

THE CITY ATTORNEY

CITY OF SAN DIEGO

Jan I. Goldsmith

CITY ATTORNEY

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

January 20, 2011

REPORT TO THE HONORABLE
MAYOR AND CITY COUNCIL

PROPOSED AMENDMENTS TO THE CENTRE CITY, GASLAMP QUARTER, AND
MARINA PLANNED DISTRICT ORDINANCES, THE LAND DEVELOPMENT CODE,
AND LOCAL COASTAL PROGRAM TO REQUIRE A SITE DEVELOPMENT PERMIT
FOR DOWNTOWN HOTEL PROJECTS

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, Gaslamp Quarter, and Marina Planned District Ordinances (Downtown PDOs) 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 Redevelopment Agency in accordance with Process Five.¹ 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. As directed, on February 5, 2010, this Office issued a Report to the Committee on Land Use and Housing and attached a draft ordinance.² However, at the May 19, 2010 Committee hearing, rather than discussing a design review requirement for hotel projects, the Committee discussed a development permit requirement for hotel projects, and directed the City Attorney's Office to prepare an ordinance that would require a Site Development Permit (SDP) decided in accordance with Process Four for downtown hotel projects consisting of 100 to 200 hotel guest rooms, and a Planned Development Permit decided in accordance with Process Five for downtown hotel projects consisting of 200 or more hotel guest rooms, with the CCDC Board acting in lieu of the Planning Commission in both cases. The Committee's motion provided that the intent of the ordinance would be to consider hotel developments "as they impact land use considerations such as noise, traffic, air quality and aesthetics, as well as consistency with other elements of the General Plan, including the Economic Prosperity Element."

¹ The City Council, rather than the Redevelopment Agency, would be the appropriate entity to have jurisdiction over such land use matters. However, because that proposal is not before the Council at this time, the distinction is not relevant for purposes of this discussion.

² Due to the more recent direction from the Committee, the proposed Ordinance has changed since this Office issued its February 5, 2010 Report. Therefore, most of that Report is inapplicable to the Ordinance now being considered by the City Council.

San Diego Municipal Code (SDMC) section 151.0202 requires that the “establishment, repeal, change in boundaries or change in development controls of a planned district may be initiated . . . [by] [t]he City Council or the Planning Commission . . . by resolution . . . [or by] [p]roperty owners that may be affected by the planned district regulations . . . [by] fil[ing] a petition with the City Manager.” Since the proposed changes to the Downtown PDOs would “change . . . [the] development controls of a planned district,” on September 14, 2010, the City Council held a hearing to determine whether to initiate the amendments. At the hearing, Councilmembers Frye and Hueso stated that the intent of the ordinance was to provide an opportunity to involve additional stakeholders in the development of downtown in front of elected decision makers. The City Council also heard public testimony from a variety of stakeholders including the business community, labor organizations, environmental organizations, and other interested individuals and organizations. Then, the City Council voted 6-2 to initiate “amendments to the Land Development Code and Centre City, Marina, and Gaslamp Quarter Planned District Ordinances necessary to require an SDP in accordance with Process Four for downtown hotel projects with 100 to 200 rooms and to require an SDP in accordance with Process Five for hotel projects with 200 or more rooms, with the CCDC Board acting in lieu of the Planning Commission.”

Accordingly, this Office has drafted an ordinance attached to this Report as Attachment A (the Ordinance). For the reasons set forth in more detail in this Report, we conclude that the Ordinance could survive a legal challenge so long as evidence is set forth in the record showing how the Ordinance reasonably relates to a land use issue and that there is a rational basis for applying it to downtown hotel development. However, this Office cautions that certain goals that may be wage-related are not an appropriate basis for the Ordinance.

BACKGROUND

Under the existing Municipal Code, CCDC is responsible for the administration of planning and zoning for the City within the Downtown PDOs. SDMC §§ 156.0304(a); 157.0103; 1511.0201(a). Currently, hotels are generally permitted by right in most downtown zoning districts.³ See SDMC §§ 156.0308, Table 0308-A; 157.0201(b); 1511.0202(a); 1511.0203; 1511.0301(e)(4)-(5). Process Four decisions are made by the Planning Commission and may be appealed to the City Council. SDMC §§ 112.0507; 112.0508; 156.0304(c)(4). Process Five

³ In the Centre City Planned District, although a Centre City Development Permit is required for “construction with 1,000 square feet or more of *gross floor area* not within an existing *structure*,” hotels are otherwise permitted by right in the Core (C), Neighborhood Mixed Use Center (NC), Employment/Residential Mixed Use (ER), Ballpark Mixed-Use (BP), Waterfront/Marine (WM), Mixed Commercial (MC), Public/Civic (PC), and Convention Center/Visitor (CC) base districts. SDMC §§ 156.0304(b)(1); 156.0308, Table 156-0308-A. In the Gaslamp Quarter Planned District, although a Gaslamp Quarter Development Permit is required for “new construction involving 1,000 square feet or more of *gross floor area* (GFA) not within an existing *building envelope*,” neither a Neighborhood Use Permit, Conditional Use Permit, nor SDP is currently required for hotel development. SDMC § 157.0201(b). Similarly, in the Marina Planned District, although a Marina Planned District Permit is required prior to issuance of any building permit, a Conditional Use Permit is not currently required for hotel development, and additionally, certain types of hotel uses are permitted in specified areas. SDMC §§ 1511.0202(a), 1511.0203, and 1511.0301(e)(4)-(5).

decisions are made by the City Council, generally with a recommendation from the Planning Commission. SDMC §§ 112.0509; 156.0304(c)(5).

