LAW OFFICES OF
JOSHUA KAPLAN
11835 W. OLYMPIC BOULEVARD
SUITE 1125E
LOS ANGELES, CALIFORNIA 90064
(310) 478-1920
FAX (310) 478-1921
EMAIL: jk@joshuakaplanlaw.com

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December 7, 2017

Clerk of the Los Angeles City Council
Los Angeles City Council
200 North Spring Street, Suite 440
Los Angeles, CA 90012

Re: The Liquor Bank – 3600 Stocker Street, Los Angeles, CA 90008;
Case No. DIR-2009-1885-RV-PA2-CD8; Applicant/Appellant: Steve Oh Yoonsik – NOTICE OF APPLICANT/APPELLANT'S OBJECTION TO CITY COUNCIL PROCEEDINGS ON JURISDICTIONAL GROUNDS AND SUBMISSION RE ABSENCE OF SUBSSTANTIAL EVIDENCE TO SUPPORT CITY REVOCATION OF LAND USE AUTHORITY;
Council File 10-0130

To Whom It May Concern:

The undersigned is now associated as legal counsel with Michael Gonzales on behalf of Appellant Steve Oh Yoonsik. We strongly urge the City to pause, consider what follows and meet with us to resolve pending issues equitably rather than forcing us to litigate against the City.

Applicant/Appellant, Steve Oh Yoonsik, objects to the jurisdiction of the City Council to proceed with revocation of Applicant/Appellant's land use authority to sell alcoholic for off-site consumption at the above address and location. Los Angeles Municipal Code §12.24 I 2. Applicant/Appellant further respectfully submits that there is no preponderance of the evidence nor substantial evidence upon which to base any such revocation decision as set forth in the record of proceedings below (Los Angeles Municipal Code §12.24 I 3 and B.S.A., Inc. v. King County (1986) 804 Fed. 2d 1104.

On August 17, 2017, the City, through its Director of Planning and Associate Zoning Administrator, found "that the operation of the market/liquor store known as The Liquor Bank located at 3600 West Stocker Street, has operated in substantial compliance

with the corrective conditions established by City Case No. DIR-2009-1855 (RV) effective March 29, 2010, and as modified by Case No. DIR-2009-1885 (RV) (PA1) and City Council File No. 10-130". The City then retained and modified existing terms and conditions of the City's land use grant to The Liquor Bank premised upon the finding by the City that the business did not directly contribute to increased nuisance activity in the vicinity. Page 2 and Page 58 of August 17, 2017, Decision of the Department of City Planning.

Twenty-eight conditions were so imposed (Page 8 of the Decision). Appellant fully accepted twenty-six of those twenty-eight conditions.

However, Appellant challenged two of those conditions in his expressly partial appeal from that August 17, 2017 decision. Appeal Application, Paragraph 4. He expressly did not appeal the decision itself nor any other determination therein.

Appellant's appeal, having been expressly limited in its scope to only Conditions 1 and 3 of the aforesaid Decision and having been expressly designated by Appellant as is required by the City's own Appeal Form as an Appeal from "Only Part" of the aforesaid Decision; the City Council has no jurisdiction to unilaterally enlarge the scope of that Appeal to convert the partial/limited appeal into an appeal from the entire decision thereby providing itself a preconceived basis to reach its preconceived determination to revoke all land use authority for Applicant/Appellant as aforesaid. This, the City Council has no jurisdiction to do.

[See Appellant's Attachment to Master Appeal Form in this matter, Pages 1 through 5, which are incorporated by reference as though set forth hereat in full.]

(A). "APPEAL" VS. "DE NOVO" HEARING

The City Council may not conduct a de novo hearing in this matter. It has only statutorily limited authority to conduct an "appeal" based on the record below, as to the points raised by Appellant. Any such action would constitute a prejudicial abuse of discretion, an act in excess of jurisdiction and an act conducted without legal authority as a "de novo" hearing. Los Angeles Municipal Code 12.24 I (2) and (3); California Code of Civil Procedure §1094.5 and 1094.6.

This distinction between a "de novo meeting" and an "appeal" is hyper-critical in the analysis of the City's intended misconduct.

