

May 3, 2011

**Via E-Mail**

Hon. Michael Sweeney, Mayor  
Members of the City Council  
City of Hayward  
777 B Street  
Hayward, CA 94541  
List-Mayor-Council@hayward-ca.gov

**Re: Adoption of Interim Ordinance Regarding Grocery Sales From Retail  
Stores Greater than 20,000 square feet -**

Dear Mayor Sweeney and Councilmembers:

This letter is submitted on behalf of United Food & Commercial Workers Local 5, and its members who live and work in Hayward. At its request, we have reviewed the draft interim ordinance referenced above, the staff report prepared for the Council's consideration of the ordinance, and the April 26, 2011 letter from the law firm of Miller Starr Regalia in opposition to an earlier version of this same ordinance. The purpose of our review was to evaluate whether the draft ordinance was substantively or procedurally invalid under current law. We find the ordinance is demonstrably valid in both respects.

In our opinion, the staff report's conclusions regarding the legal claims raised in the Miller Starr letter are correct. We would concur with staff that as currently drafted, the interim ordinance does not unlawfully prohibit a permitted use under the existing conditional use permit (CUP) for the former Circuit City Store on Whipple Road. The neighborhood-serving supermarket use proposed for this building, and for which a building permit application has been submitted, is not a "regional or subregional" retail land use, and the CUP condition Miller Starr cites does not appear to permit supermarkets in this particular building as suggested.

Furthermore, we would dispute Miller Starr's claim that adoption of the interim ordinance would violate Constitutional equal protection considerations and/or otherwise interfere with a vested property right the firm's client allegedly holds. Notwithstanding the citation to the 1961 *Sunset View Cemetery* opinion, several state and federal cases published in the modern era clearly allow a local agency to enact a zoning change that would prohibit a land use for which a building permit application was previously submitted, so long as the zoning regulation is broadly applied in the jurisdiction and there is no vested development right pursuant to a development agreement of tentative subdivision map. See *Avco Community Developers, Inc. v. South Coast Regional*

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*Commission* (1976) 17 Cal.3d 785, 795 (“Absent a development agreement, an administrative body ordinarily may deny a building permit when there is a zoning change after the permit application is made and the contemplated use is no longer permitted”); *Delta Wetlands Properties v. County of San Joaquin* (2004) 121 Cal.App.4<sup>th</sup> 128, 149; *Stott Outdoor Advertising v. County of Monterey* (2009) 601 F.Supp.2d 1143, 1154.

Finally, it is our opinion that the factual findings provided in the draft interim ordinance amply satisfy the criteria for enacting such an ordinance under Government Code Section 65858. The state of the local economy, the abundance of vacant retail buildings, and the risk of unexamined adverse fiscal, economic and environmental impacts from any new, low-tax generating supermarket uses in the community provide an ample factual basis for staff’s draft findings. There is ample precedent in the state for local interim ordinances establishing moratoriums on new supermarket uses. *See, e.g., City of Vacaville, 2004, 2007* (interim measure prohibiting grocery stores greater than 20,000 square feet).

In sum, we see no legal constraints to the City’s adoption of the interim ordinance as presented.

Thank you for your consideration of this letter.

Yours sincerely,

M. R. WOLFE & ASSOCIATES, P.C.



Mark R. Wolfe

MRW:am

cc: City Attorney (via email to: Michael.Lawson@hayward-ca.gov)