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August 12, 2024

VIA E-MAIL

Mayor Elen Asatryan
Councilmember Dan Brotman
Councilmember Ardy Kassakhian
Councilmember Ara Najarian
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Suzie Abajian, Ph.D., City Clerk
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Re: August 13, 2024 City Council Meeting Agenda Item 9b: Proposed Amendments to Glendale Zoning Code Regarding Drive-Through Restaurants

Dear Mayor Asatryan and Honorable City Councilmembers:

This firm represents In-N-Out Burgers ("In-N-Out"), and we write on its behalf with regard to the above-referenced hearing on proposed amendments to the City of Glendale ("City") Zoning Code regarding drive-through restaurants. As the Council is aware, In-N-Out currently operates a drive-through fast-food establishment at 310 North Harvey Drive in the City.

We write to express numerous concerns about the draft amendments, particularly insofar as they propose to apply new standards for drive-through restaurants to lawfully operating pre-existing drive-through restaurants such as our client's establishment at 310 North Harvey Drive (the "Restaurant"). In-N-Out has enjoyed serving the community of Glendale from this location for nearly twenty-five (25) years (and looks forward to continuing to do so), and has significant concerns about the detrimental effect these amendments, if enacted, will have on In-N-Out's long standing business in the City. In addition, as explained below, these amendments would constitute an unconstitutional and unlawful taking of In-N-Out's property.

As an initial matter, the notice provided about these zoning amendments prior to the July 17, 2024 Planning Commission hearing was so vague in its description of the proposed amendments that

it failed to alert In-N-Out or the public that new requirements would be placed on and potentially even threaten the continued existence of longstanding, lawfully operating existing businesses. The notice provided no description of the substance of the amendments, nor any indication that the amendments would be applied retroactively to existing drive-through restaurants. As a result, In-N-Out did not become aware of the substance of the proposed amendments until August 7, when the property owner forwarded a copy of a letter it received from the City about the proposed amendments. Six days is simply not enough time for In-N-Out, and other businesses in the community, to properly react and carefully consider the significant impacts of the proposed amendments. For this reason, In-N-Out requests a continuance of at least thirty days to be able to better prepare and provide comments and relevant information to the Council prior to its acting on them. Given the lack of adequate public notice and the import of the amendments, a continuance is warranted, but In-N-Out is nonetheless submitting its preliminary comments now to make its concerns known and preserve its arguments to the best of its ability under the circumstances.

The draft amendments in question would require that pre-existing lawful drive-through establishments obtain a Conditional Use Permit by December 2029 to continue operating. See Draft Ordinance at § 30.60.030(q) (p. 44). The proposed amendments completely ignore In-N-Out's existing entitlements and development rights for the Restaurant, and the clear intent of the City going all the way back to the year 2000 to allow a drive-through restaurant at this location. In-N-Out's property rights should be respected, and the proposed amendments should be revised to exempt pre-existing lawful drive-through establishments.

Further, obtaining a Conditional Use Permit is burdensome, could trigger the California Environmental Quality Act ("CEQA"), and is particularly unreasonable for existing drive-through establishments. Under the proposed amendments, a Conditional Use Permit can only be issued if certain vague findings are made, including that the drive-through establishment has "adequate vehicle queuing distance" and will not cause "adverse impacts on the surrounding neighborhoods." Draft Ordinance at §§ 30.042.030(j)(1); (j)(2) (p. 39). As written, there is very broad discretion vested in the City to interpret and apply these vague standards and very little certainty for drive-through operators as to how these standards will be applied and therefore, whether existing drive-through establishments will be permitted to continue in operation beyond December 2029.

The City is required to provide due process protections prior to the revocation of any existing use permits, including the right to a pre-deprivation hearing. In addition, the effect of the proposed amendments in requiring a Conditional Use Permit for the continued operation of pre-existing lawful drive-through establishments is quite simply and clearly a violation of the U.S. Constitution's takings clause. As the California Supreme Court has stated: "If the law effects an unreasonable, oppressive, or unwarranted interference with an existing use… the ordinance may be invalid as applied to that property unless compensation is paid." *Hansen Brothers Enterprises, Inc. v. Board of Supervisors* (1996) 12 Cal.4th 533, 551–552. In lieu of paying just compensation, a city may also require elimination of a legally nonconforming use following a reasonable amortization period. *Tahoe Regional Planning Agency v. King* (1991) 233 Cal.App.3d 1365, 1394–1395; *United Business Com. v. City of San Diego* (1979) 91 Cal.App.3d 156, 179. In this case, the period of five years for existing drive-through establishments to obtain a CUP is not a reasonable

amortization period. In-N-Out has been operating at this location since 2000, has a lease on the current property running through 2032, and has made substantial investments in the existing structure on the property, which cannot be easily retrofitted for other uses. As a result, employing the Conditional Use Permit requirement on the Restaurant with only a five year amortization period would constitute an unconstitutional taking and damaging of In-N-Out's property in violation of the State and Federal Constitutions.

Additionally, the City proposes to apply the new CUP requirement to pre-existing drive-through establishments without conducting any analysis under CEQA, using the categorical exemption of CEQA Guidelines sections 15061(b)(3) and 15305. The asserted justification for using these exemptions is that the Conditional Use Permit requirement will not have any significant impacts on the environment because it simply calls for additional analysis of existing vehicle trips. However, there is a fair argument that the zoning amendments will cause significant environmental impacts aside from vehicle trips, particularly urban decay. As you are aware, a full environmental impact report (EIR) is required whenever there is a fair argument that a land use policy will result in a significant environmental impact. See Cal. Code Regs., tit. 14, § 15064(f)(1); *No Oil Inc. v. City of Los Angeles*, (1974) 13 Cal.3d 68. In this case, if existing drive-through operators are unable to obtain a Conditional Use Permit to continue in operation, there is a significant risk that the sites on which the drive-through establishments are located will become vacant because they are unsuitable for other uses due to their location, inability to retrofit existing structures to new uses, and so forth. A rash of vacant lots, abandoned structures, and gap-toothed storefronts can collectively result in urban decay, or "visible symptoms of physical deterioration that invite vandalism, loitering, and graffiti that is caused by a downward spiral of business closures and long-term vacancies." *Joshua Tree Downtown Business Alliance v. County of San Bernardino* (2016) 1 Cal.App. 5th 677, 685. The courts have held that urban decay is a significant environmental impact that must be analyzed when there is evidence suggesting that the social and economic effects of an action "ultimately could result in urban decay or deterioration…." *Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, 1193, 1207. Therefore, if the amendments are to be applied to existing operating establishments, the City cannot process this zoning change under a CEQA exemption but must prepare and certify a full EIR.

In summary, In-N-Out has been a committed stakeholder in the City for many years, and is gravely concerned that the proposed amendments jeopardize the Restaurant and In-N-Out's ability to do business in the City. We hope the City will pause and truly consider implementing the recommendation in this letter. In-N-Out is committed to being a community asset and a partner with the City. Therefore, we ask that the City not adopt the proposed amendments at this time, or, at a minimum, exempt the Restaurant and all pre-existing lawful drive-through establishments therefrom.

Please place this letter into the administrative record for this matter and feel free to contact me with any questions.

Very truly yours,

MILLER STARR REGALIA

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Arthur Coon, Esq. (arthur.coon@msrlegal.com)
Client