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**Admitted in Colorado*

March 12, 2020

VIA HAND DELIVERY AND EMAIL

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Re: Appeal of Administrative Determination to Reject Filing of EBRRD Appeal of Zoning Manager Approval, 88 Grand Avenue Project (PLN 18-406)

Dear Mr. Gilchrist, Mr. Vollmann, Commissioners, Ms. Payne, Mr. Merkamp:

I am writing on behalf of East Bay Residents for Responsible Development ("EBRRD"), also known as Oakland Residents for Responsible Development, to appeal the March 3, 2020 administrative decision taken by the Director of City Planning, by and through City of Oakland Planning staff member Mr. Peterson Vollmann, Planner IV, to incorrectly reject EBRRD's appeal of the City of

Oakland's[1] approval of the 88 Grand Avenue Development Project, PLN 18-406 ("Appeal") as untimely.[2] EBRRD respectfully requests that the Planning Commission[3] vacate the Planning Director's decision and accept EBRRD's Appeal.

The City issued a Letter of Decision on February 20, 2020 approving the Project. Pursuant to the instructions on the Letter of Decision, the deadline to file an appeal of the City's decision to approve the Project was 4:00 pm on March 2, 2020. EBBRD sought to appeal the decision. EBRRD's counsel timely submitted electronic versions of the documents in support of EBRRD's Appeal to Mr. Vollmann and all other required City officials at approximately 3:30 p.m. on March 2, 2020, prior to the stated 4:00 p.m. deadline, including the Appeal form required by the City's Planning Code. EBRRD also made a good-faith effort to deliver the duplicate hard copy versions of its Appeal documents and the Appeal fees in person to the Planning Department on March 2, 2020. Due to an inadvertent mistake by EBRRD's legal courier service, the courier arrived at the Planning Department between 4:00 p.m. and 5:00 p.m. on March 2, 2020, to find the office closed. EBRRD attempted to re-deliver the hard copies and Appeal fees to the Planning Department at 8:00 a.m. the following morning, March 3, 2020, when the office reopened. Mr. Vollman rejected the courier's March 3, 2020 attempt to re-deliver the hard copies of the Appeal documents and the check for the Appeal fees as untimely because they had not been received by 4:00 p.m. the previous day.

EBRRD appeals the Planning Director's decision to reject the Appeal on the basis that it was error and an abuse of discretion to reject EBRRD's timely electronic submission of the Appeal. The City's Planning Code does not prescribe that appeals must be filed in hard copy, and does not prohibit electronic submission.[4] The Code simply prescribes that the appeal "shall be made on a form prescribed by the City Planning Department and shall be filed with such Department"[5] with payment of the filing fee, and that appeals of CEQA exemption determinations be "***appealed in writing***...prior to the close of the public comment

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[1] "City."
[2] Underlying approval are the approval of Minor Conditional Use Permit, Tentative Parcel Map, Design Review, approval of a CEQA Checklist / Addendum, and findings that the Project qualifies for CEQA streamlining under provisions for in-fill development.
[3] Or other legally authorized City decisionmaker.
[4] See *Tahoe Vista Concerned Citizens v. County of Placer* (2000) 81 Cal.App.4th 577, 591–592 (exhaustion requirements satisfied where administrative appeal is made "in the manner prescribed by the town code.").
[5] OPC § 17.134.060.

period on the underlying permits/decision."[6] "Writing" includes electronic submissions.[7] EBRRD's Appeal was submitted electronically, in writing, on the required City Appeal Form, before the close of the City's appeal period for the Project. EBRRD's attempted delivery of the Appeal fees after 4:00 pm on March 2, 2020 was the harmless error of its courier, and did not prejudice the City or the Applicant's ability to consider the merits of EBRRD's Appeal by the Appeal deadline. EBRRD's electronic submission of its Appeal before the City's appeal deadline was therefore timely, and should have been accepted by the City.

In the alternative, EBRRD respectfully requests that the Planning Commission vacate the Planning Director's decision to reject EBRRD's Appeal as an abuse of discretion pursuant to California Code of Civil Procedure, Section 473(b),[8] due to the inadvertent mistake of its legal courier service to deliver the hard copies of the Appeal documents and check for Appeal fees before 4:00 pm on March 2, 2020.

Pursuant to Oakland Planning Code, [9]Section 17.132.020, the deadline to file an appeal of an administrative determination or decision of the Director of City Planning is ten days. The administrative determination / decision at issue was made on March 3, 2020. This appeal is therefore timely submitted less than 10 days after the disputed administrative determination / decision.

For the reasons stated herein, EBRRD urges the Planning Commission to overturn the determination of the Planning Director to reject EBRRD's Appeal, and to order the Planning Department to duly accept EBRRD's Appeal as timely filed.

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[6] OPC § 17.158.220(A).
[7] PRC § 21167.6(e)(6) (CEQA record of proceedings must include "[a]ll written comments received in response to, or in connection with, environmental documents prepared for the project"); and (e)(7) ("[a]ll written evidence or correspondence submitted to, or transferred from, the respondent public agency with respect to compliance with this division or with respect to the project."); Gov. Code § 6252(e) ("Writing means any handwriting, typewriting, printing, photostating, photographing, photocopying, ***transmitting by electronic mail*** or facsimile, and every other means of recording upon any tangible thing any form of communication or representation, including letters, words, pictures, sounds, or symbols, or combinations thereof, and any record thereby created, regardless of the manner in which the record has been stored") (emphasis added); *Citizens for Open Government v. City of Lodi* ("Lodi") (March 28, 2012) 205 Cal. App.4th 296, 309-311 (emails are part of CEQA administrative record).
[8] "CCP 473."
[9] "OPC."

