

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

**MEMORANDUM  
MS 59**

**(619) 533-5800**

**DATE:** August 9, 2011

**TO:** Brandon Nichols, Associate Planner, Centre City Development Corporation

**FROM:** City Attorney

**SUBJECT:** Fat City Lofts Project Consistency with the General Plan and Community Plans

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**INTRODUCTION**

The Centre City Development Corporation (CCDC) has received an application to construct a residential mixed use project (Project) on a site located on the east side of Pacific Highway between Hawthorn and Ivy Streets. This application has generated opposition from neighboring industrial interests who allege that permitting the Project would conflict with the Economic Prosperity Element of the City of San Diego General Plan (General Plan). CCDC staff prepared a memorandum examining whether the Project would be consistent with the City of San Diego General Plan, the 1992 and 2006 Centre City Community Plans (Community Plans), and the 1992 and 2006 Planned District Ordinances (PDOs). See attached CCDC Memorandum dated May 25, 2011 regarding "Fat City Lofts – Summary of Land Use Issues" (CCDC Memo). CCDC staff requested that this Office verify staff's analysis and conclusion that the Project would be consistent with the General Plan's Economic Prosperity Element. CCDC Memo at 4.

In this memorandum, we discuss the analysis and legal standard of review a court would employ to examine the Project's consistency with the General Plan. We must decline for two reasons to verify staff's consistency determination. That consistency determination is first and foremost a factual determination that is more appropriately made by staff and ultimately the decisionmaker. In addition, staff has indicated that the Project has changed from what was previously analyzed in the CCDC Memo. Therefore it would be premature for this Office to opine as to whether a court would uphold a consistency determination for the Project at this point in time.

**QUESTION PRESENTED**

What analysis and legal standard of review would a court employ to examine a Project's consistency with the City's General Plan, which includes the Economic Prosperity Element?

**SHORT ANSWER**

A determination that a Project is consistent with the General Plan would be reviewed by a court to decide whether a reasonable person could conclude, based on the evidence, that the Project

would be compatible with the objectives and policies of the General Plans, and would not conflict with any of its fundamental, mandatory and clear policies.

### ANALYSIS

For a project to be consistent with a municipality's general plan, the project must generally conform to the plan. *See, e.g., Citizens of Goleta Valley v. Board of Supervisors*, 52 Cal. 3d 553, 570 (1990).<sup>1</sup> Perfect conformity is not required; a project must only be compatible with the general plan's objectives and policies. *Families Unafraid To Uphold Rural El Dorado County v. Board of Supervisors*, 62 Cal. App. 4th 1332, 1338 (1998); *see also San Franciscans Upholding the Downtown Plan v. City and County of San Francisco*, 102 Cal. App. 4th 656, 678 (2002) (A project need not be "in rigid conformity with every detail . . ."); *Corona-Norco Unified School Dist. v. City of Corona*, 17 Cal. App. 4th 985, 994 (1993) ("A project is consistent with a general plan if, *considering all its aspects*, it will further the objectives and policies of the general plan and not obstruct their attainment.") (emphasis added)(citation omitted). A project is inconsistent with a general plan only if it conflicts with a plan policy that is fundamental, mandatory, and clear. *Families Unafraid*, 62 Cal. App. 4th at 1341-42. Courts afford an agency's consistency determination a "strong presumption of regularity." *Sequoyah Hills Homeowners Assn. v. City of Oakland*, 23 Cal. App. 4th 704, 717 (1993). In sum, the analysis a court would undertake when examining a Project's consistency with the General Plans would be to look first at whether the Project will further the objectives and policies of the Plan and not obstruct their attainment, and second, at whether the Project conflicts with a Plan policy that is fundamental, mandatory, and clear. Rigid conformity with each and every detail of each element of the General Plan is not required.

