BURTON APPEAL OF PLANNING COMMISSION'S DECISION TO AFFRIM COMMUNITY DEVELOPMENT DIRECTOR'S APPROVAL OF THE FOUR-STORY HIGHROSE LUXURY APARTMENTS WITH HIGH CEILINGS AND OCEAN VIEWS

As a resident and taxpayer in the City of Manhattan Beach, I, Mark Burton (Appellant), do hereby appeal the decision of the City of Manhattan Beach's Planning Commission, affirming the Community Development Director's approval of the Highrose El Porto, LLC (Applicant) application for a coastal development permit, to the City Council.

Facts

The coastal development permit under consideration is for a four-story, 79-unit, luxury apartment building, with high ceilings and ocean views at the corner of Highland Avenue and Rosecrans Boulevard in the North End Commercial Zone ("Project").

The Project involves two adjacent parcels located at Highland Avenue and Rosecrans Boulevard, with this intersection being a primary point of ingress and egress for the residents of Manhattan Beach, the South Bay, and others. This northeast corner of Highland Avenue and Rosecrans Boulevard is the most significant commercial property location in the North End Commercial Zone. In fact, it is the premier commercial property location in this commercial zone.

Directly under, over or adjacent to the Project are active Chevron combustible fuel lines and an active Chevron large combustible fuel storage tank farm, NRG active high voltage wires and NRG active combustible natural gas fuel line, and an expanding plume of hazardous waste. Simply put, these two adjacent parcels are the most

environmentally and safety-challenged imaginable in our City for any development.

Since these two parcels were first developed, the "uses" have only been commercial "uses," with restaurants, retail, or office, that benefited the surrounding neighborhood and our community. One parcel has a restaurant that was built in 1971 and the other parcel has an office building that was built in 1977. It is noteworthy that prior to the building of the restaurant in 1971 and office building in 1977, these two parcels were owned by Chevron and leased for oil and gas drilling purposes. Both parcels are zoned "MNCNE", or North End Commercial. Further, the height of these buildings has always been two-story only. Such two-story height is consistent with the building heights throughout the surrounding area. In fact, from the intersection of Highland Avenue and Rosecrans Avenue, two-story building heights are visible in all four directions.

The El Porto Area has the highest residential density in the City. Despite the density, most buildings are low-profile structures. Before El Porto was annexed by the City from the County in 1980, the two parcels were commercial uses, as they are today.

Thus, the Project is out of character, in height, intensity and use.

<u>Summary of Argument</u>

1. ***This Project is in direct conflict with our City's General Plan, its vision, several of its overarching principles and the several specific goals set forth therein.***

2. ***This Project is in direct conflict with our City's Land Use Element, and several of its goals and polices set forth therein.***

3. ***This Project is in direct conflict with our City's Housing Element, 5th Cycle, and its primary goal and policy set forth therein.***

4. ***City Council may lawfully deny this application for a coastal development permit and/or require a full CEQA analysis.***

<u>Argument</u>

1. ***<u>This Project is in direct conflict with our City's General Plan, its vision, several of its overarching principles and the several specific goals as set forth therein.</u>***

"The Manhattan Beach General Plan identifies the community's vision for its collective future and establishes the fundamental framework to guide decision-making about development, resource management, public safety, public services, and general community well-being." In essence, it is our City's constitution for land use, development, and planning.

The General Plan sets forth "Our Vision for Tomorrow" with seven overarching principles that are the foundation of the General Plan and are embodied in every goal and policy in the General Plan. The Project is in direct conflict four of the seven overarching principles:

- The Project does not maintain a small-town community feel that preserves the unique characteristics of the surrounding neighborhood. See Principle #1. In fact, the Project's height and use will forever destroy any small-town community feel and the special characteristics of the surrounding neighborhood and our community. The Project would be an absolute blight to the surrounding neighborhood.

- The Project does not maintain the vibrant commercial areas throughout the City with businesses meeting the desired needs of the community. See Principle #3. In fact, the Project forever destroys the premier commercial property location in the North End Commercial Zone, eliminates commercial properties that serve the adjacent neighborhood, and creates "dead space" in an area that should join El Porto with North Manhattan Beach. All commercial vibrancy will be lost forever at that location.

