MEMORANDUM OF LAW

DATE: January 4, 1995

TO: Mike Tudury, Historic Preservation Planner
Planning Department

FROM: City Attorney

SUBJECT: Historic Property - Mills Act Implementation

Our office has been asked by Redevelopment Agency staff whether there are any legal restrictions to establishing eligibility criteria for implementation of a Mills Act Contract Program within the City of San Diego's redevelopment project areas.

Background

Since 1972, the State of California has authorized cities and counties to enter into voluntary contracts with the owners of qualified historic properties to restrict the use of their property in order to preserve and maintain its historic characteristics for the benefit of the public. Gov't Code Sections 50280-50290. In consideration for accepting the property restrictions, during the term of the contract the owner of the historic property enjoys the benefit of substantially reduced property taxes. This type of agreement is commonly known as a "Mills Act Contract."

On November 1, 1994, the City Council considered the City Manager's recommendation for adoption of a Mills Act Contract Program for the City of San Diego. At the public hearing, the City Manager was seeking direction from the Council with the intention of returning in the near future with a specific Council Policy for implementation of a program. The City Manager recommended adoption of a program patterned essentially after the successful program being administered by the City of Escondido. The City Manager's recommendation was for the program to be cost recoverable and made available citywide to the owners of residential historic properties.

During the hearing a motion was made by Councilmember Warden to expand the scope of the program to include commercial as well as residential property and to consider a graduated filing fee. The main motion was amended by Councilmember McCarty to eliminate any preservation or restoration work schedule requirements in the Mills Act Contracts. At that point staff from the Redevelopment Agency of The City of San Diego spoke against the pending motion. It was explained by Redevelopment staff that within redevelopment project areas maintenance

of a healthy and growing tax base is necessary to generate the tax increment which is then used by the Redevelopment Agency for implementation activities. Particular concern was expressed regarding the Gaslamp Quarter Historic District where a large concentration of commercial historic property exists in an area of intense Redevelopment Agency implementation activity.

After hearing from Redevelopment Agency staff, Councilmember Warden amended her motion to give an extra 180 days for Redevelopment Agency staff to propose an appropriate Mills Act implementation policy for Redevelopment Project Areas.

Analysis

There is very little legal authority interpreting the Mills Act or the practices of any local government in implementing the Mills Act. However, we believe instructive guidance can be found on the question presented by looking to authority interpreting the Williamson Act. Gov't Code Section 51230. The Williamson Act was enacted by the Legislature eight years before the Mills Act and it certainly appears that the Mills Act was patterned after the Williamson Act because of the remarkable similarity of their statutory structure. The Williamson Act authorizes counties to establish agricultural preserves and to enter into voluntary contracts with owners of property within the preserves to restrict the use of their property to preserve the State's limited supply of agricultural land. Like the Mills Act, once a contract is executed, the owner of the agricultural property enjoys substantial property tax savings.

In 1973, the Attorney General was requested to evaluate the Williamson Act eligibility criteria established by Trinity County. See 56 Op. Att'y Gen. 160 (1973). Trinity County had established three conditions of eligibility to establish an agricultural preserve: 1) Minimum agricultural capital outlay requirements; 2) a requirement that gross income from the agricultural preserve be at least 50% of its estimated agricultural capability; and, 3) a requirement that the applicant for the preserve derive 51% or more of his or her income from agricultural pursuits.

With respect to the first two criteria, the Attorney General characterized these restrictions as implementing a policy to limit agricultural preserves within Trinity County to "only productive agricultural land." Id. at 162. Quoting from an earlier opinion, the Attorney General stated that:

> Broad discretion is given to boards of supervisors and city councils to determine which types of property require preservation as open-space land and should be placed in agricultural preserves. A board of supervisors may in the exercise of that discretion decline to establish agricultural

> preserves with respect to property which in its judgment would not benefit from open-space treatment or where the board finds that the conferring of open-space treatment to such land is not in the public interest. Id.

However, the Attorney General did find Trinity County's third restriction to be legally problematic. The third criterion required the applicant to prove that he or she derived fifty-one percent (51%) or more of net income from agricultural pursuits. The Attorney General implied that this restriction violated the Equal Protection Clause of the Fourteenth Amendment of the United Sates Constitution and article IV, section 16 of the California Constitution, prohibiting special laws. Citing to a United States Supreme Court decision, McLaughlin v. Florida, 379 U.S. 184 (1964), the Attorney General reasoned that Trinity County's Williamson Act implementation criteria must be reasonably related to the purpose of the legislation and that "We can discern no reason why one farmer earning all of his income from 200 acres of land in full agricultural production should be distinguished from his neighbor owning 200 acres in full agricultural production who also has additional income from non-agricultural pursuits exceeding his agricultural income." Id.

Just as the Attorney General analyzed the Williamson Act, we also believe the Legislature intended for the City Council to be vested with broad discretion to make qualitative determinations regarding the manner and scope which a Mills Act Program is made available to further preservation of historic structures in the City of San Diego. Government Code section 50280 expressly provides that "the legislative body of a city, county, or city and county may contract with the owner or agent to restrict the use of the property in a manner which the legislative body deems reasonable to carry out the purposes of this article." (Emphasis added).

One factor which may justify the creation of different Mills Act eligibility criteria within redevelopment project areas stems from the potential for competition between the two discretionary programs. The underlying premise of the Mills Act, which reduces the tax burden of historic property owners in exchange for historic preservation, may conflict with the public policy goals of state redevelopment law which is premised upon the use of tax increment funds from these same properties for economic revitalization of the neighborhood. A strong argument can be made that the Council should be given the discretion to qualitatively decide which policy, historic preservation or redevelopment, is more important within redevelopment project areas and to what extent they will be permitted to complement or compromise each other.

Another factor which may justify different eligibility criteria within the Gaslamp Quarter Sub-Area of the Center City Redevelopment Project Area is that, unlike many other areas of the city, the public

policy of historic preservation is extensively addressed for that area of the City in the Gaslamp Quarter Planned District Ordinance and the Historic Preservation Focus Plan for the Gaslamp Quarter.

In summary, we believe the City Council has broad discretion to fashion Mills Act implementation criteria which they believe would be in the best interest of the citizens of San Diego. However, to the extent the program is not made available uniformly throughout the City or made available only for certain types or classes of historic structures, the legislative record should clearly reflect why the disparate application is justified and reasonable.

Please call me if you need further clarification of our analysis or if you have additional questions.

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By
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