Under the Ordinance, an SDP decided in accordance with Process Four would be required for downtown hotel projects with 100 to 200 rooms and an SDP decided in accordance with Process Five would be required for hotel projects with greater than 200 rooms. However, under the Ordinance, the CCDC Board would act in lieu of the Planning Commission, and therefore, the decision whether to grant an SDP would be made by the CCDC Board and any appeal of that decision would be made to the City Council for a hotel project with 100 to 200 rooms, and by the City Council, generally with a recommendation from the CCDC Board, for a hotel project with greater than 200 rooms.

DISCUSSION

I. THE CITY'S ASSIGNMENT OF THE FUNCTIONS OF THE PLANNING AND ZONING LAW

State law requires each city and county to establish a "planning agency with the powers necessary to carry out the purposes" of the planning and zoning law. Cal. Gov't Code § 65100. The legislative body of a local agency "shall by ordinance assign the functions of the planning agency to a planning department, one or more planning commissions, administrative bodies or hearing officers, the legislative body itself, or any combination thereof, as it deems appropriate and necessary." *Id.* One or more planning commissions may be created "which shall report directly to the legislative body" and if it creates more than one planning commission, "the legislative body shall prescribe the issues, responsibilities, or geographic jurisdiction assigned to each commission." Cal. Gov't Code § 65101(a).

The City Council currently has assigned most of the functions of its planning agency with respect to downtown development to CCDC. However, the City Council may also assign any of those functions to itself. Cal. Gov't Code § 65100. Therefore, the Ordinance, which assigns a portion of the City's planning agency with respect to downtown hotel development to the City Council does not conflict with the state's planning and zoning laws. Moreover, the Ordinance provides for the CCDC Board to act "in lieu of the Planning Commission." In doing so, the Ordinance essentially establishes the CCDC Board as another Planning Commission and "prescribe[s] the issues, responsibilities . . . [and] geographic jurisdiction assigned" to it, which is also permissible under the state's planning and zoning laws. Cal. Gov't Code § 65101(a).

II. THE CITY'S POLICE POWERS

"A city's power to enact zoning regulation derives from the police power and, as such, zoning regulations must be reasonably necessary and reasonably related to the health, safety, morals, or general welfare of the community." *Friends of Davis v. City of Davis*, 83 Cal. App. 4th 1004, 1012 (2000). A "local land use ordinance falls within the authority of the police power if it is reasonably related to the public welfare." *Associated Home Builders of the Greater Eastbay, Inc. v. City of Livermore*, 18 Cal. 3d 582, 607 (1976). Courts give great deference to an agency's determination that a zoning action is related to the public welfare and will uphold a city's land use laws "if it is fairly debatable that the restriction in fact bears a reasonable relation to the general welfare." *Id.* at 601.

Here, the Ordinance would require downtown hotel development with greater than 99 guest rooms to obtain an SDP. Where downtown hotel development can currently occur without any discretionary hearings before the City Council, under the Ordinance, some downtown hotel development projects would either be appealable to, or require approval from, the City Council.

Zoning ordinances regulate the use and intensity of land. *See* Cal. Gov't Code § 65850. Specifically, the City's zoning ordinances "set[] forth the procedures used in the application of land use regulations, the types of review of *development*, and the regulations that apply to the use and *development* of land in the City of San Diego." SDMC § 111.0102. Furthermore, the intent of the City's zoning ordinance is to "facilitate fair and effective decision-making and to encourage public participation." *Id.* Additionally, zoning ordinances implement an agency's general plan, which is a "comprehensive, long-term general plan for the *physical development* of the . . . city . . ." Cal. Gov't Code § 65300 (emphasis added). Specifically, the City's General Plan is the City's "constitution for development" and "embodies public policy for the *distribution of future land use*, both public and private." City of San Diego General Plan at SF-2 (Mar. 2008) (emphasis added).

