



Black-and-White Photograph of Historic Park Victorian  
When It Was Known As The Bay View Hotel

**MEMORANDUM ON APPEAL BY APPELLANT  
12th & "A" Hotel Partners, LP**

**Deborah M. Rosenthal (SBN 128893)**

**[drosenthal@fyklaw.com](mailto:drosenthal@fyklaw.com)**

**Brook John Changala (SBN 245079)**

**[bchangala@fyklaw.com](mailto:bchangala@fyklaw.com)**

**FitzGerald Yap Kreditor LLP**

**2 Park Plaza, Suite 850**

**Irvine, CA 92614**

**T: 949-788-8900**

**F: 949-788-8980**

**TABLE OF CONTENTS**

**I. INTRODUCTION ..... 1**

**II. DESCRIPTION OF ISSUES ON APPEAL ..... 1**

**III. THE APPEAL INVOLVES ONLY ISSUES OF HISTORIC BUILDING CODE INTERPRETATION SUBJECT TO THIS BOARD’S APPEAL JURISDICTION..... 3**

**IV. THE ISSUES OF INTERPRETATION ARE OF STATEWIDE SIGNIFICANCE ..... 3**

**V. COMPLIANCE OF PROPOSED HISTORICAL RESTORATION WITH CHBC ..... 4**

**VI THE CHBC DEPENDS ON ALTERNATIVE METHODS OF COMPLAINEE WITH THE CBC..... 6**

**VII. SUMMARY OF REASONS TO APPROVE APPEAL AND ALLOW PROPOSED REUSE OF THE HISTORIC PARK VICTORIAN ..... 9**

**VIII. ADDITIONAL ANALYSIS OF ISSUES ON APPEAL..... 11**

**IX. CONCLUSION ..... 13**

**ATTACHMENT A: DETAILED REBUTTAL OF ARGUMENTS IN OPPOSITION TO APPLICATION OF THE CHBC TO REUSE OF THE PARK VICTORIAN**

## **I. INTRODUCTION**

The Owner of the Park Victorian (formerly the Bay View Hotel) appeals the decision by the City of San Diego prohibiting memory care use of the second and third floors of the structure and fourth floor cupolas of the soon-to-be-restored historic landmark. This Appeal was originally brought by the Owner in 2018 and heard by this Board in 2019. In June 2020, the Board rescinded its original decision in response to the Owner's request that a new hearing be heard on the Appeal. Since 2019, the Owner has met with the City to clarify its position and narrowed this Appeal to two straightforward legal issues involving interpretation of the relationship between the California Historical Building Code (CHBC) and the California Building Code (CBC).

Under the Health & Safety Code Section 18960, this Board is responsible for deciding disputes over CHBC interpretation, like those raised in this Appeal. These issues are of statewide significance due to the likelihood the City's interpretation will prevent restoration, maintenance, and reuse of numerous qualified historical structures, contrary to the express intent and requirements of the State of California when it adopted the CHBC. The 2020 Appeal does not raise any issues that were not raised in the 2018 Appeal, but the arguments and discussion have been substantially rewritten for the convenience of the Board and to meet its informational or technical requirements.

## **II. DESCRIPTION OF ISSUES ON APPEAL**

This Appeal involves two legal issues raised by the City when it refused to allow the Owner to restore the Park Victorian as an R-2.1 occupancy for memory care use above the first floor:

*Issue 1: Can the requirements of the regular CBC be satisfied through alternative methods of compliance under the CHBC to achieve the equivalent of fire-resistive or Type II construction for R-2.1 occupancies?*

The City takes the position that the alternative methods of compliance specifically described as applicable to all qualified historic buildings in the CHBC are nonetheless not applicable to construction requirements for R-2.1 occupancies under the CBC.<sup>1</sup>

---

<sup>1</sup> The City participated in the Board's 2019 hearing, but has not put its positions in writing, except through comments on the Owner's restoration plans. For the Board's convenience, the Owner has prepared a written rebuttal to the City's verbal comments and explanations during in-person meetings. This rebuttal is attached to the Appeal as Attachment A, but the Owner reserves the right to submit additional rebuttal if the City raises new or different arguments during the Appeal.

In other words, the City decided that the Historical Code applies to general (*i.e.* non-specific) requirements under the regular Code, but does not apply to specific requirements for fire-resistive construction in the regular Code. The Appeal asks this Board to interpret the CHBC so can be used to satisfy fire-resistive requirements for R-2.1 construction in the CBC in the same way alternative methods of compliance are allowed for other occupancies under the CBC. The same safety standards would apply to R-2.1 as to other occupancies, but through application of the CHBC. This interpretation is essential for the future restoration, reuse and maintenance of historic buildings across the State.

*Issue 2: Can an “existing use” classification under the CHBC §8-302.1 be rejected for part of a building in the absence of room-specific evidence, or is there a presumption the entire building was used for the same purpose if there is no evidence to the contrary?*

The CHBC specifically states that, for the purpose of restoring qualified historical buildings, the term “existing uses” includes all previous uses, regardless of how long ago they ceased operation or how long they lasted. In this case, the City accepted that memory care qualified as an “existing use” under CHBC § 8-302.1 because the Park Victorian had been used for R-2.1 occupancy during the 1920s as a home for the “aged and feeble-minded.” This conclusion allowed fire-damaged portions of the third floor of the building to be restored under the CHBC. The City, however, refused to allow post-restoration R-2.1 occupancy of two cupolas because the Owner could not prove they were used by group home residents during the 1920s.

