

**SUMMONS
(CITACION JUDICIAL)**

FOR COURT USE ONLY
(SOLO PARA USO DE LA CORTE)

**NOTICE TO DEFENDANT:
(AVISO AL DEMANDADO):**
CITY OF SEBASTOPOL and the CITY COUNCIL OF THE CITY OF
SEBASTOPOL

**ENDORSED
FILED**

DEC 24 2012

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SONOMA

Does 1-20

**YOU ARE BEING SUED BY PLAINTIFF:
(LO ESTÁ DEMANDANDO EL DEMANDANTE):**
LONGS DRUG STORES CALIFORNIA, L.L.C., et al. *FRANK ARMSTRONG*
Development Properties, Inc.

NOTICE! You have been sued. The court may decide against you without your being heard unless you respond within 30 days. Read the information below.

You have 30 CALENDAR DAYS after this summons and legal papers are served on you to file a written response at this court and have a copy served on the plaintiff. A letter or phone call will not protect you. Your written response must be in proper legal form if you want the court to hear your case. There may be a court form that you can use for your response. You can find these court forms and more information at the California Courts Online Self-Help Center (www.courtinfo.ca.gov/selfhelp), your county law library, or the courthouse nearest you. If you cannot pay the filing fee, ask the court clerk for a fee waiver form. If you do not file your response on time, you may lose the case by default, and your wages, money, and property may be taken without further warning from the court.

There are other legal requirements. You may want to call an attorney right away. If you do not know an attorney, you may want to call an attorney referral service. If you cannot afford an attorney, you may be eligible for free legal services from a nonprofit legal services program. You can locate these nonprofit groups at the California Legal Services Web site (www.lawhelpcalifornia.org), the California Courts Online Self-Help Center (www.courtinfo.ca.gov/selfhelp), or by contacting your local court or county bar association. **NOTE:** The court has a statutory lien for waived fees and costs on any settlement or arbitration award of \$10,000 or more in a civil case. The court's lien must be paid before the court will dismiss the case. **AVISO!** Lo han demandado. Si no responde dentro de 30 días, la corte puede decidir en su contra sin escuchar su versión. Lea la información en continuación.

Tiene 30 DÍAS DE CALENDARIO después de que le entreguen esta citación y papeles legales para presentar una respuesta por escrito en esta corte y hacer que se entregue una copia al demandante. Una carta o una llamada telefónica no lo protegen. Su respuesta por escrito tiene que estar en formato legal correcto si desea que procesen su caso en la corte. Es posible que haya un formulario que usted puede usar para su respuesta. Puede encontrar estos formularios de la corte y más información en el Centro de Ayuda de las Cortes de California (www.sucorte.ca.gov), en la biblioteca de leyes de su condado o en la corte que le quede más cerca. Si no puede pagar la cuota de presentación, pida al secretario de la corte que le dé un formulario de exención de pago de cuotas. Si no presenta su respuesta a tiempo, puede perder el caso por incumplimiento y la corte le podrá quitar su sueldo, dinero y bienes sin más advertencia.

Hay otros requisitos legales. Es recomendable que llame a un abogado inmediatamente. Si no conoce a un abogado, puede llamar a un servicio de remisión a abogados. Si no puede pagar a un abogado, es posible que cumpla con los requisitos para obtener servicios legales gratuitos de un programa de servicios legales sin fines de lucro. Puede encontrar estos grupos sin fines de lucro en el sitio web de California Legal Services (www.lawhelpcalifornia.org), en el Centro de Ayuda de las Cortes de California (www.sucorte.ca.gov) o poniéndose en contacto con la corte o el colegio de abogados locales. **AVISO:** Por ley, la corte tiene derecho a reclamar las cuotas y los costos exentos por imponer un gravamen sobre cualquier recuperación de \$10,000 o más de valor recibida mediante un acuerdo o una concesión de arbitraje en un caso de derecho civil. Tiene que pagar el gravamen de la corte antes de que la corte pueda desecher el caso.

