

**CITY OF LOS ANGELES  
PLANNING DEPARTMENT**

**MASTER APPEAL FORM**

APPEAL TO THE: North Valley Area Planning Commission

REGARDING CASE NO.: DIR 2006-9072 (BSA)

This application is to be used for any authorized appeals of discretionary actions administered by the Planning Department. Appeals must be delivered in person with the following information filled out and be in accordance with the Municipal Code. **A copy of the action being appealed must be included. If the appellant is the original applicant, a copy of the receipt must also be included.**

**APPELLANT INFORMATION: PLEASE PRINT CLEARLY**

Name Ann Jerhoff, Esq., Director-Real Estate Law, Home Depot U.S.A., Inc.

Mailing Address 3800 West Chapman Avenue

Orange, California Zip: 92868

Work Phone: ( 714 ) 940-3620 Home Phone: (      )                     

- a) Are you or do you represent the original applicant?  
(Circle One)  YES      NO
- b) Are you filing to support the original applicant's position?  
(Circle One) YES      NO
- c) Are you filing for yourself or on behalf of other parties, an organization or company?  
(Circle One) SELF      OTHER
- d) If "other" please state the name of the person(s), organization or company (print clearly or type)

Home Depot U.S.A., Inc.

**REPRESENTATIVE**

Name Patricia Keane Tegart, Esq., Latham & Watkins LLP

Mailing Address 633 West Fifth Street

Suite 4000

Los Angeles, California Zip 90071

Work Phone: ( 213 ) 485-1234 Home Phone : (      )                     

**APPEAL INFORMATION**

A complete copy of the decision letter is necessary to determine the final date to appeal, under what authorizing legislation, and what, if any, additional materials are needed to file the appeal.

**Appeals to the City Council from a determination on a Tentative Tract (TT or VTT) by the City (Area) Planning Commission must be filed within 10 days of the written determination of the Commission.**

Final Date to Appeal: March 27, 2007

**REASONS FOR APPEALING**

Are you appealing the entire decision or parts of it?

Entire     Part

Indicate: 1) How you are aggrieved by the decision; and 2) Why do you believe the decision-maker erred or abused their discretion? If you are not appealing the whole determination, please explain and specifically identify which part of the determination you are appealing.

Attach additional sheets if necessary.

Please see Attachment A.

**ADDITIONAL INFORMATION**

- Original receipt required to calculate 85% filing fee from original applicants.
- Original applicants must pay mailing fees to BTC and submit copy of receipt.
- Any additional information or materials required for filing an appeal must be provided in accordance with the LAMC regulations as specified in the original determination letter. **A copy of the determination/decision letter is required.**
- Acceptance of a complete and timely appeal is based upon successful completion and examination of all the required information.
- **Seven copies and the original appeal are required.**

I certify that the statements contained in this application are complete and true:

Appellant Ann K. Jerhoff  
Director - Legal

OFFICIAL USE ONLY  
Receipt No. 207454 Amount 249.00 Date 3/27/07

Application Received LISA S. COOPER, Jan S. Corne

Application Deemed Complete [Signature]

Copies provided:  Determination     Receipt (original applicant only)

Determination Authority Notified (if necessary)

## INCUMBENCY/SECRETARIAL CERTIFICATE

The undersigned Assistant Secretary of Home Depot U.S.A., Inc., a Delaware corporation (the "Corporation"), hereby certifies:

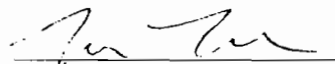
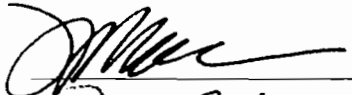
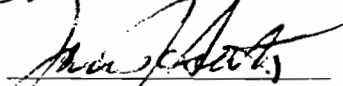

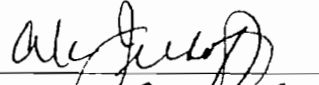




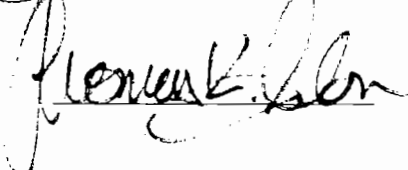
1. That the resolutions below constitute a true and correct copy of the resolutions contained in the Home Depot U.S.A., Inc., Unanimous Written Consent of the Board of Directors in Lieu of A Special Meeting, effective July 1, 2003, and that these resolutions have not been amended, annulled, rescinded or revoked and remain in full force and effect as of the date hereof.

RESOLVED, that the Executive Vice President, Secretary and General Counsel, the Senior Vice President-Real Estate, the Vice President - Real Estate, the Vice President-Real Estate Law, each of the Senior Directors-Real Estate Law, each of the Directors-Real Estate Law, each of the Corporate Counsel-Real Estate Law, and each of them acting alone or together, or their duly delegated designee, are hereby authorized and directed, in the name of the Corporation, to take such steps as are necessary or desirable to effect the Corporation's policy of expansion and maintenance of its properties including, but not limited to, the acquisition, disposition or financing of real estate, the execution of Leases, Reciprocal Easement Agreement, Development Agreements, Easements, Servitudes, Right of Way, Assignments and any amendments or modifications to the foregoing, or any other instrument required to accomplish the aforesaid Corporate purposes; and

FURTHER RESOLVED, that the Executive Vice President, Secretary and General Counsel, the Senior Vice President-Real Estate, the Vice President - Real Estate, the Vice President-Real Estate Law, each of the Senior Directors-Real Estate Law, each of the Directors-Real Estate Law, each of the Corporate Counsel-Real Estate Law and each of them acting either alone or together, or their duly delegated designee, are hereby authorized and directed, in the name of the Corporation, to take, or cause to be taken, any and all actions and to execute and deliver any and all such other contracts, assignments, easements, conveyances, deeds, leases, subleases, agreements, certificates, instruments or any other documents as such individual or delegated designee may consider necessary or desirable to carry out the foregoing resolution and the transactions contemplated thereby; and

FURTHER RESOLVED, that these resolutions hereby revoke and supersede any other resolutions that heretofore granted the delegation of corporate authority to execute and deliver real estate documents by and on behalf of the Corporation.

