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July 15, 2011

Via Facsimile & U.S. Mail
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Councilmember Kevin Faulconer
San Diego City Council
202 "C" Street, MS #10A
San Diego, CA 92101

Re: Issue 35 in proposed amendments to Land Development Code
Tuesday, July 19, 2011

Dear Councilmember Faulconer:

On Tuesday, July 19, 2011, at 2:00 p.m., the City Council will convene to consider the 7th update to the City's Land Development Code. Buried within a multitude of proposed amendments is Issue No. 35.

Issue 35 would dramatically change the *method of calculating the height of buildings* subject to the Coastal Height Limit. It would require the height of buildings in the zone to be determined using *both* the mandatory language in the City's 1972 Proposition D, as well as the City's citywide ordinance.

Proposition D placed a height limit of 30 feet on structures built in the coastal zone. In the second paragraph (of a 4-paragraph ordinance), the drafters of the ordinance, and the voters who enacted it, provided:

"The base of measurement of the height shall be in accordance with the Uniform Building Code of 1970." [Italics and bolding added]

Issue 35 would require structures to be calculated in accordance with *both* the Uniform Building Code of 1970 and the City's citywide ordinance. The City's citywide ordinance (which, unlike Proposition D, July 15, 2011 applies to structures that can be well beyond 30 feet in height) utilizes a different method of measurement. To comply with both requirements would impact some properties in the Proposition D zone by several feet.

California Elections Code §9271 allows amendment of San Diego's 1972 Proposition D only by vote of the people. The City Council cannot amend a proposition enacted by the voters, unless the proposition itself allowed for some method of amendment other than by a vote of the people. It does not.

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Councilmember Kevin Faulconer
Re: Land Development Code
July 15, 2011
Page 2

The City's staff suggests this amendment to your Land Development Code simply *supplements* 1972's Proposition D. This is not true. The proposed language would change the method of calculating the height of buildings covered by Proposition D. The proposition uses the term "shall" with respect to defining the method of measuring the height of buildings. Anything that would change that method would be an amendment to 1972's Proposition D. It would be unlawful.

The impact of this change would be substantial, both economically (to the value of properties that could be constructed by property owners; to the amount of property tax that would be collected) and environmental (impacting the ability to place solar panels on structures built within the zone). However, this is not a policy issue. This is a legal issue.

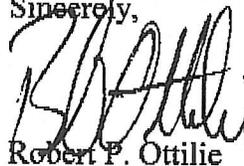
If Issue 35 constitutes an amendment to San Diego's 1972 Proposition D, then it is illegal. I have no doubt that a legal challenge would be successful. The law would be thrown out, the City would be required to pay fees, and any property owners impacted by the enforcement of the ordinance (until the court ruled it illegal and its enforcement stayed) would have damage claims against the City.

This is an effort to circumvent the law, which is particularly troubling given that it was law enacted by the people.

If this item is on the Consent Agenda, I would appreciate if you could pull Issue 35 out of the proposed amendment to the City's update to the Land Development Code and vote "NO" to Issue 35. Issue 35 breaks the law by illegally seeking to amend Proposition D.

Enclosed is a legal opinion. Thank you for your consideration.

Sincerely,



Robert P. Otilie

RPO:mau
Enclosures

MEMORANDUM OF LAW

DATE: July 15, 2011
TO: San Diego City Council Members
FROM: Robert Otilie
SUBJECT: Method of Height Measurement Under Proposition D

BACKGROUND

On Tuesday, July 19, 2011, at 2:00 p.m., you will be provided with a multitude of proposed changes to the San Diego Land Development Code. Issue 35 seeks to modify the *method of height measurement* for construction in the coastal height overlay zone created by the 1972 Proposition D. Its acceptance would illegally amend the 1972 Proposition D.

Issue 35 is entitled "Measurement of Height in Coastal Height Overlay Zone."

The proposed amendment reflected in Issue 35 would amend Municipal Code §113.0270 (measuring structure height – (a)(4)(D)(iii)) to read as follows:

"Structure height of buildings subject to the Coastal Height Limit shall also comply with the height measurement calculations for plumbline in §113.0207 (a)(2)(A) and overall height in Section 113.0207 (a)(2)(B) [emphasis added].

This amendment would constitute a substantial modification of the method of height measurement for buildings subject to the Coastal Height Limit.

Currently, as provided in Proposition D, the 30 foot height limit for buildings subject to the Coastal Height Limit is calculated according to the Uniform Building Code, 1970 Edition (this method is mandated by 1972's Proposition D).

On a sloped property, the method of height measurement as provided in 1970 Uniform Building Code is to essentially measure from the highest adjacent grade of any building. This allows at least 30 foot of vertical construction, even if (on the lower portion of the lot) the height of the structure exceeds 30 feet. A drawing demonstrating this principle is attached as Exhibit 1.

Under the Citywide ordinance, a different method of calculating height is applied. In the citywide ordinance, the height of the structure (which could be substantially more than 30 feet, depending on the zone) is measured at any point _____ the grade. The bottom drawing in Exhibit 1 reflects how this would affect a 30 foot structure. Under the citywide ordinance, the shaded triangle at the top of the drawing would be disallowed.

The amendment proposed in Issue 35 would require properties in the Coastal Height Limit area (1972's Proposition D properties) to meet the Citywide ordinance for method of height measurement.

SAN DIEGO'S 1972 PROPOSITION D

A copy of Proposition D is lodged as Exhibit 2.