Attached to this appeal is the following:

1. Appeal Form;
2. Exhibit 1: Declaration of Sara F. Dudley and Exhibits;
3. Exhibit 2: Declaration of Joe Jacques and Exhibits;
4. Exhibit 3: Declaration of Alan Rodriquez and Exhibits; and
5. Exhibit 4: March 2, 2020 88 Grand Appeal, including Appeal Form, Appeal letter, Exhibits, supporting documents, and check for Appeal filing fees ($1622.57).

I. INTEREST OF APPELLANT

EBRRD ("Oakland Residents") is an unincorporated association of individuals and labor organizations that may be adversely affected by the potential public and worker health and safety hazards and environmental impacts of the Project. The association includes: City of Oakland residents; the International Brotherhood of Electrical Workers Local 595, Plumbers & Steamfitters Local 342, The International Association of Sheet Metal, Air, Rail and Transportation Workers, SMW Local No. 104, Sprinkler Fitters Local 483 and their members and their families; and other individuals that live and/or work in the City of Oakland and Alameda County, including Michael Capps, Kahlil Larn and Jennifer Choi.

Individual members of Oakland Residents, and its affiliated labor organizations live, work, recreate and raise their families in the County of Alameda, City of Oakland, and surrounding areas. These members would be directly affected by the Project's environmental and health and safety impacts. Individual members may also work on the Project itself. Accordingly, they will be first in line to be exposed to any health and safety hazards that exist onsite. Oakland Residents has a strong interest in enforcing the State's environmental laws that encourage sustainable development and ensure a safe working environment for its members. Environmentally detrimental projects can jeopardize future jobs by causing building moratoriums or restrictions, making it more difficult and more expensive for business and industry to expand in the region, and making it less desirable for businesses to locate and for people to live there.

Oakland Residents actively and fully participated in the administrative process for this proceeding before the Director.

II. GROUNDS FOR APPEAL

This appeal is brought pursuant to OPC, Section 17.132.50,[10] which provides:

> Within ten (10) calendar days after the date of any administrative determination or interpretation made by the Director of City Planning under the zoning regulations, an appeal from such decision may be taken to the City Planning Commission by any interested party. In the case of appeals involving one- or two-unit Residential Facilities, the appeal shall be considered by the Commission's Residential Appeals Committee. Such appeal shall be made on a form prescribed by the City Planning Department and shall be filed with such Department and shall be accompanied by such a fee as specified in the City fee schedule. The appeal shall state specifically wherein it is claimed there was an error or abuse of discretion by the Director or wherein his or her decision is not supported by the evidence in the record. The appeal shall be accompanied by such information as may be required to facilitate review. Upon receipt of the appeal, the Secretary of the City Planning Commission shall set the date for consideration thereof and, not less than seventeen (17) days prior thereto, give written notice to: the applicant; the appellant in those cases where the applicant is not the appellant; adverse party or parties, or to the attorney, spokesperson, or representative of such party or parties; other interested groups and neighborhood associations who have requested notification; and to similar groups and individuals as the Secretary deems appropriate, of the date and place of the hearing on the appeal.

The Planning Director's decision to reject EBRRD's Appeal as untimely was in error and was an abuse of discretion. First, the City's Planning Code, which governs EBRRD's Appeal of the Project Approvals, does not state that appeals must be filed in hard copy.[11] Rather, the Planning Code simply requires that appeals "shall be made on a form prescribed by the City Planning Department and shall be filed with such Department, along with the appropriate fees required by the City's

[10] Or any other applicable provision of the Oakland Municipal Code, Oakland Planning Code, or Oakland Charter.
[11] See e.g. OPC, §§ 17.134.060 (minor use permits), 17.158.210 (CEQA), 17.136.080 (design review); OMC, Section 16.04.100 (tentative parcel map).

Master Fee Schedule."[12] In response to the undersigned's email inquiries about EBRRD's Appeal filing, Mr. Vollmann also indicated that appeal attachments that were provided by electronic weblinks would be provided to the Planning Commission "with the link citation as submitted with your appeal."[13]

The electronic version of EBRRD's Appeal, which included the required City Appeal form and supporting documentation, was timely submitted to the required recipient, Mr. Vollmann, and all applicable City Planning staff and officials. EBRRD's electronic submission was also reviewed by the City's Zoning Manager prior to the 4:00 p.m. deadline, on March 2, 2020.[14] The City was therefore on notice of EBRRD's Appeal submission before the deadline stated in the Letter of Decision and had access to EBRRD's Appeal documents in a timely manner. EBRRD's courier was subsequently unable to deliver the Appeal fee check and duplicate hard copies of the Appeal documents prior to the 4:00 p.m. deadline due to an inadvertent mistake regarding the time of day that the Planning Department office closed. However, there is no evidence demonstrating that either the City or the Project Applicant were prejudiced in any way from receiving hard copies the Appeal and the check for the Appeal filing fees at 8:00 a.m. the following day, on March 3, 2020, as opposed to 4:00 p.m. on March 2, 2020. Accordingly, based on the plain language of the Oakland Planning Code, EBRRD substantially complied with the Code requirements to file its Appeal with the Planning Department. The Planning Director's decision to reject EBRRD's March 3, 2020 delivery of duplicate hard copies of the Appeal documents and the Appeal filing fees constituted error and an abuse of discretion.

