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MEMORANDUM OF LAW

DATE: May 22, 2008

TO: Honorable Mayor and City Councilmembers

FROM: City Attorney

SUBJECT: Mid-City Communities Planned District Ordinance Interim Height Limit: Density Bonus Laws and California Environmental Quality Act

INTRODUCTION

The City Planning and Community Investment [CPCI] Department is working with community stakeholders to bring forward an amendment to the Mid-City Communities Planned District Ordinance [MCPDO] for an interim height limit and discretionary permit requirement in certain areas of the Uptown Community. The purpose of the ordinance is to maintain the existing character of Uptown until the community plan update, already underway, is complete. The Development Services Department [DSD] analyzed the proposed MCPDO amendment pursuant to the California Environmental Quality Act [CEQA] and prepared a commonsense exemption and a categorical exemption for the project.

On March 6, 2008, the Planning Commission heard the proposed interim height limit. After deliberation, the Planning Commission voted 4-0-0 to continue the item with direction to CPCI to provide more information and analysis. On March 12, 2008, the proposed interim height limit was heard by the Land Use and Housing [LU&H] Committee. The LU&H Committee voted 3-0-0 in favor of the interim height limit with recommendations to make Upas Street (rather than Brookes Avenue) the boundary and to draft exceptions for elevator overrides and sustainable development measures. At the LU&H meeting, Councilmember Atkins also requested legal analysis on: (1) the practical effect of the ordinance on the density bonus laws; and (2) the CEQA exemption determinations.

QUESTIONS PRESENTED

1. Will the density bonus laws be affected by the implementation of the MCPDO interim height limit?

2. Is it appropriate to rely upon the commonsense and categorical exemptions for the MCPDO interim height limit?

SHORT ANSWERS

1. No. Density bonus concessions and incentives, including deviations from the amended MCPDO interim height limit, will remain available to applicants pursuant to state and local density bonus laws.

2. Yes. Both exemptions may be relied upon because the amended MCPDO interim height limit is for the protection and maintenance of the Uptown Community character, the height limit will not impact density, and the impacts of this amendment were analyzed in the prior MCPDO environmental review.

ANALYSIS

I. State Density Bonus Law Preemption

The California Constitution grants charter cities the power to make and enforce all ordinances and regulations with respect to municipal affairs. Cal. Const. art. XI, § 5(a). On the other hand, affairs which are of statewide concern remain controlled by applicable general state laws regardless of charter or municipal law provisions. *Bishop v. City of San Jose*, 1 Cal. 3rd 56, 61-62 (1969). This is known as the "preemption doctrine." *Id.*

The state Legislature has declared that the provision of affordable housing is a matter of statewide concern and that the state density bonus regulations are applicable to charter cities. Cal. Gov. Code §§ 65580, 65918. Thus, the state density bonus regulations preempt and control over local Municipal Code provisions.

Local governments must grant concessions or incentives where the applicant has provided affordable housing as described in section 65915.[1] The City is prohibited from denying

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[1]A concession or incentive is defined in section 65915(l) as:

> (1) A reduction in site development standards or a modification of zoning code requirements or architectural design requirements that exceed the minimum building standards approved by the California Building Standards Commission …including, but not limited to, a reduction in setback and square footage requirements and in the ratio of vehicular parking spaces that would otherwise be required that results in identifiable, financially sufficient, and actual cost reductions.
> (2) Approval of mixed use zoning in conjunction with the housing project if commercial, office, industrial, or other land uses will reduce the cost of the housing development and if the commercial, office, industrial, or other land uses are compatible with the housing project and the existing or planned development

a concession or incentive requested by an applicant unless the decision maker makes one of two written findings, based upon substantial evidence, that:

> (A) The concession or incentive is not required in order to provide for affordable housing costs, as defined in Section 50052.5 of the Health and Safety Code, or for rents for the targeted units to be set as specified in subdivision (c). [or]
>
> (B) The concession or incentive would have a specific adverse impact, as defined in paragraph (2) of subdivision (d) of Section 65589.5, upon public health and safety or the physical environment or on any real property that is listed in the California Register of Historical Resources and for which there is no feasible method to satisfactorily mitigate or avoid the specific adverse impact without rendering the development unaffordable to low- and moderate-income households.

