

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

**MEMORANDUM
MS 59**

(619) 533-5800

DATE: August 9, 2011
TO: City Councilmembers
FROM: City Attorney
SUBJECT: School District Vote to Render City's Zoning Ordinances Inapplicable

INTRODUCTION

On May 10, 2011, the San Diego Unified School District (District) approved, by a unanimous vote, a resolution titled "Resolution in the Matter of Overruling Zoning Ordinances of the City of San Diego Applicable to Use, Modernization, and Construction of Facilities at Various District Schools" (Resolution, Attachment 1.) Pursuant to the authority in California Government Code section 53094, the District voted to render inapplicable any zoning ordinances which would otherwise be applicable to the listed schools and intended improvements (Projects). On July 20, 2011, Councilmember Faulconer requested that our office answer the questions presented below, prior to the end of the 90 day protest period.¹

QUESTIONS PRESENTED

1. Do the listed upgrades to stadium and sports facilities fall under the education facilities category required by the above stated Government Code section?

¹ California Government Code section 53094 does not provide for a protest period but allows for the City to seek review of the District's action in the Superior Court to determine whether it was arbitrary and capricious. Cal. Gov't Code § 53094(c). Such a review would be by way of an ordinary writ of mandate. Although the applicable statute of limitations is four years under California Code of Civil Procedure section 343, attempts to seek relief during the latter part of this time period could result in dismissal of the action for unreasonable delay under the doctrine of laches. *See Conti v. Board of Civil Service Commissioners*, 1 Cal. 3d 351, 357 n.3 (1969); California Administrative Mandamus § 9.24 at 350-51 (Cal. Cont. Ed. Bar, 3d ed. 2010).

2. Does this resolution include an exemption from the California Environmental Quality Act (CEQA) or the 1972 voter approved 30-foot coastal height limit?

SHORT ANSWERS

1. It depends upon the proposed uses. School Districts may vote to exempt themselves from local zoning ordinances if the proposed use is for classroom facilities.
2. The resolution does not include a reference to either a CEQA exemption or to the 30-foot coastal height limit; however, the coastal height limit is a local zoning ordinance.

ANALYSIS

I. SCHOOL DISTRICTS MAY VOTE TO EXEMPT THEMSELVES FROM LOCAL ZONING ORDINANCES

California Government Code section 53094 allows the governing board of a school district to render city zoning ordinances inapplicable to a proposed use of property by a two-thirds vote of its members. Cal. Gov't Code § 53094(b). However, the board may not take this action if the proposed use is for "nonclassroom facilities, including, but not limited to, warehouses, administrative buildings, and automotive storage and repair buildings." *Id.*²

The court in *City of Santa Cruz* examined the legislative history of California Government Code section 53094, and determined that "nonclassroom facilities" were those that were not by their nature so directly or sufficiently related to the school's unique function as to distinguish the school from any other local agency that is required to comply with zoning requirements. Upgrades to stadiums and sports facilities may be considered classroom facilities, if they are "used for or directly related to student instruction." *City of Santa Cruz v. Santa Cruz Schools Board of Education*, 210 Cal. App. 3d 1, 8 (1989). In the *City of Santa Cruz*, the school district had installed lighting at a sports field without a required permit, which the city had refused to issue. The board then voted to exempt the lighting renovation from the city's zoning ordinances, pursuant to California Government Code section 53094. The city challenged the board's action, and the court ruled that there was substantial evidence that the board's use of the exemption was not arbitrary and capricious.

The evidence relied on by the court to reach the conclusion that these facilities were "classroom facilities" was that the field was used for physical education classes, interscholastic athletics, spirit activities, and band performances. The students received academic credit for their physical education and band participation. The lights at the field were necessary to allow activities to be

² The board must still comply with city ordinances regulating drainage improvements and conditions or road improvements and conditions, or requiring the review and approval of grading plans for the design and construction of drainage, road conditions, or grading. Cal. Gov't Code § 53097.

scheduled on weekday evenings. In addition, San Jose State University used the field for their athletics and musical activities such as marching band. The court noted that in another context, the California Supreme Court had ruled that extracurricular activities such as sports and drama are educational within the free education guaranteed by the California Constitution.³ In another case that examined the applicability of the exemption, the court found that a college could not properly avail itself of the exemption to allow a swap meet to be conducted in its parking lot, notwithstanding that part of the revenue funded instructional programs. *People ex. rel. Cooper v. Rancho Santiago College*, 226 Cal. App. 3d 1281 (1990).

Without specific details regarding the proposed uses for each of the Projects, a determination cannot be made as to whether there is substantial evidence that the District's action was arbitrary and capricious, and therefore fell outside the exception to the City's zoning ordinances allowed by California Government Code section 53094.

