



**CITY ATTORNEY'S OFFICE**

**Council Meeting Date: July 20, 2010**

**Staff Report # 10-102**

**Agenda Item: # D-4**

**CONSENT CALENDAR:** Consider approval of the Settlement Agreement and Release of Claims with respect to Concerned Citizens of Menlo Park v. City of Menlo Park, et al., San Mateo County Case No. CIV – 489417, regarding the property commonly known as 1300 El Camino Real, Menlo Park, CA.

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**RECOMMENDATION**

The City Attorney's office recommends that the City Council consider approval of the Settlement Agreement and Release of Claims ("Settlement Agreement") approved by the Petitioners and the Real Parties in Interest in the litigation entitled Concerned Citizens of Menlo Park v. City of Menlo Park, et al., San Mateo County Case No. CIV – 489417, regarding the property commonly known as 1300 El Camino Real, Menlo Park, CA.

**BACKGROUND**

In October 2009, the City of Menlo Park ("City") issued certain approvals for a development project located at 1300 El Camino Real ("Project"). In November 2009, the Concerned Citizens of Menlo Park ("Concerned Citizens") filed a Petition for Writ of Mandate and Complaint for Declaratory and Injunctive Relief ("Lawsuit") against the City and the Project developers Peter Pau, Sand Hill Property Company, and SHP Los Altos, LLC (collectively "Developer"). The parties have engaged in settlement negotiations and desire to settle the disputes and differences among them related to the Lawsuit in full and to cause the Lawsuit to be dismissed with prejudice.

**ANALYSIS**

The core of the Settlement Agreement is the parties' agreement that the Project shall be developed with two (2) additional limitations ("Project Development Restrictions"):

- (1) The maximum square footage for a grocery store(s) shall be Thirty Two Thousand (32,000) square feet of net rentable area.** For purposes of the Settlement Agreement, the Thirty Two Thousand (32,000) square foot limitation on grocery store(s) shall mean that (a) the Project may include one grocery store of up to Thirty-Two Thousand (32,000) square feet of net rentable floor area, and (b) in addition to the one allowed grocery store, no other tenant may dedicate more than fifteen percent (15%) of its retail sales floor space to the sale of non-taxable food or other non-taxable items. The limitation shall not apply to small-

scale, food retail stores dedicated to selling prepared, non-alcoholic beverages or bakery items (e.g., stores substantially similar in size and format to a Starbucks or Jamba Juice).

**(2) Self-checkout of alcohol sales shall be prohibited.**

If the City approves and executes the Settlement Agreement, the Agreement provides that the Community Development Director shall (1) approve the Project Development Restrictions as a "minor amendment" to the Project and (2) include the Project Development Restrictions in any future PD Permit for which Developer may apply.

In exchange for the addition of the Project Development Restrictions to the Project, the Concerned Citizens have agreed not to oppose the Project (or the Project as modified in the future), so long as it includes the Project Development Restrictions.

Any modification to the Project that removes the Project Development Restrictions shall be processed by the City as a "major amendment". Developer has agreed not to request a major amendment for five (5) years. However, if within the five-year period, Developer desires to request a major amendment, Developer must first attempt to meet with a representative of the Concerned Citizens (and pay Concerned Citizens attorney's fees for participating in such meeting). If no representative of the Concerned Citizens is available, Developer may request a major amendment. Nevertheless, the Concerned Citizens may oppose the major amendment.

The Settlement Agreement includes Developer paying the Concerned Citizens Thirty-Eight Thousand Dollars (\$38,000) as payment in-full for attorneys' fees and costs. With the exception of that payment, the parties are bearing their own costs and attorneys' fees, except that, Developer is responsible to pay for all City costs and fees associated with processing the Project and fees related to the Lawsuit and settlement.

**Next Steps**

The Settlement Agreement has already been signed by Concerned Citizens and Developer and is conditioned upon City Council approval within forty-five (45) days. If executed, all parties waive any and all future claims related to the Lawsuit and the Lawsuit will be dismissed with prejudice, meaning it cannot be re-filed.

**IMPACT ON CITY RESOURCES**

Because Developer is required to pay for the City's costs and fees related to the Lawsuit, there is no fiscal impact from the settlement itself. There may be an impact on the sales tax received by the City due to the Project Development Restrictions limiting grocery store space, however, the impact if any is uncertain.

**POLICY ISSUES**

There are no policy issues created by the settlement as the Project Development Restrictions are relatively minor.