The City did not ask for evidence that any other portion of the building was used by residents of the group home, it simply presumed the remainder of the building was used for the same group home purpose. The City did not explain why it singled out the cupolas for special treatment under the “existing use” provision of the CHBC. The City did not have any evidence they were not used by residents and the Owner submitted evidence they had previously been used as part of an earlier hotel. The Appeal asks this Board to interpret CHBC § 8-302.1 as incorporating a presumption that the entirety of a qualified building was used for the same historical purpose, unless there is evidence to the contrary. This interpretation is essential to allow the unified restoration and reuse of historic structures and, in particular, character-defining historic features like the cupolas when evidence of past use is scanty or incomplete.

### **III. THE APPEAL INVOLVES ONLY ISSUES OF HISTORIC BUILDING CODE INTERPRETATION SUBJECT TO THIS BOARD'S APPEAL JURISDICTION**

At an in-person meeting on February 26, 2020, the City and Owner agreed the issues on appeal were legal matters of Code interpretation, specifically whether the CHBC applied to fire rating and construction type requirements for R-2.1 occupancies in the regular Code. City Staff, consistent with their prior statements, agreed the Park Victorian may be restored in accordance with the CHBC, so long as memory care use is not allowed above the second floor. The decision was based solely on its interpretation of the CBC and selective provisions of the CHBC, and simply ignored numerous other provisions of the CHBC that focus on whether the proposed reuse raises factual safety concerns. In fact, an extensive life-safety evaluation in 2018 concluded the proposed rehabilitation will provide the same or higher level of safety as any otherwise applicable construction requirements. Thus, in the absence of any factual disputes, the only issues to be addressed by this Board involve interpretation of the “alternate method of compliance” and “existing use” provisions of the CHBC.

### **IV. THE ISSUES OF INTERPRETATION ARE OF STATEWIDE SIGNIFICANCE**

This Board found the basic issues raised by the Appeal were of statewide significance when it was originally filed in 2018. As narrowed in 2020, those same issues are even more critical to the preservation of qualified historical buildings across California. The City’s decision is predicated on an argument that the CHBC cannot “trump” the CBC. This argument misses the point. The CHBC was never intended to supersede the regular Code. Rather, it allows Owners to prove that “alternative means” comply with regular requirements. The CHBC encourages Owners and public agencies to use new and creative methods to meet safety standards in historical buildings, so long as they are demonstrated to be effective. In some cases, the CHBC pre-approves alternative compliance methods, like the fire safety systems listed in Chapter 8-4. The CHBC acknowledges that historical buildings rarely meet construction requirements under the regular Code, but nonetheless allows them to be reused for any occupancy type provided they can be made safe through proven or pre-approved alternative methods such as the automatic sprinkler systems deemed adequate by the CHBC to meet all fire safety requirements in the CBC.

The City’s interpretation of the relationship between the CBC and CHBC would effectively preclude most new or prior uses of historical buildings – even if they fully meet all applicable CHBC requirements. Such an interpretation not only contradicts the State’s clear statutory intent but would also deter owners from rehabilitating important historic landmarks like the Park Victorian. The City’s rejection of the CHBC as applied to R-2.1 occupancy sets a dangerous precedent for historical buildings Statewide, without increasing actual fire safety under either Code.

If the City’s refusal to apply the CHBC to allow alternative methods that satisfy construction-type requirements in the CBC is upheld, virtually no licensed care facilities or congregate housing will be allowed in the majority of multi-story historical buildings. Similarly, if the City’s refusal to follow the CHBC’s “existing use” and specific “fire-resistive construction” provisions is upheld, the CHBC will be a “dead letter” and serve no purpose for any historical building seeking restoration and reuse.

The Appeal gives this Board an opportunity to underscore the importance of the CHBC in protecting historical buildings without compromising safety. The State legislature intended to apply a uniform rule for historical reuse under the CHBC, regardless of the building’s location or occupancy type. By granting this Appeal, the Board will support and reinforce the legislative intent that restoration of qualified historical buildings be allowed Statewide through “reasonably equivalent” safety requirements, as specified in the CHBC. Historic buildings like the Park Victorian will be reused through the pre-approved fire protection measures in the CHBC, and the public interest will be served through safe historic rehabilitation projects.

**V. COMPLIANCE OF PROPOSED HISTORICAL RESTORATION WITH CHBC**

The Park Victorian is a four-story historical building originally constructed in 1869 in the high Victorian style and expanded to its current size in 1889. It is listed individually as a designated Historical Resource by the City of San Diego and evaluated by qualified consultants as eligible for the National Register of Historic Places. Over the past 141 years, the Park Victorian has been used as a hotel, home for the “aged and feeble-minded,” apartments and single-resident occupancy (SRO) apartments in the building. The Park Victorian is a “qualified historical building” under Health & Safety Code (HSC) § 18955 and CHBC § 8-201.

The Park Victorian is located at 509 Park Boulevard, in the East Village of downtown San Diego. It is currently occupied and awaiting restoration. It is constructed primarily of wood with a brick veneer, qualifying as Type V construction. Prior to the 1960s, but long after its period of significance<sup>2</sup>, two prominent cupolas on the fourth floor were removed. Sometime after the turn of the twentieth century, original sections of the third and fourth floors burned. While the building was returned to use, the cupolas and burned sections were never restored. The building has a striking historic façade on two frontages and contains approximately 38,000 square feet.