Cal. Gov. Code § 65915(d). "The applicant may initiate judicial proceedings if the city, county, or city and county refuses to grant a requested density bonus, incentive, or concession." Cal. Gov. Code § 65915(d)(3).

The amendment to the MCPDO would place an interim height limit on structures in certain areas within the Uptown Community. However, the City would be required to grant density bonus concessions or incentives within the MCPDO interim height limitation area.[2] An applicant may request, as a density bonus concession or incentive, a deviation to permit a structure height in excess of the MCPDO interim height limit. Thus, the City decision maker could not deny the requested deviation from structure height limit unless the decision maker found in writing either that: (1) the deviation is not required in order to provide for affordable housing costs; or (2) that the deviation would result in a specific adverse impact to the public health and safety, the physical environment, or any real property listed in the California Register of Historical Resources and there is no satisfactory mitigation to avoid the specific adverse impact without rendering the development unaffordable to low- and moderate-income households.

II. CEQA

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[2]Our office previously opined that the City would not be required to grant a deviation from a height limit imposed by Proposition D. "While generally, municipal initiatives and regulations are preempted by State Density Bonus Law, the height limit set forth in Proposition D has previously been certified by the Coastal Commission as part of the City's land use plan. The City does not have any authority to grant a permit that is not in conformance with that certified land use plan." Memorandum of Law, ML-2006-19, dated September 8, 2006. To the extent that the MCPDO interim height limit is not part of the City's certified Local Coastal Program, that part of the analysis does not apply.

Under CEQA, when there is more than one applicable exemption, it is better to list all of the applicable exemptions rather than rely on only one. This is because if one of the exemptions is found not to apply, another may still apply. In this case, DSD prepared both a commonsense exemption and a categorical exemption for the project.

a. Commonsense Exemption

Environmental analysis under CEQA is required when a project has the potential to result in a significant effect on the environment. Cal. Code of Regs. tit. 14, § 15061(b)(3). There is a "commonsense" exemption to environmental review where the lead agency determines "with certainty that there is no possibility that the activity in question may have a significant effect on the environment." Cal. Code of Regs. tit. 14, § 15061(b)(3); *No Oil Inc. v. City of Los Angeles*, 13 Cal. 3d 68, 74 (1974).

When the lead agency relies on the commonsense exemption, "there is a burden on the agency to demonstrate, by substantial evidence in the record, that there is no possibility of significant environmental impact." Ronald E. Bass and Albert I. Herson, *1-21 California Environmental Law & Land Use Practice* § 21.06 (2008)(citing *Davidon Homes v. City of San Jose*, 54 Cal. App. 4th 106, 116-117 (1997)). Substantial evidence includes "facts, reasonable assumption predicated upon facts, and expert opinion supported by facts." Cal. Code of Regs. tit. 14, § 15384(b). However, "[d]etermining whether a project qualifies for the commonsense exemption need not necessarily be preceded by detailed or extensive fact finding." *Muzzy Ranch Co. v. Solano County Airport Land Use Commission*, 41 Cal. App. 4th 372, 388 (2007). At this stage, a general analysis is sufficient. *Id.*

City staff determined the MCPDO amendment would maintain the current character of the Uptown area and prevent potential impacts resulting from structure heights out of scale with current development. The current MCPDO underwent prior environmental review at the time it was adopted. Under CEQA, where later project amendments do not result in harm beyond what was previously contemplated in the original project approval, no additional round of environmental analysis is required. *See e.g., Benton v. Board of Supervisors*, 226 Cal. App. 3d 1467 (1991).

The Report to the Planning Commission dated March 28, 2008 explains:

> Currently, the areas to be affected by the amendment have height limits that range from 50 feet to 200 feet or have no height limit. The amendment would limit heights to 50 or 65 feet depending upon the area of implementation.

Thus, the current MCPDO analyzed impacts to community character from buildings of any height up to 200 feet or higher. The impacts of buildings below 200 feet (50 or 65 feet as

proposed by the interim height limit) were determined by City staff as not beyond that previously contemplated.

Also, City staff conducted a preliminary analysis on whether additional impacts due to potential loss of density are anticipated. That analysis revealed that with the interim height limit in place, the maximum residential capacity could still exceed the density limits imposed by the existing zoning.[3] Thus, the existing zones, not the interim height ordinance would be the limiting factor on density, and there would be no decrease in residential density resulting from the interim height limit. *See* Report to Planning Commission dated March 28, 2008.

