

MEMORANDUM OF LAW

19960311

DATE: March 11, 1996

TO: Cathy Winterrowd, Senior Planning
Development Services Department

FROM: City Attorney

SUBJECT: Authority of the Historical Site Board to Designate Historical Properties

You informed me that, during public review of the second draft of the proposed Land Development Code, members of the development industry questioned whether the Historical Resources Board has the authority under the Charter of The City of San Diego (the "Charter") to designate properties as historical resources. All decisions of the Historical Resources Board in designating properties as historical resources may be appealed to the City Council.

As the procedure for designating properties in the proposed Land Development Code is the same as is currently in place under San Diego Municipal Code ("SDMC") section 26.0201 et seq., you have asked for a legal opinion as to whether the current process violates the Charter.

QUESTION

Is it a violation of the Charter to allow the Historical Site Board (renamed the Historical Resources Board in the proposed Land Development Code) to designate properties as historic sites, with the decision being deemed final unless appealed to the City Council? Your question is posed in the context of Charter Section 43, which section allows the City to establish advisory boards and committees, but does not provide for the establishment of decision-making boards.

SHORT ANSWER

As the Charter is a document of limitation, not rights, the City Council may delegate the responsibility for designation of historic sites to the Board, provided the Board acts pursuant to policy established by the City Council. Furthermore, as any decision of the Board in designating a property as historic may be appealed by the property owner to the City Council, the City Council remains as the

final arbiter of any decision by the Board.

BACKGROUND

Charter Provisions

The general grant of powers under the Charter is laid out in Article I, Section 2. It states in pertinent part:

The City of San Diego, in addition to any of the powers now held by or that may hereafter be granted to it under the Constitution or Laws of this State, shall have the right and power to make and enforce all laws and regulations in respect to municipal affairs, subject only to restrictions and limitations provided in this Charter; provided, however, that nothing herein shall be construed to prevent or restrict the City from exercising, or consenting to, and the City is hereby authorized to exercise any and all rights, powers and privileges heretofore or hereafter granted or prescribed by General Laws of the State.

Of relevance to this discussion is Article V, Section 43(a), of the Charter which discusses advisory bodies. It reads:

The City Council may by ordinance create and establish advisory boards. Such boards shall be advisory to the Mayor, Council or City Manager as may be designated by ordinance. . . . The members of such boards shall serve without compensation and it shall be their duty to consult and advise with the Mayor, Council or City Manager, as the case may be, but not direct the conduct of any Department or Division.

Procedure for Designation of Historical Sites

San Diego Municipal Code section 26.0201 et seq. provides the statutory framework for designation of historical sites. Section 26.0201 states:

It is the purpose and intent of the City Council to establish a Historical Site Board as an advisory board to advise the Mayor, City Council, City Planning Commission, Park and Recreation Board, and the City Manager relating to the identification, protection, retention and preservation of historical sites in the City of San Diego.

Among its duties, the Historical Site Board (the "Board") is to "compile and maintain a current register of all sites, buildings and structures it has determined to be historical sites." SDMC Section 26.0204(B). In order for a property to be designated as a historical site, it must meet the definition of a "historical site" as set out in SDMC section 26.0203. The procedure for designation is set out in SDMC section 26.0204, but may be summarized as follows: Properties are placed on the register following a public hearing in which the property owner receives not less than 15 days notice. Following the hearing, "the action of the Historical Site Board in designating any historical site . . . shall be final on the eleventh (11th) day following the decision of the Historical Site Board unless an appeal to the City Council is filed with the City Clerk within ten (10) days of the action by the Historical Site Board." See SDMC Section 26.0204(G).

ANALYSIS

The Charter provides that The City of San Diego has the power to "make and enforce all laws and regulations in respect to municipal affairs, subject only to the restrictions and limitations provided in this Charter." (Emphasis added.) Charter Art. I, Section 2.

There does not appear to be any such restriction or limitation that would prohibit the Board from designating historical sites. Even the language in Charter Sections 41, 41.1 (both dealing with commissions) and 43(a) does not preclude the City Council from creating and establishing other types of advisory boards apart from those authorized by Charter Section 43. However, in this instance it seems that the role of the Board in designating properties is consistent with Section 43(a). It can only designate those properties which meet the definition found in San Diego Municipal Code section 26.0203. If a property owner does not want the property designated, he or she may appeal that decision to the City Council, which has the authority to "affirm, reverse, or modify the determination of the Board." SDMC Section 26.0204(G).

Furthermore, this type of structure is consistent with general

principles governing delegation of legislative authority:

A municipal legislative body is constitutionally prohibited from delegating the formulation of legislative policy but may declare a policy, fix a primary standard, and authorize executive or administrative officers to prescribe subsidiary rules and regulations that implement policy and standard and to determine the application of the policy or standard to the facts of particular cases. *Birkenfeld v. City of Berkeley*, 17 Cal. 3d 129, 167 (1976).

"The fact that a third party, whether private or governmental, performs some role in the application and implementation of an established legislative scheme does not render the legislation invalid as an unlawful delegation." *Kugler v. Yocum*, 69 Cal. 2d 371, 379-380 (1968).

The concern in this area is that there be adequate safe-guards whenever statutes authorize some delegation of authority in order to prevent "unfairness or favoritism." *Birkenfeld*, 17 Cal. 3d at 169. As any action of the Board in designating a property as historic can only take place at a public hearing in which the property owner has a minimum of 15 days notice, and then any decision by the Board is appealable to the City Council, it appears that there are adequate safeguards in this regard.

CONCLUSION

As the process you are proposing for designation of historical resources in the Land Development Code is the same as the one currently in place, there is not a violation of the Charter in this regard. If you would like additional clarification, or have any further questions, please feel free to contact me.

JOHN W. WITT, City Attorney

By
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