



DEVELOPMENT SERVICES DEPARTMENT

APPEAL APPLICATION FORM

Appeal the decision of the:

- Zoning Administrator
- Design Review Board
- Planning Commission
- Chula Vista Redevelopment Corporation
- Other: Historic Preservation Commission

Date Received: 12.17.13 (electronically)
 Fee Paid: \$5,000 deposit
 Receipt No.: _____
 Case No.: PCM-13-14 Appeal
AC501

Application Information

Name of Appellant: Sears Holding Company Phone No. () 415-882-5000

Home Address: _____

Business Address: 3333 Beverly Road, Hoffman Estates, IL 60179

Project Address: Chula Vista Sears 565 Broadway, Chula Vista CA 91950 Assessor Parcel No. 5720104400

Project Description: Appellant submits the attached brief in support of appeal of "eligibility" finding of the Chula Vista Sears store, under Title 21 of the Chula Vista Municipal Code

Please use the space below to provide a response to the decision you are appealing. Attach additional sheets, if necessary. Grounds for an appeal must be based on at least one of the following:

- (1) **Factual Error.** The statements or evidence relied upon by the decision maker when approving, conditionally approving, or denying a permit, map, or other matter was inaccurate;
- (2) **New Information.** New information is available to the applicant or the interested person that was not available through that person's reasonable efforts or due diligence at the time of the decision; or
- (3) **Findings Not Supported.** The decision maker's stated findings to approve, conditionally approve, or deny the permit, map, or other matter are not supported by the information provided to the decision maker.

In order for an appeal to be valid, detailed responses must be included which cite at least one of the above reasons for the appeal along with substantiation of the facts and circumstances on which the claim of the appeal is based. If an appeal is filed within the time limit specified, and determined to be valid, it automatically stays proceedings in the matter until a determination is made by the City Council.

The Historic Preservation Commission ("HPC") abused its discretion at the December 4, 2013 hearing by upholding its prior finding that the Sears store is eligible to be designated as a historical resource. The HPC's finding is not supported by the evidence. The HPC ignored the detailed information and analysis from Heritage Architecture & Planning that clearly showed the Sears store did not meet the requirements for eligibility. The HPC also committed factual error by relying on inaccurate information from ASM Associates, Inc. The HPC also applied standards and inquiries outside existing national, state and local law. See attached Letter Brief in Support of Sears Holding Company's Appeal of Finding of "Eligibility" by Chula Vista Historic Preservation Commission.

 12/19/13
 Signature of Appellant Date

DO NOT WRITE IN THIS SPACE

The above matter has been scheduled for public hearing before the:
 City Council on / /

Development Services Department City Clerk



Disclosure Statement***

Pursuant to City Council Policy 101-01, prior to any action on a matter that requires discretionary action by the City Council, Planning Commission or other official legislative body of the City, a statement of disclosure of certain ownerships, financial interests, payments, and campaign contributions must be filed. The following information must be disclosed:

1. List the names of all persons having a financial interest in the project that is the subject of the application, project or contract (*e.g.*, owner, applicant, contractor, subcontractor, material supplier).

Sears Holding Company

2. If any person* identified in section 1. above is a corporation or partnership, list the names of all individuals with an investment of \$2000 or more in the business (corporation/partnership) entity.

Sears Holding Company is a public corporation. We are not aware of the names of all persons, worldwide, with an investment of \$2,000 or more in the corporation.

3. If any person* identified in section 1. above is a non-profit organization or trust, list the names of any person who is the director of the non-profit organization or the names of the trustee, beneficiary and trustor of the trust.

Not applicable.

4. Please identify every person, including any agents, employees, consultants, or independent contractors, whom you have authorized to represent you before the City in this matter.

Ivor E. Samson, Dentons US LLP; Matthew Adams, Dentons US LLP; David Marshall, Heritage Architecture & Planning



Disclosure Statement***

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- 5. Has any person* identified in 1., 2., 3., or 4., above, or otherwise associated with this contract, project or application, had any financial dealings with an official** of the City of Chula Vista as it relates to this contract, project or application within the past 12 months? Yes ___ No [X]

None

If Yes, briefly describe the nature of the financial interest the official** may have in this contract.

- 6. Has any person* anyone identified in 1., 2., 3., or 4., above, or otherwise associated with this contract, project or application, made a campaign contribution of more than \$250 within the past twelve (12) months to a current member of the Chula Vista City Council? No [X] Yes ___ If yes, which Council member?