Plans for restoration of the Park Victorian call for creation of approximately 78 patient rooms on the first three floors (limited to 98 beds), along with substantial communal and staff support areas. The character-defining historical cupolas will be restored and used for daytime patient activities, along with new covered decking between the cupolas that will allow patients to enjoy limited open-air recreation without leaving the confines of the building to access elevators. Reconstruction of the burned-out portions of the third and fourth floors will include new fire-resistive structural supports that will be placed on a new foundation to support the reconstructed sections of the third and fourth floors. The plans also include installation of new two-hour rated enclosures and two new stairways, along with smoke refugia on the second and third floors, fire sirens, flashing fire alarms, and an automatic fire sprinkler system throughout. Staff showers and rooms will be located on the fourth floor. Twenty-four-hour staff monitoring stations will be located on every floor. In addition, staffing will meet all State mandates for memory care facilities, sometimes referred to as Alzheimer's care.

It is undisputed that the Park Victorian cannot be upgraded to a higher construction category under the CBC without substantial damage to its historical fabric. Regardless of cost, the existing wood and brick veneer construction and interior wood structural supports are historical and cannot be changed to different materials without removing large sections of the historical building. Upgrades to the foundation to meet CBC requirements would effectively require reconstruction rather than restoration of the historical building.

---

<sup>2</sup> CHBC Section 8-201 defines "period of significance" as "the period of time when a qualified historical building or property was associated with important events, activities or persons, or attained the characteristics for its listing or registration." In this case, it appears the Park Victorian's period of significance extended to at least 1941, when World War II brought extensive new development to San Diego.

Nonetheless, the Owner has proposed all protective upgrades available or suggested that do not require removal of existing historic fabric.

The Park Victorian will be restored by Owner, a local San Diego company with extensive experience in historical preservation and reuse. Milford Wayne Donaldson FAIA, a preservation architect, past chairman of this Board, and the former California State Historic Preservation Officer, and Alan Turner, a California State Licensed Architect, have been engaged to ensure compliance with historical reconstruction criteria. DCI Structural Engineers, a California State Licensed Structural Engineering firm will design structural upgrades. After reconstruction, the Park Victorian Senior Living Facility will be managed by Silverado Senior Living, one of the largest and most respected memory care companies in the nation.

**VI. THE CHBC DEPENDS ON ALTERNATIVE METHODS OF COMPLIANCE TO SATISFY CBC REQUIREMENTS**

The CHBC is not a totally separate building code adopted by the State for historical buildings. Instead, it works as an adjunct to the CBC, and is specifically designed to allow qualified historical buildings, like the Park Victorian, to satisfy CBC requirements through “alternative” means. The CHBC recognizes there may be some trade-offs between protection of historical buildings and the safety provisions of current codes. The State legislature, however, has determined that the public interest requires “the preservation and continuing use of qualified historical buildings or properties while providing reasonable safety for the building occupants and access for persons with disabilities.” (CHBC §8-101.3). Through the CHBC, the State dictates how to accomplish “reasonable safety” under the CBC. The State does not allow local or State agencies to require more than “reasonable safety” in connection with reuse of historical buildings in most cases and, in particular in this case, the CHBC defines how historical buildings may provide “reasonable safety” through reconstruction and restoration.

Application of the CHBC is Mandatory. The CHBC is intended to provide alternative regulations for repairs, alterations and additions necessary for the preservation, rehabilitation, related construction and change of use or continued use of a qualified historical building. The “intent of the CHBC is to save California’s architectural heritage by recognizing the unique construction problems inherent in historical buildings and by providing a code to deal with these problems.” (CHBC § 8-101.2). Application of the CHBC by state and local agencies is mandatory under HSC § 18954:

*The building department of every city or county or other local agency that has jurisdiction over the enforcement of code within its legal authority shall apply the alternative building standards and regulations adopted pursuant to Section 18959.5 in permitting repairs, alterations and additions necessary for the preservation, restoration, rehabilitation, moving or continued use of a qualified historical building or structure.*

(California Health and Safety Code § 18954). The regulations of the CHBC “have the same authority as state law and are to be considered as such.” (See CHBC Introduction.) Where a qualified historical building is involved, the CHBC must be applied to allow any historical building to satisfy CBC requirements through alternative methods. If the CHBC does not specify an alternative method of compliance, it requires all public agencies to “accept solutions that are reasonably equivalent to the regular code...” (CHBC §8-101.2).

Purpose of CHBC is to encourage historic preservation. Under the “Purpose” description in CHBC § 8-102.1, “the CHBC is applicable to all issues regarding code compliance for qualified historical building or properties. The CHBC may be used in conjunction with the regular code to provide a solution to *facilitate the preservation* of qualified historical buildings.” (Emphasis added.) Under § 8-105.1 “repairs to any portion of a qualified historical building ... may be made in-kind with historical materials and the use of original or existing historical methods of construction, subject to the conditions of the CHBC.” In sum, the CHBC allows building owners to achieve compliance with the provisions of the regular CBC through alternative means that are “reasonably equivalent” when applied to qualified historical buildings such as the Park Victorian. (CHBC § 8-102.1.) In some cases, as with construction types and fire safety, the CHBC affirmatively specifies “reasonably equivalent” construction methods that must be accepted in satisfaction of CBC requirements.

Use and Occupancy Changes. Under CHBC § 8-302.1, the use or character of occupancy of a qualified historical building, or any portion thereof, shall be permitted to continue in use “*regardless of any period of time in which it may have remained unoccupied or in other uses,*” provided it otherwise conforms to the CHBC. Section 8-302.2 allows the use or character of qualified buildings to be *changed from or returned to its historical use,*” provided the building conforms to the CHBC. Any “change in occupancy *shall not* mandate conformance with new construction requirements as set forth in the regular code.”

In other words, qualified historical buildings like the Park Victorian may be used for any occupancy type provided *the building* conforms to the CHBC.

