CHATTEN-BROWN AND ASSOCIATES
JAN CHATTEN-BROWN, State Bar #50275
DOUGLAS P. CARSTENS, State Bar # 193439
10951 West Pico Blvd., Third Floor
Los Angeles, California 90064
(310) 474-7793

Attorneys for Plaintiff
Arroyo Seco Foundation

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

ARROYO SECO FOUNDATION, an incorporated association Petitioner/Complainant, vs. CITY OF PASADENA, a Municipal Corporation Respondents/Defendants, _____ BOARD OF DIRECTORS OF KIDSPACE MUSEUM, a private non-profit association Real Party in Interest. _____ Time: 9:30 a.m.	Case No. BS 066513 OPPOSITION TO DEMURRER Hearing: Jan. 23, 2001

Dept: Dept. 85

Petition Filed: Nov. 21, 2000

I. INTRODUCTION.

Petitioner and Complainant Arroyo Seco Foundation ("Foundation") brought a complaint to obtain declaratory relief that a lease of public park land in the Arroyo Seco approved by the City of Pasadena ("City") is void and brought a petition to set aside a conditional use permit for the museum project contemplated by the lease. (For simplicity, this petition and complaint is referenced hereinafter as "Petition/Complaint.") Real Party in Interest Kidspace Museum ("Museum") asserts two affirmative defenses in its demurrer ("Demurrer") to the Petition/Complaint**,** but the Museum fails to acknowledge that these affirmative defenses are also defeated by facts the Foundation plead in avoidance of the Museum's asserted defenses. The Museum asserts the statute of limitations has passed for the Foundation to challenge a lease between the Museum and the City of Pasadena ("the Lease") and that the Foundation failed to exhaust administrative remedies in challenging a Conditional Use Permit ("CUP") approval by Pasadena for the museum project contemplated by the Lease. Neither of these asserted defenses have merit.

First, the statute of limitations defense raised by the Museum is not applicable because the Lease constitutes an ongoing violation of duties imposed by the Pasadena Charter and Municipal Code which is abatable at any time. Furthermore, the 90 day limit identified by the Museum is inapplicable to the City's decision to approve the Lease. The Foundation timely filed its challenge to the Lease within the limit of the three year statute applicable to the approval *of the Lease*.

Second, the exhaustion of administrative remedies defense raised by the Museum is not applicable because any administrative appeal of Pasadena's decision to approve a CUP would have been futile in light of the City Council's previously-approved declaration of surplus, Lease, and the inflexible interpretation that a Museum use in the Arroyo Seco complied with the Charter

and Municipal Code in every way. In any case, the Foundation's timely appeal was improperly rejected by the City. Since the Foundation has plead facts which defeat the affirmative defenses the Museum raises, the Demurrer should be denied.

I. STANDARD OF REVIEW FOR DEMURRERS .

The general rules applicable to demurrers include the rule that all factual assertions in them are taken as true because the demurrer admits the truth of all material facts properly plead. (*Serrano v. Priest* (1971) 5 Cal.3d 584, 591.) Where an affirmative defense is apparent on the face of the pleadings, a plaintiff may "plead around" the defense by alleging specific facts that would avoid the apparent defense. (See, e.g., *Kunstman v. Mirizzi* (1965) 234 Cal.App.2d 753, 755, and *Muraoka v. Budget Rent-A-Car*, Inc. (1984) 160 Cal.App.3d 107, 115 [where a complaint shows upon its face that the statute of limitations has run, the plaintiff may anticipate the defense of limitation of action and allege facts to establish an estoppel].) Even where a demurrer is sustained, leave to amend is routinely granted. (*Von Batsch v. American Dist. Telegraph* (1985) 175 Cal.App.3d 1111, 1119.) If there is any reasonable possibility that a plaintiff can state a good cause of action it is error to deny leave to amend. (*Okun v. Superior Court* (1981) 29 Cal.3d 442, 460.)