- 7. Has any person* identified in 1., 2., 3., or 4., above, or otherwise associated with this contract, project or application, provided more than \$420 (or an item of equivalent value) to an official** of the City of Chula Vista in the past twelve (12) months? (This includes any payment that confers a personal benefit on the recipient, a rebate or discount in the price of anything of value, money to retire a legal debt, gift, loan, etc.) Yes ___ No [X]

If Yes, which official** and what was the nature of item provided?

- 7. Has any person* identified in 1., 2., 3., or 4., above, or otherwise associated with this contract, project or application, been a source of income of \$500 or



Disclosure Statement***

more to an official** of the City of Chula Vista in the past twelve (12) months? Yes _____ No

If Yes, identify the official** and the nature of the income provided?

Date: 12/17/13



Signature of Contractor/Applicant

Ivor Samson

Print or type name of Contractor/Applicant

- * Person is defined as: any individual, firm, co-partnership, joint venture, association, social club, fraternal organization, corporation, estate, trust, receiver, syndicate, any other county, city, municipality, district, or other political subdivision, or any other group or combination acting as a unit.
- ** Official includes, but is not limited to: Mayor, Council member, Planning Commissioner, Member of a board, commission, or committee of the City, and City employees or staff members.
- *** This Disclosure Statement must be completed at the time the project application, or contract, is submitted to City staff for processing, and updated within one week prior to consideration by the legislative body.

Last Updated: September 8, 2009

December 17, 2013

VIA FEDERAL EXPRESS AND EMAIL

Hon. Mayor Cheryl Cox and Members of the City Council
City of Chula Vista
276 Fourth Avenue
Chula Vista, CA 91910

Re: Sears Store, 565 Broadway, Chula Vista, California

Dear Mayor Cox and Members of the City Council:

SEARS HOLDING COMPANY ("Sears") submits this letter brief in support of its appeal of the Chula Vista Historic Preservation Commission's December 4, 2013 failure to remove the Sears store, located at 565 Broadway, Chula Vista, California, from "eligibility" as a Historical Resource, pursuant to Title 21 of the Chula Vista Municipal Code ("CVMC").¹

1. SUMMARY OF ARGUMENT

The Chula Vista City Council ("the Council") should grant Sears' appeal because the Historic Preservation Commission ("HPC") erred in the following respects:

- The HPC's original erroneous finding of "eligibility" and failure to correct that finding at the December 4, 2013 hearing is an abuse of discretion and not supported by the overwhelming evidence submitted to the contrary;
- The HPC relied on inaccurate information and a cursory survey prepared by the City of Chula Vista's expert;
- The HPC applied the wrong legal standards and inquiries;
- The HPC failed to issue any written findings, as required by California case law; and
- The HPC's procedures, as applied in this case, are fundamentally unfair and Constitutionally impermissible.

Each of these deficiencies is set forth below in greater detail.

2. PROCEDURAL HISTORY

In 2012, the HPC of the City of Chula Vista ("the City") commissioned a Historical Resources Survey, conducted by ASM Affiliates, Inc. ("ASM"), pursuant to CVMC §§ 21.03.075 and 21.04.010. Table 24 of this survey identified the Sears building located at 565 Broadway, Chula Vista, California ("the Sears store") as being "eligible" for listing as a "Historical Resource" under CVMC § 21.03.044.² ASM

¹ The Historic Preservation Commission characterized its decision as "taking no action"; however, the commission's decision amounts to a denial of Sears' timely-submitted "Planning & Building Department Application".

² See Historical Resources Survey, conducted by ASM Affiliates, Inc., attached as Exhibit A.

based its conclusion on: (1) a reconnaissance (or "windshield") survey consisting of visual observations from public roads³ and (2) follow-up field work collecting information about exterior building features.⁴ The Sears store was not initially identified as "eligible"; ASM only included the Sears store in its survey following public input.⁵

In November 2012, legal counsel for Sears met with members of the City of Chula Vista Planning Department to discuss the survey. At that meeting, members of the City's Planning Department informed Sears' counsel that the survey was merely a preliminary analysis and the City would welcome and consider a more detailed expert analysis of the Sears store. To that end, Sears retained Heritage Architecture & Planning ("Heritage") as a "qualified expert" (as defined in CVMC § 21.03.56) to evaluate the Sears store.

