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January 19, 2021

Councilmember Mike Bonin
Los Angeles City Hall
200 N. Spring Street, Room 475
Los Angeles, CA 90012
Email: councilmember.bonin@lacity.org

Alan Como, AICP
City of Los Angeles
Department of City Planning
221 North Figueroa Street, Suite 1350
Los Angeles, CA 90012
Email: alan.como@lacity.org

RE: Response to Notice of Preparation—Berggruen Institute Project
1901 N. Sepulveda Boulevard; 2100-2187 N. Canyonback Road
Environmental Document ENV-2019-4565-EIR

Dear Councilmember Bonin and Mr. Como:

This letter is submitted on behalf of Brentwood Residents Coalition ("BRC")[1] in response to the Notice of Preparation ("NOP") for the proposed Berggruen Institute project (the "Project"). While the purpose of a comment letter at the NOP stage is nominally to assist the lead agency in determining the scope and content of the Environmental Impact Report that follows, BRC takes this opportunity to object to environmental review for the Project proceeding based on the failure of the NOP and Initial Study ("IS") to provide adequate information to meaningfully comment on the scope and content of environmental review for the Project.

Based on community questions and comments at the December 8, 2020 public scoping meeting it appears most commenters will discuss the myriad potentially significant impacts the Project will have on aesthetics, biological resources, greenhouse gas emissions, transportation/traffic, and wildfire risks, among other environmental analysis categories. This letter will focus on potential land use and planning impacts due to the substantial conflicts between the proposed Project and the City's zoning code, General Plan, and in particular the Brentwood-Pacific Palisades Community Plan (a part of the General Plan) ("Community Plan"). The IS identifies the land use and planning analysis category as one in which there are potentially significant impacts. (IS, pp. 52-54.) To put it mildly, BRC agrees.

[1] Brentwood Residents Coalition is a grass roots, non-profit advocacy group concerned with preservation and enhancement of the environment, public health and safety, and quality of life in its local area. BRC advocates for strong enforcement of zoning codes, planning and environmental laws, encourages traffic and fire safety, and educates the public on these issues.

I. Documents needed to consider all land use and planning impacts are missing.

The Project entitlements include a General Plan Amendment, two Code Amendments to create new Project-specific zoning code designations (one for the Berggruen Institute Specific Plan as well as a customized Open Space designation for the Berggruen Institute site), creation of the Berggruen Institute Specific Plan, a Vesting Tentative Map, an LAFD approval for Emergency Helicopter Landing site (if required), and other discretionary and ministerial permits and approvals as deemed necessary. (IS, pp. 30-31.)

The currently available Project environmental documents include the NOP, the IS, a slide presentation provided at the scoping meeting (consisting predominantly of project renderings), a one-page memorandum regarding local airport impacts, and a notice of extension for public comments to the NOP.[2] The IS Project Description states: "Development and operation of the Project would be implemented through the Berggruen Institute Specific Plan (Specific Plan)." (IS, p. 7.) The IS provides a Project Location Map and Project Vicinity image with the proposed Specific Plan area superimposed, as well as several renderings showing general locations of major Project features. (See, e.g., Figures 1-7, IS, pp. 9-10, 15, 17-20.) Conspicuously absent from the project environmental documents, however, is *any* proposed draft text for the Berggruen Institute Specific Plan. Also missing is draft text for either of the proposed customized zone designations requested by the applicant.

CEQA review requires a level of analytic detail commensurate with the level of project detail that is available. (14 Cal. Code Regs. [hereinafter "CEQA Guidelines"], § 15146). The Project description and renderings in the IS show a very high level of detail associated with the current proposal. (IS, pp. 13-30.) In some instances, project buildings are described down to the square foot. (*Id*., p. 13; see also Table 2, IS, p. 16.) The design and architecture are described and rendered very specifically. (IS, pp. 21-23.) More than a dozen "sustainability features" are described. (*Id*., pp. 27-28.) The proposed Specific Plan is obviously intended to permit, and in theory to regulate, these Project details. The project description even relates that the "Specific Plan would allow for future growth to accommodate the Berggruen Institute's programs as they evolve over time." (*Id*., p. 28.) But what else might the Specific Plan allow that community members do not yet know? With no Specific Plan text available to compare with existing land use and planning regulations, ordinances, General Plan documents, such as the Brentwood-Pacific Palisades Community Plan, or other regulations or statutes, it is impossible to say.

Likewise, neither of the proposed code amendments that would create customized zoning designations for the Project are included in the Project materials. It is therefore impossible to compare what could be permitted within those zones with what would ordinarily be permitted. This is particularly vexing for any analysis of future growth at the Project site beyond what is expressly admitted in project documents. Neither commenters nor the environmental review team can assess how or why the City's ordinary Open Space zone, codified at LAMC section

[2] These documents and a link to the scoping meeting are available at the Department of City Planning's Project website at: https://planning.lacity.org/development-services/eir/berggruen-institute-project.

12.04.05, would be insufficient for the needs of the Project. And they cannot assess the impacts to which the customized Open Space zone might lead.

The absence of critical project documents leads to a significant risk of later project piecemealing, which is forbidden under CEQA. A project is the "whole of the action, which has a potential for resulting in either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment." (CEQA Guidelines, § 15378.) "Where the lead agency could describe the project as either the adoption of a particular regulation . . . or as a development proposal which will be subject to several governmental approvals . . . the lead agency *shall* describe the project as the development proposal for the purpose of environmental analysis." (*Ibid*., subdivision (d) [emphasis added].)

The Project must therefore be evaluated under CEQA as a particular development. But it is necessary to have the proposed Specific Plan and Code Amendment text in order to understand the outside bounds of what later impacts could follow from Project approval. Without all of the Project documents, the "whole of the action" cannot be evaluated. CEQA's requirements "cannot be avoided by chopping up proposed projects into bite-size pieces which, individually considered, might be found to have no significant effect on the environment or to be only ministerial." (*Plan for Arcadia, Inc. v. City Council of Arcadia* (1974) 42 Cal.App.3d 712, 726.)