Alternative Fire Protection. The CHBC relies heavily on the use of automatic sprinkler systems in qualified historical buildings to comply with fire requirements of the regular Code.<sup>3</sup> For instance, CHBC § 8-302.3 allows required occupancy separations of more than one hour to be entirely omitted or reduced to one hour through provision of an automatic sprinkler system. CHBC § 8-302.5 provides the maximum height and number of stories of a qualified building “shall not be limited because of *construction type*, provided such height or number of stories does not exceed that of its historical design.”<sup>4</sup> The Park Victorian was constructed as a four-story building in 1889, and under the CHBC, its Type V construction cannot be used as an excuse to prevent restoration to its historic height. In addition, any qualified historical building meets the one-hour fire rating requirement as a matter of law under the CHBC if it has an automatic sprinkler system. CHBC Chapter 8-4 directly addresses alternative provisions for fire protection. Section 8-401.1 requires that enforcing agencies *must* “accept any reasonably equivalent alternatives to the regular code when dealing with qualified historical buildings.”

The CHBC acknowledges there may be limited trade-offs between preservation of qualified historical buildings and regular code provisions: “[t]he intent of the CHBC is to preserve the integrity of qualified historical buildings or properties while maintain a reasonable degree of fire protection based primarily on the life safety of the occupants and firefighting personnel.” (CHBC § 8-401.1.) In other words, the CHBC requires the City to treat automatic sprinkler systems and historical height as “reasonably equivalent” to the fire rating and construction type specifications in the CBC.

CHBC § 8-402.2 provides that “[u]pgrading an existing qualified historical building or property to one-hour fire-resistive construction and one-hour fire-resistive corridors *shall not be required regardless of construction or occupancy*” when an automatic sprinkler system or approved life-safety evaluation is provided. The Park Victorian will provide an automatic sprinkler system upgraded to NFPA 13 standards.

---

<sup>3</sup> Research indicates fire sprinklers reduce the risk of death by more than 80 percent in single-family homes, with close to a 100 percent success rate in dousing fires.

<sup>4</sup> The Park Victorian will be less than the 75-foot maximum allowed with fire sprinklers under CHBC Section 8-302.5.1, plus it will provide an automatic fire sprinkler system. In addition, the Park Victorian is designed with two-hour fire-rated stairwells, sealed stair openings, smoke barriers, refugia, a new fire alarm system in accordance with NFPA 72.

It has already submitted a positive life-safety evaluation by Jensen Hughes, an experienced consultant. The life-safety evaluation concluded: “It is the opinion of Jensen Hughes that the fire protection features proposed will serve to *adequately protect the safety* of the occupants in the newly renovated Park Victorian Senior Living Facility.” Therefore, the City is prohibited from requiring that the Park Victorian be upgraded to Type II construction *as a matter of law* because it has fully met the standards for compliance with CHBC § 8-402.2.

## **VII. SUMMARY OF REASONS TO APPROVE APPEAL AND ALLOW PROPOSED REUSE OF THE HISTORIC PARK VICTORIAN**

The CHBC applies to all qualified historical buildings and provides alternative methods of compliance with the occupancy, construction, structural, and fire protection requirements of the CBC. Under the law, the Owner must be allowed to proceed with its proposed plans for the following simple reasons:

1. CHBC § 8-302.1 allows an historic building to be returned to *any* prior use category, regardless of the amount time it has been used for other occupancy types. The Park Victorian was used for R-2.1 occupancy for a period of five (5) years during the 1920s, when operated as the “Rockway Home for the Feeble Minded and Aged.” The Park Victorian may reestablish R-2.1 uses for memory care under CHBC 8-302.1 as an “existing use.”

2. CHBC § 8-302.5 provides that the maximum height and number of stories of a qualified historical building “shall not be limited because of construction type,” provided it does not exceed the historical design. The Park Victorian may reestablish and reuse the original four floors, including cupolas, under the CHBC.

3. CHBC Section 8-303.1 requires the City to accept “any reasonably equivalent alternative” to the CBC for residential occupancies, involving the Park Victorian. Installation of an automatic fire sprinkler system or approved life-safety evaluation are specified and mandated as “reasonably equivalent alternatives” to the CBC for fire protections under CHBC §§ 8-401.1 and 8-402.2.

4. CHBC § 8-402.2 mandates that “upgrading an existing qualified historical building or property to one-hour fire-resistive construction shall not be required *regardless of construction or occupancy*” when an automatic sprinkler system or approved life-safety evaluation is provided. Both are provided by the Park Victorian in accordance with Section 8-402.2.

5. CHBC § 8-410.1 provides that “every qualified building or property which cannot be made to conform to the construction requirements specified in the regular code for the occupancy or use, and which constitutes a distinct fire hazard ... *shall be deemed to be in compliance* if provided with an automatic sprinkler system or a life-safety system ...” There is no statutory support for prohibiting R-2.1 occupancy of the Park Victorian, which is not a distinct fire hazard, when even buildings known to be actual fire hazards can comply through an automatic sprinkler system.

6. CHBC § 8-411 provides that “fire alarm systems, smoke and heat detection systems, occupant notification and annunciation systems, smoke control system and fire modeling, timed egress analysis and modeling, as well as other engineering methods and technologies may be accepted by the enforcing agency to address areas of nonconformance.” The Park Victorian has adopted all alternate technologies available or suggested by any enforcing agency, other than dismantling the historic structure and reconstructing it.

7. The intent of the CHBC is to preserve the integrity of qualified historical buildings while maintaining a reasonable degree of fire protection. The Park Victorian accomplishes this goal in strict conformity with the CHBC.