Heritage prepared a comprehensive report entitled, "CHULA VISTA SEARS: Expert Technical Analysis Report" that far exceeded the scope and depth of the 2012 preliminary, superficial survey by ASM.⁶ The methodology underlying Heritage's report included on-site review by a historian, archival research, evaluation of photos and drawings obtained directly from Sears and expert analysis by David Marshall.⁷ That report concluded that, "Historical research and site evaluation reveal that the Chula Vista Sears does not appear eligible as a historical resource under any of the applicable criteria of the National Register of Historic Places, the California Register of Historical Resources, or as a City of Chula Vista Historical Resource."⁸

Following the submission of Heritage's report to the City, Sears requested an opportunity to meet with the City and specifically the HPC. On August 14, 2013, Marilyn Pongeggi of the City of Chula Vista Planning Department wrote to Sears' attorneys and advised that the Sears store was identified as "potentially eligible" for listing as a historical resource but no action had been taken on the part of the City to designate the Sears store as a historical resource.⁹ Ms. Pongeggi also advised in her August 14, 2013 letter that the City did not have a mechanism or procedures for appealing "eligibility" but, as an accommodation to Sears, the HPC would reconsider its finding of "eligibility".

By letter dated August 28, 2013, Sears accepted the City's offer for the HPC to reconsider its "eligibility" finding for the Sears store and Sears paid the required fees to the City.¹⁰ The City set a December 4, 2013 hearing with the HPC and, in connection with that hearing, Sears submitted an application with the City of Chula Vista Planning and Building Department.¹¹

³ *Id.*, at pages 3-4.

⁴ *Id.*

⁵ See Transcript of City of Chula Vista Historic Preservation Commission Meeting, December 4, 2013 ("Hearing Transcript"), attached as Exhibit G, at page 20, lines 9-11.

⁶ See CHULA VISTA SEARS: Expert Technical Analysis Report, attached as Exhibit B.

⁷ *Id.*, at page 3-1.

⁸ *Id.*, at page 7-1.

⁹ See August 14, 2013 correspondence from Marilyn Pongeggi to Ivor E. Samson, attached as Exhibit C.

¹⁰ See August 28, 2013 correspondence from Ivor E. Samson to Marilyn Pongeggi, attached as Exhibit D.

¹¹ See City of Chula Vista Planning & Building Department Application form, dated October 13, 2013, attached as Exhibit E.

On December 4, 2013, Sears' attorneys and Sears' expert, David Marshall of Heritage, appeared before the HPC and presented an oral and Power Point presentation in support of the non-eligibility of the Sears store.¹² Shannon Davis of ASM presented to the HPC in support of eligibility.

The objective of the December 4, 2013 hearing was to determine if the City's survey and classification of the Sears store as "eligible" as a historical resource was correct.¹³ During Ms. Davis' presentation, and instead of emphasizing the seven (7) element inquiry for integrity, she erroneously suggested that the HPC apply the following standard or "litmus test": whether a person in attendance at the grand opening of the Sears store would recognize the building today.¹⁴

Ms. Davis also stated that the "crux" of her opinion was that, with restoration, the building "could be brought back" and, therefore the Sears store is "eligible" in spite of some loss of integrity.¹⁵ Thereafter, members of the HPC inquired into the irrelevant issue of restoration:

- Commissioner Danielson asked whether Sears planned to restore or rehabilitate the building to restore integrity and make the building "look more like the Clements architecture."^{16 17}
- Commissioner Fotiadi also inquired as to how the Sears store could be renovated and speculated that the original stone and glass of the Sears store was "right behind" the stucco, which could be "removed quite easily".¹⁸
- Chair Stillman expressed her belief that any changes to the Sears store could be reversed and that belief would cause her to side with her staff.¹⁹

Following discussion, the HPC voted by a 4-2 margin not to alter its previous determination of "eligibility" and took no further action.²⁰ It is critical to note that three of the four votes in favor of "eligibility" came from Chair Stillman and Commissioners Danielson and Fotiadi, all of whom applied the incorrect "restoration standard".

The HPC did not propose, discuss or adopt any formal findings at the December 4, 2013 hearing. The HPC also did not provide any reasoning, analysis or a written decision from the December 4, 2013 hearing, in spite of inquiries from Sears' attorneys for same.²¹ Moreover, when Sears' attorneys

¹² See hardcopies of Sears' Power Point slides from December 4, 2013 City of Chula Vista Historic Preservation Commission Meeting, attached as Exhibit F.

¹³ Exhibit G, at page 39, lines 3-7.

¹⁴ *Id.*, at page 10, line 9 to page 11, line 10.

¹⁵ *Id.*, at page 16, lines 8-17.

¹⁶ *Id.*, at page 12, lines 7-12.

¹⁷ *Id.*, at page 37, lines 6-12.

¹⁸ *Id.*, at page 47, line 19 to page 48, line 9.

¹⁹ *Id.*, at page 57, lines 1-10.

²⁰ *Id.*, at page 62, lines 1-10.

