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**MEMORANDUM OF LAW**

**DATE:** October 31, 2006

**TO:** Patti Boekamp, Director of Engineering and Capital Projects  
Marcela Escobar-Eck, Director of Development Services Department

**FROM:** City Attorney

**SUBJECT:** San Diego Municipal Code Regulations Pertaining to Sewer Group Pipeline  
Job 742

**INTRODUCTION**

The City of San Diego's Development Services Department [DSD] is currently in the process of evaluating the design and placement of Sewer Group Pipeline Job 742 [Job 742], which is located within the mapped boundaries of a known archaeological site, the Spindrift Site. No less than thirty-four inhumations and cremations of individuals of Native American descent have been unearthed during recent underground utility trenching work and private residential development in the Spindrift area. In order to prevent the recurrence of the problems encountered during prior projects, DSD has requested a possible redesign of Job 742 to avoid impacting additional human remains. It is yet unclear whether avoidance of the remains will be possible.

The Native American community considers these human remains, the soil they are contained in, and the artifacts associated with them to be sacred. In addition, parts of the Spindrift site were formally recognized as important historical resources by the San Diego Historical Resources Board when it voted to designate in 1999 and 2003. More importantly, there are numerous bodies of local, state, and federal law that govern the treatment of Native American human remains whether they are encountered in a known burial site or they are inadvertently discovered. These laws create stand alone obligations and liability, including criminal misdemeanor and felony penalties and jail time for violations. This memorandum covers only the legal implications of Job 742 and the requirements as spelled out under the San Diego Municipal Code [SDMC]. Regardless of whether avoidance is possible, specific processes for approval and findings will be required by the SDMC.

In addition, more applications for private development in this and other sensitive areas are being received by DSD on an ongoing basis. This memorandum is one of a series on related topics meant to assist the City's departments to better understand the applicable legal parameters and to avoid prior mistakes regarding the approval process. However, future projects in the Spindrift site may be subject to similar requirements under the SDMC. Certainly, any proposed

projects within the Spindrift site (or other similar burial sites) must be carefully scrutinized. The City and applicants must comply with all state and federal laws independently and concurrently.

### QUESTIONS PRESENTED

1. Do the Historical Resources Regulations apply to Sewer Group Pipeline Job 742?
2. What permit approval process is required for Sewer Group Pipeline Job 742 as set forth in the San Diego Municipal Code due to its potential to impact the Spindrift site?
3. What are the applicable findings that the Planning Commission must make when deciding whether to approve the permit for Sewer Group Pipeline Job 742 due to its potential to impact the Spindrift site?
4. If Sewer Group Pipeline Job 742 cannot feasibly adhere to the Historical Resources Regulations due to its potential to impact the Spindrift site, what are the applicable findings that must be made to determine whether a deviation from the Historical Resources Regulations should be granted?
5. Are persons performing work under a City-issued permit insulated from liability where they are in non-compliance with the requirements of the San Diego Municipal Code and/or other laws?

### SHORT ANSWERS

1. Yes. Job 742 is located in and impacts the Spindrift Native American burial site. The Spindrift site is best characterized as an *historical district*, and is therefore protected under the Historical Resources Regulations pertaining to *historical districts*.<sup>1</sup> Specifically, SDMC section 143.0251 states that “it is unlawful to substantially alter, demolish, destruct, remove, or relocate any *designated historical resource* or any...*historical object*...located within a *historical district*.” The definition of an historical district in the SDMC does not include the requirement of designation by the Historical Resources Board.
2. A Process Four Site Development Permit is required for Job 742, as said permit is required for any City public works construction project where an historical resource is present. A Process Four Site Development Permit is also required for development which deviates from the Historical Resources Regulations. It is unlawful to relocate any

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<sup>1</sup> The specific SDMC regulations that pertain to development which has the potential to impact subsurface Native American cultural sites and burial sites depends on whether the site is characterized as a designated historical resource, an historical district, a traditional cultural property, or an important archaeological site. However, the characterization which affords the greatest amount of protection and which still allows for the proper application of the definition should be used for any given area. This must be determined on a case by case basis.

of the human remains within the Spindrift historical district absent a deviation based on the required findings under Process Four.