Second, the Planning Director's decision to reject EBRRD's Appeal as untimely was in error and an abuse of discretion because EBRRD's failure to provide the City with the hard copies of its Appeal documents and Appeal filing fees was the result of inadvertence and excusable mistake by its courier. California Code of Civil Procedure, Section 473.[15] CCP 473, subdivision (b) provides that "[t]he court may, upon any terms as may be just, relieve a party or his or her legal representative from a judgment, dismissal, order, or other proceeding taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect."

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[12] See OPC, § 17.134.060.
[13] Dudley Declaration, Exhibit B.
[14] Dudley Declaration, Exhibit F.
[15] "CCP 473."

EBRRD easily meets the criteria for granting relief under the California Supreme Court's three-factor test:[16]

> 1) EBRRD's mistake was excusable, defined as a mistake than any reasonable person could make even when exercising due care. This includes mistakes made by parties employed or supervised by the attorney;
> 2) EBRRD has otherwise diligently participated in this action by filing a comment letter and multiple requests under the California Public Records Act. EBRRD also diligently sought to correct the mistake by attempting to file at 8:20 am the next day; and
> 3) the City was not prejudiced in accepting what the City deemed a late filing, because the City was aware of the basis for Appeal, was aware that EBRRD was attempting to file the Appeal prior to the deadline, and the City Zoning Manager opened the transmission email containing the Appeal documents before the 4:00 pm deadline.

In determining that relief is proper, the courts have considered public policy under California Environmental Quality Act[17] which favors reaching decisions on their merits in CEQA disputes. This is because unlike disputes between private litigants CEQA suits "*involve the health, welfare and safety of the public at large and so a forfeiture of a hearing on the merits deprives not only the petitioners, but all citizens, of judicial resolution of the controversy concerning the project and its effects on those who live and work in the community*."[18]

Moreover, courts have granted relief under the judicial doctrine of "extrinsic mistake" which works to prevent a default or dismissal and favors trying cases on their merits, under similar circumstances.

A. Facts and Timeline

The supporting Declarations of Sara F. Dudley (the undersigned), Joe Jacques, and Alan Rodriquez and attached exhibits, attached to this letter, attest to the following facts:

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[16] E.g., *Elston v. City of Turlock* (1985) 38 Cal.3d 227; *Zamora v. Clayborn Contracting Group, Inc.* (2002) 28 Cal.4th 249.
[17] "CEQA," Pub. Resources Code, § 21000 et seq.; Cal. Code Regs., tit. 14, ch. 3, § 15000 et seq. ("CEQA Guidelines").
[18] *McCormick v. Board of Supervisors* (1988) 198 Cal.App.3d 352, 362, emphasis added.

On the morning of March 2, 2020, Ms. Dudley emailed Mr. Vollmann to inquire about the methods of transmission for appeal documents. Ms. Dudley asked if documents cited at weblinks / URLs could be provided on an electronic storage device (USB or similar) because they were voluminous (the "supporting documents"). Mr. Vollmann informed Ms. Dudley that, in order for the Planning Commission to have printed copies of the supporting documents in their appeal packet, the documents needed to be printed in hard copy and delivered with the Appeal, but that "otherwise they will be provided with the link citation as submitted with your appeal."[19]

Ms. Dudley then finalized EBRRD's Appeal documents in electronic form, and transmitted the Appeal documents, including the Cover Letter, Appeal Form, Appeal Letter, Exhibits, and a link to supporting documents to County Legal Services, a legal courier and filing service used regularly by the undersigned's law firm, at around 1:00 pm on March 2, 2020.[20] Ms. Dudley's transmission email to County Legal provided the City's appeal deadline: "Please note that it must be delivered by **4pm.** Call me directly if you have any issues."[21] Subsequent emails reiterated the 4:00 pm deadline.

Joe Jacques was the employee at County Legal who responded to the request. Mr. Jacques confirmed receipt of the delivery order, and forwarded the order to its contractor, Ace Attorney Service.[22] Ace is a document delivery service based in Oakland, California, who County Legal used for printing and delivering the documents. By approximately 2:00 pm, Ace had received all of the documents. At approximately 3:30 pm on March 2, 2020, Ms. Dudley spoke with Mr. Jacques of County Legal, and asked about the status of the delivery to the Planning Department. Mr. Jacques stated that he believed that the runner had just left to deliver the documents to the City of Oakland.