²¹ See December 9, 2013 email from Lynnette Tessitore-Lopez to Matthew Adams, attached as Exhibit I.

requested copies of the minutes of the December 4, 2013 hearing, a member of the City's Planning Department informed Sears' attorneys that the minutes would not be available before the filing deadline for this appeal. The City did, however, provide Sears with an audio file from the December 4, 2013 hearing. At its own expense, Sears has prepared a certified stenographic transcript of the December 4, 2013 hearing.

3. STATEMENT OF FACTS

The Sears store is located at the Chula Vista Center mall and faces H Street to the north, Fig Avenue to the east, I Street to the south, and portions of Fifth Avenue and Broadway to the west. Stiles & Robert Clements Architects-Engineers designed the building and Neilsen Construction Co. was the general contractor.²² Broadway-Hale Company (now Macy's) was one of the original developers of the mall.²³ Construction of the Sears store commenced 3.5 years later, after the mall was completed, with groundbreaking on the Sears store taking place on January 4, 1965.²⁴ Just over a year later, the Sears store had its grand opening on February 24, 1966.²⁵

The Sears store is a one- and two-story building with basement, designed in the Modern Commercial architectural style, encompassing approximately 250,000 square feet.²⁶ The Sears store has undergone significant renovation and retrofit since its opening:²⁷

- On the north façade, the original signage was centrally located on the "penthouse" screen wall, which is now replaced with contemporary "Sears" signage.
- The original north entrance doors included a scored anodized aluminum push plate detail with "Sears" etched at the center. These doors are no longer extant and have been replaced with contemporary doors.
- The original display windows adjacent to the north entrances have been enclosed and the original stone veneer at the central bay is no longer visible.
- Tall-open frame canopies were added to the north entrances in the 1980s. The original canopy has been notched in these areas to make room for the contemporary entrance structures.
- Up until the 1980s, the west portion of the parcel included surface parking and access to Fifth Avenue, which was open to traffic. Mall renovations conducted in the late 1980s officially closed Fifth Avenue to traffic in 1988, physically linked the Sears store with the rest of the Chula Vista Center, and added stores and a courtyard between Sears and Macy's. Contemporary motifs were embellished upon the exterior existing mall

²² Exhibit B, at page 2-1.

²³ *Id.*, at page 4-3.

²⁴ *Id.*, at page 2-1.

²⁵ *Id.*

²⁶ *Id.*, at page 2-2.

²⁷ *Id.*, at pages 2-2 and 2-3.

structures. Specific renovations to the Sears store during this period included all storefront entrances and signage and display windows enclosed along the west façade.

- The south façade contains an original barrel-roof canopy that covers the entrances. Entrance doors have been changed and the central display windows have been boarded-over. The original signage has been replaced with a contemporary sign.
- The original Garden Center section was renovated in 1979 and its space incorporated with the remaining retail area. The original truck ramp with a large central planter and loading dock is extant but the walkway above the loading dock has been enclosed and the original entrance reduced.
- The east façade faces a surface parking lot. The two original store entrances have been renovated and the store display windows enclosed. The stone veneer cladding located between the entrances is no longer extant. A contemporary "Sears" sign replaced the original above the entrances.
- A separate Auto Center is located at the southwest portion of the lot. The Auto Center also underwent changes throughout the years, including removal of the brick and stone veneer cladding, enclosure of the window displays and the replacement of the original signage with contemporary signs.

4. LEGAL DEFINITION OF "HISTORICAL RESOURCE"

There are federal and California state statutory schemes that provide for eligibility and designation of historical resources.^{28 29 30} ASM originally posited that the Sears store was eligible for designation as a historical resource under the federal and California state schemes, but subsequently retreated on that position. As such, analyses of the Sears store under federal and state law are not directly relevant on this appeal as ASM now contends that the Sears store is only eligible under local criteria.

ASM concluded, and the HPC found, that the Sears store is "eligible" under CVMC § 21.03.100, because the Sears store is **at least 45 years old**; possesses **historical integrity** (defined under CVMC § 21.03.084) **and** the resource was determined to have historical significance under two (out of five) criteria:

Criterion 1: It is associated with an event that is important to prehistory or history on a national, state, regional, or local level; and

Criterion 3: It embodies the distinctive characteristics of a style, type, period, or method of construction, or represents the work of a master or important, creative individual, and/or possesses high artistic values.

