

MEMORANDUM OF LAW

DATE: January 30, 1989

TO: Honorable Mayor and City Council  
FROM: City Attorney  
SUBJECT: Proposed Civic Center Site

It has come to the attention of the City Manager's office that a developer, Whitaker Investment Corp., is about ready to request building permits to build a 72-unit apartment complex on a parcel of land contained within the proposed site for the new civic center complex. By memorandum dated January 17, 1989 (attached), this office advised the City Manager's office that if a moratorium was placed upon the site, The City of San Diego could be held liable for damages under *First Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. , 96 L.Ed.2d 250, 107 S.Ct. 2378 (1987). The questions now arise as to what environmental review, if any, would be necessary in order to acquire the property and what would be the legal consequences of not issuing the permits? Each question will be treated separately.

1. What environmental review would be necessary to acquire the site to be developed by Whitaker Investment Corp. ("Whitaker")?

The City could acquire the Whitaker property by making an offer or initiating condemnation proceedings. It appears that either way some form of environmental review would be necessary prior to acquisition. The guidelines for implementation of the California Environmental Quality Act (Public Resources Code section 15000 et seq.) state at 15004(b)(1):

(b) Choosing the precise time for CEQA compliance involves a balancing of factors. EIRs and Negative Declarations should be prepared as early as feasible in the planning process to enable environmental considerations

to influence project program and design and yet late enough to provide meaningful information for environmental assessment

(1) With public projects, at the earliest feasible time, project sponsors shall incorporate environmental considerations into project conceptualization, design and planning. CEQA compliance should be completed prior to acquisition of a site for a public

project.

Emphasis added.

Thus, under CEQA guidelines, some form of environmental review should be completed prior to acquisition, regardless of what form the acquisition takes. However, this does not seem to preclude negotiations or making an offer on the property, only that CEQA be complied with prior to the actual acquisition.

2. What are the legal consequences of withholding Whitaker's building permits?

The withholding of Whitaker's building permits has two primary legal consequences. The first is that it would create a de facto moratorium and the damages that could attach to a moratorium (as outlined in the January 17, 1989 memorandum) would attach in this situation also.

The second consequence is that by not issuing permits that the developer is entitled to, the City and City Council could be held liable for damages under the Civil Rights Act of 1871 (42 U.S.C. . 1983), according to a recent ruling in the case of *Bateson v. Geisse*, 857 F.2d 1300 (1988).

42 U.S.C. . 1983 reads in pertinent part:

Every person who, under color of any statute, ordinance, regulation, custom or usage, of any state ... , subjects or causes to be subject, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be held liable to the party injured in an action at law, suit inequity, or other proper proceeding for redress ...

In *Bateson*, the plaintiff satisfied all requirements necessary to obtain a building permit, and the issuance of the permit should have been a ministerial act, not subject to review by the City Council. Nonetheless, the City Council voted to withhold the permit (apparently due to a desired change in zoning). The Court of Appeal held:

This sort of arbitrary administration of the local regulations, which singles out one individual to be treated discriminatorily, amounts to a violation of that individual's substantive due process rights.

*Bateson v. Geisse*, *supra* at 1303.

In holding the individual council members liable, in addition to the city, the court relied on the fact that the Council,

sitting as the properly constituted legislative body of the city, voted to withhold the building permit, and that vote as "an act of official government 'policy' as that term is commonly understood" caused the plaintiff's injury. Bateson v. Geisse, id.

#### CONCLUSION

Given the options currently available, it appears the most prudent course of action would be for the City to initiate environmental review as soon as possible, and begin negotiations with Whitaker for the subject property, with actual acquisition conditioned upon completion of whatever review is deemed necessary.

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By

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Attachment

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