The complete absence of any proposed Specific Plan and zoning code text makes meaningful public comment on potentially significant environmental impacts extraordinarily difficult at this stage. More important, it renders any environmental review of the Project incomplete and inadequate. A revised NOP should be circulated that provides for another round of NOP responses by community members and responsive agencies once Project documents have been updated to include draft text for the proposed Specific Plan and zoning codes so that a thorough environmental analysis may be performed.

II. Specific Plans are intended to restrict, not to expand, uses in Specific Plan areas.

According to the IS, the Project site is approximately 447 acres. (IS, p. 8.) The current base zoning designations at the Project site are agricultural (A1-1) and residential (RE20-1-H). A residential project comprising only 25.4 acres was previously approved at the site with the remainder designated as Open Space. (*Id*., pp. 11-12.) The zoning designations correspond with the land use designations found on the Community Plan's Land Use Map designations of Very Low I Residential and Open Space. The very short list of uses available in the RE zones does not permit a use such as the Berggruen Institute. (Los Angeles Municipal Code ("LAMC"), § 12.07.01.)[3]

[3] Some additional uses may be conditionally approved in an RE zone pursuant to LAMC section 12.24.U, for example a golf course or educational institution, but the proposed Project does not fall within any use categories that may be approved with a conditional use approval.

> Footnote 14 of the Community Plan states in relevant part:
>
> Each Plan category permits all indicated corresponding zones as well as those zones referenced in the Los Angeles Municipal Code (LAMC) as permitted by such zones unless further restricted by adopted Specific Plans, specific conditions and/or limitations of project approval, Plan footnotes or other Plan map or text notifications. (Brentwood-Pacific Palisades Community Plan, General Plan Land Use Map, Sept. 2, 2006.)[4]

Footnote 14 of the Community Plan thus allows the zoning, and therefore uses, that correspond with the land use designations associated with a particular site in the plan area to be further *restricted* through approval of a Specific Plan, but does not allowing the zoning or uses to be *expanded* by an adopted Specific Plan. Such an expansion would therefore be in conflict with Footnote 14 and the Community Plan (a part of the General Plan).

Footnote 14 is also consonant with the Department of City Planning's own explanation for the proper use of Specific Plans as a planning tool:

> A Specific Plan is a popular form of a land use overlay. An overlay is an additional layer of planning control, *establishing stricter standards* that go *beyond what the underlying zoning would normally regulate*. Cities generally implement overlays to achieve goals that may not ordinarily be attainable through zoning rules alone—ranging from more specific standards governing the production of affordable housing to tailored rules on historic preservation.[5]

Planning's explanation then cites the Colorado Boulevard Specific Plan, "which was adopted *to ensure that future development* along Eagle Rock's major thoroughfare *is compatible with the surrounding residential community*." (*Ibid*. [emphasis added].)

The local Community Plan includes four Specific Plans.[6] None of these expand available uses established by the zones within their plan areas. For example, the Pacific

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[4] Available at: https://planning.lacity.org/odocument/3baed2c7-63f8-40ff-9cb3-f4142dcd1a9f/btwplanmap.pdf.

[5] Los Angeles Department of City Planning, *What is a Specific Plan?*, available at: https://planning.lacity.org/blog/what-specific-plan (emphasis added).

[6] These are the San Vicente Scenic Corridor Specific Plan, the Pacific Palisades Commercial Village and Neighborhood Specific Plan, Mulholland Scenic Parkway Specific Plan, and the West Los Angeles Transportation Improvement and Mitigation Program. (Community Plan webpage, available at: https://planning.lacity.org/plans-policies/community-plan-area/brentwood-pacific-palisades). A small part of a fifth Specific Plan located predominantly within the Westwood Community Plan area is located just west of the I-405 Freeway and includes approximately 8 blocks along the western side of Church Lane. (See Westwood Multiple Family Residential Specific Plan, Figure 6, available at: https://planning.lacity.org/odocument/a1843ec0-b5cd-45dc-8fc4-31074c782fee.)

Palisades Commercial Village and Neighborhood Specific Plan entirely prohibits certain uses that would otherwise be permitted, and disallows other ordinarily permitted uses unless they are approved subject to a conditional use permit.[7] Likewise, the San Vicente Scenic Corridor Specific Plan prohibits certain uses entirely, and provides additional regulatory restrictions on remaining uses.[8] In adopting the San Vicente plan, the ordinance recitals note "a specific plan should regulate commercial uses and eliminate undesirable uses for the benefit of the local community" and should be "compatible with the surrounding residential neighborhood."[9] The Mulholland Scenic Parkway Specific Plan extends through 5 council districts and was similarly established to "assure that land uses are compatible with the parkway environment" and to "preserve the existing residential character of areas along and adjoining the right-of-way."[10]

Here the applicant seeks to use a Specific Plan entitlement to *expand* available uses at the Project site to allow a type of commercial activity not otherwise permitted by current zoning and Community Plan land use designations. This expansion is not consistent with the City's general practice, and the particular practice within the Brentwood-Pacific Palisades Community Plan, of adopting Specific Plans to restrict uses. Nor is it consistent with Planning's explanation of a Specific Plan's purpose.

To make this inconsistent Project possible, the applicant seeks to "*clarify* Brentwood–Pacific Palisades Community Plan Footnote 14 by expressly indicating that the Berggruen Institute Specific Plan is consistent with the Minimum Residential Very Low I Residential, Public Facilities, and Open Space land use designations." (IS, p. 54 [emphasis added].) This is an absurd request—as the Project history shows, the reason a Specific Plan has been sought is the Project was unable to be approved through the ordinary land use approval process, because the Project has been shown to be *inconsistent* with the zoning code and Community Plan/General Plan. The Project now seeks to utilize a Specific Plan because it could not be approved using a Conditional Use Permit.