²⁸ 16 U.S.C. § 470a

²⁹ 36 C.F.R. § 60.4

³⁰ Cal. Pub. Res. Code § 5024.1

"Historical integrity" is defined under CVMC § 21.03.084, which provides:

The authenticity of a Resource's historic identity, evidenced by the survival of physical characteristics that existed during the Resource's historic or prehistoric period. Within the concept of Integrity there are seven recognized aspects or qualities that in various combinations, define Integrity. The seven aspects of Integrity are Location, Design, Setting, Materials, Workmanship, Feeling, and Association.^{31 32}

5. LEGAL ANALYSIS OF THE SEARS STORE

A local agency or quasi-judicial body may not decide matters without evidentiary support.³³ An abuse of discretion is established if an agency has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence.^{34 35}
³⁶

The HPC abused its discretion at the December 4, 2013 hearing by upholding its prior finding that the Sears store is eligible to be designated as a historical resource based on age; satisfaction of Criteria 1 and 3 and "historical integrity". That finding is unsupported by the evidence. The HPC ignored the detailed information and analysis from Heritage that clearly shows the Sears store did not meet the requirements for eligibility. The HPC also relied on inaccurate information from ASM and ASM's less detailed survey. The HPC also applied and proceeded on standards and inquiries outside existing law.

A. Criterion 1: Associated With An Historic Event

In support of its finding of eligibility of the Sears store, the HPC relied on ASM's incorrect conclusion that the Sears store was associated with the 1962 opening of the Chula Vista Center mall.³⁷

The opening of the Chula Vista Center was not an important event in prehistory or history. As pointed out by Heritage in its Expert Technical Report and by David Marshall at the December 4, 2013 hearing, the mall has not been identified as eligible nor has it even been considered for eligibility. Even if the mall and its opening were historically significant, the Sears store was not an original part of the Chula Vista Center, as the Sears store was developed 3.5 years after the mall's opening and physically separated from the mall until the 1980s. In contrast, the Macy's store at the Chula Vista Center was part of the original mall but the Macy's store was omitted from ASM's survey and has not been classified as eligible. Moreover, the Sears store itself and its opening were not identified in Heritage's research as being historically significant. Clearly, the Sears store is not associated with an event that is important to

³¹ CVMC § 21.03.084.

³² See also National Register Bulletin 15: How to Apply the National Register Criteria for Evaluation Section VIII. How to Evaluate the Integrity of a Property Historical Resource (incorporated by reference in CVMC §21.03.084), attached as Exhibit H.

³³ *Topanga Assn. for a Scenic Community v. City of Los Angeles*, 11 Cal.3d 506 (1974)

³⁴ Cal. Code Civ. Proc. § 1094.5(b)

³⁵ *Fukuda v. City of Angels*, 20 Cal.4th 805 (1999)

³⁶ *Georgia-Pacific Corp. v. California Coastal Commission*, 132 Cal.App.3d 678 (1982)

³⁷ See Exhibit A.

prehistory or history on a national, state, regional or local level, either by its association with the mall or on its own.³⁸

Sears provided abundant evidence of the lack of historical significance to ASM before the December 4, 2013 hearing. David Marshall presented the same evidence to the HPC at the December 4, 2013 hearing. Ms. Davis failed to dispute or rebut any of the evidence of the lack of historical significance either before or during the hearing. Nevertheless, the HPC failed to correct its error; instead, it maintained its finding of eligibility.

B. Criterion 3: Distinctive Example of Modern Architecture

The HPC relied on inaccurate information and applied the wrong standards to determine whether the Sears store satisfies Criterion 3 of CVMC § 21.04.100.

1. The HPC Incorrectly Relied On The Possibility of Restoration

National Register Bulletin 15, incorporated by reference in CVMC § 21.03.084, explains that even if a resource is physically intact, its integrity is questionable if its significant features are concealed under modern construction.³⁹ If it is not visible, it is not under consideration for eligibility.⁴⁰ That is, a resource must be evaluated for its integrity "as is", not as what it could be.⁴¹

At the December 4, 2013 hearing, three members of the HPC applied the following test: whether the original modern architecture elements of the Sears store could be restored and, if so, the finding of eligibility would stand. This inquiry is erroneous and unsupported by federal, state or local law.

- Commissioner Danielson asked whether Sears planned to restore or rehabilitate the building to restore integrity and make the building "look more like the Clements architecture."^{42 43}
- Commissioner Fotiadi also inquired as to how the Sears store could be renovated and speculated, without any basis, that the original stone and glass of the Sears store was "right behind" the stucco, which could be "removed quite easily".⁴⁴
- Chair Stillman expressed her belief that any changes to the Sears store could be reversed and that belief would cause her to side with her staff.⁴⁵

³⁸ Exhibit G, at page 17, lines 1-7.

³⁹ Exhibit H, at page 46.

