MEMORANDUM OF LAW

DATE: August 1, 1994

TO: Ernest Freeman, Director, Planning Department

FROM: City Attorney

SUBJECT: Amendments to Process Two

The First Public Review Draft of the Land Development Code, dated June 30, 1994 (referred to herein as the "Draft") shows that several changes have been made to Process Two (Municipal Code Sections 111.0503 and 111.0504). We have had a number of discussions in the past with the Zoning Code Update Team in which we were asked to determine whether the changes made to Process Two would survive a legal challenge. We concluded that Process Two may be appropriate for making two types of decisions; decisions that have a de minimis impact on adjoining property owners and decisions that are based on strict standards. This memorandum of law will serve to summarize the legal issues raised with respect to the types of permits and approvals that could be sorted into this revised process.

BACKGROUND

Chapter 11 of the Municipal Code, adopted by the City Council on May 26, 1992, established five processes in which land use decisions are made. We have opined in the past, that the five decision processes established by the City to decide land use matters were modeled after the three types of actions that can be taken by local agencies in land use matters; legislative, adjudicatory and ministerial. The City's 140 types of permits and approvals were originally sorted into the five decision processes based upon the legal distinction between the various types of actions. Legislative matters were sorted into Process Five. Adjudicatory decisions were sorted into Processes Three, Four and Five and ministerial actions were handled by Processes One and Two. (Report by City Attorney John Witt to City Council, dated March 19, 1992.)

Our review of the Draft indicates that Process Two has now been revised to create a hybrid process that would permit land use decisions to be made initially by the Development Services Department without a noticed public hearing. The Development Services Department would be responsible for notifying the

surrounding property owners of the initial decision only if the property owners request such notification. A public hearing would be held only if the initial decision is appealed (hereinafter referred to as "Revised Process Two"). In addition, Revised Process Two will be used to decide additional land use matters.

ANALYSIS

In order for us to determine whether Revised Process Two will survive a legal challenge, we must determine whether the appropriate type of land use matter is being decided under this process. The classification of a land use matter as either legislative, adjudicatory or ministerial will determine the type of due process that is required; who the decision-maker must be; and the range of discretion the decision-maker has available when deciding the matter.F

The distinction between legislative, discretionary or ministerial will also determine whether the California Environmental Quality Act applies, findings are required, whether the initiative or referendum process applies and what the judicial standard of review will be.

For example, Revised Process Two may be appropriate for making a decision on matters that have a "de minimis," i.e., negligible, impact on surrounding property owners, such as permits for temporary uses; but not for legislative matters such as an amendment to the General Plan. This memorandum of law will focus on the three types of land use actions taken by local agencies and the impact this has on Revised Process Two.

I. Legislative Acts

A legislative act has been defined as an action that is taken by a legislative body that establishes the laws, standards and policies that govern and control the development permit process. San Diego Building Contractors Assn. v. City Council, 13 Cal.3d 205, 213 (1974). Legislative actions must be enacted by the governing body of a city or county. Kuglar v. Yocum, 69 Cal.2d 371 (1968) and Groch V. City of Berkeley, 118 Cal.App.3d 518 (1981).

Legislative matters, such as adopting planning and zoning ordinances, adopting or amending community plans or amending the General Plan, should continue to be decided by Process Five. Process Five follows the State Zoning Law (Government Code Section 65100 et seq.) requirement that the legislative body (the City Council) take action on such matters at a noticed public hearing after receiving a recommendation from the Planning Commission.F

We have opined in the past, that it is prudent to provide

a noticed public hearing for the adoption of legislative actions. Many legislative acts are statutorily mandated by the State Zoning Law to provide a noticed public hearing even though the Due process Clause of both the United States and California Constitutions do not require a hearing. Although the State Zoning Law does not generally apply to charter cities, there is speculation among some legal commentators that the courts will expand notice and hearing requirements beyond quasi-judicial proceedings and apply such requirements to legislative and rule-making actions as well. (27 UCLA Law Review 859.)

Naturally, such matters can not be decided by Process Two because this process does not provide for a noticed public hearing before the City Council.

II. Adjudicatory Decisions

An "adjudicatory" action has often been defined as an action that is taken on an individual development project in accordance with objective standards and policies. It involves the actual application of a rule to a specific set of existing facts. Pacific Corp. v. City of Camarillo, 149 Cal.App.3d 168, 175 (1983).

