

July 29, 1988

REPORT TO THE HONORABLE
MAYOR AND CITY COUNCIL
DEVELOPMENT AGREEMENT POLICY

I. Background

The City of San Diego is in the midst of fashioning a Growth Management Element which includes both a growth section and a sensitive lands section (hereinafter collectively referred to as Growth Management Element) to the Progress Guide and General Plan. At the same time, the City Council is considering action on a policy establishing standards and guidelines for approving development agreements. It is possible such action may occur after the Council has approved the Growth Management Element but before the November vote on its adoption and the simultaneous consideration of the citizen sponsored Quality of Life Initiative.

This report addresses three principal issues: (1) What legal principles must be adhered to, to avoid conflict with the initiatives; (2) What legal principles must be followed to assure consistency with the present General Plan; and (3) What legal principles must be followed to assure consistency with the California Government Code and Municipal Code section 105.0106. Finally, it addresses what should be included in the development agreement policy to ensure it and any agreements negotiated under it survive legal challenges.

A. Conflict with the Pending Initiative Proposals.

The citizen sponsored Quality of Life Initiative requires that the Council shall establish a residential development allocation system using affordable housing, adequacy of public facilities and environmental and community impact as the controlling criteria. The effect of the measure, if adopted, will be to require the timing and sequencing of residential development based upon a building permit allocation system reflecting certain required criteria. The proposed initiative requires the City Council and all city agencies, boards and

commissions to take all actions necessary to carry out the measure, including amendment of the Progress Guide and General Plan and applicable ordinances. The City Clerk has certified that the petition contains the requisite number of valid signatures and an election has been scheduled. The approval of development agreements which conflict with the proposed

requirements of the Quality of Life initiative may be subject to legal challenge on the following bases.

The California Constitution reserves to the electorate the power to adopt legislative acts. The people have the power by ballot to enact or amend zoning ordinances or adopt or amend a general plan. *Committee of Seven Thousand v. Superior Court, City of Irvine*, 45 Cal.3d 491, 504, 754 P.2d 708, 715, 247 Cal.Rptr. 362, 369 (1988). "It is the duty of the Courts to jealously guard this right of initiative of the people and to prevent any action which would improperly annul that right." *Martin v. Smith*, 176 Cal.App.2d 115, 117, 1 Cal.Rptr. 307, 309 (1959). Any attempt by the Council to approve development agreements which constitute an evasion of the requirements established by the Quality of Life Initiative could be viewed by a court as interfering with the power of initiative vested in the people by the constitution and on that basis be invalidated. See, e.g., *Newport Beach Fire & Police Protective League v. City Council*, 189 Cal.App.2d 17, 10 Cal.Rptr. 919 (1961); *Lawing v. Faull*, 227 Cal.App.2d 23, 38 Cal.Rptr. 417 (1964).

Development agreements by their nature create a contractual vesting of property rights which would exempt property from the regulatory effect of the initiative proposal. Generally, in order to prevent a governing body from enacting new measures affecting a property owner's development rights, the owner must prove that substantial expenditures were made in good faith reliance upon a promise, such as that implied by a building permit, that the proposed regulation will not be prohibited by subsequent regulations. *Avco Community Devs., Inc. v. South Coast Regional Comm'n*, 17 Cal.3d 785, 793, 553 P.2d 546, 551, 132 Cal.Rptr. 386, 391 (1976), cert. denied and appeal dismissed, 429 U.S. 1083 (1977). However, California courts have held that estoppel based upon expenditures made after the adoption of an initiative measure were not made in good faith and, therefore, could not be considered, *Santa Monica Pines, Ltd. v. Rent Control Board*, 35 Cal.3d 858, 679 P.2d 27, 201 Cal.Rptr. 593 (1984), and that one who proceeds with "unseemingly haste" bears a risk "that his conduct might bear the stigma of bad faith." *Russian Hill Improvement Ass'n. v. Board of Permit Appeals*, 66 Cal.2d 34, 39, 423 P.2d 824, 829, 56 Cal.Rptr. 672, 677 (1967).