At approximately 3:32 pm on March 2, 2020, the undersigned's legal assistant, Ms. Lorrie J. LeLe, electronically submitted EBRRD's Appeal Cover Letter, Appeal Form, Appeal Letter, and Exhibits as email attachments to Mr. Vollmann, all members of the Planning Commission, Ms. Catherine Payne (Acting Development Planning Manager), Mr. William Gilchrist (Director of City Planning),

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[19] Exhibit B to the Dudley Declaration.
[20] "County Legal."
[21] Dudley Declaration, Exhibit C, emphasis in original.
[22] "Ace." See Jacques Declaration and attached exhibits.

and Mr. Robert Merkamp (Zoning Manager).[23] Consistent with Mr. Vollmann's email correspondence earlier that day, supporting documents were contained in weblink references within the attached documents, but were not attached to Ms. LeLe's email, due to file size. At the time Ms. LeLe submitted the Appeal documents to the Planning Department electronically, EBRRD's counsel had been informed that hard copies of the Appeal documents, including the check for Appeal filing fees and the supporting documents, had been printed and were en route to Mr. Vollmann's office.

Mr. Merkamp opened Ms. LeLe's email at approximately 3:40 pm on March 2, 2020, confirming that City Planning staff received the Appeal submission email prior to the 4:00 p.m. deadline.[24]

At approximately 5:25 pm on March 2, 2020, Mr. Jacques called Ms. Dudley and informed her that the hard copy documents had not been delivered. Mr. Jacques stated that the runner had arrived at the Planning Department at 4:50 pm. He offered no explanation as why they would attempt filing after 4:00 pm, contrary to her instructions. Ms. Dudley instructed County Legal to return to the City at 8:00 am the next morning to make a second attempt to "hand deliver" the hard copies of the Appeal documents and the check for the Appeal filing fees.

On March 3, 2020, Mr. Jacques explained to Ms. Dudley that he had mistakenly thought that they could deliver the Appeal documents to the Planning Department until 5:00 pm on March 2, 2020, and had incorrectly authorized County Legal's contractor from Ace to deliver the documents after 4:00 pm.

Ace's staff returned to the Planning Department on March 3, 2020, at approximately 8:20 am, to re-deliver the Appeal documents and check to the City. The filing was rejected. On March 3, 2020 at 9:03 am, Mr. Vollmann emailed Ms. Dudley to inform her that that the City had rejected the Appeal as untimely.[25]

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[23] Dudley Declaration, Exhibit E.
[24] Dudley Declaration, Exhibit F.
[25] Dudley Declaration, Exhibit H.

B. The Planning Director's Rejection of EBRRD's Appeal Was An Abuse of Discretion Not Authorized by the Planning Code.

The City's Planning Code, which governs EBRRD's Appeal of the Project Approvals, does not prescribe that appeals must be filed in hard copy.[26] Therefore, the Planning Director's decision to reject EBRRD's Appeal as untimely when EBRRD's electronic submission of the Appeal was timely, was not authorized under the Planning Code, and violated EBRRD's due process rights to have its administrative appeal heard by the Planning Commission.[27]

The Planning Code requires that appeals of Planning Director decisions "shall be made on a form prescribed by the City Planning Department and shall be filed with such Department, along with the appropriate fees required by the City's Master Fee Schedule"[28] and that CEQA appeals must be "***appealed in writing***...prior to the close of the public comment period on the underlying permits/decision."[29] The Planning Code does not state that appeals must be presented in "hard copy" or "paper" form. Rather, the Code requires that the correct City form must be used, that the appeal must be "in writing," and that the appeal fee be paid. The OPC does not define "writing" or "filing," and therefore does not prescribe that either of these words must be interpreted to mean "on paper," "in hard copy," or "in person." Under rules of municipal code construction, applicable sections of the Planning Code must be interpreted pursuant to the "plain meaning of the statutory language" and may not be interpreted to result in an unreasonable construction that is not stated in the code.[30] By rejecting EBRRD's Appeal filing as untimely, the Planning Director implied a meaning in the Planning Code which is not contained in the Code – i.e. that Appeals must be filed "on paper" and "in person." This construction resulted in the absurd result of EBRRD's timely electronic submission of its Appeal being rejected as untimely.

By contrast, state laws construe electronic documents to meet the requirements for "written" submissions to local agencies like the City. In particular, CEQA and the Public Records Act – both of which apply to the City's record on this Project – clearly define "written" documents and "writing" to include "emails,"

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[26] See e.g. OPC, §§ 17.134.060 (minor use permits), 17.158.210 (CEQA), 17.136.080 (design review); OMC, § 16.04.100 (tentative parcel map).
[27] CCP § 1094.5(b).
[28] See OPC sec. 17.134.060.
[29] OPC § 17.158.220(A).
[30] *Lateef v. City of Madera* (Cal. Ct. App., Feb. 14, 2020, No. F076227) 2020 WL 746176, at *4.

"transmitting by electronic mail," and documents attached to electronic transmissions.[31] Guidance from the League of California Cities similarly explains that "[a]n email is simply a document," and that "[e]mails that [] forward attached correspondence to the agency before the decisionmaking body made its decision" must be "include[d] with attached correspondence" in the administrative record for the project.[32]

Indeed, the City has recognized the same rule in past correspondence related to this Project. On January 7, 2020, Mr. Vollmann confirmed acceptance of EBRRD's January 6, 2020 electronic submission of its CEQA comment letter on the Project as timely.[33] Additionally, in response to Ms. Dudley's March 2, 2020 email inquiries about EBRRD's Appeal filing, Mr. Vollmann indicated that appeal attachments would be accepted electronically "with the link citation as submitted with your appeal."[34] It was therefore reasonable for EBRRD to rely on its electronic submission of the Appeal prior to the 4:00 pm deadline on March 2, 2020 to constitute a timely filing of the Appeal pursuant to the language of the City's Planning Code and the City's past representations to EBRRD regarding electronic transmission.

