Office of
The City Attorney
City of San Diego

MEMORANDUM
MS 59

(619) 533-5800

DATE: November 2, 2010

TO: Council President Hueso and Councilmembers

FROM: City Attorney

SUBJECT: Proposed Ordinance to Protect Small and Neighborhood Businesses

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Since this Office issued City Attorney Report No. RC-2010-33, Proposed Amendments to the Land Development Code (LDC) to Require a Site Development Permit (SDP) and an Economic and Community Impact Analysis Report for Superstore Development, interested parties have raised various legal issues regarding the proposed Ordinance to Protect Small and Neighborhood Businesses (Ordinance), which is scheduled for introduction at a special hearing of the City Council on November 3, 2010 at 2:00 p.m. This memorandum addresses these legal issues. This memorandum also responds to questions related to certain proposed changes to the Ordinance.

I. LEGAL ISSUES

A. Procedure

1. Process

It has been asserted that required procedures for adoption of the Ordinance were not followed. Specifically, interested parties argue that the Ordinance was not reviewed by the City's Development Services Department, Land Development Code Update staff, the City's Code Monitoring Team, and the Land Use and Housing Technical Advisory Committee. Neither state law nor the San Diego Municipal Code requires these advisory bodies to review the Ordinance. State law requires that "the planning commission . . . hold a public hearing on the proposed zoning ordinance or amendment to a zoning ordinance." Cal. Gov't Code § 65854. Since the Ordinance is an amendment to a zoning ordinance, as required by state law, the Ordinance was presented to the City's Planning Commission during a public hearing on October 7, 2010.

2. Noticing

San Diego Municipal Code section 122.0106 provides:

> At least 6 weeks before the City Council hearing to approve or deny an amendment to the *Local Coastal Program*, the City Manager shall distribute a notice of availability in accordance with the applicable provisions of the California Coastal Act and Guidelines and shall make available to the public a review draft of the amendment language.

The California Coastal Act provides that with respect to local coastal programs (LCP), the public "shall be provided maximum opportunities to participate." Cal. Pub. Res. Code § 30503. The Coastal Commission regulations further provide that "[n]otice of the availability of review drafts of LCP . . . materials and transmittal of said documents . . . shall be made as soon as such drafts are available, but at a minimum at least six (6) weeks prior to any final action on the documents by the local government . . . ." Cal. Code Regs. title 14, § 13515(c).

On September 23, 2010, a notice was mailed to interested parties and published in the Daily Transcript. The notice was titled "Notice of Public Meeting" and contained a summary of the substance of the Ordinance and informed the reader that there would be a public hearing before the Planning Commission on October 7, 2010 (September 23 Notice). The September 23 Notice further directed the reader to contact Stephen Hill if they had any questions after reviewing the information.[1] An argument could be made that the notice does not meet the requirements of San Diego Municipal Code section 122.0106 because it was not titled "Notice of Availability."

The California Court of Appeal has held that the "fact that [a notice] was titled a notice of public hearing and review rather than a notice of availability . . . is meaningless" and that the law does not place form above substance. *Maintain Our Desert Env't v. Town of Apple Valley*, 124 Cal. App. 4th 430, 440 (2004). Therefore, the issue remains whether the September 23 Notice satisfies the substantive requirements for the required Notice of Availability. Although the September 23 Notice does not specifically state that the Ordinance is available for review, it arguably satisfies the requirement in that it describes the substance of the Ordinance, thereby putting the public on notice that a draft is available for review.

If the September 23 Notice was defective, it is unclear whether a court would invalidate the Ordinance on that ground. California Government Code section 65010(b) provides that "[n]o action [or] inaction . . . by any public agency . . . on any matter subject to this title shall be held invalid or set aside . . . by reason of any error . . . as to any matter pertaining to . . . notices . . . unless the court finds that the error was prejudicial and that the party complaining or appealing

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[1] Additionally, a "Notice of City Council Public Hearing," which referenced the scheduled date of the second reading of the Ordinance, was mailed to interested parties and published in the Daily Transcript on October 5, 2010. Although such notice was given before notice of the Ordinance's introduction, such additional notice was not impermissible.

suffered substantial injury from that error and that a different result would have been probable if the error had not occurred." With respect to compliance with the Coastal Commission regulations, while it is also unclear whether the Ordinance would be invalidated, neither the Coastal Act nor the Coastal Commission regulations expressly provide a nullification remedy for violations of the regulatory notice requirement. *See N. Pacifica LLC v. Cal. Coastal Comm'n*, 166 Cal. App. 4th 1416, 1435 (2008). However, a court could hold that the regulations implicitly authorize such nullification.

