

MARY JO LANZAFAME
ASSISTANT CITY ATTORNEY

HEIDI VONBLUM
DEPUTY CITY ATTORNEY

OFFICE OF

THE CITY ATTORNEY

CITY OF SAN DIEGO

JAN I. GOLDSMITH

CITY ATTORNEY

CIVIL ADVISORY DIVISION
1200 THIRD AVENUE, SUITE 1620
SAN DIEGO, CALIFORNIA 92101-4178
TELEPHONE (619) 236-6220
FAX (619) 236-7215

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REPORT TO THE COMMITTEE ON LAND USE AND HOUSING

PROPOSED CENTRE CITY PLANNED DISTRICT ORDINANCE AMENDMENTS CONCERNING HOTEL DEVELOPMENT DESIGN REVIEW.

INTRODUCTION

On October 21, 2009, the Land Use and Housing Committee [Committee] discussed Councilmember Frye's and Council President Hueso's request to amend the Centre City Planned District Ordinance [Centre City PDO] to subject downtown hotel projects consisting of 100 to 200 hotel guest rooms to design review by the Centre City Development Corporation [CCDC] Board in accordance with Process Four and appealable to the Redevelopment Agency, and to subject hotel projects consisting of 200 or more hotel guest rooms to design review by the Agency in accordance with Process Five. At the October 21, 2009 hearing, the Committee directed the City Attorney's Office to provide a legal analysis of the proposal and to prepare an ordinance for consideration. The requested draft ordinance is included in this Report as Attachment A. In addition, Councilmember Lightner discussed the possibility of extending the applicability of the proposed amendments to include all development – not just hotel development – in the downtown area.

For the reasons set forth in more detail in this Report, we conclude that the Centre City PDO may be amended, as requested, provided that there is a rational basis for requiring a higher level of design review for hotel developments. However, such an amendment would be less likely to be subject to a legal challenge if the proposed amendment was extended to apply to all downtown development. In considering the proposed amendments, this Office cautions that the purpose of the proposed design review regulations must be founded upon an appropriate use of the City's police powers.

BACKGROUND

Under the Centre City PDO, hotels are permitted by right in most downtown zoning districts. San Diego Municipal Code [SDMC] § 156.0308, Table 0308-A. However, a Centre City Development Permit is required for projects involving construction of 1,000 square feet or more of gross floor area not within an existing structure. SDMC § 156.0303(b)(1). Centre City Development Permits are issued by the CCDC President. However, the CCDC President may not issue Centre City Development Permits until all required design review approval has been obtained. SDMC § 156.0303(e)(1)(A). Currently, the CCDC President conducts design review for projects that propose less than 100,000 square feet of gross floor area and/or less than 50

dwelling units. SDMC § 156.0303(e)(1)(B)(i). For projects proposing at least 100,000 square feet of gross floor area and/or at least 50 dwelling units, the Centre City Advisory Committee [CCAC] reviews and makes a recommendation to the CCDC Board, which ultimately is responsible for the design review of the project. SDMC § 156.0303(e)(1)(B)(ii). Finally, where a project requires Redevelopment Agency review and approval for any form of agreement or financial assistance, the Redevelopment Agency has final design review approval authority for such projects. SDMC § 156.0303(e)(1)(B)(iii).

On June 24, 2009, Local 30 of Unite Here [Unite Here] submitted a letter to the Rules, Open Government and Intergovernmental Relations Committee of the San Diego City Council. This letter proposed an amendment to the Centre City PDO that would subject 100 to 200 hotel guest room projects to design review by the CCDC Board in accordance with Process Four and be appealable to the Redevelopment Agency, and that would subject 200 or more hotel guest room projects to design review by the Redevelopment Agency in accordance with Process Five. Unite Here's letter asserts that such amendments would "facilitate a more comprehensive discussion of the social and economic impacts that are unique to downtown hotel projects."

It is unclear what proponents of the proposed amendment mean by the terms "in accordance with Process Four" and "in accordance with Process Five." The current Centre City PDO does not define Process Four and Five and only references these processes in the sense that CCDC is required to administer Process Two, Three, Four, and Five applications in accordance with Chapter 12, Article 6 of the San Diego Municipal Code [Municipal Code]. Chapter 11, Article 2, Division 5 of the Municipal Code describes the discretionary decisionmaking processes. Process Two and Process Three decisions are staff-level and hearing officer, respectively, appealable to the Planning Commission. SDMC §§ 112.0504, 112.0506. Process Four decisions are made by the Planning Commission and may be appealed to the City Council. SDMC §§ 112.0507, 112.0508. For Process Five decisions, the Planning Commission generally makes a recommendation to the City Council, which then approves, conditionally approves, or denies the application. SDMC § 112.0509.