Thus, good faith is an essential element which must be present before the law will create an estoppel which will prevent the City from altering the law applicable to the development of a project. Application of these principles may raise legal questions about the approval of development agreements which undermine the objective of pending legislation.¹ The general

rule concerning the judicial review of a legislative determination is that courts will not interfere with such acts unless the legislative judgment or discretion has been abused or fraudulently exercised. *Babcock v. Community Redevelopment Agency*, 148 Cal.App.2d 38, 49, 306 P.2d 513 (1957). Bad faith is an element to be considered by courts in determining whether to intervene. See *Hunter v. Adams*, 180 Cal.App.2d 511, 517, 4 Cal.Rptr. 776, 780 (1960) (recognizing the good faith of the City in adopting a resolution freezing permits pending the adoption of a redevelopment plan and upholding the freeze as a valid and reasonable exercise of the police power).

If the City Council had prior to the certification of the Quality of Life initiative, however, actually authorized the execution of a development agreement and specified the basic terms of the agreement subject only to its final drafting, it would appear that in good faith the City could approve such an agreement prior to the election on the initiative. The terms of such agreement could vest the property with regard to use and density but, as pointed out in Section IC of this Report, a strong argument can be made that it could not vest the property against subsequent moratoria, building permit allocations, timing and phasing of development or future provisions as to financing and assurance of adequate public facilities.

Lately we have seen a change in legal philosophy which suggests that, based upon judicial analysis of the constitutional protection of the initiative power and common law principles of estoppel, a court will apply principles of good faith to estop the Council from adopting legislative acts that undermine the objectives of an initiative measure which has been certified and is awaiting a vote of the electorate, other than normal discretionary approvals creating vested rights under applicable law.

For example, in *County of Kauai v. Pacific Standard Life Ins.*, 653 P.2d 766 (Haw. 1982), the Hawaii Supreme Court held that certification of an initiative measure is the critical point from which a court must view developer's expenditures to determine the existence of estoppel. All expenditures made subsequent to certification "were not only speculative but also fell short of good faith as manifestations of a race of diligence to undermine the referendum process." *Id.* at 778.

No California case has established certification as the critical point.² The California Supreme Court has held that municipalities may properly refuse to issue a building permit for a land use repugnant to a proposed ordinance, even though when applied for the intended land use conformed to the existing

regulations. *Russian Hill*, supra. *Russian Hill* establishes the proposition that the Council should consider pending legislation when adopting legislative acts in conflict with the pending legislation. A logical extension of this principle is that the approval of an ordinance which conflicts with or undermines the pending legislative act is not an act taken in good faith and may be invalid.

The case of *Silvera v. City of South Lake Tahoe*, 3 Cal.App.3d 554, 83 Cal.Rptr. 698 (1970), supports the application of the principles of good faith to prevent the Council from approving development agreements which conflict with the requirements of a proposed citizen's initiative. In *Silvera*, the Court of Appeal held that adoption of an interim ordinance authorizing construction of a building taller than that authorized by applicable zoning was an attempt to circumvent the statutory scheme and was void; much as the approval of nonconforming development agreements would circumvent the statutory scheme established in a certified citizen's initiative.

B. Consistency with the Existing Progress Guide and General Plan, Council Policies and Relevant Ordinances and Policies.

Section 65867.5 of the California Government Code requires that before a City Council may adopt an ordinance approving a development agreement it must find that the agreement is consistent with the City's General Plan.

San Diego Municipal Code section 105.0103 requires that: "The City Council, in approving a development agreement, must find that the agreement is consistent with the adopted Progress Guide and General Plan for the City of San Diego, applicable specific plans and relevant City policies." Therefore, in order to avoid legal challenges, any policy which is adopted must ensure that no development agreement is approved which is inconsistent, not only with the Progress Guide and General Plan, but with all city ordinances and policies which are now in effect and relate to the development of land proposed to be covered by the agreement.

No development agreement can be approved without adherence to these current City policies nor can a new Development Agreement policy alter the applicability of these City plans, policies or ordinances.

1. Council Policy 600-10 which requires that adequate public facilities be in place at the time of development;
2. Council Policy 600-28 which establishes requirements for development approval in Planned Urbanized Areas, including the assurance that adequate public facilities will be provided at the time of development and that development

will be phased over the appropriate planning period of the community plan;

3. Council Policy 600-36 which establishes guidelines for review of facility benefit assessments and modifications thereto;

4. San Diego Municipal Code section 102.0201, relating to vesting tentative parcel maps which requires that they be conditioned upon: (a) the phasing of development in accordance with the buildout period and schedule of the applicable community plan, and (b) the construction and actual installation of all public facilities; and

5. Ordinance Number O-16908 (New Series), the Interim Development Ordinance, which establishes the procedure for development approval during the period of growth management approval, the period of growth management reevaluation and the adoption and implementation of the Progress Guide and General Plan update based upon annual allocations for each community plan area.

