MEMORANDUM OF LAW

DATE: December 4, 1995

TO: Jeff Washington, Deputy Director, Planning Department

FROM: City Attorney

SUBJECT: Subarea V Specific Plan Proposal

Question Presented

On October 11, 1995, a workshop was conducted at the Land Use and Housing Committee (the "Committee") of the City Council to consider various alternatives for utilizing a specific plan process to develop Subarea V of the Future Urbanizing Area. At the conclusion of the workshop, the Committee directed City staff to prepare a specific plan for Subarea V in accordance with Government Code section 65450. The Committee further directed staff to prepare the specific plan consistent with Alternative B, one of the three proposed development alternatives presented by staff. Alternative B was conceived by a group of Subarea V property owners. The proposal calls for calculating the maximum number of residential units permissible within Subarea V under the constraints of City of San Diego Proposition A ("Prop. A") approved on November 5, 1985, and then allocating the majority of that density within the Subarea to a portion of the Subarea to be designated for a higher concentration of development.

At the Committee's direction, our office was asked to analyze the legality of the Alternative B specific plan proposal and to provide that legal guidance to Planning Department staff. In particular, we were asked to comment about whether Alternative B complies with the mandate of Prop. A and whether it violates any property rights of owners of land within the Subarea.

Background

In 1979 the Progress Guide and General Plan of The City of San Diego (the "General Plan") was extensively amended and a section titled "Guidelines for Future Development" was added to implement the Urban Development Program. The Urban Development Program consists of classifying land within our planning jurisdiction into three phased development categories: Urbanized, Planned Urbanizing and Future Urbanizing ("FUA"). The definition of these categories and the designation of property within them is reflected in the text and maps contained in the General Plan. General Plan at 23-40.

On November 5, 1985, the citizens of San Diego approved the ballot

initiative measure known as Prop. A (Attachment 1) which amended the Guidelines for Future Development section of the General Plan. The Urban Development Program now contains a provision which, under certain circumstances, requires a vote of approval from the citizens before property is removed from the FUA category. Prop. A does allow the City Council to adopt changes to the General Plan applicable to the FUA when those changes "are neutral or make the designation more restrictive in terms of permitting development." Id. at 37.

In 1992, the City Council exercised its legislative prerogative consistent with Prop. A to adopt growth management guidelines applicable to the Future Urbanizing Area in the North City Area. The guidelines are known as the Framework Plan for the North City Future Urbanizing Area ("Framework Plan"). They were adopted as an amendment to the General Plan but specifically require voter approval prior to implementation of any increased development rights. Now, as incorporated into the General Plan, the Framework Plan has the same force and effect under the law as the General Plan and Prop. A itself. The Framework Plan is applicable to Subarea V. It contains both "Guiding Principles" and "Implementing Principles" which allow for development in the North City Future Urbanizing Area. The Framework Plan envisions that interim short term development can proceed in accordance with regulations in place as of August 1, 1984, the effective date of Prop. A. Additionally, a process is established within the Framework Plan for the creation of long range Subarea Plans which designate development within five different Subareas of the North City Future Urbanizing Area at urban intensity levels. As required by Prop. A, the Framework Plan provides for a phase shift vote prior to implementation of any Subarea Plan.

Analysis

The Alternative B proposal does not remove Subarea V from the FUA designation which is the basic prohibition under Prop. A. It is intended to be a neutral regulatory amendment which would permit development within Subarea V at an overall intensity which does not exceed that which was allowed by regulations existing upon the passage of Prop. A. Development may occur within the FUA without a vote if that development proceeds in accordance with regulations in place on the effective date of Prop. A. This rule is derived by the express terms of Prop. A itself, which simply precludes amendments to the General Plan to change the designation from Future Urbanizing and precludes amending the text or maps of the General Plan to allow additional development rights, without first getting the approval of a majority of the electorate.

