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Public Works and Gang Reduction Committee
Los Angeles City Council
200 N. Spring Street
Los Angeles, CA 90012

RE: Item No. 3, June 19, 2019 - CEQA Appeal Ordinance – **Council File # 14-0090-S1**

Dear Committee Members:

This office represents clients interested in CEQA appeals before the City Council. We strongly urge the City Council to reject the proposed CEQA appeal ordinance on the June 19, 2019 meeting agenda, and send it back to resolve a number of constitutional due process and common sense problems with the first draft. The Motion of City Council members that initiated this proposed ordinance observed that the City has not adopted written procedures for CEQA appeals guaranteed under Public Resources Code section 21151(c):

> "By not having a formal written process, that includes timelines, this impedes the ability of interested stakeholders to make their views heard. The public would benefit from clear written guidelines regarding CEQA appeals."

Indeed, the public would not only benefit, the City is mandated by law to provide for CEQA appeals. However, as discussed herein, the draft ordinance is vague, ambiguous, and constitutionally infirm. It should be rejected by the Council and sent back to the City Attorney to produce an ordinance setting forth a lawful administrative process.

Potential CEQA Appellants Are Left to Guess What Departments Are Subject To This Ordinance

The applicability provision identifies the City Departments this appeal process <u>does not apply to</u>, but it fails to provide a list of departments to which it does apply. In omitting the list of departments it is intended to apply to, the proposed ordinance does not meet the Motion's goal of making the CEQA appeal process transparent to the interested public. Why would City Council not list the departments to which this ordinance applies? Certainly, the proposed ordinance was

circulated to a list of departments who take actions subject to CEQA. Why not list those departments in the applicability section, and then say the list "includes, but is not limited to the following departments: [list of departments]." The draft as proposed is unnecessarily vague.

The Ordinance Fails To Require The Decisionmaker To Issue A Written Environmental Determination Which Would Definitively Demark The Beginning Of A CEQA Appeal Period

The ordinance defines an Environmental Determination as the act of adopting three types of CEQA documents (most likely at a meeting), but the decision maker is not required to issue a City-based written notice of the Environmental Determination to each person signing a list requesting to receive notice of the Environmental Determination. This is the process that occurs in the City Planning Department for zoning administrator and advisory agency decisions. This process works well because the date of the mailing of the Letter of Determination starts a 15-day appeal period that can be known with precision. A similar process should be adopted for CEQA appeals subject to this ordinance. This process is also consistent with constitutional due process because interested persons have a means of informing the City of their mailing address at which they may receive written notice of the Environmental Determination that commences running of the appeal period.

Reliance On A Notice of Exemption Or Notice of Determination As Commencing the Appeal Period is Constitutionally Infirm Because It Does Not Provide Aggrieved Persons With Actual Mailed Notice Of The Environmental Determination

Instead of requiring departments subject to this ordinance to issue a City-based Letter of Determination, as is the practice in Planning proceedings, the ordinance proposes to measure the commencement of the time to file an appeal from the posting of a Notice of Exemption or Notice of Determination at the County Clerk's Office. California case law, including the seminal case of *Horn v. County of Ventura*, requires that CEQA actions affecting the substantial rights of property owners be noticed with mailed notice, not substituted notice on a bulletin board (physical or electronic). This office believes the mailed notice of a City-based Letter of Determination is constitutionally supported, while the proposed ordinance's use of a Notice of Exemption or Notice of Determination not mailed to interested parties would be constitutionally infirm.

Additionally, the City has no statutory authority to use and post a state statutorily mandated Notice of Exemption or Notice of Determination as a substitute for what ought to be its own notice of decision while a case in the midst of the administrative review process. The authority to issue and post a Notice of Exemption or Notice of Determination exists only when the City makes a **final** administrative decision at the end of its appeal process. For instance, the

Advisory Agency might approve a tract map and issue a Letter of Determination. Because state law provides a right to appeal, the City must wait until expiration of the appeal period, when the Letter of Determination would become final, before issuing and posting with the County Clerk a Notice of Determination. If the tract map is timely appealed, the City must process and hear the appeal to final determination by the City Council before issuing a state statutorily mandated Notice of Determination. Given this process, the City Attorney's proposal to use the state mandated Notice of Exemption and Notice of Determination, which is used solely to trigger the state statute of limitation to initiate a court action, would create completely unnecessary confusion. A Notice of Exemption and Notice of Determination are creatures of the state CEQA process, and the City has no authority to issue them until the end of the administrative appeal process – not in the midst of it.