3. In order for a Process Four Site Development Permit to be approved for this project, the Planning Commission must find that: (1) The proposed development will not adversely affect the applicable land use plan; AND (2) The proposed development will not be detrimental to the public health, safety, and welfare; AND (3) The proposed development will comply with the applicable regulations of the San Diego Municipal Code (specifically the Historical Resources Regulations which prohibit any substantial alterations to historical districts).
4. To obtain a Site Development Permit where compliance with the Historical Resources Regulations is infeasible, additional findings allowing for a deviation from these requirements will have to be made. A substantial alteration of a designated historical resource or within an historical district would result in non-compliance with the Historical Resources Regulations. These supplemental findings must be made by the Planning Commission: (1) There are no feasible measures, including a less environmentally damaging alternative, that can further minimize the potential adverse effects on the *designated historical resource* or *historical district*; AND (2) The deviation is the minimum necessary to afford relief and accommodate the *development*; AND (3) All feasible measures to mitigate for the loss of any portion of the *historical resource* have been provided by the *applicant*; AND (4) The denial of the proposed *development* would result in economic hardship to the owner.
5. No. City departments are not authorized to issue permits that are in violation of the SDMC, and permits that are in violation of the SDMC are invalid. Once a City department becomes aware that a permit is defective, it must take the appropriate steps to issue a stop work order or an emergency stop work order to prevent destruction of Native American human remains and to put the appropriate mitigation in place. Violations of the SDMC may result in criminal fines, jail time, civil penalties and injunctive relief, as well as administrative remedies. The City Attorney's Office is taking, and will continue to take, enforcement action based on violations of this nature.

## LEGAL ANALYSIS

### 1. **Historical Resources Regulations Pertain to Sewer Group Pipeline Job 742 Because of Impacts to An Historical District – the Spindrift Site**

The SDMC provides general development regulations for historical resources, traditional cultural properties, and important archaeological sites. SDMC §§ 143.0250, 143.0251, 143.0252, 143.0253. The Historical Resources Regulations contained in the SDMC are triggered when “*historical resources* are present on site, whether or not a Neighborhood Development Permit or Site Development Permit is required...” SDMC § 143.0210. Historical Resources include designated historical resources, historical buildings, historical structures, historical objects, important archaeological sites, historical districts, historical landscapes, and traditional cultural

properties. SDMC § 113.0103. More specifically, proposed development on a property where there are Native American burial sites, including human remains and related cultural items, is governed by Historical Resources Regulations as they fall within the definitions in the SDMC for designated historical resources, historical districts, traditional cultural properties, and/or important archaeological sites. SDMC § 113.0103.

Various levels of protection are afforded to historical resources depending on which definition is applied to characterize the resource. The SDMC defines a “designated historical resource” as one “which has been designated by the Historical Resources Board [HRB]...” Id. Parts of the Spindrift site are listed on the San Diego register of designated historical resources as numbers 390 and 638. Therefore, when parcels 390 and 638 are potentially impacted by Job 742, the regulations and processes as provided in the SDMC for *designated historical resources* would apply.

In addition, the SDMC currently protects *historical districts*, which are defined in pertinent part as “a significant concentration, or continuity of sites, buildings, structures, or objects that are united historically, geographically, or aesthetically by plan or physical development and that have a special character, historical interest, cultural or aesthetic value....” Id. The definition does not include the requirement for designation. Thus, a Native American burial site may be protected as an “historical district” where there is a significant concentration of objects and/or sites which are unified historically and that have cultural value to the San Diego Native American communities regardless of designation.