It may be argued that the Ordinance is not within the City's police power because it is not reasonably related to the general welfare in the context of land use because there has been testimony related to hotel worker wages and benefits. However, an ordinance that has an incidental effect on competition does not render arbitrary an ordinance that was enacted for a valid purpose. *Wal-Mart Stores, Inc. v. City of Turlock*, 138 Cal. App. 4th 273, 302 (2006). Furthermore, even when the regulation of economic competition can be reasonably viewed "as a direct and intended effect of a zoning ordinance or action, so long as the primary purpose of the ordinance or action – that is, its principal and ultimate objective – is not the impermissible *private* anticompetitive goal of protecting or disadvantaging a particular favored or disfavored individual, but instead is the advancement of a legitimate *public* purpose . . . [,] the ordinance reasonably relates to the general welfare of the municipality and constitutes a legitimate exercise of the municipality's police power." *Hernandez v. City of Hanford*, 41 Cal. 4th 279, 296-97 (2007). Here, so long as there is a legitimate public purpose for the Ordinance, even if it would have an incidental effect on competition, it nonetheless would likely be valid.

However, this Office cautions that evidence showing how the Ordinance reasonably relates to the general welfare should relate to land use and should be clearly articulated into the record. This Office also cautions against relying on the goal of achieving better wages for hotel workers as a basis for the Ordinance. Although ensuring consistency with the City's General Plan Economic Prosperity Element is a legitimate exercise of the City's zoning power, the Economic Prosperity Element's relationship to zoning must be understood when providing evidence in the record related to the purpose of the Ordinance.

As discussed above, the City's General Plan relates to the "*physical development* of the . . . city," is the "constitution for development," and "embodies public policy for the *distribution of future land use*." Cal. Gov't Code § 65300 (emphasis added); General Plan at SF-2 (emphasis added). The general plan expresses the community's development goals and embodies public policy relative to the distribution of future land uses, both public and private. Governor's Office of Planning and Research, *State of California General Plan Guidelines* at

10 (Oct. 2003). State law mandates the inclusion of certain elements into a general plan, but also explicitly authorizes a city to adopt “other elements . . . which, in the judgment of the legislative body, *relate to the physical development* of the . . . city.” Cal. Gov’t Code § 65303 (emphasis added). The Governor’s Office of Planning and Research’s (OPR) General Plan Guidelines (General Plan Guidelines) discuss a range of common optional elements, including an economic development element. The General Plan Guidelines state that an effective economic development element establishes a “consistent set of policies that provide general direction to local government on how the community can focus resources to retain local business, attract new industries, support the tax base, and sustain the ability to provide public services for current and future residents” and that “[c]onsideration should be given during the preparation of the element to the cumulative effectiveness of *the integration of policies central to land use, circulation, and public facilities.*” General Plan Guidelines at 109 (emphasis added). The City’s Economic Prosperity Element explains that it “links economic prosperity goals with land use distribution and employment land use policies.” General Plan at EP-4. It also states that it “expands the traditional focus of a general plan to include . . . policies that have a less direct effect on land use, but are designed to achieve a rising standard of living.” *Id.* at EP-5.

However, to the extent that the Economic Prosperity Element seeks to achieve a rising standard of living, that goal must be viewed in the context of what the general plan is, which is a land use planning document. Thus, where the Economic Prosperity Element identifies goals related to “[a] higher standard of living through self-sufficient wages and an increase in citywide real median income per capita,” and “an increase in the number of quality jobs for local residents, including middle-income employment opportunities with career ladders,” those goals must be viewed in the context of how those goals can be achieved through land use regulation. *Id.* at EP-20-EP-21.

This Office advises that the purpose of the Ordinance relate to the regulation of land use. So that the Ordinance can be reasonably related to a legitimate land use purpose, it is important to understand how the Ordinance will help achieve that goal. Thus, when articulating the purpose of the Ordinance in the record, this Office advises that the City Council understand how the Ordinance may or may not be implemented. *See* Section IV, below, for additional discussion related to implementation of the Ordinance.

III. EQUAL PROTECTION

It may be argued that the Ordinance violates the equal protection clauses of the constitutions of the United States and California. 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. The standard of review under the California Constitution’s Equal Protection Clause is the same as that under the United States Constitution’s Equal Protection Clause. *Edelstein v. City & County of S.F.*, 29 Cal. 4th 164, 168 (2002). When an action involves social and economic policy, and neither targets a suspect class nor impinges on a fundamental right, it is reviewed according to the “rational basis” standard.⁴ *RUI One Corp. v. City of Berkeley*, 371 F.3d 1137, 1156 (9th Cir. 2004). Under the “rational basis” standard, an action will be upheld on equal protection grounds so long as the

⁴ For purposes of this Report, it is assumed that conditions would not be imposed on a discretionary permit based on a suspect class and that imposed conditions would not impinge on a fundamental right.

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)). Moreover, courts are sensitive to the fact that ““reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind,”” and therefore, the legislature is ““allowed leeway to approach a perceived problem incrementally.”” *RUI One*, 371 F.3d at 1155 (citing *F.C.C. v. Beach Commc'ns, Inc.*, 508 U.S. 307, 316 (1993)).