III. STATEMENT OF FACTS

The Arroyo Seco is a natural area of Pasadena which was set aside for preservation as public park land in 1964. Pasadena's Municipal Code contains provisions applicable to the Arroyo Seco which prohibit institutional and commercial uses. (Pasadena Municipal Code "PMC" § 3.32.060.) [1] The Municipal Code section defines "cultural institutions" as including "museums." (PMC § 17.16.040 (F).)[2] Pasadena's Charter contains provisions applicable to park

[1] A true and correct copy of Pasadena Municipal Code § 3.32.060 is attached to the concurren Request for Judicial Notice as Exhibit A.

[2] A true and correct copy of Pasadena Municipal Code § 17.16.040 is attached to the concurren

land throughout the City which require any sale, transfer, or change in use of park land be submitted to a vote of the electorate for approval. (Pasadena Charter §§ 1601, 1603.)[3]

In 1998, the City of Pasadena declared relevant portions of the Arroyo Seco surplus lands, then entered into the Lease of the property with the Museum. The Lease provided the Museum would pay $1 per year for 3 acres of land in the Arroyo Seco for a term of 50 years, on which they are allowed to hold functions throughout the year to generate revenue. The Museum will charge an admission fee to the public. In the Lease, the City Council stated "... these activities [establishing exhibits and programs] qualify as a 'park and recreation use' within the meaning of Article XVI of the Pasadena City Charter...."

In August, 2000, the Museum submitted an application for a CUP. The City's Zoning Hearing Officer ("ZHO") held a public hearing on September 20, 2000 to consider the CUP for the Museum. At the hearing, the attorney for the Museum said that the Museum project had already been reviewed and approved by the City Council in 1998 and that all issues had been addressed at that time.

The Foundation and numerous individuals objected orally and in writing at the September 20, 2000 hearing. The Foundation stated it would support the Museum project if it were located somewhere in Pasadena other than the Arroyo Seco. The ZHO continued the public hearing for one month. The continued hearing was held on October 18, 2000. On the day of the hearing, the City Attorney submitted a memorandum to the ZHO which stated that the City Attorney's position that the Museum was a permissible use remained unchanged from the position previously stated in a memorandum to the City Council dated December 9, 1999.[4] At the

---

Request for Judicial Notice as Exhibit B.

[3] A true and correct copy of Pasadena Charter section 1601, 1603 is attached to the concurren Request for Judicial Notice as Exhibit C.

[4] A true and correct copy of the City Attorney's October 18, 2000 memorandum is attached to the

October 18, 2000 hearing, the ZHO stated he relied upon the advice of the City Attorney regarding the permissibility of the Museum. The ZHO indicated he would approve the CUP but that he would make complete findings and decide upon the conditions of approval at some point afterward.

The ZHO issued a written decision dated October 23, 2000. Eight days after the October 23, 2000 decision letter, on Tuesday, October 31, 2000, the Foundation and 57 individuals attempted to appeal the ZHO's decision.[5] Pasadena rejected the Appeal.[6]

IV. THE MUSEUM'S DEMURRER SHOULD BE DENIED BECAUSE THE MUSEUM'S AFFIRMATIVE DEFENSES HAVE NO MERIT.

A. PASADENA'S MUSEUM LEASE IS A CONTINUING VIOLATION OF THE CITY CHARTER AND MUNICIPAL CODE.

The Museum's claim that the challenge to the 1998 Lease is barred by the statute of limitations is untrue because the Foundation is challenging a continuing violation of the City Charter and Municipal Code caused by the Lease. The Petition/Complaint asserts Pasadena has a "clear, present, and mandatory prohibition against approving institutional or commercial uses in the Arroyo Seco" (Petition/Complaint, p. 9, ln. 8-9) and a duty to obtain prior approval by the electorate which it violated in approving the Lease in 1998. Where the violation charged is a continuing violation, the statute of limitations does not bar an action based on the violation. (*City of Fontana v. Atkinson* (1963) 212 Cal.App.2d 499, 509; accord *Philips v. City of Pasadena*

---

concurrent Request for Judicial Notice as Exhibit D.

[5] A true and correct copy of the Foundation's October 31, 2000 Appeal letter, without enclosures, is attached to the concurrent Request for Judicial Notice as Exhibit E.

