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April 26, 2011

**VIA E-MAIL LIST-MAYOR-COUNCIL@HAYWARD-CA.GOV**

Honorable Mayor Michael Sweeney  
and Members of the City Council  
City of Hayward  
777 B Street  
Hayward, CA

Re: April 26, 2011 City Council Meeting; Agenda Item 4: Adoption of Interim  
Moratorium Ordinance Regarding Supermarkets of 20,000 Square Feet or  
More or Large Retail Stores Containing at least 10,000 Square Feet or Ten  
Percent of Area Devoted to Sale of Grocery or Non-Taxable Items

Dear Honorable Mayor Sweeney and Members of the City Council:

This office represents Hayward 880, LLC in connection with its building permit application for tenant improvements for a grocery store at the vacant, approximately 35,000 square-foot building located at 2480 Whipple Road ("Property"), formerly occupied by Circuit City ("Application"). At approximately 10:00 a.m. this morning, we received a forwarded email of yesterday evening indicating that the City Council would be considering adopting a supermarket moratorium tonight. Over the past several hours, our legal team has reviewed and preliminarily analyzed the agenda and the staff report prepared for your consideration of an urgency ordinance establishing a 45-day moratorium on the approval of land use entitlements and building permits associated with supermarkets ("Urgency Moratorium").

As set forth in detail below, the proposed Urgency Moratorium is unlawful and cannot be adopted because it: (1) unlawfully prohibits an expressly permitted use under our client's existing use permit and interferes with vested rights; (2) fails to satisfy statutory procedures required for the adoption of urgency ordinances; (3) is unlawfully targeted at the Application in violation of our client's equal protection and substantive due process rights; and (4) deprives our client of all economically beneficial uses of the property and constitutes a taking of property without payment of just compensation. The purpose of this letter is to state our vehement objection to the Urgency Moratorium and to strongly urge the Council not to adopt the Urgency Moratorium.

1. **The Urgency Moratorium Unlawfully Prohibits a Use Expressly Permitted Under the Existing Use Permit and Interferes with Vested Rights to A Supermarket Use**

The Property is subject to an existing use permit approved by the City in 2004 - Use Permit No. PL-2004-0039 ("Use Permit"). Pursuant to Condition of Approval No. 13 of the Use Permit, the expressly permitted uses of the property are limited to those listed in Hayward Municipal Code Section 10-1.1315a(5), which in turn, includes as an expressly permitted use in subsection (dd), "Supermarket." To the extent the Urgency Moratorium purports to modify the existing conditional use permit, it constitutes a taking for which just compensation must be paid (as discussed further under Section 4 below). Put simply, the City cannot revoke our client's vested right to a supermarket use under the terms of the existing entitlements without paying our client just compensation.

It is well-established in California that a City cannot revoke a conditional use permit without affording the permittee proper notice and a hearing. (*Community Development Com. v. City of Fort Bragg* (1988) 204 Cal.App.3d 1124, 1131-1132.) Moreover, the rights that inure to property owners under conditional use permits are considered fundamental vested property rights and will be reviewed by the courts under heightened standards of review. (See *Goat Hill Tavern v. City of Costa Mesa* (1992) 6 Cal.App.4th 1519, 1529-1531.) Because the Urgency Moratorium would prohibit a use expressly permitted under the Use Permit, it constitutes a de facto revocation without proper notice and hearing.

Under the City's own zoning ordinance, a conditional use permit cannot be revoked or modified without compliance with notice and hearing requirements, and revocation requires that specific findings are made that (1) the use or the manner in which it is conducted, managed or operated impairs the character and integrity of the zoning district and surrounding area or (2) the applicant has not fully complied with or completed all conditions of approval or improvements indicated on the approved development plan and modification of the conditions or plan would not be in the public interest or would be detrimental to the public health, safety, or general welfare. (HMC Sec. 10-1.3260.) The City has not satisfied the requirements for revocation or modification of the Use Permit.

2. **The Urgency Moratorium Does Not Satisfy The Requirements of Government Code Section 65858**

Government Code Section 65858 establishes the method pursuant to which the City may adopt an urgency ordinance of this type. Among other things (and unlike other legislative acts), section 65858 requires that an urgency ordinance contain express findings, supported by substantial evidence in the record, that there is a current and immediate threat to the public health, safety, and welfare, and that the approval of additional subdivisions, use permits, variances, building permits, or any other

applicable entitlement for use which is required in order to comply with a zoning ordinance would result in that threat to public health, safety, or welfare (Gov. Code, § 65858(c).) The findings set forth in the proposed ordinance are inadequate, as they fail to bridge the analytical gap between the evidence (as set forth below, no evidence exists) and the need for the Urgency Moratorium. (*Topanga Ass'n for a Scenic Community v. County of Los Angeles* (1974) 11 Cal. 3d 506, 513-517.)