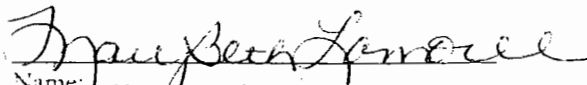
2. The persons named below were on the date hereof the duly designated and qualified signatories of the Corporation, as set opposite his or her respective name, and that the signature appearing opposite his or her name, is the genuine facsimile signature of said signatory:

<u>Name</u>	<u>Title</u>	<u>Signature</u>
Michael C. LaFerle	Vice President Real Estate	
Michael T. McGuire	Vice President Real Estate Law	
James J. Scott	Senior Director Real Estate Law	
Jeff A. Israel	Senior Director Real Estate Law	
Ann K. Jerhoff	Director Real Estate Law	
Jacob R. Pritcher, Jr.	Director Real Estate Law	
Cynthia L. Warren	Director Real Estate Law	
Brett D. Soloway	Director Real Estate Law	
Erika M. Strawn	Corporate Counsel - Real Estate Law	
Thomas K. Anderson	Corporate Counsel - Real Estate Law	

IN WITNESS WHEREOF, the undersigned has hereunto affixed the seal of the Corporation and set his/her signature, on this, the 1 day of March, 2007.

[CORPORATE SEAL]



  
 Name: Mary Beth Lamoree  
 Title: Assistant Secretary

## ATTACHMENT A

### EXECUTIVE SUMMARY

The Zoning Administrator erred and abused his discretion in finding that Home Depot's proposed tenant improvements constituted a "Project." Home Depot proposes to reuse the former Kmart building located at 8040 Foothill Boulevard as a Home Depot store. After consulting with the Los Angeles City Planning Department and the Los Angeles Department of Building and Safety ("LADBS") for over six months on the scope of the tenant improvement work and making numerous revisions based on the City's advice, on July 24, 2006, LADBS with approval from the Planning Department, issued to Home Depot Permit No. 06016-10000-03354 (the "Permit") allowing for the necessary tenant improvements to reuse the existing building. On September 18, 2006, 56 days after issuance of the Permit, the Sunland-Tujunga Alliance and No Home Depot Campaign (collectively, the "Opponents") appealed the Permit to LADBS. In a report dated October 5, 2006, LADBS rejected the appeal, finding that the Permit was properly issued. The Opponents then attempted to appeal again, this time to the Director of City Planning under Section 12.26.K of the Los Angeles Municipal Code ("LAMC"). The Opponents failed to file their appeal properly, and it should have been denied on that basis alone. On March 9, 2007, 65 days after the deadline for a decision had expired, the Zoning Administrator, acting on behalf of the Planning Director, incorrectly issued a determination overturning LADBS's decision, finding that LADBS erred or abused its discretion in issuing the Permit. We respectfully appeal the Zoning Administrator's determination, which itself is the result of error and abuse of discretion.

The Zoning Administrator blatantly erred and abused his discretion in finding that the proposed tenant improvements involved structural alterations, thereby making them a "Project" under the Foothill Boulevard Corridor Specific Plan. The Zoning Administrator also erred and abused his discretion in not upholding LADBS's determination that the tenant improvements did not constitute a "Significant Project." As noted below, and described in more detail in the attached response, the Zoning Administrator's decision is procedurally and substantively flawed and represents an error and abuse of discretion that should be reversed.

#### The Zoning Administrator's Determination Is Procedurally Flawed

- The Zoning Administrator accepted and ruled on an improper appeal.
  - The appeal was untimely. The Opponents failed to satisfy the filing requirements within the requisite 15-day appeal period.
  - The Opponents failed to file their appeal on the proper City forms.
  - The Zoning Administrator should have rejected the appeal, and failing to do so constitutes an error and abuse of discretion.
- The Zoning Administrator failed to act within the required time.
  - Under LAMC Section 12.26.K, the Zoning Administrator must act within 75 days of the expiration of the appeal period. He did not.
- The Zoning Administrator improperly found that the matter lacked Citywide significance. The instant appeal, therefore, should go to the City Planning Commission.

- The Zoning Administrator applied the incorrect standard of review and did not afford LADBS's determination proper deference.

The Zoning Administrator's Determination Is Substantively Incorrect

- There is substantial evidence in the record to support LADBS's determination that the tenant improvements do not constitute a "Project" or a "Significant Project."
- The Opponents' contradictory assertions do not establish that the tenant improvements rise to the level of a "Project" or a "Significant Project."

For all of the reasons set forth above and explained more fully in the attached response, Home Depot respectfully requests that the Area Planning Commission overturn the Zoning Administrator's decision. The Zoning Administrator's actions and decision constituted error and an abuse of discretion and, thus, his decision requires reversal.

## DETAILED RESPONSE SETTING FORTH REASONS FOR THE APPEAL

### I. INTRODUCTION

On March 9, 2007, the Zoning Administrator, acting on behalf of the Director of Planning pursuant to Section 12.26.K of the Los Angeles Municipal Code (the "Municipal Code" or "LAMC"), issued a determination (the "Determination") finding that LADBS erred or abused its discretion in issuing Building Permit No. 06016-10000-03354 (the "Permit") (Case No. DIR-2006-9072). We respectfully appeal the Zoning Administrator's decision, which itself is the result of the Zoning Administrator's error and abuse of his discretion.

Home Depot U.S.A., Inc. ("Home Depot") has worked within the proper process to obtain the necessary permits to remodel the former Kmart building (the "Building") located at 8040 Foothill Boulevard (the "Property") in order to reuse that Building as a Home Depot store. Throughout the permit process, the Opponents were given unprecedented access to City departments, and the Permit has been subject to detailed review that far exceeds the level of scrutiny to which other building permits are subject in the City.<sup>1</sup> The Opponents have essentially acted as another arm of the City, as they have been allowed to review LADBS and Planning Department reports and decisions prior to their issuance, have had unprecedented access to decision makers, have been given materials related to Home Depot's application for the Permit outside of the normal course by which the average person is given access, and have essentially co-opted the local neighborhood council. Granting a private organization this type of access has unnecessarily delayed the permitting process, and has allowed the Opponents to repeat ad nauseam the same objections to Home Depot and the Permit. The Opponents' issues are apparently driven in part by their opposition to "illegal aliens," "migrant workers," or "day laborers." This discriminatory position is well documented in materials that the Opponents submitted to the Zoning Administrator as part of their appeal as well as in materials that the Sunland community provided to Home Depot in response to Home Depot's outreach. A copy of these materials is attached as Exhibit A.