Additionally, on October 15, 2010, a notice was published in the Daily Transcript and mailed to interested parties (October 15 Notice). The October 15 Notice was titled "Notice of Public Hearing and Additional Notice of Availability." The October 15 Notice contained a summary of the substance of the Ordinance, informed the reader of the upcoming City Council hearings for the introduction, adoption, and mayoral veto reconsideration of the Ordinance, and specifically informed the reader that a copy of the draft Ordinance was available for review. Even if the September 23 Notice were interpreted to not provide sufficient notice pursuant to San Diego Municipal Code section 122.0106, the California Coastal Act, and Coastal Commission regulations, and assuming that the Ordinance is not finally passed until the scheduled December 2, 2010 mayoral veto reconsideration hearing, the October 15 Notice would fulfill the six week Notice of Availability requirement.

B. General Plan Consistency

State law requires zoning ordinances to be consistent with the general plan in general law cities. Cal. Gov't. Code § 65860. However, charter cities are exempt from this consistency requirement except to the extent that the same may be adopted by charter or ordinance of the city. Cal. Gov't. Code § 65803. The City of San Diego has not adopted such a requirement. Nonetheless, it should be noted that while chartered cities are not required to ensure consistency, depending on the particular circumstances, a court could find that a zoning ordinance is inconsistent with the general plan and is therefore arbitrary and invalid. With that in mind, a zoning ordinance "is consistent with the city's general plan where, considering all its aspects, it will further the objectives and policies of the general plan and not obstruct their attainment." Governor's Office of Planning and Research, *State of California General Plan Guidelines at* 164 (October 2003) (citing 58 Op. Cal. Att'y Gen. 21, 25 (1975)); *see also deBottari v. City Council*, 171 Cal. App. 3d 1204, 1213 (1985). It "need not be in perfect conformity with each and every [general plan] policy" since "no project [can] completely satisfy every policy stated in [a general plan]." *Friends of Lagoon Valley v. City of Vacaville*, 154 Cal. App. 4th 807, 817 (2007); *Sequoyah Hills Homeowners Ass'n v. City of Oakland*, 23 Cal. App. 4th 704, 719 (1993). The Council must determine whether the Ordinance furthers the objectives and policies of the General Plan and whether it obstructs their attainment.

C. California Environmental Quality Act

The City's Development Services Department Environmental Analysis Section (EAS) has determined that the Ordinance is not subject to the California Environmental Quality Act (CEQA) pursuant to CEQA Guidelines section 15060(c)(2) because it will not result in a direct

or reasonably foreseeable indirect physical change in the environment. It has been asserted that the Ordinance would require further environmental review pursuant to CEQA. In particular, it has been stated that because the Ordinance is an "effective ban" on superstores, it is therefore reasonably foreseeable that superstore development would occur outside the City limits resulting in adverse impacts to traffic and air quality.

1. Potential for Effective Ban

To assert that the Ordinance would result in a reasonably foreseeable indirect impact to the environment presupposes that the Ordinance is an effective ban on superstores from the city limits. However, the Ordinance neither allows nor prohibits any additional development to occur. Rather, with respect to superstore development, it would impose an additional requirement that the impacts to the surrounding neighborhood be specifically analyzed in an economic and community impact analysis report and would require the decision maker to make additional findings before approving a Site Development Permit for a superstore development.

However, there are concerns that the required findings could not be made if the economic impact analysis suggests that the superstore would have any adverse impacts to a small business. A decision-maker's finding that the superstore would not adversely impact small and neighborhood businesses could nevertheless be upheld so long as the finding is supported by substantial evidence. *See* Cal. Civ. Proc. Code § 1094.5(b); *Topanga Ass'n for a Scenic Cmmty. v. County of Los Angeles* 11 Cal. 3d 506, 514 (1974). Any reasonable doubts are resolved in favor of the administrative findings and decision. *Dore v. County of Ventura*, 23 Cal. App. 4th 320, 327 (1994).