Section 1 of Proposition D provides, in part, as follows:

"... no building or addition to a building shall be constructed with a height in excess of 30 feet within the Coastal Zone of the City of San Diego.

....

The base of measurement of the height shall be in accordance with the Uniform Building Code of 1970.

Notwithstanding any section to the contrary, there shall be no exceptions to provisions of this Ordinance.

....

[Italics and bolding added].

1970 EDITION OF THE UNIFORM BUILDING CODE

Lodged as Exhibit 3 is a copy of the 1970 Edition of the Uniform Building Code. It describes the base of measurement of the height of buildings as reflected in the diagram at the top of Exhibit 1.

ISSUE 35 WOULD ILLEGALLY AMEND PROPOSITION D

Issue 35 provides that the "structure height of buildings subject to the Coastal Height Limit shall also comply with the height measurement calculations for plumbline in Section . . . and overall height in Section"

In essence, this proposed amendment would require the height measurement calculations for a building constructed in the Coastal Height Limit area to meet both the requirements of Proposition D (in accordance with the Uniform Building Code of 1970) and the City's citywide ordinance (which utilizes a different method of calculation). The compliance with the Citywide ordinance would result in a different method of calculation for properties than is mandated by Proposition D.

THE CITY COUNCIL CANNOT AMEND PROPOSITION D

The California Election Code, §9217 provides, in part, as follows:

“. . . No ordinance . . . adopted by the voters, shall be . . . amended except by a vote of the people, unless provision is otherwise made in the original ordinance.

Proposition D was adopted by the voters in 1972. It can be amended only by the voters, unless a provision to the contrary was made in the original ordinance.

There is no provision in Proposition D allowing it be amended by the City Council.

The drafters of Proposition D provided that it “*shall* be in accordance with the Uniform Building Code of 1970.” It did not say, “*may* be in accordance.” It did not say, “shall be in accordance, along with any other ordinances adopted by the City Council.”

In California, the intent of a law is determined first and foremost by the *plain meaning* of the statute’s language. [*Hughes v. Board of Architectural Examiners* (1998) 17 Cal.4th 763, 775.] “[W]e seek to give meaning to every word and phrase in the statute.” (*Ibid.*) If the language is clear and unambiguous, there is no need for judicial construction. (*Ibid.*)

The United States Supreme Court has held, “The mandatory ‘shall’ . . . normally creates an obligation impervious to judicial discretion.” [*Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998).]

In the argument *against* Proposition D, signed by Stewart R. Shafer (Director of the San Diego Section of the American Institute of Planners) and John D. Henderson (President of the San Diego Chapter of the American Institute of Architecture), the Proposition’s opponents argued:

“There is no exception and no amendment possible without another citywide vote.”

AN AMENDMENT TO PROPOSITION D COULD HAVE SERIOUS ECONOMIC AND ENVIRONMENTAL CONSEQUENCES

Look again at Exhibit 1. Proposition D’s method of calculating height guarantees that a structure will have 30 feet of height going horizontally from its base at the highest adjacent grade. With mandatory ceiling space of 7.5 feet, and reserving space for the diaphragm of the building, a structure can, if desired, be three stories.

Loss of even some of this height will have both an economic and environmental impact. Construction of true 30 foot structures will become difficult, jeopardizing the ability to place three floors into a structure. This will decrease property values (and property taxes).

The loss of space is reflected by the shaded area on the bottom of the two diagrams in Exhibit 1. That building area lost in the Citywide method is area used on structures for solar panels. While the panels take up only approximately 6 inches, that space is available because of the method of calculating the height of the structures. Were the method of calculating the height to be changed, builders would, in all likelihood, lose the ability to place solar panels on the roof.

While most of what we perceive as coastal properties is relatively flat, a substantial amount of property in the Proposition D overlay zone is sloped, some substantially so. Many, if not the majority, of parcels in the zone would be impacted.

EFFORTS TO RATIONALIZE ISSUE 35 HAVE NO MERIT

In a memo dated August 12, 2004, Casey Gwinn attempted to suggest use of the City's general zoning height limits would *not* constitute an amendment to Proposition D. Gwinn's memo admitted that application of a different means of measurement would result in an actual height difference of several feet. Nevertheless, Gwinn claimed Proposition D provided only a ceiling over which structures cannot be built in coastal areas (30 feet) and that reducing that limit would not be inconsistent with Proposition D.

Gwinn's 2004 opinion totally missed the point. Gwinn was not analyzing an ordinance which placed a more restrictive height limit on the property. He was analyzing whether a *different method of measuring the height* could be applied to a 30 foot structure. The *method of calculating the height* contained within Proposition D was not a "ceiling," but rather a mandatory *method* for calculating the 30 foot height limit. The ordinance provided:

"The base of measurement of the height shall be in accordance with the Uniform Building Code of 1970."

CONCLUSION

This language leaves no room for interpretation. To apply a different base of measurement to determine the height of a structure would be an amendment to specific mandatory language in 1972's Proposition D. The drafters and voters used the word "shall." The ordinance provides no discretion for the San Diego City Council to change the method of calculation, without changing Proposition D. Elections Code §9217 allows for amendment of San Diego 1972 Proposition D to be by the voters only, not the City Council.

Passage of Issue 35 would be illegal. A court action would be likely to invalidate it. A prevailing party would recover fees. Damages property owners would seek compensation.