The record demonstrates that the electronic version of EBRRD's Appeal was timely submitted to Mr. Vollmann and all applicable City staff and officials, and

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[31] PRC § 21167.6(e)(6) (CEQA record of proceedings must include "[a]ll written comments received in response to, or in connection with, environmental documents prepared for the project"); and (e)(7) ("[a]ll written evidence or correspondence submitted to, or transferred from, the respondent public agency with respect to compliance with this division or with respect to the project."); Gov. Code § 6252(e) ("Writing means any handwriting, typewriting, printing, photostating, photographing, photocopying, ***transmitting by electronic mail*** or facsimile, and every other means of recording upon any tangible thing any form of communication or representation, including letters, words, pictures, sounds, or symbols, or combinations thereof, and any record thereby created, regardless of the manner in which the record has been stored") (emphasis added); *Citizens for Open Government v. City of Lodi* ("Lodi") (March 28, 2012) 205 Cal. App.4th 296, 309-311 (emails are part of CEQA administrative record).

[32] See Scope of Materials and E-Mails in the Administrative Record in CEQA and Other Writ Cases (May 7, 2014), available at https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=3&cad=rja&uact=8&ved=2ahUKEwis2p2Rr5XoAhUHrp4KHaijCr0QFjACegQIAhAB&url=http%3A%2F%2Fwww.cacities.org%2FResources-Documents%2FMember-Engagement%2FProfessional-Departments%2FCity-Attorneys%2FLibrary%2F2014%2FSpring-Conf%2F5-2014-Spring-Holly-Whatley-Scope-of-Materials-and.aspx&usg=AOvVaw3PTVTt9nGgjWKTIevfZqTv (last visited 3/12/20).

[33] See 1/7/20 email exchange between P. Vollmann and L. LeLe attached hereto.

[34] See Dudley Declaration, Exhibit B.

was reviewed by the City Zoning Manager prior to the 4:00 p.m. deadline, on March 2, 2020. The City was therefore on notice of EBRRD's Appeal submission, and had the Appeal documents in its possession, before the appeal deadline passed. The City cannot argue that the substantive components supporting the merits of the Appeal were not received before the deadline.

The only component of EBRRD's Appeal that was not received by the City by 4:00 pm on March 2, 2020 was EBRRD's check for the Appeal fees. Due to the courier's mistake, the check for the Appeal fees was not delivered until the following morning. EBRRD's courier's failure to timely arrive with the check for the Appeal filing fees was harmless error and an extrinsic mistake that should not preclude the City from finding EBRRD's Appeal to be timely.

In *Rappleyea v. Campbell* (1994) 8 Cal.4th 975 ("*Rappleyea*"), the California Supreme Court overturned a default judgement, and granted equitable relief under the doctrine of extrinsic mistake, for a similar situation in which a litigant timely filed a court document, but failed to timely pay the filing fee. The error initially led to a default judgment against defendants of over $200,000.[35] On appeal, the Supreme Court reversed the default, holding that 1) a mistake was made that led to unintended consequences of failure to timely pay the filing fee; 2) that the underlying case had merit; and 3) the moving party showed diligence in correcting the mistake.[36] The holding in *Rappleyea* is consistent with judicial policy which favors cases being resolved on their merits.[37]

Here, the City was notified by EBRRD's timely electronic submission that the Appeal fees were in the process of being delivered to Mr. Vollman's office. There was therefore no surprise, and no harm, to the City or the Project Applicant in receiving the Appeal check and the hard copy version of EBRRD's Appeal the following morning, since they already knew it was coming. The late arrival of EBRRD's courier at the Planning Department at 4:50 pm was the result of an inadvertent, extrinsic mistake by the courier service. It was not due to any fault of EBRRD or its legal counsel, who provided the courier with the correct 4:00 pm delivery deadline. There is no dispute that EBRRD's Appeal raises meritorious issues related to the City's compliance with CEQA, which EBRRD has a right to raise under State law. Finally, EBRRD diligently attempted to correct the courier's

[35] *Id.* at p. 978.
[36] *Id.* at pp. 981–982.
[37] *Id.*

mistake by promptly providing the Appeal fees to the City as soon as the Planning Department opened the following day. Moreover, the City failed to demonstrate any prejudice from receiving EBRRD's check for the Appeal filing fees at 8:00 a.m. on March 3, 2020, as opposed to 4:00 p.m. on March 2, 2020, which is in stark contrast to the significant prejudice that EBRRD will suffer from the City's erroneous rejection of its Appeal. Under *Rappleyea*, the City should consider the late delivery of the Appeal fees to be harmless error and extrinsic mistake, and must deem EBRRD's Appeal to be timely filed.