Finally, the lack of use of a mailed City-based notice of Environmental Determination as the action that commences the administrative appeal process, leaves the departmental decisions subject to an unacceptable 180 day period of uncertainty if the department fails to issue a Notice of Exemption or Notice of Determination. The 180 day period in the ordinance is drawn from the CEQA statute's limitation period for commencing court action. Why would the City want to adopt an ordinance that creates potential six months of uncertainty for the filing of a CEQA appeal? For instance, some projects that depend on federal/state grants or private bond funding might be denied funding because of this 180 day administrative appeal period. This is not a good idea, and City grant-funded projects could be unnecessarily impaired by this method of excusing the affected department from simply issuing a written notice of an Environmental Determination – and then enforcing it with a reasonable appeal period.

The Ten Day Appeal Period Is Too Short

If the City retains the proposed method to measure the commencement of an administrative appeal period from the filing of a Notice of Exemption or Notice of Determination with the County Clerk, 10 days for the filing of a notice of appeal is too short. In the City of Los Angeles, the usual appeal period is 15 days. That is a reasonable period of time, particularly if the mailed notice is constitutionally required. Additionally, there should be consistency in appeal periods.

Required Filing Of The Appeal At Two Locations Invites Legal Disputes

The ordinance proposes that appeals be filed with the City Clerk and the affected department in order to perfect the appeal. This is ill-conceived. The City Council has the duty under law to schedule and hear the CEQA appeal. A cleaner process would be to require the filing of an original and say, three copies of the appeal on a form the City Clerk is required to provide. This process would provide certainty and a consistent City location for CEQA appeal filing. The Clerk would then forward a copy of the appeal to the affected department. A process

similar to this is currently performed at the Planning Counter for CEQA appeals affecting Planning decisions. The proposal to require a CEQA appellant to file an appeal in two locations is inherently subject to confusion, particularly in departments that do not routinely make CEQA-based decisions. The City should reject a two location requirement to perfect an appeal.

The Ordinance Should Mandate That Affected Departments Implement Written Notice Of Environmental Determinations, Implementing Rules, And Notice On Meeting Agendas Of How Interested Persons May Add Their Names To A List To Receive Mailed Notice Of The Environmental Determination

The proposed ordinance lacks any requirement that the affected departments implement use of City-based written notices of Environmental Determinations, adopt implementing rules consistent with the ordinance so that a CEQA appellant has an ability to follow the process, and have a way to add names to the mailing list for the Environmental Determination.

The City Council, Consistent With Its Goal Of Allowing Affected Persons To Be Heard, Should Set A Non-Trivial Appeal Fee Not To Exceed $100 So That Appeal Fees Are Not A Constitutional Barrier To Protecting Property Rights

The appeal fee for CEQA appeals are properly set at a non-trivial amount, however, set too high would embroil the City Council in unnecessary claims that persons without financial means are unconstitutionally foreclosed from protecting their interests. Consistent with current subsidized appeal fees in the Planning Department, a specific appeal fee of not more than $100 should be provided by ordinance.

City Council Should Not Be Able To Indefinitely Continue Hearing The CEQA Appeal

The CEQA statute places priority on prompt decision making. It is inconsistent with CEQA's intent for the City Council to give itself an indefinite period of time to hear and decide the CEQA appeal. The ordinance should be modified to provide that the City Council shall hear the appeal within 60 days of the filing of the CEQA appeal, or else the appeal is granted for the reasons stated in the appeal. Such a provision would assure City Council would act timely and prevent the indefinite postponement of decision making which is harmful to all parties.

Because State Law Requires The Elected Decision Making Body To Hear The Appeal, CEQA Appeals, Consistent With City Council Rule 16, Are Required To Go Directly On The City Council Meeting Agenda Under "Items Scheduled For Public Hearing"

The entire purpose of the right of CEQA appeal to the elected officials of the lead agency is to ensure a hearing before, and the accountability of, the elected officials. City Council Rule 16 provides that matters submitted to the City Council are not to be referred to a committee for hearing when any law requires City Council to hear and decide the matter.

The City Council Rules therefore do not provide for referral of CEQA appeals to a City Council Committee, unless the City enacts different laws or rules to delegate decision making to a committee of elected members of the lead agency. The City has undertaken no such delegation

of decision making authority. Accordingly, under the City Council rules, CEQA hearings must be scheduled for hearing before the full City Council.

Conclusion

This CEQA appeal ordinance, if anything, appears designed to suppress stakeholder use of the CEQA appeal right granted in state law. It suffers from serious constitutional and practical infirmities. It should be sent back to staff for revision based upon the concepts outlined in this letter.

Most sincerely,

s/Daniel Wright
Daniel Wright