In Arnel Development Company v. City of Costa Mesa, 28 Cal.3d 511 (1980), the Court concluded that certain types of land use decisions are per se adjudicatory. The Court explained that the generic classification of a land use decision, as either a legislative, adjudicatory or ministerial action, allows the public to readily determine whether notice, a hearing and findings are required, the form of judicial review that is appropriate, and whether the measure can be enacted by initiative. Id. at 523.

The courts have determined that tentative subdivision map approvals (Kennedy v. City of Hayward, 105 Cal.App.3d 953 (1980)); variances (Topanga Assn. For A Scenic Community v. County of Los Angeles, 11 Cal.3d 506, (1974)); coastal development permits (Patterson v. Central Coast Regional Com., 58 Cal.App.3d 833, (1976)) and conditional use permits (Hayssen v. Board of Zoning Adjustments, 171 Cal.App.3d 400, (1985)) are adjudicatory in nature.

A. When Due Process Is Triggered

The California Supreme Court in Horn v. County of Ventura, 24 Cal.3d 605 (1979), concluded that due process is triggered whenever an adjudicatory decision "substantially affects" adjacent landowners. The Court reasoned that persons whose property interests may be significantly affected by an adjudicatory decision are entitled to due process protection. In

Horn, the Court determined that the approval of a four lot subdivision substantially affected adjacent landowners in terms of interference with street access and the creation of traffic congestion and air pollution. Id. at 615.

Since Horn, other courts have held that due process is triggered whenever adjudicatory land use decisions are made. Hayssen v. Board of Zoning Adjustments, 171 Cal.App.3d 400, 404 (1985). See also Arnel, 28 Cal.3d 511, 523 and Kennedy v. City of Hayward, 105 Cal.App.3d 953, 961 (1980). The court in Hayssen states "It is by now settled law that the property interests of adjacent land owners are at stake in a land use proceeding, and that procedural due process protections are therefore invoked." Hayssen, 171 Cal.App.3d, at 404.

In the increasingly complex world of land use regulation, it may be argued that most adjudicatory decisions have a substantial affect on adjacent landowners. We cannot accurately predict whether a court would find that adjacent landowners are significantly affected by an adjudicatory decision in many marginal situations that arise.

Therefore, it is both safer and easier to apply due process principles whenever adjudicatory decisions are made by the City, rather than to make a case by case analysis of each land use decision to attempt to determine whether the surrounding property owners will be substantially affected by the decision. We advise that the City should assume that adjudicatory actions, such as variances, conditional use permits, coastal development permits and tentative maps, substantially affect the rights of adjacent property owners so as to trigger due process.

Once it has been determined that due process applies, we must next determine what process is due. Two essential components of procedural due process are notice and hearing, such that the person being deprived of an interest has an opportunity to be heard at a meaningful time and in a meaningful manner.F

Due process also requires that a person must have an "impartial" decision-maker. However, for purposes of the Memorandum this component of due process will not be discussed. This topic has been addressed in great detail in City Attorney Opinion 90-2 dated June 15, 1990.

Armstrong v. Manzo, 380 U.S. 545 (1965).

It has been well established that in most instances the opportunity to be heard at a "meaningful time" means that a noticed public hearing must be provided before a person's property interest is affected. (This is often referred to as a "pre-derivation" hearing.) Boddie v. Connecticut, 401 US 371, 379 (1971). See also Memphis Light, Gas & Water, v. Craft, 436 US 1, 19 (1978).

One of the first cases in California to address this issue was Scott v. City of Indian Wells, 6 Cal.3d 541, (1972). The court in Scott held that affected property owners should have been provided with an opportunity to be heard before the City approved a conditional use permit, even though the affected property owners were not located within the city limits. The court explained that an individual's interest in his property is often affected by local land use controls, and the "root requirement" of due process is that an individual be given an opportunity for a hearing before he is deprived of any significant property interests. Id. at 549.

The courts in subsequent California cases have concluded that before local agencies can approve or deny a land use matter, affected property owners must be provided with an opportunity to be heard. Horn v. County of Ventura, 24 Cal.3d 605, 617 (1979). See also Kennedy v. Hayward, 105 Cal.App.3d 953 (1980), (tentative parcel map approval required a pre-deprivation hearing) and Reed v. California Coastal Zone Conservation Com., 55 Cal.App.3d 889 (1975) (coastal permit also required a pre-deprivation hearing). The California Supreme Court in Horn explained that an affected property owner is entitled to a pre-deprivation hearing that focuses on his particular concerns and the general feasibility and desirability of the project. Id. at 617.