Accordingly, based on the plain language of the Oakland Planning Code, EBRRD substantially complied with the Code requirements to file its Appeal with the Planning Department.[38] The Planning Director's decision to reject EBRRD's March 3, 2020 delivery of duplicate hard copies of the Appeal documents and the Appeal filing fees constituted error and an abuse of discretion.

C. The City Should Provide Relief Consistent with CCP 473.

The City has not promulgated standards for evaluating staff or Director decisions to reject a filing and dismiss an appeal of a planning decision on procedural grounds. However, the California courts have provided guidance at CCP 473. CCP 473, subdivision (b) provides that "[t]he court may, upon any terms as may be just, relieve a party or his or her legal representative from a judgment, dismissal, order, or other proceeding taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect." The City should evaluate the decision of its Director and staff under this guidance.

i. Standard under CCP 473

The California Supreme Court articulated the rule for interpreting CCP 473 in *Elston v. City of Turlock* (1985) 38 Cal.3d 227 (*"Elston"*) [39] and *Zamora v. Clayborn Contracting Group, Inc.* (2002) 28 Cal.4th 249 (*"Zamora"*). In both cases, the Court found excusable mistake and granted relief from default or dismissal.

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[38] *See e.g. Davis v. Allstate Ins. Co. (*1989) 217 Cal. App. 3d 1229, 1231 (service of summons and complaint not invalid because of defects that do not impair timely notice to defendant).
[39] Superseded by statute on other grounds.

Under *Zamora, Elston* and following cases in the CEQA and land use context, the courts found excusable mistake where: 1) the mistake was "reasonable," defined as a mistake that anyone could make, even when exercising due care; 2) the attorney was diligent by within the CCP 473 timeline; and 3) there was no prejudice to the opposing party or to their case. Excusable mistake was found even where third parties (including staff under the direction and supervision of the attorney) made the error, because staff failed to follow explicit instructions or office procedures.

In *Zamora,* the attorney's legal assistant inserted a typographical error into a settlement offer. The attorney had given the legal assistant instructions by phone and authorized his assistant to send out the documents on his behalf, but did not review them. As a result of the error, the offer stated that Zamora was to pay Clayborn, although what had been previously agreed to was that Clayborn was to pay Zamora.[40]

In analyzing the first factor, "whether the attorney's mistake or inadvertence was excusable, the court inquires whether a reasonably prudent person under the same or similar circumstances might have made the same error."[41] The Court then stated that the moving party must be "diligent," which the Court defined as seeking relief within CCP 473's statutory timeline. The Court also considered "if no prejudice to the opposing party will ensue."[42]

The Court concluded that the error was excusable because it was "a clerical or ministerial mistake that could have been made by anybody. While counsel's failure to review the document before sending it out was imprudent, we cannot say that his imprudence rendered the mistake inexcusable under the circumstances."[43]

That the mistake had been made by a staff member (third party) was *not* a bar to granting relief. "Indeed, appellate courts have routinely affirmed orders vacating judgments based on analogous mistakes made by an attorney *or his or her staff.*"[44]

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[40] *Zamora, supra,* 28 Cal.4th at p. 253.
[41] *Id.* at p. 258, internal citations and quotations omitted.
[42] *Id.* at pp. 258-259.
[43] *Id.* at p. 259.
[44] *Ibid.* and citing *Romadka v. Hoge* (1991) 232 Cal.App.3d 1231 (attorney mistakenly checked box for "with prejudice" instead of "without prejudice"); *Bergloff v. Reynolds* (1960) 181 Cal.App.2d 349,

Elston concerned a personal injury suit by private litigant against a city, where an attorney failed to answer a set of admissions. The attorney's excuse was that he was not aware of the request for admissions, as the office had recently become short-staffed and so the admissions had been misplaced. The city moved to have all the allegations deemed admitted. In granting relief to Elston, the Court analyzed the facts under the three-factor test stated above. The Court also stated that CCP 473 "is often *applied liberally*" where the party is diligent and the opposing party will not suffer prejudice; moreover, "the law strongly favors trial and disposition on the merits, any doubts in applying section 473 must be resolved in favor of the party seeking relief from default."[45]

ii. CCP 473 applied to CEQA and Land Use Cases

The standard set by the Court has been applied in the CEQA and land use context. These cases strengthen the presumption that relief should be granted here, as CEQA cases involve the health, safety and welfare of the entire community.

In *McCormick v. Board of Supervisors* (1988) 198 Cal.App.3d 352 ("*McCormick*"), the petitioner filed a claim under CEQA. Although the petitioner failed to file the required request for a hearing within CEQA's statutory deadline, the court granted relief from dismissal. The court stated the basic rule above, and also based its finding on the public policy underlying CEQA claims, stating *"we cannot overlook the fact that the proceeding below involves not merely a dispute between private litigants. CEQA proceedings concern the whole community and involve the health, welfare and safety of the public at large. ... The forfeiture of a hearing on the merits deprives not only the petitioners, but all citizens, of judicial resolution of the controversy concerning the project and its effects on those who live and work in the community.*[46]

In *Comunidad en Accion v. Los Angeles City Council* (2013) 219 Cal.App.4th 1116 ("*Comunidad*"), the petitioner also failed to timely file a notice requesting a hearing under CEQA and sought relief under CCP 473. The Court overturned the

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358–359 (associate misinterpreted instructions and gave wrong information at a hearing); *Alderman v. Jacobs* (1954) 128 Cal.App.2d 273, 275–276 (secretary lost document).

