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File No. 99999

January 21, 2014

VIA E-MAIL

Mayor Michael Sweeney
City Council Members Mark Salinas, Marvin Peixoto, Barbara Halliday, Francisco Zermeño, Greg Jones, and Al Mendall
City of Hayward
777 B Street
Hayward, CA 94541

Re: Proposed Mission Boulevard Corridor Specific Plan

Dear Mayor and City Council Members:

We write on behalf of the Chrysler Group Realty Company LLC, owner ("CGRC" or the "Owner") of the parcel commonly known as 25601 Mission Boulevard (the "Property") in the City of Hayward (the "City") concerning the proposed Mission Boulevard Corridor Specific Plan (the "Specific Plan") and its potential impacts on the Property. In particular, the Specific Plan contemplates the dedication of approximately forty percent of the Property for public roads and other public purposes, apparently without payment the Owner. (Compare Staff Report for the January 21, 2014 City Council hearing (the "Staff Report") at 84 [Property is 4.73 acres] to *id.* at 136 [Property would be reduced to 2.96 acres].) This approach to acquiring private property for public purposes threatens an unconstitutional taking of the Owner's Property, which will expose the City to substantial damages and liability for the Owner's attorneys' fees.

Given the City's stated intention in the Specific Plan to acquire a substantial portion of the Property, our client understood that the City intended to acquire the rights for the roads and park through eminent domain. Yet when asked if the City planned to begin condemnation proceedings, the City responded that it did not plan to acquire property through eminent domain. Instead the City stated that it would "require such dedications as conditions of approvals as properties are redeveloped." (Email from Mr. David Rizk, City of Hayward, to Ms. Deborah M. Cox, CGRC (Jan. 16, 2014).) This statement is partially repeated on page 55 of the Staff Report, which states, "Property owners where such new thoroughfares are shown will be required when properties are redeveloped to dedicate land and construct the new thoroughfares." For the reasons explained below, the City's proposed course of conduct greatly concerns us.

The City cannot require that the Owner dedicate land for public use without just compensation. The City's proposal to "seek dedications as conditions of approvals" is similar to the actions of the Santa Clara Valley Water District and City of Morgan Hill that were challenged in

Martino v. Santa Clara Valley Water District (9th Cir. 1983) 703 F.2d 1141. There, the City of Morgan Hill adopted a "General Plan Policy Document" that stated "development shall be prohibited within the floodway areas" required by a Water District ordinance and depicted a 180-foot floodway area across property owned by the Martinos; this easement constituted approximately one third of the Martinos' property. (*Id.* at 1143–44.) In light of the general plan document and ordinance, the Martinos reasonably asked Morgan Hill and the Water District when the Water District intended to purchase or condemn the right of way across their property and inquired about the impact of the easement on any future development they may plan. (*Id.*) Those entities responded that the Martinos would be required to dedicate "the entire 180 feet right of way" and "would have to meet all [c]ity and Water District requirements" to obtain a project approval. (*Id.* at 1144.)

Without filing a development application, the Martinos sued, alleging that "the acts of the Water District and Morgan Hill were intended to preclude all development and use of their property and to depress the value of their property pending public acquisition" and therefore constituted a taking without just compensation, as well as violations of the Federal Civil Rights Act. (*Id.*) The court held that the Martinos' taking and related claims were ripe and that they had legally cognizable claims. (*Id.* at 1148.) The court found that the Martinos did not have to submit a development plan for them to successfully allege an illegal taking based on the deprivation of reasonably beneficial uses of a portion of their property. (*Id.* at 1146–47.) Moreover, the court noted that "a 'taking' may be found without any physical invasion where, for example, 'a public entity acting in furtherance of a public project directly and substantially interferes with property rights and thereby significantly impairs the value of property.'" (*Id.* at 1147 [quoting *Richmond Elks' Hall Ass'n v. Richmond Redevelopment Agency* (9th Cir.1977)561 F.2d 1327, 1330].) Substantial interference "typically occurs when the public entity excessively delays condemnation proceedings after the property is slated for acquisition or otherwise acts unreasonably." (*Id.*) Thus, "[t]o the extent that the Martinos [sought] to prove that a 'taking' occurred because of unreasonable delays or other unreasonable conduct in the condemnation process," they had. (*Id.*)

If the City proceeds in adopting the Specific Plan without eliminating the proposed roads and parks through the Property, the Owner would be able to show that the City has interfered with investment backed expectations and will likely deny future beneficial use of the property, and thus has taken property without just compensation as well as violated the Owner's due process rights. (Cf. *Lockaway Storage v. County of Alameda* (2013) 216 Cal.App.4th 161, 187 [holding that a county ordinance caused a regulatory taking because of "its devastating economic impact" on property]; *Monks v. City of Rancho Palos Verdes* (2008) 167 Cal.App.4th 263 [successful inverse condemnation claim based on a city's ordinance imposing a moratorium on construction in a landslide area and owner's loss of beneficial use of the subject property]; see generally *Lingle v. Chevron U.S.A. Inc.* (2005) 544 U.S. 528, 548 [holding that a regulation that causes a substantial "interference with distinct investment-backed expectations" constitutes a taking].)

The City notes in the Specific Plan (and indirectly admits in its response to our client's inquiry) that it has limited funds to implement the contemplated improvements and will rely on "dedications" from private property owners to implement its vision. This is improper. (See

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Koontz v. St. Johns River Water Mgmt. Dist. (2013) 133 S.Ct. 2586, 2603 [holding that the government's demand for property from a land-use permit applicant must satisfy the requirements of *Nollan* and *Dolan* even when the government denies the permit and even when its demand is for money].) The adoption of the Specific Plan will result in multi-million dollar liability to the City as a direct result of the impacts to our client's Property. Indeed, those damages exist now. (Cf. *McCarran Int'l Airport v. Sisolak* (Nev. 2006) 122 Nev. 645, 671 [holding that county ordinances that authorized a taking required the county to provide monetary compensation to injured property owner].) Simply put, the better course of action would be for the City to either abandon the components of the Specific Plan that purport to require these dedications and infrastructure improvements, or establish a funding mechanism to provide the compensation that is required by law.

The Specific Plan also affects a taking without just compensation through illegal spot zoning. Notably, none of the other neighboring commercial lots would be designated "Civic Space" under the Specific Plan and no other commercial parcel is bisected by multiple roads. The City has offered no rational explanation why the Property was singled out as the appropriate place for new roads and a public park. This suggests "spot zoning," which occurs where a "parcel is restricted and given lesser rights than the surrounding property." (*Avenida San Juan P'ship v. City of San Clemente* (2011) 201 Cal.App.4th 1256, 1268.) Irrational spot zoning of the Property cannot occur without payment of compensation. (See *id.* at1272–74 [explaining how monetary damages should be calculated when illegal spot zoning has occurred].)

For the foregoing reasons, we request that the City abandon its plan to down-zone a portion of the Property and propose roadways through the Property, as well as to require such dedications as conditions of future development on the Property. If you have any questions about our concerns, please do not hesitate to contact me at asabey@coxcastle.com or 510.262.5103.

Sincerely,

Andrew B. Sabey

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