## ENVIRONMENTAL REVIEW

The Settlement Agreement is exempt from the California Environmental Quality Act ("CEQA") pursuant to Section 15305 of the CEQA Guidelines.

A handwritten signature in black ink, appearing to read "William L. McClure", with a long horizontal flourish extending to the right.

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William L. McClure  
City Attorney

## ATTACHMENTS:

- A. Settlement Agreement and Release of Claims signed by Concerned Citizens and Developer.

## SETTLEMENT AGREEMENT AND RELEASE OF CLAIMS

This Settlement Agreement and Release of Claims ("Agreement") is made and entered into on this 23<sup>rd</sup> day of June, 2010, by and between Concerned Citizens of Menlo Park, a group of individuals ("Concerned Citizens"); Tony Alexander, individually and as the designated representative of Concerned Citizens; the City of Menlo Park and the City Council of the City of Menlo Park (collectively "City"), and Peter Pau, individually, and dba Sand Hill Property Company, and SHP Los Altos, LLC (collectively "Developer").

### RECITALS

1. Developer is the owner of that certain property located at 1300 El Camino Real in the City of Menlo Park ("Property").
2. On or about October 6, 2009, the City issued certain approvals ("Approvals") for a development project located on the Property ("Project").
3. On or about November 9, 2009, Concerned Citizens filed its Petition for Writ of Mandate and Complaint for Declaratory and Injunctive Relief, Case No. CIV-489417, in the Superior Court for the County of San Mateo naming the City as Respondents and Defendants and Developer as Real Parties in Interest. On or about November 16, 2009, Concerned Citizens filed its First Amended Petition for Writ of Mandate and Complaint for Declaratory and Injunctive Relief ("Lawsuit").
4. City and Developer have not filed an Answer to the Lawsuit, but the parties have engaged in settlement negotiations. The parties now desire to settle their disputes and differences among them related to the Lawsuit in full and to cause the Lawsuit to be dismissed with prejudice.

NOW, THEREFORE, in consideration of the foregoing recitals and the mutual covenants and conditions contained herein, the parties hereto agree as follows:

A. Payment to Concerned Citizens. Developer shall pay to Concerned Citizens the sum of Thirty-Eight Thousand Dollars (\$38,000.00) ("Settlement Sum") representing payment in-full for attorneys' fees and costs incurred by Concerned Citizens relating to the Approvals and in preparation and prosecution of the Lawsuit. The payment shall be made by check made payable to Concerned Citizens' counsel of record, Lippe Gaffney Wagner, LLP, and shall be delivered to Lippe Gaffney Wagner, LLP no later than five (5) business days after (i) this Agreement has been approved by the City Council, and (ii) the City's Community Development Director has approved the minor amendment to the development plan for the Project specified in Part B and Exhibit 1 of this Agreement, whichever occurs last. Within two (2) court days following receipt of the Settlement Sum, Lippe Gaffney Wagner, LLP shall cause to be filed a Request for Dismissal with Prejudice of the entire Lawsuit.

B. Limitations on Project. The parties acknowledge that under the Approvals, various categories of commercial uses are allowed as part of the Project. Notwithstanding the flexibility allowed under the Approvals, the parties hereto agree that the Project shall be developed with the following additional two (2) limitations, which shall be binding upon Developer and City: (a) the maximum square footage for a grocery store or grocery stores shall be 32,000 square feet of net rentable area; and (b) self-checkout of alcohol sales shall be prohibited. These two (2) restrictions shall be collectively referred to as the "Project Development Restrictions." By executing this Agreement, Developer requests and, upon execution of this Agreement by all parties, the City's Community Development Director shall 1) approve as a "minor amendment" to the Approvals, an amendment to Table 3.1 of the development plan approved by the City as shown in Exhibit 1 to this Agreement, and 2) include the Project Development Restrictions in any future PD Permit for which Developer may apply. For purposes of this Agreement, the 32,000 square foot limitation on grocery store(s) shall mean that (i) the Project may include one grocery store of up to Thirty-Two Thousand (32,000) square feet of net rentable floor area, and (ii) in addition to the one allowed grocery store, no other tenant may dedicate more than 15% of its retail sales floor space to the sale of non-taxable food or other non-taxable items. The foregoing restrictions on allowable floor space for grocery sales shall not apply to small-scale, food retail stores dedicated to selling prepared, non-alcoholic beverages or bakery items (e.g., stores substantially similar in size and format to a Starbucks or Jamba Juice).

