JAN I. GOLDSMITH
SAN DIEGO CITY ATTORNEY

July 22, 2011

Via Facsimile Transmission
Robert P. Ottilie, Esq.
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Dear Bob:

Thank you for providing us a copy of your Memorandum of Law to the City Council dated July 15, 2011. Although we always appreciate receiving your comments, we must respectively disagree on this one.

Proposition D's requirements must be met using the method of calculation set forth in Proposition D. The issue is whether the city can impose an additional method of calculation that would result in a lower height limit.

The enclosed legal opinion issued in 2004 by this office is well-reasoned and remains the opinion of this office. The method resulting in a lower height limit may be used. As explained in the 2004 opinion:

> "The Property owner's argument that the City can only use the method of measurement listed in Proposition D is incorrect. Two separate limits apply to the Property. The fact that the method of height measurement used in the general zoning regulations results in a lower structure than Proposition D would allow, does not result in an improper amendment of the initiative. Proposition D provides a ceiling and not an absolute minimum. Use of the general zoning regulations here does not result in a violation of this ceiling."

Proposition D states that no structure "be constructed with a height in excess of thirty feet." By its plain meaning, the initiative sets a ceiling, which means that the City can, if it chooses, use an additional method of height calculation that ensures the structure will be even lower than the Proposition D ceiling.

Had voters wanted to preclude a lower height limit, they would have provided that in the initiative. They did not and our office will not read such language into the initiative.

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Thank you, again, for your memo.

Sincerely,

JAN I. GOLDSMITH
City Attorney

JIG:cbs
Enclosure

cc: Honorable Mayor (*via email)*
Honorable City Councilmembers (*via email)*
Mary Jo Lanzafame, Assistant City Attorney (*via email)*
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MEMORANDUM OF LAW

DATE: August 12, 2004

TO: Kelly Broughton, Deputy Director, Development Services Department

FROM: City Attorney

SUBJECT: Method of Height Measurement Under Proposition D

BACKGROUND

You were recently contacted by the owner of property located at 1715 and 1723 Malden Street in Pacific Beach [Property], where two single family residences are currently under construction. The owner claims that the City is using an incorrect method of measurement to determine the height of the structures being built. In addition to using the measurement method listed in the coastal height limit overlay zone, known as Proposition D, the City is also using the city-wide measurement method in Municipal Code section 113.0270 for structures in residential zones. The owner claims that use of this latter method, which results in a slightly lower structure than could be built under Proposition D, is an improper amendment of a voter approved initiative. As a result, the owner asserts that the general zoning height limits do not apply in the coastal height limit overlay zone, and that the City may only use the Proposition D method of measurement on the Property.

QUESTIONS PRESENTED

1. Does the City's general height measurement method amend Proposition D?

2. Do the City's general zoning height limits apply to property also governed by Proposition D?

SHORT ANSWERS

1. No. The City's use of its general height measurement method does not result in a change in the intended scope or effect of Proposition D. Therefore, it does not amend the initiative.

2. Yes. Because the City's general zoning height limits supplement rather than amend Proposition D, they apply in the coastal height limit overlay zone.

ANALYSIS

Proposition D was approved by City of San Diego voters on November 7, 1972, and became effective on December 7, 1972. As the Municipal Code codifies it, Proposition D places a 30 foot height limit on all buildings in the coastal height limit overlay zone. SDMC § 132.0501 et seq. With some exceptions, this zone roughly covers those portions of the City of San Diego lying between Interstate 5 and the coast, including the Property. SDMC § 132.0502. When measuring building height under Proposition D, "the base of measurement shall be in accordance with the Uniform Building Code of 1970." SDMC § 132.0505(c). In other words, height under Proposition D, with a few exceptions not applicable here, is always measured from the finished grade of a site rather than the preexisting grade.

In addition to the Proposition D height limit, the Municipal Code also has height restrictions which apply to the Property. The residential zone in which the Property lies prohibits structures higher than thirty feet. SDMC § 131.0444. When measuring structural height, the zoning height limit uses "the existing grade or proposed grade, whichever is lower." SDMC § 113.0270. This difference from Proposition D creates a more restrictive height limit for the Property. As a result, the measurement method under the general zoning height limit prevents the Property owner from building a structure as tall as Proposition D allows.