[45] *Elston, supra,* 38 Cal.3d 227, 233, internal citations omitted.

[46] *McCormick, supra,* 198 Cal.App.3d at p. 362 and citing *Emmington v. Solano County Redevelopment Agency* (1987) 195 Cal.App.3d 491, 503 and *Concerned Citizens of Costa Mesa, Inc. v. 32nd Dist. Agricultural Assn.* (1986) 42 Cal.3d 929, 936, 231, internal quotations omitted, emphasis added.

dismissal. The petitioner's excuse was that he simply failed to calendar the deadline, and the error was compounded by being distracted and out of town due to a family emergency.

The court reiterated the test under CCP 473 and stated that it "cannot be disputed that Comunidad's counsel was diligent in prosecuting this case and the motion for relief was filed a week after the hearing request, well within a reasonable time. Nor can it reasonably be argued respondents would have suffered prejudice from Comunidad's one-week delay in requesting a hearing as respondents successfully sought extensions to prepare the administrative record, which was not ready at the time Comunidad requested a hearing."[47]

The *Comunidad* court also reconciled competing public policies under CEQA and CCP 473: "the strong preference for a trial on the merits and the policy favoring expeditious review of CEQA challenges."[48] Notwithstanding CEQA's policy favoring expedited review, CEQA does not bar relief under CCP 473.[49]

A holding in recent case arising in Oakland, where the court found that relief was not appropriate under CCP 473, is distinguishable. In *McClain v. Kissler* (2019) 39 Cal.App.5th 399 ("*McClain*"), the Second District Court of Appeals found against the moving party under CCP 473, but in very different circumstances than here. In *McClain*, the defendant, Kissler, failed to answer the complaint despite a Minute Order from the court ordering her to comply. The court found that the trial court did not abuse its discretion in denying relief where the trial court, whose duty it is to weigh evidence, found that Kissler's error was "knowing and deliberate" and her assertion that she misunderstood the court's Minute Order was not "credible."[50]

Here, EBRRD has submitted three signed declarations, attesting to the same basic facts, supporting the assertation that our claims here are credible. Nor did EBRRD knowingly or deliberately ignore the City's instructions to file by 4:00 pm. The opposite is true. EBRRD acted with good-faith to comply, as particularly evidenced by counsel's emails to Mr. Vollmann, asking instructions on what documents needed to be printed and subsequent attempt refile the Appeal.

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[47] *Comunidad, supra,* 219 Cal.App.4th at p. 1133.
[48] *Id.* at pp. 1131–1132.
[49] *Ibid.*
[50] *McClain, supra,* 39 Cal.App.5th at pp. 404–405, 417-418.

iii. The City should provide relief consistent with CCP 473.

Applying these standards here, any mistake by EBRRD's courier in delivering the Appeal documents to the Planning Department after 4:00 pm on March 2, 2020 was excusable, because any reasonable person would have relied on the statements of its legal courier service stating that the Appeal was in process for timely deliver, consistent with EBRRD's express instructions: EBRRD's counsel had informed County Legal of the filing deadline; EBRRD's counsel was informed repeatedly by County Legal that there were no issues or concerns with the delivery; and EBRRD was told that the Appeal and related documents were out for delivery at 3:30 pm. Any reasonable person would rely on these representations, made by a professional legal courier service. As the courts have found, when staff fail to follow express instructions, an ensuing mistake can be deemed "excusable."

EBRRD was also diligent in seeking relief in several ways. First, EBRRD has diligently represented itself and its members in all stages of the administrative proceeding below, by filing a comment letter and multiple requests for documents under the Public Records Act. EBRRD was diligent in correcting its mistake by instructing its courier to promptly re-deliver the Appeal the next morning, as soon as the Planning Department's office reopened. EBRRD has been further diligent, by filing this appeal within 10 days of the City's rejection.

The City has not alleged, nor could it, that it has suffered any prejudice by the untimely filing of the CEQA Appeal, for several reasons. First, the Zoning Manager opened EBRRD's email at 3:30, before the deadline. Second, Mr. Vollmann was in communication with EBRRD starting that morning, and so was aware that EBRRD was filing the CEQA Appeal; thus, the City cannot claim that it was surprised that an Appeal was filed.

Third, the CEQA Appeal reiterates all of our previous arguments that were made below, because appeals from these approvals are not de novo. This is even a stronger set of facts that under *Elston,* where the opposing party would not know what the other party may admit or deny. Fourth, per the Oakland Planning and Municipal Codes, appeal hearings for these approvals are noticed seventeen days prior to the hearing. In other matters, the City has taken months to schedule an appeal. In this context, the passage of a few hours can hardly be taken as prejudicial.

Finally, a relief from dismissal of the appeal here is consistent with the court's liberal interpretation of CCP 473, in favor of moving party, so that cases can be tried on their merits, rather than resolved based on non-prejudicial procedural errors. This is particularly true, in CEQA disputes as here, where the moving party acts to protect the health, safety and welfare of entire community.