The regulations applicable to Subarea V at the time of passage of Prop. A, as set forth in City Council Policy 600-29, included: the A-1 zoning regulations, the Rural Cluster Development Regulations and the Planned Residential Development ("PRD") Regulations. However, to understand the Alternative B proposal, it is important to recognize that

Prop. A did not freeze the existing regulatory scheme in place upon its passage. By its express terms, Prop. A allows amended or alternative development regulations or processes within the FUA, so long as those regulations "are neutral or make the designation more restrictive in terms of permitting development." A specific plan, as proposed in Alternative B, is defined in Government Code section 65450 et seq. And, while Government Code section 65451 requires that a specific plan must include a statement of the relationship of the specific plan to the General Plan, a specific plan is not in itself a modification of a General Plan.

The Alternative B proposal calls for first calculating the maximum density yield obtainable from land within the entire Subarea as permitted by the regulations in place upon passage of Prop. A. This is a hypothetical exercise which assumes for purposes of the calculation that the entire Subarea is in single ownership. As reflected in the planning documents created by City staff in connection with this project, there are approximately 240 acres within Subarea V currently zoned A-1-1. This gross acreage yields 240 dwelling units, applying the equation of 1 dwelling unit per acre. There are 1,795 acres zoned A-1-10 within Subarea V. This gross acreage yields 448 dwelling units, applying the equation of one dwelling unit per four acres, pursuant to the PRD regulations as they existed on August 1, 1984. Therefore, the total dwelling units permitted over the entire gross acreage in Subarea V is 688 dwelling units.

The Alternative B concept then clusters the maximum amount of dwelling units within the specific plan to an area designated for higher concentration of development, as intended by the PRD and Rural Clustering Regulations. Public land which is owned by The City of San Diego and zoned A-1-10 (412.8 acres) and zoned A-1-1 (20 acres) would be reflected in the specific plan as open space devoid of development potential. All of the dwelling unit yield calculated from this land, 123 dwelling units, would be clustered into the development area. Public land owned by the State and County (119 acres zoned A-1-10) and all other private land zoned A-1-1 and A-1-10 and outside the clustered development area would retain minimum development rights pursuant to applicable underlying zone, i.e. one unit per 10 acres. The retention of these minimum development rights results in the subtraction of 268 dwelling units from the units available for clustering within the development area. Therefore, of the 688 units available within the Subarea as a whole, approximately 420 could be clustered within acreage set aside for more concentrated development.

Conclusion

If the process set forth above is followed to create the specific plan, adoption and implementation of such a plan would be consistent with the authority delegated to the City Council in Prop. A. It would amount to a neutral regulatory amendment which would not require a phase

shift vote. It can be expected that some of the property owners within the Subarea who own land outside of the clustered development area may complain that "rights" are being taken away from them. However, our office has previously opined that while the removal of the opportunity to seek a PRD or Conditional Use Permit may frustrate the plans of a property owner, a property owner does not have a present right to a future use of property. Op. San Diego City Att'y 729 (1990). See generally, Avco Community Developers, Inc. v. South Coast Regional Commission, 17 Cal. 3d 785, 793 (1976).

Finally, as with any land use action, there is some legal risk associated with approving the development. In this case, City Council Policy 600-29 exists as a longstanding policy which addresses allowable development within the FUA. Although this policy is not binding as regulation and may be freely changed at the discretion of the Council, since the passage of Prop. A it has expressed the desire and intent of the Council to "prohibit development at urban intensities" within the FUA until a phase shift occurs. Therefore, we believe it will be easier to defend the adoption of the specific plan as a reasonable exercise of the legislative prerogative delegated to the Council under Prop. A if the specific plan for Subarea V results in a plan for development which retains rural qualities of the area, distinguishable in character, scope and scale from other Planned Urbanized or Urbanized areas of the City.

JOHN W. WITT, City Attorney
By
Richard A. Duvernay
Deputy City Attorney

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Attachment
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