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May 3, 2011

VIA E-MAIL MIRIAM.LENS@HAYWARD-CA.GOV

Miriam Lens
City Clerk, City of Hayward
City of Hayward
city Hall
777 B Street, Second Floor
Hayward, CA 94541

Re: Item No. 10; Consideration of Emergency Interim Moratorium Ordinance
Regarding Supermarkets

Dear Ms. Lens:

Attached please find letters from Miller Starr Regalia and Hayward 880, LLC regarding the above-referenced agenda item. Please assure that the Mayor and City Council members have copies of this material. Miller Starr Regalia will bring additional copies to the meeting.

Very truly yours,

MILLER STARR REGALIA

Susan Elwell, Assistant to Kristina D. Lawson

ACA:vse
Attachments



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May 3, 2011

VIA E-MAIL LIST-MAYOR-COUNCIL@HAYWARD-CA.GOV

Honorable Mayor Michael Sweeney
and Members of the City Council
City of Hayward
777 B Street
Hayward, CA 94541

Re: May 3, 2011 City Council Meeting; Agenda Item 10 - Adoption of Interim
Moratorium Ordinance Regarding Supermarkets of 20,000 Square Feet or
More or any Retail Store Containing at least 20,000 Square Feet of Area
Devoted to Sale of Grocery or Non-Taxable Items

Dear Honorable Mayor Sweeney and Members of the City Council:

As you know, this office represents Hayward 880, LLC in connection with its building permit application for tenant improvements for a full-service grocery store at the vacant, approximately 35,000 square foot building located at 2480 Whipple Road (the "Property"). We previously forwarded to your attention a letter dated April 26, 2001 (which we incorporate herein by this reference), wherein we informed the City that the proposed moratorium on the approval of land use entitlements and building permits associated with supermarkets (the "Moratorium") is unlawful and because of vested existing entitlements, would be inapplicable to the Property. The purpose of this letter is to supplement our previous correspondence and respond to new issues raised by the recently released staff report dated May 3, 2011. For the reasons set forth below, and for those reasons presented by us and others at this evening's public hearing (all of which we incorporate herein by this reference), the Moratorium is unlawful, ill-conceived, and must not be approved.

I. **SUPERMARKETS ARE NOT PRIMARY USES IN THE
INDUSTRIAL (I) ZONE – FOR THIS REASON, HAYWARD 880
SOUGHT AND OBTAINED A CONDITIONAL USE PERMIT TO
ALLOW SUCH A USE**

In both the April 26 and May 3 staff reports, staff indicates that the Moratorium is "necessary" because supermarkets are allowed as primary uses in commercial zoning districts, which designation limits the City's discretion to require traffic and other studies prior to allowing such uses. However, supermarkets are not primary uses in the Industrial (I) zoning district in which the Property is located. Rather,

supermarkets, as regional retailers, are conditionally permitted uses in the Industrial zone. (See H.M.C., § 10-1.1620b(6).) Pursuant to section 10-1.1620b.(6) of the Hayward Municipal Code, "[t]he sale of retail goods with a regional or sub-regional marketing base, including but not limited to discount retail or warehouse retail, on a minimum 4-acre parcel which is visible from Interstate 880 or State Highway 92," is permitted subject to approval of a conditional use permit.

Because regional or subregional retail uses are not primary uses in the Industrial zone, Hayward 880 sought and obtained the conditional use permit required by section 10-1.1620b, a complete copy of which is attached hereto as Exhibit A. As set forth in the existing use permit:

- It was expressly determined by the City that **regional and subregional retail uses are appropriate for the Property**; and
- Construction of a **34,000 square foot "regional retail building" is approved**.

The conditional use permit was issued after discretionary review by both the City's Planning Commission and City Council. This review included preparation of a Mitigated Negative Declaration ("MND") under the California Environmental Quality Act ("CEQA"; Pub. Resources Code, § 21000 et seq.), which was based on studies including, but not limited to, a traffic report prepared by Kimley-Horn and Associates which concluded that none of the study intersections would operate at unacceptable levels. (See March 25, 2004 Staff Report for PL-2004-0039, p. 3.)

The City staff enthusiastically supported the project in 2004 and the City Council unanimously approved the conditional use permit when it came before the City Council on appeal. The permit includes 93 separate conditions, all of which Hayward 880 fully satisfied. Among other things, Hayward 880 installed a new traffic signal and realigned the Target driveway to line up with the new traffic signal and the entrance to the Property. The cost of these improvements alone was approximately \$500,000. The total cost invested in developing the Property based on the vested 2004 entitlements was more than \$15 million.

Because of the City's existing conditional use permit process, the project proposed at the Property has already been subjected to exactly the type of discretionary review that the City now seeks to also require in its commercial districts. A conditional use permit was duly issued and then relied upon by Hayward 880, LLC for the past seven years. As set forth in detail below, the de facto revocation of the existing permit through the imposition of the Moratorium is unreasonable and unlawful.

II. **HAYWARD 880, LLC HAS A VESTED RIGHT TO A SUPERMARKET USE AT 2480 WHIPPLE THAT MAY NOT BE LAWFULLY REVOKED OR MODIFIED BY THE MORATORIUM**

Use Permit No. PL-2004-0039 was issued in 2004 and covers the entirety of the Property. As indicated in the Findings for Approval of Use Permit No. PL-2004-0039, the zoning for the Property is Industrial (I). As set forth above, the conditional use permit was issued to allow regional and subregional retail uses at the Property. (See Use Permit No. PL-2004-0039, Findings B & C, Planning Division Conditions 1 & 13.)

