April 12, 1996

REPORT TO THE HONORABLE
MAYOR AND CITY COUNCIL

ITEM 331 - COUNCIL MEETING OF TUESDAY, APRIL 16, 1996
APPEAL OF COASTAL DEVELOPMENT PERMIT NO. 95-0580
(SANDAGE RESIDENCE)

Councilman Byron Wear has asked our office to comment about the City's exposure to liability in the event the Council decides to grant the appeal and deny the coastal development permit. Breaking this question into two parts, the first issue is whether, if the appeal is denied, the applicant could challenge the action of the City and obtain a court ruling overturning the decision and mandating issuance of the permit. The second issue is whether, if the appeal is denied and the applicant is forced to remove the addition, could the applicant recover damages as reimbursement for expenses incurred to improve the property in reliance upon the erroneous granting of the exemption.

With respect to the first issue, you should be apprised that, in accordance with Municipal Code section 111.1201 et seq., if the appeal is denied and the permit is approved, the neighbors will have standing

to appeal the decision to the California Coastal Commission, and in fact they are required to exhaust that administrative appeal prior to seeking any recourse through the courts. On the other hand, if the appeal is granted and the permit is denied, the decision is final and the applicant's only recourse is with the courts.

If the City Council were to decide to grant the appeal and deny the

permit, we believe the decision could withstand a challenge in court. A court decided a very similar issue in a leading cited case called Pettitt v. City of Fresno, 34 Cal. App. 3d 813 (1973). In that case, the City of Fresno erroneously represented to a property owner that they had a non-conforming right to use a portion of a commercial building for a beauty salon. In reliance upon that representation, the owner expended substantial sums to improve the facility. When the City ordered the owner to remove the improvements and cease the use, the owner sued. The court ruled that estoppel will not be invoked against a governmental agency where it would defeat the effective operation of a policy adopted to protect the public, and it concluded that the field of zoning laws involves a vital public interest. The court relied upon prior established precedent that the public and community interest in preserving the community patterns established by zoning laws outweighs the injustice that may be incurred by the individual in relying upon an invalid permit to build issued in violation of zoning laws.

In the case of the Sandage residence, the building permits issued were invalid. San Diego Municipal Code section 91.0303(c) specifically provides that "permits presuming to give authority to violate or cancel the provisions of This Code or any other City ordinances shall not be valid." Moreover, San Diego Municipal Code section 91.0303(f) further provides that "the Building Official may, in writing, suspend or revoke a permit issued under the provisions of This Code whenever the Building Official finds that the permit was issued in error either on the basis of incorrect information, or in violation of law." Therefore, the general rules established by the case law cited above should apply to this situation. However, having stated the general rule, it should be understood that this principle of law will insulate the City from liability for a revocation of building permits and denial of the Sandage's coastal development permit only if the record on appeal clearly demonstrates that the reason for granting the appeal is directly related (based upon the evidence) to an inability to make the required land use findings for issuing the permit.

One of the findings required to approve a coastal development permit is that "the proposed development will be visually compatible with the character of surrounding areas, and where feasible, will restore and enhance visual quality in visually degraded areas." San Diego Municipal Code section 105.0208. This appears to be the only "finding related" issue that has been raised by the appeal. Some of the collateral issues raised by the appellant, issues related to the culpability of the applicant and his architect in not accepting the

City's decision to initially grant an exemption and the owners conduct after issuance of the Stop Work Order, do not relate to the above referenced visual compatibility finding. While these collateral issues are of obvious and justifiable concern to the community, if the hearing at Council becomes dominated by a discussion of these collateral issues and the appeal is granted on that basis alone, it would be much more difficult for our office to defend the action if challenged in court.

The second part of the liability question relates to whether the City could be liable for damages if the permit is denied. Government Code section 818.4 generally provides statutory immunity to the City for any injury or damage caused by the

> issuance, denial, suspension or revocation of, or by the failure or refusal to issue, deny, suspend or revoke, any permit, license, certificate, approval, order, or similar authorization where the public entity or an employee of the public entity is authorized by enactment to determine whether or not such authorization should be issued, denied, suspended or revoked.

In the City of Fresno case cited above, the plaintiff did not seek damages (they sought an order permitting them to maintain the improvements), however the court did cite to the above referenced Government Code section and clearly implied that the City would be immune from liability for paying damages should the owner seek them. In this case, the City did act promptly to mitigate Sandage's damages by immediately issuing a Stop Work Order upon discovering the error. That conduct should be viewed favorably by any court. Nevertheless, it goes without saying that at the Superior Court level there is always the possibility that the court will sympathize with the plaintiff and attempt to place financial responsibility for the error on the City. You should be advised that the Sandages, through written correspondence from their attorney, do believe they would have recourse for damages in an amount exceeding $100,000. (See attached letter from Matthew A. Peterson, dated April 9, 1996.)

As a related issue, all parties who appear before the City Council on an appeal are entitled to a fair and impartial hearing, i.e., due process. It is, therefore, a good practice that the Councilmembers

avoid accepting "evidence" and "testimony" outside the public hearing. If they do hear such testimony outside the hearing, they should at least summarize what they have heard at the hearing, so that anyone present can refute any statements that they consider inaccurate.

Respectfully submitted,

JOHN W. WITT
City Attorney

RAD:lc:605.3(043.1)
Attachment
RC-96-18