Since these proceedings are required to be "an appeal hearing", by virtue of both express statutory mandate and controlling case authority; the scope of the review is necessarily limited to only those issues expressly raised by the Appellant. In a "de novo

hearing", all related issues would be before the reviewing body. Breakzone Billiards vs. City of Torrance (2000) 81 Cal.App. 4th 1205, 1221-1222.

This fundamental principle precludes any city revocation action. It allows only a consideration of the evidentiary support, if any, for Conditions 1 and 3 imposed below. (Los Angeles Municipal Code §12.24 I 2 and 3; Cohan vs. Thousand Oaks (1994) 30 Cal.App. 4th 547; Breakzone vs. City of Torrance, supra.

That these proceedings are indeed mandated to be "an appeal" (and certainly not a "de novo" meeting") is irrefutably supported by Los Angeles Municipal Code §12.24 I 3. That controlling provision regarding "appeals" from a decision of the Zoning Administrator provides as follows:

> " . . . When considering an appeal from the decision of an initial decision-maker, the appellate body shall make its decision, based on the record, as to whether the initial decision-maker erred or abused his or her discretion." [Emphasis added.]

That legislative mandate does not authorize a "de novo" hearing with any enlargement of issues, the testimony of witnesses, etc. But that is exactly what the city declares it intends to do here.

Los Angeles Municipal Code §12.24 I 2 also provides as follows:

> "The appeal shall set forth specifically the points at issue, the reasons for the appeal, and the basis upon which the appellant claims there was an error or abuse of discretion by the initial decision maker . . . Once an appeal is filed, the initial decision-maker shall transmit the appeal and the file to the appellate body, together with any report if one was prepared by staff, responding to the allegations made in the appeal."

In Cohan vs. City of Thousand Oaks, supra, as explained by the court in Breakzone Billiards vs. City of Torrance, supra, 81 Cal.App. 4th 1205, 1221; it was held that Administrative Land Use Review Hearings may be "appeals" or they may be "de novo hearings" depending upon the express statutory provisions governing same. In Cohan, supra, the City Municipal Code section required that "the appellant shall show cause on the grounds specified in the Notice of Appeal, why the action appealed from should not be approved." That language was held to mandate that the review be "an appeal" as it places the burden upon the appellant to demonstrate why designated portions of the action (the record) below is erroneous. The substantially same requirement is in the Los Angeles Municipal Code and Appellant made that showing.

While there are a number of judicial decisions examining local code sections concerning appellant review of land use decisions which recognize an appellate authority

to conduct a de novo review if authorized by statute, as the court held in Breakzone Billiards, supra, at 1221 – 1222:

> "There are exceptions to this rule. The exception applicable in this circumstance would be created by a local ordinance which provided for a different standard of review. That was the circumstance presented in Cohan v. City of Thousand Oaks (1994) 30 Cal.App. 4th 547. There, the Thousand Oaks Municipal Code §1-4.04 required that the 'applicant shall show cause on the grounds specified in the Notice of Appeal why the action appealed from should not be approved'".

The City's attention is respectfully directed to Los Angeles Municipal Code §12.24. I-2 wherein a substantially identical procedure as in the Thousand Oaks Municipal Code is mandated. Accordingly, the general rule of de novo review is not operative in Los Angeles.

The mandate in Los Angeles Municipal Code §12.24 I-3 that " the appellate body shall make its decision based on the record . . . (emphasis added), obviously refers to the proceedings below before the Zoning Administrator which must be transmitted to the appellate body pursuant to the requirements of Los Angeles Municipal Code §12.24 I-2.

Finally, as the court held in Breakzone Billiards, supra and Cohan, supra, the right to procedural Due Process is absolute. It requires that a city ordinance mandating that a Notice of Appeal contain a statement of grounds be honored as it has a Due Process function. As the court held in Cohan, supra, at 557:

> "The notice gives direction to both the adjudicatory body that has to decide the issues and those who may have to respond to the challenges to the ruling appealed.

Once again, Los Angeles Municipal Code §12.24 I-2, requiring just such a specification which was indeed given by Appellant, directs the City Council to only those issues to be decided by it and based only on an examination of the record below as limited by the parameters of the appeal. Without honoring such a specification of issues and limited review as aforesaid, the city appeal hearing will indeed become a "free for all" during which Appellant would be unconstitutionally "forced to respond to wide ranging concerns in an impromptu fashion." Cohan, supra, at 557.