II. THE RESOLUTION DOES NOT REFERENCE EITHER A CEQA EXEMPTION OR THE 30-FOOT COASTAL HEIGHT LIMIT; HOWEVER THE 30-FOOT COASTAL HEIGHT LIMIT IS A LOCAL ZONING ORDINANCE

The District resolution provided does not refer to a CEQA exemption. California Government Code section 53094 does not authorize a school board to avoid CEQA compliance. The District may, however, find that specific projects are subject to a CEQA exemption. Cal. Pub. Res. Code §§ 21080(b)(9), 21084; Cal. Code Regs. tit.14, §§ 15260-15333.

The District resolution does not reference the 30-foot coastal height limit. The 30-foot coastal height limit, enacted by an initiative, is a local zoning ordinance. The District's ability to exempt itself from the local zoning ordinance includes the ability to exempt itself from zoning ordinances passed by an initiative. 82 Op. Cal. Att'y Gen. 135 (1999).⁴ In that opinion, the California Attorney General concluded that a school district could construct a school on land designated for agricultural, open space, or rural land use through an initiative. Local zoning ordinances may be enacted by initiative measure. 66 Cal. Jur. 3d *Zoning and Other Land Controls* § 252 (2011). The electorate's right to initiative and referendum is generally coextensive with the legislative power of the local governing body. *San Mateo County Coastal Landowners' Association v. County of San Mateo*, 38 Cal. App. 4th 523, 537 (1995). Like legislation enacted by the local governing body, initiative measures are preempted by controlling

³ In a later, unpublished opinion, the same court relied on the legislative history of California Government Code section 53094 to find that a community college's proposed athletic stadium was a "non-classroom facility," and therefore, the exemption did not apply. *City of Saratoga v. West Valley-Mission Community College District*, No. H022365, 2002 WL 1057448 (Cal. App. May 24, 2002). Absent exceptions not applicable here, unpublished opinions may not be cited or relied on. Cal. Rules of Court, Rule 8.1115(a).

⁴ City Attorney MOL No. 2006-19 (Sept. 8, 2006) concluded that applicants could not request an incentive pursuant to the state density bonus law that could invalidate the coastal height limit because the coastal height limit was part of the City's approved Local Coastal Program; the City would not have any authority to issue permits in the coastal zone contrary to its Local Coastal Program. This Memorandum does not change that opinion. The City would not be issuing any permits to the District, other than as may be related to the design and construction of drainage, road conditions, or grading.

City Councilmembers

August 9, 2011

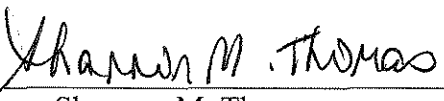
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state statutes. *Kehoe v. City of Berkeley*, 67 Cal. App. 3d 666 (1977) (neighborhood preservation ordinance adopted by initiative was preempted by redevelopment plan adopted pursuant to state Community Redevelopment Law).

CONCLUSION

Whether the listed Projects fall within the education facilities category in California Government Code section 53094 cannot be determined based on the information provided. Such a determination would be based on the proposed uses of the Projects. The District is not exempt from CEQA, however, the District may determine that specific projects are exempt from CEQA. Finally, a vote to exempt itself from the City's local zoning ordinances includes the coastal height limit.

JAN I. GOLDSMITH, CITY ATTORNEY

By 

Shannon M. Thomas
Deputy City Attorney

SMT:als

Attachment: Resolution dated 5/10/11

cc: Mayor Jerry Sanders

Andrea Tevlin, Independent Budget Analyst

MS-2011-8

ATTACHMENT 1

BOARD OF EDUCATION
SAN DIEGO UNIFIED SCHOOL DISTRICT
SAN DIEGO, CALIFORNIA

Resolution in the Matter of Overuling Zoning)
Ordinances of the City of San Diego Applicable to) RESOLUTION
Use, Modernization, and Construction of)
Facilities at Various District Schools)

WHEREAS, San Diego Unified School District (“District”) currently uses the facilities at certain comprehensive High School Sites (“School Sites”) for educational purposes (the location of the School Sites is attached hereto as Exhibit “A”);

WHEREAS, District proposes to modernize and construct new facilities (“Projects”) at their School Sites;

WHEREAS, the Projects are for educational facilities as required by Government Section 53094 and is subject to design review by the Division of the State Architect (“DSA”) under Education Code section 17280 et seq.;

WHEREAS, Government Code section 53094 authorizes District, by a vote of two-thirds of its members, to render city zoning ordinances inapplicable to the Projects and School Sites when the District’s use is for educational facilities;

WHEREAS, School Sites are located within the boundaries of the City of San Diego, California; and

WHEREAS, District has balanced the interests of the public, including those of District and those of the City of San Diego and determined that the interests of the public are best served by commencing and completing the Projects upon the School Sites under DSA review.

NOW THEREFORE, THE GOVERNING BOARD OF THE SAN DIEGO UNIFIED SCHOOL DISTRICT DOES HEREBY RESOLVE, DETERMINE AND ORDER AS FOLLOWS:

Section 1. That all the above recitals are correct.