Moreover, the City Council can hardly "clarify" that its 1977 action adopting the Community Plan, in which it designated *residential* and *open space* land uses in the area of the Project site, was somehow meant to embrace a customized *commercial* zone typology to expand commercial uses in the residentially zoned neighborhood. Such a

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[7] Pacific Palisades Commercial Village and Neighborhood Specific Plan, p. 6. The plan text is available at: https://planning.lacity.org/odocument/b46760aa-a0ba-46d9-bdb5-7d191d4eafaa/Pacific_Palisades_Commercial_Village_and_Neighborhoods_Specific_Plan.pdf.
[8] San Vicente Scenic Corridor Specific Plan, pp. 5-7. The plan text is available at: https://planning.lacity.org/odocument/4ffdaa5c-d57c-4b58-8cf2-0090f73ca9c5/San_Vicente_Scenic_Corridor_Specific_Plan_.pdf.
[9] *Id*., p. 1.
[10] Mulholland Scenic Parkway Specific Plan, p. 3. The plan text is available at: https://planning.lacity.org/odocument/1ca45b19-cbf5-40ec-b169-1735878beca2/Mulholland_Scenic_Parkway_Specific_Plan_.pdf.

"clarification" is a logical impossibility and legal fiction since the customized zone wouldn't exist until 40-plus years after the Council adopted the Community Plan.[11]

III. The City has no duty to process a General Plan Amendment, Specific Plan, or Code Amendment, and therefore no duty to perform environmental review.

The applicant requests multiple entitlements requiring legislative action by the City Council. These include a General Plan Amendment, a Specific Plan, Code Amendments, and Zone Changes. The Los Angeles City Charter ("Charter") is very specific with respect to the adoption, amendment, or repeal of land use ordinances, orders, and resolutions. (Charter, § 558.) It states that a land use "ordinance, order or resolution may be proposed by the Council, the City Planning Commission, or Director of Planning or by application of the owner of the affected property if authorized by ordinance." (*Ibid*.) LAMC section 12.32 states: "An owner of property may apply for a proposed land use ordinance *if authorized to do so by Subsections F through S* relative to that owner's property." (LAMC, § 12.32.B [emphasis added].) The Charter is even more specific for General Plan Amendments, and also requires they be initiated, if at all, by the City Council, the City Planning Commission, or Director of Planning. (Charter, § 555.)

The applicant may request a zone change, as LAMC section 12.32.F provides authorization for a landowner to apply for zone and height district changes. But an applicant has no right to a General Plan Amendment, Specific Plan, or Code Amendment, because these all require legislative action subject to Charter sections 555 or 558, and no ordinance authorizes an applicant to initiate such entitlement requests.

For example, the procedure to adopt a Code Amendment is found in LAMC section 12.32 subsection *E*. Since that is not within subsections *F* through *S* of section 12.32, it is not an entitlement request the applicant can make. It can only be initiated by the City Council, City Planning Commission, or Director of Planning. (LAMC § 12.32, §§ A, B, and E.)

The procedure to initiate a General Plan Amendment is not even found in LAMC section 12.32, it is in section 11.5.6, which is located in a different Article of the zoning code. Subsection *B* of that code section references Charter section 555, and reminds the reader that only the Council, Planning Commission, or Director of Planning may initiate the request.

Similarly, Specific Plans are referenced in LAMC section 11.5.7, an entirely different zoning code Article and code section than LAMC section 12.32, and are therefore unavailable for a landowner to initiate. (LAMC, § 11.5.7.) Specific Plan initiation *is* made pursuant to LAMC section 12.32 by reference, but to be clear, nothing in either zoning code section 11.5.7 or section 12.32 authorizes a *private applicant* to initiate such an entitlement. It must be initiated by the Council, City Planning Commission, or Director of Planning.

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[11] See Council File 98-0771, "Complete Council File" pdf document, p. 4, available at: https://clkrep.lacity.org/onlinedocs/1998/98-0771.pdf.

None of the above is intended to argue that the applicant could not somehow obtain one or more of its requested entitlements. To the extent the applicant has the political clout, one or another of the authorized actors may initiate the action on the applicant's behalf. The point is that the City has no express *duty* to entertain a private request for a Code Amendment, Specific Plan, or General Plan Amendment. The City made exactly this point in a recent Los Angeles Superior Court argument, in which it successfully demurred from a petition for writ of mandate on the basis that it had no such duty to initiate a General Plan Amendment.

In *Hermosa Funding, LLC v. Department of City Planning, et. al* (LA Sup. Ct., Case No. 19STCP04100, hereinafter "*Hermosa*"), the petitioner landowner argued the Department of City Planning had a mandatory duty pursuant to LAMC section 11.5.6 to initiate the LLC's General Plan Amendment request. (*Hermosa*, order granting demurrer, p. 3, attached.) The City argued it had no such duty, and further that another entitlement related to the General Plan Amendment (a zone change request) for which the City might otherwise have a duty was moot, since its consideration would be futile without consideration of the General Plan Amendment. (*Id*., p. 9.) The Court agreed the City had no duty to initiate a General Plan Amendment on behalf of the owner. (*Id.*, p. 11: "The Charter does not impose a duty on Respondent to initiate a GPA at Petitioner's request.")

BRC agrees entirely with the City. It has no duty to initiate or process a General Plan Amendment. The City also has no duty to initiate a Specific Plan request for the benefit of an individual applicant. Nor does it have a duty to entertain a Code Amendment to create new customized zone designations for the benefit of one landowner out of the tens of or hundreds of thousands of property owners within the City. No hearings have been held before the City Planning Commission or City Council for the Project, so here presumably the Director of Planning has determined he would initiate these requests on behalf of the applicant.

The application materials the Department of City Planning makes available to applicants seeking a General Plan Amendment require an applicant to provide its "justification of all aspects of your request in terms of public necessity, general welfare and good zoning practices."[12] This is due to LAMC section 12.32 subsection C(2), which requires the initiation or adoption of initiated land use ordinances to be "in conformity with public necessity, convenience, general welfare and good zoning practice." Based on section II of this letter it should be self-evident that the proposed Project cannot be justified based on public necessity, general welfare, or good zoning practices. The requests and the City's consideration of the

[12] The form for an applicant to request initiation of a General Plan Amendment is available at: https://planning.lacity.org/odocument/df234bb1-a9d2-43c6-ba3b-3eea70932cc3/General%20Plan%20Amendments%20-%20Request%20for%20Initiation.pdf. A second form with screening criteria and noting the requirement of a "justification is also available, at: https://planning.lacity.org/odocument/b74ff0f2-9ca8-4f11-87f5-f40968280a62/General%20Plan%20Amendments%20-%20Specialized%20Requirements.pdf. BRC is unaware of similar application materials to allow an applicant to request initiation of a Specific Plan or Code Amendment.

requests make a mockery of those terms. The City has no duty to entertain the applicant's Project, which should be summarily denied.