Therefore, the legislative mandate and case authority absolutely preclude any "de novo" hearing in this matter.

Further, the City requires that any land use appeal utilize only its "form" for a Notice of Appeal within this context. Los Angeles Municipal Code §12.24 I 2.

As utilized by Appellant herein, that form is labeled a "Master Appeal Form" [emphases added]. It does not anywhere give notice that the review proceedings will be "de novo". Critically, it also provides on its second page that the appellant must elect whether the appeal is from "the entire decision [below] or parts of it." Appellant expressly designated his appeal as from only part of the decision below, thus expressly limiting the conditions to be reviewed on appeal to Conditions 1 and 3 as set forth. The "Master Appeal Form" further requires that Appellant state "specifically the points at issue". Master Appeal Form, Page 2. See Cohan, supra.

Again, all cognizable authorities, legislative and decisional, mandate that the City should only conduct "an appeal" with a very limited scope of review. in this case.

Appellant is very much aware that Los Angeles Municipal Code §12.24 I 5 provides a general authority to act when it provides that "the appellate body may, by resolution, reverse or modify, in whole or in part, any decision of the initial decision maker." But it clearly may do so only after holding an "appeal" hearing examining only Appellant's designated portions of the Zoning Administrator record. (Los Angeles Municipal Code §12.24 I 3. Such was also a provision in the Thousand Oaks Code in the Cohan, supra, decisions with the court therein holding that such general to act authority was obviously circumscribed by the concurrent code requirement that there be an "appeal" and only then could the decision below be reversed, etc. Cohan, supra at 557.

An appeal is not a new trial. Rather, it is a review, within Appellant's established limits, of the action taken by the inferior adjudicatory body. Moles vs. Regents of the University of California (1982) 32 Cal.3d 867, 871.

An administrative body or agency may be said to exceed its jurisdiction whenever it takes action outside its defined power, whether the source of the law providing that definition is constitutional, statutory or decisional. Abelleira vs. District Court of Appeal (1941) 17 Cal.2d 280, 288-290.

An abuse of discretion includes a showing that the administrative agency has not proceeded in the manner required by law. An abuse of discretion by an agency may well be shown when the agency fails to act in a manner consistent with its governing statutes and the agency's actions then result in prejudice to a party. Sierra Club vs. State Board of Forestry (1994) 7 Cal.4th 1215, 1236.

If the administrative body clearly acts outside its jurisdiction or abuses its discretion, a reviewing court in an administrative mandate proceeding must set aside the agency's order or action and no remand will be ordered. Mumaw vs. City of Glendale (1969) 270 Cal.App. 2d 454, 460.

IT IS RESPECTFULLY SUBMITTED THAT THE VERY ESSENCE OF THE RIGHT TO APPEAL ANY PORTION OF AN ADVERSE LAND USE DETERMINATION IS EVISCERATED AND RENDERED UTTERLY VOID IF APPELLANT IS SUBJECTED TO THE IRRECONCILABLE DILEMMA OF EITHER RISKING THE ENTIRE VALIDITY OF A LAND USE GRANT WHEN HE CHALLENGES ONLY TWO CONDITIONS THEREOF OR NOT APPEALING AT ALL. THIS RISK PUTS ANY APPELLANT TO A CLASSIC "HOBSON'S CHOICE". WHO WOULD REALISTICALLY RISK LOSS OF ALL LAND USE AUTHORITY BY VIRTUE OF A CHALLENGE TO ONLY TWO OF TWENTY-EIGHT CONDITIONS IMPOSED ON THE GRANT OF THAT AUTHORITY?

(B). PROCEDURAL AND SUBSTANTIVE DUE PROCESS

As the court held in Cohan, supra at 557: "The right to procedural Due Process is 'absolute' in the sense that it does not depend upon the merits of a claimant's substantive assertions . . . ". The court then held that procedural Due Process is denied where land use applicants are not given prior notice of precisely the issues to be considered on review because they have a constitutional right to know what they need to prove to satisfy their burden of proof at the hearing on the appeal. Supra at 557 – 558.

It is respectfully submitted that a Due Process infirmity vitiates these City Council proceedings.

All notice by Code and by Master Appeal Form notified Appellant only that he would be faced with very limited issues for review which would expressly not include total loss of land use authority.