In deciding the consistency of projects with general plans, courts have employed different standards of review. Some courts have examined consistency determinations under the arbitrary and capricious standard of ordinary mandamus, which asks whether the determination is arbitrary, capricious, entirely lacking in evidentiary support, unlawful, or procedurally unfair. *See, e.g., Corona-Norco Unified School Dist.*, 17 Cal. App. 4th at 992. Other courts have employed the abuse of discretion standard applicable to administrative mandamus. *See, e.g., Families Unafraid*, 62 Cal. App. 4th at 1338.

In more recent cases, courts have stated that the factual inquiries of the two standards are essentially the same. For example, the court in *Endangered Habitats League* stated that in reviewing a plan consistency determination under the arbitrary and capricious standard, it would "defer to an agency's factual finding of consistency unless no reasonable person could have reached the same conclusion on the evidence before it." *Endangered Habitats League v. Orange County*, 131 Cal. App. 4th 777, 782 (2005). The court characterized the factual inquiry involved in a review under the abuse of discretion standard in very similar terms, stating that "[u]nder the substantial evidence prong, a common formulation asks if a reasonable person could have

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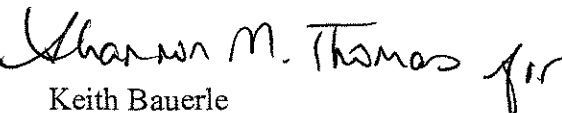
<sup>1</sup>This is not necessarily true for a charter city like San Diego. A charter city's zoning enactments do not have to be consistent with its general plan. *See Garat v. City of Riverside*, 2 Cal. App. 4th 259, 281-84 (1991), overruled on other grounds, *Morehart v. County of Santa Barbara*, 7 Cal. 4th 725, 743 n.11 (1994). However, if a charter city adopts a zoning ordinance that is inconsistent with its general plan, the inconsistency creates a presumption that the zoning ordinance does not reasonably relate to the general welfare and is therefore an abuse of the city's police power. *City of Del Mar v. City of San Diego*, 133 Cal. App. 3d 401, 414-15 (1982).

reached the same conclusion on the evidence.” *Id.* at 782 n.3. The court then equated both standards, stating that “[s]ince this is the same test used under the arbitrary and capricious standard for factual findings, for purposes of this case we see no inconsistency.” *Id.* See also *California Native Plant Soc. v. City of Rancho Cordova*, 172 Cal. App. 4th 603, 637 (2009) (stating that “there is no difference between the two standards of review, at least when it comes to determining whether the agency’s finding of consistency with the general plan has the requisite evidentiary support in the record”.) Thus, the courts have held, under either standard of review, that “it is the province of elected city officials to examine the specifics of a proposed project to determine whether it would be in ‘in harmony’ with the policies stated in the plan. *Friends of Lagoon Valley v. City of Vacaville*, 154 Cal. App. 4th 807, 822 (2007) quoting *Sequoyah Hill Homeowner’s Ass’n v. City of Oakland*, 23 Cal. App. 4th 704, 719 (1993).

### CONCLUSION

In conclusion, a court would examine whether a reasonable person could conclude, based on the evidence, that the Project is “in harmony” with the City’s General Plan, which includes the Economic Prosperity Element, and would not conflict with any of its fundamental, mandatory and clear policies. It need not be in rigid conformity with each of the elements.

JAN I. GOLDSMITH, CITY ATTORNEY

By  for  
Keith Bauerle  
Deputy City Attorney

KGB:hm  
Attachment  
MS 2011-9

## MEMORANDUM

**TO:** Brad Richter, Asst. Vice President, Planning

**FROM:** Brandon Nichols, Associate Planner

**DATE:** 5.25.11

**SUBJECT:** Fat City Lofts – Summary of Land Use Issues

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### Background

On February 18, 2011, Centre City Development Corporation (CCDC) staff received an application to construct a residential mixed use project (237 residential apartment units, including ground level retail) on the Fat City site ("Project"), which is located along the east side of Pacific Highway between Hawthorn and Ivy Streets. The southernmost portion of the Solar Turbines Industrial complex lies to directly to the west of the Project site, across Pacific Highway. The Solar Turbines Complex is located on property within the jurisdiction of, and owned by, the San Diego Unified Port District ("Port"). Both the Project and Solar Turbines sites are located within the Coastal Zone.