The Ordinance would subject downtown hotel development to a discretionary review process, where other downtown development and other hotel developments not located within the downtown area, would not be subject to such a process. To prevail on an equal protection claim, the record must contain information that additional discretionary review is rationally related to a legitimate government interest. Land use plan consistency and traffic and air pollution prevention are legitimate state interests. *Wal-Mart Stores, Inc. v. City of Turlock*, 483 F. Supp. 2d 987, 1006 (E.D. Cal. 2006). Rational basis review does not require the government’s action actually advance its state purposes, but merely that the government could have had a legitimate reason for acting as it did. *Id.* at 1008-09 (citing *Currier v. Potter*, 379 F.3d 716, 732 (9th Cir. 2004)). As discussed above in the Introduction of this Report, the Committee stated that the purpose of the Ordinance is to address noise, traffic, air quality, aesthetics, and general plan consistency issues. Requiring a discretionary permit which would result in a public hearing, or an appeal, before an elected decision-making body that could result in identification and mitigation of these land use issues as they pertain to individual downtown hotel developments would also likely be found to be rationally related to achieving the objectives of the Ordinance.

However, as stated above, this Office recommends that the City Council provide evidence in the record to better articulate the land use issues it seeks to regulate through the Ordinance and how the Ordinance relates to addressing those land use issues. Additionally, as discussed above, when providing evidence in the record related to the land use issues the Ordinance is intended to address, it is important to understand how the Ordinance may or may not be implemented. See Section IV, below, for a discussion related to implementation of the Ordinance.

IV. IMPLEMENTING THE ORDINANCE

Although some Councilmembers stated at the September 14, 2010, City Council hearing that the Ordinance would not relate to project labor agreements and worker wages, there was nonetheless public testimony that the Ordinance would give the City Council a tool to ensure that hotel projects are consistent with the Economic Prosperity Element. Specifically, at the various public hearings, there has been testimony related to the goals and policies in the Economic Prosperity Element and their link to wages and benefits. Even though the intent of the Ordinance may not specifically be to address wage issues, it is important to understand the limitations associated with implementation of the Economic Prosperity Element through the Ordinance, specifically, the types of conditions that could be imposed on an SDP for downtown hotel development.

A. Power to Impose Conditions

Local agencies derive the power to impose conditions of approval from a variety of powers, including the police power and the City's general plan. *See* Continuing Education of the Bar, California Land Use Practice § 12.5. Here, the Ordinance would require an SDP for downtown hotel development. The purpose of an SDP is to "establish a review process for proposed *development* that, because of its site, location, size or some other characteristic, may have significant impacts on . . . the surrounding area" and to "apply site-specific conditions as necessary to assure that the *development* does not adversely affect the applicable *land use plan* and to help ensure that all regulations are met." SDMC § 126.0501. Accordingly, conditions may be imposed on an SDP for a downtown hotel project to ensure that the project does not adversely affect the applicable land use plan, which includes the City's General Plan. SDMC § 113.0103. However, with respect to any future conditions imposed on an SDP for downtown hotel development, the question will be how those conditions ensure that a particular hotel development will not "adversely affect" the City's General Plan, or ensure that "all regulations are met."

To understand how a condition of approval ensures that a particular project does not adversely affect the general plan, we look to what a general plan is and what it means to ensure that a project "does not adversely affect" it. Determining a project's adverse affect on the general plan can be viewed in terms of a project's consistency with the general plan. A project is consistent with the general plan "if, considering all its aspects, it will further the objectives and policies of the general plan and not obstruct their attainment." General Plan Guidelines at 164 (citing 58 Op. Cal. Att'y Gen. 21, 25 (1975)). A project must be "in agreement or harmony" with the general plan; however, it "need not be in perfect conformity with each and every [general plan] policy" since "no project [can] completely satisfy every policy stated in [a general plan]." *Friends of Lagoon Valley v. City of Vacaville*, 154 Cal. App. 4th 807, 817 (2007); *Sequoyah Hills Homeowners Ass'n v. City of Oakland*, 23 Cal. App. 4th 704, 719 (1993). In determining a project's consistency with a general plan, the "nature of the policy and the nature of the inconsistency are critical factors to consider." *Families Unafraid to Uphold Rural El Dorado County v. Bd. of Supervisors*, 62 Cal. App. 4th 1332, 1341 (1998). Courts distinguish between policies that are "amorphous in nature" or afford officials discretion and policies that are "fundamental, mandatory and specific." *Id.* at 1341-42. Furthermore, a city's finding that a project is consistent with the general plan "can be reversed only if it is based on evidence from which no reasonable person could have reached the same conclusion." *A Local & Reg'l Monitor v. City of L.A.*, 16 Cal. App. 4th 630, 648 (1993).