Further, as the California Supreme Court has held, an agency denial is not considered a "project" under CEQA, and the City therefore also has no duty to undertake any environmental review if it summarily denies the Project, as it should. (*Sunset Sky Ranch Pilots Assn. v. County of Sacramento* (2009) 47 Cal.4th 902.)

IV. The City should consider the following questions and comments in determining the scope and content of the Project's Environmental Impact Report.

Based on all of the above, and in addition to the anticipated thorough analysis of potentially significant impacts the City will undertake as required by CEQA, the scope and content of the Environmental Impact Report should respond to or be informed by the following questions and comments.

The Project EIR must provide a detailed analysis explaining how the Project is or is not consistent with the Brentwood-Pacific Palisades Community Plan, a part of the City's General Plan. Given that the City anticipates updating the Brentwood-Pacific Palisades Community Plan in 2021,[13] why is it appropriate for this private Project to benefit from two new customized zoning code designations, a customized Specific Plan, and a General Plan Amendment to implement these changes before the Community Plan Update process has been undertaken?

The Project EIR should explain how a complete and thorough environmental analysis can be performed with critical Project documents missing, including draft text for the proposed Specific Plan and Code Amendments. The EIR should consider and analyze how future project piecemealing will be avoided if environmental analysis will be performed without this information. Since Specific Plans and zoning codes may be later amended, what procedural safeguards, if any, could be imposed to mitigate against the possibility of future piecemealed actions with associated additional impacts, the review of which would be evaded during the present environmental review process?

Since an EIR is an informational document, why is it permissible for the NOP comment period to end before responsive agencies and members of the public have had an opportunity to review the Specific Plan and Code Amendment text? An EIR "is a document of accountability… protect[ing] not only the environment but also informed self-government." (*Laurel Heights Improvement Assn. v. Regents of the University of California* (1988) 47 Cal.3d 376, 392.) How does the failure to provide the Specific Plan and Code Amendment text so that community members can review and comment *before* the City reviews the project "demonstrate to an

[13] The Department of City Planning's website page for the Community Plan states: "The Brentwood - Pacific Palisades Community Plan was last updated in 1996. It is anticipated that the Department will begin a plan update process in 2021 (approximate)." See https://planning.lacity.org/plans-policies/community-plan-area/brentwood-pacific-palisades.

apprehensive citizenry that the [City] has, in fact, analyzed and considered the ecological implications of its action[?]" (*Ibid*.)

How many Code Amendments to create entirely new zoning code designations have been adopted by the City for the benefit of a single private project? How many Specific Plans have been created for the benefit of a single private project? How many of these have permitted commercial uses not otherwise permitted by standard zoning tools on parcels previously zoned as residential and open space?

Since the previous iteration of the Project, which would have utilized a Conditional Use Permit, could not be approved, in what way is the Project in conformity with public necessity, convenience, general welfare, or especially good zoning practice? Given the City's interpretation of its Charter and Zoning Code as argued in the *Hermosa Funding, LLC* matter, has the City changed its position that it does not have a duty to process all applications? If not, what distinguishes the Berggruen Institute project for special consideration to have its project considered?

BRC notes the IS compares the proposed Project with well-known Brentwood institutions, such as schools located in the Mulholland Institutional Use Corridor, Mt. St. Mary's University, and the Skirball Center, among others. Which of these institutions, if any, were approved utilizing customized zoning codes or Specific Plans? The EIR should compare and contrast the entitlements for the institutions to which the Project compares itself in the IS with the entitlements sought by the Project to get a true sense of the consistency of the Project with the comparison institutions.

Since the proposed Project, if approved, would utilize a customized zoning code to allow a commercial use of greater intensity than the currently permitted residential use, does the City consider it a spot zone? If so, how is the spot zone permissible and what are its environmental impacts? Assuming the Project will introduce a spot zone, the City must analyze the environmental impacts of introducing such a commercial spot zone in an otherwise residential neighborhood. In analyzing the spot zoning question, the City should use the same CEQA threshold for spot zone analysis it has used since at least 2006, found in its CEQA Threshold Guide. Threshold Guide Section H.2–Land Use Compatibility states: "A 'spot' zone occurs when the zoning or land use designation for only a portion of a block changes, or a single zone or land use designation becomes surrounded by more or less intensive land uses." The screening criteria asks simply, "would the project result in a 'spot' zone?"[14]

The EIR should explain in detail how the proposed Code Amendments would implement or avoid requirements of existing generally applicable zoning code provisions, such as the Baseline Hillside Ordinance, to show how the Project is or is not consistent with zoning code provisions that would be otherwise applicable at the Project site if a customized zoning

[14] The City's CEQA Threshold Guide is available at the Department of City Planning website at: https://planning.lacity.org/eir/CrossroadsHwd/deir/files/references/A07.pdf.

designation were not considered. The EIR should explain how resulting zoning code inconsistencies, if any, will or will not become a precedent for future Project applicants to utilize customized zoning codes and the potentially significant environmental implications of creating customized zoning on a per-project basis.

The EIR should explain why a customized Open Space zoning code designation is required for the Berggruen Open Space land area. In what way or ways is the existing Open Space zoning code designation inadequate for the Project site? What Project features specifically require the customized zoning designation? The EIR must analyze the differences in the context of General Plan, Community Plan, and zoning code consistency.

Thank you for the opportunity to comment on the Notice of Preparation.

Sincerely,

John Given

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

Civil Division

Central District, Stanley Mosk Courthouse, Department 82

19STCP04100 August 18, 2020
HERMOSA FUNDING, LLC vs DEPARTMENT OF CITY PLANNING, et al. 9:30 AM

Judge: Honorable Mary H. Strobel
Judicial Assistant: N DiGiambattista
Courtroom Assistant: R Monterroso

CSR: D Van Dyke/CSR 10795
ERM: None
Deputy Sheriff: None

APPEARANCES:

For Petitioner(s): Benson K. Lau (Telephonic) (X)

For Respondent(s): Patrick James Hagan (X) (Telephonic)

NATURE OF PROCEEDINGS: DEMURRER OF RESPONDENTS, DEPARTMENT OF CITY PLANNING, ET AL, TO THE PETITION

Matter comes on for hearing and is argued.