The City's zoning ordinance defines "retail" as "[t]he sale of commodities or goods to ultimate consumers." (H.M.C., § 10-1.3500.) **Supermarkets are by definition retail uses.** (See also, Moskowitz & Lindbloom, Development Definitions, p. 394 [defining "supermarket" as "a retail establishment primarily selling food as well as other convenience and household goods"].) While the City's zoning ordinance does not include definitions of "regional" or "subregional," Webster's Dictionary defines "regional" as "of or pertaining to a whole region, not just a locality." A subregion is defined by Webster's as a division of a region.

We find it difficult to understand the City's recently changed position that a supermarket "is not necessarily a regional or subregional use." (See May 3, 2011 Staff Report, p. 2.) It is particularly difficult to understand the City's abrupt change in position given the fact that it was the City's Economic Development Director that suggested Hayward 880, LLC pursue a supermarket for the vacant Circuit City building. **In November of 2009, in discussions with Hayward 880, LLC's commercial real estate broker, the City's Economic Development Director proposed a "Ranch 99" supermarket for the vacant building.¹**

Additionally, the City has previously interpreted "regional" and "subregional" to include nail salons, taquerias, computer repair shops, postal service, bike shops, delis and other similar uses. In fact, these uses are located directly across Whipple Road from the Property. Supermarkets are certainly regional uses by comparison.

As we noted in our previous correspondence, it is well-established in California that a municipality's power to revoke or modify a use permit is limited - a City cannot revoke or modify an existing conditional use permit without affording the permittee proper notice and a hearing. (*Community Development Com. V. City of Fort Bragg* (1988) 204 Cal.App.3d 1124, 1131-1132.) The City's Municipal Code codifies these procedural due process requirements. (H.M.C, § 10-1.3260.) The grant of a conditional use permit and subsequent reliance on the permit by the permittee

¹ We also understand that the City has been actively seeking grocery uses for other sites in the City, including a site located at Hesperian Blvd. and Industrial Blvd. This active marketing approach by the City seeking supermarkets is wholly inconsistent with the Moratorium.

creates a **fundamental vested property right**. (*Malibu Mountains Recreation, Inc. v. County of Los Angeles* (1998) 67 Cal.App.4th 1281, 1294.)

In good faith reliance on the terms of the existing and vested use permit, following an investment in the property of over \$15 million, our client submitted an application for a building permit to authorize tenant improvements at the vacant Circuit City building. This application included payment to the City of \$4,000 for the necessary building permit and plan check fees. The City accepted this application for processing and has already issued plan check comments to the project architect.² To stop this process for “three to six months” (see May 3, 2011 Staff Report, p. 3) and possibly longer, would effectuate an unlawful revocation or modification of Use Permit No. PL-2004-0039. Based on our experiences in jurisdictions throughout California, it is unlikely that the Moratorium will last less than two years.

The record is clear that no notice or hearing has been provided in connection with this revocation or modification, and accordingly, the Moratorium would not be legally effective against the existing project entitlements.

III. **THE MORATORIUM CAUSES A TAKING OF THE PROPERTY FOR PUBLIC USE FOR WHICH JUST COMPENSATION MUST BE PAID**

Hayward 880 has a constitutionally protected, fundamental vested property right in Use Permit No. PL-2004-0039. In reliance on this permit, Hayward 880 has spent more than \$1.5 million subsidizing the underperforming center over the past 2 ½ years, and the City’s adoption of the Moratorium would deprive them of the ability to use the property in an economically viable manner, and would likely force the property into foreclosure. The “shops” tenants have publicly disclosed to the City that they may be unable to continue to operate in the absence of an anchor tenant at the shopping center. Consequently, the Moratorium would unreasonably impair the value and use of the Property and would deprive Hayward 880 of all economically beneficial use of the Property. (*Lucas v. South Carolina Coastal Council* (1992) 505 U.S. 1003, 1015-16.)

In addition to the adverse economic impact on Hayward 880, the Moratorium will directly interfere with Hayward 880’s distinct investment backed expectations while also failing to advance a legitimate governmental interest. (*See Penn Central Transportation Company v. City of New York* (1978) 438 U.S. 104; *see also Kavanau v. Santa Monica Rent Control Bd.* (16 Cal. 4th 761, 766-67.) The stated

² Notably, Use Permit No. PL-2004-0039 does not require that replacement tenants be approved by the City, so long as the replacement tenants meet the criteria of being a retailer with a regional or subregional marketing base. Other use permits issued by the City, including the use permit for the Target center across the street from the Property, expressly require that use modifications return to the City for review and approval. (See PL 2003-0153 CUP.)

goal of the Moratorium is to allow the City staff time to analyze the potential impacts supermarkets which are allowed as primary uses in the City's zoning districts. This goal is not relevant to the Property, because supermarkets are not primary uses in the Industrial zone. The City has land use controls – a conditional use permit requirement – over supermarkets in the Industrial zone. Quite simply, the stated goals and interests included in the text of the Moratorium are not legitimate as applied to the Property.

IV. THE CITY IS UNLAWFULLY TARGETING THE PENDING BUILDING PERMIT APPLICATION FOR 2480 WHIPPLE ROAD THROUGH THE MORATORIUM

On March 23, 2011, our client submitted an application for a building permit to allow tenant improvements to proceed for a full-service grocery store that proposes to occupy the vacant anchor tenant space at the Property. Instead of corresponding with our client through the building permit process, the City instead has raised concerns about that pending application in its staff reports related to the Moratorium. Specifically:

- The April 26, 2011 staff report references the building permit application for 2480 Whipple as the only pending application for a full-service grocery store in the City of Hayward;
- During the April 26, 2011 meeting, staff expressly indicated that the pending application would be the only application affected by the Moratorium;
- In its May 3, 2011 staff report, staff raises specific concerns about the building permit application, notwithstanding that said application is not before the Council for consideration:
 - “Staff has raised concerns whether a supermarket may be considered a subregional retail use and whether the location of a supermarket, in any case, is appropriate in the Industrial District.” (May 3, 2011 Staff Report, p. 2)
 - “In staff’s opinion, a small supermarket is not necessarily a regional or subregional use.” (May 3, 2011 Staff Report, p. 2.)

