

**Office of
The City Attorney
City of San Diego**

MEMORANDUM

DATE: July 12, 2006

TO: Dr. Jerry Schaefer
Laura Burnett
Abel Silvas
Kelly Saunders
Myra Herrmann
Cathy Winterrowd

FROM: City Attorney

SUBJECT: Protection of Archeological Resources Through Designated Districts

INTRODUCTION

On Monday, July 10, 2006, the Archeological Subcommittee for the City of San Diego Historical Resources Board met to discuss whether there is a need for designated archeological districts. During the meeting, two legal issues were raised, which deserve some clarification in order for the Subcommittee to better understand the added legal protections to archeological resources that would occur as a result of recognizing archeological districts.

QUESTIONS PRESENTED

1. Does the creation of archeological districts serve to better protect archeological resources found in the City of San Diego under the Land Development Code?
2. What justifications for the creation of archeological district boundaries are necessary in order for land development restrictions on property to be valid and enforceable?

SHORT ANSWERS

1. Yes. There would be added protection afforded by the creation of designated archeological districts including, but not limited to, the restriction against removal or relocation of archeological finds within the district. Where such removal or relocation is allowed, supplemental findings would be required to establish that: (1) there are no feasible, less damaging alternatives; (2) the deviation is the minimum necessary to afford

relief; (3) all feasible mitigation measures have been provided for by the applicant; and (4) strict adherence to the regulations would deny the applicant of all reasonable use of his or her land.

2. Designated archeological districts will be found constitutionally valid as a limit on development if the justification for the creation of the archeological districts is not arbitrary and is rationally related to the public welfare.

ANALYSIS

LAND DEVELOPMENT CODE (LDC)

The threshold for application of the Historic Resources Regulations is whether “historic resources are present on site.” SDMC § 143.0210. Historic Resources are specifically defined in the LDC to include a designated historical resource, historical building, historical structure, historical object, important archeological site, historical district, historical landscape, or traditional cultural property. *Id.* Each of these categories is in turn specifically defined in the LDC. SDMC § 113.0103.

Under the LDC, a Neighborhood Development Permit and a Site Development Permit is required for development proposals affecting important archeological sites in accordance with Process Four if the proposed development will cause more than a minor alteration in the resource. SDMC §§ 143.0210(e), 143.0220. However, the Development Regulations for Important Archeological Sites under Section 143.0253 afford only minimal protection and allow a reasonable development area to intrude into archeological sites. Specifically, encroachments of up to 25 percent into important archeological sites are allowed on standard projects, and encroachments of up to 40 percent are allowed for essential public service projects where it has been demonstrated that there is no feasible less environmentally damaging location or alternative. *Id.*

If archeological districts are recognized through the Historical Resources Board designation process, there are additional protections that would be afforded under the LDC. First, the Development Regulations for Designated Historical Resources and Historical Districts in Section 143.0251 states that:

In addition to the general development regulations in Section 143.0250, the following regulations apply to designated historical resources and historical districts.

- (a) It is unlawful to substantially alter, demolish, destruct, remove, or relocate any designated historical resource or any historical building, historical structure, historical object or historical landscape located within a historical district except as provided in Section 143.0260.

- (b) Minor alteration of any designated historical resource, or any historical building, historical structure, historical object or historical landscape located within a historical district, or any new construction within a historical district may be permitted if the minor alteration or new construction would not adversely affect the special character or special historical, architectural, archaeological, or cultural value of the resource consistent with the Secretary of Interior's Standards and Guidelines.
- (c) Development affecting designated historical resources or historical districts shall provide full mitigation for the impact to the resource, in accordance with the Historical Resources Guidelines of the Land Development Manual, as a condition of approval.

Id. (emphasis added). Thus, once designated an archeological district, any development inside of that district which would result in the alteration, removal, and/or relocation of archeological items would be prohibited under the LDC. In other words, monitoring and reporting the excavation and removal of archeological finds within the district would alone be inadequate, in violation of the LDC, and constitute a misdemeanor absent other findings required for deviations from the Historical Resources Regulations. If proposed development cannot meet the Historical Resources Regulations, then under Section 143.0260 of the SDMC, the minimum deviation that would afford relief may be allowed, only if additional findings are made:

§143.0260 Deviations from the Historical Resources Regulations

- (a) If a proposed development cannot to the maximum extent feasible comply with this division, a deviation may be considered in accordance with decision Process Four.
- (b) The minimum deviation to afford relief from the regulations of this division and accommodate development may be granted only if the decision maker makes the applicable findings in Section 126.0504.
- (c) If a deviation for demolition or removal of a designated historical resource or a contributing structure within a historical district is approved, the applicant shall obtain approval for new development on the same premises before issuance of a Demolition/Removal Permit.

Id. (emphasis added). The findings required under Section 126.0504 include regular findings for Site Development Permit approval, as well as the applicable supplemental findings found in Sections (b) through (m).

