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REPORT TO THE COMMITTEE ON NATURAL RESOURCES AND CULTURE

COMMON AREA LAUNDRY ROOMS

INTRODUCTION

The Natural Resource and Culture Committee [NRC] has asked this office to perform a legal analysis of whether the City of San Diego may legally adopt an ordinance mandating the retention of multifamily Common-Area Laundry Rooms [CALR] and prohibiting the addition of in-unit laundry connections during renovations, as a method of water conservation within the City limits. We address whether such an ordinance is legally permissible and if so, with what limitations.

QUESTION PRESENTED

May the City of San Diego legally adopt an ordinance mandating the retention of CALR's and prohibiting the addition of in-unit laundry connections during renovations, as a method of water conservation within the City limits?

SHORT ANSWER

The City Council may be able to exercise its police powers to adopt an ordinance mandating the retention of CALR's and prohibiting the addition of in-unit laundry connections during renovations. However, to better insulate the proposed ordinance from a legal challenge, our office recommends that the City Council conduct the following: (1) make an independent investigation to quantify the water conversation benefit of CALR's; and (2) study the fiscal impact of the proposed ordinance upon condominium conversion developers in light of the water conservation benefit to the City of San Diego.

BACKGROUND

On June 22, 2006, the Water Department submitted a report regarding CALR's to the NRC in Council Report No. 06-086 [CALR Report]. The CALR Report, in part, stated the following:

> In 1985, the San Diego City Council officially established the City's Water Conservation Program, to reduce San Diego's dependency upon imported water. Today, the Water Conservation Program directly accounts for over 26 million gallons per day (MGD) of potable water savings per year. This savings has been achieved by creating a water conservation ethic, adopting programs, policies and ordinances designed to promote water conservation practices, and implementing comprehensive public information and education campaigns.
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> The Water Conservation Program has appeared before the City Council on numerous occasions. Perhaps the most significant date is on September 23, 1991, when the San Diego City Council joined the California Urban Water Conservation Council (CUWCC) by signing the Memorandum of Understanding (MOU) for Urban Water Conservation in California. The MOU is a collaborative effort by members of the CUWCC which commits the City to implementing BMP's as defined in the MOU. To date, implementation of recognized BMP's in water conservation has resulted in the City achieving the goal, set out in 1997, of saving 26,000 acre feet of water by 2005.
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> The City's Water Conservation Program has been approached by representatives of the Multihousing Laundry Association (MLA) regarding the effectiveness of CALR's in achieving water conservation. The MLA notes that a study by the National Research Center, Inc., indicates that CALR's save water. According to the report, residents with in-unit washers tend to do many more, smaller and less-efficient loads of laundry than residents utilizing a common area laundry room. (Cite omitted.)
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> Of concern to the MLA is the number of apartment complexes being converted to condominiums where the property owner/manager removes the CALR and installs individual washer/dryer hook-ups in each dwelling unit. As a result, the MLA

has proposed the following initiatives to promote the retention of CALR's:

1) Increase water and sewer capacity charges for apartment conversions that eliminate CALR's and install in-unit hook-ups; establish incentives for CALR construction in new development
2) Approve San Diego Municipal Code (Ordinance) changes that mandate the retention of existing CALR's.
3) Designate CALR's as a CUWCC Best Management Practice (BMP).

(See CALR Report Page 2, ¶¶1-2)

ANALYSIS

I. The City of San Diego May Adopt a Local Ordinance to Mandate Retention of CALR's as a Proper Exercise of its Police Powers.

A. The City of San Diego May Create Water Conservation Programs.

The City of San Diego, as a local water retailing agency, has the authority to create, "a water conservation program to reduce the quantity of water used by those persons for the purpose of conserving the water supplies of the public entity." *Water Code § 375 (a).* As you may be aware, the California Constitution provides cities or counties within the state with the authority to "make and enforce within [its] limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws." *Cal. Const. art. XI*, § 7; *Sherwin-Williams Co. v. City of Los Angeles*, 4 Cal. 4th 893, 897 (1993). However, this power may be exercised only within the confines of the city and may not be in conflict with the state's general laws. *Carlin v. City of Palm Springs*, 14 Cal. App.3d 706, 711 (1971).[1] In the case of water conservation, the State Legislature has declared that local water agencies may pass more stringent water conservation standards since local agencies are in the best position to regulate water conservation pursuant to public policy stated in *Cal. Const. art. X, § 2. Water Code §§380,381*.

