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September 20, 2016

REPORT TO THE RULES COMMITTEE

PROPOSED ORDINANCES RELATING TO HIGH OCCUPANCY SINGLE DWELLING UNITS AND CODE ENFORCEMENT PENALTY INCREASES

INTRODUCTION

On April 11, 2016, the Rules Committee directed the City Attorney and Mayor to work with City Council District 9 and the Development Services Department to draft an ordinance addressing nuisance-related issues created by high occupancy single dwelling units, commonly referred to as “mini dorms,” in the College Area Community Plan area. The Rules Committee further directed the City Attorney to conduct related legal review and analysis as well as a possible interim building moratorium with respect to high occupancy single dwelling units in the College Area Community Plan area. Accordingly, this Office has worked with City Council District 9 staff to draft the ordinance that is attached to this Report as Exhibit A (High Occupancy Ordinance). At the request of City Council District 9, this Office also drafted an ordinance that would increase maximum allowable code enforcement administrative civil penalties (Code Enforcement Ordinance). The High Occupancy Ordinance and the Code Enforcement Ordinance are expected to be considered by the Rules Committee on September 28, 2016. The legal standard for an interim building moratorium is provided in this Report, and this Office will draft an ordinance related to a building moratorium if directed by the Rules Committee, if it determines a moratorium is appropriate.

BACKGROUND

The San Diego Municipal Code currently requires that any single dwelling unit that is occupied by six or more persons eighteen years of age and older residing in the dwelling unit for a period of 30 or more consecutive days (high occupancy single dwelling unit) to comply with additional parking requirements and to obtain a Residential High Occupancy Permit. SDMC §§ 123.0502, 142.0520. In general, high occupancy single dwelling units must provide one parking space per occupant eighteen years of age and older, less one space. *Id.* On lots less than 10,000 square feet, paving and hardscape for vehicular use is limited to a maximum of four parking spaces and single dwelling units are limited to six bedrooms maximum. SDMC §§ 131.0431(b), 131.0447(c).

Citywide, the proposed High Occupancy Ordinance would continue to limit single dwelling units to six bedrooms on lots less than 10,000 square feet, except that the calculation of lot size would exclude the RS-1-1 zoned portion of a lot with more than one zoning designation.

Within the College Area Community Plan area, the High Occupancy Ordinance would limit single dwelling units to five bedrooms on lots less than 10,000 square feet, and to six bedrooms on lots 10,000 square feet or greater. Citywide, with respect to paving and hardscape for vehicular use, the High Occupancy Ordinance would continue to limit off-street parking to four spaces on lots less than 10,000 square feet, except that the calculation of lot size would exclude the RS-1-1 zoned portion of a lot with more than one zoning designation, and off-street parking would be limited to six spaces on lots 10,000 square feet or greater. Within the College Area Community Plan area, the High Occupancy Ordinance would also prohibit required off-street parking not located within a garage from being located within 30 feet of the front lot line.

The Code Enforcement Ordinance would apply citywide to all San Diego Municipal Code violations. Specifically, the Code Enforcement Ordinance would increase maximum administrative civil penalties from \$2,500 per violation per day to \$10,000 per violation per day. This Ordinance would also increase the maximum total amount of civil penalties per parcel or structure for any related series of violations from \$250,000 to \$400,000. The increased penalty amounts would continue to be subject to the procedures set forth in the San Diego Municipal Code that govern the imposition, enforcement, collection, and administrative review of the administrative penalties.

ANALYSIS

I. HIGH OCCUPANCY ORDINANCE

A. Police Power

Like any zoning regulation, the City's power to enact the High Occupancy Ordinance derives from the police power and, as such, "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). Thus, "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.

The purpose of the residential single-unit (RS) zone is to provide for development of single dwelling units that promote neighborhood quality, character, and livability; the zone is intended to allow reasonable use of property while minimizing adverse impacts to adjacent properties. SDMC § 131.0403. According to Council District 9, the High Occupancy Ordinance is intended to promote the legitimate public purpose of preserving the character of the RS zones by protecting against increased traffic, incompatible bulk and scale, excessive noise, excessive trash and litter, and excessive paved parking areas. Therefore, so long as there is evidence in the record to support the existence of these issues, it is likely that a court would find the High Occupancy Ordinance to be a valid exercise of the City's police power.

