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Santa Clara & San Benito Counties Building & Construction Trades Council

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August 12, 2014

VIA E-MAIL

Planning Commissioners
City of San Jose
200 East Santa Clara Street
San Jose, CA 95113

Re: August 13th Planning Commission Agenda Item 4.a, CEQA Streamlining Ordinance

Dear Chairman Kamkar and members of the Planning Commission:

Please accept this letter on behalf of the Santa Clara & San Benito Counties Building & Construction Trades Council ("Trades Council"). On Wednesday, the Planning Commission will consider a proposed "CEQA Streamlining Ordinance." The staff report states that the ordinance will "ensure internal consistency within the Municipal Code" and "implement the requirements" of CEQA. The Trades Council supports the achievement of internal code consistency and compliance with CEQA, but many sections of the proposed ordinance are not in line with these objectives. The ordinance contains confusing procedural requirements, and it would stifle public notice and participation, conflict with public rights under CEQA, and establish a framework for ineffective and redundant City proceedings. The Trades Council asks the Planning Commission to adopt a "no" recommendation for the proposed ordinance, and urges the City to instead adopt procedures for CEQA review that are similar to those followed by other cities in California.

1. The City's "petition for reconsideration" process is flawed

Section 14 of the proposed ordinance would amend Section 21.07.080 of the Municipal Code, the "petition for reconsideration" process that applies to City Council decisions to certify an Environmental Impact Report ("EIR"). We are aware of no other cities that require members of the public to petition for an additional City Council hearing after an EIR is certified. The procedure is burdensome and potentially expensive for members of the public, is not contemplated by CEQA, and is inconsistent with CEQA. The proposed ordinance would even *shorten* the period for filing a petition for reconsideration, from 10 days to only 3 business days after City Council certification. A 3-day time limit is unrealistic, and there is little chance that the resulting petitions would be informative or helpful to the City Council in any way.

The City's petition-for-reconsideration requirement was first adopted by the City Council in April 2014. The Trades Council was unaware of the April ordinance, a fact that only underscores the point of our letter today: that a complex and time-limited procedure such as that proposed by the City will exclude members of the public on technical grounds rather than substantive grounds. The ordinance does not provide a

helpful model of informed decision-making, but instead erects roadblocks for those who seek to exercise their rights under state law.

a. ***Mandatory petitions for reconsideration are highly disfavored in California and are inconsistent with CEQA***

The California Supreme Court has made it abundantly clear that mandating petitions for reconsideration of agency decisions serves no real purpose than to keep rightful litigants out of court, and this is not in keeping with state or federal law:

> "In sum, even an alert legal practitioner could overlook the necessity of seeking rehearing, as a condition to judicial review, until after the deadline to act had passed, and many who petition before administrative bodies do so without the benefit of legal training. . . . When the parties are aware of the rule and comply with it, the administrative body presented with the same facts and arguments is unlikely to reverse its decision. The only likely consequence is delay and expense for both the parties and the administrative agency prior to the commencement of judicial proceedings. Of course, the courts' burden is marginally reduced by the occasional case when a party, unaware of the rule, fails to comply and thus is barred from seeking judicial review, but we believe the striking of potentially meritorious claims solely to clear them from a court's docket should not stand as a policy goal in and of itself. ... Finally, all things being equal, we deem it preferable to apply our decisions in such a manner as to preserve, rather than foreclose, a litigant's day in court on the merits of his or her action." *Sierra Club v. San Joaquin Local Agency Formation Com.* (1999) 21 Cal.4th 489, 500-502, 509.

The City's ordinance is contrary to the Supreme Court's rationale, and contrary to state and federal laws which make clear that "the right to petition shall not be affected by the failure to seek reconsideration before the agency." (*See* Gov. Code § 11523, claims under the California Administrative Procedure Act.) Given the strong policy reasons and numerous laws and rulings that reject mandatory petitions for reconsideration in California, it is no surprise that other cities do not have mandatory reconsideration requirements in their municipal codes.

In the context of CEQA, a mandatory post-approval petitioning process conflicts with the legal rights that CEQA grants to members of public. CEQA's "exhaustion of administrative remedies" requirements are found in Public Resources Code section 21177. That statute requires only that objections must be "presented to the public agency orally or in writing during the public comment period . . . or prior the close of the public hearing on the project before the issuance of the notice of determination." That section also states that anyone who so objected to the project approval may file suit "agreeing with or supporting the comments of another person." The City's petitioning process would require a potential challenger to do *more* than present their objections to the City Council prior to the close of the public hearing. Moreover, it could be used to prevent a challenger from relying on comments raised by another person. This is inconsistent with the exhaustion provision in CEQA. Courts disapprove of local ordinances that curtail rights provided by state law.