- The Project does not safeguard picturesque vistas of the ocean. See Principle #5. In fact, the Project has the grotesque size and mass that will forever blot out the picturesque vistas of the ocean.

- The Project does not create a sense of community that bonds residents together, thus making a stronger, better Manhattan Beach. See Principle #6. In fact, the Project divides forever El Porto and North Manhattan Beach, creates a "dead space" in an area that should join El Porto and North Manhattan Beach, and denies the surrounding neighborhood and community necessary commercial services. The Project doesn't bond residents together, it divides residential neighborhoods.

2. ***<u>This Project is in direct conflict with our City's Land Use Element, and several of its goals and polices set forth therein.</u>***

In the City's General Plan, the Land Use Element guides the development of property with the desire to maintain Manhattan Beach as a city with a small-town feel. To that end, the Land Use Element provides goals and polices to assist in making development decisions. Goals are overall statements of community desires and consists of statements of purpose or direction with policies providing guidance to City staff in their review of development proposals.

In the City's Land Use Element primacy importance is given to our small-town character. "Manhattan Beach values its small-town atmosphere…Low-profile, human-scale development that not only promotes a sense of neighborhood and community among residents and businesses...". Further, the Land Use Element recognizes that "Excessively large structures that are tall and bulky…can produce streetscapes that are aesthetically overbearing."

The Land Use Element provides that the North End Commercial Zone has commercial uses limited to a small-scale, low-intensity, neighborhood serving service businesses, retail stores and offices.

The Project is in direct conflict with the most important Goals and Policies of the Land Use Element:

- The Project does not maintain the low-profile development and small-town atmosphere as set forth in Goal LU-1. In fact, the Project is the ultimate antithesis of that goal. The Project is repugnant to our low-profile development and small-town atmosphere.

- The Project does not limit the height to two stories and does not preserve the low-profile image as set forth in Policy LU-1.1. In fact, the Project is the ultimate antithesis of that goal. The Project is just so grossly out of scale and proportion, with heights soaring to 4 stories.

- The Project does not maintain the viability of the commercial areas in Manhattan Beach as set forth in Goal LU-6. In fact, the Project forever destroys the premier commercial property location in the North End Commercial Zone. Further, the Project ignores the North End Commercial Zone, and the fact that the parcels south of 38th Street are for commercial only. These

parcels have always been for commercial uses. And, specifically, the Project's two parcels have always been zoned commercial, with commercial uses. It is a tragedy for the City to lose this premier commercial property location.

- The Project does not support small businesses, does not encourage a diverse mix of businesses, does not recognize the need for a variety of commercial development types, and does not recognize the unique qualities of mixed-use areas as set forth in Policy LU-6.1, LU-6.2, LU-6.3 and LU-6.4. In fact, the Project ignores the North End Commercial Zone, and the fact that the parcels south of 38th Street are for commercial only. These parcels have always been for commercial uses. The Northeast corner of Highland Avenue and Rosecrans Boulevard presents such a unique and wonderful development opportunity with a diverse mix of businesses to serve the adjacent neighborhood, or a mix use development that would connect and support El Porto and North Manhattan Beach. Instead, the Project ignores all these policies to create a "dead zone".

- The Project does not preserve the low-intensity, pedestrian-orientated character of commercial areas in the North End and El Porto as set forth in Goal LU-9. In fact, the Project forever destroys the premier commercial property location in the North End Commercial Zone. Further, the Project ignores the North End Commercial Zone, and the fact that the parcels south of 38th Street are for commercial only. These parcels have always been for commercial uses. And, specifically, the Project's two parcels have always been zoned commercial, with commercial uses. The Northeast Corner of Highland Avenue and Rosecrans Boulevard, and these two parcels, would be ideal for a commercial or mixed-use development that would not only preserve, but enhance, the low-intensity, pedestrian-orientated character of North End and El

Porto. In fact, such development would serve to bridge these two commercial areas and neighborhoods.

- The Project does not provide zoning regulations that encourage neighborhood-oriented businesses within the North End Commercial Zone as set forth in Policy LU-9.1; does not continue to improve the aesthetic quality of businesses in North End and El Porto as set forth in Policy LU-9.3; and does not recognize the unique qualities of mixed-use development and balance the needs of both commercial and residential uses as set forth in Policy LU-9.7.