This analysis is predicated on facts and reasonable assumptions drawn therefrom. Because this analysis reveals no harm is anticipated beyond that contemplated in the current MCPDO and zoning, the commonsense exemption may be applied. However, as the applicability of the commonsense exemption is predicated on the City's certainty that there is no possibility of significant environmental impacts, "if a reasonable argument is made to suggest a possibility that a project will have a significant environmental impact, the agency must refute that claim *to a certainty* before finding that the exemption applies." *Davidon Homes v. City of San Jose*, 54 Cal. App. 4th 106, 118, (1997). Upon hearing the MCPDO amendment, the City Council must determine whether such an argument has been made and whether the claim has been refuted to a certainty.

b. Categorical Exemption

The CEQA Guidelines list classes of projects that normally have no significant effect on the environment and are exempt from CEQA. Cal. Pub. Res. Code § 21084. Implied in the determination that a categorical exemption applies is the finding that the project has no significant effect on the environment. *Davidon Homes v. City of San Jose,* 54 Cal. App. 4th 106, 115 (1997).

DSD determined that the MCPDO amendment is categorically exempt from CEQA because the amendment will maintain and protect the character of the Uptown Community Plan area and involves actions to maintain, restore, or enhance the environment under CEQA Guidelines section 15308. Cal. Code of Regs. tit. 14 § 15308.

The burden is now shifted to a challenging party to show there is a fair argument based on substantial evidence that one or more exceptions to the exemption apply. *Assoc. for Protection of Environmental Values in Ukiah v. City of Ukiah*, 2 Cal. App. 4th 720, 728 (1991). An exception would apply if a project is located in a sensitive environment, involves significant cumulative impacts, or may have a significant environmental impact due to unusual

circumstances. Cal. Code of Regs. tit. 14, § 15300.2.[4]

Again, substantial evidence includes "facts, reasonable assumption predicated upon facts, and expert opinion supported by facts." Cal. Code of Regs. tit. 14, § 15384(b). Substantial evidence takes into account the whole record before the lead agency and evidence sufficient to support a fair argument standard may exist even in the face of contrary evidence. Cal. Code of Regs. tit. 14, § 15384(a).

An expert opinion that provides only that "it is reasonable to assume" a significant adverse impact "potentially" may occur is insufficient on its own to constitute substantial evidence. *Apartment Association of Greater Los Angeles v. City of Los Angeles*, 90 Cal. App. 4th 1162, 1176 (2001). "Substantial evidence excludes argument, speculation, unsubstantiated opinion, or narrative." Cal. Pub. Res. Code § 21080; *Wal-Mart Stores Inc. v. City of Turlock*, 138 Cal App. 4th 273, 293 (2006)(disapproved on other grounds, *Hernandez v. City of Hanford*, 41 Cal. 4th 279, 296-97 (2007)). Thus, the City Council will need to determine whether any assertions that the categorical exemption does not apply are substantiated by evidence, including but not limited to, market studies or specific development proposals. *Id.*

CONCLUSIONS

The density bonus laws will not be affected by the implementation of the MCPDO interim height limit. Density bonus concessions and incentives, including deviations from the amended MCPDO interim height limit, will remain available to applicants pursuant to state and local density bonus laws.

The City has provided evidence and analysis to support the application of both the commonsense and the categorical exemptions to the MCPDO amendment under CEQA. Upon hearing the issue, it will be the City Council's determination as to whether, in light of the entire record: (1) a reasonable argument has been made suggesting a possibility that a project will cause significant impacts (that City staff has not refuted to a certainty) making the commonsense exemption inapplicable; or (2) there is a fair argument supported by substantial evidence that environmental impacts may occur such that further environmental review would be required because an exception to the categorical exemption applies. If City Council determines that at least one of the exemptions still applies, no further environmental review will be required.

MICHAEL J. AGUIRRE, City Attorney

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[4] CEQA also prohibits the use of categorical exemptions for projects that adversely affect scenic highways or designated historical resources, or that are located on properties listed by the state as hazardous waste sites. Cal. Pub. Res. Code § 21084(b), (c) and (e).

By
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