[6] A true and correct copy of this November 2, 2000 rejection letter, without enclosures, is attached to the concurrent Request for Judicial Notice as Exhibit F.

(1945) 27 Cal.2d 104, 107-108 [gate on the road to the Arroyo Seco is a continuing nuisance, abatable at any time].) The Foundation is not challenging the execution of the Lease. Rather, the challenge is to the Lease itself because it constitutes a *continuing* violation of Pasadena's Charter and Municipal Code. Any contract or lease entered into in violation of the City of Pasadena's Charter or statutes is void ab initio. (*City of Pasadena v. Estrin* (1931) 212 Cal. 231, 234.) No statute of limitations blocks a challenge to a continuing violation of a statute which is designed to maintain natural resources on an ongoing basis. (*California Trout v. State Water Resources Control Board* (1989) 207 Cal.App.3d 585, 628.)

The Lease is a continuing violation of Pasadena's Municipal Code because Pasadena has a continuing statutory duty to prohibit museum-type uses in the Arroyo Seco. Pasadena's Municipal Code states "No portion of the lands of the Arroyo Seco shall be used for any commercial or institutional uses other than those which existed at the effective date of the ordinance." (PMC § 3.32.060.) The Municipal Code defines the term "cultural institutions" as including but not limited to "museums." (PMC 17.16.040 (F).) Thus the prohibition on institutional uses in the Arroyo Seco set forth by the Municipal Code is applicable to the Museum.

The Lease is a continuing violation of Pasadena's Charter because Pasadena has a continuing statutory duty to conduct an election before allowing the Museum use approved by the CUP. City Charter Section 1601 provides: "All dedicated park land owned by the City shall be used only for park and recreational purposes, and shall not be sold, transferred or used for other purposes, except upon the approval of a majority of the voters at an election held for such purpose." "Park and Recreation Facilities" are defined as "*Noncommercial* parks, playgrounds and recreational facilities, and open spaces officially designated as a park or recreation facility." (PMC § 17.16.040, emphasis added.) Thus, because the Museum is not a park and recreation

facility within the meaning of the Charter, an election was required before the Lease was approved which transferred the land and changed its use.

In *California Trout v. State Water Resources Control Board, supra*, 207 Cal.App.3d 585, petitions were filed for writs of mandate to command the Board to rescind licenses giving water rights. The petitions alleged the licenses issued in 1974 violated Fish and Game Code section 5946's requirement that conditions imposed on the licenses allow a sufficient flow of water to maintain fish below a dam. (*Id.* at 592.) The Board argued, among other things, that the action was barred by the statute of limitations. In rejecting that argument, the court found the Board's failure to attach necessary conditions to the licenses constituted a continuing violation of the board's statutory obligation to which no statute of limitations prevented remediation. (*Id.* at 628.) The court explained why the statute of limitations did not bar the action because the purpose of a statute was to sustain streams on an ongoing basis:

> Hence, the failure to affix to the licenses language conditioning future diversion upon such releases presents a continuing violation of the statute as to which no statute of limitations prevents remediation..... The situation is similar to that which arises when a nuisance has been maintained for a protracted period of time. If the nuisance is the sort of ongoing conduct that can be discontinued by an order to stop acts or omissions it is viewed as 'continuing' and hence 'abatable,' despite the fact that the acts or omissions have been conducted for a period beyond that of the pertinent statute of limitations.

(*Ibid*.)

The Lease approved in violation of Pasadena's Charter and Municipal Code in this case is similar to the water rights licences approved in violation of the Fish and Game Code in *California Trout.* The purpose of Pasadena's Charter and Municipal Code provisions to maintain the Arroyo Seco in a natural state is analogous to the relevant portion of the Fish and Game Code intended to maintain fisheries on an ongoing basis in *California Trout*. Just as the Board's failure to attach conditions to the licenses in *California Trout* constituted an ongoing violation of the Fish and Game Code the remediation of which was not barred by the statute of

limitations, Pasadena's failure to prohibit commercial and institutional uses in the Arroyo Seco and to hold an election before changing park land uses are continuing violations of Pasadena's statutory and charter duties to which no statute of limitations bars remedy.