Giving credence to such a discriminatory position has resulted in the disparate treatment of Home Depot during the permitting process and has effectively rendered a ministerial approval discretionary. Home Depot consulted with LADBS and the Planning Department for over six months in reviewing the scope of tenant improvements for the Building and made numerous revisions to the scope based on directions from LADBS and the Planning Department to determine a scope of work that would be ministerial. The Zoning Administrator's decision is, therefore, disappointing given the close collaboration and directions from LADBS and the Planning Department. In addition, the Zoning Administrator's decision is precedent setting and has far-reaching Citywide implications for reinvestment in existing buildings and quality job

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<sup>1</sup> As an example, other businesses located within the Foothill Boulevard Corridor Specific Plan area undertook improvements to existing buildings that are broader in scope than Home Depot's proposed tenant improvements, but were not required to undergo discretionary review. For example, Auto Zone located at 7448 Foothill Boulevard (in Target Area No. 3) made extensive improvements to the existing building and to the exterior of the site, including signage, but was not required to obtain discretionary approvals. World Gym located at 6658 Foothill Boulevard (in Target Area No. 4) changed uses from retail to a health club, and made extensive improvements including signage and tearing out the entire roof, but was not required to undergo discretionary review.

creation. LADBS issues over 142,000 permits with an estimated valuation of over \$5 billion annually. Many of these permits are to remodel and revitalize existing buildings within the City. The uncertainty created by the Zoning Administrator's Determination coupled with the fact that the previously ministerial building permit process now appears to be discretionary will significantly and adversely impact redevelopment and investment in the City. This Determination effectively adds another layer of challenge to an already difficult, time-consuming, and expensive permitting process, and will reduce the incentive for businesses of any type (including those that would be welcomed by the Opponents) to invest in the City.

As a result of these improper and discriminatory actions, Home Depot has suffered and will continue to suffer significant damages. Home Depot has substantially and justifiably relied on the Permit and the City's assurances, expending over \$2 million in direct reliance on the Permit alone. Home Depot has also incurred substantial damages related to the delay in processing the Permit and will continue to incur damages if the erroneous Determination is allowed to stand.

Home Depot has followed the procedures required by the Planning Department and LADBS in obtaining the Permit. Early in the process, the Planning Department issued a letter stating that interior improvements to the existing building would require only ministerial approvals and would not be considered a "Project." A copy of the letter is attached as Exhibit B. Based on this City letter, Home Depot narrowed its scope of work to be primarily interior improvements to the existing building with the only exceptions being work that was necessary to comply with mandatory State building codes. In addition, Home Depot met with both the Planning Department and LADBS on a number of occasions prior to the issuance of the Permit to re-affirm that the tenant improvements would not constitute a "Project" under the Foothill Boulevard Specific Plan (the "Specific Plan"). Further, Home Depot revised the scope of tenant improvement work multiple times based on the direction and advice provided by the two City departments. These meetings with the Planning Department and LADBS occurred over an approximately six-month time period and substantially delayed the issuance of the Permit. This delay has resulted in Home Depot incurring substantial carrying costs and delay damages to date. Home Depot expends over \$250,000 per month in carrying costs on the site and significant additional amounts in consultants and personnel time, among other costs, in dealing with the unreasonable delays. Home Depot has invested significant amounts of money in reliance on the Permit, and its reliance is justified. Invalidating the Permit now, and as the result of improper analysis, results in an unjust and inequitable outcome that could open the City to substantial liability.

We respectfully request that the North Valley Area Planning Commission ("APC") find that the Zoning Administrator erred and abused his discretion and reverse his Determination, thereby allowing LADBS's decision to stand.

## **II. BACKGROUND**

In late 2004, Home Depot acquired leases on a number of properties formerly occupied by Kmart stores after Kmart declared bankruptcy. Home Depot took over Kmart's leases with the intention of either demolishing the existing building and constructing a new Home Depot store, or remodeling the existing building to house a Home Depot store.



Home Depot originally proposed to demolish the existing Kmart building on the Property and construct a new store on the site. After more than a year of meeting with the Council office, the community, and the City departments, Home Depot decided to abandon the demolition plans and instead to reuse the existing Building. In February 2006, Home Depot submitted proposed reuse plans to LADBS for tenant improvements to the Building. Over the course of several months, Home Depot worked with LADBS and the Planning Department to revise the plans to be responsive to both the City and the community in connection with the reuse of the Building. The Opponents and their consultants commented on the proposed plans throughout the process, raising substantially the same issues at each point in the process, which were the same issues that were fully considered by LADBS and the Planning Department prior to issuing the Permit.

After several months of meetings with the City and the community, LADBS, with approval from the Planning Department, issued to Home Depot the subject Permit on July 24, 2006, which allowed for the tenant improvements to the Building. Despite being intimately involved at every stage of the process, the Opponents unreasonably delayed in filing their appeal of the Permit with LADBS. In a bad faith attempt to delay the process, the Opponents did not file an appeal with LADBS until two months after the Permit was issued. This delay is inexplicable given the fact that the Opponents were aware of the necessary appeal process as early as a week after the Permit was issued. In an email dated August 10, 2006, to the Opponents, the LADBS Commission Secretary explained that to appeal the Permit, the Opponents must follow the procedures “as outlined in the memo I sent you last week.” The email is attached as Exhibit C. Despite having this information a week after the Permit was issued, the Opponents waited until September 18, 2006—almost two months—to file an appeal.

On October 5, 2006, LADBS issued its report (the “Report”) in response to the appeal, and affirmed the issuance of the Permit. LADBS concluded that it “did not err or abuse its discretion in its determination that the construction work permitted by [the Permit] for the conversion of an existing K-mart into a Home Depot is not a ‘Project’ or a ‘Significant Project.’” The Report is attached as Exhibit D. On October 20, 2006, the Opponents attempted to appeal LADBS’s determination to the Planning Director under Section 12.26.K of the Municipal Code. *See Opponents’ Planning Department Appeal attached hereto as Exhibit E.* The Opponents failed to use the correct City form and failed to pay the necessary BTC fees required to perfect the appeal in a timely manner (and did not pay such fees until after the expiration of the appeal period).