In response, the Property owner claims that the City's use of the more restrictive zoning height limit amends Proposition D in violation of California Elections Code section 9217. This section prevents a legislative amendment to a voter approved initiative, such as Proposition D. However, an amendment must change the scope or effect of the initiative, "whether by addition, omission or substitution of provisions." *Franchise Tax Board v. Cory*, 80 Cal. App. 3d 772, 776-77 (1978) (quoting Sutherland, *Statutory Construction* (4th ed. 1972) § 22.01, p. 105). An amendment is a "legislative act designed to change some prior and existing law by adding or taking from it some particular provision." *Id.* at 777 (quoting *Assets Reconstruction Corp. v. Munson*, 81 Cal. App. 2d 363, 368 (1947). When comparing a new law to existing law, if the aim of the new law is to "clarify or correct uncertainties which arose from enforcement of existing law, or to reach situations which were not covered by the original statute, the act is amendatory." *Id.* (quoting *Balian Ice Cream Co. v. Arden Farms Co.*, 94 F. Supp. 796, 798-799 (S.D. Cal. 1950).

Here, both height limits that apply to the Property are thirty feet. Although the two methods of measurement result in an actual height difference of several feet between them, nothing in Proposition D prevents the City from further restricting the height of structures in coastal areas. Proposition D simply states that no structure "be constructed with a height *in excess* of thirty feet." SDMC § 132.0505(a) (emphasis added). It does not grant an absolute right to build structures up to the height limit it creates. Instead, Proposition D provides a ceiling over

which structures cannot be built in coastal areas. Even if the zoning height limit allowed a taller structure than Proposition D in this case, the Property owner would still need to comply with Proposition D. Not only is this consistent with the Municipal Code's preference for the more restrictive regulation, it recognizes the ability of the City to create further zoning restrictions as long as they reasonably relate to the public welfare. SDMC § 11.0206; *Arnel Dev. Co. v. City of Costa Mesa*, 126 Cal. App. 3d 330 (1981). Because the zoning height limit supplements Proposition D rather than changing its intended scope or effect, it does not improperly amend a voter approved initiative.

In claiming that the City's use of the zoning method of measurement illegally amends Proposition D, the Property owner relies on *Mobilepark West Homeowners Assn. v. Escondido Mobilepark West*, 35 Cal. App. 4th 32 (1995). However, that case addressed a city ordinance that specifically stated it was intended to clarify a voter approved initiative. *Id.* at 37. In this case, there is no mention of Proposition D in either the general zoning ordinance that first used existing grade as the base of height measurement in 1974, or in the current Municipal Code section that sets the zoning height limit for residential zones. SDMC § 131.0444. (Attachment 1). As a result, *Mobilepark West Homeowners Assn.* does not affect the City's use of the zoning method of measurement.

Even if the City's zoning method of measurement amends Proposition D, it falls under an exception to California Elections Code section 9217. Where a voter approved initiative establishes a basic policy, legislative amendments may implement this policy consistent with the voters' intent. *Mobilepark West Homeowners Assn.*, 35 Cal. App. 4th at 42 (quoting *Creighton v. City of Santa Monica*, 160 Cal. App. 3d 1011. 1021-1022 (1984). The best evidence for determining the voters' intent is the ballot argument in favor of the proposition. *C-Y Development Co. v. City of Redlands*, 137 Cal. App. 3d 926, 933 (1982).

The ballot argument in favor of Proposition D states it intends to preserve the "unique and beautiful character of the coastal zone of San Diego," by preventing high rise buildings from "fencing off private property" and "obstructing needed ocean breezes, sky and sunshine." (Attachment 2). Nowhere does the argument state that the City may not impose more restrictive height limits, or provide for methods of measurement that could potentially result in slightly shorter structures. Once again, Proposition D shows an intent to establish a ceiling over which structures may not go, not an absolute right to build to a certain height. Consequently, even if this method of height measurement somehow results in an amendment to Proposition D, it still implements the policy and intent of the initiative because it does not allow buildings to exceed the ceiling established by Proposition D.

CONCLUSION

The Property owner's argument that the City can only use the method of measurement listed in Proposition D is incorrect. Two separate height limits apply to the Property. The fact that the method of height measurement used in the general zoning regulations results in a lower

structure than Proposition D would allow, does not result in an improper amendment of the initiative. Proposition D provides a ceiling and not an absolute minimum. Use of the general zoning regulations here does not result in a violation of this ceiling. Consequently, you are correct to apply both height limits to the Property, as well as to other similarly situated properties in the coastal height limit overlay zone.

CASEY GWINN, City Attorney

By
William W. Witt
Deputy City Attorney

WWW:w:pev
Attachments
ML-2004-13