The proposed Urgency Moratorium is void on its face because there is no evidence whatsoever of any current and immediate threat to the public health, safety, and welfare that would result from the approval of permits or applications for supermarket projects. Because the only building permit application pending is the Application, in order for the City Council to make the required finding under Government Code Section 65858, it would be necessary for substantial evidence to show that the Application presents a current and immediate threat to the public health, safety and welfare. No such evidence exists. It is well-established that there must be substantial evidence in the record to support any adopted findings. (*Topanga Ass'n for a Scenic Community, supra*, 11 Cal. 3d at 515.)

To the contrary, there is evidence to demonstrate that, in fact, the City's failure to process and approve the Application would result in a threat to public health, safety and welfare, because the building that is the subject of the Application would remain vacant for the foreseeable future. The building is an anchor tenant space located within a commercial retail center that has long suffered from high vacancy rates (currently at 87%) and the re-leasing and use of the building is critical to the revitalization of the shopping center area. Accordingly, the adoption of the urgency zoning ordinance establishing a moratorium on supermarket uses would be both inappropriate and unlawful.

**3. The Urgency Moratorium Violates Our Client's Right to Equal Protection**

The Urgency Moratorium would discriminatorily affect only our client's Application and because there is no rational or legal basis for such a moratorium, the adoption of the proposed ordinance would be arbitrary, capricious, and irrational, and constitute a violation of the equal protection and due process clauses of the California and United States Constitutions. (*Friends of Davis v. City of Davis* (2000) 83 Cal.App.4th 1004, 1013, quoting *Ross v. City of Yorba Linda* (1991) 1 Cal.App.4th 954, 964-968 ["While valid zoning regulations may affect competition and have other economic effects, a city does not have carte blanche to exclude a retail merchant that it, or some of its residents, do not like."].)

It is our understanding that there are no other applications for supermarkets on file with the City and that during the 45 days in which any interim ordinance establishing a moratorium is initially effective pursuant to Government Code Section 65858(a),

no other applications for supermarket uses will be before the City for a final decision or determination.

We note that there is substantial evidence in the City's record to indicate that the proposed Urgency Moratorium is targeted at specific end-users. In fact, the City's own minutes of its meeting of Tuesday, February 1, 2011 indicate that the consideration of the proposed Urgency Moratorium only occurred following a specific request from a group known for challenging projects including specific end-users.

A zoning amendment that occurs after the submittal of an application for a permit cannot be enforced upon the applicant if the sole purpose for enacting the zoning amendments was to frustrate a particular project. (*See Sunset View Cemetery Assn. v. Kraitz* (1961) 196 Cal.App.2d 115, 121 [striking down an emergency ordinance where the circumstances prompting adoption of the ordinance (filing of a building permit application) and the speed of its adoption demonstrated the adoption of the ordinance to change zoning regulations was an arbitrary action by the county].)

4. **The Urgency Ordinance Deprives Our Client of All Economically Beneficial Uses of the Property and Constitutes a Taking of Land Without Payment of Just Compensation**

A land use regulation that effects an unreasonable, oppressive, or unwarranted interference with a planned use for which a substantial investment has been made is invalid as applied to that property unless compensation is paid. (*See Hansen Bros. Enterprises, Inc. v. Bd. Of Supervisors* (1996) 12 Cal. 4th 533, 552.) As you may know, the property at issue is a distressed property, as the former anchor tenant, Circuit City, vacated the site following its bankruptcy in 2008. Since then, our client has subsidized the shopping center at a significant cost. The proposal submitted to the City represents the only viable opportunity to revitalize the distressed center. By eliminating the ability to re-lease the building to an anchor tenant, the Urgency Ordinance would deny our client all economically beneficial use of its property, resulting in a per se categorical taking. (*See Lucas v. South Carolina Coastal Council* (1992) 505 U.S. 1003, 1015-1016.)

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For the reasons set forth above, and for and such other grounds as may be presented at the meeting this evening, we strongly urge the City Council to decline to adopt the ordinance. We will be present at tonight's meeting to answer any questions or provide such additional information as the City Council may require.

Very truly yours,

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