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LAND USE ENTITLEMENTS □ LITIGATION □ MUNICIPAL ADVOCACY

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BY EMAIL AND HAND DELIVERY

The Honorable Planning and Land Use Committee  
of the City of Los Angeles  
200 North Spring Street, Room 350  
Los Angeles, CA 90012-2601  
Sharon.dickinson@lacity.org

Re: Proposed HI Ordinance/CF 15-1013 ✓

Dear Chairman Huizar and Committee Members:

Our clients – property owners who are seeking to develop live/work or hotel projects on industrially zoned sites in the City – strongly support the adoption of the proposed Hybrid Industrial Ordinance (“HI Ordinance”). The HI Ordinance will provide an important zoning tool to allow compatible live/work projects in certain underutilized industrial areas in the City.

On September 8, 2015 John Given submitted a letter asserting purported legal inadequacies of the HI Ordinance and its clearance under the California Environmental Quality Act (“CEQA”). The following is a point-by-point response to the letter.

As set forth below, the letter is without merit. Therefore, we respectfully request that you recommend approval of the HI Ordinance.

**A. The City Properly Determined The HI Ordinance Is Not A Project**

The commenter asserts that if the activity in question (here, the adoption of the HI Ordinance) is listed under CEQA Guidelines Section 15378 (a)(1), the action is deemed a “project” under CEQA. The commenter is incorrect. The commenter fails to acknowledge that CEQA Guidelines Section 15378(a) provides a two-part test for an action to qualify as a CEQA project. First, and foremost, the action must have the “the potential for resulting in either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment.” Second, the action must be listed in subparts (1) through (3). The commenter jumps past the first part of the test concluding that because the action is listed under (a)(1), it must be a CEQA project. Yet, Section 15378 (a) is clear that the action must have the potential to result in a physical change to the environment and be listed in subparts (1) through (3). The commenter ignores the first part of the test as there is no evidence, substantial or otherwise, that there is a possibility of a direct or indirect impact to the physical environment from the adoption of the HI Ordinance. Indeed, the HI Ordinance results in **no change** to the physical environment as the Ordinance does not require any construction activities, does not rezone any parcel, does

The Honorable Planning and Land Use  
Committee of the City of Los Angeles  
January 27, 2016  
Page 2

not change the use or intensity of any existing site and does not lead to any direct or reasonably foreseeable indirect physical environmental impacts.

#### **B. The HI Ordinance Has Not Evaded CEQA Review**

The commenter argues that because the City asserted in the alternative that the HI Ordinance is not a project under CEQA, the Ordinance evaded CEQA review. Yet, in order for the City to make the determination that the HI Ordinance is CEQA exempt (which it did), the City subjected it to CEQA review. CEQA Guidelines Section 15061 makes this clear: (a) **“Once a lead agency has determined that an activity is a project subject to CEQA, a lead agency shall determine whether the project is exempt from CEQA.”** (Emphasis added.) Thus, a determination of a CEQA exemption is CEQA review and, here, the City determined that there was “no possibility the proposed new zone would have a significant effect on the environment.” (Notice of Exemption, pg. 2.)

#### **C. There Is No Substantial Evidence Supporting The Inapplicability of the CEQA Common-sense Exemption**

The commenter wrongly argues that the City’s failed to cite a “specific exemption category under which the project might be exempt, and none applies.” The City cited to two specific CEQA exemptions – the common-sense exemption (CEQA Guidelines Section 15061(b)(3)), as well as the City’s Class M CEQA exemption. There is no rule that a specific exemption category under Section 15061(b)(2) must be specified. The common-sense exemption (Section 15061(b)(3)) is a stand-alone exemption, as is the City’s Class M CEQA exemption.

By ignoring the City’s determination that the HI Ordinance is subject to the City’s Class M CEQA exemption (City of Los Angeles CEQA Guidelines, Article II, Section 2, class (m)), the commenter tacitly concedes the proper application of this exemption. The commenter makes no specific argument regarding the Class M exemption, instead only arguing that “reliance on the common-sense exemption is misplaced” which, as demonstrated below, is incorrect.

The commenter speculates that there should exist evidence of physical impacts from the adoption of the HI Ordinance and, thus, the CEQA common-sense exemption should not apply. As the commenter is well aware (having accused the City of this multiple times in his comment letter), speculation is not evidence. The commenter presents no evidence, substantial or otherwise, to contradict the City determination that the HI Ordinance will result in **no change** to the physical environment as the Ordinance does not permit any construction activities, does not rezone any parcel, does not change the use or intensity of any existing site, and does not lead to any direct or reasonably foreseeable indirect physical environmental impacts.

The commenter takes issue with the City determination that no specific project will be built by the adoption of the HI Ordinance and that to consider unspecified future projects would be inappropriate speculation under CEQA. He claims that the City lacks evidence to support its

The Honorable Planning and Land Use  
Committee of the City of Los Angeles  
January 27, 2016  
Page 3

determination. Yet, the City's Staff Report and Planning Department Recommendation Report constitute substantial evidence, and each demonstrates beyond question that the HI Ordinance does not permit any construction activities, does not rezone any parcel, and does not change the use or intensity of any existing site. Thus, there is substantial evidence of the lack of the potential for physical change to the environment from the adoption of the HI Ordinance. These two reports also constitute substantial evidence demonstrating that future projects utilizing the HI Ordinance are too speculative to be included in the Ordinance's CEQA review. The City has met its burden under CEQA.<sup>1</sup>

The commenter asserts that there is a "great deal of evidence" as to the certainty of future projects, yet that "evidence" is merely a summary of questions to Staff regarding the administrative process to utilize the Ordinance contained in the Recommendation Report and general statements that some developers may avail themselves of the new zoning tool at some undetermined point in the future. This is far from evidence of a physical impact from the HI Ordinance, is not specific to any future project such that it could be included in the Ordinance's CEQA review, and certainly does not meet the CEQA test for substantial evidence. The commenter cannot get out from under the certainty that the HI Ordinance does not permit any construction activities, does not rezone any parcel, does not change the use or intensity of any existing site, and does not approve any future project.