The fact that a continuing violation requires denial of a demurrer based on the statute of limitations was explained in *The People Ex Rel. Attorney-General v. Stanford et al.* (1888) 77 Cal. 360, 18 P. 85. In that case, the principal allegation was that a non-legally formed corporation that had no right to own and operate franchises was nonetheless doing so. The corporation demurred, arguing that the claim was barred by the statute of limitations. The court denied the demurrer, stating:

> if the proceeding were simply one in which a forfeiture were sought by reason of the misuse or nonuse of its powers by a corporation, the statute of limitations might be pleaded in bar, (Code Civil Proc. § 345;) but the continued exercise of a franchise without right is a *continuously renewed usurpation on which a new cause of action arises each day.*

(*Id*. at 377-378, emphasis added.)

The statute of limitations defense raised in the present case is analogous to the similar unsuccessful defense in *Stanford*. Pasadena's continued reliance on the Lease and the processing of a CUP application in conformance with the terms of the Lease compares with *Stanford*'s continued exercise of a void franchise: each constitutes a renewed usurpation on which a new cause of action arises each day. Where the franchise in *Stanford* was void because the corporation was not legally formed, the Lease in this case is void because it constitutes a continuing violation of Pasadena's Charter and Municipal Code. In both *Stanford* and the present case, the statute of limitations does not bar an action to remedy a continuing violation.

The Museum's demurrer on the basis of the statute of limitations should be denied because the Lease is a continuing violation of Pasadena's Charter and statutory duties, giving rise to a new violation each day. No statute of limitation bars an action to remedy such a

violation.

B. THE MUSEUM RELIES UPON AN INAPPLICABLE STATUTE OF LIMITATIONS IN DEMURRING TO THE FOUNDATION'S CHALLENGE TO THE MUSEUM LEASE.

Even if the Lease were not a continuing violation of Pasadena's Charter and Municipal Code, the Petition/Complaint to void the Lease is timely because the applicable statute of limitations is three years. (Code Civ. Proc. § 338 (a).) The Petition/Complaint was brought within three years of Pasadena's decision to approve the Lease in 1998. The Museum cites the wrong statute of limitations by asserting Code of Civil Procedure 1094.6 applies to the portion of this action seeking to void the Museum Lease. (Demurrer, p. 6). This statute only applies when four conditions are met, including that the decision involves employee discipline, permit or license application, or retirement benefits. (*Foster v. Civil Service Com.*(1983) 142 Cal.App.3d 444, 450-451, citing Code Civ. Proc. § 1094.6 (e).) Where a challenged decision is not one of the requisite types of decisions, the 90-day limitation does not apply. (*Nolan v. Redevelopment Agency* (1981) 117 Cal.App.3d 494, 502 ["Section 1094.6 does place a 90 day limitation on certain proceedings brought under section 1094.5, but ... The action here [challenging a redevelopment agency's agreement with an airport partnership regarding disposition of property] does not fit those classifications."]) The 1998 Museum Lease in the present case is similar to the agency agreement regarding property disposition in *Nolan*; neither is the type of decision to which Code of Civil Procedure section 1094.6 applies. The 90-day limitation asserted by the Museum may be applicable to the CUP approved on October 23, 2000, but it is not applicable to the Lease approval.

Pasadena's obligation under the Municipal Code to prohibit institutional and commercial uses is a liability created by statute. Pasadena's obligation to conduct an election when park land use is changed is a liability created under the Charter. Therefore, the statute of limitations which

is applicable to the Foundation's challenge to the Lease is the three year statute (Code Civ. Proc. § 338 (a)), which applies to an action based upon a liability created by statute. The application of the three year statute to a mandamus proceeding was illustrated in *McBrearty v. City of Brawley* (1997) 59 Cal.App.4th 1441, 1446. There, plaintiff filed a petition for a writ of mandamus to require a city to submit a utility tax to a vote of the local electorate. The court held:

> The statute of limitations applicable to a request for mandamus relief depends on the nature of the obligation sought to be enforced. [Citation]. Here, McBrearty seeks to enforce the City's obligation to submit its utility tax to a public vote, an obligation based on the statutory provisions created by Proposition 62. Because the City's obligations is a liability created by statute [citations omitted], a three year statute of limitations applies. (Code Civ. Proc. § 338, subd. (a).)