It is clear that Hayward 880’s proposed supermarket use is the target of the Moratorium and that the Property has been singled out by the City to bear a special burden that should be shared by the public as a whole.³

³ We are puzzled that in the most depressed commercial real estate market since the Great Depression, the City of Hayward would propose an ordinance that would restrict or burden any property owner in the City.

V. **THE PROPOSED FINDINGS ARE NOT SUPPORTED BY ANY EVIDENCE IN THE RECORD – TO THE CONTRARY, THE EVIDENCE SHOWS THAT (1) THE CITY HAS DISCRETION TO FULLY REVIEW AND ANALYZE PROPOSED SUPERMARKET USES, AND (2) THERE ARE ONLY 3 SITES AVAILABLE IN THE CITY FOR SUPERMARKET USES IN ANY EVENT**

The City has not provided any evidence that there are real health, safety, or general welfare concerns related to supermarket uses (proposed or otherwise) in the City of Hayward. As a matter of law, there must be substantial evidence in the record to support any findings made under section 65858 of the Government Code. (*Topanga Ass'n for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 515.)

Government Code section 65858(c) mandates that an urgency moratorium may not be lawfully adopted unless the ordinance contains findings, supported by substantial evidence in the record, that:

...there is a current and immediate threat to the public health, safety, or welfare, and that the approval of additional subdivisions, use permits, variances, building permits, or any other applicable entitlement for use which is required in order to comply with a zoning ordinance would result in that threat to public health, safety, or welfare.

This statute requires two very specific findings: first, the definition of a threat to the public, and second, an explanation as to how the approval of a permit will result in that defined threat. (Id.)

The Moratorium completely fails to demonstrate a "current and immediate threat to the public" from supermarket uses. The record evidence shows that only one application has been submitted to the City to allow a supermarket to occupy the vacant anchor tenant space at the Property. The City's proposed findings H and J, which attempt to document a current and immediate threat are conclusory (they merely assert a threat exists, but do not describe or define the threat) and include no reference to any evidence whatsoever.

Further, nothing in the proposed ordinance demonstrates that approval of the one pending application will result in the undefined current and immediate threat to the public health, safety, or welfare. As set forth above, Hayward 880 sought and obtained a discretionary conditional use permit entitlement from the City. The City retains a significant amount of discretion under various state planning and zoning laws, the California Environmental Quality Act, and its own local ordinances to

review supermarket applications, to the extent it receives such applications in the future.

While Finding C of the Moratorium seems to indicate a possible flood of supermarket applications will be forthcoming, in actuality, we understand there are only three sites available in the entire City of Hayward for such uses (in addition to the Property). It is not clear whether these sites are appropriately zoned, or include sufficient parking for a supermarket use, but based on the square footage, these sites are the only locations that could accommodate a supermarket. Accordingly, the City's concerns about numerous supermarkets seeking to locate in the City is unfounded.

* * *

The Moratorium is not only ill-conceived, it is illegal. The City's findings are not supported by any evidence, and the Moratorium ignores the fundamental vested property rights of Hayward 880, LLC. From a practical perspective, this Moratorium will harm the City's business reputation, and will make it more difficult for the City to attract tenants to the City's vacant and blighted commercial real estate. On behalf of our client, we look forward to the opportunity to discuss this matter with you further at tonight's hearing.

We urge you to decline to adopt the Moratorium.

Very truly yours,

MILLER STARR REGALIA

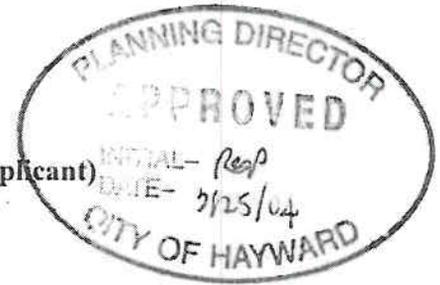


Kristina D. Lawson

KDL:kdl

cc: Client
City Manager
City Attorney

CONDITIONS OF APPROVAL
Use Permit No. PL-2004-0039
2480 Whipple Road
Jim Towslee for PacLand/Batavia Holdings (Applicant)
Frank J. Warn, Inc. (Owner)



Planning Division

1. Use Permit No. PL-2004-0039 to accommodate construction of a commercial retail center consisting of a 34,000-square-foot regional retail building with two retail buildings of 5,100 and 6,000 square feet, shall be constructed according to these conditions of approval and the plans approved by the Planning Commission on March 25, 2004.
2. This approval is void one year after the effective date of approval unless prior to that time an extension is approved. Any modification to this permit shall require review and approval by the Planning Director. A request for a one-year extension-of-time, approval of which is not guaranteed, must be submitted to the Planning Division at least 30 days prior March 25, 2005.
3. If a building permit is issued for construction of improvements authorized by the site plan review approval, the site plan review approval shall be void two years after issuance of the building permit, or three years after approval of the application, whichever is later, unless the construction authorized by the building permit has been substantially completed or substantial sums have been expended in reliance upon the site plan review approval.
4. Unless otherwise required, all pertinent conditions of approval and all improvements shall be completed to the satisfaction of the Planning Director prior to final inspection and occupancy of any structures.
5. The permittee shall assume the defense of and shall pay on behalf of and hold harmless the City, its officers, employees, volunteers and agents from and against any or all loss, liability, expense, claim costs, suits and damages of every kind, nature and description directly or indirectly arising from the performance and action of this permit.
6. Violation of these conditions is cause for revocation of permit, after a public hearing before the duly authorized review body.
7. No outside storage of material, crates, boxes, etc. shall be permitted anywhere on site, except within the trash enclosure area as permitted by fire codes and within areas designated for outdoor display of merchandise for sale. No material shall be stacked higher than the height of the trash enclosure screen wall and gate.
8. Tenant management shall take reasonable necessary steps to assure the orderly conduct of employees, patrons and visitors on the premises to the degree that surrounding commercial uses would not be bothered and that loitering is not permitted.
9. Sidewalks and parking lots must be kept free of litter and debris and to minimize the amount of wind-blown debris into surrounding properties and streets. If pressure washed, debris must be

