Office of
The City Attorney
City of San Diego

MEMORANDUM

DATE: October 26, 2006

TO: Historical Resources Board and Staff

FROM: City Attorney's Office

SUBJECT: Public Views of Designated Historical Resources

INTRODUCTION

Historical Resources Board Member, Otto Emme, requested that this office prepare a memorandum relating to whether public views or visual accessibility of an historical property is (or may be) legally required for designation of that property as an historical resource.

QUESTIONS PRESENTED

1. Is it a valid exercise of police power for the San Diego Historical Resources Board to designate a property as an historical resource when that resource is not visually accessible to the public?

2. Would requiring that the public be able to view a property as a condition to designation by the Historical Resources Board amount to a taking without just compensation?

SHORT ANSWERS

1. Yes. The San Diego Municipal Code states that the purpose of designation of historical resources is to preserve "the city's architectural, artistic, cultural, engineering, aesthetic, historical, political, social, and other heritages." SDMC § 123.0201. In addition, the purpose of the Historical Resources Regulations is 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." SDMC § 143.0201. Because the stated public purposes of the regulations include more than just the visual enjoyment of the resources, designation without requiring a public view would have a sufficient nexus to the stated purpose so that it would be a valid exercise of police powers.

2. Probably No. The issue is whether the regulation interferes with the investment backed expectation of the property owner so that imposing the regulation would amount to a taking without just compensation. As for interiors, courts have held that it is not a taking where the property may already have a public use (e.g., a theatre). By analogy to exteriors, it seems that requiring a public view of an exterior of a property would not go so far as to be a taking within the meaning of the Constitution. Right now, the Mill's Act contracts require that the property be visually accessible to the public. Neither the San Diego Land Development Code, nor the criteria for designation require visual accessibility at this time; however, if the Board chose to modify its requirements for exteriors and some interiors, it may do so without it being a taking requiring compensation to the property owner.

ANALYSIS

I. VALID EXERCISE OF POLICE POWERS UNDER THE CALIFORNIA CONSTITUTION

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 San Diego Municipal Code [SDMC] states that the public welfare is served by the historical resources 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.

Because the stated purposes of the regulations pertaining to historical resources include more than just the visual enjoyment of the resources, designation without requiring a public view would have a sufficient nexus to the stated purpose so that it would be a valid exercise of police powers. *J.A. Weinberg v. Marion S. Barry*, 634 F.Supp. 86, 92-93 (1986) (holding that "public viewing of the historic area is not necessary to serve a public purpose" when the stated purposes of the preservation law include "public benefits other than visual enjoyment").

II. REQUIRING PUBLIC VISUAL ACCESSIBLITY TO ALL EXTERIORS AND LIMITED TYPES OF INTERIORS IS NOT A TAKING UNDER THE 5TH AMENDMENT

The Fifth Amendment of the United States Constitution Provides that the government may not take property from a private individual without just compensation being provided. Courts have included in the meaning of "taking," certain regulations that prevent the property owner from getting any economic benefit from their property or regulations that interfere with the investment backed expectations for the use of the property.

The cases addressing this issue in the context of historical preservation regulations have focused on designation of properties that required visual accessibility to the interiors of buildings. In response to the regulations, property owners argued the requirement to allow the public to view the interior "went too far" and interfered with the investment backed expectations of the use of the property, thus the regulations amounted to a taking under the Fifth Amendment of the United States Constitution. The Courts in Washington, D.C., New York, and Pennsylvania disagreed with that assertion and generally held that where a building traditionally or historically had a public use (a restaurant, a train station, or a theatre) that requiring visual accessibility to the interior was not a taking. Scott H. Rothstein, *Takings Jurisprudence Comes in the From the Cold: Preserving Interiors Through Landmark Designation*, 26 Conn. L. Rev. 1105, 1129.

Using the reasoning of the courts in those cases and related law review articles, it would make sense that making public visual accessibility a requirement for designation when the public normally may view the exterior of buildings from the public right-of-way would not prevent the homeowner from all economic use or from enjoying their investment backed expectation in the home. The current criteria for designation by the San Diego Historical Resources Board do not require public view of exteriors, but they may be amended to make such a requirement.

CONCLUSION

Based on the foregoing, the designation of historical resources without the requirements of public accessibility does serve valid public purposes under the San Diego Municipal Code, and is a proper exercise of police power. Moreover, the Board and/or Staff may decide that they want to require visual accessibility of exteriors of historical properties and the interiors of some (typically commercial) historical properties without it being a taking without just compensation under the Constitution.

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By
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