Earlier this month, the preliminary project design was brought forward for review by the CCDC Real Estate Committee and the Pre-Design Subcommittee of the Centre City Advisory Committee. Representatives from Solar Turbines and the Industrial Environmental Association attended the meetings and expressed opposition to the project, stating that residential was not a compatible land use across from Solar Turbines' industrial operations, and if constructed the residential project could significantly impact the ability of Solar Turbines to continue to operate a viable industrial operation on their site. Claims were also made that the project was in conflict with the policies of the City of San Diego's General Plan Economic Prosperity Element since it was not located 1,000 feet from the Solar Turbines site.

### Regulatory Framework

Development of the site is governed by a number of policy and regulatory documents, including the 1992 Centre City Community Plan ("Community Plan") and 1992 Planned District Ordinance (PDO), the FEIR for the Downtown San Diego Community Plan, and the City of San Diego General Plan. The project site also lies within the boundaries of the North Embarcadero Overlay District, the purpose of which is to implement certain provisions of the North Embarcadero Visionary Plan (including those related to parking, building height, vehicular access and view corridors). Since the Solar Turbines site is located within Port jurisdiction, development of that site is governed by the Port Master Plan, which designates the site Aviation Related Industrial.

1992 Community Plan and PDO

The 1992 Community Plan and PDO remain in effect in the Coastal Zone, as the 2006 Downtown Community Plan and PDO have not yet been certified by California Coastal Commission. For this reason the Project is being processed pursuant to the policies and regulations of the 1992 Community Plan and PDO. Under the 1992 PDO, the land use district of the site is Recreation/Visitor/Marine (RVM). The RVM district applies to waterfront areas and is intended to accommodate "major tourist and local visitor attractions, recreation areas, and marine related areas". Pursuant to Table IV of Section 103.1925 of the 1992 PDO, Multifamily Residential is a permitted land use classification in the RVM district. 2006 Downtown Community Plan and PDO

In 2006 a new Community Plan and PDO were approved for the Centre City Planned District. Pending certification by the California Coastal Commission, those documents will govern the development of all Coastal Zone areas within the boundaries of the Centre City Planned District. Under the 2006 Community Plan and PDO, a new land use designation was applied to the Project site and other surrounding areas to the north and east. The site now lies within the Mixed Commercial Land Use District (MC), which allows a "diverse array of uses, including residential, artist studios, live/work spaces, hotels, research and development and retail. The district also allows certain light industrial, repair, warehousing and distribution, transportation, and communications services that are "essential for the livelihood of businesses and residents of the downtown area."

A new Economic Prosperity Element was included with the adoption of the 2006 Community Plan. The element contains the following general policy related to industrial uses:

- 11.3-P-6: Establish an inventory of targeted industry clusters and identify locational characteristics and determine the effects of CCDC/City policy and regulation on the operation and continued success of these clusters; work closely with industry contacts to identify specific needs to be addressed.*

Subsequent to the adoption of the 2006 Community Plan, the City's Economic Prosperity Element was adopted which identified "Industrial and Prime Industrial Land" and established policies intended to ensure the viability of the City's most valuable industrial land areas. These policies are discussed in the following section.

City of San Diego General Plan (Economic Prosperity Element)

The City of San Diego General Plan was updated in 2008. At that time a new Economic Prosperity Element ("Element") was added to the general plan. The stated purpose of the Element is "To increase the wealth and the standard of living of all San Diegans with polices that support a diverse, innovative, competitive, entrepreneurial and sustainable local economy." The Element recognizes that base sector employment uses (manufacturing, R&D etc.) play an important role in the economic health of San Diego and focuses on strategies to evaluate and preserve important industrial areas, but also to allow, through comprehensive analysis, consideration of

conversion or mixed-use of industrial land if it is not critical to the City's or region's employment goals.

