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ITEM 8 PLUM 9/11/12
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STATEMENT of J.H. McQUISTON on
PROJECT PROPOSAL for 5241-5247 Santa Monica Blvd

Honorable Chairman and Members of the Committee:

The project sites on Santa Monica contain a density bonus which is absolutely forbidden by Sections 65915 and 65906, California Government Code. Notwithstanding any "permission" to the contrary ostensibly-cited in the City Municipal Code, **the City must obey the California Government Codes hereinbefore cited.**

The appeal requesting an EIR for the project is thus immaterial and the project as-is cannot be allowed.

The applicant proposes a "Mixed Use" project for the Santa Monica lots. **However, the plain language of Section 65915 limits density bonuses only to "housing" developments, by-omission prohibiting bonuses for projects which incorporate "mixed commercial" uses:**

"65915 (a) When an applicant seeks a density bonus **for a housing development** within, or for the donation of land for housing within, the jurisdiction of a city, county, or city and county, that local government shall provide the applicant with incentives or concessions for the production of housing units and child care facilities as prescribed in this section."

Because the **buildings** on Santa Monica **contain both commercial and residential uses, State law does not permit density bonuses per Section 65915. Uses explicitly-stated in parcel-law per 65906 must be obeyed. A building with commercial use must comply with the "commercial" FAR & height limit on the property.**

The plain language of **Section 65906 has been thoroughly interpreted, not only** by the California Supreme Court and the United States Court of Appeals for the 9th Circuit, **but also the Superior Court has Mandated that the City must observe and obey the Section's absolute-prohibition as follows:**

" A variance shall not be granted for a parcel of property which authorizes a **use or activity which is not otherwise expressly authorized by the zone regulation governing the parcel of property.**"

In *Broadway, Laguna v Board of Contract Appeals*, 66 C. 2d 767; 59 Cal. Rptr. 146; 427 P.2d 810 (*en banc* 1967), said **with respect to chartered cities:**

"A broader construction of "intended use" might bring the **code provision into conflict with state law, since Government Code section 65906 authorizes variances "only** when, because of special circumstances applicable to the property, including size, shape, topography, location or surroundings, the strict application of the zoning ordinance deprives such property of privileges enjoyed by other property in the vicinity and under identical zoning classification." (See Comment (1962) 50 Cal L Rev 101, 104, 110 & fn 61.)"

Both **City Charter Section 562 and Municipal Code Section 12.17 Mandate:**

"A **variance shall not be used** to grant a special privilege or **permit a use substantially-inconsistent with the limitations upon other properties in the same zone and vicinity."**

The United States Court of Appeals for the 9th Circuit in *Herrington v Sonoma County*, 857 F.2d 567 (9 Cir 1988), applied the **Mandate of California Section 65906:**

"The Herringtons did not apply for a variance. Nevertheless, the second *Kinzli* factor— application for a variance— need not be met in this case **because pursuit of a variance was not a legally viable option.**

"Five months after rejecting the 32-unit subdivision proposal, the Board adopted the Specific Plan, which **rezoned the Herrington's property to agricultural use. This designation only allowed residential development with a minimum lot size of 100 acres.**

"The testimony of two County planning witnesses indicated that the only means of obtaining approval of the 32-lot proposal was through a General Plan amendment. **This testimony finds support in Cal. Gov't Code Sec. 65906, which prohibits the granting of a variance for a use not expressly authorized by the zoning**

regulation that governs the land in question. Residential development in lots under 100 acres is not an agricultural use, and thus **could not be authorized by variance under section 65906.** Indeed, the County has at no time asserted that application for a variance was a viable option."

In *Philip Anaya v City of Los Angeles*, BS No 99892 (2006), the Superior Court **Mandated that Los Angeles comply with Section 65906.**

The developer **proposes averaging the parking between the parcels zoned RD and C2. Averaging "use" between parcels differently-zoned was the issue in** *Anaya.*

The Court **cited Section 65906 when it prohibited the City from allowing "averaging use".** Thus each type of zone **must provide its own required parking and density.**

If the City wants the proposal to be allowed, the zoning for the properties affected must be amended by "zone change" and not by "variance" or by an administrative fiat. However, other State law and Court decisions **may prohibit the zoning of one parcel in the "block" of parcels to be revised.** *See, e.g, Dale v. City of Mountain View* 55 Cal. App. 3d 101(1976) (City plan here, to limit a building if used as commercial to 0.5 FAR is reasonable legislative power and zone change is not appropriate); *Dolan v. City of Tigard*, 512 U. S. 374 (1994) (single treatment in block of zoning is not "equal protection"); *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987)(zoning amendment must show benefit to public and "equal protection"); *Village of Willowbrook v. Olech* 528 U.S. 562 (2000)(city may not favor a single property in a zone).

Thus the MND is not in accordance with the clear purpose and language of State law which is binding on the City.

Moreover, the Committee is situated per its Code not as legislator but as administrator for this review. It has no power to "amend" City Charter and Code for this matter, nor does the entire Council.

Also, California Government Code Section 65861 **does not permit** (due to absence of permission) **the Council to act as a Planning Code Administrator,** because the City has enacted a department to administer the Planning Code per the Government Code requirement. **Thus this agenda item is not in accordance with law.**

Finally, the Council-District Member, not being a Member of this Committee, is prohibited from appearing before (in person or by delegate) **this Committee for the purpose of influencing the Committee's decision on this issue,** *per* Sections 54950 *et seq* as interpreted by the California Attorney General in Opinion 97-1207.

You have been served with notice of the above issues, laws, and Court decisions. Please comply.

Respectfully submitted,

J. H. McQuiston

c: Interested persons