In reliance on the Permit’s validity, Home Depot began remodeling the vacant Kmart store. Based on the October 20th appeal filing date, the Zoning Administrator was required to act by January 3, 2007. The Zoning Administrator failed to act within the mandatory 75-day period. There was no consent on the part of Home Depot to extend this 75-day period. On January 19, 2007, the Zoning Administrator, acting on behalf of the Planning Director, inappropriately conducted a public hearing on the appeal. At the January 19, 2007 hearing, the Zoning Administrator expressed significant animosity toward Home Depot and its representatives, at one point stating: “As a side light, and it may not be relative to the decision that I have to make, but I’ve seen this before with big corporations that fear communities . . . I think it’s evident by the community that’s here today that there is a feeling that perhaps that the social contract has been broken.” January 19, 2007 Hearing Transcript, v.2 at 75:1-9. A copy of the relevant excerpts from the hearing transcript is attached as Exhibit F. The Zoning

Administrator was also unfairly harsh to LADBS, stating: “So we haven’t heard from Building and Safety; so if they want to write, they can write if they want to defend certain things. That’s up to them.” *Id.* at 72:21-24. LADBS was under no obligation to defend its conclusions to the Zoning Administrator, particularly given the fact that, as explained below, under the proper standard of review, the Zoning Administrator is required to give LADBS’s determination deference. The Zoning Administrator also previewed his intention to go beyond the Code and apply his own erroneous standard of review, stating:

Now, also, when we look at these definitions, there are words that we use for these definitions . . . . But when we look at definitions, is it the mere words or do we also look at—look at it in the context of legislative intent? Why do we have specific plans? What are they to accomplish? . . . I’m not quite sure how that will figure into the equation, but I don’t think that we can look at just mere words when we make a decision.

*Id.* at 74:6-23.

On March 9, 2007, the Zoning Administrator issued his decision, which contained three pages of analysis, overturning LADBS’s decision to issue the Permit. This Determination constitutes an error and abuse of discretion by the Zoning Administrator. Accordingly, Home Depot respectfully requests that the APC grant its appeal to reverse the Zoning Administrator’s decision.

### **III. APPLICABLE STANDARD OF REVIEW FOR THE AREA PLANNING COMMISSION**

Under Section 12.26.K of the Municipal Code, the APC reviews the Zoning Administrator’s decision to determine whether there “was error or abuse of discretion.” LAMC § 12.26.K.6. An “error or abuse of discretion” occurs where the Zoning Administrator has not proceeded in the manner required by law or if his decision is not supported by the evidence. *See* Code Civ. Proc. § 1094.5(b). Under this standard, the APC’s role is not to decide whether it agrees or disagrees with the Zoning Administrator’s decision, but to examine whether the Zoning Administrator proceeded in a manner prescribed by the Code; if he did not, he has “erred and abused his discretion,” and his decision must be overturned. Similarly, where there is no evidence supporting the Zoning Administrator’s decision, it must be overturned.

Here, the Zoning Administrator erred and abused his discretion for at least four different reasons. As explained in more detail below, the Zoning Administrator failed to act within the time period required by Section 12.26.K, he acted on an appeal that was untimely and improperly filed, he failed to conclude that the matter has Citywide significance, and he applied the wrong standard of review, thereby reaching an erroneous conclusion. Accordingly we respectfully request that the APC reverse the Zoning Administrator’s Determination.

#### **IV. THE ZONING ADMINISTRATOR ERRED AND ABUSED HIS DISCRETION IN FINDING THAT THE TENANT IMPROVEMENTS CONSTITUTE A “PROJECT”**

##### **A. The Zoning Administrator’s Determination Is Procedurally Flawed**

The Zoning Administrator, acting on behalf of the Planning Director, erred and abused his discretion in processing the Opponents’ appeal under Section 12.26.K of the Los Angeles Municipal Code. The Zoning Administrator erred and abused his discretion because he: (1) issued an untimely decision, (2) processed an untimely and improperly filed appeal; (3) failed to conclude properly that the matter had Citywide significance and so should be appealed to the City Planning Commission; and (4) applied the wrong standard of review. For all these reasons, and as discussed more fully below, the Zoning Administrator erred and abused his discretion in approving the Opponents’ Appeal. Therefore, the decision should be overturned.

##### **1. The Zoning Administrator Erred and Abused His Discretion Because His Determination Was Untimely**

The Zoning Administrator issued his Determination “approving” the Opponents’ Appeal on March 9, 2007. Under Section 12.26.K, “[t]he Director *shall* make his or her decision within 75 days after the expiration of the appeal period.” LAMC § 12.26.K.4 (emphasis added). The appeal period expired October 20, 2006. *See* Exhibit D, above. Seventy-five days after October 20, 2006, is January 3, 2006. Home Depot did not consent to any extension of this 75-day period. However, the Zoning Administrator did not conduct a public hearing until January 19, 2007, and did not issue a decision until March 9, 2007—140 days *after* the appeal period expired. Accordingly, the Zoning Administrator failed to act within the required time period and, thus, acted outside of his authority in issuing a decision. The Zoning Administrator’s action is void and has no legal effect. Therefore, the Determination should be disregarded, and the APC should review LADBS’s decision to issue the Permit as the initial reviewing body. Under this standard, the APC would not evaluate whether the Zoning Administrator erred or abuse its discretion, but rather whether LADBS did.

##### **2. The Planning Department and the Zoning Administrator Erred and Abused Their Discretion by Accepting the Opponents’ Untimely and Improperly Filed Appeal**

The acceptance and processing of the Opponents’ untimely and improperly presented appeal under 12.26.K was an error and abuse of discretion. The Opponents’ appeal was untimely because the Opponents did not remit all necessary appeal fees until long after the appeal deadline had passed. Also, the Opponents’ appeal was improperly brought because the Opponents submitted it on the wrong City appeal form. Nevertheless, the Planning Department accepted and processed the Opponents’ untimely and incorrect appeal, and the Zoning Administrator conducted a public hearing and issued a Determination regarding the improper appeal. This was an error and an abuse of discretion and, therefore, the Zoning Administrator’s Determination overturning LADBS’s decision to issue the Permit should be reversed.