⁴⁰ Exhibit G, at page 25, lines 12-13.

⁴¹ *Id.*, at page 25, lines 5-10

⁴² *Id.*, at page 12, lines 7-12.

⁴³ *Id.*, at page 37, lines 6-12.

⁴⁴ *Id.*, at page 47, line 19 to page 48, line 9.

⁴⁵ *Id.*, at page 57, lines 1-10.

Clearly, these members of the HPC incorrectly relied on the possibility that the Sears store could be restored to its original state. Based on that possibility, the HPC upheld its original finding of eligibility by a 4-2 vote, with three of those four votes coming from Chair Stillman and Commissioners Danielson and Fotiadi.

2. The HPC Failed To Apply The "*Significant Integrity*" Standard

At the December 4, 2013 hearing, the HPC applied the incorrect standard of whether integrity has been *completely* lost. Noting that some integrity remained, the HPC maintained its earlier finding of eligibility for the Sears store. That inquiry and the result are wrong.

The correct inquiry is whether *significant* integrity remains. National Register Bulletin 15, incorporated by reference into CVMC's definition of integrity, clearly states that the property is not eligible if it retains some basic features conveying massing but has lost the majority of the features that once characterized its style.⁴⁶ Even ASM stated in its own survey prepared for the City that buildings from the City Maturation Period must "retain to a significant degree their building materials dates to the period of significance" and "retain a high degree of design, materials, and craftsmanship" in order to be eligible for listing.⁴⁷

The HPC had overwhelming evidence in both Heritage's Expert Technical Report and in David Marshall's presentation at the December 4, 2013 hearing showing that the Sears store has not retained integrity of design, setting, materials, and feeling.⁴⁸

Design is the combination of elements that create form, plan, space, structure and style. Over the years, the Sears store has undergone a series of renovations and retrofits that have significantly reduced and compromised its design integrity. The original storefront doors have been replaced, including the "Sears" engraved push plates. The original display windows are no longer visible and have been enclosed. Retrofitted columns now obscure the original slender columns. On the north and east façades, the stone veneer cladding has been removed. Contemporary signage is in the place of the original "Sears" signage. The original Garden Center section was renovated in 1979 and its space incorporated into the remaining retail area. In view of the various renovations, changes and retrofits throughout the years, the Sears store maintains little of its original design integrity such that it has lost the majority of the features that once characterized its architectural style.^{49 50}

Setting is the physical environment of a historic property and refers to the character of the site and relationship to surrounding features and open space. The original setting integrity of the Sears store has been compromised.⁵¹ Although the surrounding neighborhood has remained mostly unchanged, the relationship of the Sears store and the surrounding streets has changed drastically with the enclosure of Fifth Avenue in the late 1980s.⁵² As a result, the Sears store is linked to the adjacent shopping center

⁴⁶ Exhibit H, at page 46.

⁴⁷ Exhibit A, at page 56.

⁴⁸ Exhibit B, at pages 6-1 and 6-2.

⁴⁹ *Id.*, at page 6-1.

⁵⁰ Exhibit G, at page 25, line 19 to page 26, line 3.

⁵¹ Exhibit B, at pages 6-1 and 6-2.

⁵² Exhibit G, at page 23, lines 3-6.

and is viewed mostly from a pedestrian level from the west, in contrast to the original intent to have the store visible from all elevations for passing motorists.

Materials are the physical elements that were combined or deposited during a particular period of time, and in particular patterns or configuration to form a historic property. The Sears store no longer retains the integrity of its original materials.^{53 54} Although the much of the upper level walls appear as they did in 1966, the majority of the original features at ground level are no longer visible or have been removed or replaced with contemporary materials. For example, the original store front doors with the "Sears" engraved push plates and the original Sears signage have been removed. The columns have been clad over. The display windows have been enclosed. The original stone veneer cladding at the north and east façades is no longer visible.

Feeling is a property's expression of the aesthetic or historic sense of a particular period of time. The feeling of the Sears store has been compromised.⁵⁵ Renovations conducted in the late 1980s, including the enclosure of Fifth Avenue to integrate the store with the shopping center, the post-modern open-frame entry structures, contemporary signage and missing store veneer negatively impact and greatly reduce the store's architectural and aesthetic expression of the 1960s.⁵⁶

In its Expert Technical Report and at the December 4, 2013 hearing, Heritage provided the information, analysis and reasoning, detailed above, to support the conclusion that four major elements of integrity (design, setting, materials and feeling) have been compromised in the Sears store. In stark contrast, Ms. Davis of ASM quickly glossed over the elements of integrity at the December 4, 2013 hearing. Although she mentioned design, materials and "craftsmanship" (not workmanship), she did not provide any details or analysis of these elements of integrity nor did she rebut any of Heritage's evidence.⁵⁷ The evidence clearly showed compromise of the elements of design, setting, materials and feeling that are necessary to a finding of integrity, yet the HPC ignored these facts and applied the standard of whether there was a complete loss of integrity. In applying this incorrect standard, the HPC erroneously maintained its of earlier finding of "eligibility".