#### **VIII. ADDITIONAL ANALYSIS OF ISSUES ON APPEAL**

A. *Can the requirements of the regular CBC be satisfied through alternative methods of compliance under the CHBC to achieve the equivalent of fire-resistive or Type II construction for R-2.1 occupancies?*

All parties agree the Park Victorian is a qualified historical building entitled to the protections of the CHBC. The primary legal issue, therefore, is whether the CHBC can be used to satisfy an affirmative CBC requirement for Type II construction above the first two floors of R-2.1 occupancy. The City agrees the CHBC can provide alternative compliance methods for generally applicable construction-type or fire safety requirements. However, the City contends that an affirmative requirement for a specific construction type above two floors in the CBC cannot be satisfied through any alternative methods allowed under the CHBC, even though the CHBC specifically provides that construction type shall not limit historical heights or use. There is no legal support or justification for this position.

In meetings, the City argued that CBC § 435.4 affirmatively prohibits R-2.1 occupancy in non-fire-resistance-rated construction, and also refers to HSC § 13131.5, which requires that “the entire building shall be of Type II fire resistive construction.” The City then pointed to the prohibition on R-2.1 use above the second floor of Type V buildings in CBC Table 504.4 as the kind of requirement that cannot be satisfied through the special rules applicable to historical buildings under the CHBC.<sup>5</sup> The City simply dismissed the CHBC provision that specifically allows *all* fire resistive construction requirements in the CBC to be satisfied through automatic sprinklers, on the ground that the CHBC is not mentioned as an exception in the text of the regular Code.

In fact, the CBC does not mention the CHBC at all, because the CHBC applies *automatically* to construction-related issues affecting the potential reuse of historical buildings. There was no need to mention an exception for historical buildings to construction type requirements in the CBC, because the CHBC Section 8-402.2 specifically and affirmatively provides that “upgrading an existing qualified historical building or property *shall not be required regardless of construction or occupancy*” if fire sprinklers are provided. The City interprets the CHBC as though the italicized phrase was simply meaningless surplusage rather than a statement of State law. All statutory statements are entitled to equal status, and the fact that R-2.1 occupancy is proposed does not change the legislative intent that *all* historical buildings are deemed to satisfy CBC fire-rating requirements if they have automatic sprinkler systems.

The City also ignores exceptions for historical buildings in numerous provisions of state law, including the CHBC and the California Fire Code (CFC). For instance, CFC § 102.6 expressly exempts historic buildings: “[t]he provisions of this code relating to the construction, alteration, repair, enlargement, restoration, relocation or moving of buildings or structures *shall not be mandatory* for existing buildings or structures identified and classified by the state or local jurisdiction as historic buildings where such buildings or structures do not constitute a distinct hazard to life or property....” Buildings that pose a distinct life-safety hazard are subject to special rules, but none of them are applicable to the Park Victorian.

---

<sup>5</sup> In fact, contrary to the City’s arguments, CBC Table 504.4 also prohibits R-2.1 occupancy above the second floor in Type IIA construction and prohibits it entirely in Type IIB. CBC §435 affirmatively requires one-hour fire resistance-rated construction for R-3.1 and R-4 occupancies but prohibits non-fire-resistance-rated construction for R-2.1. There is no practical difference between a requirement for one-hour rating and a prohibition on non-rated buildings, especially when historical buildings are deemed by law to meet one-hour rating requirements with automatic sprinklers under the CHBC.

In other words, regular CBC requirements are not mandatory for qualified historical buildings, unless they pose a “distinct life hazard” under Chapter 8-2 of the CHBC. As there is no suggestion the Park Victorian will be a “distinct life hazard” after restoration, and the life-safety evaluation found it will be safe, the City is obliged to accept the CHBC’s alternative methods, including use of automatic sprinklers to any satisfy one-hour fire rating requirements.

The question, therefore, is not whether the CHBC “trumps” the CBC or vice-versa. The CBC remains in full effect, but the CHBC allows it to be satisfied through any construction and life-safety methods that meet the protective intent of the CBC. In this case, the State has *pre-determined* that CBC fire-resistive construction standards can be satisfied through installation of automatic fire sprinklers in qualified historical buildings. Any other interpretation eviscerates the legislative intent that historical buildings be reused according to performance-based rather than prescriptive requirements.

B. *Can an “existing use” classification under the CHBC §8-302.1 be rejected for part of a building in the absence of room-specific evidence, or is there a presumption the entire building was used for the same purpose if there is no evidence to the contrary?*

The City contends the reconstructed cupolas on the restored fourth floor of the Park Victorian cannot be used for memory care without specific evidence they were used by residents of the property during the 1920s, when it was a “home for the feeble minded and elderly.” Preliminarily, there is no basis for the City splitting the building into different segments for the purposes of determining “prior use.” The CHBC *assumes* that historical buildings were single use, unless the applicant or City demonstrates that portions were put to different use in the past. In reconstructing the cupolas, Owner will follow the current California Access Compliance Advisory Reference Manual for access, doors, hardware, height restrictions, tactile surfaces, etc.

Further, the Owner submitted evidence the cupolas were used by hotel guests and others prior to the Property’s use as a “home for the feeble minded and elderly.” There is simply no evidence the cupolas were used for any other purpose or left vacant during the 1920s. Unless there is evidence the cupolas were *not* used for the same purpose as the remainder of the building, the presumption must be that the entire building was occupied for the same use.