LADBS issued a written Report upholding its issuance of the Permit on October 5, 2006. The Report is attached at Exhibit D, above. In addition to concluding that LADBS did not err in issuing the Permit, the transmittal letter informed the Opponents that “[i]f you choose to appeal the determination, you must file the appeal at the public counter of the Department of City Planning no later than **October 20, 2006.**” (emphasis in original.) Section 12.26.K of the Municipal Code requires that the “appeal shall be filed at the public counter of the Department of City Planning . . . within 15 days after the Department of Building and Safety has rendered a decision is writing.” LAMC § 12.26.K.2. Finally, the Planning Department’s Master Appeal form states that “acceptance of a complete and timely appeal is based upon successful completion and examination of all the required information.”

The Opponents appealed LADBS’s determination on October 20, 2006, however, as of that date, their appeal was not complete because the Opponents had not paid all of the required fees. In fact, it appears as if the Opponents did not pay the required fees until at least November 30, 2006—approximately 40 days after the appeal deadline. A copy of the Opponents’ BTC receipt, dated November 30, 2006, is attached as Exhibit G. However, instead of rejecting the appeal as untimely because the Opponents did not submit the required fees, the Planning Department granted them additional time to pay the fees without notice to or consent from Home Depot. Because the Opponents did not pay all the necessary fees before the appeal period expired, their appeal was untimely and not properly before the Zoning Administrator, and it should have been rejected. Therefore, the Zoning Administrator’s consideration of the untimely appeal was an error and abuse of discretion.

The Opponents not only missed the appeal deadline by not remitting the required fees on time, but their submissions after the October 20, 2006 deadline were improper and should have been rejected. Section 12.26.K requires that “[t]he appellant . . . set forth specifically how there was error or abuse of discretion in the action of the Department of Building and Safety.” LAMC § 12.26.K.2. Similarly, the Planning Department’s Master Appeal form provides, “[a]ny additional information or material required for filing an appeal must be provided in accordance with the LAMC regulations as specified in the determination letter.” See Exhibit H, at 2. Taken together, the Code and the appeal form require that an appellant present the entire basis for its appeal *along with* its appeal. It is not enough to submit an appeal form and a few sheets of paper and supplement them at a later date. As Robert Janovici’s June 10, 1996 memorandum attached to the Master Appeal form and entitled “Rejection of Improper Appeals” states, appeals that do not set forth “specifically the points at issue, the reasons for the appeal, and wherein the appellant believes there was an error or abuse of discretion,” should be rejected. See Exhibit H, at 3.

Here, the Opponents’ eight-page “Attachment to City Appeal Form” was an incomprehensible jumble of bullet points and repetitious and incomplete sentences. However, the Planning Department accepted it and continued to permit the Opponents to supplement their appeal with additional “evidence” and new argument. This was improper and an abuse of discretion. The Opponents should have been required to follow the same rules that apply to all appellants, and should not have been given special treatment. Under the Code and the Planning Department’s policies, the Opponents’ appeal should have been complete and final as of October 20, 2006. Nothing in the Code allows for the continual revision and update of an appeal. In

allowing the Opponents to update and revise their appeal continually, the Planning Department and the Zoning Administrator erred and abused their discretion.

In addition to being untimely, the Opponents' appeal was submitted on an incorrect and out-of-date form. As stated above, Section 12.26.K requires that the appeal be filed on a "form *prescribed* by the Department [of City Planning]." LAMC § 12.26.K.2 (emphasis added). The Opponents' appeal form, attached above as Exhibit E, was, and is, out-of-date. The Planning Department's current Master Appeal form, readily available on the Planning Department's website, is attached above as Exhibit H. Notably, the correct Master Appeal form states, "[o]riginal applicants must pay mailing fees to BTC and submit copy of receipt," something the Opponents did not do until at least 40 days after the appeal period expired. The payment of BTC mailing fees by October 20, 2006, was a mandatory requirement and necessary for perfection of the appeal.

The Planning Department's current Master Appeal form has been in use since September 2006, which is prior both to LADBS issuing its written determination and to the Opponents' Appeal. The Opponents should have used the most current form—they did not. The Planning Department should have rejected an appeal filed on an expired form—it did not. This failure was an error and abuse of discretion and, therefore, the Zoning Administrator's Determination cannot stand because the matter was beyond his jurisdiction.

In sum, the Zoning Administrator erred and abused its discretion by issuing a decision on an untimely and improperly filed appeal. Accordingly, the APC should overturn the Zoning Administrator's Determination.

### **3. The Zoning Administrator Abused His Discretion by Failing to Conclude that This Matter Had Citywide Significance**

Under Section 12.26.K, where the Zoning Administrator finds that a decision "may have a Citywide impact," the decision is appealed to the City Planning Commission. LAMC § 12.26.K.6. In the instant matter, the Zoning Administrator erred and abused his discretion in finding that the "determination . . . will not have a Citywide Impact as the use of the specific property, circumstances and issues are unique to the affected site and will not generally apply to other sites in the City." Determination at 31.

The Zoning Administrator's decision is precedent setting and has far-reaching, Citywide implications for reinvestment in existing buildings and quality job creation. Under the procedures the Zoning Administrator applied here, applicants will no longer be able to rely upon building permits issued by LADBS. These formerly ministerial permits will now be subject to additional discretionary review, potentially months after they have been issued. Home Depot's Permit was not challenged for nearly two months by the Opponents, and there is nothing in the Municipal Code itself that would have prevented the Opponents from challenging the Permit's issuance six, twelve, or even twenty-four months from the date it was issued. This level of uncertainty will only discourage reinvestment in existing buildings, which has extreme Citywide implications. In addition, this decision makes permitted, by-right uses subject to discretionary action just because there is opposition to the permitted use. This is a troubling decision that applies beyond this specific property and has application to all by-right building permits

throughout the City. This is even more troubling after understanding the biased and prejudiced nature of the opposition.

For the foregoing reasons, Home Depot respectfully requests that the APC find that the Zoning Administrator erred and abused his discretion in finding that his decision would not have Citywide impacts, and further find that this appeal should be heard by the City Planning Commission.