The name and address of the court is:
(El nombre y dirección de la corte es):

CASE NUMBER
(Número del Caso): *SW 252962*

The Superior Court of California, County of Sonoma
3055 Cleveland Avenue
Santa Rosa, CA 95403

FAXED

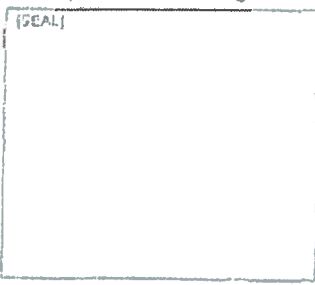
The name, address, and telephone number of plaintiff's attorney, or plaintiff without an attorney, is:
(El nombre, la dirección y el número de teléfono del abogado del demandante, o del demandante que no tiene abogado, es):

Charles L. Coleman, III (SBN 65496) Tel: (415) 743-6970 Fax: (415) 748-6910
HOLLAND & KNIGHT LLP
50 California Street, Suite 2800, San Francisco, CA 94111

DATE: **DEC 24 2012**
(Fecha)

Clerk, by **JOSE O. GUILLEN** *Kaela Oskins*, Deputy
(Secretario) (Adjunto)

(For proof of service of this summons, use Proof of Service of Summons (form POS-010).)
(Para prueba de entrega de esta citación use el formulario Proof of Service of Summons, (POS-010).)



- NOTICE TO THE PERSON SERVED; You are served**
- as an individual defendant.
 - as the person sued under the fictitious name of (specify):
 - on behalf of (specify):
under:

<input type="checkbox"/> CCP 416.10 (corporation)	<input type="checkbox"/> CCP 416.60 (minor)
<input type="checkbox"/> CCP 416.20 (defunct corporation)	<input type="checkbox"/> CCP 416.70 (conservatee)
<input type="checkbox"/> CCP 416.40 (association or partnership)	<input type="checkbox"/> CCP 416.90 (authorized person)
<input type="checkbox"/> other (specify):	
 - by personal delivery on (date):

**CITY OF SEBASTOPOL
RECEIVED
DEC 24 2012**

ENDORSED
FILED

DEC 24 2012

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SONOMA

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12 and ARMSTRONG DEVELOPMENT
13 PROPERTIES, INC.

14 SUPERIOR COURT OF THE STATE OF CALIFORNIA,
15 COUNTY OF SONOMA
16 UNLIMITED JURISDICTION

17 LONGS DRUG STORES CALIFORNIA,
18 L.L.C., a California limited liability company,
19 and ARMSTRONG DEVELOPMENT
20 PROPERTIES, INC., a Pennsylvania
21 corporation,

22 Plaintiffs and Petitioners,

23 vs.

24 CITY OF SEBASTOPOL, CITY COUNCIL
25 OF THE CITY OF SEBASTOPOL, and DOES
26 1-20,

27 Defendants and
28 Respondents.

Case No.: SLV-252962

COMPLAINT FOR DECLARATORY
JUDGMENT AND INJUNCTION;
PETITION FOR WRIT OF MANDATE

FAXED

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13 PROPERTIES, INC.

14 SUPERIOR COURT OF THE STATE OF CALIFORNIA

15 COUNTY OF SONOMA

16 UNLIMITED JURISDICTION

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25 OF THE CITY OF SEBASTOPOL, and DOES
26 1-20,

27 Defendants and
28 Respondents.

Case No.:

**COMPLAINT FOR DECLARATORY
JUDGMENT AND INJUNCTION;
PETITION FOR WRIT OF MANDATE**

1 Plaintiffs and Petitioners LONGS DRUG STORES CALIFORNIA, L.L.C. and
2 ARMSTRONG DEVELOPMENT PROPERTIES, INC. (collectively, "Petitioners") allege
3 against defendants and respondents, CITY OF SEBASTOPOL and the CITY COUNCIL OF THE
4 CITY OF SEBASTOPOL (collectively the "City ") and DOES 1-20 as follows:

5 **JURISDICTION AND VENUE**

6 1. This Court has jurisdiction over this action pursuant to California Code of Civil
7 Procedure Sections 410.10, 1085 and 1094.5. This action arises out of an "Urgency Ordinance of
8 the Council of the City of Sebastopol Adopting and Imposing a Moratorium on the Establishment
9 of Drive-Through Uses" adopted by defendants City Council and City on December 18, 2012 (the
10 "Ordinance"), purportedly pursuant to California Government Code section 65858. A copy of the
11 Ordinance is attached as Exhibit 1 to this Complaint/Petition.