Under the Centre City PDO, in lieu of the Planning Commission, the CCDC Board hears Process Two and Three Appeals. SDMC § 156.0303(c). Process Four and Process Five decisions are not specifically defined or discussed within the Centre City PDO. Therefore, the above-discussed Citywide regulatory process would apply. As such, the proposed amendment does not correspond with the existing regulatory process under the Municipal Code. The existing Centre City PDO requires design review by the Redevelopment Agency for projects that require Redevelopment Agency (a separate legal entity) review and approval for any form of agreement or financial assistance. However, where Redevelopment Agency review and approval is not otherwise required, the City Council, rather than the Redevelopment Agency, would have jurisdiction over such land use matters. Therefore, for purposes of this discussion, it is assumed that the proponents of the proposed amendment simply intend that 100 to 200 guest room hotel projects be subject to design review by the CCDC Board with a right of appeal to the City Council, and that 200 or more guest room hotel projects be subject to design review by the City Council.

Additionally, at the October 21, 2009 Committee hearing, Councilmember Lightner mentioned that she would like to consider expanding the proposed amendment to apply not only to hotel development but to all development that falls within the criteria set forth in

Redevelopment Agency Resolution 2130, which requires design review and approval by the CCDC Board for projects proposing more than 100,000 square feet or 50 dwelling units.

DISCUSSION

The issue is whether the proposed amendment – to subject projects consisting of 100 to 200 hotel guest rooms to design review by the CCDC Board with a right of appeal to the City Council, and projects consisting of more than 200 hotel guest rooms to design review by the City Council – is legally permissible.

A. A City's Use of Its Police Power Includes Aesthetic Regulations

The City may use its police power to promote the public's health, safety, and welfare, which includes aesthetics and other quality of life concerns. *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978). Design review refers to the process by which cities and counties consider the proposed design of buildings and other developments, and then issue an approval or denial for that proposal. 1 Adam U. Lindgren et al., *California Land Use Practice* 455 (Continuing Education of the Bar 2009). Design review is a legitimate exercise of the local police power. *Briggs v. City of Rolling Hills Estates*, 40 Cal. App. 4th 637 (1995). Therefore, amending the Centre City PDO to subject development to design review would be within the City's police powers.

B. Aesthetic Regulations Must Be Rationally Related to a Legitimate Government Interest

The Fourteenth Amendment Equal Protection Clause of the United States Constitution provides that no state shall “deny to any person within its jurisdiction the equal protection of the laws.” U.S. Const., amend. XIV, §1. When no suspect class or fundamental right is involved, an action will be upheld on equal protection grounds so long as the action is rationally related to a legitimate government interest. *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976); *Christensen v. Yolo County Bd. of Supervisors*, 995 F.2d 161, 165 (9th Cir. 1993). Legislative acts that are subject to the rational relationship test are presumed valid, and such a presumption is overcome only by a “clear showing of arbitrariness and irrationality.” *Kawaoka v. City of Arroyo Grande*, 17 F.3d 1227, 1234 (9th Cir. 1994) (quoting *Hodel v. Indiana*, 452 U.S. 314, 331-32 (1981)).

A court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive. *Wal-Mart Stores, Inc. v. City of Turlock*, 483 F. Supp. 2d 987, 1009 (E.D. Cal 2006) (citing *Int'l Paper Co. v. Town of Jay*, 928 F.2d 480, 485 (1st Cir. 1991)). However, even with a rational basis, an equal protection challenge can be based on a claim that the proffered rationale for the action is pretextual if there is evidence that the City's asserted rationale is pretextual. See *Squaw Valley Dev. Co. v. Goldberg*, 375 F.3d 936, 945 (9th Cir 2004); *Lockary v. Kayfetz*, 917 F.2d 1150, 1155 (9th Cir. 1990).