The City of San Diego may pass an ordinance requiring retention of CALR's during condominium conversions if the proposed ordinance does in fact conserve water. The MLA has submitted reports to NRC which suggest that buildings with a CALR conserve more water. However, since the MLA has financial interest in this finding, the City Council should conduct its own investigation to verify the MLA's report that CALR's conserve water. If an independent

[1] A county has the same authority to enact regulatory ordinances within its limits. Generally speaking however, cities and counties do not exercise concurrent jurisdiction over regulatory matters. A county ordinance would generally have no binding effect in any incorporated city within that county. *Great Western Shows, Inc. v. County of Los Angeles*, 27 Cal. 4th 853, 870-871 (2002); *Ex parte Pfirrmann*, 134 Cal. 143, 145 (1901); *In re Knight*, 55 Cal. App. 511, 518 (1921).

study shows that CALR's conserve water, the City Council may use its police powers to enact an ordinance requiring the retention of a CALR for condominium conversion buildings since water conservation protects the health and safety of the citizens of the City of San Diego.

B. The Municipal Code Authorizes the City of San Diego to Regulate CALR's in Condominium Conversions.

The City of San Diego already exercises its police powers in the regulation of condominium conversions. San Diego Municipal Code Section 144.0501 permits the City Council to enact regulations that require owners to make "reasonable improvements for the health, safety, and general welfare of the public" to their structure. Therefore, the City Council has authority under its charter and municipal code to require the retention of CALR's by condominium conversion developers.

II. The City of San Diego May Not Increase Water and Sewer Capacity Fees as a Disincentive for the Elimination of CALR's.

The City of San Diego most likely does not have the legal authority to increase water and sewer capacity fees as a disincentive for condominium conversion developers from removing CALR's. Under the Mitigation Fee Act, water and sewer capacity fees cannot exceed the reasonable cost of providing the service without 2/3 vote of the electorate. *Government Code §66013(a).* Since the proposed fee is clearly designed as a means to encourage retention of CALR's, the fee would not be reasonably related to the cost of providing water service. Therefore, the City Council most likely does not have the authority to raise water capacity rates for the proposed purpose of CALR retention. In addition, as reported previously to NRC by the Water Department it is impractical to increase water capacity fees as a method to retain CALR's. (See CALR Report, Page 2, ¶¶ 4-5).

III. Legal Challenges

A. Substantive Due Process

A challenge to the proposed ordinance under the due process clause will likely fail if the proposed law is reasonably related to promotion of water conservation. The City of San Diego may not exercise its police powers in violation of the United States Constitution's and California Constitution's due process clause. Substantive due process "prevents government from enacting legislation that is 'arbitrary' or 'discriminatory' or lacks 'a reasonable relation to proper legislative purpose.'" *Kavanau vs. Santa Monica Rent Control Board* 16 Cal. 4th 761, 771 (1997); citing *Nebbia vs. New York* 291 U.S. 502, 537 (1934).

To determine if a municipality has exceeded its authority under the due process clause, it must be "fairly reasonable that the ordinance is reasonably related to the public welfare." *Associated Home Builders of the Greater Eastbay, Inc. vs. City of Livermore* 18 Cal. 3d 582,

606(1976); citing *Euclid vs. Ambler Co*. 272 U.S. 365(1926). "In deciding whether a challenged ordinance reasonably relates to the public welfare, the courts recognize that such ordinances are presumed to be constitutional, and come back before the court with every intendment in their favor." *Associated Home Builders* at 605; Citing *Lockard vs. City of Los Angeles* 33 Cal.2d. 453, 461 (1949).

Detractors may argue that the proposed ordinance unfairly limits the development of condominium conversions in the City of San Diego. In order to defeat a due process challenge, the NRC should confirm that the proposed measure does in fact conserve water. As stated earlier, the MLA, which has a financial interest in the proposed ordinance, is the only entity to present a report on the water conservation benefit from CALR's. To avoid the appearance of impropriety or discrimination against condominium conversion developers, the NRC should conduct its own investigation as to whether the proposed ordinance does in fact conserve water. After the NRC conducts its own investigation, it will be in a better position to determine if the proposed ordinance would be reasonably related to water conservation.