Finally, the cupolas provided a rare birds-eye view of downtown San Diego for residents and guests. This vista was highly prized by hotel guests, as demonstrated by newspaper articles, and there is no reason to believe that elderly or “feeble-minded” residents would have been less interested in the view over the surrounding buildings. The cupolas and fourth-floor walkways provided a different environment that may have been much enjoyed by the 1920s residents, who otherwise would have been limited to their rooms and common areas.

In sum, there is no reason to disregard the presumption that the entirety of a qualified historical building was used for a single purpose during prior periods. Without this presumption, a regulatory agency could “slice and dice” historical buildings and allow reuse of some parts, but not others, without explanation. This is inconsistent with the legislative intent that historical buildings be reused in their entirety, especially with regard to character-defining features like the cupolas.

### **XIII. CONCLUSION**

The CHBC is unique among state regulations in that it is performance-based rather than prescriptive. When adopted, it was a totally new approach to building codes for historical structures, allowing site-specific performance-oriented solutions that nonetheless maintained life-safety standards. The regulations are mandatory for state or local agencies in permitting repairs, alternations, and additions necessary for the preservation, rehabilitation, relocation, related construction, change of use or continued use of a qualified historical building.

The Park Victorian meets every requirement of the regular CBC by utilizing the alternative methods set forth in the CHBC to provide reasonably equivalent or pre-approved methods of compliance. The City’s refusal to accept these alternative methods of compliance, even when they are specifically authorized under the CHBC, puts all historical buildings in California at risk. The Owner of the Park Victorian asks this Board to uphold its Appeal and declare its full support for the alternative provisions of the CHBC.

FITZGERALD YAP KREDITOR LLP

DATED: December 18, 2020

*/s/ Deborah Rosenthal*

---

Deborah Rosenthal  
Attorneys for Petitioner  
12<sup>th</sup> & “A” Hotel Partners, LP

## **ATTACHMENT A**

### **DETAILED REBUTTAL OF ARGUMENTS IN OPPOSITION TO APPLICATION OF THE CHBC TO REUSE OF THE PARK VICTORIAN**

**December 17, 2020**

The City of San Diego has made numerous arguments in support of its denial of the Owner's application to restore and reuse the Park Victorian for R-2.1 memory care use. Most of these arguments have been communicated verbally to the Owner's representatives. For the convenience and assistance of the Board, the Owner has prepared written responses to arguments made by the City, as understood by the Owner. The City may make new or different arguments during the Appeal, and the Owner reserves the right to supplement this rebuttal as helpful to the Board.

Argument No. 1: CBC § 435.4 governs the "type of construction" required for R-2.1 occupancies, including memory care facilities. "Type of construction" requirements in the CBC are not subject to the CHBC.

Response No. 1: HSC § 18954 affirmatively requires application of the CHBC to any action relating to reuse of qualified historic buildings: "Repairs, alterations, and additions necessary for the preservation restoration, rehabilitation, moving, or continued use of a qualified historical buildings or structure may be made if they conform to this part. (*See also* HSC § 18951.) CHBC § 80303.1 affirmatively "requires enforcing agencies to accept *any reasonably equivalent alternative* to the regular code when dealing with qualified historical buildings and properties" classified as residential occupancies. (Emphasis added.)

CHBC § 8-402.2 expressly provides that upgrading an existing qualified historical building, like the Park Victorian, to one-hour fire-resistive construction "shall not be required *regardless of construction or occupancy*" if automatic sprinklers are provided. Sections 8-402.1 and 8-402.2 specify that installation of an automatic sprinkler system satisfies all fire-resistance requirements for existing exterior wall, openings, construction methods, and corridors. The Park Victorian will meet all requirements under CHBC § 8-402 and therefore satisfies CBC requirements for "type of construction or occupancy."

There is no evidence to support the position that "type of construction" requirements in the CBC prohibit application of the CHBC when a qualified historical building is involved. Nor is there any support for asserting the proposed R-2.1 occupancy is illegal, when CHBC § 8-402.2 allows one-hour fire rating requirements under the CBC to be satisfied by automatic sprinklers, "*regardless of occupancy*" classification. In fact, accepting Argument No. 1 would make the CHBC statement that one-hour fire-resistive construction is automatically satisfied by automatic sprinklers a complete nullity. All State and local agencies are required to interpret State law, including every relevant section of the CHBC, by enforcing all such applicable sections instead of ignoring some of those sections applicable to historical buildings or discarding them at its whim.

Argument No. 2: CBC Section 435.4.1 prohibits R-2.1 occupancies in "non-fire-resistance-rated construction, see [HSC] § 13131.5."

Response No. 2: HSC § 13131.5 is a requirement for memory care licensing under the CFC, which is not enforced under the CBC. On its face, therefore, this Section does not apply to the Appeal. Nonetheless, HSC § 13131.5 triggers an interpretation of the CHBC, because it requires Type II construction for R-2.1 occupancy above the first two stories, by reference to the CBC. Type II construction provides one-hour fire-rating under the CBC. As explained above, CHBC § 8-402.2 provides an alternative method of complying with all one-hour (*i.e.* Type II) construction requirements.

Specifically, “upgrading an existing qualified historical building or property to one-hour fire-resistive construction and one-hour fire-resistive corridors *shall not be required regardless of construction or occupancy*” when an automatic sprinkler system or approved life-safety evaluation is provided. The Park Victorian provides both. In other words, after installation of fire sprinklers and other life-safety measures, the Park Victorian will be *deemed by law to satisfy* the CBC requirement for one-hour fire rating. There is no basis to conclude the Park Victorian is “non-fire-resistance-rated construction” when it qualifies as one-hour rated *as a matter of law* under CHBC § 8-402, a section that directly addresses this issue.