#### **4. The Zoning Administrator Erred and Abused His Discretion By Applying the Incorrect Standard of Review**

The Zoning Administrator reviewed the Opponents' appeal under Section 12.26.K. Section 12.26.K provides that the Zoning Administrator, acting on behalf of the Planning Director, has the power to investigate and make a decision on an appeal "where it is alleged that there is *an error or abuse of discretion* in any order, interpretation, requirement, determination, or action" made by LADBS "in the enforcement or administration of Chapter I of this Code and other land use ordinances in site-specific cases." LAMC § 12.26.K.1 (emphasis added). Pursuant to this section, the issue on appeal was whether LADBS abused its discretion in determining that the proposed tenant improvements did not constitute a "Project" under the Specific Plan.

The Zoning Administrator, therefore, should have reviewed LADBS's decision to determine whether LADBS erred or abused its discretion. The Zoning Administrator was not free to substitute his own standard of review to decide this question. To the contrary, when the Municipal Code provides a standard of review, it must be applied. *See BreakZone Billiards v. City of Torrance* (2000) 81 Cal.App.4th 1205; *Lagrutta v. City Council* (1970) 9 Cal.App.3d 890, 894-95 (holding that only when a municipal code is silent about the standard of review can *de novo* review be presumed). However, as discussed below, this is exactly what the Zoning Administrator did—applied his own standard—and this constitutes error and an abuse of discretion.

An abuse of discretion could have only been established if LADBS's decision to issue the Permit was not supported by the evidence. *See Western States Petroleum Ass'n v. Superior Ct.* ("WSPA"), 9 Cal. 4th 559, 572 (1995). In determining whether a decision was supported by findings and whether the findings are supported by evidence, reviewing bodies accord the decision maker, here LADBS, substantial deference. *Id.* at 571. As the WSPA court explained, in reviewing the evidence "all conflicts must be resolved in favor of the [prevailing party], and all legitimate and reasonable inferences indulged in to upholding the [decision] if possible." *Id.* The court further explained that it is a basic "principle of law, that when a [decision] is attacked as being unsupported, the power of the . . . [reviewing body] begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the [decision]." *Id.*

Thus, if the record contained "any substantial evidence" supporting LADBS's decision, then the Zoning Administrator was required to uphold it. *See Barthelemy v. Chino Basin Mun. Water Dist.*, 38 Cal. App. 4th 1609, 1620 (1995). Under this standard, even if the Opponents had pointed to some evidence in the record that it claimed called LADBS's decision into question—

which they could not do—LADBS’s conclusions must be upheld if any substantial evidence supported them. *See id.* It is not for the Zoning Administrator to determine whether he would have made the same decision or whether he preferred a different outcome.

The Zoning Administrator’s review, therefore, should have been focused on the question of whether there was “any substantial evidence, contradicted or uncontradicted,” in the record to support LADBS’s determination that the tenant improvements were not a “Project.” In undertaking this review, the Zoning Administrator should have accorded LADBS’s determination substantial deference. The question was *not* whether the Opponents offered evidence that might have supported a finding to the contrary. The fact that the Opponents offered contradictory evidence and the fact that it arguably might have been possible to reach a different conclusion based on the evidence, therefore, does not somehow change the applicable standard of review.

Rather than according the LADBS decision the proper deference, the Zoning Administrator faulted LADBS (and improperly shifted the burden of proof to LADBS) for not offering additional information and erroneously framed the issue as, “pertain[ing] to the question of whether construction activity on the site is considered a ‘Project’ or a ‘Significant Project’ as defined in the Foothill Boulevard Corridor Specific Plan.” Determination at 29. The question was not whether there was evidence showing that the tenant improvements constituted a “Project,” but rather whether there was substantial evidence in the record to support LADBS’s determination that they were not.

This is a significant distinction because by applying the incorrect standard of review articulated in the Determination, the Zoning Administrator improperly shifted the burden to LADBS and Home Depot and away from the Opponents who, according to the standard set forth in the Code, must show that there is no substantial evidence in the record to support LADBS’s determination. Notwithstanding clear and binding guidance to the contrary, the Zoning Administrator applied his own standard—one of *de novo* review that afforded no deference to LADBS and ignored the substantial evidence in the record supporting its decision that the Permit did not constitute a “Project” or a “Significant Project” under the Specific Plan. The standard of review is not simply a scale to determine which side weighs more. Under the correct standard of review, the Opponents have the burden of proof to demonstrate that there is no evidence to support the LADBS determination. The Opponents have failed to prove their case using the correct standard of review.

The Determination shows that the proper standard was not applied. For example, the Determination erroneously concludes that “the weight of evidence by the appellant supports the reasonable conclusion that sufficient ‘structural alterations’ have occurred for a ‘project’ and is therefore subject to Project Permit Compliance Review pursuant to the provisions of the Foothill Boulevard Corridor Specific Plan.” Determination at 30. Under a properly applied standard of review, the Determination should have analyzed whether there was substantial evidence in the record to support LADBS’s determination that the tenant improvements were not a “Project” and not whether there was some evidence to support an alternate conclusion.

Similarly, in rejecting one of the Opponents’ arguments, the Determination states, “the issue of ‘change of use’ appears to not be supported by relevant evidence, and there is no legal

basis for determining that a ‘change of use’ will occur.” Determination at 29. In other words, because the Opponents did not present enough evidence that a change of use had occurred, none was found. Although the Zoning Administrator reached the correct conclusion on this issue, under a properly applied standard of review, the Zoning Administrator should have first, and only, looked to see whether LADBS’s determination was supported by substantial evidence. Numerous statements in the Determination further demonstrate the application of an erroneous, and legally unsupportable, standard of review. *See also* Determination at 30 (“The appellant has provided extensive expert testimony and written documentation from structural engineers and other expert observers to suggest that [structural alterations are] occurring.”); Determination at 31 (“Structural renovation appears to exceed the specific threshold 50 percent level, but this conclusion cannot be specifically an inarguable determined without contest, based on the *evidence submitted by the appellant.*”) (emphasis added);<sup>2</sup> *Id.* (“[I]t would be in the City’s and the public interest that [LADBS] consider the evidence and arguments of appellant . . .”).