C. Covenant Not to Oppose Project. Concerned Citizens and Tony Alexander, individually and as the designated representative of Concerned Citizens, hereby represent and warrant that if Developer proceeds to develop the Project under the existing Approvals subject to the Project Development Restrictions, they will not oppose by themselves as individuals, or as a group, in person or through proxies, either formally or informally, including in meetings, discussions or communications with City staff, Planning Commissioners and/or Council Members, such development of the Project (including all further entitlements or permits necessary or convenient to such development that may be applied for from City or any other public agency or entity) or file any legal action related thereto. Tony Alexander and Concerned Citizens understand and acknowledge that this warranty and representation of no opposition applies to any modification of the Project that may add or modify a residential component thereof, or is otherwise consistent with the Approvals' general terms, so long as such modifications do not otherwise alter either of the Project Development Restrictions.

D. The parties acknowledge that a request could be made in the future by the Developer or its successors to pursue a different project that may not include one or both of the Project Development Restrictions. The parties agree that any such request shall be treated by the City as a major amendment, and Developer further agrees that no such request shall be made within five (5) years of the date of this Agreement first above written. At any time during said five-year period, Tony Alexander (or another authorized representative of Concerned Citizens in the event of Tony Alexander's inability to attend such a meeting) shall make himself available upon reasonable notice for a face-to-face meeting with Developer or its successors to engage in good faith

discussions concerning such possible request. Upon demand, Developer shall pay reasonable attorneys' fees actually incurred by Tony Alexander or other representative of the Concerned Citizens in connection with such meeting, not to exceed Two Thousand Dollars (\$2,000) per meeting. In the event Tony Alexander does not make himself or another authorized representative of the Concerned Citizens available for a meeting and as a result such meeting does not actually occur within thirty (30) days of Developer's written request, this five-year restriction shall be deemed null and void. If the thirty (30) day period elapses with no response from Tony Alexander or another authorized representative of the Concerned Citizens, then the Developer may move forward with seeking City review and approval of its request to modify or remove one or both of the Project Development Restrictions. The Parties agree that the restriction on opposition in this Agreement, by definition, applies only to the Approvals as modified by the Project Development Restrictions. Accordingly, if the Developer applies to the City to modify or remove one or both of the Project Development Restrictions, the foregoing restriction on opposition shall not apply to such a proposal.

E. Release of Claims. Effective upon the execution of the Agreement by all parties, the City's Community Development Director's approval of the "minor amendment" referenced in Part B and Exhibit 1 to this Agreement, and receipt by Lippe Gaffney Wagner, LLP of the Settlement Sum, and except as set forth herein, Tony Alexander and Concerned Citizens, on behalf of himself and itself and its members, and his/its successors, assigns and representatives, hereby releases and forever discharges City and Developer, and their respective successors, assigns, agents, employees, representatives, insurers, partners, heirs, and attorneys, of and from any and all claims, controversies, damages, causes of action, liabilities, obligations, costs, losses or demands of any nature whatsoever, whether for compensatory or punitive damages or any other relief or compensation, whether known, unknown, suspected or unsuspected, arising out of or connected with the facts, transactions, or occurrences described in, or relating to, the matters and claims set forth, or that could have been set forth in the Lawsuit, existing at any time up to and including the date of full execution of this Agreement. Likewise, City and Developer on behalf of themselves and their respective successors, assigns, agents, employees, representatives, insurers, partners, and heirs, hereby release and forever discharge Tony Alexander and Concerned Citizens and its members, successors, assigns, representatives and attorneys, of and from any and all claims, controversies, damages, causes of action, liabilities, obligations, costs, losses or demands of any nature whatsoever, whether for compensatory or punitive damages or any other relief or compensation, whether known, unknown, suspected or unsuspected, arising out of or connected with the facts, transactions, or occurrences described in, or relating to, the matters and claims set forth, or that could have been set forth, in the Lawsuit, existing at any time up to and including the date of full execution of this Agreement.

F. Agreement Subject to City Council Approval. This Agreement is conditioned upon City Council approval of the Agreement within forty-five (45) days of full execution by the Concerned Citizens, Tony Alexander, and Developer.

G. Fees and Costs. Except as set forth herein, each party shall bear his/her/its own costs and attorneys' fees. Notwithstanding the foregoing, Developer acknowledges that it is responsible to pay for all City fees and costs associated with processing the Project and related to the Lawsuit.

