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MEMORANDUM OF LAW

DATE: June 25, 2008

TO: Honorable Mayor and City Councilmembers

FROM: City Attorney

SUBJECT: Reforming the Appeals of Historical Resources Board Designations (San Diego Municipal Code § 123.0203)

INTRODUCTION

On November 9, 2004, the City Council referred to the Land Use and Housing Committee [LU&H] for further consideration the topic of reforming the appeals of historical resource designations decided by the Historical Resources Board [HRB]. On June 21, 2006, the LU&H requested that this office evaluate contrasting reform proposals, analyze the legislative history of designation appeals, and examine designation appeals elsewhere in California.¹ The LU&H then returned this matter back to the City Council. (Attachment A) Currently, the City Council may affirm, reverse, or modify HRB designations, but is limited, absent new information, to finding the HRB made procedural or factual errors. San Diego Municipal Code section 123.0203 governs HRB appeals:

- (a) . . . The City Council may reject designation on the basis of *factual errors* in materials or information presented to the Board, violations of bylaws or hearing *procedures* by the Board or individual member, or presentation of *new information*.
- (b) . . . At the public hearing on the appeal, the City Council may by resolution *affirm, reverse, or modify* the determination of the Board and shall make written findings in support of its

¹ Although not among the LU&H requests, this memorandum analyzes an important, closely related matter, namely, should San Diego Municipal Code section 123.0205 be amended to clarify that the HRB may not amend or repeal its designations while an appeal is pending with the City Council?

decision.

Emphasis added. As stated, there are contrasting proposals to reform HRB designation appeals. (Attachment B) Each would broaden the City Council's discretion over these appeals. One would allow the Council to remand appeals back to the HRB; the other would allow it to review designations from scratch.² The Office of the Mayor proposes to give the Council the remand option. Historical resources consultant, Marie Burke Lia, proposes the alternative, to give the City Council blanket discretion to review HRB designations. This is commonly called *de novo* review. It would no longer limit the Council to finding procedural or factual errors, to reverse or modify designations, and unlike the remand proposal, does not defer to the collective expertise of the HRB in considering the merits of an appeal.

QUESTIONS PRESENTED

1. May the City Council reform the appeals process for HRB historical resource designations, to give the City Council discretion to either remand appeals back to the HRB for reconsideration or conduct *de novo* review?
2. What standards of review for the appeal of historical resource designations have been applied by other comparable California cities?
3. Should City Council clarify that the HRB may not amend or repeal a previous historical designation while an appeal of that designation is pending with the City Council?

SHORT ANSWERS

1. Yes, the San Diego Charter in no way restricts the City Council review on appeal. Thus the City Council may adopt either of the proposals to reform the appeals of HRB historical resource designations, or both.
2. Other California charter cities and major metropolitan areas have adopted the *de novo* standard of review, some with provisions that give deference to the collective expertise of their historical board.
3. Yes, this would protect the City Council's jurisdiction until it decides an appeal, thus harmonizing local law governing designation appeals with state law governing judicial appeals.

² Another proposal, to exclude community stakeholders, and restrict the right to appeal to property owners, was subsequently withdrawn, and is therefore not analyzed in this memorandum.

ANALYSIS

I. The City Council May Reform the Appeals of Historical Designations Because the San Diego Charter Does Not Restrict Its Review of Board Decisions.

The City Council has plenary authority to reform the appeals process and standard of review applied to HRB historical resource designations because the San Diego Charter in no way restricts City Council review of any HRB decisions.

Generally, where a city charter empowers a city council to enact zoning regulations, and it neither limits council in its consideration of an appeal, nor restricts it from hearing an appeal *de novo*, then *de novo* review of board or commission decisions may be applied. *De novo* review means a council may give full consideration to all the facts and issues.

In *Break Zone Billiards v. City of Torrance*, 81 Cal. App. 4th 1205, 1221 (2000), the court held, that where the local ordinance did not otherwise limit city council review, *de novo* review was correctly applied to an appeal of a planning commission decision to grant a conditional use permit. The San Diego Charter empowers the City Council to enact zoning regulations and nowhere limits City Council review, either procedurally or substantively. Indeed, San Diego Charter section 11 maximizes the legislative power of the City Council without express or implied limits on how it considers appeals of any boards or commission decisions.

All legislative powers of the City shall be vested, subject to the terms of this Charter and of the Constitution of the State of California, in the Council, except such legislative powers as are reserved to the people by the Charter and the Constitution of the State.