The Zoning Administrator previewed his intention to go beyond, and against, the Municipal Code’s strictures at the January 19, 2007 public hearing on the Opponents’ appeal. At the conclusion of the hearing, the Zoning Administrator commented on his role as the reviewing body, stating, “when we look at definitions, is it the mere words or do we also look at . . . it in the context of legislative intent? . . . I don’t think that we can look at just mere words when we make a decision.” January 19, 2007 Hearing Transcript, v.2 at 74:15-23.

The above quotes from the Determination and the public hearing clearly show that the Zoning Administrator applied the incorrect standard of review. Applying the incorrect standard of review is an error and an abuse of discretion. *See Sierra Club v. Gilroy City Council*, 222 Cal. App. 3d 30 (1990). Applicable law requires that the Zoning Administrator give substantial deference to LADBS, but none was given. Instead, a new standard of review was created out of whole cloth. Applying this standard was error and an abuse of discretion and, accordingly, the Zoning Administrator’s Determination must be reversed on this ground.

### **B. Under the Correct Standard of Review, It Is Clear that LADBS’s Determination Should Be Upheld**

There is substantial evidence in the record to support LADBS’s determination that the tenant improvements to the Building do not constitute a “Project” or a “Significant Project.” The fact that the Opponents introduced some contradictory evidence is not sufficient to overturn LADBS’s decision. As explained above, under the proper standard of review, the Zoning Administrator must accord LADBS’s decision deference and uphold it so long as there is substantial supporting evidence in the record.

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<sup>2</sup> Notably, the issue regarding the “replacement value” of the building is not one that was even within the Zoning Administrator’s jurisdiction, even if the Opponents’ appeal had been properly brought. As LADBS stated in its Report, “Issues dealing with the LADBS valuation determination . . . are not within the jurisdiction of the Department of Planning.” LADBS Report attached above as Exhibit D, at 2. LADBS’s observation was correct, as 12.26.K only grants the Planning Director the authority to review LADBS decisions that involve “the enforcement or administration of Chapter I of this Code and other land use ordinances.” LAMC § 12.26.K.1. Because the method of determining the replacement value of the Building and the value of Home Depot’s improvements is beyond Chapter I of the LAMC and other land use ordinances, this issue was not properly before the Zoning Administrator. Therefore, his decision opining on LADBS’s support for its determination was error and an abuse of discretion.



According to *County of San Diego v. Assessment Appeals Bd. No. 2*, 148 Cal. App. 3d 548 (1983), evidence is considered “substantial evidence” when it is “of ponderable legal significance . . . reasonable in nature, credible and of solid value” or when it is “relevant evidence that a reasonable mind might accept as adequate to support a conclusion.” *Id.* at 555 (internal citations and quotations omitted).

**1. There Is Substantial Evidence in the Record to Support LADBS’s Determination that the Tenant Improvements Are Not a “Project”**

There is substantial evidence in the record that a “reasonable mind might accept as adequate to support a conclusion” that the proposed tenant improvements are not a “Project.” The Specific Plan defines a “Project” as:

The construction, erection, structural alteration of, or addition to, any building or structure, including architectural projections attached to the exterior walls or roof structures, which requires the issuance of a building permit or change of use permit on a lot located in whole or in part within the Specific Plan area. A Project does not include interior remodeling of a building which does not increase the floor area, or single-family dwellings.

Specific Plan § 4. The Opponents alleged throughout the process that the tenant improvements constituted a “Project” because they involved a change of use and entailed structural alterations.<sup>3</sup> The LAMC defines a “structural alteration” as:

[A]ny change which would prolong the life of the supporting members of a building or structure, such as building walls, columns, or girders.

LAMC § 12.03.

LADBS addressed the Opponents’ issues repeatedly throughout the permit process and concluded that the improvements did not meet the definition of a “Project” under the Specific Plan. LADBS had substantial evidence on which to rely when reaching that conclusion. Attached as Exhibit I is a summary of the evidence supporting the conclusion that the tenant improvements do not constitute a “Project.”

The proposed tenant improvements were the result of a lengthy process in which Home Depot repeatedly consulted with LADBS, the Planning Department, the Council office, and the community. Attached as Exhibit J is a chronology detailing the meetings and steps that Home Depot undertook to work with the City and the community regarding the proposed tenant improvements. Early in the process, the Planning Department issued a letter explaining that interior tenant improvements would not constitute a “Project” and, therefore, would require only

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<sup>3</sup> The Determination correctly finds that Home Depot’s reuse of the existing Building does not constitute a change of use, concluding, “there is no legal basis for determining that a ‘change of use’ will occur.” Determination at 29. While the Zoning Administrator reached the correct conclusion, as explained above, his analysis illustrates that he was applying the wrong standard of review. *See id.*

ministerial approvals. A copy of that letter is attached above as Exhibit B. Although Home Depot originally proposed to demolish the existing building and build a new store, after numerous meetings with the City and the community, Home Depot decided to scale back the original plans and reuse the existing building.

After several months of refining the reuse plans and meeting with LADBS and the Planning Department to confirm that the scaled-back reuse plans would not constitute a "Project," LADBS, with approval from the Planning Department, issued the Permit to Home Depot in July 2006. LADBS issued the Permit based on months of meetings and documentation supporting the conclusion that the proposed tenant improvements did not meet the definition of a "Project" under the Specific Plan because the tenant improvements did not constitute a change of use, did not involve structural alterations, and did not exceed 50 percent of the replacement value of the existing building. Attached as Exhibit K are copies of the materials that Home Depot submitted from February 2006 through June 2006 explaining that the proposed improvements did not constitute a "Project." The Planning Department concurred with this conclusion when it signed off on the Permit clearance sheet on July 21, 2006, stating: "This building permit application does not constitute a 'project' under the definition in the Foothill Blvd. Specific Plan." A copy of the Clearance Summary Worksheet is attached as Exhibit L. LADBS also concurred with this conclusion when it subsequently issued the Permit on July 24, 2006.

