MEMORANDUM OF LAW

DATE: August 6, 1991

TO: Bernard Johnson, Project Manager
Southeast Economic Development Corporation

FROM: City Attorney

SUBJECT: Southeast Economic Development Corporation Board Policy Regarding Developers Meeting their "Projected Employment Profiles"

By memorandum, you have requested the City Attorney to render an opinion as to whether the Redevelopment Agency of The City of San Diego (the "Agency") can impose penalties on developers who fail to meet their "Projected Employment Profile" (the "Profile") which is an attachment to disposition and development agreements ("DDAs") and is incorporated into the DDAs by reference. The Southeast Economic Development Corporation's ("SEDC") Board wishes to look into this matter and is especially interested in the imposition of monetary penalties.

Background

When SEDC, on behalf of the Agency, enters into a DDA with a developer, the developer is required to submit a "Specific Plan" which outlines the developer's goals and plans for hiring and training minority workers (hopefully from southeast San Diego). An element of the Specific Plan is a projected employment rate which covers a five year period.

In addition to the Specific Plan, the DDAs reference an Exhibit B which is an attachment to the project's Grant Deed. Exhibit B states the developer's goals regarding training and employment of minority persons, but of particular relevance to your inquiry is paragraph 5. It says:

> Grantee shall actively and directly recruit and extend employment opportunities on an on-going basis to low and moderate income residents of the Southeast San Diego community, as defined herein, in accordance with the Projected Employment Profile submitted by Grantee attached hereto as Attachment No. 2 and incorporated herein by this reference. In addition, Grantee shall cause all other operators of a business on the Property to actively and directly recruit and extend employment opportunities to low- and moderate-income residents of Southeast San Diego pursuant to a projected employment profile which shall be submitted by each such operator for Grantor review and approval.

You indicated in a subsequent telephone conversation that it is the opinion of some members of SEDC's Board of Directors, that a few of the developers who entered into DDAs are not only not meeting the goals set out in the Specific Plan, they are not even making a "good faith" effort to do so. It is in this context that the issue of penalties has arisen.

Issues

Can a penalty be imposed on developers who are currently a party to a DDA with the Agency for failure to meet projected training and employment goals? If a penalty may be imposed, may it be a monetary penalty?

Answer

It appears from the information provided and the current state of the law, that a penalty may not be imposed for failure to meet projected training and employment goals.

Analysis

There does not appear to be any legal precedent allowing one party to a contract to penalize another party to the contract based on the failure to meet goals. In addition, there does appear to be ample precedent for overturning affirmative action or equal opportunity programs based on set-asides or quotas without accompanying back-up information and statistical data.

In Richmond v. Croson Co., 488 U.S. 469 (1989), the United States Supreme Court overturned a lower court decision holding that a minority set-aside program was legal. In the Richmond case, the city had adopted a Minority Business Utilization Plan ("Plan") which required prime contractors to subcontract at least thirty percent of the dollar amount of the contract to a minority business enterprise ("MBE") on the basis that such set-asides were remedial in nature. In rejecting the Plan, the Supreme Court stated, "when a legislative body chooses to employ a suspect classification, it cannot rest upon a generalized assertion as to the classification's relevance to its goals." Richmond v. Croson Co., id. at 500. The Supreme Court later indicated that short of findings documenting that minority contractors were being systematically and purposely excluded, such programs would most likely be deemed unconstitutional. Id. at 509.

As to training and employment programs, the language on pages 501 and 502 of the Richmond opinion states the Court's opinion:

> In the employment context, we have recognized that for certain entry level positions or positions requiring minimal training, statistical comparisons of racial composition of an employer's work force to the racial composition of the relevant population may be probative of a pattern of discrimination. But where special qualifications are necessary, the relevant statistical pool for purposes of demonstrating discriminatory exclusion must be the number of minorities qualified to undertake the particular task.

As you can see, this sort of data must be available in order to enforce any program which requires employers to hire a certain percentage of minority workers. I have not been given any indication that such information is available.

With this in mind, the SEDC Board's proposal must be explored.

The Specific Plan is a voluntary program based solely on goals a developer hopes to reach. A goal in this instance is not unlawful, but to convert it into a legal requirement would require findings on the nature of those set out in Richmond v. Croson Co.

Conclusion

As indicated previously, it does not seem to be legally permissible to exact penalties (monetary or otherwise) from developers under these circumstances. If you wish to discuss the matter further or have additional questions, please contact me.

JOHN W. WITT, City Attorney
By
Allisyn L. Thomas
Deputy City Attorney

ALT:lc:pev:704(x043.2)
cc Maureen Stapleton, Assistant City Manager
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