIATES	05/14/20	3,306.57	SALES TAX CONSULTING/AUDIT SERVICES
21126	1457	HOME DEPOT CREDIT SERVICES DEPT. 32 - 25	05/14/20	188.78	SUPPLIES
21127	11806	JOHN KAPU	05/14/20	369.80	EXPENSE REIMBURSEMENT
21128	11681	KBA DOCUMENT SOLUTIONS, LLC.	05/14/20	322.29	COPIER LEASE AGREEMENT
21129	10504	THE LEW EDWARDS GROUP	05/14/20	3,000.00	PROFESSIONAL SERVICES
21130	11246	LOOMIS ARMORED	05/14/20	135.53	ARMORED CAR SERVICE

Final Disbursement List. Check Date 05/14/20, Due Date 05/25/20, Discount Date 05/25/20. Computer Checks.  
 Bank 1001 US BANK

MICR check#	Vendor Number	Payee	Check Date	Check Amount	Description
21131	7618	METLIFE SBC	05/14/20	1,294.56	LONG TERM DISABILITY PREMIUM
21132	10907	MICHAEL YORKS INVESTIGATIONS	05/14/20	3,075.00	BACKGROUND INVESTIGATIONS
21133	7335	MUNICIPAL MAINTENANCE EQUIPMENT INC	05/14/20	148.15	SWEEPER PARTS
21134	611	KKR AUTOMOTIVE DBA NAPA AUTO PARTS	05/14/20	1,043.06	AUTO PARTS
21135	11272	NICHOLAS CUEVAS	05/14/20	2,375.00	EDUCATION REIMBURSEMENT
21136	349	PACIFIC GAS & ELECTRIC PG&E CFM/PPC DEPA	05/14/20	26,782.57	CIVIC CENTER PG&E CONNECTIONS
21137	349	PACIFIC GAS & ELECTRIC PG&E CFM/PPC DEPA	05/14/20	94,306.69	CIVIC CENTER PG&E CONNECTIONS
21138	11697	PAKPOUR CONSULTING GROUP, INC.	05/14/20	8,300.25	ENGINEERING PLAN CHECK AND INSPECTION SE
21139	11789	KAILEY PETERSON	05/14/20	246.10	EXPENSE REIMBURSEMENT
21140	11074	RUTAN & TUCKER LLP 611 ANTON BLVD. SUITE	05/14/20	20,873.71	LEGAL CONSULTING SRVCS PURSUANT TO C1902
21141	503	STANDARD INSURANCE COMPANY	05/14/20	1,186.68	EMPLOYEE LIFE INSURANCE AND AD&D COVERAG
21142	2778	STATE OF CALIFORNIA FRANCHISE TAX BOARD	05/14/20	250.00	PAYROLL DEDUCTION - GARNISHMENT
21143	7744	T-MOBILE	05/14/20	577.90	TMOBILE CELL SERVICE
21144	10883	THE TACTICAL ADVANTAGE POLICE SUPPLY	05/14/20	997.26	VEST REPLACEMENT #2020-09
21145	11809	JENNIFER TRAN	05/14/20	17.60	EXPENSE REIMBURSEMENT
21146	11776	TYLER TECHNOLOGIES, INC.	05/14/20	4,800.00	ERP IMPLEMENTATION - TRAINING SERVICES
21147	6797	US BANK CORPORATE PAYMENT	05/14/20	13,162.89	CC PAYMENT 04/22/20
21148	853	VALLEY OIL COMPANY LOCKBOX# 138719	05/14/20	9,218.10	FUEL
21149	5623	VERIZON BUSINESS SERVICES	05/14/20	616.33	CELL SVC FOR MDTs 19/20
21150	339	WASHINGTON HOSPITAL GENERAL ACCOUNTING	05/14/20	300.00	LAB TESTS
21151	5050	WEST COAST ARBORISTS INC	05/14/20	8,190.00	TREE REMOVAL
21152	7308	THE GOODYEAR TIRE & RUBBER COMPANY	05/14/20	1,978.62	TIRE PURCHASE
Total				392,283.09	