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Steven A. Herum
sherum@herumcrabtree.com

September 19, 2017

Mayor Lee Brand and Honorable Members of the Fresno City Council
Fresno City Hall
2600 Fresno Street
Fresno, California 93721

Re: Appeal of Planning Commission Adoption of Negative Declaration for Conditional Use Permit Number C-17-013

Dear Mayor Brand and Honorable Members of the Fresno City Council:

This office represents the developer of the project subject to Conditional Use Permit Number C-17-013 and we offer the following comments for your consideration.

Executive Summary

An appeal from a planning commission decision confers jurisdiction on a city council to review the planning commission's decision. The Fresno Ordinance requires separate appeals of a planning commission land use decision and its CEQA determination. The appeals process for each matter is different. Here the opponents, economic competitors, timely filed an appeal of the planning commission's CEQA determination; however, an appeal of the planning commission's land use decision was not perfected. This means that the City Council does not have jurisdiction over the land use decision and it is a final decision. Thus preparing an EIR is a pointless activity. Since the City Council does not have jurisdiction over the land use decision it cannot modify or change that approval by adding CEQA mitigation measures.

1. Different Methods are provided by the Municipal Code to appeal either a Planning Commission land use decision or a CEQA determination.

The Fresno Municipal Code provides two separate and unrelated methods to appeal a Planning Commission decision.

A. Method to appeal a land use decision by the Planning Commission.

Under the Fresno Municipal Code a land use decision is final unless an appeal is timely filed. Stated slightly differently, unless an appeal is timely filed the administrative

process for granting a land use permit is complete and final. Thus, the Fresno Planning Commission is the "administrative body with ultimate or final responsibility to approve or disapprove the Project" (*Tahoe Vista Concerned Citizens v. County of Placer* (2000) 81 Cal. App. 4th 577, 594). As explained later a permit is a property right and a government agency must observe Constitutional protections before changing the permit.

The appeal of a Planning Commission land use decision is governed by Section 15-5017.A.2. It provides that a party may petition either the Mayor or the Councilmember of the district where the project is located to appeal the decision. If the Mayor or Councilmember decline to appeal the Planning Commission decision is a final and conclusive decision and there are no more administrative processes. In other words, once the appeal process lapses without an appeal being filed all administrative remedies have been exhausted. Nothing in the Code indicates that a final Planning Commission land use decision is stayed or tentative should a separate appeal be filed on the Planning Commission's CEQA determination.

In this instance the period to appeal lapsed without appeal rights being exercised; hence the land use approval (Conditional Use Permit Number C-17-013) is final and is not pending before the Fresno City Council. It enjoys all the benefits and Constitutional protections of a final approved land use permit.

B. Method to appeal a CEQA determination by the Planning Commission.

The appeal of a Planning Commission CEQA determination is governed by Section 15-5005.L. In contrast to the process to appeal a Planning Commission land use decision (Section 15-5017.A.2), Section 15-5005.L allows either "the applicant or any aggrieved person" to file an appeal.

Here an appeal of the Planning Commission CEQA determination was made. Thus by virtue of this appeal the City Council has jurisdiction over the Planning Commission CEQA determination but because no appeal of the Planning Commission land use decision was perfected the City Council does not have jurisdiction over the land use decision, which in this instance is a conditional use permit.

The question raised by this constellation of events is: What is the legal consequences of this bifurcated appeal process; that is, a situation where the land use decision is final and conclusive while the CEQA determination is appealed?

2. <u>The City Council Does Not have Jurisdiction over the Planning Commission's land use decision.</u>

In *Tahoe Vista Concerned Citizens v. County of Placer* (2000) 81 Cal.App.4th 577 a project opponent raised CEQA issues at the planning commission hearing but the administrative appeal to the county board of supervisors challenged only the land use permit and not the CEQA determination. The Appellate Court concluded the project

opponents failed to confer jurisdiction on the county board of supervisors to consider the planning commission's compliance with CEQA. "These procedures thus provided plaintiffs with an appeal from the Planning Commission's decision, but required plaintiffs to specify the particular subject or grounds of the appeal. Although the Board of Supervisors would consider the matter "over again," or in legal parlance, de novo, its review was limited solely to those issues the plaintiffs placed before it. Here, plaintiffs' appeal placed only the conditional use permit before the Board of Supervisors and only with regard to parking." Id. at 592.