As the court held in Cohan, supra at 560; with startling applicability to the City's declared intentions in the instant matter:

> "The . . . [respondent] ignored the very laws and regulations meant to insure fair process concerning property development conflicts."

(C). THE DECISION TO IMPOSE CONDITIONS NOS. 1 AND 3 BELOW IS NOT SUPPORTED BY LEGALLY COGNIZABLE FINDINGS AND THE FINDINGS ARE NOT SUPPORTED BY SUFFICIENT EVIDENCE IN THIS RECORD.

Substantial evidence is evidence of ponderable legal significance, reasonable in nature, creditable and of solid value. Pennel v. Pond Union School District (1973) 29 Cal.App.3d 82, 837, footnote 2, 106 Cal.Rptr. 817. The city must then examine not just the evidence in support of the Zoning Administrator's decision, if any, but, rather, all of the evidence in the record. Levesque v. Workman's Compensation Appeals Board (1970)

1 Cal.3d 627, 638, footnote 22, 83 Cal.Rptr. 208. Finally, see Apte v. Regents of the University of California (1988) 198 Cal.App.3d 1084, 244 Cal.Rptr. 312, wherein the court declared that the substantial evidence test requires the reviewing body to consider all relevant evidence in the administrative record, including evidence that fairly detracts from the evidence supporting the agency's decision.

It is respectfully submitted that there is no substantial evidence in this record to support the imposition of Conditions 1 and 2 (and certainly not to revoke all land use authority to sell alcohol for off-site consumption).

By way of example only, with regard to the alleged "sixteen calls for service" set forth by the Los Angeles Police Department in this matter, that evidence is totally deficient as a basis for any imposition of the conditions challenged, let alone for revocation of land use authority. See B.S.A., Inc. v. King County (1986) 804 Fed. 2d 1104, wherein the court addressed that very deficiency in this evidentiary context. In the B.S.A. matter, the Sheriff's Department sought to present statistics regarding the "number of police calls to a particular location" as evidence that it was a nuisance location. The court quickly dispatched this statistical presentation as essentially meaningless in not providing comparative statistics with regard to police calls or occurrences at other, comparable licensed locations within the same city. The record herein is likewise fatally flawed.

The evidence in the record below does indeed demonstrate that, as found by the Zoning Administrator, Appellant has been in compliance with twenty-four of the originally imposed twenty-eight conditions. The minor and somewhat technical lack of complete compliance with four of the originally imposed conditions was not deemed a sufficient basis to revoke all land use authority nor can it be.

It is respectfully submitted that liability may not lawfully be imposed upon a Appellant for the misconduct of non-employees in or near its premises when Appellant has taken all reasonable precautions to prevent such. As the record demonstrates, Appellant has engaged in substantial, cooperative, consultations with the Los Angeles Police Department with regard to security issues; Appellant has and had security procedures in place to prevent or mitigate any patron misbehavior; Appellant did and does have in place a well trained security force to patrol inside and outside its premises; a system to preclude minor's accessing alcohol; litter abatement, etc. Nevertheless, it is not surprising to see some forms of misconduct from time to time in its vicinity in light of the fact that the surrounding community has law enforcement issues. Notwithstanding his aforesaid best efforts, it is not terribly surprising that some really unforeseeable misconduct by non-employees or patrons may occur. Under the authorities discussed hereafter, however, "strict liability" may not be imposed on Appellant for such.

In Laube v. Stroh, (1992) 2 Cal.App.4th 364, 3 Cal.Rptr.2d 781, the court emphasized that the possible imputation of knowledge to a permittee regarding improper activity itself can be based upon improper activity or misconduct only by "employees."

When those engaged in misconduct on or near the permittee's premises are not "employees", the factual predicate for imputation of liability to the permittee fails and no

liability may be imposed if reasonable precautions were taken to prevent it. This is certainly even more true when the non-employee misconduct is not in nor even linked to the permitted premises.

It is also respectfully submitted that since this Appellant has done everything humanly possible to prevent the occurrence of such misconduct, it cannot be held to have "knowingly permitted" same.