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The court adopts its tentative ruling as the order of the court and is set forth in this minute order.

Respondent City of Los Angeles ("Respondent" or "City") demurs to the petition and complaint of Petitioner Hermosa Funding, LLC ("Petitioner") for failure to state a cause of action and uncertainty.

Judicial Notice

Respondent's RJN Exhibits A-E – Granted.

Petitioner's RJN Exhibits A-B – Granted.

Background

The petition alleges the following facts, which the court deems as true for purposes of demurrer.

"This petition arises out of Respondents' failure to initiate Petitioner's zone change and GPA [General Plan Amendment] applications pursuant to" City Charter sections 555 and 558, and Los Angeles Municipal Code ("LAMC") sections 11.5.6 and 12.32. (Pet. ¶ 1.)

"Petitioner submitted its applications on August 9, 2017, October 18, 2018, and a final time on December 28, 2018" seeking a zone change and GPA for two properties on South Ocean Front Walk in Los Angeles, CA (the "Properties"). (Id. ¶¶ 2-3.)

On or about April 8, 2015, Respondent's Department of City Planning ("DCP") issued a memorandum that established its policy concerning GPA requests from property owners (the "Memo"). (Id. ¶ 20; Pet. RJN Exh. A.) Petitioner alleges that the Memo served as a precursor to Respondent's publication of Form 7723.1, which allegedly sets forth Respondent's procedures for GPA requests with or without a zone change. (Pet. ¶¶ 16-18, 21; Pet. RJN Exh. B.) Both the Memo and Form 7723.1 required Petitioner to submit to a "pre-filing review" before Petitioner could file its application for a GPA. (Pet. ¶¶ 21-22; Pet. RJN Exh. A, B.) Pursuant to the Memo and Form 7723.1, an applicant will only be permitted to proceed with an application requiring a GPA "if the Director determines the request is worth consideration and has the potential of meeting the Findings for a [GPA]" (the "Worthiness Test.") (Pet. ¶¶ 17, 21-22.)

"On or about August 9, 2017, Petitioner submitted a GPA Request Form to revise the land use designation in the Venice Community Plan from Medium Residential to Community Commercial. However, after months of inexplicable delays, the GPA Request Form was never initiated." (Id. ¶ 24.)

"On or about October 10, 2018, Petitioner's counsel sent a letter to the DCP to request a zone change." (Id. ¶ 25.) "On or about October 18, 2018, Petitioner's counsel had a conference call with the Senior City Planner, Debbie Lawrence ('Lawrence'), concerning its request for a zone change and was informed by Lawrence that the zone change would also require a GPA. Accordingly, Petitioner submitted a second GPA Request Form." (Id. ¶ 26.) "While Petitioner's request was pending, Lawrence informed Petitioner that 'the committee' and/ or 'the management team' was reviewing Petitioner's request." (Id. ¶ 27.)

"On or about November 20, 2018, Lawrence informed Petitioner that 'the management team has determined that it is not appropriate at this time to move forward with [Petitioner's GPA Request Form], given the concurrent update of the Venice [Local Coastal Program] and [Land Use Plan], and therefore have not approved [Petitioner's] request." (Id. ¶ 28.)

"On December 27, 2018, Petitioner attempted to file its zone change application and GPA a final time, together with the Time Extension Authorization." (Id. ¶ 31.) "For clarification on the process, Petitioner, through counsel, asked: 'As I understand the process, [Lawrence] and the Department's management team did a pre-filing review and determined the timing was not appropriate to initiate the zone change and GPA because of the Local Coastal Plan updates, etc. Is this a correct understanding?" (Id. ¶ 32.)

On an unspecified date, "Lawrence responded, 'Yes, your understanding is correct. The Department will not initiate the GPA during the update process.'" (Id. ¶ 33.)

"Petitioner … alleges, that the pre-filing procedures set forth in the Memo are unlawful and invalid because Charter section 555 expressly provides that, '[p]rocedures pertaining to the preparation, consideration, adoption and amendment of the General Plan, or any of its elements or parts, shall be prescribed by ordinance, subject to the requirements of this section.'" (Id. ¶ 23 [emphasis in original].)

"Petitioner … alleges, that the DCP utilized the prescreening 'worthiness' test, outlined in the Memo and Form 7723.1 to unlawfully avoid DCP's mandatory duty to initiate, prepare, and act upon Petitioner's GPA Request Form and zone change application." (Id. ¶ 34.)

In the first cause of action for writ of mandate, Petitioner seeks a writ "commanding Respondents to initiate and cause to be filed Petitioner's GPA Request Form in conjunction with its application for a zone change." (Id. Prayer ¶ 1.)

In the second cause of action for declaratory relief, Petitioner seeks a declaration that "City's Charter section 555 and LAMC section 11.5.6 requires either the Director of Planning, City Council, or Planning Commission, to initiate a request for a GPA submitted by an individual property owner in connection with his application for a zone change pursuant to Charter section 558 and LAMC 12.32." (Id. Prayer ¶ 2.)

Procedural History

On September 23, 2019, Petitioner filed its petition for writ of mandate and complaint for declaratory relief.

On December 12, 2019, Respondent filed its demurrer and meet and confer declaration. The court has received Petitioner's opposition and Respondent's reply.

Analysis

A demurrer tests the sufficiency of a pleading, and the grounds for a demurrer must appear on the face of the pleading or from judicially noticeable matters. The demurrer admits all material facts properly pleaded. (CCP 430.30(a); Blank v. Kirwan (1985) 39 Cal.3d 311, 318.) "A demurrer tests the pleadings alone and not the evidence or other extrinsic matters." (Hahn v.

Mirda (2007) 147 Cal.App.4th 740, 747.)

First Cause of Action – Writ of Mandate Pursuant to CCP Section 1085

Respondent contends that Petitioner does not allege a cause of action for writ of mandate because: (1) the entire action is barred by the 90-day limitations period in Government Code section 65009(c); and (2) Petitioner does not identify a mandatory duty owed by City.