The Spindrift site underlies many different parcels of property and public rights-of-way in the La Jolla Shores area and represents a significant concentration of inhumations, cremations, and cultural items and artifacts, which are highly valuable to the Native American and archaeological communities. Because of the importance of Native American burial sites and the extensive bodies of law that govern their treatment, the characterization which affords the greatest protection should be used. Therefore, the Spindrift site is an *historical district* for the purposes of development approvals under the SDMC.

## **2. A Site Development Permit [SDP] is Required for Sewer Group Pipeline Job 742**

A Site Development Permit [SDP] is required for “any City public works construction project... when a *historical resource* is present.” SDMC § 143.0210(e)(2)(B); See also SDMC § 126.0502(d)(1)-(2). Job 742 is a City public works construction project which will be completed in the Spindrift historical district, so an SDP is required. An SDP is granted or denied by the Planning Commission under Process Four review and that decision may be appealed to the City Council. SDMC § 112.0501.

Under the SDMC, when either a “designated historical resource” or an “historical district” is present on the project site, “it is unlawful to substantially alter, demolish, destruct, remove, or relocate any *designated historical resource* or any...*historical object*...located within a *historical district*.” unless a minimal deviation is allowed after undergoing Process Four review. SDMC § 143.0251 (Emphasis added). “Development affecting designated historical resources or historical

districts shall provide full mitigation for the impact to the resource, in accordance with the Historical Guidelines of the Land Development Manual, as a condition of approval.” Id. (Emphasis added).

This mitigation should be developed based on recommendations from the Historical Resources Board, which “[are] required prior to the Planning Commission decision on a Site Development Permit when a historical district or designated historical resource is present.” SDMC § 126.0503. Because, the Spindrifft site is characterized as an *historical district*, any proposed development affecting the Spindrifft site should not be approved absent a recommendation by the Historical Resources Board. Full HRB involvement is necessary so that proper mitigation is made part of the conditions of approval of any permits issued for Job 742.

### **3. Planning Commission Findings Before Issuance of an SDP**

In order to approve an SDP, the Planning Commission must be able to make “all of the findings in Section 126.0504(a) and the supplemental findings in Section 126.0504(b) through (n) that are applicable to the proposed development as specified in this section.” SDMC §126.0504. The findings under subsection (a) for Site Development Permits are:

- (1) The proposed development will not adversely affect the applicable land use plan;
- (2) The proposed development will not be detrimental to the public health, safety, and welfare; and
- (3) The proposed development will comply with the applicable regulations of the Land Development Code.

In order for these findings to be properly made, the proposed development and permit conditions must adhere to the provisions in the California Health and Safety Code, and other provisions of law that pertain to the treatment of human remains and Native American burial sites and cultural items. In addition, proposed Job 742 must comply with the Historical Resources Regulations, which, as stated above, dictate that the project must not “substantially alter, demolish, destruct, remove, or relocate any designated historical resource or any...historical object...located within a historical district,” and that any alteration or destruction caused by the project shall be fully mitigated. SDMC § 143.0251. In other words, avoidance if at all possible is required. In the event that total avoidance is not possible but the alteration will be less than substantial, then full mitigation (including, but not limited to, data recovery and curation) must be provided for any human remains, artifacts, sacred soils, cultural items, burial goods, etc. that would be excavated, destroyed in whole or part, altered, and/or relocated from the Spindrifft site. In the event that substantial alteration of historical objects, including but not limited to, human remains, artifacts, sacred soils, cultural items, and burial goods, cannot be feasibly avoided, the Planning Commission may only approve the project if the required findings for a deviation from the Historical Resources Regulations are made.