In Laube v. Stroh, supra, the Court of Appeal specifically rejected the imposition of "strict liability" upon a permittee for misconduct in their licensed premises. The court held, supra at 233 through 235 as follows:

> ". . . a licensee must have knowledge, either actual or constructive, before he or she can be found to have 'permitted' unacceptable conduct on the licensed premises. It defies logic to charge someone with permitting conduct of which they are not aware. It also leads to impermissible strict liability of liquor licenses when they enjoy a constitutional standard of good cause before their license - and quite likely their livelihood - may be infringed by the state."

The court has thus provided us with a much needed clarification of the import of McFaddin San Diego 1130, Inc. v. Stroh (1989) 208 Cal.App.3d 1384. The court goes to great lengths to analyze the antecedents of the McFaddin decision as such relate to the concept of "permitting" misconduct in licensed premises. The court concludes that the Department of Alcoholic Beverage Control and the Alcoholic Beverage Control Appeals Board had mistakenly interpreted the McFaddin decision and the "permission" requirement. For a permittee cannot be deemed to have permitted misconduct in his licensed premises without knowledge of the occurrence and its prohibited nature. Thus, the Department and Board, by previously dispensing with the knowledge requirement, have misinterpreted precedent.

Finally, the court concluded with the following summary of its holding in this matter, supra at 234:

> "A licensee has a general, affirmative duty to maintain a lawful establishment. Presumably this duty imposes upon the licensee the

> obligation to be diligent in anticipation of reasonably possible unlawful activity, and to instruct employees accordingly. Once a licensee knows of a particular violation of the law, that duty becomes specific and focuses on the elimination of the violation. Failure to prevent the problem from reoccurring, once the licensee knows of it, is to 'permit' by a failure to take preventative action."

Simply put, liability without knowledge of the misconduct and of its prohibited nature is now conceptually and legally impossible and there can be no constructive knowledge regarding misconduct of non-employees. And there is no evidence here that Appellant knew of such misconduct by anyone, employee or patron.

The supposed "evidence" produced below and/or asserted now is really nothing more than conclusionary assertions that the area surrounding Appellant's location" is somehow a problem area. However, of crucial significance is the fact that no misconduct therein is attributable to any act or omission by Appellant nor were any of the alleged perpetrators thereof in any manner connected to Appellant. See Sunset Amusement Company vs. Board of Police Commissioners (1972) 7 Cal.3d 64; Tarbox vs. Board of Supervisors (1958) 162 Cal.App. 2d 373 and Flores vs. Los Angeles Turf Club (1961) 55 Cal. 2d 736 which amply support the proposition that a licensee is not accountable for off-premises disturbances beyond its reasonable control in that it is not an insurer of the good conduct of the entire world. Appellant is not so liable unless there is clear and convincing proof that some act or omission by Appellant proximately caused or contributed to that misconduct and/or that the alleged perpetrators were in a definitive way linked to Appellant.

In Sunset Amusement Company, supra, the court declined to impose liability upon a licensee for disturbances beyond the reasonable control of management. "The law does not require the impossible." Tarbox, supra. As Justice Mosk concluded in his concurrence and dissent:

> "Absent a direct causal relationship between the nature of activities taking inside . . . [the licensed premises] . . . and those occurring outside, and absent a showing that petitioners encouraged or acquiesced in the disorderly conduct off the premises, licensee responsibility should not attach. The general rule as enunciated by this court in Flores vs. Los Angeles Turf Club, 55 Cal. 2d 736 . . . and by the appellate court in Tarbox vs. Board of Supervisors, 163 Cal. App. 2d 373 . . . remains sound: 'A licensee is responsible for governing only patrons' activities which are reasonably within the scope of the licensee's control.'"

Thus, the lesson of these decisions is quite clear. Only where there is no reasonable effort made by a permittee to control patrons' conduct, where patron misconduct is the proximate result of that very failure of any effort and/or where there has been an

independent act or omission of a duty to act which proximately caused the misconduct, can there be any imposition of liability upon the permittee.

For all the reasons stated herein, the City may not revoke Appellant's land use authority. Rather, the City should pause and meet with Appellant to seek equitable resolution therein.

Dated: December 7, 2017

RESPECTFULLY SUBMITTED,

JOSHUA KAPLAN (for Michael Gonzales),
Attorneys for Appellant

cc: Michael Feuer, Los Angeles City Attorney
Attn: Wendy A. Lew, Deputy City Attorney
200 North Main Street, Suite 920
Los Angeles, CA 90012
wendy.lew@lacity.org