3. ***This Project is in direct conflict with our City's Housing Element, 5th Cycle, and its primary goal and policy set forth therein.***

The City's Housing Element recognizes that the General Plan "protects the mix of multi-family and commercial development presently existing in the El Porto area. And, in the North End Commercial Zone, the City's Housing Element states that commercial uses are limited to small-scale, low-intensity neighborhood businesses and that residential uses are conditionally allowed at high density residential, District 4, with limits on heights. The Project is in direct conflict with the Housing Element's most important Goal and Policy:

- The Project does not preserve existing neighborhoods as set forth in Goal I. In fact, the Project forever destroys the premier commercial property location in the North End Commercial zone, eliminates commercial properties that serve the adjacent neighborhood, and creates "dead space" in an area that should join El Porto with North Manhattan Beach. The El Porto neighborhood will never be the same.

- The Project does not preserve the scale of existing residential neighborhoods. As far as scale, the Project dwarfs any residential development in the entire City and it will set the precedent for up-zoning in our City.

4. ***City Council may lawfully deny this application for a coastal development permit and/or require a full CEQA analysis.***

California's density bonus law is a confusing, poorly drafted statute…". League of California Cities, 2016 Annual Conference, City Attorneys Track. This law is currently subject to a great deal of uncertainty. As such, we can expect this law will be clarified by the courts in the coming years.

The questions raised by the density bonus law are many and varied. A few of these questions of interpretation come into play in this hearing regarding the Project. For instance, questions of legislative intent, zoning, approval process review standards, environmental or safety concerns that might support a denial of an application or height concession, the application of CEQA, and the extent of any State preemption, to name a few.

As we all know, since California became a State, land use and zoning laws and regulations were under the local control of cities. You might say these decisions were "the bread and butter" of local city councils. In many instances, it was the most important business of a city and its council. After all, local land use and zoning defined a city's character.

In the past few years, the State has very aggressively attempted to preempt a city's local control of land use and zoning matters under the guise of a housing shortage. This preemption is sometimes referred to

as the “new preemption”, a term sometimes that refers to the abuse of preemption.

The California Supreme Court limits preemption to situations where the law not only addressed a matter of statewide concern, but also is “reasonably related” to the state concern and “narrowly tailored” to avoid unnecessary interference with local governance. It could be argued that the density bonus law and several other housing laws do not meet this test. Especially since the State recently changed the formula they had used for over thirty years to calculate housing needs, that resulted in the RHNA for SCAG skyrocketing from 400,000 to 1.3 million in the seven So. Cal. Counties. At the same time, SCAG changed the approach they had used for over thirty years for how to they assigned those 1.3 million housing units, that resulted in the City of Manhattan Beach’s RHNA skyrocketing from 38 to over 700.

What SCAG did in its approach is contrary to market forces. Today, more people are moving out of Los Angeles County and more people are moving into Riverside, San Bernardino, Imperial, and other So. Cal. Counties that have abundant and affordable land. Rather than assign the 1.3 housing needs to these Counties to the east, as SCAG had done for thirty years, they assigned the bulk of the 1.3 million housing needs to built-out communities in the west, with no available space or affordable land.

So, you can see the State’s efforts really have very little to do with affordable housing, and everything to do with “up-zoning” where developers make more money. For example, the Project is using the density bonus law as a pretense to build the gargantuan 4-story, 79-unit, luxury Highrose Luxury Apartments, with high ceilings and ocean views.

The State's "up-zoning" strategy was first developed in 1978 by Governor Jerry Brown. His administration authored "An Urban Strategy for California". In essence, all future population growth in the State should be in urban areas, in buildings with more and more height. When our State became a single party State, it was time to execute that "Urban Strategy". Sans the "density bonus" law, SB 9, and many others.
Recently, cities have begun to challenge these unfair State laws. You can expect more and more challenges in the coming years. When the State overreaches, destroying the character of small-town communities, the only recourse is the courts. You can also expect a revolt by California residents with Initiatives and other efforts to restore local control of land use and zoning to the cities, where it belongs. It is only a matter of time before it becomes so.