Legal Standard – CCP Section 1085

There are two essential requirements to the issuance of an ordinary writ of mandate under Code of Civil Procedure section 1085: (1) a clear, present and ministerial duty on the part of the respondent, and (2) a clear, present and beneficial right on the part of the petitioner to the performance of that duty. (California Ass'n for Health Services at Home v. Department of Health Services (2007) 148 Cal.App.4th 696, 704.) "An action in ordinary mandamus is proper where … the claim is that an agency has failed to act as required by law." (Id. at 705.)

"A ministerial act is an act that a public officer is required to perform in a prescribed manner in obedience to the mandate of legal authority and without regard to his own judgment or opinion concerning such act's propriety or impropriety, when a given state of facts exists." (Kavanaugh v. West Sonoma County Union High School Dist. (2003) 29 Cal.4th 911, 916.) "Normally, mandate will not lie to control a public agency's discretion, that is to say, force the exercise of discretion in a particular manner. However, it will lie to correct abuses of discretion. In determining whether a public agency has abused its discretion, … [a] court must ask … whether the agency failed to follow the procedure … the law requires." (County of Los Angeles v. City of Los Angeles (2013) 214 Cal.App.4th 643, 654.)

Relevant Charter and LAMC Provisions

The following Charter and LAMC provisions are cited in the parties' legal briefs and are relevant to Petitioner's writ cause of action.

Charter Section 555 provides in relevant part:

Procedures pertaining to the preparation, consideration, adoption and amendment of the General Plan, or any of its elements or parts, shall be prescribed by ordinance, subject to the requirements of this section.

….[¶]

(b) Initiation of Amendments. The Council, the City Planning Commission or the Director of Planning may propose amendments to the General Plan…. (Resp. RJN Exh. A.)

LAMC section 11.5.6, General Plan, provides in relevant part:

A. Amendments. Amendments to the General Plan of the City shall be initiated, prepared and acted upon in accordance with the procedures set forth in Charter Section 555 and this section.

B. Initiation of Plan Amendment…. As provided in Charter Section 555, an amendment to the General Plan may be initiated by the Council, the City Planning Commission or the Director of Planning…. (Resp. RJN Exh. B.)

Charter section 558 provides in relevant part:

(a) The requirements of this section shall apply to the adoption, amendment or repeal of ordinances, orders or resolutions by the Council concerning:

(1) the creation or change of any zones or districts for the purpose of regulating the use of land;

….[¶¶]

(b) Procedures for the adoption, amendment or repeal of ordinances, orders or resolutions described in subsection (a) shall be prescribed by ordinance, subject to the following limitations:

(1) Initiation. An ordinance, order or resolution may be proposed by the Council, the City Planning Commission, or Director of Planning or by application of the owner of the affected property if authorized by ordinance.

(2) Recommendation of the City Planning Commission. After initiation, the proposed ordinance, order or resolution shall be referred to the City Planning Commission for its report and recommendation regarding the relation of the proposed ordinance, order or resolution to the General Plan and, in the case of proposed zoning regulations, whether adoption of the proposed ordinance, order or resolution will be in conformity with public necessity, convenience, general welfare and good zoning practice. The City Planning Commission shall act within the time

specified by ordinance. After the City Planning Commission has made its report and recommendation, or after the time for it to act has expired, the Council may consider the matter. Failure to act within the time prescribed by ordinance shall be deemed to be a recommendation of approval by the City Planning Commission of the proposed ordinance, order or resolution.

(3) Action by the Council. Before adopting a proposed ordinance, order or resolution, the Council shall make the findings required in subsection(b)(2) of this section.

….[¶]

(C) Failure of Planning Commission to Act. If the Commission fails to make any recommendation within the time specified by ordinance, an ordinance, order or resolution in conformity with that which was initiated by the Council or by application shall be prepared and presented to the Council, and may be adopted by majority vote. (Resp. RJN Exh. E [emphasis added].)

LAMC section 12.32, Land Use Legislative Action, provides in relevant part:

B. Application…. An owner of property may apply for a proposed land use ordinance if authorized to do so by Subsections F through S relative to that owner's property. The applicant shall complete the application for that proposed land use ordinance, pay the required fee and file the application with the Department of City Planning on a form provided by the Department.

C. Action on the Initiation or Application.

….[¶¶]

3. Procedure for Applications…. Once a complete application is received, as determined by the Director, the Commission shall hold a public hearing or direct a Hearing Officer to hold the hearing. If a Hearing Officer holds the public hearing, he or she shall make a recommendation for action on the application. That recommendation shall then be heard by the Planning Commission, which may hold a public hearing and shall make a report and recommendation regarding the relation of the proposed land use ordinance to the General Plan and whether adoption of the proposed land use ordinance will be in conformity with public necessity, convenience, general welfare and good zoning practice. (Resp. RJN Exh. C [emphasis added].)

Statute of Limitations - General Plan Amendment

"'A demurrer on the ground of the bar of the statute of limitations will not lie where the action may be, but is not necessarily barred.' [Citations.] It must appear clearly and affirmatively that, upon the face of the complaint, the right of action is necessarily barred. [Citations.] This will not be the case unless the complaint alleges every fact which the defendant would be required to prove if he were to plead the bar of the applicable statute of limitation as an affirmative defense." (Lockley v. Law Office of Cantrell, Green, Pekich, Cruz & McCort (2001) 91 Cal.App.4th 875, 881.)

Government Code section 65009(c)(1) establishes a 90-day limitations period for actions challenging local land use decisions. Respondent contends that the following sub-provisions may apply in this case:

(c)(1) [N]o action or proceeding shall be maintained in any of the following cases by any person unless the action or proceeding is commenced and service is made on the legislative body within 90 days after the legislative body's decision:

(A) To attack, review, set aside, void, or annul the decision of a legislative body to adopt or amend a general or specific plan. This paragraph does not apply where an action is brought based upon the complete absence of a general plan or a mandatory element thereof, but does apply to an action attacking a general plan or mandatory element thereof on the basis that it is inadequate.

(B) To attack, review, set aside, void, or annul the decision of a legislative body to adopt or amend a zoning ordinance.

….

(F) Concerning any of the proceedings, acts, or determinations taken, done, or made prior to any of the decisions listed in subparagraphs (A), (B), (C), (D), and (E). (See Dem. 12.)