(*Id*. at 1446.)

The Foundation in this case seeks to enforce Pasadena's obligation under the Charter to submit any changes in park land use to a public vote in the same way the plaintiff in *McBrearty* sought to enforce the city's obligation to submit a utility tax to a public vote. Additionally, the Foundation seeks to enforce Pasadena's obligation under the Municipal Code to prohibit commercial and institutional uses in the Arroyo Seco. Therefore, since Pasadena's obligations are liabilities created by the Charter and Municipal Code, *McBrearty* demonstrates that the applicable statute of limitations is three years (Code Civ. Proc. § 338, subd. (a)) and the Foundation filed this action within that time. Thus, the Museum's demurrer to the Foundation's complaint to void the Museum Lease based on an inapplicable statute must be denied.

C. THE MUSEUM'S DEMURRER TO THE CUP CHALLENGE MUST FAIL BECAUSE APPEALS WOULD HAVE BEEN FUTILE.

Contrary to the Museum's assertion (Demurrer, p. 7), the exhaustion of administrative remedies doctrine does not bar this action because administrative appeals would have been futile, thus excusing the requirement. "*Abelleira* makes it abundantly clear that the doctrine of

exhaustion of remedies does not implicate subject matter jurisdiction but rather is 'a procedural prerequisite' 'originally devised for convenience and efficiency' and now 'followed under the doctrine of stare decisis.'" (*Green v. City of Oceanside* (1987) 194 Cal.App.3d 212, 221, citing *Abelleira v. District Court of Appeal* (1941) 17 Cal.2d 280, 288 and 291.) "There are numerous exceptions to the rule including situations where ... resort to the administrative process would be futile because it is clear what the agency's decision would be. [Citations omitted.]" (*Ibid*.) The exhaustion requirement is excused where its pursuit would be futile, idle, or useless. (*Ogo Associates v. City of Torrance* (1974) 37 Cal.App.3d 830, 834; *Huntington Beach Police Officers' Assn. v. City of Huntington Beach* (1976) 58 Cal.App.3d 492, 499.)

As stated by the Petition/Complaint, an appeal of Pasadena's approval of a CUP would have been "futile." (Petition/Complaint, p. 7, ln. 8.) The reason that administrative appeals would have been futile was also explained by the Petition/Complaint: the City Council had already found construction of a Museum at the location complied with the applicable section of Pasadena's Charter (Petition/Complaint, p. 5, lns. 11-12) and the City Attorney had advised that there were no violations of Pasadena's Charter or Municipal Code. (Petition/Complaint, p. 5, lns. 18-21.) On demurrer, the material factual assertions of a complaint such as these must be taken as true. (*Serrano v. Priest* (1971) 5 Cal.3d 584, 591.)

The documents provided with the Museum's Demurrer provide further evidence supporting the Foundation's assertions. In administratively reviewing the Museum's CUP application, Pasadena was bound by the previous 1998 resolution declaring surplus property (Demurrer, Exh. A) and by the terms of the Lease (Demurrer, Exh. B) so there was no possibility that it would deny the CUP for the Museum. A party need not pursue administrative remedies when the agency's decision is certain to be adverse. (*Huntington Beach, supra,* 58 Cal.App.3d 492, 499; *Ogo Associates, supra,* 37 Cal.App.3d 830, 834.) Because of Pasadena's 1998

commitment to the Museum project, it clearly would have denied an appeal of the CUP.

As the court explained in *Ogo Associates*, "the doctrine of exhaustion of administrative remedies has not hardened into inflexible dogma." (*Ogo Associates, supra,* 37 Cal.App.3d 830, 834.) In *Ogo Associates*, the defendants, the City of Torrance, argued that the plaintiffs did not exhaust their administrative remedies when they failed to apply to the city council for a variance to a zoning ordinance. However, plaintiffs argued, and the court agreed, such an application clearly would have been futile in light of the fact that "the evidence clearly showed that the ordinances had been enacted to block the proposed project and that, therefore, it was inconceivable that plaintiffs would have obtained a variance if they had sought one." (*Id* at 830.)