There are several significant legal challenges to the City's approval of the Project, and the Planning Commission's affirming that approval. This appeal is based on the following:

- The Project must comply with CEQA with a full CEQA analysis. In examining the several density bonus laws, only "an application for a subdivision pursuant to the Subdivision Map Act shall be exempt from the requirements of the California Environmental Quality Act…" and the San Francisco Bay Area Rapid Transit. See Government Code Section 65934.4, Housing Development Approvals. If you examine the legislative scheme and its history, it is clear that CEQA still applies to density bonus projects that would have been considered discretionary, or where a conditional use permit is required by local regulation. In fact, the density bonus law does reference "public health and safety" or the environment as a reason to deny a proposed density bonus incentive, concession, or waiver. It is eminently reasonable that a city would only become aware of such environmental or safety

concerns by conducting a full CEQA analysis. The State in drafting this density bonus law was aware of this fact as well. What the density bonus law does is use a "legal fiction" to classify some discretionary decisions as "ministerial" for purposed of a streamlined review, not CEQA. It is reasonable to conclude that for purposes of interpreting the density bonus law that decisions that would have been considered discretionary decisions remain discretionary for purposes of CEQA application. In enacting the density bonus law, the California Legislature could have amended CEQA if they intended that CEQA would not apply to a density bonus project.

- The Project's parcels are zoned commercial. For the first time in our City's history, the Project proposes that commercial use parcels be used for a residential use, with a four-story, 79-unit, luxury apartments with high ceilings and ocean views. The Project is in the North End Commercial Zone, with all the land south of 38th Street zoned commercial, and the uses in the area being commercial since the time the City annexed this property from the County in 1980. One parcel has a restaurant that was built in 1971 and the other parcel has an office building that was built in 1977. It is noteworthy that prior to the building of the restaurant in 1971 and office building in 1977, these two parcels were owned by Chevron and leased for oil and gas drilling purposes. Both parcels are zoned "MNCNE", or North End Commercial. As such, the Project does not qualify for a streamlined, ministerial approval process. See Government Code Section 65913.4. Therefore, the discretionary review standard should be used by City Council and a full CEQA analysis is required.

- The Council has the authority to require a full CEQA Analysis, and it certainly should. The California Environmental Quality Act is a comprehensive statutory scheme that requires cities to consider

the environmental consequences of the actions prior to approving a project. Directly, under, over and adjacent to the Project are active Chevron combustible fuel lines and an active Chevron large combustible fuel storage tank farm, and NRG active high voltage wires and active NRG combustible natural gas fuel lines, and an expanding plume of hazardous waste. The Project's two adjacent parcels are one of most environmentally and safety challenged imaginable in our City for any development. If ever a development needed a full CEQA analysis, this Project certainly does. The City Council has the inherent discretion under its police powers to require such a full CEQA analysis, to protect the safety and welfare of all regarding such open and obvious environmental and safety concerns. Also, with the Project's two commercial parcels being directly adjacent to a 100s year old oil refinery, it would be reasonable to assume the soils below have some contamination as well. Importantly, a CEQA analysis will permit Chevron and NRG to publicly disclose all the risks that they are privy to.

- The Project is appropriately subject to discretionary review. Whether a permit is ministerial or discretionary depends on the circumstances and such a determination should be made on a case-by-case basis. Protecting Our Water and Environmental Resources v. County of Stanislaus, (2020) 10 Cal. 5th 479; 14 CCR Sec. 15268. If you examine the CEQA Guidelines and other State and local regulations, it becomes clear the types of local government decisions that are discretionary and ministerial. Clearly, the process for the Project is discretionary, in every sense of the word, by its very nature. Importantly, the CEQA guidelines recognize that determining if a decision is ministerial or discretionary should be made on a "case by case" basis.

For all the reasons above, CEQA clearly applies to the Project.