12 2. Venue for this action is proper before this Court because the City and, on information
13 and belief, Does 1-20, are located or reside in the City of Sebastopol, County of Sonoma and the
14 actions complained of herein occurred in the City of Sebastopol, County of Sonoma.

15 **PARTIES**

16 3. CVS is a California limited liability company that owns a 2.45-acre property located
17 at 6877 Sebastopol Avenue in Sebastopol, California in the County of Sonoma (the "Property").

18 4. Armstrong is a Pennsylvania corporation that has contracted with CVS to secure the
19 necessary permits, regulatory approvals and entitlements for the development of the Property into
20 viable retail uses.

21 5. Defendant/Respondent City is a general law city located in the County of Sonoma,
22 State of California.

23 6. Defendant/Respondent City Council is a five-member legislative body of the City that
24 adopted the Ordinance.

25 7. Defendants/Respondents DOES 1-20 are persons or entities and/or capacities that are
26 not presently known to Petitioners and who are responsible in some manner for, or who are in a
27

1 position to perpetuate, the unlawful acts that Petitioners ask this Court to declare unlawful, enjoin
2 and prohibit as set out more fully in this Complaint and Petition.

3 **RELIEF REQUESTED**

4 8. By this Complaint and Petition, the Petitioners seek: (a) A declaration from this Court
5 that the Ordinance (including any extension or enforcement of the Ordinance) is unlawful, *ultra*
6 *vires*, and of no force or effect; (b) an injunction prohibiting Defendants from extending or
7 enforcing the Ordinance, or refusing to perform any ministerial duties in connection with the
8 processing of building permits or other non-discretionary approvals in connection with the
9 Project; and (c) a writ of mandate directing the City and City Council to vacate the Ordinance.

10 **THE PROJECT**

11 9. The Property is located on the edge of the City's downtown core area and is currently
12 comprised of a defunct automobile dealership and several deteriorating accessory buildings that
13 have been vacant for four years.

14 10. The Petitioners purchased the Property to revitalize it with vibrant retail uses
15 including a CVS pharmacy and a bank (the "Project"). The Project includes adding more than
16 eighty trees to the Property (where there is currently only one which is being preserved), creating
17 a new public gathering area with benches and shade trees on the Property, and improving the
18 pedestrian walkways on and off the Property. In addition to restoring the downtown area's former
19 vibrancy, the Project will also generate property and sales tax revenue for the City and State.

20 11. A significant number of pharmacy customers are elderly, ill, and/or physically
21 impaired, making it difficult for these customers to obtain necessary medications and fulfill basic
22 banking needs. The Petitioners designed the Project to include drive-through features to enable
23 this population to use the pharmacy and bank in the most convenient manner - from their
24 vehicles.

25 12. While Petitioners currently have a pharmacy in the City, it does not include a drive-
26 through and cannot be altered to include one due to site constraints.

27 //

28

1 **THE CITY'S DETAILED REVIEW AND APPROVAL OF THE PROJECT**

2 13. The Petitioners first had preliminary discussions with the City about the Project in
3 2009. Since the commencement of these discussions more than three years ago, the Project has
4 always included two drive-throughs.

5 14. The Petitioners submitted applications for the relevant permits and worked diligently
6 with the City to complete a comprehensive Mitigated Negative Declaration/Initial Study (dated
7 April 12, 2011) ("MND") in compliance with the California Environmental Quality Act (Cal.
8 Pub. Res. Code §§ 21000, *et seq.*) ("CEQA"). A true and correct copy of the MND is attached as
9 Exhibit 2 and copy of the City Council resolution certifying the MND is attached as Exhibit 3.

10 15. A small group of persons opposed to the Project have filed a suit in this court,
11 captioned *Kramer, Shane, Dwan, as Members of the Committee for Small Town Sebastopol vs.*
12 *City of Sebastopol* (Superior Court of California, County of Sonoma Case No. SCV-250149) (the
13 "CEQA Action") claiming that the MND violates CEQA. The CEQA action has, however, been
14 delayed by stipulation of the parties.