trapped and collected to prevent entry to the storm drain system. No cleaning agent may be discharged to the storm drain. If any cleaning agent or degreaser is used, washwater shall be collected and discharged to the sanitary sewer. Discharges to the sanitary sewer are subject to the review, approval, and conditions of the City wastewater treatment plant.

10. A minimum of two trash receptacles shall be placed at each customer entry to the primary building; one receptacle shall be placed at each customer entry in the "Shops" buildings. Trash receptacles shall be the same decorative, pre-cast concrete type with a self-closing metal lid.
11. No vending machines shall be displayed outside the building, except for newspaper racks.
12. The applicant, owner(s) and/or tenants shall maintain in good repair all building exteriors, walls, lighting, trash enclosure, drainage facilities, driveways and parking areas. The premises shall be kept clean. Any graffiti painted on the property shall be painted out or removed within seven days of occurrence.
13. The uses permitted in the "Shops" buildings shall be limited to those Retail Commercial Uses that have a regional/sub-regional marketing base and are listed in Section 10-1.1315a.(5) (Central Business District – Retail Commercial Uses). Other approved uses are banks, barber or beauty shops, and copying and mailing facilities. Other similar uses may be approved by the Planning Director with the determination that they support a regional/sub-regional marketing base. Prohibited uses include industrial uses, administrative and professional offices/services (except banks), automobile related uses, personal services (except barber or beauty shops), service commercial uses (except copying and mailing facilities), and residential uses.

Design

14. All roof mechanical equipment and any satellite dish shall be fully screened from the freeway and from ground-level view within 150 feet of the property.
15. Prior to occupancy and the installation of any signs, the applicant shall submit a Sign Permit Application to the Planning Director for review and approval, subject to the following:
 - a. compliance with the City of Hayward Sign Regulations;
 - b. the sign program may include one freeway-oriented sign and one monument sign;
 - c. the base and framing of any freestanding/monument sign shall reflect the architectural design, colors and materials of the building, and shall consist of pilasters on each side with a raised center panel to mimic the entry section of the Circuit City store;
 - d. only the letters, and the exterior ring, in the sign for the major tenant may be illuminated;
 - e. wall signs for tenants in the "Shops" buildings shall use individual channel letters;
 - f. directional signs shall not exceed 6 sq.ft. in area per face and 3 feet in height; and
 - g. the applicant/business operators shall not display any illegal banner signs, portable signs, inflatable signs, or other illegal signs on the property.
16. Exterior lighting for the establishment shall be maintained which is adequate for the illumination and protection of the premises but does not exceed a light level that provides glare to motorists, nor spills onto nearby properties, or up into the sky. The fixtures shall be designed to keep the light from spilling onto adjacent properties. Within the parking lot, the

minimum requirement is 1-foot candle of light across the entire surface. Luminaires shall be of a design that complements the architectural style of the building and the landscaping in developing a quality image of the City of Hayward and shall be approved by the Planning Director. The maximum height of the luminaires shall be no greater than the height of the structures unless otherwise permitted by the Planning Director. The lighting, and its related photometric, plan shall be reviewed and approved by the Planning Director.

17. The design of the metal awnings shall be appropriate to the mass of the building as determined by the Planning Director; details shall be submitted for approval prior to submittal of an application for building permit.
18. The pedestrian walkway between the "Shops B" building and the Circuit City building shall be delineated continuously by decorative paving subject to approval by the Planning Director. The portions of the walkway that cross vehicular drives shall be differentiated from the dedicated walkway, but the materials and colors of the various segments shall be coordinated.
19. The pedestrian "plazas" in front of the Circuit City store and the "Shops A" building shall architectural features, such as low walls, or landscape features to form a visual "barrier" between the vehicular and pedestrian areas.
20. The chain-link fence along the easterly property line (Shurgard) shall be replaced with a new chain-link fence with slats, subject to approval by the Planning Director.
21. The chain-link fence along the southerly and southwesterly property lines (Amaral Court and I-880) shall be replaced with a solid masonry wall with detailing to match the buildings, subject to approval by the Planning Director.
22. The chain-link fence between the project and the gas station shall be removed.
23. Changes in building color require the approval of the Planning Director.

Landscaping

24. The applicant shall submit detailed landscaping and irrigation plans prepared by a licensed landscape architect for review and approval by the City. Landscaping and irrigation plans shall comply with the City's Water Efficient Landscape Ordinance and the following requirements:
 - a. Parking areas shall include a minimum of one 15-gallon parking lot tree for every six parking stalls. The minimum dimension of any new tree well or landscape median shall be five feet, measured from back of curb.
 - b. Parking areas shall be buffered from the street and freeway with shrubs; their type and spacing shall create a continuous 30-inch high screen within two years.
 - c. All blank building façades, at the discretion of the Planning Director, shall be softened with a combination of vertical-growth landscape materials and vines on decorative trellises.
 - d. Above ground utilities (e.g. gas or electric meters, backflow devices) shall be screened from public view with shrubs.
 - e. Where any landscaped area adjoins driveways or parking areas, Class B Portland Cement concrete curbs shall be constructed to a height of six inches above the adjacent finished pavement.