San Diego Charter § 11. Further, the state supreme court in *Lagrutta v. City Council*, 9 Cal. App. 3d 890, 894 (1970), held a city council had the power and the obligation to hear an appeal from planning commission *de novo*. This holding underscores the extent to which charter cities like the City of San Diego may regulate land use and zoning.

In 1914, section 6 of article XI of the state Constitution was amended to provide that cities could amend existing charters and adopt new ones ‘*to make and enforce all laws and regulations in respect to municipal affairs*, subject only to the restrictions and limitations provided in their several charters, and in respect to other matters they shall be subject to and controlled by general laws.

Emphasis added. Lagrutta, p. 894. Historical resource designation an area of zoning that lies firmly within the constitutional police power of local governments. *Penn Central Transportation*

Co. v. City of New York, 438 U.S. 129 (1978); *Bohannon v. City of San Diego*, 30 Cal. App. 3d 416, 422- 423 (1973).

The HRB is just one of several boards created by the Council to advise on land use matters. San Diego Municipal Code § 11.0201 et. seq. San Diego Charter section 43 gives the City Council full legislative power create advisory boards and to govern their powers and duties. San Diego Charter § 43. Neither this section, nor any other section of the San Diego Charter, limits the Council's review of any actions of the HRB, or any other advisory board. Therefore *de novo* review of HRB historical designations is entirely within the legal purview of the Council. Nor should it be surprising then that Council may adopt a lesser or different standard of review (*Break Zone Billiards*, 81 Cal. App. 4th at 1221, fn 10; *Lagrutta*, 9 Cal. App. 3d at 895.) including the remand of appeals back to the HRB for reconsideration.

The City Council created a Historic Site Board on December 6, 1965. It gave the board authority to create a local register of historic sites but it was silent on the right to appeal board decisions. SDMC § 26.02(D)(2). As explained, this silence could not prevent board decisions from being appealed to the Council, and could not prevent the Council from applying the *de novo* standard of review. Twenty-four years later, on April 24, 1989, the City Council amended (and renumbered) the city's historical resources regulations. For the first time, it expressed the right to appeal Board decisions, "... within ten (10) days of the action . . .," and broadly authorized the Council to, "... affirm, reverse or modify the determination of the Board." SDMC § 26.0204(G). It was however silent on the standard of review and thus the Council could continue to give fresh and full consideration to all the facts and issues – that is *de novo*. Not for another seven years, on December 9, 1997 (during the first major overhaul of the Land Development Code) did the City Council adopt the current and more limited standard of review for HRB appeals. In retrospect, until recently, the City Council exercised *de novo* review authority over HRB appeals uninterrupted for thirty-two years.³ Thus reverting to this standard, as proposed by consultant Maria Burke Lia, has strong historical precedent.

In sum, the City Council has considerable flexibility to consider the proposals before it, to reform the standard of review of HRB designation appeals, because the state constitution and state law give the City of San Diego wide latitude to create and govern advisory boards, and the San Diego City Charter in no way restricts City Council review of advisory board decisions.

II. The Standard of Review Applied to Appeals of Historical Designations in Other Comparable California Cities.

The LU&H requested a review of how other local governments approach the appeals process for historical designations. Most California cities with historic preservation ordinances specify procedures and standards of review for designation appeals. The State Office of Historic Preservation recommends including provisions that defer to the collective expertise of historic

³ The foregoing legislative history is documented at Attachment E.

boards. Such provisions, for example, may allow planning staff decisions to be appealed or forward appeals to boards with specialized expertise, or allow designations to become final and only denials to be appealed. Drafting Effective Historic Preservation Ordinances, Department of Parks and Recreation, California Office of Historic Preservation, Technical Assistance Bulletin #14, Rev. 2005, p. 76. Many cities review designation appeals *de novo*, including two of the largest California metropolitan areas, Los Angeles and San Francisco.

First, we review the City of Los Angeles. Their Cultural Heritage Commission is advisory only and can not designate historical resources. Los Angeles Administrative Code, 2nd Ed. § 22.171.10 (c)(1). Appeals go to city council, and are *de novo*, but the appeals proceeds depending on how the resource was initially nominated.