Since it is impossible to predict the facts of a particular future superstore application before the City, it is speculative at this time to determine whether the Ordinance would result in an "effective ban" on superstores. However, to further ensure that the Ordinance's findings could be made and to allay concerns related to the "effective ban," the Ordinance could be changed to add the word "materially" into each of the required findings for the Site Development Permit. *See* Ordinance § 126.0504(p)(1)-(4).

2. Reasonably Foreseeable

Furthermore, even if the Ordinance were viewed as an "effective ban" on superstore development within the City, the issue is whether it is *reasonably* foreseeable that a superstore will be developed outside the City limits and that significant environmental effects will result from such development. In evaluating the significance of the environmental effect of a project, reasonably foreseeable indirect physical changes in the environment which may be caused by the project must be considered. CEQA Guidelines § 15064(d). "An indirect physical change is to be considered only if that change is a *reasonably* foreseeable impact which may be caused by the project. A change which is speculative or unlikely to occur is not reasonably foreseeable." CEQA Guidelines § 15064(d)(3) (emphasis added). Finding that an off-site impact would occur because of the construction of a superstore outside the city limits would necessitate substantial evidence in the record that there are plans to build a superstore outside the city limits in response

to the passage of the Ordinance. *See Wal-Mart Stores, Inc. v. City of Turlock*, 138 Cal. App. 4th 273, 297-98 (2006). The California Court of Appeal has previously held that a statement in a letter that an ordinance prohibiting development of a "supercenter" in the City of Turlock would force discount superstores to locate in communities around the city did not constitute substantial evidence because it was "'argument, speculation, unsubstantiated opinion or narrative.'" *Wal-Mart*, 138 Cal. App. 4th at 297 (citing Cal. Pub. Res. Code § 21080(e)(2); CEQA Guidelines § 15384(a)).

When analyzing a project's reasonably foreseeable indirect impacts, the project (the Ordinance) must be compared to existing physical conditions. *City of Carmel-by-the-Sea v. Bd. of Supervisors*, 183 Cal. App. 3d 229, 246-47 (1986). If the Ordinance is approved, to date, the record does not contain evidence that a specific superstore development would be relocated outside the city limits. Moreover, there is currently no evidence that shows that a market demand exists to support such a development outside the City limits. Also, as discussed in *Wal-Mart*, superstore developers could also have "the option of responding to the Ordinance by taking no action at all–that is, it could choose not to build a super[store] near [the] [c]ity." *See Wal-Mart*, 138 Cal. App. 4th at 298. Based on all of the evidence, the Council will need to determine whether it is *reasonably* foreseeable that a superstore will be built outside the City limits.

II. PROPOSED ORDINANCE CHANGES

This Office has been asked to provide legal analysis with respect to the following proposed changes:

- Change Ordinance section 126.0504(p)(4) as follows:

  > The *superstore* will not materially adversely affect the character <u>or economic health or viability</u> of the surrounding neighborhood.

- Add Ordinance section 143.0365(a)(14) to add an additional requirement for the economic and community impact analysis report as follows:

  > <u>An assessment of how the construction and operation of the proposed superstore will affect wages and benefit levels in the economic and community impact area, including a review of the number of jobs displaced or created, the quality of the jobs, whether the jobs are temporary or permanent, and the employment sector in which the jobs are located.</u>

This Office was specifically asked (1) whether the substance of these proposed changes would be legally permissible, and (2) an explanation of the procedures required if these changes were made.