- f. Street trees, low shrubs and groundcover shall be planted along Whipple Road. Trees shall be minimum 24-inch box planted 40 feet apart according to City Standard Detail SD-122.
 - g. Evergreen trees shall be planted every 20 feet along all interior property lines. Trees shall be minimum 15-gallon.
25. Landscaping shall be installed and a Certificate of Substantial Completion and an Irrigation Schedule shall be submitted prior to issuance of a Certificate of Occupancy.
26. Landscaping shall be maintained in a healthy, weed-free condition at all times and shall be designed with efficient irrigation practices to reduce runoff, promote surface filtration, and minimize the use of fertilizers and pesticides, which can contribute to runoff pollution. The owner's representative shall inspect the landscaping on a monthly basis and any dead or dying plants (plants that exhibit over 30% dieback) shall be replaced within ten days of the inspection. Trees shall not be severely pruned, topped or pollarded. Any trees that are pruned in this manner shall be replaced with a tree species selected by, and size determined by the City Landscape Architect, within the timeframe established by the City and pursuant to the Municipal Code.

Parking/Driveways

27. All parking stalls and maneuvering areas shall meet the minimum standards of the City Parking Ordinance. The parking areas shall be paved with either Portland cement or asphalt concrete and the area shall be striped to designate the parking stalls. The Planning Director shall approve the design of the driveway, curbing and materials to be used. Aisles, approach lanes, drive-through lanes and maneuvering areas shall be marked and maintained with directional arrows and striping to control traffic flow.
28. Vehicular circulation areas shall be signed as a fire lane and posted for no parking except within designated parking stalls and pick-up areas.
29. The primary Whipple Road driveway entry, between the property line and the first cross aisle, shall be enhanced with decorative pavement such as colored, stamped concrete (bomanite or equivalent), brick, concrete interlocking pavers, or other approved materials. The secondary driveway shall be so enhanced between the property line and the first parking space. The Planning Director shall approve the location, design and materials utilized.
30. A reciprocal, permanent and non-exclusive access and parking agreement shall be entered into between all project property owners/tenants and recorded prior to issuance of any building permit. Such agreement shall include the installation and maintenance of lighting and landscaping. The City Attorney shall approve such agreement.
31. The property owner(s) shall provide for vehicular access connections into parking and circulation areas on the adjacent properties, as shown on Exhibit A, to reduce the need for multiple street access points.

Building Division

32. The project plans shall include storm water measures for the operation and maintenance of the project for the review and approval of the City Engineer prior to occupancy. The project plan shall identify Best Management Practices (BMPS) appropriate to the uses conducted on-site to effectively prohibit the entry of pollutants into stormwater runoff. Prior to issuance of a building permit, a drainage plan shall be submitted that meets the approval of the Planning Director, and shall include the following:
- a. That all storm water is conveyed into City of Hayward or Alameda County Flood Control District facilities.
 - b. Structural controls such as a CDS unit with oil absorbent material, a Vortechs system or other approved devices per applicant's discretion which accomplish the same shall be installed to intercept and treat storm water prior to discharging to the storm drain system. The design, location, and a maintenance schedule shall be submitted to the City Engineer for review and approval prior to the issuance of a building permit.
 - c. Erosion control measures to prevent soil, dirt and debris from entering the storm drain system during construction, in accordance with the regulations outlined in the ABAG Erosion and Sediment Control Handbook.
 - d. The labeling of all on-site storm drain inlets in the shopping center with "No Dumping - Drains to Bay," using approved methods approved by the City.
 - e. The cleaning of all storm drains in the shopping center at least once a year immediately prior to the rainy season (October 15th). The City Engineer may require additional cleaning.
 - f. No storm water shall be discharged to the sanitary sewer without a Wastewater Discharge Permit, which will be issued only if there is no feasible alternative. This means that if washing takes place in the trash area, the wash water shall be discharged to the sanitary sewer. If this area is covered and protected from storm water runoff, a permit is not necessary.
 - g. Drains in any wash or process area shall not discharge to the storm drain system. Drains should connect to an approved collection system. The collection system is subject to the review and approval of the City Engineer prior to the issuance of a building permit.
 - h. Truck loading docks shall be constructed so to prevent run-off of drainage from outside the dock; and to minimize the discharge of dock area flows to the storm drain.
33. The National Pollution Discharge Elimination System (NPDES) standards shall be met. A Notice of Intent permit is required from the Regional Water Quality Control Board prior to the start of any grading. The applicant shall submit a construction Best Management Practice (BMP) program for review and approval by the City prior to the issuance of any building or grading permits. These BMPs shall be implemented by the general contractor and all subcontractors and suppliers of material and equipment. Construction site cleanup and control of construction debris shall also be addressed in this program. The applicant is responsible for ensuring that all contractors are aware of all storm water quality measures and implement such measures. Failure to comply with the approved construction BMPs will result in the issuance of correction notices, citations or a project stop work order. The NPDES program shall include the following items:
- a. Gather all construction debris on a regular basis and place them in a dumpster or other container, which is emptied or removed on a weekly basis. When appropriate, use tarps on the ground to collect fallen debris or splatters that could contribute to storm water pollution.