To facilitate the goals of the Element, a map of "Industrial and Prime Industrial Land" was developed for the entire City of San Diego. Detailed maps of community plan areas were also created, including a map of Centre City (attached). The maps identify larger areas of the City that support base sector employment uses, and the Element contains policies when considering "collocation" in, or "conversion" of, these Industrial and Prime Industrial Land areas. Per the General Plan Glossary, collocation is defined as "the geographic integration of residential development into industrial uses located on the same premises" and conversion is "the redesignation or change in use of an industrially-designated site to institutional, mixed-use or residential use". When considering collocation or conversion of Industrial or Prime Industrial Lands, the Element requires an analysis of factors contained in Appendix C, EP-2 "Collocation/Conversion Suitability Factors" of the General Plan (attached). Among other considerations, the Appendix requires a study of "adequate separation between industrial and residential properties with regard to toxic air contaminants and or toxic substances." In-lieu of a study, the Element requires a 1,000 separation between property lines.

Critical to this discussion, however, is that the Solar Turbines site is not designated on the on the Element's Industrial and Prime Industrial Land map. Based upon discussions with City staff responsible for drafting the Element, the site is not designated because it is a singular site, and not part of a larger assemblage of industrial land. Furthermore, the proposed construction of a residential project on the Fat City site does not meet the definition of collocation or conversion as defined in the General Plan glossary. The proposed residential development is not located on a site with an Industrial land use designation, nor does it require any change in the underlying land use designation. Residential development is a permitted use, under both the 1992 and 2006 PDOs, and has been permitted for nearly 20 years.

In addition to the policies pertaining to Prime Industrial Land, the Element contains the following policy regarding "All Industrial Areas":

#### *All Industrial Areas*

*EP-A.20. Meet the following requirements in all industrial areas as a part of the discretionary review of projects involving residential, commercial, institutional, mixed-use, public assembly, or other sensitive receptor land uses:*

- *Analyze the Collocation/Conversion Suitability Factors in Appendix C, EP-2.*
- *Incorporate pedestrian design elements including pedestrian-oriented street and sidewalk connections to adjacent properties, activity centers, and transit.*
- *Require payment of the conversion/collocation project's fair share of community facilities required to serve the project (at the time of occupancy).*

This policy again requires an analysis of “Collocation/Conversion Suitability Factors”, but applies the requirement to “All Industrial Areas.” It is not clear, however, what defines an “Industrial Area”, and whether this policy would apply to the proposed project merely because it is located across the street from a single site designated for industrial use. The proposed project site is not designated Industrial under the 1992 or 2006 Planned District Ordinances, nor are any sites to the north, east or south; however, certain light industrial uses do exist in the surrounding neighborhood and are permitted uses per the 2006 Planned District Ordinance. Assuming the policy did apply, it still remains unclear whether an analysis of “Collocation/Conversion Suitability Factors” would be required since the proposed project does not meet either definition.

### Summary

CCDC staff is seeking input from the City Attorney’s Office to confirm staff’s analysis that the residential project is not in conflict with the goals and policies of the Economic Prosperity Element, including the requirements for separation of industrial and residential land uses discussed in the policies of the Element. Important points leading to staff’s determination are:

- The Solar Turbines Site is not designated Prime Industrial by the Economic Prosperity Element.
- The project proposal does not qualify as collocation or conversion as defined by the General Plan.
- Residential Land Use has been permitted on the Fat City Site (and surrounding sites) for nearly 20 years.
- The Solar Turbines parcel is a single industrial parcel of land, lying adjacent to one of the most prolific and successful residential mixed-use neighborhoods (Little Italy) in Downtown. For this reason it is expected that there will be significant pressure in the future to develop additional residential projects on sites within northern Little Italy, clearly within 1,000 feet of the Solar Turbines site. A number of residential projects already exist that are well within this 1,000 foot boundary.
- Imposition of a 1,000 foot separation between residential development and the Solar Turbines site would exclude residential development in nearly all of Northern Little Italy (see attached map).
- The impacts of locating residential use within in 1,000 feet of industrial use were considered in the 2006 FEIR for the Downtown Community Plan but were found not to be significant since “any substantial health risk to future residents depends on long-term exposure which is indicated to require a period of 70 years of continued exposure”.