3. The Sears Store Is Not A Rare Example Of Modern Architecture

Ms. Davis of ASM opined, and HPC relied on information, that the Sears store embodies the distinctive characteristics of a type, period, region, or method of construction, or represents the work of an important creative individual, or possesses high artistic values. At the December 4, 2013 hearing, Ms. Davis stated that the Sears store is an example of mid-century modern architecture.⁵⁸ She also noted that examples of such architecture are "rare" in Chula Vista and therefore, the Sears store should be afforded greater leeway when determining integrity.⁵⁹ Hence, ASM's conclusion that the Sears store is

⁵³ Exhibit B, at page 6-2.

⁵⁴ Exhibit G, at page 26, lines 6-10.

⁵⁵ Exhibit B, at page 6-2.

⁵⁶ Exhibit G, at page 26, lines 10-15.

⁵⁷ *Id.*, at page 10, lines 9-22.

⁵⁸ *Id.*, at page 10, lines 17-22.

⁵⁹ *Id.*, at page 9, line 20.

"eligible" is based on the notion that the Sears store is a "rare" example of mid-century modern architecture in Chula Vista.⁶⁰

ASM's classification of Sears as a rare example of mid-century modern architecture is inaccurate and artificial because (1) the Macy's store - an original part of the mall - is also an example (if not a better example) of mid-century modern architecture designed by a master architect; and (2) ASM omitted Macy's from its survey and therefore created a false scarcity of mid-century modern resources. Indeed, Macy's and the Chula Vista Center (completed 3.5 years before the Sears building) were designed by the firm of Charles Luckman & Associates - a very significant Los Angeles firm.⁶¹ Charles Luckman was a master architect featured on the cover of Time Magazine and worked on architecturally significant projects such as LAX, Madison Square Garden and The Forum in Los Angeles.^{62 63 64}

ASM's cursory survey was patently inaccurate, especially in view of ASM's omission of Macy's but its inclusion of the Sears store as an "eligible" resource. In fact, Ms. Davis admitted at the December 4, 2013 hearing that she had not conducted a survey or any research on the Macy's building at the Chula Vista Center because she had not initially thought Macy's met the age requirement. Ms. Davis also admitted at the hearing that her "gut" told her that Macy's would be eligible.^{65 66} Although Ms. Davis admitted her mistake by not including Macy's in her survey, and in spite of the strong evidence showing that the Sears store was not such a rare example of modern architecture, the HPC nevertheless relaxed its standards to allow for more degradation and compromise of the aspects of integrity based upon this erroneous and artificial "rarity". As a result, the HPC failed to correct its erroneous finding that the Sears store is eligible as a historical resource.

⁶⁰ *Id.*, at page 51, line 21 to page 52, line 4.

⁶¹ *Id.* at page 30, lines 14-18

⁶² *Id.*, at page 30, line 18 to page 31, line 8.

⁶³ In contrast, the Sears store is not the distinctive work of a master. While the firm of Stiles and Robert Clements Architects-Engineers is recognized for their design of commercial department stores and shopping centers, the Sears store is not notable or unique as a Stiles and Robert Clements Architects-Engineers design. The Sears store was not recognized in industry and trade publications at the time of its completion or in subsequent years as an important or notable work of the firm. Moreover, the Sears store incorporates innovative design elements in earlier shopping centers of the 1940s and 1950s but by the 1960s - when the Sears store was constructed - these elements were commonplace and widely used. Exhibit B, at page 5-5.

⁶⁴ Individually, Stiles O. Clements gained significance for his earlier Deco, Colonial Revival and Mayan Revival styles but not for his work on department stores and shopping centers or 1960s mid-century modern works like the Sears store. Exhibit B, at page 5-5.

⁶⁵ Exhibit G, at page 17, lines 1-7.

⁶⁶ In addition to being inaccurate, the survey conducted by ASM employed inferior methodology in comparison to the Expert Technical Report from Heritage. The latter was more detailed, focused on the Sears store and included on-site review by a historian, archival research, evaluation of photos and drawings from Sears and included expert analysis by a "qualified expert" per CVMC § 21.03.056. Exhibit B, at page 3-1.