Similarly, in the present case, the City Council of Pasadena already has approved the Lease for Kidspace in a project configuration exactly like that which was granted a CUP. The City Attorney's October 18 memoranda made it clear that the City's legal opinion of the Lease was not subject to change. Therefore, as the plaintiffs in *Ogo Associates* could, the Foundation could positively state that Pasadena would approve the CUP, regardless of the Charter and Municipal Code violations the Foundation identified.

Huntington Beach Police Officers' Assn. v. City of Huntington Beach (1976) 58 Cal.App.3d 492 also turned upon the futility of administrative appeals and has important factual parallels to the instant case. In *Huntington Beach*, a police officers' association obtained a writ of mandate directing a city to reinstate a four-day, 10-hour-day work week schedule. Defendant city argued that plaintiff failed to exhaust the city's grievance procedures, thus precluding judicial relief. (*Id*. at 496.) Rejecting the argument, the court stated:

> Moreover, the record reveals that further pursuit of either the grievance procedure or an appeal under section 14--4 of the EER [Employer-Employee Relations] Resolution would have been futile. Throughout the entire controversy the city steadfastly maintained that a change in the application of the [ten-hour work week schedule] was a matter of management prerogative and was neither negotiable nor a proper subject for grievance. Where the administrative agency has made it clear what its ruling would be, idle pursuit

> of further administrative remedies is not required by the exhaustion doctrine. (*Ogo Associates v. City of Torrance*, 37 Cal.App.3d 830, 834--835, 112 Cal.Rptr. 761. See *Gantner & Mattern Co. v. California E. Com.*, 17 Cal.2d 314, 318, 109 P.2d 932.)

(*Id*. at 496.)

The facts of the present case are similar to the situation in *Huntington Beach.* Where the City of Huntington Beach steadfastly maintained changes in the work week schedule were its prerogative and not subject to grievance procedures, in this case Pasadena has steadfastly maintained that there is no violation of the Municipal Code or Charter by approval of the Museum Lease and CUP without an election. This is a position Pasadena initially took in 1998 in declaring the subject property surplus and adopting the resolution approving the Lease, a position it stayed with in 1999 in administratively considering a prior CUP application, and a position it kept in 2000 in connection with the presently challenged CUP application. In this context, the administrative appeal of the ZHO's approval of the CUP would have been futile.

The futility exception to administrative exhaustion is narrow, but the Foundation fits it. It is narrow because it only applies where a petitioner can positively state what the administrative agency's decision will be. The California Supreme Court explained the narrow nature of the futility exception to the doctrine of exhaustion of administrative remedies in *Sea & Sage Audubon Society, Inc. v. Planning Com.* (1983) 34 Cal.3d 412:

> In *Gantner & Mattern Co. v. California E. Com.* (1941) 17 Cal.2d 314, [318], 109 P.2d 932 the court stated, '[t]he exhaustion of remedial procedure as laid down by the statute is required unless the petitioner *can positively state that the commission has declared what its ruling will be* in a particular case....' " (Emphasis added.) (*See also Ogo Associates v. City of Torrance* (1974) 37 Cal.App.3d 830, 834, 112 Cal.Rptr. 761.)

(*Id*. at 418, emphasis added.)

Sea and Sage involved a public interest organization's challenge to a city's approval of an Environmental Impact Report for a development project. The challenge was rejected because

the organization had failed to exhaust its administrative remedies and could not show that the failure was excused on the basis of futility or any other exception. The Supreme Court reasoned the plaintiff could not show administrative appeals were futile because the city council "had never addressed plaintiff's specific legal challenges." (*Id*. at 418.) The present case is different from *Sea and Sage* in this important regard because the Pasadena City Council specifically resolved that the Museum was a park use within the meaning of the Charter, thus addressing the Foundation's legal challenge based on noncompliance with the Charter and Municipal Code. (Demurrer, Exh. B, Recitals.) The City Attorney stated verbally at the September 20, 2000 hearing and in writing on October 18, 2000 that the legal issues identified by the Foundation had previously been addressed and dismissed as misguided. (Concurrently filed Request For Judicial Notice, Exhibit D.) Therefore, there was no point in administratively appealing Pasadena's grant of the CUP for the Museum to the City Council which had previously approved the Lease for the project. The precise legal points regarding Charter and Municipal Code violations raised by the Foundation had been considered by Pasadena but rejected.