15 16. The City diligently considered the Project, and it held more than twenty public
16 hearings on the Project over sixteen months from April 2011 until August 2012.

17 17. During the public hearings, many of the Project elements were fully vetted. The
18 discussion regarding the drive-throughs focused on design issues and site circulation. The City
19 Planner tasked with analyzing the Project advised the City Council at its hearing on July 5, 2011
20 that "the City has changed its zoning reference to prohibit drive-through fast-food restaurants, but
21 we haven't done that with banks or pharmacies. So we have made some policy choices with our
22 zoning regulations."

23 18. Throughout the public hearing process, the City required the Petitioners to modify the
24 Project several times. One such modification included removing one lane of the pharmacy drive-
25 through for design reasons. See City Council Resolution No. 5864 attached as Exhibit 4. At no
26 point did the City Council raise public health or safety concerns pertaining to the drive-throughs.

1 19. The City ultimately found that the Project would have a less than significant impact in
2 terms of "substantial adverse effects on human beings, either directly or indirectly." Exhibit 2 at
3 p. 23. It also found that there would be no impact in terms of "substantially increas[ing] hazards
4 due to a design feature" or "conflict with adopted policies, plans, or programs . . . or otherwise
5 decrease the performance or safety of such facilities." *Id.* at pp. 20-21.

6 20. The only potential health or public harm impact that arguably was mentioned in a
7 singular public comment as related to the drive-throughs was a potential increase in greenhouse
8 gas emissions, in part from traffic trips to the Property including idling at the proposed drive-
9 throughs. The City specifically found that this potential impact of the Project has been mitigated
10 to a less than significant level. Exhibit 2 at pp. 8-9.

11 21. In August 2012, at the twenty-first public hearing for the Project, the City Council
12 finally approved the revised Major Design Review application. The City Council's findings for
13 approval provide that, as conditioned, the Project's design, which includes the drive-throughs, is
14 compatible with the "neighborhood and visual character" of the City. Attached as Exhibit 5 is a
15 true and correct copy of the City Council Resolution approving the Project's Major Design
16 Review application.

17 22. Petitioners now have obtained all discretionary planning and environmental reviews,
18 permits and approvals necessary to develop the Project. The approvals include the certified MND
19 (Exhibit 2), major design review approval (Exhibit 5), an alcohol use permit, and the initiation of
20 the abandonment of a street. In order to commence construction of the Project, Petitioners must
21 obtain a building permit from the City, but the Ordinance (Exhibit 1) purports to prohibit the
22 processing of any building permit applicant from Petitioners.

23 23. In good faith reliance on the City's final discretionary approvals of the Project,
24 Petitioners purchased the Property in November 2012, submitted for a demolition permit in
25 December 2012, and hired consultants to finalize plans to commence building development.

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1 **A NEW CITY COUNCIL SEEKS TO REVERSE THE DISCRETIONARY APPROVALS**
2 **ON WHICH PETITIONERS HAVE JUSTIFIABLY RELIED**

3 24. The City held a general election in November 2012, which included a race for two
4 seats on the Sebastopol City Council. One of the major issues of the City Council election was
5 the City's previous approval of the Project. The election changed the composition of the City
6 Council by adding two new members who had vociferously opposed the Project when it was
7 being considered by the previous City Council. The new City Council was sworn in on
8 December 4, 2012.

9 25. Ten days later, on December 14, 2012, the City notified Petitioners that the new City
10 Council would consider an "urgency" ordinance at a public hearing on December 18, 2012 to
11 prohibit "new" drive through uses.

12 26. At its December 18, 2012 meeting, the City Council considered two alternative
13 "urgency" measures to prohibit "new" projects with drive-through components. As described in
14 the City Council's Agenda Report (a copy of which is attached as Exhibit 6 hereto): "The first
15 version would affect projects with a drive-through component that do not yet have a Building
16 Permit. The second version would affect projects that do not yet have Planning permits."

17 27. On information and belief, the only project in the City of Sebastopol that has received
18 all required discretionary planning permits from the City but does not yet have a building permit
19 is the Project. Accordingly, the first alternative ordinance would apply to: (a) Those proposed
20 projects that had not yet been through the City's regulatory, discretionary, planning and design
21 review processes; and (b) A single project that had been through all of the City's regulatory,
22 discretionary, planning and design review processes, i.e., the Project. The second alternative
23 ordinance would apply uniformly to those proposed projects that have not yet been through the
24 City's discretionary review processes, but would not affect the Project.