"The statute was enacted 'to alleviate the 'chilling effect on the confidence with which property owners and local governments can proceed with projects' [citation] created by potential legal challenges to local planning and zoning decisions.'" (General Develop. Co., L.P. v. City of Santa Maria (2012) 202 Cal.App.4th 1391, 1394 [holding that the word "decision" in section 65009(c) "is broad and includes grants and denials."].)

"For the actions described in section 65009, subdivision (c)(1), the 90–day limitations period

begins to run from the date on which the challenged decision is made. …. Thus, to pinpoint when the statute of limitations began to run …, one must determine what specific governmental act or acts the [petitioner] sought to challenge…. The true nature of those claims may be found by looking to the allegations of the pleadings and to the relief requested….” (County of Sonoma v. Sup.Ct. (2010) 190 Cal.App.4th 1312, 1324.)

Respondent contends that section 65009(C)(1)(A) and (B) apply here because “the Petition/Complaint challenges the City’s decision to reject Petitioner’s request to initiate an amendment to the City’s General Plan, and the City’s decision to reject Petitioner’s zone change application.” (Dem. 13 [emphasis added].) Petitioner challenges Respondent’s “failure to initiate Petitioner's zone change and GPA applications.” (Pet. ¶ 1.) Thus, for instance, Petitioner alleges that Senior City Planner Lawrence informed Petitioner on November 20, 2018, that “the management team has determined that it is not appropriate at this time to move forward with [Petitioner's CPA Request Form], given the concurrent update of the Venice [Local Coastal Program] and [Land Use Plan].” (Id. ¶ 28.) In response to Petitioner’s December 27, 2018 inquiry, Lawrence similarly confirmed that “[t]he Department will not initiate the GPA during the update process." (Id. ¶ 33.) Regardless of the reason given, these statements are unequivocal that the Department will not grant Petitioner’s request to initiate a General Plan Amendment, and triggers the 90 day statute of limitations.

Moreover, the petition refers to the December 2018 application as Petitioner’s “final” attempt to submit an application. (Pet. ¶¶ 2, 33.) Petitioner’s use of the word “final” in the petition is consistent with the premise that a decision had been made to deny the request for initiation. While Lawrence’s statements quoted above (see ¶¶ 28, 33), suggest that Petitioner could, consistent with Lawrence’s statements, submit a new application after the update process, that does not mean the statute of limitations was tolled with respect to City’s December 2018 decision.

Respondent contends that “this decision falls within the broad language of subsection 65009(c)(1)(F), insofar as it concerns the proceedings, acts, or determinations made prior to the decision to amend or not amend the City’s General Plan.” (Dem. 13.) In reply, Respondent relies on 1305 Ingraham v. City of Los Angeles (2019) 32 Cal.App.5th 1253. This case should have been cited and discussed in the moving papers so that Petitioner could respond. Petitioner may respond at the hearing.

The petitioner in Ingraham challenged the planning director’s approval of an affordable housing project. Although the petitioner administratively appealed the director’s decision, the city never

held an appeal hearing. The Court of Appeal's conclusion that section 65009(c)(1)(F) applied was based substantially on LAMC section 16.05.H.4, which stated in pertinent part that "If the Area Planning Commission fails to act within the time specified, the action of the Director shall be final." (Ingraham, supra at 1261.) Based on this code provision, the Court held that "the Commission's failure to act in a timely fashion renders the Director's decision the final one," thus triggering the 90-day limitations period. (Ibid.) Here, in contrast, Respondent does not cite any allegations from the petition or LAMC provisions suggesting that the Planning Department's refusal to take action on Petitioner's GPA application resulted in a "final decision" on the applications. Nonetheless, the Planning Department through its Director, was one of the entities specially authorized to initiate a General Plan Amendment. The Department's decision not to initiate a General Plan Amendment was final in December 2018.

Statute of Limitations – Zone Change Request

In paragraphs 31 -34 of the Petition, Petitioner alleges that on December 27, 2018 Petitioner attempted to file its zone change application [and General Plan Amendment request] a "final time." Through counsel, Petitioner asked Respondent to affirm its understanding that the Department determined that timing was not appropriate to initiate the zone change, to which the Department answered that the understanding was correct. Petitioner alleges that the Department utilized an unlawful prescreening process to "unlawfully avoid DCP's mandator duty to initiate, prepare, and act upon Petitioner's GPA Request Form and zone change application." For the same reasons discussed above, the City's decision not to initiate the GPA or zone change triggered the statute of limitations. Petitioner's challenge was not timely filed.

The court separately considers Respondent's other argument that the demurrer should be sustained because City has no mandatory duty to initiate a General Plan Amendment.

Has Petitioner Alleged a Clear, Present, and Ministerial Duty Owed by Respondent?

Respondent contends that "the Petition does not identify a mandatory duty on the City to initiate the process for a General Plan amendment." (Dem. 16.) Relatedly, Respondent contends that Petitioner's zone change application is moot or "futile" in the absence of a GPA. (Dem. 16.)

City Charter Section 555 specifically governs initiation of GPAs. Initiation is discretionary, and limited to Council, the City Planning Commission, and the Planning Director: "The Council, the

City Planning Commission or the Director of Planning may propose amendments to the General Plan." (Resp. RJN Exh. A [emphasis added].) Similarly, section 11.5.6B of the LAMC expressly states that "an amendment to the General Plan may be initiated by the Council, the City Planning Commission or the Director of Planning." (Resp. RJN Exh. B [emphasis added].) The use of "may," as opposed to "shall," refers to a discretionary action, not a ministerial duty. (Bayside Auto & Truck Sales, Inc. v. Dep't of Transp. (1993) 21 Cal. App. 4th 561, 566.) Although the Court of Appeal has noted that nothing in the Charter or the LAMC prohibits a private party from requesting that the City initiate the process to amend the General Plan, the discretionary language in sections 555 and 11.5.6B suggests that City is not required to grant such requests. (See Westsiders Opposed to Overdevelopment v. City of Los Angeles (2018) 27 Cal.App.5th 1079, 1089.)