c. ***Three days is not a realistic amount of time for a member of the public to prepare and file a petition for reconsideration***

The currently proposed ordinance would shorten the petitioning period to 3 business days, which is an abnormally short time for a member of the public to respond to a City Council certification decision. The staff report states that the petitioning period should be shortened to 3 days to prevent undue delay in the "filing of Notices of Determination and project commencement dates." Under CEQA, however, the lead agency files a Notice of Determination "within five working days *after the approval or determination becomes final.*" (Pub. Resources Code § 21152.) The City, should it decide to retain the petition requirement at all, could simply note that its EIR certification is not final until the existing 10-day period for filing a petition has expired. Furthermore, delaying project commencement by 7 additional days is not a burden for project applicants, who often spend weeks, if not months, obtaining project permits and other approvals after an EIR is certified.

Staff does not provide any persuasive reasons to shorten the petitioning process to only 3 days. A member of the public wishing to challenge the City Council's decision to certify an EIR often needs to hire an attorney to represent them. Three days is not sufficient time to retain an attorney and draft a petition for reconsideration stating every ground upon which a lawsuit might be filed. CEQA gives petitioners ten times as many days to develop their claims. If the City adopts a 3-day petitioning period, it is all but guaranteed that petitions for reconsideration will include nothing new for the City Council to consider, leading to redundant and unnecessary hearings.

d. ***If the City retains its petition for reconsideration requirement, clear written notice and delay of project approvals must occur***

The proposed ordinance would allow the City Council to "affirm, reverse, or modify its original decision" to certify an EIR, or to "adopt additional findings of fact." Under CEQA, a lead agency cannot approve a project until its findings and EIR certification decisions are final. Thus, the City Council would be required to delay or reverse its decision to approve a project. The ordinance does not specify that this will occur.

Finally, it is critical that members of the public be informed of the petition for reconsideration requirement, in bold letters, on project hearing notices and related documents.

2. <u>The proposed ordinance creates vague, confusing, and potentially redundant land use appeal requirements</u>

Rather than "streamlining" the CEQA process, the proposed ordinance adds confusing language to the Municipal Code that would frustrate public participation and result in unnecessary layers of public decision-making:

a. Sections 10 and 11 of the ordinance would amend the appeal procedures that currently apply to CEQA determinations made by the Planning Director and Planning Commission. Under Municipal Code Sections

21.04.140 and 21.07.040, environmental clearance determinations made by the Planning Director or Planning Commission may be appealed to the City Council. The proposed ordinance would add the words "or other decision-making body" to the list of decision-makers whose environmental clearance determinations may be appealed. The only other designated decision-making body is the City Council. Thus, the proposed ordinance can be interpreted to mean that a member of the public should appeal a City Council decision *to the City Council* for another hearing. The addition of this language is vague, confusing, unnecessary, and should not be adopted.

b. Section 14 of the ordinance involves the petition for reconsideration process in Municipal Code Section 21.070.080. Petitions for reconsideration are required only for certification decisions made by the City Council under Sections 21.07.020 and 21.07.030. The petitioning requirement does not apply to decisions made by the City Council on appeal, under Sections 21.07.040 through 21.07.060. The ordinance is confusing about the petitioning requirements for projects that are upheld on appeal to the City Council. The Trades Council requests that the mandatory reconsideration process be removed altogether from the Municipal Code.

3. <u>The ordinance deletes a number of public notice requirements, apparently to reduce public participation in the land use process</u>

The ordinance would reduce the type of notice provided to members of the public in at least three ways:

a. Section 12 of the ordinance would delete the requirement in Municipal Code Section 21.07.050.B, that owners of property contiguous to a project site must receive notice of appeal hearings. This requirement has been part of the Municipal Code for years, and the City Council chose to keep this requirement when it recently amended this section.

b. Section 14 of the proposed ordinance would delete the requirement that the City Clerk shall provide notice of an EIR certification decision to those who make a written request for such notice.

c. Section 14 would also delete the current requirement that the City Clerk shall provide notice to all interested persons at least 10 days prior to a reconsideration hearing. It would instead require that notice be given only to the applicant and the person who filed the petition for reconsideration.

Staff has not provided sufficient justification for the proposed amendments described above. The ordinance would not streamline the CEQA process or make the City's existing appeal requirements more easy to understand. Instead, it appears that the entire purpose of the proposed ordinance is to preclude public notice and participation in the CEQA process, and add more layers of complex procedural requirements to an already difficult-to-understand ordinance. The resulting Municipal

Code provisions would be substantially different from the procedures adopted by other cities in California.

Thank you for your consideration.

Sincerely,

Josué García
Chief Executive Officer
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Building & Construction Trades Council

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