At the prior public hearings, public testimony was heard related to the need for downtown hotel projects to be consistent with the Economic Prosperity Element, and specifically, the policies of the Economic Prosperity Element related to quality jobs. Economic Prosperity Element Policy EP-E.1 states "[e]ncourage the retention and creation of middle-income employment by . . . [s]upporting the creation of higher quality jobs in low-paying industries (such as visitor, entertainment and amusement)," Policy EP-E.3 states "[s]upport the creation of higher quality jobs with advancement opportunities and self-sufficient wages," and Policy EP-I.1 states "[d]evelop a priority ranking system for Transient Occupancy Tax projects and programs [and] [i]nclude *consideration* of the . . . [t]he creation of middle-income employment opportunities, and programs to assist businesses which offer sustainable wages and

demonstrate the use of training or other programs resulting in career ladders for its employees” in the ranking system.⁵ General Plan at EP-23, EP-24, EP-29 (emphasis added).

Some public testimony has suggested that a hotel project with low-paying jobs would be inconsistent with the Economic Prosperity Element. Notwithstanding that a downtown hotel project – or any project – could be inconsistent with the General Plan for other reasons, it would not necessarily be inconsistent with the policies in the Economic Prosperity Element identified above. The policies are arguably amorphous in that they “encourage,” “support,” and call for “consideration,” and thus, are not mandatory. Rather than setting forth a requirement, Policy EP-E.1 “encourages” middle-income employment through “support” for high quality jobs, Policy EP-E.3 refers to “support” for higher quality jobs, and Policy EP-I.1 refers to “consideration” of the creation of middle-income employment opportunities in developing a priority ranking system for Transient Occupancy Tax projects. Allowing a hotel development that does not create middle-income employment is not necessarily in conflict with a policy of encouraging and supporting high quality jobs with self-sufficient wages.

On the other hand, even if a hotel project with low-paying jobs were found to be inconsistent with the Economic Prosperity Element policies, this Office again cautions that these policies must be viewed in the context of how they relate to the physical development of land since they are contained within the City’s General Plan. Therefore, for example, a general plan policy that calls for support for the creation of higher quality jobs may be implemented by distributing land uses in a manner that promotes uses that tend to result in higher quality jobs or providing infrastructure that supports land uses that tend to result in higher quality jobs. Although there is no case law specifically on point, it is difficult to say how such a policy could be implemented through project-specific permit conditions that are related to the project’s physical development, and this Office cautions that imposing conditions related to wages in a discretionary permit would be subject to a legal challenge.⁶ Section IV.B, below, also discusses other legal issues associated with the imposition of development permit conditions related to wages.

B. Wage-Related Permit Conditions and Equal Protection

When imposing conditions on a permit, the City must continue to ensure that its actions do not violate the equal protection clauses of the constitutions of the United States and California. As discussed above, when an action neither targets a suspect class nor impinges on a fundamental right, it is reviewed under the “rational basis” standard. *RUI One*, 371 F.3d at 1156.

⁵ According to the City’s 2010 General Plan Monitoring Report, a priority ranking system for Transient Occupancy Tax projects and programs has not been established. City of San Diego, 2010 General Plan Monitoring Report, adopted December 6, 2010 by Resolution No. 306419.

⁶ While regulating wages through a discretionary land use approval would likely be subject to a legal challenge, such regulation may be possible outside of the land use approval process. Existing state law regulating wages, hours, and working conditions for employees does not “restrict the exercise of local police powers [over those matters] in a more stringent manner.” *See* Cal. Lab. Code § 1205(b). If in the future, the City adopted an ordinance regulating wages for downtown workers, or any other class of workers within the city, then compliance with such a regulation could be required absent any discretionary development permit approval. As such an Ordinance has not been proposed, this Office has not fully reviewed the legality of such an ordinance. Such a proposal would require more specific detail before this Office can provide a legal analysis.

Thus, if a condition is imposed on one development project and not another, the distinction must be rationally related to a legitimate government interest. *City of New Orleans*, 427 U.S. at 303; *Christensen*, 995 F.2d at 165. “The equal protection guarantee protects not only groups, but individuals who would constitute a ‘class of one.’” *Squaw Valley Dev. Co. v. Goldberg*, 375 F.3d 936, 944 (9th Cir. 2004) (citing *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000)). A “‘class of one’ equal protection claim is sufficient if the plaintiff alleges that (1) the plaintiff was treated differently from other similarly situated persons, (2) the difference in treatment was intentional, and (3) there was no rational basis for the difference in treatment.” *Las Lomas Land Co., LLC v. City of L.A.*, 177 Cal. App. 4th 837, 858 (2009).

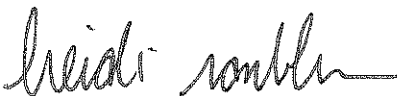
Imposing conditions related to wages paid to hotel workers for one downtown hotel development project and not another could result in equal protection challenges. As discussed throughout this Report, any rational basis for imposing such conditions should be based on the physical development of the hotel project. To avoid such potential legal issues, a more comprehensive, evenly-applied approach, outside of the development review process context, could be considered. As such an ordinance has not been proposed, this Office has not fully reviewed the legality of such an approach. However, if directed, this Office can provide legal analysis on that issue.