B. Equal Protection

The High Occupancy Ordinance would regulate single family dwellings within the College Area Community Plan area differently than single family dwellings outside of the College Area Community Plan area. It would also regulate development in the RS zones differently than development outside the RS zones.

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 San Francisco*, 29 Cal. 4th 164, 168 (2002).

When an action neither targets a suspect class nor impinges on a fundamental right, it is reviewed according to the “rational basis” standard. *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 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)).

Preventing deterioration of the character of a neighborhood and traffic congestion 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 stated 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, the purpose of the High Occupancy Ordinance is to preserve the character of the RS zones by protecting against increased traffic, incompatible bulk and scale, excessive noise, excessive trash and litter, and excessive paved parking areas. Limiting bedrooms and regulating the amount of hardscape for off-street parking would likely be found to be rationally related to achieving the objectives of the High Occupancy Ordinance. Excluding other areas outside of the College Area Community Plan area likely does not negate the achievement of the City’s legitimate interests so long as the legislative record shows that there is a greater likelihood of adverse effects inside the College Area Community Plan area absent the regulations. Therefore, the High Occupancy Ordinance likely would not be found to violate equal protection under the state or federal constitutions.

II. CODE ENFORCEMENT ORDINANCE

The Code Enforcement Ordinance proposes to increase the range of allowable administrative civil penalties. The increased penalty amounts would continue to be subject to the procedures set forth in the San Diego Municipal Code that govern the imposition, enforcement, collection, and administrative review of the administrative penalties. California legislative bodies may impose fines and penalties for violations of ordinances so long as the fine does not exceed \$1,000; however, a charter city may enact an ordinance that provides for different penalties so long as such penalties do not exceed any maximum limits set by its charter. Cal. Gov't Code § 36901; *County of Los Angeles v. City of Los Angeles*, 219 Cal. App. 2d 838, 844 (1963). Such penalties must also not be excessive, as determined on a case-by-case basis, and may not be mandatory in amount and potentially unlimited in duration. Cal. Const., art. I, § 17; *Hale v. Morgan*, 22 Cal. 3d 388, 404 (1978); *City & County of San Francisco v. Sainez*, 77 Cal. App. 4th 1302, 1310 (2000).

While the proposed increased penalties would exceed \$1,000, because the San Diego Charter does not contain any applicable limits, the increased amounts proposed in the Code Enforcement Ordinance are legally permissible. The proposed Code Enforcement Ordinance does not provide for mandatory penalty amounts and provides for a maximum amount per parcel or structure for any related series of violations. The imposition of any penalties would be subject to the procedures set forth in the San Diego Municipal Code that govern the imposition, enforcement, collection, and administrative review of the penalties, and would be determined on a case-by-case basis. Additionally, the Development Services Department has conducted a survey of other similar jurisdictions and has informed this Office that it has determined that the proposed increased amounts are comparable.

III. RESIDENTIAL HIGH OCCUPANCY MORATORIUM

In the event that the High Occupancy Ordinance does not move forward for City Council consideration at this time, this Office understands that a possible moratorium to be considered would be applicable to any building permit that would result in a single dwelling unit with five or more bedrooms within the RS zones, in the College Area Community Plan area. In that case, the purpose of a building moratorium would be to prohibit such construction while the City considers amendments to the San Diego Municipal Code that would address public health, safety, and welfare concerns related to construction that could potentially be used as high occupancy single dwelling units, which could adversely affect the single-family residential character of the College Area Community Plan area.

An agency may adopt as an urgency measure an interim ordinance prohibiting any uses that may be in conflict with a contemplated general plan, specific plan, or zoning proposal that the agency is considering or studying or intends to study within a reasonable time to protect the public health, safety, and welfare. Cal. Gov't Code § 65858(a). A four-fifths¹ vote of the legislative body is required, and the ordinance may only be effective for 45 days from its date of

¹ A four-fifths vote of the nine member City Council would require eight affirmative votes.

adoption, but may be subsequently extended for up to a total effective period of two years, subject to specified noticing requirements.² Cal. Gov't Code § 65858(a)-(b).