25 28. The City Council adopted the first ordinance (the Ordinance, Exhibit 1 hereto, also
26 attached as pages 2-3 to Exhibit 6 hereto), thereby singling out the Project as the only approved
27 project to be blocked by the Ordinance.

THE ORDINANCE IS UNLAWFUL AND ULTRA VIRES

1
2 29. The Ordinance was not adopted, and does not purport to have been adopted, pursuant
3 to the procedures normally required prior to the adoption of a new zoning ordinance. Instead, the
4 Ordinance purports to have been issued pursuant to California Government Code section 65858,
5 which prescribes the circumstances pursuant to which cities may, "[w]ithout following the
6 procedure otherwise required prior to the adoption of a zoning ordinance" adopt an "urgency
7 measure," which it may then extend after further notice and hearing.

8 30. Government Code section 65858(c) provides, in pertinent part, that: "The legislative
9 body shall not adopt or extend any interim ordinance pursuant to this section unless the ordinance
10 contains legislative findings that there is a *current and immediate* threat to the public health,
11 safety, or welfare, and that the approval . . . which is required in order to comply with a zoning
12 ordinance *would result* in that threat to public health, safety or welfare." (Italics added).

13 31. The Ordinance (Exhibit 1), in Section 4 (entitled "Immediate Threat to Health, Safety
14 and Welfare") declares that it is necessary "as an urgency measure to address existing threats to
15 the public health, safety and welfare as described in Section 1" of the Ordinance.

16 32. Section 1 of the Ordinance does not identify any genuine and immediate threats to the
17 public safety, health or welfare. Instead, it speaks of the "needs and desires of the community. . .
18 including the City's objective of fostering pedestrian-oriented urban design, reducing use of the
19 automobile, and concerns with potential adverse consequences of drive-through uses of health,
20 safety, air quality and climate change." These "needs and desires" attributed to "the community"
21 to encourage "pedestrian-oriented urban design" (Ordinance, Section 1) do not amount to a
22 "current and immediate threat" to the public health, safety or welfare contemplated by the
23 Legislature when it allowed urgency measures in the limited circumstances set out in Government
24 Code section 65858.

25 33. This is particularly true in the case of drive-through facilities. The Legislature, in
26 Government Code section 65090(d), has enacted that: "Whenever a local agency considers the
27 adoption or amendment of policies or ordinances affecting drive-through facilities, the local
28

1 agency shall incorporate, where necessary, notice procedures to the blind, aged, and disabled
2 communities in order to facilitate their participation. The Legislature finds that access restrictions
3 to commercial establishments affecting the blind, aged, or disabled is a *critical statewide problem*
4" Italics added.

5 34. Defendants provided no notice or outreach to the blind, aged or disabled communities
6 in or around Sebastopol when they adopted, as an "urgency" measure, an Ordinance banning any
7 further drive-through facilities in Sebastopol.

8 35. Even if the City Council and City had a basis for characterizing additional drive-
9 through facilities *in general* as potential "threats" to public health, safety or welfare for the
10 reasons stated in the Ordinance (which they did not), this basis could only apply to proposed
11 projects that had not yet been subjected to the City's (and CEQA's) exacting environmental, safety
12 and design review standards and procedures, and possibly would not be subject to CEQA as drive
13 throughs could be developed as ministerial permitted uses, *i.e.*, those covered by the "version 2"
14 ordinance that was not adopted by the City Council or City and would not have applied to the
15 Project.

16 36. In view of the City and City Council's prior CEQA, design and other approvals of the
17 Project, they had no rational basis, or indeed any basis, for applying the legislative "findings" in
18 the Ordinance to the Project on an "emergency" bases after months of consideration where the
19 drive-through was never described as being a public health threat and indeed the Council had
20 reached and stated the *opposite* conclusions in their prior approvals of the Project after months of
21 study and hearings.