D. Extrinsic Mistake

EBRRD would also be entitled to relief under the equitable remedy of "extrinsic mistake, "a term broadly applied when circumstances extrinsic to the litigation have unfairly cost a party a hearing on the merits."[51]

In *Rappleyea v. Campbell* (1994) 8 Cal.4th 975 ("*Rappleyea*"), the California Supreme Court overturned a default judgement, and granted equitable relief under the doctrine of extrinsic mistake. The test set forth by the Court is if the party can show: 1) a mistake was made that led to unintended consequences; 2) that the case has merit; and 3) the moving party showed diligence in correcting the mistake, which is intertwined with an inquiry as to whether the other party would be prejudiced. This is consistent with judicial policy which favors cases being resolved on their merits.[52] The Court noted that this a separate basis for relief, independent of CCP 473.[53]

In *Rappleyea* the clerk's office had misadvised defendants' informal counsel as to the correct filing fee. The clerk's error led to a default judgment against defendants of over $200,000.[54]

The first element of the extrinsic mistake doctrine was satisfied because the clerk never intended for a default to occur when he committed a "ministerial action" and provided the wrong information.[55]

Second, the court found that the case had merit. "Moreover, the answer did deny, admit, or otherwise respond to the allegations. And the Arizona lawyer who informally aided defendants declared under oath that he believed these Defendants

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[51] *Rappleyea, supra,* 8 Cal.4th at p. 981.
[52] *Id.* at pp. 981–982.
[53] *Id.* at p.986 (noting that the moving part did not file for relief within CCP 473's statutory deadline, so relief under that statute was not available).
[54] *Id.* at p. 978.
[55] *Id.* at p. 983.

have a very good (and certainly a justiciable) defense to the Plaintiff's claim. On the combined strength of these facts, we believe defendants have sufficiently shown merit."[56]

The third element, a showing of diligence, is intertwined with prejudice. "If heightened prejudice strengthens the burden of proving diligence, so must reduced prejudice weaken it. Under that view, and given this record, we believe defendants have sufficiently shown diligence."[57] For example, opposing counsel repeatedly told the moving party that he would stipulate to allow the moving party to file.[58]

Here, as with the clerk's error, the mistake was a ministerial error made by a third party. Second, EBRRD can show merit, as our CEQA Appeal properly alleged that the City abused its discretion and failed to support its findings with substantial evidence. Third, the City cannot demonstrate prejudice, as discussed above.

III. CONCLUSION

The Planning Director's decision to reject EBRRD's Appeal as untimely was an abuse of discretion and in error. The Planning Commission should vacate this decision, and direct Planning Department staff to accept the Appeal, so that this matter may be heard by the Planning Commission and evaluated on its merits.

Sincerely,

Sara Dudley

SFD:ljl

[56] *Ibid.*, internal citations and quotations omitted.
[57] *Id.* at pp. 978-979.
[58] *Id.* at pp. 983–984.

Christina Caro

From: Sara F. Dudley
Sent: Tuesday, January 7, 2020 4:02 PM
To: Christina Caro
Subject: FW: Comments - 88 Grand Avenue Project (4782)

From: Vollmann, Peterson <PVollmann@oaklandca.gov>
Sent: Tuesday, January 7, 2020 4:00 PM
To: Lorrie J. LeLe <ljlele@adamsbroadwell.com>; rmerkamp@oakland.ca.gov; Mulry, Brian <BMulry@oaklandcityattorney.org>
Cc: Sara F. Dudley <sdudley@adamsbroadwell.com>
Subject: RE: Comments - 88 Grand Avenue Project (4782)

Yes, I received it.

Peterson Z. Vollmann | Planner IV | City of Oakland | Bureau of Planning | 250 Frank H. Ogawa, Suite 2114 |Oakland, CA 94612 | Phone: (510)238-6167 | Fax: (510)238-4730 | Email: pvollmann@oaklandca.gov | Website: https://www.oaklandca.gov/

From: Lorrie J. LeLe [mailto:ljlele@adamsbroadwell.com]
Sent: Tuesday, January 7, 2020 3:54 PM
To: rmerkamp@oakland.ca.gov; Vollmann, Peterson <PVollmann@oaklandca.gov>; Mulry, Brian <BMulry@oaklandcityattorney.org>
Cc: Sara F. Dudley <sdudley@adamsbroadwell.com>
Subject: RE: Comments - 88 Grand Avenue Project (4782)

Following up to make sure you received our comments from yesterday by email.

Thank you,

Lorrie LeLe
Legal Assistant
Adams Broadwell Joseph & Cardozo
520 Capitol Mall, Suite 350
Sacramento, CA 95814
ljlele@adamsbroadwell.com | Phone: 916. 444.6201 Ext. 10 | Fax: 916.444.6209 |

From: Lorrie J. LeLe
Sent: Monday, January 6, 2020 2:37 PM
To: rmerkamp@oakland.ca.gov; pvollmann@oaklandca.gov; bmulry@oaklandcityattorney.org
Cc: Sara F. Dudley <sdudley@adamsbroadwell.com>
Subject: Comments - 88 Grand Avenue Project (4782)

Please find attached Comments submitted on behalf of Oakland Residents for Responsible Development regarding the 88 Grand Avenue Project (PLN 18-406). The original will be hand-delivered today.

If you have any questions, please contact Sara Dudley directly.

Thank you,

Lorrie LeLe
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