1. If city council initiates the designation, and the commission recommends designation, the council may designate on a majority vote, but if the commission recommends against designation, then a two-thirds majority is required to override the recommendation. (Los Angeles Administrative Code, 2nd Ed. § 22.171.10(c)(2))
2. If the commission, or the city planning department director, initiates the designation, and the commission recommends designation, the city council may, again, designate by a simple majority, but if the commission recommends against designation, it is final. (Los Angeles Administrative Code, 2nd Ed. § 22.171.10(c)(3))

This ordinance gives deference to the expertise of their commission by raising the bar to surmount recommendations against designation.⁴

Second, we review the City and County of San Francisco. Their Landmarks Preservation Advisory Board is also advisory only. It may recommend for or against proposed designations to the planning commission. San Francisco Municipal Code § 1004.2. The planning commission decides designations, either by approving, disapproving, or modifying advisory board recommendations. San Francisco Municipal Code § 1004.3(b). The planning commission automatically transmits approvals and modifications, but not disapprovals, to the board of supervisors. San Francisco Municipal Code § 1004.3(c). Upon transmittal, the board of supervisors may affirm or modify, but not reverse, the designation. San Francisco Municipal Code § 1004.4. Planning commission denials are final but may be appealed. San Francisco Municipal Code § 1004.5. On appeal, the board of supervisors may overturn the planning commission designation by a simple majority, and the standard of review is *de novo*. San Francisco Municipal Code § 1004.5(b). By automatically transmitting designations, and restricting appeals to denials, this ordinance defers to the specialized land use and zoning

⁴On February 7, 2008, the Los Angeles Office of Historic Resources issued recommendations for a comprehensive revision of their Cultural Heritage Ordinance, which has been modified little since it was approved in 1962.

expertise of their planning commission.

The Office of the Mayor has requested, in general, that our historical resources regulations be compared to those of following cities:

- Los Angeles
- San Francisco
- Sacramento
- San Jose
- Riverside
- Ontario

The historic boards of the last four cities, Sacramento, San Jose, Riverside, and Ontario, only recommend designations, they do not decide them, and so their historic regulations do not contribute to this analysis. To provide still a few more comparisons, our office drew from a list of sample cities, compiled by the State Office of Historic Preservation, other charter cities with designation appeals provisions. These included the cities of Fresno, Pasadena, and Glendale.

In the City of Fresno, the Historic Preservation Commission is advisory only (Municipal Code of Fresno § 12-1609(c)(2)), however the city council, by a majority vote, may reconsider its own previously disapproved designations. The standard of review is *de novo*.

No proposal for designation once considered *and disapproved* by the Council *shall be reconsidered* except upon the affirmative vote of four Council members. Any decision to reconsider shall be *treated as a new proposal* for designation.

Emphasis added. Municipal Code of Fresno § 12-1620(d). The San Diego Municipal Code generally allows City Council to reconsider its actions, but unlike the City of Fresno, it does not specifically address actions on board or commission appeals, or designation appeals. San Diego Municipal Code § 2.11 et. seq. The HRB itself has adopted procedures to reconsider its own designations, conditioned on new facts or changed circumstances. San Diego Historical Resources Board Procedures, Section 2(C), Revised January 24, 2008.

In the City of Pasadena, the Historic Preservation Commission is also advisory only (Pasadena Municipal Code § 2.75.045(a)), however before the commission considers a designation, the zoning director makes a preliminary determination. Pasadena Zoning Code § 17.62.050(A)(3). If that determination is against designation, it is appealable to the commission. Pasadena Zoning Code § 17.62.050(A)(4). In turn, commission designations are appealable to the council. Pasadena Zoning Code § 17.62.050(B)(1). The standard of review there is *de novo*. Pasadena Zoning Code § 17.62.050(B)(3). By comparison, preliminary determinations by the City of San Diego Office of the Mayor are neither codified nor appealable.

The City of Glendale Historic Preservation Commission is also advisory only. Glendale Municipal Code § 2.76.100(A). However, if the commission was authorized to designate historic

resources, the Glendale Municipal Code uniform appeal procedures allow council, on condition, to remand decisions back to its boards and commissions.

[If] the council determines that *new and material evidence not previously presented* to the respondent is available and such evidence could not with reasonable diligence have been discovered and produced at the prior hearing before the respondent . . .

Emphasis added. Glendale Municipal Code § 2.88.060(A). The appeal procedures also allow the council to hear board and commission appeals *de novo*.

[Appeals hearings] shall be held as a part of the regular meetings of the council. The hearing shall be *de novo*, in that *an independent reexamination of the matter shall be made* . . .