H. Covenant Against Future Actions. The parties hereto covenant and agree never to commence or prosecute any action or other proceeding based on any of the matters that have been released pursuant to the terms of this Agreement, including without limitation, any administrative or regulatory proceeding or complaint directed to any governmental or quasi-governmental agency or to any other forum or tribunal. Nothing in this Agreement bars the parties from enforcing the terms of this Agreement.

I. Reliance on Own Judgment. The parties to this Agreement understand and accept the risk that facts with respect to which this Agreement is executed may later be found to be different from the facts now believed to be true and each party hereto is relying on its own judgment in entering into this Agreement. This Agreement shall be and shall remain effective despite any such difference, except as to any representation expressly made in this Agreement.

J. Authority to Bind Concerned Citizens and its Members. By signing this Agreement Tony Alexander hereby expressly represents and warrants that there has been a meeting of Concerned Citizens at which the terms of this Agreement have been approved, that no other signatures, approvals, or consents are required in order for this Agreement to be effective for all purposes as against Concerned Citizens and the individual members thereof, and that Tony Alexander has been designated by Concerned Citizens as its representative with the authority to (a) execute this Agreement on behalf of Concerned Citizens, (b) bind Concerned Citizens to the terms hereof, and (c) carry out the terms hereof on behalf of Concerned Citizens.

K. Binding Effect. The parties to this Agreement expressly covenant and agree that this Agreement shall inure to the benefit of, and be binding upon, their respective heirs, successors and assigns.

L. Execution of Documents. The parties to this Agreement agree to execute any and all documents reasonably necessary to effectuate the terms, conditions, purposes, and aims of this Agreement.

M. Understanding of Agreement. The parties hereto each affirm and acknowledge that they have read this Agreement and have had the opportunity to have it fully explained by counsel of choice, that they fully understand and appreciate the words and terms used in this Agreement, as well as the effect of those words and terms, and further understand that this is a final compromise, release, and settlement of the matters released herein. Each party, or its attorney, has carefully and fully reviewed this Agreement and has revised, or has had the opportunity to revise, this Agreement. Accordingly, the normal rule of construction to the effect that any ambiguities are to be resolved against the drafting party shall not be utilized in the interpretation of this Agreement.

N. Amendments to be in Writing. This Agreement may not be altered, amended, modified or changed in any respect or particular whatsoever except by writing duly executed by all the parties to this Agreement.

O. Notices. All notices herein required to be given, or which may be given by either party to the other, shall be deemed to have been fully given and fully received when made in writing and deposited in the United States Mail, certified and postage prepaid, and addressed to the respective parties as follows:

*To Concerned Citizens  
and to Tony Alexander  
individually:*

Mr. Tony Alexander, individually & on behalf of  
Concerned Citizens of Menlo Park  
12845 Mt. Hamilton Rd.  
San Jose, CA 95140

*With copy to:*

Mr. Thomas N. Lippe  
Mr. Keith G. Wagner  
Lippe Gaffney Wagner, LLP  
329 Bryant St., Suite 3D  
San Francisco, CA 94107

*To City:*

City Clerk's Office  
City of Menlo Park  
701 Laurel Street  
Menlo Park, CA 94025

*With a copy to:*

William L. McClure  
City Attorney  
1100 Alma Street, Suite 210  
Menlo Park, CA 94025

*To Developer:*

SHP Los Altos, LLC  
489 S. El Camino Real  
San Mateo, CA 94402  
Attn: General Counsel

*With a copy to:*

Peter Pau  
489 S. El Camino Rea  
San Mateo, CA 94402

P. Counterparts. This Agreement may be executed in counterpart and an executed duplicate of this Agreement shall be deemed an original for all purposes.

IN WITNESS WHEREOF, the undersigned do hereby execute this Agreement as of the dates written below.

Dated: 7-6, 2010

CONCERNED CITIZENS OF  
MENLO PARK

By:   
Tony Alexander

Dated: 7-6, 2010

TONY ALEXANDER

By:   
Tony Alexander, Individually

Dated: \_\_\_\_\_, 2010

CITY OF MENLO PARK and CITY  
COUNCIL OF THE  
CITY OF MENLO PARK

By: \_\_\_\_\_

Dated: \_\_\_\_\_, 2010

PETER PAU, Individually and dba  
SAND HILL PROPERTY COMPANY

By: \_\_\_\_\_  
Peter Pau

Dated: \_\_\_\_\_, 2010

SHP LOS ALTOS, LLC

By: \_\_\_\_\_

IN WITNESS WHEREOF, the undersigned do hereby execute this Agreement as of the dates written below.