CONCLUSION

The Ordinance is permissible under the state’s planning and zoning laws. Whether the Ordinance is within the City’s police powers and whether it could survive an equal protection challenge depends on whether there is evidence in the record to show how it is reasonably related to a land use purpose and that there is a rational basis for applying the regulations contained in the Ordinance to downtown hotel development. However, in setting forth evidence, it is important for the City Council to understand how the Ordinance can be implemented to address any identified issues so that the Ordinance can be reasonably related to the legitimate land use goals sought to be achieved.

Respectfully submitted,

JAN I. GOLDSMITH, City Attorney

By: 
Heidi K. Vonblum
Deputy City Attorney

Attachment A

ORDINANCE NUMBER O-_____ (NEW SERIES)

DATE OF FINAL PASSAGE _____

AN ORDINANCE AMENDING CHAPTER 15, ARTICLE 6, DIVISION 3 OF THE SAN DIEGO MUNICIPAL CODE BY AMENDING SECTIONS 156.0304 AND 156.0308, AND TABLE 156-0308A; AMENDING CHAPTER 15, ARTICLE 7, DIVISION 2 BY AMENDING SECTION 157.0201; AMENDING CHAPTER 15, ARTICLE 11, DIVISION 2 BY AMENDING SECTION 1511.0203; AND AMENDING CHAPTER 15, ARTICLE 11, DIVISION 3 BY AMENDING SECTION 1511.0301, ALL PERTAINING TO DOWNTOWN HOTEL DEVELOPMENT.

BE IT ORDAINED, by the Council of the City of San Diego as follows:

Section 1. That Chapter 15, Article 6, Division 3 of the San Diego Municipal Code is amended by amending sections 156.0304 and 156.0308, and Table 156-0308A to read as follows:

§156.0304 Administration and Permits

- (a) [No change in text.]
- (b) Permit Required

The following permits are subject to the *development* review and permit procedures in this Article: Centre City Development Permits, Neighborhood Use Permits, Conditional Use Permits, Coastal Development Permits, Site Development Permits, Planned Development Permits, and Variances.

(1) through (3) [No change in text.]

- (4) Site Development Permit

A Site Development Permit decided in accordance with Process Four is required for *development* of a *hotel or motel* with 100 to 200 *guest rooms*, except that the *CCDC Board* shall act in lieu of the Planning Commission. A Site Development Permit decided in accordance with

Process Five is required for *development* of a *hotel* or *motel* with greater than 200 *guest rooms*, except that the *CCDC Board* shall act in lieu of the Planning Commission.

§156.0308 Base District Use Regulations

- (a) [No change in text.]
- (b) *Previously Conforming Land Uses*

Land uses that were legally established under previous regulations but that do not conform to the land use regulations of this Article may continue to exist and operate pursuant to Chapter 12, Article 7, Division 1 of the Land Development Code, with the following exceptions: (1) the *gross floor area* of *previously conforming* uses may be expanded up to 100 percent through a Neighborhood Use Permit, and (2) expansion or enlargement of *previously conforming hotels* or *motels* with greater than 100 *guest rooms* or that would result in greater than 100 *guest rooms* is subject to Section 156.0304(b)(4).

Table 156-0308A: CENTRE CITY PLANNED DISTRICT USE REGULATIONS														
LEGEND: P = Permitted by Right; C = Conditional Use Permit Required; -- = Use Not Permitted; L = Limited Use; N = Neighborhood Use Permit Required; S = Site Development Permit Required														
Use Categories/ Subcategories	C	NC	ER	BP	WM ⁹	MC	RE	I ⁹	T ⁹	PC	OS	CC ⁹	Additional Regulations	<i>Main Street/ Commercial Street/Emp- loyment Required Overlays</i>
Public Park/Plaza/Open Space through Retail Sales [No change in text.]	[No change in text.]													
Commercial Services														

Animal Grooming & Veterinary Offices through Radio and Television Studios [No change in text.]	[No change in text.]														
Visitor Accommodations															
<i>Hotels and Motels</i>	S	S ⁵	S	S	S	S	--	--	--	S	--	S	156.0304(b)(4)	CS, E	
Separately Regulated Commercial Service Uses through Other Use Requirements, Temporary Uses [No change in text.]	[No change in text.]														

Footnotes to Table 156-0308A

1 through 4 [No change in text.]

5 Requires active ground-floor uses along *street frontages*.

6 through 12 [No change in text.]

Table 156-0308B [No change in text.]

Section 2. That Chapter 15, Article 7, Division 2 of the San Diego Municipal Code is amended by amending section 157.0201 to read as follows:

§157.0201 Gaslamp Quarter Approvals and Permits

(a) [No change in text.]

(b) Permits

(1) through (3) [No change in text.]

(4) Site Development Permit

(A) through (B) [No change in text.]