#### **4. Deviations from the Historical Resource Regulations**

To obtain a Site Development Permit where compliance with the Historical Resources Regulations is infeasible, additional findings allowing for a deviation from these requirements will have to be made. A substantial alteration of a designated historical resource or within an historical district would result in non-compliance with the Historical Resources Regulations. SDMC § 126.0504(i). Substantial alteration is defined in the SDMC to mean “demolition, destruction, relocation, new construction or alteration activities that would impair the significance of a historical resource.” SDMC § 143.0250. The excavation and relocation of human remains during Job 742 construction, even with an archaeological monitor present, is a substantial alteration to the Spindrift site that would require authorization from the Planning Commission through a Process Four review to deviate from the requirements.

In order for a deviation to be approved by the Planning Commission for Job 742, the supplemental findings found in section 126.0504(i) of the SDMC must be made. In order to approve a deviation, the Planning Commission must find:

- 1) There are no feasible measures, including a less environmentally damaging alternative, that can further minimize the potential adverse effects on the *designated historical resource or historical district*; AND
- 2) The deviation is the minimum necessary to afford relief and accommodate the *development*; AND
- 3) All feasible measures to mitigate for the loss of any portion of the *historical resource* have been provided by the *applicant*; AND
- 4) The denial of the proposed *development* would result in economic hardship to the owner.<sup>7</sup>

See SDMC § 126.0504(i).

#### **5. Violations of the San Diego Municipal Code Are Strict Liability Offenses**

Compliance with the Historical Resources Regulations as set forth in the SDMC is required by law. SDMC § 121.0302. Moreover, even if the City has mistakenly issued a development permit or other type of development approval that does not comply with the standards, requirements or procedures of the SDMC (as explained above), such permit or approval would be invalid. The SDMC specifically states in section 121.0308(a) (Emphasis added):

The issuance or granting of any *development permit* or *construction permit* ...does not constitute a permit for, or an approval of, any violation of any of the provisions of the Land Development Code...or any other ordinance of the City.

*Development permits, construction permits, or inspections presuming to give authority to violate or cancel the provisions of the Land Development Code...or other ordinances of the City are not valid.*

It is important for City departments to realize that contractors should not rely on permits that do not comply with the provisions of SDMC, and if they do, the City retains the power to stop the development which is in violation of the SDMC by issuing a Stop Work Order. SDMC §§ 121.0308(b), 121.0309. In addition:

All persons performing work in the public rights-of-way are solely responsible for ensuring that the work performed, whether by that person, contractors, subcontractors, employees, agents or representatives, complies with all applicable City and State standards.

SDMC § 62.1114. In other words, for Job 742, the individuals who complete the work should be on notice that he or she will be responsible for any violation of any state or local law which sets the standards for how the work should be performed in the public rights-of-way.

Even more importantly, a violation of the SDMC may be prosecuted as a misdemeanor and is a strict liability offense regardless of whether the person intended to violate the SDMC. SDMC § 121.0311. One may face criminal fines and jail time, as well as civil injunctive relief and civil penalties for violating the SDMC. Id. Code Enforcement Officials may also pursue administrative remedies “including administrative abatement, revocation of permits, recordation of notice of violation, and withholding of issuance of City permits.” Id. The City Attorney’s Office takes violations of this nature seriously and is taking and will continue to take enforcement action as necessary.

The consequences for non-compliance with the SDMC are separate and independent from other state and federal regulations pertaining to Native American human remains and associated burial goods. Civil and criminal penalties may be imposed by courts ranging from misdemeanors to felonies depending on the specific violation of the law. Many of these legal issues will be addressed in related memoranda from this office pertaining to Job 742. However, future projects in this and similar areas should be closely scrutinized as they arise and our office consulted on the appropriate action to take prior to approval of those projects.

## **CONCLUSION**

Based on the foregoing, the Sewer Group Pipeline Job 742 will need to comply with the procedures and approvals for a Process Four Site Development Permit due to its potential to impact the Spindrift site. Violations of the SDMC are taken seriously, and may result in enforcement action taken against the violators. In addition to the requirements of the SDMC, the City and all contractors must comply with the many stand alone requirements under state and federal law.

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October 31, 2006

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