The proposed amendment would subject hotel development to a greater level of design review than other similar development, in that hotel development would be subject to appeal to or approval by the City Council. To prevail on an equal protection claim, the record must contain

information that the heightened level of design review is rationally related to a legitimate government interest, such as aesthetics or other quality of life concerns.

To strengthen the defensibility of an equal protection challenge, the City Council may wish to consider extending the proposed amendment to apply to all development greater than 100,000 square feet of gross floor area and/or 50 dwelling units. This suggestion is consistent with the comments by Councilmember Lightner at the October 21, 2009 Committee hearing. Under this option, all development greater than 100,000 square feet and/or 50 dwelling units would be subject to design review by the CCDC Board with an appeal to the City Council. Any potential equal protection challenge to the ordinance would likely be eliminated because the higher level of design review would be imposed on all development over a certain size. However, a rational basis for the legislation still would need to be included in the record.


While the higher level of design review would apply to larger developments (more than 100,000 square feet and/or 50 dwelling units) and not to smaller developments, a rational basis to support that distinction could easily be made as larger buildings tend to have greater adverse effects on the aesthetic quality and visual character of the community. Therefore, an alternative to more broadly regulate larger developments within the Centre City is shown in Attachment B.

We caution, however, that while a city may use its police power, such as design review, to regulate private activity to promote the public health, safety, and welfare, it is inappropriate to use the design review context to address other non-design related concerns. *See Friends of Davis v. City of Davis*, 83 Cal. App. 4th 1004, 1012-1013 (2000); 1 Adam U. Lindgren et al., *California Land Use Practice* 461 (Continuing Education of the Bar 2009). Based on the assumptions discussed above and so long as the record contains a factual basis of the City Council's intention to promote the public's health, safety, and welfare, the Centre City PDO could be amended as shown in Attachment A.

CONCLUSION

The Centre City PDO may be amended as requested provided that a rational basis is set forth for requiring a higher level of design review for hotel developments that is related to aesthetic regulation. However, the amendment contained in Attachment B requiring all large-scale downtown development to be subject to a higher level of design review, would strengthen the City's position if challenged.

JAN I. GOLDSMITH
City Attorney

By: 
Heidi K. Vonblum
Deputy City Attorney

HKV:js
Attachment
RC-2009-32

ATTACHMENT "A"
DRAFT ORDINANCE

§156.0303 Administration and Permits

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- (e) *Centre City Development Permit Process*
- (1) Review Procedures. *Centre City Development Permits* shall be subject to the following rules:
 - (A) [No change.]
 - (B) *Design Review*. The Centre City Development Corporation shall serve as the *Design Review* board for Centre City projects, subject to the following thresholds and procedures for review and approval of such projects.
 - (i) [No change.]
 - (ii) Projects containing 100,000 square feet of *GFA* and/or 50 *dwelling units* or greater or containing 100 to 200 hotel guest rooms shall be reviewed and approved by the *CCDC* Board of Directors. The Centre City Advisory Committee (*CCAC*), or other designated community planning group, shall also review the project and make a recommendation to the Board. For projects consisting of 100 to 200 hotel guest rooms, the decision of the *CCDC* Board of Directors shall be appealable to the City Council.
 - (iii) Projects that require Redevelopment Agency review and approval for any form of agreement or financial assistance shall also be reviewed and approved by the Redevelopment Agency, which shall have the final *Design Review* approval authority for such projects.
 - (iv) Projects consisting of more than 200 hotel guest rooms shall also be reviewed and approved by the City Council, which shall have the final *Design Review* approval authority for such projects.

ATTACHMENT "B"
DRAFT ORDINANCE

§156.0303 Administration and Permits

- (e) *Centre City Development Permit Process*
- (1) Review Procedures. *Centre City Development Permits* shall be subject to the following rules:
 - (A) [No change.]
 - (B) *Design Review*. The Centre City Development Corporation shall serve as the *Design Review* board for Centre City projects, subject to the following thresholds and procedures for review and approval of such projects.
 - (i) [No change.]
 - (ii) Projects containing 100,000 square feet of *GFA* and/or 50 *dwelling units* or greater shall be reviewed and approved by the *CCDC* Board of Directors. The Centre City Advisory Committee (*CCAC*), or other designated community planning group, shall also review the project and make a recommendation to the Board. The decision of the *CCDC* Board of Directors shall be appealable to the City Council.
 - (iii) [No change.]