Under some circumstances, a person's property interest could be affected without legal necessity for a prior hearing. Dixon v. Love, 431 U.S. 105 (1977). (This is referred to as a "post-deprivation" hearing.) In Dixon, the Supreme Court held that the State of Illinois could revoke a person's drivers license without a prior hearing. The Court considered three factors when determining whether due process was required: (1) the private interest that was affected by the action; (2) the likelihood that an erroneous decision could be made by the government; and (3) the governmental interest that was served by the decision process. Id. at 112.

The Supreme Court reasoned that the private interest at stake, a drivers license, was not an "essential" property interest. Also, the Court found that there was an important public interest served by promptly removing unsafe drivers from the roads. Finally, the Court believed there was little risk that an erroneous decision would be made by the decision-maker. The decision to suspend a person's license was based on the number of prior traffic convictions a person had accumulated over a certain period of time. This meant that the person had an opportunity for a full judicial hearing in connection with each of the prior traffic convictions.

However, the Court, in dicta, explained that the need for a hearing would arise when there was no statutory standard used by the governmental authority because "...the power to make discretionary decisions under a broad statutory standard, case by case decision-making, may not be the best way to assure fairness." Id. at 115.

A year later, the Supreme Court used the same balancing of interest test in Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1 (1978), but found that a pre-deprivation hearing was required in order to terminate a person's utility services. The Court reasoned that terminating a person's utility services would constitute a deprivation of a significant property interest. Moreover, the Court believed that there was a high probability of error in the decision-making process. In Dixon people were provided with an opportunity for a judicial hearing on each of the prior traffic convictions. However, in Memphis Light an opportunity for a hearing was never provided before the person's utility services were terminated.

In any event, Horn and its progeny have summarily held that adjudicatory actions that have a substantial effect on the property rights of adjoining property owners require a noticed public hearing before such interests could be affected. The courts have consistently determined that tentative map approvals, conditional use permits and coastal development permits, require a pre-deprivation hearing. Kennedy v. Hayward, 105 Cal.App.3d 953 (1980), and Reed v. California Coastal Zone Conservation Com., 55 Cal.App.3d 889 (1975). We believe that it is likely that the courts would determine that other similar adjudicatory land use matters, such as variances and planned development permits, would also trigger the need for a pre-deprivation hearing.

Moreover, the Supreme Court in Dixon, explained that the risk of erroneously depriving an individual of a property interest is greater when the government has the power to make discretionary decisions on a case by case basis. This type of case by case decision-making usually occurs in adjudicatory land use decisions. Finally, we suspect that a post-deprivation hearing would not be upheld by the courts based solely on the City's need for administrative efficiency or for fiscal considerations.

In addition to a pre-deprivation hearing, the courts have held that proper notice is a constitutionally required element of due process. Notice must be reasonably calculated to afford affected persons the realistic opportunity to protect their interest. However, the courts have thus far not provided a

specific formula for determining the nature, content or timing of the notice that must be given to the public. This is left to the local governments to decide depending on the magnitude of the project and the degree to which a particular landowner's interest may be affected. Horn, 24 Cal.3d 605, 618.

In Horn, the Supreme Court objected to the County of Sausalito's noticing regulations which required notices to be posted at public buildings and mailed to persons who specifically requested it. The Court believed that the County essentially placed the burden solely on the public to obtain the proper notice. The Court stated: "... Persons ... cannot reasonably be expected to place themselves on a mailing list or 'haunt' county offices on the off-hand chance that a pending challenge to those interests will thereby be revealed." Id. at 618.

In view of the above, it is our opinion that adjudicatory actions, such as tentative maps, conditional use permits, variances and other similar actions, should continue to be decided by Processes Three, Four and Five. (See page 3 of Report to City Council, dated March 19, 1994.) If such permits and approvals were decided by Revised Process Two, the City would be vulnerable to legal attack for failing to provide affected property owners with sufficient procedural due process protection for several reasons. First, Revised Process Two does not provide adjoining property owners with a public hearing until "after" a decision has been made on a land use matter. Second, the notice provided by Revised Process Two may be insufficient to meet due process standards. As in the case of Horn, Revised Process Two places the burden solely on the public to request notice of the City's decision.

Finally, we would like to reiterate the concerns we have with respect to "neighborhood use permits" being decided by Revised Process Two. As we described above, the courts have consistently found that conditional use permits trigger due process requirements. In addition, the court in Scott indicated that before action can be taken on conditional use permits, affected property owners must be provided with an opportunity to be heard. Scott v. City of Indian Wells, 6 Cal.3d 541, 549 (1972). As we previously stated, we can not see a distinction between the "neighborhood use permit" described in Chapter 12 of the Draft and the traditional concept of a conditional use permit. Therefore, we believe that the currently proposed neighborhood use permit should be decided by Process Three or Four.

