RC-87-6

February 3, 1987

REPORT TO THE COMMITTEE ON TRANSPORTATION AND LAND USE
INCREASED INCENTIVES FOR COMPLYING WITH CITY VARIANCE OR CONDITIONAL USE PERMIT REQUIREMENTS - FEASIBILITY OF IMPOSING CIVIL PENALTIES

At the Transportation and Land Use Committee meeting of September 8, 1986, the City Attorney was directed to research and explore the feasibility of imposing civil penalties against violators of San Diego's zoning ordinances. Specifically, the Committee asked what types of fines and penalties may be imposed against owners or builders who apply for a conditional use permit or variance after having built such projects in violation of the Municipal Code or who refuse to seek the proper approval?

By way of a written report dated September 3, 1986, the City Attorney advised the Committee that there are currently three available enforcement techniques to use against such violators:

1) Administrative: San Diego Municipal Code (SDMC) . 101.0204 authorizes an automatic penalty for permit applications which have been filed after the use of the property has commenced in violation of the Municipal Code.

2) Criminal: SDMC . 11.12 allows violations of the Municipal Code to be prosecuted as misdemeanors with a maximum penalty of $1000 and/or six months in jail.

3) Civil: SDMC . 11.17 establishes the option to enforce violations of the Municipal Code by filing a civil action seeking an injunction or court order requiring the owner or builder to file a permit application. This section currently does not provide for the imposition of civil penalties.

The Committee then inquired about alternative civil penalties against violators, possibly determined by the size or a percentage of the project's value as opposed to the cost of processing applications or a set fee.

As a charter city, San Diego may have the authority to impose civil penalties against individuals who violate its land use ordinances. The power of local government to regulate zoning and land use has been well established as a legitimate exercise of the police power and its authority over its own "municipal affairs". Since municipalities have the flexibility to determine the means of enforcement, enactment of an ordinance creating civil penalties for land use violations appears as a logical extension of a chartered city's powers to control its municipal affairs. A more detailed Memorandum of Law is attached

supporting the imposition of such civil penalties.

This authority to impose civil penalties is not without some limitations. Article I, section 17 of the California Constitution prohibits the imposition of excessive fines. The courts will determine on a case by case basis whether or not a specific fine is excessive under the circumstances. A municipality can provide for penalties subject to any restrictions within its own charter. San Diego's Charter does not contain any apparent limitations on its ability to impose civil penalties for land use violations.

In a preliminary effort to explore the feasibility and the format of an ordinance establishing civil penalties, the City Attorney surveyed several major municipalities in California. None of these cities have enacted an ordinance providing civil penalties for land use violations.

A cursory review of several state statutes found that most civil penalties are usually discretionary in amount as opposed to mandatory. They generally establish a maximum limit by either a fixed multiple of actual damages (Civil Code . 1159 permits recovery up to three times the actual damages incurred), a specified total amount per violation (Business and Professions Code . 17536 sets a maximum $2500 penalty for each unfair business practice) or a total fixed by duration (Labor Code . 203 imposes a daily penalty for thirty (30) days for failure to pay an employee's termination wages).

Discretionary civil penalties also allow the consideration of various ameliorating factors like size of the business or project, gravity of the violations, degree of culpability, prior misconduct and ability to pay. Several federal consumer and trade regulations incorporate such factors. A sampling of these civil statutes is attached for the Committee's information.

At this juncture, the City Attorney and Planning Department will need to collaborate on the precise terms of a proposed ordinance. As a general concept the ordinance should establish a maximum civil penalty for each day an owner or tenant continues to use the property or premises in violation of San Diego's zoning ordinances after receiving written notice to cease and desist such use.

The City could impose these penalties either through administrative procedures or by filing a civil action or a combination of both. If the administrative route is selected, the ordinance would likely vest discretionary authority to fix the amount of the penalty with the Zoning Administrator or Planning Director, subject to specified criteria like the size of

the project, gravity of the violation, prior misconduct and/or ability to pay. These administrative procedures should provide for at least one level of appeal to comport with general notions of due process. Should the owner fail to timely pay the penalties, the ordinance should further authorize the City Attorney to file a civil action to recover the penalties.

Alternatively, the administrative process could be entirely avoided by allowing the City Attorney to file a civil action to recover the penalties from the outset. Please be advised that such litigation may take several months before a judgment is actually rendered and enforced by the courts. Obviously, obstacles like bankruptcy or probate could complicate such a recovery.

Respectfully submitted,
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Attachment
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