22 37. In view of Petitioner's foreseeable and justifiable reliance on the City, City Council's
23 and Doe 1-20's prior statements, findings, approvals and other representations, Defendants are
24 estopped to deny their prior findings and approvals of the Project and are estopped from applying
25 the Ordinance to the Project, whatever its effect on other, not-yet-reviewed projects involving
26 drive-through features.

1 38. Government Code section 65858 provides that, in situations involving a current and
2 immediate threat to public safety, health or welfare, a city "may adopt as an urgency measure an
3 interim ordinance prohibiting any *uses* that may be in conflict with a contemplated general plan,
4 specific plan, or zoning proposal" (Italics added). Neither this section, nor any other
5 provision of law, allows Defendants to prohibit the *filing or processing of applications*, including
6 applications for a building permit, as opposed to "uses."

7 39. The Ordinance (Exhibit 1), at Section 2, provides in pertinent part that: ". . . *no*
8 *application* for a City of Sebastopol Use Permit, Design Review Permit, other discretionary
9 Planning permit, or Building Permit shall be processed or issued for a drive through use, or a
10 project that includes a drive-through use." (Italics added).

11 40. Sebastopol is a "general law city" not a "charter city" under California law, so its
12 powers are to be strictly construed, so that any fair, reasonable doubt concerning the exercise of a
13 power is resolved against the City.

14 41. Sebastopol does not have the power to enact the Ordinance as it relates specifically to
15 the Project and, as applicable to the Project, the Ordinance is *ultra vires* and a nullity.

16 42. Petitioners sent a letter to the City Council on December 17, 2012, objecting to the
17 Ordinance and pointing out its unlawfulness.

18 43. Despite the objections articulated in the December 17, 2012 letter, and with full
19 knowledge of the unlawfulness of their actions, the City adopted the Ordinance.

20 44. The City and City Council (and, on information and belief, Does 1-20) are enforcing
21 the Ordinance and, under color of the Ordinance, refusing to process any building permit
22 submitted by Petitioners in connection with the Project and otherwise refusing to perform
23 ministerial duties in order to prevent Petitioners from moving forward with the Project.

24 **FIRST CLAIM FOR RELIEF**

25 **(Declaratory Relief)**

26 45. Petitioners incorporate by reference, as if fully set forth herein, each and every
27 allegation contained in paragraphs 1 through 44, inclusive.

1 46. An actual controversy has arisen and now exists between Petitioners and the City
2 regarding the lawfulness and enforceability of the Ordinance, both in general and as applied
3 specifically to the Project.

4 47. As a result of the Ordinance and the uncertainties about the future of the previously-
5 approved Project caused by the Ordinance, Petitioners has been and continue to be damaged in
6 that their investment of millions of dollars in acquiring the Property and pursuing and perfecting
7 the entitlements for the Project is now being jeopardized by the City's after-the-fact attempted
8 revocation of their previous discretionary approvals of the Project through the unlawful device of
9 the Ordinance and its enforcement by the City.

10 48. The City and City Council's actions in approving the Ordinance were arbitrary,
11 capricious and an abuse of discretion.

12 49. The City and City Council's Ordinance was and is *ultra vires* and not authorized by
13 law.

14 50. The City and City Council were informed in writing by Armstrong's counsel that the
15 Ordinance, if enacted, would be arbitrary, capricious, discriminatory, *ultra vires*, contrary to its
16 duties under the law, and lacking in substantial evidence or a rational basis.

17 51. By adopting the Ordinance with specific knowledge and scienter concerning the
18 unlawfulness of the Ordinance and its enforcement, the City and City Council acted maliciously,
19 intentionally, and with intent to harm Petitioners.

20 52. By knowingly adopting an unlawful Ordinance in excess of their powers, the City and
21 City Council violated their statutory and constitutional duties as sworn legislators.

22 53. There is a compelling public interest, reflected in Government Code section
23 65090(d), in providing effective notice to the blind, aged and disabled communities of any
24 proposal that would adversely affect drive-through facilities, the loss of which has been
25 determined to be a "critical statewide problem."

26 54. Declaratory relief would promote both the public interest and vindicate the rights of
27 Petitioners that are being adversely affected by the Ordinance.