Argument No. 3: CBC Table 504.4 governs the number of stories above grade allowed for each type of construction, and it prohibits R-2.1 uses above the second floor. Table 504.4 does not expressly reference the CHBC, so the CHBC does not apply to requirements in the Table, even if the CHBC otherwise applies. No historical building can use the CHBC to satisfy Table 504.4 because it does not mention alternative methods of compliance.

Response No. 3: There is no evidence the legislature intended CBC Table 504.4 to apply to the Park Victorian without reference to the CHBC. Table 504.4 states that it is based on the relationship between “occupancy classification” and “construction type” for the purpose of determining the “allowable number of stories above grade plane.” CHBC § 8-302.5 clearly states “the maximum height and number of stories of a qualified historical building or property shall not be limited because of *construction type*, provided such height or number of stories does not exceed that of its historical design.” (Emphasis added.) In addition, CHBC § 8-402.2 states automatic sprinklers satisfy all requirements for one-hour fire-resistive construction “regardless of occupancy.” In this case, the Park Victorian had four stories historically, including the two prominent cupolas and other fourth-floor walkways. The plans call for installation of an automatic sprinkler system throughout. Table 504.4 cannot be used to limit the number of usable stories beyond the historical design, regardless of construction type or occupancy classification. Since “occupancy classification” and “construction type” are both addressed in the CHBC, it applies to Table 504.4.

If applied to other qualified historical buildings, Table 504.4 would prevent many of them from being reused for any purpose. For instance, Table 504.4 affirmatively requires Type I construction above the first two floors for R-2.1 uses, in direct contradiction to HSC § 13131.5 which expressly allows Type II construction. If applied, Table 504.4 would prevent many other uses in historical buildings, because it requires Type I construction for a large number of occupancies. In effect, the City is cherry-picking the requirements of Table 504.4 and applying them only to the Park Victorian’s memory care uses.

Argument No. 4: Table 504.4 limits R-2.1 occupancies to three stories above grade in Type II, III and V construction, with non-ambulatory persons limited to the first two stories in Type II, III and V construction.

Response No. 4: There is no support for the argument that Table 504.4 applies to the Park Victorian without regard to the CHBC. The purpose of this table is to ensure adequate fire-resistive construction for residential buildings. Automatic sprinkler systems under CHBC §§ 8-402.1 and 8-402.1 have already been *predetermined* as adequate for qualified historical buildings. The Owner also notes that Table 504.2 requires Type I construction for any R-2.1 or R-4 use above the second story, which effectively would eliminate most multi-story historical buildings from any multi-family or congregate care use.

It has also been suggested that memory care use of the Park Victorian is barred because the CBC affirmatively prohibits R-2.1 uses in non-fire rated buildings, but simply “requires” fire-resistive construction in other use categories. There is no meaningful difference between the requirement for one-hour fire-resistive construction applicable to R-3.1 and R-4 occupancies, and the prohibition on non-fire-resistance-rated construction for Type R-2.1 uses.

There is no meaningful distinction between an “affirmative requirement” and a “negative prohibition” in the CBC. There is no difference between prohibiting R-2.1 occupancy in non-fire rated buildings (i.e. those without sprinklers) and allowing R-2.1 occupancy in buildings with automatic sprinklers in accordance with CHBC standards. This position argues backwards by ignoring the overriding CHBC provision that allows all historical uses to meet all current fire requirements by providing automatic sprinkler systems.

The argument also ignores the impact of applying Table 504.4 to qualified historical buildings without referencing the CHBC. Under a strict application of Table 504.4, R-2.1 uses are not allowed above the second story under Type II, III, IV or V construction. R-2.1 uses are allowed above five (5) floors only in Type IA construction. If this interpretation were correct, qualified historical buildings could not be used above the second floor for *most* residential occupancy categories, even if they have automatic sprinklers throughout. In other words, this interpretation would prevent the third and fourth stories of the Park Victorian from being reused for almost any residential purpose, even if they met all fire and health-safety requirements of the CHBC. This interpretation is completely contrary to the State legislature’s intent in adopting the CHBC and would make all the current historic residential uses of historic wood frame buildings illegal above the second-floor illegal, which is clearly not the case.

Argument No. 5: The CBC requires both a one-hour fire rating and automatic sprinklers for use above the second floor by non-ambulatory persons in an R-2.1 use category. Since the CBC requires both, it cannot be satisfied by providing automatic sprinklers alone, even if they are deemed equivalent to a one-hour fire rating by the CHBC.

Response No. 5: Nothing in the CBC makes the CHBC’s alternative methods inapplicable simply because automatic sprinklers are already required for R-2.1 occupancies under the CBC. The State legislature has affirmatively decided that automatic sprinklers are the equivalent of *any construction type* required under the CBC and satisfy *all* fire-resistive construction requirements. While the CBC requires fire sprinklers plus Type II (or Type I) construction, the legislature has decided that only automatic sprinklers are required for reuse of historical buildings in CHBC 8-402.2, and they are the legal equivalent of one-hour fire rating. The State legislature affirmatively adopted this requirement under CHBC § 8-401.2 by ruling that “the intent of the CHBC is to preserve the integrity of qualified historical buildings or properties while maintaining a reasonable degree of fire protection based primarily on the life safety of the occupants and firefighting personnel.”

Argument No. 6: As a matter of law, the automatic sprinklers allowed under the CHBC cannot satisfy an affirmative CBC requirement that one-hour fire-resistive construction be provided for R-2.1 occupancies. No alternative methods of compliance can satisfy specific affirmative requirements in the CBC.