There could be no clearer statement of what the City Council's final decision regarding the CUP would be than was expressed in its unanimous approval of the declaration of surplus land and desirability of the Lease (Demurrer, Exh. A) and subsequent approval of the Museum Lease in 1998. (Demurrer, Exh. B.) The declaration of surplus, the Lease, and Pasadena's subsequent treatment of them as binding in the administrative review process for the CUP are overwhelming factual evidence of Pasadena's precommitment to the Museum use which rendered any appeal of the CUP approval futile. Thus, the Foundation was excused from the procedural requirement of exhausting administrative remedies.

D. DESPITE THE FACT THAT EXHAUSTION WAS EXCUSED, THE FOUNDATION FILED A TIMELY APPEAL EIGHT DAYS AFTER PASADENA'S WRITTEN DECISION.

Even if exhaustion of administrative remedies were required, the Foundation satisfied this requirement by filing an appeal eight days after Pasadena's written decision granting the CUP. The Museum does not dispute that Pasadena did not make a *written* decision on the CUP until a letter was issued on October 23, 2000 ("Decision Letter") or that the Foundation appealed on October 31, 2000. The Museum makes the unsupported factual assertions that the ZHO "made findings of fact at the October 18 hearing" and that the October 23, 2000 decision letter was a "Confirmation Letter." (Demurrer, p. 5.) The Museum fails to provide a transcript or other written evidence to support this assertion and characterization. The only evidence that this alleged event occurred is the October 23, 2000 Decision Letter. (Demurrer, Tab C.) This letter improperly attempts to "backdate" the findings of fact to the October 18, 2000 hearing by stating "the Zoning Hearing Officer made the findings as shown on Attachment A to this letter." (Demurrer, Tab C, p. 2.) This letter is inadmissible because it is not the best evidence of what occurred on October 18. (*Obermeyer v. Patterson* (1900) 130 Cal. 531, 532 [a certificate by a city engineer "that a record in this office" shows that grading work was examined was inadmissible and not the best evidence of what the record contained].)

In addition to being inadmissible hearsay, the Decision Letter is factually incorrect. As asserted in the Petition/Complaint, "The Zoning Hearing Officer indicated he would approve the CUP but that he would make findings and decide upon the conditions of approval at some point afterward." (Petition/Complaint, p. 6, lns. 19-20.) The ZHO did not make all of the findings or impose all conditions listed in his Decision Letter at the October 18 hearing.

The Foundation attempted to appeal the decision of the ZHO by filing an appeal on October 31, 2000, which was eight days after the written decision issued by the ZHO. Pasadena's Municipal Code provides appeals must be filed within ten days of the date of the

"decision," but it does not specify what "decision" means.[7] As explained in the Foundation's appeal letter, the Foundation's Counsel interpreted the Decision Letter to mean an appeal filed on October 31, 2000 would be timely. [8] Thus, by filing an appeal on October 31, 2000, which was eight days after the ZHO's Decision Letter, the Foundation timely appealed.

The Museum argues Pasadena made its "decision" on October 18, 2000, which was the day of the hearing on the matter. This interpretation of what constitutes a decision is contrary to law. It is well-settled that adjudicatory decisions such as Pasadena's grant of a conditional use permit must be supported by findings. (*Topanga Association for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 515.) Oral statements at a hearing unsupported by findings of fact and delaying necessary conditions of approval cannot be considered the final "decision" for purposes of review pursuant to Code of Civil Procedure section 1094.5. The Supreme Court explained why an explicit, reasoned explanation of the grounds supporting a decision was necessary:

> *Significantly, many zoning boards employ adjudicatory procedures that may be characterized as casual*. [Citations.] The availability of careful judical review may help conduce these boards to insure that all parties have an opportunity fully to present their evidence and arguments. Further, although we emphasize that we have no reason to believe that such a circumstance exists in the case at bar, the membership of some zoning boards may be inadequately insulated from the interests whose advocates most frequently seek variances. [Citation]. Vigorous judicial review thus can serve to mitigate the effects of insufficiently independent decision-making.