Based on the foregoing, and incorporating by reference the several appeals before this City Council, I respectfully request that the City Council:

1. ***Deny the application for a coastal development permit for a four-story, 79-unit, luxury apartment project with 12.5-foot ceilings and ocean views.***

2. ***Remand the application for a coastal development permit for a four-story, 79-unit, luxury apartment project with 12.5-foot ceilings and ocean views to the Community Development Director with direction to require a full CEQA analysis.***

3. ***Remand the application for a coastal development permit for a four-story, 79-unit, luxury apartment project with 12.5-foot ceilings and ocean views to the Community Development Director and with direction to negotiate with the applicant for a public/private development agreement for an expanded development site to include the City owned parking lot, with such new development to be mixed use, with the height of the buildings to be two-story and include senior or low-income housing.***

4. ***Continue this hearing and direct the City Attorney to report back in a future closed session on all legal questions and issues raised during this hearing by the several appeals and identify all good faith legal arguments that could be raised by the City to oppose the Project.***

5. ***Direct the City Manager and City Attorney to report back to City Council with a plan to "take" the two parcels by the eminent domain, so that the City can develop the entire Northeast Corner of Highland Avenue and Rosecrans Boulevard to benefit the surrounding neighborhood and community. Such a plan for development shall be a mixed-use plan and include senior or low-income housing.***

<u>Closing Comments</u>

In closing, I have several comments that I believe are worth highlighting:

- I urge, no implore, this Council to assert any, and all, good faith arguments to deny this Project and/or order CEQA compliance. This Council can, and should, do so on behalf of our MB residents of today, and tomorrow. Make no mistake, the decision you make regarding this Project will be the established precedent for all "up-zoning" matters soon. Consistent with our General Plan's commitment to our low-profile character existing State and local law and regulations, this Project should be denied. To do so, you will need to exhibit strong leadership and courage. Two prior Manhattan Beach City Councils have done so, with the California Supreme Court agreeing with both of those Councils. Let this be your legacy as well.

- In this hearing, both the Applicant and the Appellants are entitled to due process, the same amount of due process, under the law. Therefore, I respectfully request that appellant(s) be provided sufficient opportunity to file a written reply to the City and Applicants response to all appeals. I don't think it's fair for the City staff who approved the project to write a Council report summarizing and responding to my appeal or the other appeals.

The proper order of a fair and impartial hearing calls for the Council to read the appeals, then the City's response and then the replies of the Appellants to the City's response. Then, and only then, can the hearing proceed. After all, it is the Appellants who bear the burden of proof in this hearing.

- Although I respect City staff and the public service they provide to our MB residents, the Applicant has publicly stated that the idea to develop the two parcels as density bonus residential project was City staff's idea. If so, City staff may have crossed the line from being independent evaluators of the application to advocates for the Project. If this bias does exist, it calls into question several aspects of the approval and appeals process. It is noteworthy that there were several delays in City staff approving the application that resulted in the hearing at the Planning Commission being scheduled on June 8, the day after the June 7 election.

- It is always prudent to assess risks of litigation. If the Council, acting in good faith, denies the application, or takes any action other than approving the Project, there is a risk that the Applicant may file litigation. Practically speaking, this risk is minimal or nil. The Applicant, and the Applicant's investors, have no interest in protracted litigation. More likely than not, litigation will not be filed or, if filed, would be settled in short order. It is possible that such a settlement may result a public/private development with the City and the Applicant that would include the two parcels and the City owned parking lot. Or the Applicant may enter negotiations with the City to buy the two parcels, providing the City the opportunity to develop the entire location of the Northeast Corner of Highland Avenue and Rosecrans Boulevard. On the other hand, if the Council were to ignore our General Plan, the significant environmental and safety concerns, fail to require a

full CEQA analysis, and ignore the several good faith legal arguments based on existing State and local law and regulations, then the exposure to protracted and complex litigation is likely. Clearly, from a risk management perspective, Council, at a minimum, should remand this application and order a full CEQA analysis. The possible risk to the health and safety of our residents, and future residents, and our community is just too great.

- The Council should set the hearing date as soon as possible, since these are the summer months with MB residents planning vacations. In that regard, I suggest you set Tuesday, August 2 for the hearing date and publicly notice that date and time well in advance. This provides sufficient time for the filing of the City's response and the Appellants reply, weeks prior to the actual date for the hearing, assuring due process and a fair and impartial hearing for both the Applicant and Appellants.

Respectfully submitted,

Mark Burton