Dated: \_\_\_\_\_, 2010

CONCERNED CITIZENS OF  
MENLO PARK

By: \_\_\_\_\_  
Tony Alexander

Dated: \_\_\_\_\_, 2010

TONY ALEXANDER

By: \_\_\_\_\_  
Tony Alexander, individually

Dated: \_\_\_\_\_, 2010

CITY OF MENLO PARK and CITY  
COUNCIL OF THE  
CITY OF MENLO PARK

By: \_\_\_\_\_

Dated: \_\_\_\_\_, 2010

PETER PAU, individually and dba  
SAND HILL PROPERTY COMPANY

By: \_\_\_\_\_  
Peter Pau

Dated: \_\_\_\_\_, 2010

SHP LOS ALTOS, LLC

By: \_\_\_\_\_  
PETER PAU  
MANAGER

Dated: 7/6, 2010

Approved as to form:

LIPPE GAFFNEY WAGNER, LLP

By: Keith G. Wagner  
Keith G. Wagner,  
For: CONCERNED CITIZENS OF  
MENLO PARK AND TONY  
ALEXANDER

Dated: \_\_\_\_\_, 2010

Approved as to form:

CITY OF MENLO PARK AND CITY  
COUNCIL OF CITY OF MENLO PARK

By: \_\_\_\_\_  
William McClure, City Attorney

Dated: \_\_\_\_\_, 2010

Approved as to form:

BERLINER COHEN

By: \_\_\_\_\_  
Andrew L. Faber,

For: PETER PAU AND SHP LOS  
ALTOS, LLC

Dated: \_\_\_\_\_, 2010

Approved as to form:

LIPPE GAFFNEY WAGNER, LLP

By: Keith G. Wagner,

For: CONCERNED CITIZENS OF  
MENLO PARK AND TONY  
ALEXANDER

Dated: \_\_\_\_\_, 2010

Approved as to form:

CITY OF MENLO PARK AND CITY  
COUNCIL OF CITY OF MENLO PARK

By: William McClure, City Attorney

Dated: 7/2, 2010

Approved as to form:

BERLINER COHEN

By: Andrew L. Faber,

For: PETER PAU AND SHP LOS  
ALTOS, LLC

**Exhibit 1**

3.1 The project site includes a maximum of 110,065 square feet of commercial space in two buildings that may be subdivided into a maximum of four commercial condominium units. The following table describes the various uses and the locations and the maximum square footage allowed for each of the uses:

Use	1st Floor ECR	2nd Floor ECR	1 <sup>st</sup> and 2 <sup>nd</sup> floors on Garwood Way	Maximum Gross Floor Area (square feet)**
Non-medical Offices*	-	P	P	58,700
Retail Stores (including grocery stores) ***	P	-	-	51,365
Sale of Alcohol (ancillary) ****	P	-	-	
Outdoor Seating	P	-	-	
Personal Services	C	-	-	Established by the use permit
Cafes and Restaurants, except fast food	P	-	-	16,365
Sale of Alcohol	P	-	-	
Outdoor Seating	P	-	-	
Live Entertainment	C	-	-	
Health and Fitness Centers	P	-	-	25,000
Massage	P	-	-	

P = Permitted Use, C = Conditionally Permitted Use, "-" = Not Permitted

\* medical office uses include physicians, dentists and chiropractors

\*\*Due to the various permitted uses on the ground floor, the maximum permitted square footages for each use do not add up to the total building square footage. In no case can the ground floor uses exceed 51,365 square feet.

**\*\*\* The maximum permitted square footage for grocery stores is 32,000 square feet. For purposes of this development plan, the 32,000 square foot limitation on grocery stores means that (i) the project may include one grocery store of up to 32,000 square feet of net rentable floor area, and (ii) in addition to the one allowed grocery store, no other tenant may dedicate more than 15% of its retail sales floor space to the sale of non-taxable food or other non-taxable items. The foregoing restrictions on allowable floor space for grocery sales shall not apply to small-scale, food retail stores dedicated to selling prepared, non-alcoholic beverages or bakery items (e.g., stores substantially similar in size and format to a Starbucks or Jamba Juice).**

**\*\*\*\*Self-service alcohol sales are prohibited.**