Our situation is the flip side of *Tahoe Vista* and makes *Tahoe Vista* controlling legal authority over this dispute. In *Tahoe Vista* the project opponents appealed the planning commission's land use decision but did not appeal the CEQA determination. Here the project opponents appealed the CEQA determination but there was no appeal of the planning commission's land use decision. In *Tahoe Vista* the Board of Supervisors did not have jurisdiction over the planning Commission CEQA decision and here the City Council does not have jurisdiction over the planning commission's land use decision. The differences in the two administrative processes is unimportant to the legal conclusion: "Because the scope of the administrative remedy is determined by the procedures applicable to the public agency in question, our decision is limited to the scope of review provided by section 25.140 of the Placer County Code. Other public agencies which serve as lead agencies under CEQA may provide differing types of administrative remedies and appeals with different scopes of review." *Id.* at 592 n.6.

3. Because the City Council does not have jurisdiction over the Planning Commission's land use decision there is no ability to impose new CEQA mitigation measures.

The project opponents, consisting of economic competitors, ask the City Council to require preparation of an EIR. But for what purpose? CEQA is a procedural not substantive statute. Pub. Res. C. §21004. But if an EIR is prepared and recommends CEQA mitigation measure and/or project design modification the City Council does not have jurisdiction over the Planning Commission's final land use decision and therefore cannot add additional conditions of approval or new mitigation measures. This makes the EIR a pointless act.

The approval and form of the approval is final and binding on the City of Fresno and the landowner/applicant. So long as the landowner/applicant fulfill the terms and conditions of the permit it has the right to build out and operate the project. A conditional use permit is a property right that runs with the land. *Anza Parking Corp. v. City of Burlingame* (1987) 195 Cal.App.3d 855. A city must observe Constitutional protections before changing, modifying or revoking a permit. *Garavatti v. Fairfax Planning Commission* (1971) 22 Cal/App.3d 145,150; *O'Hagan v. Board of Zoning Adjustment* (1971) 19 Cal.App.3d 151,158 ["Once a use permit has been properly issued, the power of a municipality to revoke is limited."]

In this instance since no appeal was perfected during the period to file an appeal of the Planning Commission's land use decision the City Council lacks **jurisdiction** to modify, change or revoke the permit. Filing an appeal from a lower to higher tribunal, for instance, from a planning commission to a city council, confers jurisdiction on the higher tribunal, in this case the City Council, to consider the Planning Commission decision. *California Aviation Council v. County of Amador* (1988) 200 Cal.App.3d 337, 340 [filing an appeal is jurisdictional].

Nothing in the Fresno Municipal Code indicates that a final Planning Commission land use approval, for which no appeal was perfected, is less than final or suspended if a party perfects an appeal of the Planning Commission's CEQA determination. To put a finer point on it, once the time has lapsed to file an appeal of the Planning Commission land use decision without an appeal being affected the City Council cannot change, modify or deny the final land use decision without following Constitutional protections.

4. The Opponents present no evidence.

The decision of whether to prepare a negative declaration or an environmental impact report for a proposal pivots on whether there is **substantial evidence** of a significant environmental effect. *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68. Here the project opponent's letter consists of unsubstantiated and unsupported attorney opinions. Attorney opinions are not substantial evidence in a CEQA context. CEQA authorities dismiss this type of attorney statement as being relevant or substantial evidence:

> "Pala's four-page letter of comment, which was submitted by Pala's general counsel, consisted almost exclusively of various arguments supporting counsel's opinion that CEQA required the preparation of an EIR in connection with approval of the plan....We conclude that Pala's comment letter does not constitute substantial evidence under the applicable 'fair argument' standard because it consists almost exclusively of mere argument and unsubstantiated opinion, which are excluded from the definition of substantial evidence under CEQA."

Pala Band of Mission Indians v. County of San Diego (1998) 68 Cal.App.4th 556, 568, 580 (underlined added).

More recently a lawyer's testimony was dismissed because she was neither an expert nor presented factual support for her arguments: "Doyle was not an expert in any relevant area...She was a business owner and a lawyer. She was not an economist; she did not claim so much as an MBA. Thus, she was not qualified to opine on whether the Project would cause urban decay...[T]here were legitimate issues regarding the credibility of Doyle's opinions. Hence, the County could deem them not substantial evidence." *Joshua Tree Downtown Business Alliance v. County of San Bernardino*, (2016) 1 Cal. App. 5th 677, 691 (underlined added). This opponent

presented **no** substantial evidence or facts during the administrative process. Letter and attorney's oral presentation "consists almost exclusively of mere argument and unsubstantiated opinion" and likewise is "excluded from the definition of substantial evidence under CEQA".

Thus, no evidence is presented to support the allegations raised in the attorney's letter and the appeal must be dismissed.

Very truly yours,

STEVEN A. HERUM
Attorney-at-Law

SAH:lac

cc: City Attorney
City Planning Director