(C) A Site Development Permit decided in accordance with

Process Four is required for *development* of a *hotel* or *motel*

with 100 to 200 *guest rooms*, except that the CCDC Board of

Directors shall act in lieu of the Planning Commission. A Site Development Permit decided in accordance with Process Five is required for *development* of a *hotel* or *motel* with greater than 200 *guest rooms*, except that the CCDC Board of Directors shall act in lieu of the Planning Commission.

- (D) Expansion or enlargement of *previously conforming hotels* or *motels* with greater than 100 *guest rooms* or that would result in greater than 100 *guest rooms* is subject to Section 157.0201(b)(4)(C).

Section 3. That Chapter 15, Article 11, Division 2 of the San Diego Municipal Code is amended by amending section 1511.0203 to read as follows:

§1511.0203 Conditional Use Permits and Site Development Permits

(a) through (c) [No change in text.]

- (d) A Site Development Permit decided in accordance with Process Four is required for *development* of a *hotel* or *motel* with 100 to 200 *guest rooms* in accordance with Section 112.0507, except that the CCDC Board of Directors shall act in lieu of the Planning Commission. A Site Development Permit decided in accordance with Process Five is required for *development* of a *hotel* or *motel* with greater than 200 *guest rooms* in accordance with Section 112.0509, except that the CCDC Board of Directors shall act in lieu of the Planning Commission.

- (e) Expansion or enlargement of *previously conforming hotels or motels* with greater than 100 *guest rooms* or that would result in greater than 100 *guest rooms* is subject to Section 1511.0203(d).

Section 4. That Chapter 15, Article 11, Division 3 of the San Diego Municipal Code is amended by amending section 1511.0301 to read as follows:

§1511.0301 Use Classifications for the Marina Planned District

Use classifications for the Marina Planned District are illustrated geographically in Diagram 1511-03A of this Planned District Ordinance.

(a) through (d) [No change in text.]

(e) Nonresidential Uses

(1) through (3) [No change in text.]

(4) Mixed Hotel/Residential Development

In the area designated Subarea 1 on Diagram 1511-03B of this Planned District Ordinance, mixed uses including hotel and residential are permitted, except that *development of a hotel or motel* with greater than 100 *guest rooms* is subject to a Site Development Permit in accordance with Sections 1511.0203(d) and (e).

(A) through (D) [No change in text.]

(5) Hotel Subarea 2

In the area designated Subarea 2 on Diagram 1511-03B, the following hotel uses are permitted, except that *development of a hotel or motel* with greater than 100 *guest rooms* is subject to a Site Development Permit in accordance with Sections 1511.0203(d) and (e):

(A) through (C) [No change in text.]

Section 5. That a full reading of this ordinance is dispensed with prior to its passage, a written or printed copy having been made available to the City Council and the public prior to the day of its passage.

Section 6. That this ordinance shall take effect and be in force on the thirtieth day from and after its final passage, except that the provisions of this ordinance applicable inside the Coastal Overlay Zone, which are subject to California Coastal Commission jurisdiction as a City of San Diego Local Coastal Program amendment, shall not take effect until the date the California Coastal Commission unconditionally certifies those provisions as a local coastal program amendment.

Section 7. That City departments and the Centre City Development Corporation are instructed not to issue any permit for development that is inconsistent with this ordinance unless application for such permit was submitted and deemed complete by the Mayor or the Centre City Development Corporation prior to the date this ordinance becomes effective.

APPROVED: JAN I. GOLDSMITH, City Attorney

By

Heidi K. Vonblum
Deputy City Attorney

HKV:cw
01/10/11
Or.Dept: CCDC
PL# 2010-00272

STRIKEOUT ORDINANCE

OLD LANGUAGE: STRIKEOUT

NEW LANGUAGE: UNDERLINE

ORDINANCE NUMBER O-_____ (NEW SERIES)

DATE OF FINAL PASSAGE _____

AN ORDINANCE AMENDING CHAPTER 15, ARTICLE 6, DIVISION 3 OF THE SAN DIEGO MUNICIPAL CODE BY AMENDING SECTIONS 156.0304 AND 156.0308, AND TABLE 156-0308A; AMENDING CHAPTER 15, ARTICLE 7, DIVISION 2 BY AMENDING SECTION 157.0201; AMENDING CHAPTER 15, ARTICLE 11, DIVISION 2 BY AMENDING SECTION 1511.0203; AND AMENDING CHAPTER 15, ARTICLE 11, DIVISION 3 BY AMENDING SECTION 1511.0301, ALL PERTAINING TO DOWNTOWN HOTEL DEVELOPMENT.

§156.0304 Administration and Permits

- (a) [No change in text.]
- (b) Permit Required

The following permits are subject to the *development* review and permit procedures in this Article: Centre City Development Permits, Neighborhood Use Permits, Conditional Use Permits, Coastal Development Permits, Site Development Permits, Planned Development Permits, and Variances.

(1) through (3) [No change in text.]