- b. Remove all dirt, gravel, rubbish, refuse and green waste from the sidewalk, street pavement, and storm drain system adjoining the project site. During wet weather, avoid driving vehicles off paved areas and other outdoor work.
 - c. Broom sweep the sidewalk and public street pavement adjoining the project site on a daily basis. Caked on mud or dirt shall be scraped from these areas before sweeping.
 - d. Install filter materials (such as sandbags, filter fabric, etc.) at the storm drain inlet nearest the downstream side of the project site prior to: 1) start of the rainy season (October 15), 2) site dewatering activities, or 3) street washing activities, 4) saw cutting asphalt or concrete, in order to retain any debris or dirt flowing into the City storm drain system as necessary. Filter materials shall be maintained and/or replaced as necessary to ensure effectiveness and prevent street flooding. Dispose of filter particles in the trash.
 - e. Create a contained and covered area on the site for the storage of bags of cement, paints, flammables, oils, fertilizers, pesticides or any other materials used on the project site that have the potential for being discharged to the storm drain system through being windblown or in the event of a material spill.
 - f. Never clean machinery, tools, brushes, etc. or rinse containers into a street, gutter, storm drain or stream.
 - g. Ensure that concrete/gunite supply trucks or concrete/plasters finishing operations do not discharge washwater into street gutters or drains.
34. Water Pollution Source Control requirements shall include but not be limited to the following:
- a. No polluted waters from HVAC units shall be discharged to the storm drain via roof drains. Uncontaminated condensate is acceptable for storm drain discharge.
 - b. All wastewater and washing operations shall be discharged to the sanitary sewer and not the storm drain, including mat cleaning and any washing of the trash area.
 - c. The sanitary sewer discharge from this facility shall be in compliance with all wastewater discharge regulations, prohibitions and limitations to discharge, including the 300-milligram per liter oil and grease limit. A monitoring structure (SD309) shall be constructed on the sewer lateral for each building.
 - d. Materials, gasoline spill, oil spill, heavy stains, radiator fluid, litter, etc. shall be picked-up by dry methods and sweeping so as not to pollute stormwater runoff.
 - e. All discharges and connections shall require approval from Water Pollution Source Control.

Utilities

- 35. Prior to issuance of a building permit, the developer shall submit gallon per minute demand to determine proper meter size.
- 36. Install Reduced Pressure Backflow Prevention Assembly per City of Hayward Standard Detail 202 on all domestic & irrigation water meters. All water meters shall have remote radio read capability.
- 37. Installation of a separate irrigation meter to avoid sanitary sewer charges on water used for landscape purposes is recommended.
- 38. Only Water Distribution Personnel shall perform operation of valves on the Hayward Water System.

39. Provide keys/access code/automatic gate opener to utilities for all meters enclosed by a fence/gate per Hayward Municipal Code 11-2.02.1.
40. Water service shall be made available subject to standard conditions and fees in effect at time of application. Allow 4-6 weeks from time of application to installation of water services.
41. Sanitary connections for the new retail building shall be subject to the review, approval, and conditions of the City wastewater treatment plant. Sanitary sewer main shall always end with a manhole.
42. All water mains shall be looped.
43. Any water or sewer services that cross CalTrans right-of-way will require a CalTrans permit.
44. Water mains and sanitary sewer mains shall have a minimum separation of 10 feet.

Public Safety

Access

45. Prior to start of combustible construction, an all-weather access road shall be installed for the development.
46. Design and engineering of the site access roads shall meet Fire Code requirements and shall be capable of sustaining 50,000 lb. gross vehicle weight (GVW).
47. Curbs shall be painted red at driveway entrances and along all landscape islands that are in the driveable path. Fire lane signage shall be installed throughout the parking lot in locations approved by the Fire Department. Signage shall meet Hayward Fire Department Standards.
48. Fire Department lock boxes shall be installed on each building in locations approved by the Fire Department.

Water Supply

49. Provide civil engineered (site improvement/grading/utility) drawings to the Fire Department for review and approvals.
50. Provide fire flow calculations for each on-site fire hydrant. Fire flows shall meet a minimum of 2,500 gallons per minute (gpm) at 20 PSI (50% allowance has been granted for automatic fire sprinkler systems within each building).
51. Type of fire hydrant(s) shall be double steamers, equipped with 2 - 4 ½" outlets and 1 - 2 ½" outlet.

52. On-site fire hydrants are allowed to share the same fire service laterals serving the fire sprinkler systems for each building, but shall be installed independent of the fire service laterals so that they remain operational when a fire sprinkler system is shut-down for service and/or repair.
53. On-site fire hydrants shall be installed in accordance to NFPA 14 Standards and Hayward Fire Department Standards.
54. On-site fire hydrants shall be maintained as a private fire hydrant system and it shall be the responsibility of the property owner to keep accurate service and maintenance records.
55. Crash posts may be required at each fire hydrant to prevent any potential impact damage from moving vehicles and/or equipment.

Building Construction

56. The development (each building) will require the proper submission of plans and permits to the City of Hayward.
57. Building construction shall be in accordance with the California Building Code (CBC) and applicable City Ordinances and Standards.
58. Building addressing shall be established for each building within the property. Address numbers shall be installed on each building in locations approved by the Fire Department.

Fire Protection

59. Each building shall be fully protected with an automatic fire sprinkler system designed and installed per NFPA 13 Standards. If there is no known tenant, sprinkler system densities shall meet Fire Department Standards with a minimum of .33gpm/3,750 sq.ft.
60. Each building shall have a dedicated underground fire service line designed and installed per NFPA 24 Standards. Underground fire service lines shall also meet City of Hayward Fire Department Standards (Detail #204) for installation of check valve, fire department connection (FDC) and post indicator valve (PIV).
61. Portable fire extinguishers shall be installed within each building (once a tenant is established).
62. Fire sprinkler system(s) shall be provided with central station monitoring for waterflow activity.
63. Each building shall have an exterior audible alarm device and an interior audible alarm device installed as part of the fire sprinkler system, which will activate upon any waterflow alarm.
64. Building address shall be installed in an approved location on the structure. Minimum size of numbers shall be 6" on contrasting background, visible and legible from the street.