§126.0504 Findings for Site Development Permit Approval

A Site Development Permit may be approved or conditionally approved only if the decision maker makes all of the findings in Section 126.0504(a) and the supplemental findings in Section 126.0504(b) through (m) that are applicable to the proposed development as specified in this section.

- (a) Findings for all Site Development Permits
 - (1) The proposed development will not adversely affect the applicable land use plan;
 - (2) The proposed development will not be detrimental to the public health, safety, and welfare; and
 - (3) The proposed development will comply with the applicable regulations of the Land Development Code.

The particular supplemental findings applicable to important archeological sites, designated historical resources, and historical districts are found in SDMC Sections 126.0504(f) through (i). Essentially, Sections 126.0504(f) through (i) require that decision makers, before approving development that substantially alters designated archeological resources and/or districts by relocating archeological items found within that district, find that (1) there are no feasible, less damaging alternatives; (2) the deviation is the minimum necessary to afford relief; (3) all feasible mitigation measures have been provided for by the applicant; (4) strict adherence to the LDC and denial of the permit would deny the applicant of all reasonable use of his or her land. *Id.* Thus, the supplemental findings pertaining to designated archeological districts would afford much greater protection than what is afforded absent the designation of a district.

CALIFORNIA CONSTITUTION

A second issue was raised at the Archeological Subcommittee meeting regarding the justification for the boundaries of the archeological districts in the face of complaints or potential challenge by community members who want to develop their property without restriction. As a general matter, the California Constitution allows a city to “make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws.” (Cal. Const. art. XI, § 7). California courts presume the constitutionality of land use restrictions, and uphold their validity upon challenge so long as there is a rational relationship to the public welfare. *Associated Home Builders, etc. Inc. v. City of Livermore* (1976) 18 Cal.3d 582, 604-605. A land use restriction is valid “if it is fairly debatable that the restriction in fact bears a reasonable relation to the general welfare.” *Id.* So long as there is a “question upon which reasonable minds might differ,” the courts will not interfere with a municipality’s policy decision. *Id.* Land restrictions are invalid if they are arbitrary or capricious. *Klajic v. Castaic Lake Water Agency* (2001) 90 Cal.App. 4th 987, 995.

In this case, the SDMC states that the public welfare is served by the historical resource regulations. Section 123.0201 of the SDMC states, "The purpose of these [designation] procedures is to establish a process to identify and designate for preservation those historical resources that embody the special elements of the city's architectural, artistic, cultural, engineering, aesthetic, historical, political, social, and other heritages." In addition, Section 143.0201 states that:

The purpose of these regulations is to protect, preserve and, where damaged, restore the historical resources of San Diego, which include historical buildings, historical structures or historical objects, important archaeological sites, historical districts, historical landscapes, and traditional cultural properties. These regulations are intended to assure that development occurs in a manner that protects the overall quality of historical resources. It is further the intent of these regulations to protect the educational, cultural, economic, and general welfare of the public, while employing regulations that are consistent with sound historical preservation principles and the rights of private property owners.

Thus, there is a reasonable relation to the general welfare in our preservation of San Diego's historical resources. The City of San Diego already has the authority to place restrictions on development pertaining to designated historical resources and districts. The Historical Resources Board was established in accordance with San Diego City Charter Section 43, and its authority to designate historical resources in accordance with the Historical Resources Guidelines in the Land Development Code Manual was established under the LDC Section 123.0202(e). The Guidelines include designation of archeological districts. So long as the boundaries of the archeological districts are based on some facts evincing the presence of the districts as established by set criteria laid out in Land Development Code Guidelines, the creation and enforcement of regulations pertaining to the districts are valid and justified under the California Constitution.

Moreover, the valid restriction of development in archeological districts would also increase the protection of such districts. Currently, under the LDC Section 143.0220(d), "development that would not result in substantial alteration, demolition, destruction, removal relocation or encroachment on important archeological sites" is allowed if there is, among other things, "a 100-foot buffer measured from the edge of the important archeological site." This however, does not take into account the presence of nearby archeological sites that could be within an archeological district if so designated, but which are not recognized or protected by this regulation that is site specific. Designation of the archeological district would prohibit the destruction, relocation, and/or removal of archeological objects located within the district. SDMC 143.0251(a). The district could, in many circumstances, create a larger buffer zone than 100 feet out from known sites.

CONCLUSION

Based on the foregoing, there is a justification under the California Constitution for the creation of archeological districts. The creation of archeological districts will also afford more

July 12, 2006

Page 6

protection to archeological resources from proposed development than is currently afforded absent the designation of such districts.

MICHAEL J. AGUIRRE, City Attorney

By

Nina M. Fain-Newman
Deputy City Attorney

NFM:mm

cc: Karen Heumann
Jacqueline Lindsay