#### **D. Projects Utilizing the HI Ordinance Will Undergo Separate CEQA Review**

The commenter ignores the fact that any project seeking to utilize the HI Ordinance will have to at least apply for a zone change, which is a discretionary action subject to CEQA review. Thus, while future projects at this time are too uncertain and speculative to be included in the CEQA review for the HI Ordinance, those projects will undergo their own CEQA review if and when they arise. Thus, the project specific potential impacts the commenter is concerned about will not evade CEQA review.

#### **E. Deeming The HI Ordinance A Project of Statewide, Regional or Areawide Significance Does Not Cure Future Project Uncertainty**

The commenter argues that the HI Ordinance must be deemed a project of statewide, regional or areawide significance under CEQA Guidelines Section 15206. Although the HI Ordinance does not qualify as a project of statewide, regional or areawide significance as presently drafted, even if it did, such would be of no moment. To be deemed a project of statewide significance is **not** a determination or evidence of (1) the likelihood that future unspecified projects will utilize the HI Ordinance, or (2) any potential significant impacts as a

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<sup>1</sup> The commenter's citation to *Napa Citizens for Honest Govt. v. Napa County Bd. Of Supervisors* (2001) 91 Cal. App. 4th 342 is misplaced. There, under review, was an EIR for a specific project, not an ordinance of general applicability, which was found to contain insufficient analysis and holding that "EIR review is not required *absent some resulting effect* [from the project] *on the physical environment.*" (*Napa Citizens for Honest Govt.* 91 Cal. App. 4th at 368.) Here, there is no evidence of a direct or indirect effect on the physical environment from the adoption of the HI Ordinance.

The Honorable Planning and Land Use  
Committee of the City of Los Angeles  
January 27, 2016  
Page 4

result of the HI Ordinance or uncertain future projects. Rather, a determination under Section 15206 would have merely resulted in submission of certain CEQA documents to the State Clearinghouse.

**F. There Is No Basis To Require Tiered Environmental Review**

The commenter argues strenuously for the tiered environmental review, yet, as he admits, tiered review is an option under CEQA; it is not required. The commenter notes that purpose of tiered review is to avoid repetitive discussion of the same issues – again not a legal requirement. Yet, here, there is likely to be little to no repetition of issues as future project utilizing the Ordinance are not known with any certainty at this time so they are not part of the HI Ordinance CEQA review. They will instead undergo for their own CEQA review when they apply for discretionary approvals under the Ordinance.

Moreover, the commenter’s citation to CEQA Guidelines Section 15144 is misplaced. That Section concerns forecasting of foreseeable impacts to be analyzed in an EIR or negative declaration; that Section does not address uncertain future projects subject to their own CEQA review. Finally, *City of Santa Ana v. City of Garden Grove* (1979) 100 Cal. App. 3d 521 only acknowledges that under CEQA Guidelines Section 15037(a) (as it existed in 1979), adoption or amendment of general plans are “subject to CEQA” – a proposition not in dispute. As noted above, the HI Ordinance underwent CEQA review and two CEQA exemptions were deemed applicable. *City of Santa Ana* **does not** hold that a CEQA exemption cannot be applied to the adoption of a general plan or general plan amendment or, here, a zoning ordinance.

**G. There Is No Conflict Between The HI Ordinance And the City’s Unadopted Industrial Land Use Policy Memo (“ILUP Memo”)**

As the commenter is aware, the ILUP Memo reflects a policy that was never adopted by the City Council and has no force of law. Thus, the HI Ordinance, even if it were to be deemed inconsistent with the ILUP Memo (which it is not), is not an inconsistency with a City zoning policy. Moreover, an adopted ordinance trumps an unadopted policy; thus, even if there were to be a “conflict” it would not be deemed a policy inconsistency. Finally, even if an inconsistency were found, such would not prevent the application of a CEQA exemption, constitute evidence of an impact, or prevent the City from making its finding under City Charter Section 558. .

**H. Substantial Evidence Supports The City’s Finding Under City Charter Section 558**

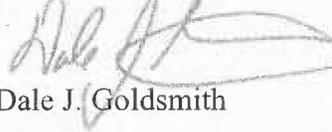
The commenter boldly proclaims there is “abundant evidence” that the adoption of the HI Ordinance will not be in conformity with finding required under City Charter Section 558. Yet, the commenter cites to none. And review of the “evidence” the commenter cites to in other sections of his comment letter reveals a dearth of evidence. In contrast, the Staff Report and Planning Department Recommendation Report contain ample substantial evidence supporting the Charter Section 558 finding that the adoption of the HI Ordinance will “be in conformity with public necessity, convenience, general welfare and good zoning practice.”

ARMBRUSTER GOLDSMITH & DELVAC LLP

The Honorable Planning and Land Use  
Committee of the City of Los Angeles  
January 27, 2016  
Page 5

Thank you for your consideration.

Very truly yours,



Dale J. Goldsmith

cc: Department of City Planning

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City Attorney's Office