Section 2. That San Diego Unified School District hereby renders inapplicable any zoning ordinances of the City of San Diego including, without limitation, the City’s Zoning Ordinances and General Plans, which would otherwise be applicable to the Projects or the School Sites.

Section 3. That the Superintendent of San Diego Unified School District, or his designee, is further directed to give written notice to the City as required by Government Code Section 53094 within ten (10) days of this action.

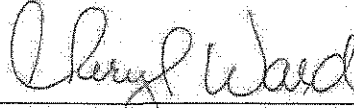
PASSED AND ADOPTED BY THE GOVERNING BOARD OF THE SAN DIEGO UNIFIED SCHOOL DISTRICT, San Diego, California, at a public meeting duly called and held on this 10th ay of May 2011, by the following vote:

AYES: Barnett, Barrera, Beiser, Evans, Jackson
NAYS: None
ABSENT: None
ABSTAIN: None

oOo

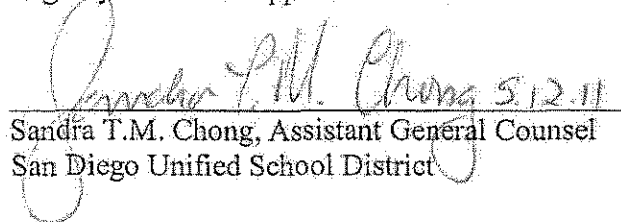
STATE OF CALIFORNIA)
COUNTY OF SAN DIEGO)

I, Cheryl Ward, Board Action Officer of Board of Education, San Diego Unified School District, San Diego, California, do hereby certify that the forgoing is a full, true, and correct copy of a Resolution adopted by said Board at a meeting thereof held at its regular place of meeting at the time and by the vote above stated, which Resolution is on file in the office of said Board.



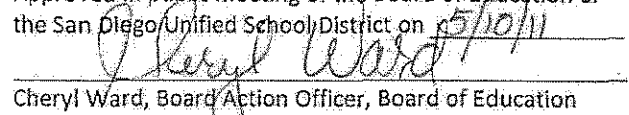
Board Action Officer, Board of Education
San Diego Unified School District

Legality and Form Approved



Sandra T.M. Chong, Assistant General Counsel
San Diego Unified School District

Approved in public meeting of the Board of Education of
the San Diego Unified School District on 5/10/11



Cheryl Ward, Board Action Officer, Board of Education

EXHIBIT "A"

Clairemont High School Stadium and Sports Facility Improvements
4150 Ute Dr., San Diego, CA 92117

Crawford High School Stadium and Sports Facility Improvements
4191 Colts Way, San Diego, CA 92115

Hoover High School Stadium and Sports Facility Improvements
4474 El Cajon Blvd., San Diego, CA 92115

Kearny High School Stadium and Sports Facility Improvements
7651 Wellington St., San Diego, CA 92111

La Jolla High School Whole Site Modernization
750 Nautilus St., San Diego, CA 92037

Madison High School Stadium Improvements
4833 Doliva Drive, San Diego, CA 92117

Mission Bay High School Stadium and Sports Facility Improvements
2475 Grand Ave., San Diego, CA 92109

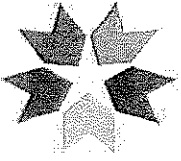
Morse High School Stadium Improvements
6905 Skyline Dr., San Diego, CA 92114

Patrick Henry High School Stadium and Sports Facility Improvements
6702 Wandermere Drive, San Diego, CA 92120

Point Loma High School Stadium Restroom/Concession Stand Improvements
2335 Chatsworth Blvd., San Diego, CA 92106

Serra High School Whole Site Modernization
5156 Santo Road, San Diego, CA 92124

University City High School Stadium and Sports Facility Improvements
6949 Genesee Ave., San Diego, CA 92122



San Diego Unified
SCHOOL DISTRICT

Board of Education-Board Services

EUGENE BRUCKER EDUCATION CENTER
4100 Normal Street, Room 2231, San Diego, CA 92103-2682
Phone: (619) 725-5550 – Fax: (619) 297-5624

May 12, 2011

Ms. Elizabeth Maland, City Clerk
Office of the City Clerk, City of San Diego
202 C Street, 2nd Floor
San Diego, California 92101

Dear Ms. Maland:

At its May 10, 2011 public meeting, the district Board of Education approved a "Resolution Overruling Zoning Ordinances of the City of San Diego Applicable to Use, Modernization, and Construction of Facilities at Various District Schools." Government Code section 53094 authorizes a governing board of a school district, by a vote of two-thirds of its members, to render city zoning ordinances inapplicable to its proposed use of property for classroom facilities. Please see Exhibit "A" to the resolution for the projects at certain school sites. As required by that same statute, the district is providing written notice to the City within ten days of this action. A true, correct copy of said resolution is enclosed for your reference.

Thank you for your attention to this matter.

Sincerely,

Cheryl Ward
Board Action Officer

CW:jv

Enc.

c: Lee Dulgeroff
Sandra Chong
Jim Watts