1 55. Petitioners have no plain, speedy or adequate remedy at law other than the relief
2 sought in this action. A determination and declaratory judgment by the Court that the Ordinance
3 is unlawful, either in general or as applied to the Project, is necessary and appropriate at this time
4 so that Petitioners may ascertain their rights in the multi-million dollar Property and Project.

5 56. Petitioners seek a declaratory judgment finding that the Ordinance is unlawful, *ultra*
6 *vires* and void in its entirety or, in the alternative, to the extent applicable to the Project.

7 **SECOND CLAIM FOR RELIEF**

8 **(Injunction)**

9
10 57. Petitioners incorporate by reference, as if fully set forth herein, each and every
11 allegation contained in paragraphs 1 through 56, inclusive.

12 58. Petitioners, as well as a significant segment of the public that would otherwise benefit
13 from drive-through facilities in the Sebastopol area, are being irreparably harmed by the
14 Ordinance and Defendants' ongoing enforcement of the Ordinance in knowing violation of the
15 law.

16 59. Petitioners are entitled to and seek a preliminary and permanent injunction enjoining
17 defendants from: (a) enforcing the Ordinance, either generally or as applied to the Project; and
18 (b) extending the Ordinance, either generally or as applied to the Project; and (c) refusing to
19 perform any ministerial duties in connection with the processing of building permits or other non-
20 discretionary approvals in connection with the Project.

21 **THIRD CLAIM FOR RELIEF**

22 **(Writ of Mandate)**

23 **(Cal. Code Civ. Pro. §§ 1085 and/or 1094.5)**

24 60. Petitioners incorporate by reference, as if fully set forth herein, each and every
25 allegation contained in paragraphs 1 through 59, inclusive.

1 61. The City has a statutory and non-discretionary duty to administer the City's planning
2 and zoning laws and regulations consistently, without singling out a particular project or property
3 owner for special and unfavorable treatment.

4 62. The City has no legal authority to adopt the Ordinance, which is contrary to law and
5 not authorized under Government Code section 65858.

6 63. The City has a mandatory and non-discretionary duty to refrain from enforcing the
7 Ordinance because the Ordinance is unlawful and *ultra vires*, either in general or as applied to the
8 Project.

9 64. Defendants have failed and refused to carry out, and continue to fail and refuse to
10 carry out without excuse and in a willful manner, their mandatory and non-discretionary duties
11 described above.

12 65. Petitioners have a direct and beneficial interest in the issuance of a Writ of Mandate
13 because they have suffered, and are continuing to suffer, damages because of the Defendants'
14 enactment and enforcement of the Ordinance.

15 66. The City and City Council have proceeded in excess of their powers, and have failed
16 to proceed in a manner required by law, in enacting the Ordinance.

17 67. The Ordinance and its adoption are not supported by substantial evidence of a current
18 and immediate threat to public health, safety or welfare, either in general or as applied to the
19 Project.

20 68. The public interest in supporting drive-through access for seniors, disabled persons
21 and others will be promoted by the issuance of the writ sought by Petitioners.

22 **PRAYER FOR RELIEF**

23 WHEREFORE, Petitioners pray for relief as follows:

- 24 1. On their first claim for relief, for a declaration and judgment that the Ordinance is
25 unlawful, null and void, either in its entirety or, in the alternative, as applied to the Project; and
26 2. On their second claim for relief, for a preliminary and permanent injunction enjoining
27 defendants from: (a) enforcing the Ordinance, either generally or as applied to the Project; and
28

1 (b) extending the Ordinance, either generally or as applied to the Project; and (c) refusing to
2 perform any ministerial duties in connection with the processing of building permits or other non-
3 discretionary approvals in connection with the Project; and

4 3. On their third claim for relief, for the issuance of a peremptory writ of mandate
5 commanding the City and City Council to set aside the Ordinance, either generally or, in the
6 alternative, as applied to the Project and compelling the City to process the building permit and
7 other non-discretionary permits for the Project in the ordinary course and without further
8 obstruction or delay; and

9 4. For their costs of suit and, to the extent permitted by law including but not limited to
10 California Civil Procedure Code section 1021.5, their attorneys' fees; and

11 5. For such other and further relief as may be just and proper.

12 Dated: December 24, 2012

HOLLAND & KNIGHT LLP

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15 _____
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