

MEMORANDUM OF LAW

DATE: July 30, 1986

TO: Sharren Boyer, Zoning Administrator, Planning
Department

FROM: City Attorney

SUBJECT: Recordation of Zoning Variances

QUESTION PRESENTED

Whether all variances are required to be recorded pursuant to San Diego Municipal Code (the "Code") Section 101.0245.

BRIEF ANSWER

Yes. Inasmuch as the Code does not distinguish what types of variances must be recorded, it can be assumed that all variances are subject to the requirement.

DISCUSSION

Code Section 101.0245 provides as follows:

Upon approval of a variance or any of the permits or entitlements listed in this section, all of which are found to constitute instruments affecting title to or possession of real property, the variance, permit or entitlement shall be recorded in the office of the County Recorder of San Diego County. Emphasis added.

...

E. Code Section 101.0502, Zone Variance.

....

(Code Section 101.0502 provides the procedures to be followed by the Zoning Administrator prior to the granting of a zone variance.)

Code Section 101.0245 does not make any distinctions as to the types of variances that must be recorded. Nor was there any legislative intent expressed in the Request for Council Action (1472) "Docket Supporting Information."

Inasmuch as Code Section 101.0245 mandates the recordation of all variances, a landowner in San Diego could seek a writ of mandamus directing the City Clerk to record a variance that had not been previously recorded.

Code Section 101.0502.B.3. mandates that notice must be published prior to the hearing in which it is determined whether a variance will be granted. Subsection 101.0502.B.1., however, exempts the following from the requirement of an advertised public hearing when the application is for limited relief:

a. Modification of distance or area regulations,
provided such modification does not exceed 20 percent of

required front, side or rear yards, nor exceeding ten percent of maximum lot coverage regulations;

b. Modification of distance or area regulations for property located in an area designated by the City Council as a "Neighborhood Improvement Area" during such time as rehabilitation activities are in progress, provided such modifications do not exceed 50 percent of the required front, side or rear yard, nor exceed 20 percent of maximum lot coverage regulations, or the modifications would conform to existing building lines;

c. Tract real estate offices, model homes, and signs in connection therewith, provided no such variance shall be granted for a period of more than one year;

d. Additions to structures which are nonconforming as to side yard, rear yard, or lot coverage, provided the additions shall meet the requirements of the zoning regulations affecting the property;

e. Walls or fences to exceed heights permitted by the zoning regulations; or

f. A Reconstruction Permit.

g. A temporary construction yard and/or a temporary construction project office permit.

h. A Satellite Antenna Permit.

It could be argued that since an advertised public hearing is not required when the application for relief is minimal, the same should hold true for the recording requirement.

However, the purpose of the notice prior to hearing requirement is to fairly and sufficiently apprise those who may be affected by the proposed action of the nature and character of the proposal so that they may intelligently prepare for the hearing. See e.g., *Chitwood v. Adams County*, 495 P.2d 562 (Colo. App. 1972). On the contrary, the major purpose of the recording laws is to protect purchasers of property from monetary loss by providing a system of notification of various interests in such property, *Beach v. Faust*, 2 Cal.2d 290, 292-293 (1935). Thus, even minor variances such as walls or fences could significantly affect title to real property. In addition, a variance may not be enforceable if constructive notice thereof is not imparted by recordations.

CONCLUSION

Inasmuch as the Code requires that all variances which have been granted by the Zoning Administrator are to be recorded, and since no exceptions were provided, all variances should be recorded. The City could perhaps amend the Code by providing exceptions, as was done in Code Section 101.0502, although any

variance that is not recorded may not be enforceable against successors in interest.

JOHN W. WITT, City Attorney

By

Janis Sammartino Gardner

Deputy City Attorney

JSG:ta:630(x043.2)

ML-86-86