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PLANNING DIVISION
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VIA E-MAIL AND HAND DELIVERY

Honorable Chair Carolyn Hemming and Planning Commission
c/o City Clerk
City of Pomona
505 S. Gary Avenue
Pomona, CA 91766

Re: Deficiencies in Code Amendment (Code 6899-2017) - Waste and Recycling Facilities

Dear Chair Hemming and Planning Commissioners:

We represent SA Recycling ("SA"), the owner of a scrap metal recycling facility located at 1475 E. Franklin Avenue ("Property") that has lawfully operated in the City of Pomona ("City") under a conditional use permit ("CUP") since 1986. The draft Waste & Recycling Code Amendment ("Code Amendment") before you is fatally flawed and will expose the City to unnecessary litigation and damages because of the impacts it will have on SA's lawful business operations. As currently drafted, the Code Amendment will convert SA into a nonconforming use. This will interfere with SA's lawful and vested right to operate in the City, and SA will have no choice but to file a lawsuit challenging the validity of the Code Amendment, and seek damages from the City.[1] We strongly urge the Planning Commission to include a very minor change to the Code Amendment, as described in more detail below, in order to resolve this issue. This minor change will clarify that SA's operations will remain a conforming use, while preserving the intended effect of the Code Amendment (i.e., prohibiting new recycling facilities in the City).

I. Property Background and SA's Operations.

By way of background, SA has lawfully operated in the City since 2006, and before that time, Fred and Jean Kornoff operated a trucking and recycling business on the Property. On December 10, 1986, the City adopted Resolution No. 6571, approving the CUP for the Property. The CUP states the project is "compatible with the existing and proposed development in the area" and "will produce a minimum amount of conflict with the adjoining uses." The CUP addresses the storage and loading of scrap metal, which has been dropped off and consolidated on the Property for thirty years. (Resolution No. 6571.)

[1] We request that this letter be included in the administrative record for this matter.

Now, after years of investment, operation and reliance on the vested rights bestowed upon SA by the CUP, SA will be converted into a legal nonconforming use under the Code Amendment, thereby subjecting SA to the legal nonconforming use provisions in the City's Municipal Code, including but not limited to sections 554 and .5513. This is because the Code Amendment eliminates recycling uses as a permitted use in SA's General Industrial District M-2 zone, but fails to acknowledge that certain existing facilities have vested rights to continue operating as permitted/conforming uses.

II. The Proposed Code Amendment Must Include Minor Revisions to Avoid Illegal Interference with SA's Vested Rights.

By eliminating SA's use as a permitted use from the M-2 zone while failing to acknowledge that existing permitted and vested uses can continue as conforming uses, the Code Amendment goes too far and will impose greater restrictions on SA's operations, and potentially subject SA to being illegally shut down, resulting in a compensable taking and other Constitutional violations. The Code Amendment should be clarified to state that existing recycling facilities that are legally operating pursuant to a valid CUP when the Code Amendment becomes effective will remain as permitted/conforming uses.

The change to the Code Amendment proposed by SA in order to resolve this issue is very simple. In fact, the issue can be resolved with the addition of one or two short sentences to the Code Amendment. For example, SA's concerns would be resolved if the following two sentences are added at the end of paragraph G on the last page of the Code Amendment (regarding the M-2 zone):

> "This Ordinance shall not apply to all such facilities legally operating pursuant to a valid conditional use permit on the date this Ordinance becomes effective. Those facilities shall not be deemed nonconforming as the result of this Ordinance, and shall be allowed to continue to operate in accordance with all applicable laws and permits."

Another simple option is to add the following to the City's proposed language for paragraph G on the last page of the Code Amendment regarding the M-2 zone (with SA's proposed additions shown in underline):

> "G. Waste and Recycling facilities including hazardous waste facility, automobile dismantling facility, electronic waste facility, food waste facility, green waste facility, recycling facility (excluding convenience recycling facilities), solid waste facility, construction and demolition waste facility, and pallet yards, except all such facilities legally operating pursuant to a valid conditional use permit on the date this Ordinance becomes effective, in which case this Ordinance shall

not apply and such facilities shall be governed by applicable laws and permits and shall remain as conforming uses."