B. Regulatory Taking

The NRC should also study the devaluation of converted condominium units in light of the water conservation benefit from the mandatory retention of CALR's before enacting the proposed ordinance. "The Takings Clause of the Fifth Amendment, made applicable to the States through the Fourteenth, (cite omitted), provides that private property shall not be taken for public use, without just compensation." *Lingle vs. Chevron* 544 U.S. 528, 536 (2005). The United States Supreme Court has recognized that government regulation may be so onerous that it amounts to a "regulatory taking", which is compensable under the Fifth Amendment. *Pennsylvania Coal Co. vs. Mahon* 260 U.S. 393, 415 (1922).

A proposed ordinance mandating retention of CALR's could be challenged as a partial regulatory taking since the ordinance may take the retail value of having in-unit laundry facilities in the converted condominium units from developers. The United States Supreme Court has not established a "set formula" to determine when economic injuries caused by a regulatory taking require compensation from the government. *Penn Central Transportation Company vs. City of New York* 438 U.S. 104, 124 (1978); citing *Goldblatt vs. Hempstead* 369 U.S. 590, 594 (1962). A factor in determining whether a partial regulatory taking has occurred, the Court focuses on both the "character of the action and the extent of the interference with the rights." *Penn Central* at 130. The Court will look at whether, "the economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations." *Lingle* at 538-539; citing *Penn Central* at 124. Thus, the Courts will scrutinize the law, "albeit not exclusively, upon the magnitude of a regulation's economic impact and the degree to which it interferes with legitimate property interests." *Lingle* at 540.

Additional factors such as the following will assist the Court in determining whether a partial regulatory taking has occurred:

> (1) whether the regulation "interferes with the interests that are sufficiently bound up with the reasonable expectations of the claimant to constitute 'property' for Fifth Amendment purposes"; [cite omitted];
> (2) whether the regulation affects the existing or traditional use of the property and thus interferes with property owner's "primary expectation"; [cite omitted];
> (3) "the nature of the state's interest in the regulation...."; [cite omitted];
> (4) whether property owner's holding is limited to the specific interest the regulation abrogates or is broader; [cite omitted];
> (5) whether the government is acquiring "resources to permit or facilitate uniquely public functions", such as government's "entrepreneurial operations"; [cite omitted];
> (6) whether the regulation "permits the property owner to profit and obtain a 'reasonable return' on investment"; [cite omitted];
> (7) whether the regulation provides the property owner benefits or rights that "mitigate the financial impact of the regulation"; [cite omitted];
> (8) whether the regulation "prevents the best use of the land"; [cite omitted];
> (9) whether the regulation extinguishes a fundamental right of ownership; [cite omitted].
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> *Kavanau* at 775.

In our case, the NRC should also study the financial impact of the proposed ordinance on the condominium conversion developers in relationship to the CALR's water conservation benefit. At the present moment, the NRC does not know the financial impact of the proposed legislation on the retail value of the converted condominium units. The NRC should determine the financial impact that the proposed ordinance would have on developers, before taking any further legislative action. When making this determination, the NRC should also factor the amount of money the developers would save by not having the cost of furnishing in-unit laundry facilities. This information is necessary before making a determination if the ordinance would be partial regulatory taking.

As previously stated, the NRC should make an independent investigation to verify the MLA's report that the retention of CALR's improve water conversation in condominium conversions. After this advised inquiry has been made, the NRC should next determine whether the water conservation benefit of retaining CALR's outweighs the financial impact on the

developers. Once this final analysis has been made, our office would be in a better position to issue a conclusive opinion as to whether the proposed ordinance does or does not violate the Fifth Amendment of the United States Constitution.

CONCLUSION

The City of San Diego may possess the authority to pass the proposed legislation. However, the City Council should conduct an independent investigation as to whether the proposed ordinance would in fact conserve water. In addition, in order to uphold this law in Court from a Constitutional challenge**,** this office advises the City Council to conduct an investigation into the financial impact of the proposed ordinance on the condominium conversion developers. After determining the financial impact on developers, the City Council needs to establish whether the water conservation benefit of the proposed ordinance outweighs the financial impact on condominium conversion developers.

Once these steps have been taken, our office will be in a better position to determine whether the proposed ordinance would pass judicial scrutiny.

Respectfully submitted

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