The ordinance must include “findings that there is a *current and immediate threat* to the public health, safety, or welfare, and that the approval of additional . . . permits . . . result[s] in that threat to public health, safety, or welfare.” Cal. Gov't Code § 65858(c) (emphasis added). The purpose of such interim ordinances is to prohibit the introduction of potentially nonconforming land uses that could defeat a later adopted general plan or zoning ordinance. *Bldg. Indus. Legal Defense Found. v. Superior Court*, 72 Cal. App. 4th 1410, 1418 (1999). Where an interim ordinance “recites facts that constitute [an] urgency and those facts may reasonably be held to constitute an urgency, the courts will neither interfere with nor determine the truth of those facts.” *216 Sutter Bay Assoc. v. County of Sutter*, 58 Cal. App. 4th 860, 868 (1997) (citing *Crown Motors v. City of Redding*, 232 Cal. App. 3d 173, 179 (1991)). A “current” and “immediate” threat to the public health, safety, or welfare must be identified, meaning that a threat to public health, safety, or welfare will be occurring without delay, and is happening or existing now. *Current*, Merriam-Webster Online Dictionary, <http://www.merriam-webster.com/dictionary/current> (last visited June 21, 2016); *Immediate*, Black's Law Dictionary (10th ed. 2014).

At the April 11, 2016 Rules Committee hearing, evidence was presented to demonstrate the existence of a current and immediate threat to the public health, safety, or welfare. Specifically, the staff report included a draft ordinance that identified that bedroom additions in the College Area Community Plan area resulted in excessive noise, traffic, litter, public drunkenness, and on-street parking, as well as overcrowding and various negative aesthetic conditions. In order to adopt a moratorium for any building permit that would result in a single dwelling unit with five or more bedrooms within the RS zones in the College Area Community Plan area, the City Council must determine whether the evidence is sufficient to make the required finding that there exists a current and immediate threat to the public health, safety, or welfare and that issuance of additional permits would result in that threat. The City Council may enact such an interim zoning ordinance provided it makes the findings required in California Government Code section 65858.

² The City Council could enact an extension after proper notice is given in accordance with California Government Code section 65858(a).

CONCLUSION

The High Occupancy Ordinance is likely a valid exercise of the City's police power and would likely not be found to violate equal protection under the state or federal constitutions. While the Code Enforcement Ordinance would result in penalties that would exceed the limits set forth in the California Government Code, because the San Diego Charter does not contain any such limit, the City Council may legally adopt the proposed increased penalty amounts. If the City Council separately desires to adopt a moratorium on single dwelling units development within the College Area Community Plan area, it must determine whether the evidence in the record is sufficient to make the required finding that there exists a current and immediate threat to the public health, safety, or welfare and that issuance of additional permits would result in that threat. A four-fifths vote of the City Council is required.

JAN I. GOLDSMITH, CITY ATTORNEY

By /s/ Heidi K. Vonblum
Heidi K. Vonblum
Deputy City Attorney

HKV:nja

RC-2016-15

Doc. No. 1346011

Attachments: Draft High Occupancy Ordinance
and Draft Code Enforcement Ordinance

cc: Kevin L. Faulconer, Honorable Mayor
Scott Chadwick, Chief Operating Officer
Andrea Tevlin, Independent Budget Analyst

STRIKEOUT ORDINANCE

OLD LANGUAGE: ~~Struck Out~~

NEW LANGUAGE: Double Underline

ORDINANCE NUMBER O-_____ (NEW SERIES)

DATE OF FINAL PASSAGE _____

AN ORDINANCE AMENDING CHAPTER 11, ARTICLE 3, DIVISION 1 OF THE SAN DIEGO MUNICIPAL CODE BY AMENDING SECTION 113.0103; AMENDING CHAPTER 13, ARTICLE 1, DIVISION 4 BY AMENDING SECTION 131.0431, RETITLING AND AMENDING SECTION 131.0447, AND BY ADDING NEW SECTION 131.0457; AND AMENDING CHAPTER 14, ARTICLE 2, DIVISION 5 BY AMENDING SECTIONS 142.0510, 142.0520, AND 142.0521, ALL RELATING TO HIGH OCCUPANCY SINGLE DWELLING UNITS.

§113.0103 Definitions

Abutting property through Beach, coastal (See *coastal beach*) [No change in text.]

Bedroom means an enclosed space within a ~~dwelling unit~~ dwelling unit that is designed or could be used for sleeping and has or is designed to have a permanent door permitting complete closure and separation from all *kitchen*, living room, and hallway areas. A room or other enclosed space is not considered a *bedroom* if it is the sole access to another *bedroom*.