Thus until repeal of the existing General Plan and the referenced ordinances and code provisions, development agreements and any development agreement policy must provide for development phasing over the life of the community plan buildout and require that financing measures in effect at the time that building permits are authorized to be issued in the future will govern all fees and adequate public facility standards. The Council cannot act inconsistently with the General Plan and these ordinance requirements.

C. Consistency with the State Statute and City Ordinance Relating to Development Agreement.

California Government Code section 65865.2 provides that development agreements shall "specify the duration of the agreement, the permitted uses of the property, the density or intensity of use, the maximum height and size of proposed buildings, and provisions for reservation or dedication of land for public purposes." They may include conditions, terms, restrictions and requirements provided they do not prevent

development of the land for uses and density or intensity as agreed. An agreement may also provide a schedule for commencement and completion of construction and establish conditions relating to the financing of necessary public facilities.

Section 105.0106 of the San Diego Municipal Code parallels Government Code section 65866 by providing that unless, otherwise specified in the agreement, rules, regulations and official policies governing permitted use of land, governing density and

governing design, improvement and construction standards and specifications, applicable to development of the property subject to a development agreement, shall be those rules, regulations and official policies in force at the time of execution of the agreement.

Thus, new rules adopted subsequent to the execution of a development agreement which concern any subject not mentioned in Municipal Code section 105.0106, will be governing and the property will not be vested as to such requirements. The Municipal Code is, therefore, silent in terms of ordinances, regulations and policies relating to the timing and sequencing of development, building permits, moratoria and allocations and ensuring the adequacy of public facilities. See *Pardee Constr. Co. v. City of Camarillo*, 37 Cal.3d 465, 690 P.2d 701, 208 Cal.Rptr. 228 (1984) (holding that vested rights obtained by virtue of a consent decree were not interfered with by a subsequent initiative which limited the number of residential units which could be built in a given year - timing and sequencing).

Thus, the City may include provisions in development agreements which bind the developer as to timing, phasing, moratoria and building permit allocations. A strong argument may be made, however, that the City cannot vest the development from future changes in such regulations and ordinances and that the development policy may not provide otherwise.

II. Development Agreement Policy Inclusion

In order to minimize the potential for legal challenges, the standards contained in any adopted development agreement policy should: (1) be consistent with the Progress Guide and General Plan, relevant City ordinances and policies; (2) not authorize approval of development agreements inconsistent with the pending Quality of Life initiative and/or any Growth Management Element thereof adopted by the Council; and (3) comply with California Government Code section 65864 et seq. and San Diego Municipal Code section 105.0101 et seq.

In developing standards, development agreements should be limited in terms of what they actually vest to strictly comply with Municipal Code section 105.0106 (permitted use of land, density, design, improvement and construction standards and specifications). The right to regulate the rate and amount of growth should not be abrogated by the City, and therefore language in the development agreement should not vest such control with the developer nor limit the City's ability to regulate that area of growth as required. The City will thus retain its police powers to regulate for health, safety or

welfare purposes.

To ensure that provisions relating to moratoria, building permit allocations, timing and sequencing and the adequacy of public facilities can be changed to reflect exigencies, yet continue to control projects subject to development agreements, these provisions must not be specifically included in the development agreement without a companion provision expressly stating that no vested rights to those requirements are established by the agreement. The existing ordinances and policies on these subjects control the development of land covered by development agreements and, if not included in the agreement, rights to regulations in effect at the time the agreement is executed are not vested by the agreement.

Additionally, to ensure consistency with both current land policy and proposed pending measures, the Council may desire to have the right to screen proposed development agreements to determine whether they should proceed through the negotiation process. This mechanism would be both cost and time efficient for the City as proposed developments inconsistent with such laws and policies could be rejected in absolute legislative discretion at an early point in the process. The Council, however, would still retain the right as provided by law to approve, deny or modify the proposed agreements once the approved negotiations had been complete.

Respectfully submitted,

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NOTES

1 The Quality of Life initiative in Section 11b exempts vesting tentative maps and approvals giving vested rights having final approval prior to the measure's effective date. No similar protection is given to development agreements which expedite vesting prior to a final discretionary approval. Such action is governed by Section 11a of the initiative.

2 Moreover, the Quality of Life initiative establishes the effective date as being the date of the election. However, in Section 11a the initiative provides that actions taken by developers to expedite vesting with knowledge of the pendency of the measure shall not be deemed to be in good faith.