C. The HPC Failed To Issue A Written Finding; Therefore, Their Decision Must Be Reversed

The California Supreme Court requires an agency to issue findings sufficient both to enable parties to determine whether and on what basis they should seek review.⁶⁷ Local law also requires the HPC to render written findings.⁶⁸ Neither at the December 4, 2013 hearing nor at any time thereafter did the HPC issue any written findings or decision from which Sears could appeal "eligibility". Sears has made inquiries with the City regarding formal findings and a written decision from the December 4, 2013 hearing. The City has responded that Sears need not "respond" to findings for its appeal as "no findings" were required for the HPC to take "no action" at the December 4, 2013 hearing.^{69 70}

D. As A Practical Matter, The HPC's Finding That The Sears Store Is Eligible Is Arbitrary and Unfair

Although Sears could and does raise substantive Due Process arguments under the federal and California constitutions based on the vagueness of CVMC § 21.04.100,⁷¹ the fundamental reality is that Sears is being treated unfairly and differently from other property owners, including owners of better examples of modern architecture located in the same shopping mall (*i.e.* Macy's).

Sears is a member of the Chula Vista community. Like other property owners in the community, Sears pays local and state taxes, including property taxes for its unencumbered fee ownership in its property. However, Sears (unlike Macy's) is being deprived of its unencumbered fee ownership in its store in Chula Vista based on inaccurate information gathered by the City's experts who performed a cursory visual survey of the local area, followed by public input to include the Sears store in the survey.⁷² All said, the HPC relied on wrong information from ASM's survey, ignored the in-depth, detailed evidence from Heritage, applied incorrect standards and then deemed the Sears store eligible as a historical resource. As a result of that eligibility, Sears cannot demolish, renovate, or remodel the "historically

⁶⁷ *Topanga Assn. for a Scenic Community*, *supra* at 514.

⁶⁸ See *e.g.* CVMC § 21.04.09(3)(B) (written findings from the City required for denial of historical resource designation); CVMC § 21.06.040(3)(B) (written findings from the City required for denial of historical district designation); CVMC § 21.06.100(3)(B) (written findings from the City required for denial of historical preservation modifying district).

⁶⁹ See December 9, 2013 email from Lynnette Tessitore-Lopez to Matthew Adams, attached as Exhibit I.

⁷⁰ Sears has also requested minutes from the hearing. As of the date of this letter brief, minutes from the December 4, 2013 hearing remain unavailable to Sears. Absent a written decision or explanation, the HPC's finding of "eligibility" is unsupported, does not comply with local laws and is not enforceable.

⁷¹ The HPC found the Sears store eligible because it is "important to prehistory or history" and "represents the work of a master or an important, creative individual" and/or "possesses high artistic value" per CVMC § 21.04.100. Yet, these terms are so vague and ambiguous that an ordinary, reasonable person (including Sears) would not have an understanding of the criteria for classification of eligibility. See *e.g.*, *Papachristou v. Jacksonville*, 405 U.S. 156, n.1 (1972) (holding vague an ordinance that punished "vagrants", defined to include "rogues and vagabonds," "persons who use juggling," and "common night walkers" (citations omitted)); *Nunez v. City of San Diego*, 114 F. 3d 935 (9th Cir. 1997). (City's juvenile curfew ordinance containing terms "loiter, wander, idle, stroll or play" was unconstitutionally vague.); *People v. Townsend*, 62 Cal.App.4th (1998).

⁷² Exhibit G, at page 20, lines 9-11.

eligible" Sears store without first obtaining approval from the City, its Zoning Administrator and/or the HPC above and beyond the normal process and fees for building permits.⁷³

Now on this appeal, Sears is forced to incur the costs of experts, attorneys and fees to the City in order to disprove an incorrect, unsupported finding of eligibility that was never put into writing. In essence, the Sears building is deemed "eligible" and Sears has the burden of proving its store "ineligible." Procedurally, the cart is before the horse and this is fundamentally unfair, as well as constitutionally impermissible. Fairness, as well as compliance with applicable legal standards, requires the City to review the overwhelming evidence against a finding of "eligibility" and reverse the HPC's earlier finding.

6. CONCLUSION

Based on the facts and analysis above, Sears requests that the Council reverse the HPC's December 4, 2013 finding that the Sears store, located at 565 Broadway, Chula Vista, California, is "eligible" to be listed as a Historical Resource and issue a decision that the Sears store is ineligible for listing as a Historical Resource under Title 21 of the Chula Vista Municipal Code.

Very truly yours,

DENTONS US LLP



IVOR E. SAMSON

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⁷³ CVMC § 21.07.020, *et seq.*