Benefitted area through Sign, wall (See *wall sign*) [No change in text.]

Single dwelling unit means a detached *dwelling unit* or attached *dwelling units* where each ~~dwelling unit~~ dwelling unit is on an individual *lot*.

Social service institution through Yard [No change in text.]

§131.0431 Development Regulations Table for Residential Zones

The following development regulations apply in the residential zones as shown in Tables 131-04C, 131-04D, 131-04E, 131-04F, and 131-04G.

- (a) [No change in text.]
- (b) RS Zones

Table 131-04D
Development Regulations for RS Zones

Development Regulations [See Section 131.0430 for Development Regulations of Residential Zones]	Zone Designator	Zones						
	1st & 2nd >>	RS-						
	3rd >>	1-	1-	1-	1-	1-	1-	1-
	4th >>	1	2	3	4	5	6	7
Max permitted <i>density</i> (DU per lot) through Supplemental requirements [See Section 131.0464(a)] [No change in text.]	[No change in text.]							
Bedroom <u>Bedroom</u> regulation [See Section 131.0457]	applies ^(?)							
Refuse and Recyclable Material Storage [See Section 142.0805] through Visibility Area [See Section 113.0273] [No change in text.]	[No change in text.]							

Development Regulations [See Section 131.0430 for Development Regulations of Residential Zones]	Zone Designator	Zones						
	1st & 2nd >>	RS-						
	3rd >>	1-	1-	1-	1-	1-	1-	1-
	4th >>	8	9	10	11	12	13	14
Max permitted density (DU per lot) through Supplemental Requirements [See Section 131.0464(a)] [No change in text.]		[No change in text.]						
Bedroom <u>Bedroom</u> regulation [See Section 131.0457]		applies ⁽⁷⁾						
Refuse and Recyclable Material Storage [See Section 142.0805] through Visibility Area [See Section 113.0273] [No change in text.]		[No change in text.]						

Footnotes for Table 131-04D

¹ through ⁶ [No change in text.]

⁷On lots less than 10,000 square feet a single dwelling unit shall be limited to 6 bedrooms maximum.

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

§131.0447 Maximum Paving and Hardscape in Residential RS Zones

Paving and *hardscape* on *single dwelling unit* lots lots located in the RS zones shall be minimized as follows:

(a) [No change in text.]

(b) Within the required *street yard*, paving and *hardscape* shall be limited to:

(1) A driveway with direct vehicular access to required *off-street parking spaces* located outside of the required *setback* in accordance with sSection 142.0521₂;

(2) A walkway to facilitate pedestrian access to the *dwelling unit*; and

(3) [No change in text.]

(c) In order to maintain the character of the RS zone, paving and *hardscape* for vehicular use ~~on lots less than 10,000 square feet~~, shall be further limited to as follows:

- (1) ~~off street, surface parking for a~~ A maximum of 4 ~~four vehicles. off-~~ street parking spaces not located within a garage shall be permitted on lots less than 10,000 square feet;
- (2) A maximum of six off-street parking spaces not located within a garage shall be permitted on lots 10,000 square feet and greater;
- (3) Additional paving and *hardscape* shall be permitted for non-vehicular use or where necessary to provide vehicular access to garage parking;
- (4) For purposes of this subsection, notwithstanding Section 113.0237, the lot size shall not include the RS-1-1 zoned portion of a lot with more than one zoning designation.

§131.0457 Bedroom Regulation in RS Zones

To maintain the character of the RS zone, single dwelling units in the RS zones shall be subject to the following regulations:

- (a) On lots less than 10,000 square feet, a single dwelling unit shall be limited to a maximum of six bedrooms.
- (b) Within the College Area Community Plan area, the following additional regulations shall apply:
 - (1) On lots less than 10,000 square feet, a single dwelling unit shall be limited to a maximum of five bedrooms.

- (2) On lots 10,000 square feet or greater, a single dwelling unit shall be limited to a maximum of six bedrooms.
- (3) The combined gross floor area of all bedrooms shall not exceed 60 percent of the gross floor area, excluding any garage.
- (c) For purposes of this Section, notwithstanding Section 113.0237, the lot size shall not include the RS-1-1 zoned portion of a lot with more than one zoning designation.

