WOODRUFF, SPRADLIN & SMART
A Professional Corporation

DAVID A. DEBERRY
DIRECT DIAL: (714) 415-1088
DIRECT FAX: (714) 415-1188
E-MAIL: DDEBERRY@WSS-LAW.COM

October 11, 2017

VIA E-MAIL

Mayor Radecki and
Members of the City Council
City of Industry
15625 E. Stafford Street
City of Industry, CA 91744

Re: **City Council Agenda Item 5.2 – Ratification of Master Lease with San Gabriel Valley Water and Power**

Dear Honorable Mayor and Members of the City Council:

I am submitting these comments on the above referenced agenda item on behalf of the City of Diamond Bar ("Diamond Bar") as its City Attorney. At the outset, Diamond Bar must note that Industry's agenda and attachments are silent as to why "ratification" of these pre-existing agreements are currently before the Council. Diamond Bar can only assume that the proposed "ratification" is potentially an effort to correct Brown Act deficiencies identified in Diamond Bar's September 26, 2017 demand letter. As such, the proposed action currently before the City Council is not a "ratification" – one cannot ratify a prior illegal action – it constitutes an entirely new approval of the Master Lease.

As to this new approval, Diamond Bar once again expresses its concern that Industry is committing itself to a 450 MW solar facility on the Tres Hermanos property located within the cities of Chino Hills and Diamond Bar ("Property") without first obtaining a finding of General Plan conformance from Chino Hills and Diamond Bar and without conducting review under the California Environmental Quality Act ("CEQA"). We respectfully request that the City Council not ratify or otherwise approve the Master Lease or amendments and instead, rescind/invalidate the Master Lease and amendments providing Industry with an opportunity to ensure compliance with all applicable legal requirements concerning Industry's proposed project.

Initially, at its meeting on October 10, 2017, the Diamond Bar Planning Commission rejected as incomplete and untimely Industry's application for a General Plan conformance finding for the Property pursuant to Government Code Section 65402. The application was rejected, in significant part, because Section 65402 requires that Industry identify the purpose for acquiring the Property. Outside of stating that it is acquiring the Property for a public use and open space, Industry provided no further details. When Diamond Bar requested additional details on the proposed use, Industry's City Manager responded in writing that Industry "does not have any more definitive plans for the future use of Tres Hermanos." This statement is contradicted by the agenda item currently before the City Council, which seeks to ratify a lease and four amendments for a 450 MW solar facility ("Solar Project") on the Property that was apparently executed by Industry's City Manager beginning *over a year ago*.

This brings Diamond Bar to the primary point of submitting these comments. Pursuant to CEQA, before Industry approves any discretionary project, it must first assess and publicly disclose the project's environmental effects. The general principle is that before conducting CEQA review, agencies must not take any action that significantly furthers a project "in a manner that forecloses alternatives or mitigation measures that would ordinarily be part of CEQA review of that public project."[1] Whether or not Industry has pre-committed to the Solar Project depends on several factors, including the commitment of significant resources in shaping and accommodating the Solar Project and whether it has entered into binding agreements to go forward with the Solar Project. As defined in the CEQA guidelines, "Approval means the decision by a public agency which commits the agency to a definite course of action in regard to a project intended to be carried out by a person."

The most often cited pre-commitment case is the California Supreme Court's decision in *Save Tara v. City of West Hollywood,* wherein the Court found that West Hollywood has pre-committed to a project to construct 35 low-income housing units. Industry's commitments to the Solar Project without the benefit of a CEQA analysis bear substantial similarities to the *Save Tara* case and one could reasonably argue that Industry's level of commitment has gone even further.

It is well documented that Industry has already expended some $10 million in consultant fees shaping the Solar Project. Industry recently committed itself to spending another $41.6 million to purchase the Property upon which the Solar Project, at least in part, will be located. The fact the City Council approved the purchase prior to having the General Plan conformance findings from Chino Hills and Diamond Bar as part of its consideration, is further evidence of pre-approval commitment. The Master Lease and amendments, which have already been executed, commit Industry to leasing the Property to San Gabriel Valley Water and Power ("San Gabriel") for the Solar Project for a term of up to 65 years and San Gabriel to pay to Industry anywhere from a minimum of $2 million to $4 million annually. The Master Lease is clear, if Industry purchases the Property, it must lease it to San Gabriel and San Gabriel must use it for a Solar Project. The Master Lease thus forecloses Industry from considering any Project alternatives without San Gabriel's consent.

In addition to the above, it is clear that Industry has set its public relations scheme in motion to convince local residents that the Solar Project is better than what Chino Hills or Diamond Bar have ostensibly planned for the Property, greatly exaggerating the number of housing units that can be built on the Property.

Without benefit of any information on the possible environmental impacts of the Solar Project, the City Council is being asked to ratify actions it apparently already took once in violation of CEQA. Outside of reviewing some future environmental document, for which Industry apparently believes it is the Lead Agency and will prepare or cause to be prepared, Industry has left itself without any additional discretionary approvals. In sum, Industry has approved a binding development agreement before considering its environmental impacts.

---

[1] CEQA Guidelines, Title 14, California Code of Regulations, section 15004.

As was the case in *Save Tara,* the fact that the Master Lease permits Industry to terminate the Master Lease unless a CEQA analysis is performed within certain timelines and Industry retains its discretion to not approve the environmental document (which is simply a recitation of the law) is insufficient to save Industry from its pre-approval violation. As was stated by the Supreme Court in *Save Tara*:

> *A public entity that, in theory, retains legal discretion to reject a proposed project may, by executing a detailed and definite agreement with the private developer and by lending its political and financial assistance to the project, have as practical matter committed itself to the project. When an agency has not only expressed its inclination to favor a project, but has increased the political stakes by publicly defending it over objections, putting its official weight behind it, devoting substantial resources to it, and announcing a detailed agreement to move forward with the project, the agency will not be easily deterred from taking whatever steps remain toward the project's final approval.*

If the City Council assesses the level of commitment Industry has made to the Solar Project in the light of the above description, it must recognize that it has gone too far. As noted, Diamond Bar requests that the City Council rescind/invalidate the Master Lease and amendments. Diamond Bar further requests that the City Council direct Industry staff to work with Diamond Bar and Chino Hills and any other public agency with jurisdiction to determine who should be the CEQA Lead Agency for the Solar Project. A lease on the Property should not be considered until such time as the final environmental document has been prepared. This will provide the Industry City Council with the benefit of understanding the Solar Project's environmental impacts, possible project alternatives and mitigation, prior to irrevocably committing itself to leasing the Property for the Solar Project.

Sincerely,

WOODRUFF, SPRADLIN & SMART
A Professional Corporation

DAVID A. DEBERRY
CITY ATTORNEY
CITY OF DIAMOND BAR

cc: Mr. Dan Fox, City Manager, City of Diamond Bar
Jack Rubens, Esq.
Mark Hensley, Esq.
James Casso, Esq.