(*Topanga, supra,* 11 Cal.3d 506, 518, emphasis added.) Pasadena's practice, if it is that, of

---

[7] Under provisions added in 1997, the Government Code requires that adjudicatory decisions by state agencies "shall be *in writing.*" (Gov. Code § 11425.10 (a)(6) and Gov. Code § 11425.50(a) emphasis added.) While this requirement may not necessarily apply to the City of Pasadena's decisions, the requirement shows the importance the Legislature has placed upon *written* decisions.

[8] As was also explained in that letter, any misconstruction of Pasadena's procedural requiremen were entirely due to the Foundation's counsel's advice and should not prejudice the Foundation's rights. (See concurrent Request for Judicial Notice, Exh. E).

making decisions orally, informally, incompletely, and unsupportedly at hearings is just the type of "casual" adjudicatory procedure which the Supreme Court sought to avoid in discussing its conclusions in *Topanga*. Where incomplete "decisions" can be made without complete conditions of approval and findings, the entire decision-making process can lose legitimacy.

Oral statements on October 18 cannot be considered the final decision in this case because without the ZHO's written decision, it was impossible to know what findings or what conditions were made part of the conditional use permit. The ZHO himself stated on October 18, 2000 that he had not finalized the conditions he would impose as part of the CUP but would do so after the hearing. This delay in making a final determination made it impossible for the Foundation to know whether to appeal the CUP and on what basis to do so. As stated in *Topanga*, "[P]roperly constituted findings [footnote omitted] enable the parties to the agency proceeding to determine whether and on what basis they should seek review. [Citations]." (*Topanga, supra,* 11 Cal.3d 506, 516.) Absent complete findings and conditions of approval, Pasadena did not make an appealable decision until October 23, 2000.

V. THE MUSEUM'S REQUEST FOR JUDICIAL NOTICE OF THE OCTOBER 23, 2000 DECISION LETTER SHOULD BE DENIED BECAUSE INSUFFICIENT FACTS ARE PROVIDED TO SUPPORT IT.

The Museum requests judicial notice of documents attached as exhibits to its demurrer. (Demurrer, fns. 1-4). The Foundation objects to the request for judicial notice of the October 23, 2000 Decision Letter (Demurrer, p. 5, fn. 3) because insufficient information is provided to take judicial notice of it, thus rendering it inadmissible hearsay and violation of the Secondary Evidence Rule. (Ev. Code §§ 1200 and 1521.) The information provided by the Museum is not sufficient to determine what occurred on October 18, 2000 because no transcript, tape recording, or other record of the events reported in the Decision Letter are provided. Instead, the Museum offers the statement in the Decision Letter that a decision and certain findings were made

previously. This lack of direct evidence is legally deficient. (*Obermeyer v. Patterson* (1900) 130 Cal. 531, 532.) The Decision Letter violates the Secondary Evidence Rule and is inadmissible to prove a decision supported by findings was made on October 18, 2000.

CONCLUSION

The Foundation's challenge to the 1998 Lease was brought within the applicable three year statute of limitations. The existence of the 1998 Lease is a continuing violation of Pasadena's Charter and Municipal Code which can be abated at any time. Because of the Lease and Pasadena's stubborn precommitment to the Museum proposal, any administrative appeal of the CUP approval would have been futile. Despite the futility, the Foundation attempted to appeal the approval but this appeal was rejected. Thus, the Museum's demurrer on the grounds of statute of limitations and exhaustion of administrative remedies should be denied. If the demurrer is granted, the Foundation respectfully requests leave to amend.

Dated: January 16, 2000 CHATTEN-BROWN & ASSOCIATES

_____

Jan Chatten-Brown
Douglas P. Carstens
Attorneys for Petitioner/Complainant
Arroyo Seco Foundation

F:\FILES\ArroyoSeco\Pleadings\Demuropp\demopp.fnl.wpd