§142.0510 General Parking Regulations

- (a) through (d) [No change in text.]
- (e) Parking in Required Yards. Parking in required yards is subject to the following regulations:
 - (1) *Off-street parking spaces* shall not be located in any required front or street side ~~yard~~ yard except as otherwise provided in the particular zone or by Section 142.0510(f).
 - (2) No vehicle shall be parked in any required front or street side ~~yard~~ yard except where permitted by a particular zone, or except as provided below:
 - (A) through (B) [No change in text.]
- (f) In RS zones, the required parking may be provided on a driveway or paved surface within the front or ~~street side~~ street side yard on premises where required parking was converted to habitable space prior to January 1, 1992~~;~~₂ subject to the following requirements:
 - (1) through (4) [No change in text.]

(g) [No change in text.]

§142.0520 Single Dwelling Unit Residential Uses — Required Parking Ratios

The required number of *off-street parking spaces* for *single dwelling units* and related uses are shown in Table 142-05B.

**Table 142-05B
Minimum Required Parking Spaces for
Single Dwelling Units and Related Uses**

Type of Unit and Related Uses	Number of Required Parking Spaces
All <i>single dwelling units</i> , except those with five or more <i>bedrooms</i> in campus impact areas (See Chapter 13, Article 2, Division 8)	2 spaces per dwelling unit <i>dwelling unit</i> ⁽¹⁾
<i>Single dwelling units</i> with five or more <i>bedrooms</i> in campus impact areas (See Chapter 13, Article 2, Division 8)	1 space per <i>bedroom</i> (previously conforming <i>previously conforming</i> parking regulations in Section 142.0510(d) do not apply) ⁽²⁾
High-occupancy <i>Single dwelling units</i> that have an occupancy that would consist of 6 or more persons eighteen years of age and older residing in the <i>dwelling unit</i> for a period of 30 or more consecutive days, subject to Section 123.0502 ⁽³⁾	1 space per occupant eighteen years of age and older, less one 1 space (<i>previously conforming</i> parking regulations in Section 142.0510-(d) do not apply) ^{(4),(5)}

Footnotes for Table 142-05B

- ¹ through ² [No change in text.]
- ³ Housing for senior citizens, residential care facilities, and transitional housing facilities in a *single dwelling unit* are not subject to this parking regulation, but are otherwise subject to all other parking regulations.
- ⁴ This requirement may be reduced if evidence is provided to the satisfaction of the City Manager that an occupant eighteen years of age and older does not have a vehicle or does not have a valid driver's license, in which case, the required number of *off-street parking spaces* shall be one space per occupant eighteen years of age and older with a valid driver's license and a vehicle, less one space.
- ⁵ In the case of a conflict between this requirement and the requirements set forth in the Parking Impact Overlay Zone, the higher of the applicable *off-street parking space* requirements shall apply.

§142.0521 Parking Site Design for Single Dwelling Unit Residential Uses

Parking facilities for *single dwelling unit residential* uses shall be designed in accordance with the following:

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

(f) The minimum distance between an ~~parking space~~ *off-street parking space* and a sidewalk or curb opening shall comply with Diagram 142-05A.

- (g) Within the College Area Community Plan area, notwithstanding Section 142.0510(f), when a required *off-street parking space* is not located in a garage, it shall not be located within 30 feet of the front *lot* line.

**Diagram 142-05A
Minimum Distance Between an Off-Street Parking Space
and a Sidewalk or Curb Opening**

[No change to diagram.]

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ORDINANCE NUMBER O-_____ (NEW SERIES)

DATE OF FINAL PASSAGE _____

AN ORDINANCE AMENDING CHAPTER 1, ARTICLE 2,
DIVISION 8 OF THE SAN DIEGO MUNICIPAL CODE BY
AMENDING SECTION 12.0803, RELATING TO CODE
ENFORCEMENT ADMINISTRATIVE CIVIL PENALTIES.

§12.0803 Authority

- (a) through (c) [No change in text.]
- (d) Civil penalties for violations of any provision of the Municipal Code or applicable state codes shall be assessed at a daily rate determined by the Director or Enforcement Hearing Officer pursuant to the criteria listed in Section 12.0805 of this Division. The maximum rate shall be ~~\$2,500~~ \$10,000 per violation. The maximum amount of civil penalties shall not exceed ~~\$250,000~~ \$400,000 per parcel or structure for any related series of violations.

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09/06/16
Or.Dept: Council District 9
Doc. No.: 1345456