65. There shall be no use and/or storage of any hazardous materials within each building unless reviewed and approved by the Fire Department.
66. Each tenant shall be required to obtain a City of Hayward business license prior to occupancy. At that time, if there are any hazards listed on the business license application for the proposed use, the Fire Department will impose additional requirements as needed.

Hazardous Materials

67. Prior to issuance of a building permit, provide and submit a completed Hayward Fire Department Chemical Inventory Worksheet Packet for each proposed building.
68. Prior to issuance of a building permit, submit copies of the Phase I Environmental Site Assessment with recommendations to the Hazardous Materials Coordinator, Hugh Murphy (510) 583-4924.
69. The current Crescent Trucking facility did not conduct the required facility closure in coordination with the Hayward Fire Department. Prior to issuance of a building permit, complete this requirement to ensure the proper handling and disposal of hazardous materials/waste(s) as well as other closure requirements for the facility.

Solid Waste

70. The owner(s) and/or tenants shall participate in the City's recycling program. The applicant shall clearly indicate the proposed location and dimensions of each enclosure, indicating whether the trash and recyclables will be compacted. The applicant must also indicate the number and type of refuse and recycling containers that will be used. The space and available capacity provided for the storage of trash must be the same size as that provided for recyclables. The procedure that must be followed regarding sorting and collection of recyclables is provided for in Section 3.2.02 of the Franchise Agreement.
71. A 6-inch wide curb or parking bumpers must be provided along the interior perimeter of trash enclosure walls to protect them from damage by the dumpster. A 6-inch wide parking bumper, at least 3 foot long, should also be placed between the refuse dumpster(s) and the recycling containers.
72. A minimum space of 12 inches must be maintained between the dumpster(s) and the walls of any trash enclosure and the recycling carts/dumpster to allow for maneuvering the dumpster(s). A drain to the sanitary sewer should be provided beneath the refuse dumpster(s) wherever wet waste, such as food waste, is generated and wherever can washing areas are located.
73. If any equipment/trash enclosure is gated, the gates and hinges must be flush with the enclosure wall. It is important to ensure that the gates open straight out and that the hinges and that the gate be flush with the enclosure wall, in order to allow adequate maneuverability of the equipment/dumpster in and out of the enclosure to service it. All trash enclosures shall be covered.

74. The applicant must ensure that there is adequate space for a garbage truck to service each dumpster. A 40-foot turning radius is adequate for garbage trucks.
75. The applicant is required to submit for review by the Solid Waste Manager an on-site recycling plan, which would be implemented during the entire demolition and construction phases. The plan must:
 - a. Show the anticipated start and completion dates of the project.
 - b. Estimate the quantities of construction and demolition waste that will be generated by the project.
 - c. Estimate the quantities of material that will be recycled and identify the facilities that will be used.
76. The applicant must ensure that construction and demolition debris is removed from the site by a licensed contractor as an incidental part of a total construction, remodeling, or demolition service offered by that contractor, rather than as a separately contracted or subcontracted hauling service using debris boxes, or is directly loaded onto a fixed body vehicle and hauled directly to a disposal facility that holds all applicable permits.
77. The applicant shall provide for adequate on-site storage capacity for recyclables within the buildings, including storage space for containers to store paper, glass/plastic/metal beverage containers, and other recyclables where these materials are generated.
78. The applicant shall ensure that the specifications of any compactor meet the approval of Waste Management.
79. The applicant must contact the City's franchised hauler, Waste Management of Alameda County, at 537-5500 to arrange for delivery of containers with sufficient capacity to store construction and demolition materials to be landfilled.

Engineering/Transportation Division

80. Developer must obtain an agreement from Target for the realignment of Target's main driveway on Whipple Road to line up with the Circuit City driveway. The design of the intersection caused by the alignment of the two driveways with Whipple Road shall be approved by the City Engineer. Changes to the Target site shall be approved by the Planning Director and plans shall include revised landscape plans. Improvement plans shall be approved prior to issuance of any grading permit. Improvements requirements due to this realignment shall be installed prior to occupancy of the project.
81. The developer shall design and install a traffic signal at the intersection of the aligned Circuit City/Target driveways with Whipple Road. The signal design shall include a timing plan for coordination and interconnection with the proximate signal(s) and shall be subject to approval by the City Engineer.
82. A preliminary soils report shall be submitted for review and approval of the City Engineer prior to the issuance of a building permit.

83. The applicant shall provide appropriate signage at project entrances and exits. Signage shall meet City standards. The applicant shall install "Right Turn Only" signs at the secondary, unsignalized, exit at Whipple Road.
84. All overhead utility lines along Whipple Road shall be placed underground.
85. Install a double-steamer fire hydrant on Whipple Road.
86. Install a standard street light on Whipple Road.
87. Remove and replace the cracked sidewalk along the Whipple Road frontage.
88. The applicant shall pay the appropriate Supplemental Building Construction & Improvement Tax prior to receipt of a certificate of occupancy.
89. Prior to commencement of any clearing, grading or excavation, the developer shall submit evidence to the City that a Notice of Intent (NOI) has been submitted to the State Water Resources Control Board.
90. The design of the drainage system shall be reviewed and approved by the Alameda County Flood Control District. The Hydrology & Hydraulics Criteria Summary, Alameda Flood Control & Water Conservation District, latest edition, shall be used to determine the storm drainage runoff.
91. Prior to the issuance of a grading permit and/or beginning of construction activity, the developer's engineer shall complete the Development Building Application Form Information, namely 1) Impervious Material Form and 2) Operation & Maintenance Information Form.
92. The developer/owner shall prepare a Maintenance Agreement for stormwater BMPs (available from Engineering & Transportation Division), and the Maintenance Agreement shall be recorded with the Alameda County Recorder's Office to ensure that the maintenance is bound to the property in perpetuity.
93. The applicant shall relocate the adjacent AC Transit/Union City Transit bus stop such that it can be placed along the Whipple Road frontage. The applicant shall pay for all relocation costs.