In its March 8, 2017 Staff Report to the Planning Commission, the City said the Code Amendment only targets new facilities, so there should be no issue with adding either one of the above two options to the Code Amendment because they are both consistent with the City Council's direction to staff, and what staff expressed in its March 8th Staff Report.

II. The Proposed Code Amendment Amounts to an End-Run Attack on SA's CUP and Vested Right to Operate.

The Property has been operated under a valid CUP for thirty years. The City cannot restrict, interfere or terminate SA's fundamental vested rights by turning SA into a nonconforming use. "Interference with the right to continue an established business is far more serious than the interference a property owner experiences when denied a conditional use permit in the first instance. Certainly, this right is sufficiently personal, vested and important to preclude its extinction by a nonjudicial body." (*Goat Hill Tavern v. City of Costa Mesa* (1992) 6 Cal.App.4th 1519, 1529.)

When a CUP is granted, the permittee acquires a vested right that runs with the land and cannot be interfered with, revoked or terminated without due process. (*Malibu Mountains Recreation, Inc. v. County of Los Angeles* (1998) 67 Cal.App.4th 359.) Once a CUP is acquired, the power to revoke the use is limited. (*Bauer v. City of San Diego* (1999) 75 Cal.App.4th 1281, 1294.) Due process requires notice, an opportunity to be heard at a public hearing, and that the City act only upon evidence substantially supporting a finding of revocation. (Gov. Code, § 65905(a); *Malibu Mountains*, 67 Cal.App.4th at p. 367; *Bauer, supra,* 75 Cal.App.4th at p. 1294.)

There is no basis for the City to interfere with SA's vested rights under its existing CUP. Nevertheless, the proposed Code Amendment would have the effect of turning SA into a legal nonconforming use and SA will then be subject to additional restrictions and limitations, and the threat of being "phased out," or "amortized," in direct conflict with state law regarding vested rights. However, the City can avoid interfering with SA's protected property rights by revising the proposed Code Amendment as outlined above.

III. The Proposed Code Amendment Exposes the City to Constitutional Challenges and Constitutes a Compensable Taking

As discussed above, the Code Amendment would convert SA into a nonconforming use because it eliminates SA's use as a permitted use in the M-2 zone. By turning SA into a nonconforming use, it subjects SA to significant risk, and additional restrictions and limitations in the Municipal Code that are inconsistent with SA's existing CUP. It could even lead to a future determination that SA is "incompatible," and should be phased out completely. This

would be a taking without just compensation, and a violation of SA's civil rights, which will expose the City to considerable damages. "[W]hen a regulatory authority goes so far as to deprive owners of "all economically beneficial or productive use of land" there is a complete taking. . ." (*Avenida San Juan Partnership v. City of San Clemente* (2011) 201 Cal.App.4th 1256, 1272.) A compensable taking can also occur if a regulation goes too far but stops short of denying all economically viable use. (*Ibid.*)

There are three central factors to determine if a regulation goes too far and constitutes a partial taking: (1) the economic effect on the landowner; (2) the extent of the regulation's interference with investment-backed expectations; and (3) the character of the governmental action. (*Kavanau v. Santa Monica Rent Control Bd.* (1997) 16 Cal.4th 761.) Accordingly, a regulation may constitute a taking even though it does not involve a physical invasion of private property and leaves the property owner some economically beneficial use of the property. (*Id.* at pp. 774-775.) Courts also consider the following: Whether the regulation affects the existing use of the property and thus interferes with the property owner's "primary expectation," whether the regulation permits the owner to obtain a reasonable return on the investment, and whether the regulation provides owners benefits or rights that mitigate financial burdens the law has imposed. (*Kavanau, supra*, 16 Cal.4th at p. 775.) All of these factors support a case for inverse condemnation. SA's business has been in operation since the 1980s, and the Property was developed and purchased specifically as a scrap metal recycling and trucking facility in reliance on the CUP that was approved for the Property.

IV. Conclusion.

The proposed Code Amendment should be amended to include the language provided above in order to avoid interference with SA's vested right to operate. Otherwise, SA will have no choice but to protect its investment backed expectations by bringing an action for inverse condemnation, civil rights violations and additional procedural and substantive defects.

Sincerely,

Gregory P. Powers

cc: Andrew Jared, Assistant City Attorney*
Jeff Farano Sr., Esq.*

*via email only