Response No.6: As a *matter of law*, the automatic sprinkler requirements in CHBC § 8-402 satisfy all requirements for one-hour fire-resistive construction under the CBC, or other sections of the HSC that rely on the CBC. The CHBC is applicable to provide alternative methods of compliance regardless of whether they are described as affirmative, negative or neutral requirements in the CBC.

There is no evidence the CBC requirement for one-hour fire-resistive construction for R-2.1 occupancy cannot be satisfied through the alternative methods outlined in Section 8-402.2 of the CHBC. In fact, under the CHBC, State and local agencies is *required* to reasonably determine whether the Park Victorian has satisfied the requirements of CHBC 8-402.2 and to allow the proposed occupancy if it does so. In the case of the Park Victorian, the Owner has provided *both* an automatic sprinkler system *and* an approved life-safety evaluation. All State and local agencies are mandated to consider whether the automatic sprinkler system and life-safety evaluation meet Code requirements applicable to R-2.1 uses.

Argument No. 7: The “existing use” provisions in CHBC § 8-302.1 only apply to continuation of the most recent occupancy classification. Use of the Park Victorian for the “feeble-minded and aged” was for a short number of years in the 1920s and the most recent uses were residential. The CHBC should not treat previous short-term uses as “existing uses.”

Response No. 7: According to CHBC Section 8-302.1, “the use or character of occupancy of a qualified historical building or property, or portion therefore, shall be permitted to continue in use *regardless of any period of time in which it may have remained unoccupied or in other uses*, provided such building or property otherwise conforms to all applicable requirements of the CHBC.”) In this case, Owner provided evidence acceptable to the local agency that the property was used as a “home for the feeble-minded and elderly” for five (5) years during the 1920s. This means the property is being returned to a former use under Section 8-302.1, not changed to a new use.

Argument No. 8: Occupancy of the Park Victorian for memory care would be a “change of occupancy” under the CHBC because its most recent use was not classified as R-2.1.

Response No. 8: The CHBC specifically allows any qualified building to be returned to *any* historical use as an “existing use,” regardless of the time since it was last in that use. The opposite position effectively would prevent historical buildings from being returned to any prior use without meeting the current CBC, which is directly contrary to State legislative intent in adopting the CHBC.

In this case, Owner provided evidence, accepted by the local agency, that the property was used as a sanitarium or “home for the feeble-minded and elderly” for five years during the 1920s. This means the property is being returned to a former use under § 8-302.1, not changed to a new use. The CHBC does not support an argument that its “existing” or “continued” use provisions are only applicable to the most recent or longest use of the property. The CHBC specifically allows any qualified building to be return to *any* historical use, regardless of the time since it was last in that use. This interpretation of the CHBC is not challenged by the local agency. In sum, restoration of the Park Victorian as a memory care facility does not constitute a “change of use” for any purpose.

Argument No. 9: Any “change of occupancy” in historical buildings mandates conformance with the new construction requirements of the CBC under the provisions of California Fire Code Section (“CFC”) 102.3 which provides: “[a] change of occupancy shall not be made unless the use or occupancy is made to comply with the requirements of this code and the California Existing Building Code.”

Owner Response No. 9: As explained above, application of the CFC is not at issue in this Appeal. Nonetheless, at the original SHBSB hearing the State Fire Marshal’s representative argued that reuse of the Park Victorian was not allowed under the CFC because memory care was a “new use.” In fact, memory care use of the Park Victorian is not a “change of use” under CHBC § 302.1. Even if it were a change in the occupancy category, however, CHBC § 8-302.2 provides that a “change in occupancy *shall not mandate conformance* with new construction requirements set forth in the regular code.” (Emphasis added.) The CFC does not apply unless there is a “change of use” under the CHBC, which is not proposed for the Park Victorian. Even if a “change of use” were proposed, which it is not, Fire Code § 102.6 makes all code provisions non-mandatory for qualified historic buildings, provided they submit an approved fire protection plan. The Park Victorian has satisfied all fire protection requirements.

Argument No. 10: HSC § 13131.5 requires Type II construction as described in the CBC to house non-ambulatory persons above the second floor in a residential care facility for the elderly.

Response No. 10: HSC 13131.5 is a licensing requirement that is not directly appealable to this Board. However, to the extent it relies on an interpretation of the CBC or CHBC, this aspect of the decision is appealable.

Type II construction essentially requires minimum one-hour fire-resistive construction. (*See* Uniform Building Code, § 1901, CBC Table 601.)<sup>6</sup> Under CHBC § 8-402, historical buildings are deemed to satisfy one-hour fire-resistance requirements provided they install automatic sprinkler systems. Therefore, under the CHBC, any construction type satisfies one-hour requirements under the CBC if combined with sprinklers or an approved life-safety evaluation. The CBC cannot be applied to qualified historical buildings without reference to the CHBC, which is required by law.

The Park Victorian provides both automatic sprinklers and an approved life-safety evaluation. There is no restriction on occupancy of a qualified historical building based on construction type, provided it does not exceed its historical height and offers automatic sprinklers. Mechanical interpretation of HSC § 13131.5 fails to consider the statutory requirement that all references to the CBC are subject to the CHBC when applied to a qualified historical building. Rejection of the equivalent alternative methods provisions and sprinkler requirements of the CHBC is inconsistent with the statutory intent in adopting the CHBC.

---

<sup>6</sup> Table 601 provides that both Types IIA and VA are one-hour fire-resistive construction. Types IIB and VB are both rated “0.” It is not clear that Type II construction is always one-hour fire-rated, although it must be built of designated materials. For the purposes of this Appeal, it is assumed that Type II construction is one-hour fire rated.