HAYWARD 880, L.L.C.

1002 TOWER BUILDING
1809 SEVENTH AVENUE
SEATTLE, WA 98101

May 3, 2011

Mayor Michael Sweeney and
Members of the City Council
City of Hayward
City Hall
777 B Street, Second Floor
Hayward, CA 94541

Re: Item No. 10; Consideration of Emergency Interim Moratorium
Ordinance Regarding Supermarkets

Honorable Mayor Sweeney and Members of the City Council:

As a representative of the owner of the five-acre center at 2480 Whipple Road, I want to, once again, state our strong opposition to the adoption of the proposed emergency ordinance. We submitted a letter last week on this matter and our attorneys are submitting correspondence that addresses the appropriate legal issues. They have advised us that because of our position as a shopping center with a valid, existing use permit, the emergency ordinance cannot legally be applied to prohibit the proposed full-service grocery use for which we have sought a building permit for the old Circuit City building. That use permit was issued in 2004 after exhaustive environmental review and remains in full force and effect.

My purpose in writing you is to point out the very apparent practical and equitable arguments against the City becoming involved in limiting economic competition between various centers. We have always worked to further not only our best interests but also the best interests of the City and its residents. The proposed emergency ordinance appears to be an anti-competitive device meant solely to effect a limitation on the number of grocery outlets available to the City's residents. While we are unable to identify the specific user for this center, we have forthrightly indicated that this will be a full-service grocery store with delicatessen and other features of a high-end supermarket. We urge you not to adopt the emergency ordinance and to consider the following:

1. This Tenant is Essential to a Revitalization of This Center: In 2008, the assessed value of the center was 16.6 million dollars. Since then the County Assessor has reassessed the property at 6.7 million dollars. The cause of this plummet in value is the recession and, specifically, the bankruptcy of Circuit City (after the loss of our anchor tenant, Circuit City, and four additional shop tenants, occupancy of the center stands at 23%). Our lender has been cooperative with us but the center runs at an enormous monthly cash flow deficit. In this highly competitive retail market we have been unable to locate a replacement tenant until entering into a deal last year with a full-service grocery company for which we sought a building permit in

March. To our disappointment, the apparent result of this application was a notice late last Monday afternoon of the consideration by the Council of the emergency ordinance 24 hours later.

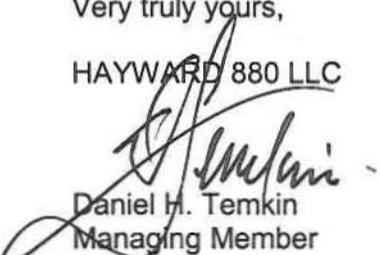
This tenant presents the best and last chance to salvage and keep afloat this center. For the City to step in and prohibit this proposed use is unconscionable and, our attorneys advise us, illegal.

2. The Alleged Health and Safety Reasons Supporting the Emergency Ordinance are Non-Existent: Traffic for this center was fully and completely analyzed in 2004 and the actual traffic situation now is probably better than that when the permit was issued. Our brokers advise us that they have done an inventory of available sites within the City of 20,000 square feet or more (the area necessary for a full-service grocery) and there exists few, if any, alternative sites. The staff report indicates that supermarkets pose significant public safety issues and require an inordinate allocation of police resources. In actuality, the vacant and run-down status of the center now constitutes much more of an attraction for illegal activity and we urge that you seek advice from your Police Department as to whether they would rather deal with a functioning and economically viable center with a supermarket or the current run-down and semi-abandoned center. We think the answer is obvious.

3. Conclusion: The proposed emergency ordinance is unnecessary, non-competitive and enormously destructive of the economic wellbeing of the City. The impacts of various use in our center have been fully analyzed and mitigated pursuant to the use permit approvals. The City's Economic Development Committee has urged the establishment of a full-service grocery use in the area of the center and our proposal, solicited and developed in accordance with the City's enunciated goals and policies, fully satisfies and fulfills that desire. We urge you to not adopt the emergency ordinance.

Very truly yours,

HAYWARD 880 LLC



Daniel H. Temkin
Managing Member

cc: City Manager
Planning Director
City Attorney
Kristina D. Lawson
Wilson F. Wendt

1. The benefits of permitting a new full-service grocery store in this location:

- a. provides a much needed service for the residents of south Hayward;
- b. revitalizes the shopping center and will attract new tenants in the vacant shop spaces;
- c. increases property tax revenues through higher property assessments;
- d. generates new sales tax revenues;
- e. generates new building permit fees;
- f. creates over 100 new jobs in the city;
- g. allows the struggling businesses in the shopping center to stay in business;
- h. reduces potential for crime in the neighborhood

2. The adverse impacts of denying a permit for a new full-service grocery store:

- a. additional businesses in the shopping center will fail and will result in a loss of jobs;
- b. shopping center will remain an eye sore for many more years;
- c. shopping center will continue to be a place for gangs to congregate and engage in criminal activities, and for dumping of trash and abandoned vehicles;
- d. lost sales tax revenues;
- e. lost property tax revenues (tax assessment went from \$16.6 million in 2009 to \$6.6 million in 2011);
- f. Hayward will be viewed as a city unfriendly to business - new businesses and real estate developers will be reluctant to make investments in the city.