It is interesting to note that the "neighborhood use permit" described in the Draft is similar to the minor use permits used by the County of San Diego. However, the County of

San Diego uses a decision-making process similar to Process Three when deciding to approve or deny a minor use permit.

B. When Due Process Is Not Triggered

Of course, not all land use actions trigger the need for a noticed public hearing. The California Supreme Court in Horn explained that actions that have a de minimis effect on adjoining property owners or decisions that are based on the non-discretionary application of an objective standard do not trigger due process. Therefore, such decisions do not require a noticed public hearing. Horn v. County of Ventura, 24 Cal.3d 605, 616 (1979).

The City would be less vulnerable to attack if Revised Process Two is used to decide land use matters that do not trigger due process. In view of the Horn decision, this would mean that two types of land use decisions could be decided by Revised Process Two; decisions that are based on strict standards and decisions that have a de minimis impact on surrounding property owners.

However, we would stress that careful attention be paid when determining whether a particular decision would have a de minimis impact on adjoining property owners. The Court in Horn does not provide us with any guidelines for determining what would be considered de minimis. In the present case, the City may want to analyze whether home occupation permits and some temporary permits could be reasonably placed into Revised Process Two.

III. Ministerial Decisions

Ministerial actions have been defined as mandatory, non-discretionary decisions which must be approved if certain standards and conditions have been met. Ellis v. City Council, 222 Cal.App.2d 490, (1963). Examples of ministerial decisions include approval of final subdivision maps and the issuance of building and occupancy permits. Actions that are based on the non-discretionary application of an objective standard do not trigger procedural due process. Horn v. County of Ventura, 24 Cal.3d 605, 616 (1979). See also Hodel v. Virginia Surface Mining and Reclamation Assoc., 452 U.S. 264 (1980).

In Hodel, the Supreme Court found that a company's due process rights were not violated because the decision to summarily suspend the company's mining activity was based on a strict statutory scheme. The Court reasoned that when strict standards are used in decision-making it minimizes the possibility that an erroneous decision would be made. Id. at 302.

Moreover, the Legislature has provided, by Government Code section 65901, that local agencies may by ordinance decide some

forms of variances without a noticed public hearing. Government Code section 65901 provides, in part:

> In accordance with the requirements for variances specified in Section 65906, the legislative body of the city or county may, be ordinance, authorize the zoning administrator to decide applications for variance from the terms of the zoning ordinance without a public hearing on the applications. Such ordinance shall specify the kinds of variances which may be granted by the zoning administrator and the extent of variation which the zoning administrator may allow.

Although we found no case law which has yet to interpret this provision of the Government Code, we believe that it follows the same reasoning provided by the Hodel decision. The use of strict standards in decision-making is important when determining whether due process is required.

Again, little guidance has been provided by the courts in determining the degree of specificity a standard must contain in order to withstand a due process challenge. Arguably, the stricter the standard established for deciding such matters, the more likely the courts will find that due process does not apply.

In view of the case law discussed above, certainly the most conservative approach is to place land use permits that are subject to precise standards into Revised Process Two. We also suggest that careful attention be paid to creating clear standards for deciding such matters.

Finally, we would like to comment on the proposed "limited variance" procedure.F

Limited variances allow persons to obtain a deviation from a specific development regulation within a certain range, e.g., a person may be allowed a 20 percent decrease from a 5-foot setback requirement.

Municipal Code section 101.0502(B) is incorporated into Chapter 12 of the Draft to provide limited variances from certain development regulations. Arguably the City may approve such variances without a public hearing as provided by Government Code Section 65901 because the extent of the variation allowed under this process is limited. However, we feel compelled to alert you that, for the reasons discussed above, we cannot predict with certainty whether the courts would find that limited variances trigger the need for due process.

Therefore, we would advise that limited variances not be expanded beyond what is currently provided under Municipal Code Section 101.0502.

CONCLUSION

In view of the case law discussed above, the conservative approach is to permit only those land use decisions that do not trigger due process to be decided by Revised Process Two. This means that two types of land use decisions can be decided by Revised Process Two; decisions that are based on strict standards and decisions that have a de minimis impact on surrounding property owners. When sorting permits into Process Two we suggest that each specific permit be analyzed in this fashion.

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