(4) Site Development Permit

A Site Development Permit decided in accordance with Process Four is required for *development* of a *hotel* or *motel* with 100 to 200 *guest rooms*, except that the *CCDC Board* shall act in lieu of the *Planning Commission*. A Site Development Permit decided in accordance with

Process Five is required for development of a hotel or motel with greater than 200 guest rooms, except that the CCDC Board shall act in lieu of the Planning Commission.

§156.0308 Base District Use Regulations

- (a) [No change in text.]
- (b) *Previously Conforming Land Uses*

Land uses that were legally established under previous regulations but that do not conform to the land use regulations of this Article may continue to exist and operate pursuant to Chapter 12, Article 7, Division 1 of the Land Development Code, with the following exceptions: ~~that~~(1) the gross floor area of previously conforming uses may be expanded up to 100 percent through a Neighborhood Use Permit, and (2) expansion or enlargement of previously conforming hotels or motels with greater than 100 guest rooms or that would result in greater than 100 guest rooms is subject to Section 156.0304(b)(4).

Table 156-0308A: CENTRE CITY PLANNED DISTRICT USE REGULATIONS														
LEGEND: P = Permitted by Right; C = Conditional Use Permit Required; -- = Use Not Permitted; L = Limited Use; N = Neighborhood Use Permit Required; S = Site Development Permit Required														
Use Categories/ Subcategories	C	NC	ER	BP	WM ⁹	MC	RE	I ⁹	T ⁹	PC	OS	CC ⁹	Additional Regulations	Main Street/ Commercial Street/Emp- loyment Required Overlays
Public Park/Plaza/Open Space through Retail Sales [No change in text.]	[No change in text.]													
Commercial Services														

Animal Grooming & Veterinary Offices through Radio and Television Studios [No change in text.]	[No change in text.]													
Visitor Accommodations														
<i>Hotels and Motels</i>	<u>P</u> <u>S</u>	<u>PS</u> ⁵	<u>PS</u>	<u>PS</u>	<u>PS</u>	<u>PS</u>	--	--	--	<u>PS</u>	--	<u>PS</u>	<u>156.0304(b)(4)</u>	CS, E
Separately Regulated Commercial Service Uses through Other Use Requirements, Temporary Uses [No change in text.]	[No change in text.]													

Footnotes to Table 156-0308A

1 through 4 [No change in text.]

5 Up to 200 rooms permitted. Requires active ground-floor uses along *street frontages*.

6 through 12 [No change in text.]

Table 156-0308B [No change in text.]

§157.0201 Gaslamp Quarter Approvals and Permits

(a) [No change in text.]

(b) Permits

(1) through (3) [No change in text.]

(4) Site Development Permit

(A) through (B) [No change in text.]

(C) A Site Development Permit decided in accordance with

Process Four is required for *development of a hotel or motel*

with 100 to 200 *guest rooms*, except that the CCDC Board of

Directors shall act in lieu of the Planning Commission. A Site

Development Permit decided in accordance with Process Five

is required for development of a hotel or motel with greater than 200 guest rooms, except that the CCDC Board of Directors shall act in lieu of the Planning Commission.

(D) Expansion or enlargement of previously conforming hotels or motels with greater than 100 guest rooms or that would result in greater than 100 guest rooms is subject to Section 157.0201(b)(4)(C).

§1511.0203 Conditional Use Permits and Site Development Permits

(a) through (c) [No change in text.]

(d) A Site Development Permit decided in accordance with Process Four is required for development of a hotel or motel with 100 to 200 guest rooms in accordance with Section 112.0507, except that the CCDC Board of Directors shall act in lieu of the Planning Commission. A Site Development Permit decided in accordance with Process Five is required for development of a hotel or motel with greater than 200 guest rooms in accordance with Section 112.0509, except that the CCDC Board of Directors shall act in lieu of the Planning Commission.

(e) Expansion or enlargement of previously conforming hotels or motels with greater than 100 guest rooms or that would result in greater than 100 guest rooms is subject to Section 1511.0203(d).

§1511.0301 Use Classifications for the Marina Planned District

Use classifications for the Marina Planned District are illustrated geographically in Diagram 1511-03A of this Planned District Ordinance.

(a) through (d) [No change in text.]

(e) Nonresidential Uses

(1) through (3) [No change in text.]

(4) Mixed Hotel/Residential Development

In the area designated Subarea 1 on Diagram 1511-03B of this Planned District Ordinance, mixed uses including hotel and residential are permitted, except that development of a hotel or motel with greater than 100 guest rooms is subject to a Site Development Permit in accordance with Sections 1511.0203(d) and (e).

(A) through (D) [No change in text.]

(5) Hotel Subarea 2

In the area designated Subarea 2 on Diagram 1511-03B, the following hotel uses are permitted, except that development of a hotel or motel with greater than 100 guest rooms is subject to a Site Development Permit in accordance with Sections 1511.0203(d) and (e):

(A) through (C) [No change in text.]

HKV:cw
01/10/11
Or.Dept: CCDC
PL#2010-00272