In opposition, Petitioner contends that Respondent focuses on a "straw man" argument and does not analyze all relevant allegations from the petition. Specifically, Petitioner contends that the petition alleges that "Respondent's Worthiness Test, which was not prescribed by any ordinance, denied Petitioner's rights to initiate a zone change through the filing of its application." (Oppo. 5.)

As relevant to the writ cause of action, Petitioner alleges that "the pre-filing procedures set forth in the Memo are unlawful and invalid because Charter section 555 expressly provides that, '[p]rocedures pertaining to the preparation, consideration, adoption and amendment of the General Plan, or any of its elements or parts, shall be prescribed by ordinance, subject to the requirements of this section.'" (Pet. ¶ 23 [emphasis in original]; see Charter Section 555, opening paragraph.) "Petitioner … alleges, that the DCP utilized the prescreening 'worthiness' test, outlined in the Memo and Form 7723.1 to unlawfully avoid DCP's mandatory duty to initiate, prepare, and act upon Petitioner's GPA Request Form and zone change application." (Id. ¶ 34.) "Petitioner … alleges, that the DCP has a clear ministerial duty to at initiate Petitioner's proposal for a zone change and GPA pursuant to LAMC sections 11.5.6 and 12.32, and prepare a report recommending action." (Id. ¶ 36; see also Id. ¶¶ 42-43.) In the first cause of action for writ of mandate, Petitioner seeks a writ "commanding Respondents to initiate and cause to be filed Petitioner's GPA Request Form in conjunction with its application for a zone change." (Id. Prayer ¶ 1.)

Thus, the petition alleges that Respondent has a ministerial duty to "initiate" or consider both Petitioner's application for a zone change and Petitioner's application for a GPA. (See Pet. ¶¶ 36, 42-43.) As to the General Plan Amendment, Petitioner's arguments are not persuasive. Whether or not the prefiling procedures set forth in the Memo are inappropriate as having not been

adopted by ordinance, Charter section 555 also states that any such ordinances are "subject to the requirements of this section." The requirements of Charter section 555 and LAMC section 11.5.6B specifically authorize only the Planning Director, Planning Commission or City Council to initiate a General Plan Amendment. The Charter does not impose a duty on Respondent to initiate a GPA at Petitioner's request.

Nonetheless, this conclusion does not end the analysis of the demurrer. The petition also alleges that Respondent has a duty to process Petitioner's zone change application, and that Respondent improperly utilized the Memo and Form 7723.1 to avoid taking action on Petitioner's applications for a zone change and GPA.

Petitioner contends that Charter section 558 and LAMC section 12.32 impose a mandatory duty on Respondent to process Petitioner's zone change application. (Oppo. 5-6.) Respondent apparently concedes the point. (See Dem. 16:15-28; Reply 6.) Charter section 558(b)(1) states that a zone change "may be proposed … by application of the owner of the affected property if authorized by ordinance." After initiation, the proposed zone change "shall be referred to the City Planning Commission." (§ 555(b)(2); Resp. RJN Exh. E.) LAMC section 12.32, quoted at length above, similarly includes mandatory language (i.e. "shall") suggesting that Respondent has a ministerial duty to take action on an application for a "proposed land use ordinance" "once a complete application is received." (LAMC § 12.32C(3); Resp. RJN Exh. C.) Respondent makes no argument that Petitioner lacks authority under section 12.32B to file its zone change application.

Respondent contends that, even if Petitioner's rights have been violated by Respondent's refusal to take action on the zone change application, a writ would be "moot" or "futile" and cannot issue because the "Petition admits that a zone change application could not be granted in the absence of an amendment to the General Plan." (Dem. 16:20-27, citing Bruce v. Gregory (1967) 65 Cal. 2d 666 and Pet. ¶ 15.) It is unclear from the Petition whether in fact Petitioner concedes its zone change application would not need to be processed if a General Plan Amendment is not adopted.

In paragraph 15 of the petition, Petitioner alleges that "City is under mandate to keep its zoning consistent with the General Plan. The effect of this mandate makes a request for a zone change dependent on a GPA." (Pet. ¶ 15.) This allegation suggests that, without a GPA, Petitioner's zone change application may be denied as being inconsistent with the General Plan. However, the petition does not include all relevant information about Petitioner's zone change application and the City's General Plan, or any GPAs currently being considered by Respondent. (See Pet.

¶¶ 32-33 [referring to Local Coastal Plan updates].) Nor has Respondent requested judicial notice of such information. The court cannot determine on demurrer that a writ compelling Respondent to comply with a ministerial duty to process Petitioner's zone change application would be moot or futile.

Should Petitioner agree at the hearing that its particular zone change application requires a General Plan Amendment, the court would sustain the demurrer to the first cause of action for failure to show a clear ministerial duty. Absent such a concession, since the court cannot sustain a demurrer to part of a cause of action, the court would overrule the demurrer on that basis. In either event, the court sustains the demurrer to the first cause of action based on the statute of limitations.

Second Cause of Action – Declaratory Relief

Pursuant to the local rules which designate that Department 82 is a specialized Writs and Receivers department and not a general civil department, only a cause of action for writ of mandate is properly assigned to this department. (LASC Local Rules 2.8(d) and 2.9.) As amended for January 2020, Local Rules 2.8(d) and 2.9 do not include a claim for declaratory relief as a special proceeding assigned to the writs departments, even if joined with a petition for writ of mandate. Accordingly, the court stays the second cause of action pending resolution of the writ cause of action.

Conclusion

The demurrer to the first cause of action is sustained. Petitioner should address whether leave to amend should be granted. The second cause of action is STAYED pending resolution of the writ cause of action.

After hearing argument from both counsel, the court sustains the demurrer as to the first cause of action with thirty days' leave to amend.

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In light of the court's ruling, the hearing on the petition for writ of mandate set for November 19, 2020, is advanced to this date and ordered off calendar.

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A status conference is scheduled for October 20, 2020, at 9:30 a.m. in Department 82.

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19STCP04100 August 18, 2020
HERMOSA FUNDING, LLC vs DEPARTMENT OF CITY PLANNING, et al. 9:30 AM

Judge: Honorable Mary H. Strobel
Judicial Assistant: N DiGiambattista
Courtroom Assistant: R Monterroso

CSR: D Van Dyke/CSR 10795
ERM: None
Deputy Sheriff: None

Notice is waived.