A. Legality of Proposed Changes

Whether the proposed changes will withstand a legal challenge depends on the purpose of the new language. The proposed changes appear to relate to the provision of sufficient wages and benefits. The Ordinance at issue here is contained entirely within the Land Development Code, which is the City's zoning ordinance. The City's authority to pass zoning ordinances derives from its police power. Exercise of the police power must be reasonably related to a legitimate governmental purpose. *Birkenfeld v. City of Berkeley*, 17 Cal. 3d 129 (1976). Zoning ordinances regulate the use and intensity of land. *See* Cal. Gov't. Code § 65850. Specifically, the City's zoning ordinance "sets forth the procedures used in the application of land use regulations, the types of review of *development*, and the regulations that apply to the use and *development* of land in the City of San Diego." SDMC § 111.0102. Additionally, zoning ordinances implement an agency's general plan, which is a "comprehensive, long-term general plan for the *physical development* of the . . . city . . . ." Cal. Gov't. Code § 65300 (emphasis added). Specifically, the City of San Diego's General Plan is the City's "constitution for development" and "embodies public policy for the *distribution of future land use*, both public and private." City of San Diego General Plan at SF-2 (Mar. 10, 2008) (emphasis added). In a legal challenge to a legislative action brought under Code of Civil Procedure section 1085, the standard of review is whether the action is "'arbitrary, capricious, or entirely lacking in evidentiary support.'" *Pitts v. Perluss*, 58 Cal. 2d 824, 833 (1962) (citation omitted).

Here, since the Ordinance is a zoning ordinance, the governmental purpose is to regulate the physical development of land, and specifically, the Ordinance seeks to protect small and neighborhood businesses as a land use.[2] With respect to the proposed changes, the question is how those changes relate to those land use goals. If they relate to land use, then to survive a legal challenge, there needs to be evidence in the record to support that connection. If they do not relate to those land use goals or if there is insufficient information in the record to show the relationship between the proposed changes and those land use goals, then they should not be addressed within the Land Development Code.[3] If the proposed changes are included in the Ordinance without sufficient evidence to support their inclusion, then a court could find them to be arbitrary, capricious, or entirely lacking in evidentiary support. [4]

B. Procedure for Proposed Changes

If sufficient evidence is provided in the record to show the relationship between the proposed changes and the land use goals of the Ordinance, the next issue is how such changes may be made to the Ordinance.[5] The Ordinance is scheduled to be introduced at a special City Council

[2] Among other purposes, the Ordinance also seeks to address issues related to air quality, traffic, urban and suburban decay, and the provision of adequate public services.

[3] Accomplishing the intended legislative purpose may be within the City's police powers outside of the land use context. However, because the Ordinance is a zoning ordinance, this Office has not analyzed that specific issue.

[4] In accordance with San Diego Charter section 40, this Office may require additional time to evaluate the legality of such proposed changes.

[5] If sufficient evidence is not provided in the record to show the relationship between the proposed changes and the land use goals of the Ordinance, then the proposed changes would fall outside the scope of the Ordinance that was

hearing on November 3, 2010. San Diego Charter section 275(a) provides that all "[o]rdinances shall be introduced in the Council only in written form." Furthermore, "[e]ach ordinance shall be read in full prior to passage unless such reading is dispensed with by a vote of five members of the Council, and a written copy of the ordinance was made available to each member of the Council and the public prior to the day of its passage." *Id.*

Therefore, the proposed changes would need to be introduced in written form. In order to do this, the Council President could call a recess while the changes are made. Once made, the Ordinance with the proposed changes could be provided to the Councilmembers in written form. If the Council votes on the proposed changes in written form, the written copy would then need to be made available to each member of the Council and the public prior to the day of its passage.

Alternatively, the Council President could continue the meeting to a specified time and place. Given that Charter section 275(c) allows passage of ordinances "only after twelve calendar days have elapsed from the day of their introduction," and assuming that the item is still to have a second reading on November 16, 2010 as currently scheduled, the latest that a continued meeting could occur is the following day, Thursday, November 4, 2010. A special meeting for November 4, 2010 would need to be called prior to continuing the item in order for the Council to continue to that meeting. SDMC § 22.0101.5, Rule 1.5. The special meeting for November 4, 2010 would also need to be noticed in accordance with Rule 1.5. Rule 1.5 requires twenty-four hour notice to each member of the Council and the Mayor, and to each local newspaper of general circulation, radio, or television station requesting notice in writing. Therefore these notices would need to occur prior to the scheduled introduction of the Ordinance on November 3, 2010. Furthermore, if the item is continued to a specified time on November 4, 2010, a copy of the order of continuance must be posted immediately following the meeting at which the order of continuance was adopted. *See* Cal. Gov't. Code § 54955.1.

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