Emphasis added. Glendale Municipal Code section 2.88.090. In sum,

Upon the hearing of the appeal the council *may refer the matter back* to the respondent board, commission or officer, with directions, for further consideration, *or it may reverse, affirm or modify* the determination or the action of the respondent, and it may make such decision or determination as may appear just and reasonable in the light of the evidence presented, and its decision or determination shall be final and conclusive.

Emphasis added. Glendale Municipal Code section 2.88.100.

Thus, it is not uncommon for California cities, comparable to the City of San Diego, to adopt *de novo* review of historical resource designations. Further, *de novo* appeals ordinances may be augmented with provisions giving deference to the collective expertise of historical boards, or other boards that specialize in land use and zoning. As recommended by the State Office of Historic Preservation, and as appear in other charter city municipal codes, these provisions, for purposes of drafting a local ordinance, would operate to:

- Allow City staff decisions to be appealed to the HRB, when staff declines to nominate a resource for designation.
- Permit HRB to reconsider designations but only after it denies a designation.
- Limit HRB appeals to the City Council, to when the HRB denies a designation.
- Require the City Council to override HRB designations by a supermajority.

III. Municipal Code § 123.0205 Should Explicitly Stay HRB From Changing a Designation While an Appeal is Pending with the City Council.

Finally, while considering amendments to the designation appeals process, San Diego Municipal Code section 123.0205 also should be reviewed, in tandem, and amended to clarify that the HRB may not amend or repeal its designations while an appeal is pending with the City Council. San Diego Municipal Code section 123.0205 governs the amendment of historical resource designations:

The Historical Resources Board may amend or rescind any designation of a *historical resource* in the same manner and procedure as was followed in the original designation. This action may be taken only if, and there is new information, the discovery of earlier misinformation, or a change in circumstances surrounding the original designation.

In 1988, this office opined, in a Memorandum to Ron Buckley, then-Secretary to the Historical Site Board, that the board loses its jurisdiction once an appeal is filed to City Council. This opinion drew an analogy to state law that an appeal from the trial court to the appellate court stays the lower court proceeding.

[T]he perfecting of an appeal *stays proceedings in the trial court* upon the judgment or order appealed from or upon the matters embraced therein or affected thereby, including enforcement of the judgment or order, but the trial court may proceed upon any other matter embraced in the action and not affected by the judgment or order.

Emphasis added. Cal. Code Civ. Pro. § 916 (a). “The purpose of the rule depriving the trial court of jurisdiction during the pending appeal is to protect the appellate court’s jurisdiction by preserving the status quo until the appeal is decided. The rule prevents the trial court from rendering an appeal futile by altering the appealed judgment or order by conducting other proceedings that may affect it.” *In re Marriage of Varner*, 68 Cal. App. 4th 932, 936 (1988). Staying the HRB until the City Council decides an appeal is similarly beneficial because under the remand proposal, for example, the City Council could send a designation back to the HRB, or, under the *de novo* proposal, could reverse the designation. In either case, if the HRB were to amend the designation, the appeals decision could render the amendment moot.

To provide a stable procedure, and prevent confusion among Council members, the HRB, and the parties appealing, the municipal code should be more precise than it is. To wit, San Diego Municipal Code section 123.0205 should be amended to explicitly stay the HRB when appeals are pending with the City Council:

The Historical Resources Board may amend or rescind any designation of a *historical resource* in the same manner and procedure as was followed in the original designation. This action may be taken only if there is no appeal pending before the City

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Council, and there is new information, the discovery of earlier misinformation, or a change in circumstances surrounding the original designation.

CONCLUSION

The City Council has ample leeway to reform the appeals process for HRB historical resource designations. It may remand or conduct *de novo* reviews, or both. There is considerable precedent locally and statewide for *de novo* review of historical designation appeals. Some jurisdictions also include provisions that defer to the collective expertise of historical or other boards that specialized in land use and zoning.

MICHAEL J. AGUIRRE, City Attorney

By

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List of Attachments:

Attachment A: June 26, 2006, Land Use and Housing Committee, Meeting minutes.
Attachment B: June 14, 2006, Report to Council, Revisions to the Historical Resource Designation Appeal Process, Report No. 06-073.
Attachment C: Legislative history of San Diego Municipal Code § 123.

cc: Mary Wright, Deputy Director, City Planning and Community Investment
Cathy Winterrowd, Senior Planner, City Planning and Community Investment
Maria Burke Lia, Attorney-at-Law
John Lemmo, Chair, Historic Resources Board