Despite the ample evidence in the record supporting LADBS's conclusion, on September 18, 2006, the Opponents appealed the issuance of the Permit to LADBS, making the same claims that the Opponents had been making all along and that LADBS and the Planning Department repeatedly rejected. As noted above, in the October 5, 2006 Report, LADBS rejected the Opponents' appeal and affirmed the issuance of the Permit. The Report explained that "LADBS reviewed the proposed scope of work and concluded that said work did not meet the definition of a 'Project' because it did not include structural alterations as defined in Section 4 of the Foothill Boulevard Corridor Specific Plan." Report at 2. Based on the applicable definitions of "Project" and "structural alterations" in the Specific Plan and the Municipal Code, LADBS concluded that "none of the work proposed in the application for the Home Depot permit would prolong the life of the supporting members [of the existing building]." *Id.* The Report further explained that "[a]lthough structural analysis was required for some of components of the building, such as for the new slab and strengthening of the roof members to support the new HVAC system, these alterations would not prolong the life of the supporting members of the building." *Id.* LADBS also determined that the work did not constitute a change of use, explaining that "there was no change of use, as both uses are retail." *Id.*

Representatives from LADBS also attended a lengthy community meeting on November 6, 2006, to provide the community with information regarding its decision to issue the Permit. Three representatives from LADBS (David Keim, David Lara, and Lincoln Lee) spent approximately five hours repeatedly informing the Opponents that the tenant improvements did not constitute structural alterations and did not qualify as a "Project" under the Specific Plan. The LADBS representatives patiently responded to each question and specifically supported the ministerial nature of the tenant improvement work under the Permit.

Home Depot also submitted additional materials supporting the conclusion that the tenant improvements did not entail structural alterations and did not constitute a "Project," including an

expert report from a third-party engineer. As detailed in the expert report attached as Exhibit M, from Mr. Kayvon Shakerin and Mr. Graeme Dick, both licensed engineers with considerable structural engineering expertise, Home Depot's tenant improvements do not constitute structural alterations under the Municipal Code. This issue was addressed repeatedly in our prior submissions, which span more than eleven months (letters dated March 10, and 23, 2006, May 24, 2006, June 28 and 30, 2006, January 16, 2007, and February 2, 2007). These letters are attached at Exhibit K, above, and Exhibit N. In a January 18, 2007 letter, CASCO, the architect and engineer of record for the Permit work, also concluded that Home Depot's tenant improvements do not constitute structural alterations under the Municipal Code. A copy of that letter is attached as Exhibit O.

As is clear from the record, there is substantial evidence that LADBS could have reasonably relied upon in making the determination that the proposed tenant improvements did not constitute a "Project" and, therefore, required only ministerial approvals. The Zoning Administrator, therefore, erred and abused his discretion in determining that the tenant improvements were a "Project" and in basing that decision on the incorrect assessment that the Opponents submitted more evidence. Not only was the Zoning Administrator applying the wrong standard of review, the Zoning Administrator also ignored the substantial body of evidence that was submitted. In ignoring the substantial body of evidence, the Zoning Administrator summarily dismissed LADBS's conclusions, instead relying on "expert observations" from the Opponents' paid consultants (paid for by the Do-It Center hardware store, a competing business interest), rather than the City's own experts, and the "casual observation of the average person." Determination at 30.

**2. There Is Substantial Evidence in the Record to Support the Conclusion that the Tenant Improvements Are Not a "Significant Project"**

There is also substantial evidence in the record that a "reasonable mind might accept as adequate to support a conclusion" that the proposed tenant improvements are not a "Significant Project." The Specific Plan defines "Significant Project" as:

New building or structure or a Project in which the aggregate value of the work in any twelve month period exceeds 50 percent of the replacement value of the existing building. The valuation shall be determined by the Department of Building and Safety.

Specific Plan § 4. In order for an action to be a "Significant Project," it must first be either a new building or structure, or a "Project." As discussed above, Home Depot's tenant improvements are not a new building or structure, nor are they a "Project." Therefore, the proposed tenant improvements do not constitute a "Significant Project."

In its Report, LADBS concluded that the tenant improvements did not exceed 50 percent of the replacement value of the existing building. *See* Report at 2. LADBS explained that the "replacement value of the building was estimated by LADBS to be \$7,587,510.00, based on an average unit cost of \$70.00 per square foot for a retail building of Type V construction." *Id.* LADBS conservatively calculated the cost of the tenant improvements to be \$3,500,000.00,

based on the original valuation of the building permit application, which is less than 50 percent of the replacement value.

In a follow-up letter to LADBS, Home Depot explained that the cost of the tenant improvements, including the work covered by all the associated trade permits, was actually \$2,771,190.72, because the original \$3,500,000.00 was based on a broader scope of work that was subsequently reduced. The letter also confirmed what LADBS told the community at the November 6, 2006 meeting, namely, that the standard method of calculating replacement value did not include the value of building systems, such as mechanical and fire sprinkler systems. Therefore, the replacement value, including those systems, would be higher than the original estimate of \$7,587,510. Thus, with the inclusion of the building systems, the replacement value of the building was calculated to be \$8,123,976.00. With the cost of the tenant improvements was \$2,771,190.72, the proposed improvements are significantly under the 50 percent threshold. A copy of the letter is attached as Exhibit P.

Under the proper standard of review, therefore, LADBS's decision should have been upheld—and the Opponents' appeal should have been denied—because there is substantial evidence in the record supporting the determination that the tenant improvements are not a "Significant Project." The Zoning Administrator erred and abused his discretion in not affording the LADBS's conclusion that the tenant improvements did not exceed 50 percent of the existing building's replacement value proper deference. The Zoning Administrator's conclusion that LADBS did not provide "sufficient justification for its method of calculating replacement value and the total cost of renovations" ignores the substantial evidence in the record supporting LADBS's determination. *See Determination at 31.*

## V. CONCLUSION

There was ample evidence in the record upon which LADBS reasonably relied in reaching the conclusion that the tenant improvements did not constitute a "Project" or a "Significant Project" under the Specific Plan. Under the appropriate standard of review, the Zoning Administrator should have afforded LADBS's decision that the tenant improvements did not constitute a "Project or a "Significant Project" appropriate deference and upheld it so long as any substantial evidence existed in the record. However, the Zoning Administrator failed to apply the appropriate standard of review. Therefore, the Zoning Administrator's decision is procedurally and substantively flawed and represents an error and abuse of discretion that should be reversed. We respectfully request that the APC grant the instant appeal and reverse the Zoning Administrator's Determination.