Office of
The City Attorney
City of San Diego

MEMORANDUM
MS 59

(619) 533-5800

DATE: February 22, 2018

TO: Honorable Councilmember Mark Kersey

FROM: City Attorney

SUBJECT: The Legal Effect of the Rancho Penasquitos Community Plan Language

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INTRODUCTION

On March 5, 2018, City Council will hear a project that is proposed within the Village neighborhood of the Rancho Penasquitos Community Plan (RPCP) area. The RPCP states that, "[a]ny redevelopment in this neighborhood should occur through the Planned Development Permit process." Rancho Penasquitos Community Plan at 41. You have requested legal guidance regarding whether use of the word "should" in the RPCP creates a legal requirement.

QUESTION PRESENTED

Does the term "should" in the RPCP create a legal requirement?

ANSWER

No. Use of the word "should," which is permissive and not mandatory, in the RPCP does not create a legal requirement, nor does the RPCP contain or amend land use laws or regulations (collectively, the "land use regulations").

ANALYSIS

The Office of the City Attorney previously issued a memorandum explaining that community plans are detailed policy documents that provide guidance on community development within the City. *See* City Att'y MS 2014-12 (June 24, 2014), attached as Exhibit A. While they express a strong policy directive, community plans do not contain or amend land use regulations.

As our previous memorandum advised, land use regulations are codified in the San Diego Municipal Code. Local laws are adopted by ordinance. *McPherson v. Richards*, 134 Cal. App. 462, 466 (1933) ("An ordinance is a local law which is adopted with all the legal formality of a statute."). While the San Diego Charter does not require all ordinances to be codified in the San Diego Municipal Code, it is the City's standard practice to codify its land use regulations. *See* San Diego Charter § 20 ("The Council *may* by ordinance codify all of the ordinances of a general nature of the City into a Municipal Code.") (emphasis added).

Because community plans are approved by resolution rather than ordinance, they do not rise to the level of local laws. The City Council approved the RPCP, including the subject language, on March 30, 1993, by Resolution No. R-281713. Therefore, the language in the RPCP is policy language that does not mandate the application of a Planned Development Permit process to redevelop the neighborhood.

In addition, courts have interpreted the term "should" as a strong recommendation rather than a mandate. *Boam v. Trident Fin. Corp.*, 6 Cal. App. 4th 738, 745 n. 6 (1992) (citing Black's Law Dict. (6th ed. 1990) p. 1379) ("'should' used in the present or future tense, while not synonymous with and more forceful than may, can convey only a moral obligation or strong recommendation"). Specifically with respect to ordinances, the courts have determined the term "should" to be permissive rather than mandatory. *Kucera v. Lizza*, 59 Cal. App. 4th 1141, 1152 (1997) ("The words 'may' and 'should' are ordinarily permissive"; *Cuevas v. Superior Court*, 58 Cal. App. 3d 406, 409 (1976) (in Penal Code section 1538.5, subdivision (b), "[t]he word 'should' is used in a regular, persuasive sense, as a recommendation, not as a mandate").

As such, even if the RPCP was approved by ordinance, the use of the word "should" makes the subject language a recommendation that redevelopment of the neighborhood occur through the Planned Development Permit process, rather than a legal requirement.

CONCLUSION

Community plans are policy documents approved by resolution that do not contain or amend land use regulations. Furthermore, the use of the term "should" conveys a strong, but not a mandatory, recommendation. Therefore, the language in the RPCP that any redevelopment of the Village neighborhood should occur through the Planned Development Permit process is a policy recommendation and does not require a Planned Development Permit for all development in that neighborhood.

MARA W. ELLIOTT, CITY ATTORNEY

By /s/ *Corrine L. Neuffer*
Corrine L. Neuffer
Deputy City Attorney

CLN:als
MS-2018-2
Doc. No.: 1688409
Attachment: Exhibit A – MS-2014-12 dated June 24, 2014
cc: Honorable Mayor and Councilmembers
Andrea Tevlin, Independent Budget Analyst
Robert Vacchi, Director, Development Services Department
Alyssa Muto, Deputy Director, Planning Department

EXHIBIT A

Office of
The City Attorney
City of San Diego

MEMORANDUM
MS 59

(619) 533-5800

DATE: June 24, 2014

TO: Honorable Mayor and City Councilmembers

FROM: City Attorney

SUBJECT: Inclusion of Potential Variance Prohibition Language in the Ocean Beach Community Plan Update

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INTRODUCTION

In recent years, a series of variances were granted along a particular block on West Point Loma Boulevard in the Ocean Beach Community pursuant to the regulations set forth in sections 126.0801 through 126.0805 of the San Diego Municipal Code. These requests for variances were met by objections from some members of the community because they made possible the development of single-family residences with increased bulk and scale which exceeded the otherwise allowable Floor Area Ratio (FAR).[1] Last year, the Ocean Beach Planning Board requested that the City place a moratorium on the approval of such variances. In response to this request, a prior Mayoral administration advised in writing (attached as Exhibit 2) that the Ocean Beach Community Plan Update would include policy language which would preclude later approval of variances on the block (variance language).

The community continues to request language in the Ocean Beach Community Plan Update that will prohibit FAR variances in certain areas within the Ocean Beach Community. Over the past year, the variance language has evolved based upon this Office's legal concerns with prohibition language and the enforceability of such language in a policy document. While the current

[1] One of the objections made previously was that the cumulative effect of granting the variances constituted a rezoning of specific areas in violation of the rezoning procedures. This Office has previously advised that the granting of multiple development variances does not constitute a rezone. *See* attached Memorandum dated December 7, 2011 as Exhibit 1.

language[2] presented by City staff adequately addresses these concerns, this memorandum outlines the legal concerns previously expressed for Council's consideration at the hearing scheduled for June 30, 2014.

QUESTIONS PRESENTED

1. May a community plan include land use regulations, such as language prohibiting variances in that community?

2. What is the legal standard for prohibiting variances in one particular area through an amendment to the Municipal Code?

SHORT ANSWERS

1. Probably not. Community plans are detailed policy documents that provide guidance on community development within the City and do not contain or amend land use regulations. The Municipal Code contains all of the City's codified land use regulations. The inclusion or amendment of land use regulations in community plans would not only exceed the purpose of community plans, but could also subject them to various legal challenges.

2. A land use regulation prohibiting variances in one particular area based upon that community's aesthetics would only be permissible if the enactment complies with the standards of equal protection.

ANALYSIS

I. COMMUNITY PLANS ARE POLICY DOCUMENTS THAT DO NOT CONTAIN OR AMEND LAND USE REGULATIONS

Community plans are detailed policy documents that provide guidance on development for a particular community within the City, but do not contain or amend land use regulations. While the San Diego Charter does not require all ordinances to be codified in the Municipal Code, it is the City's standard practice to codify its land use regulations. *See* San Diego Charter § 20 ("The Council *may* by ordinance codify all of the ordinances of a general nature of the City into a Municipal Code." (emphasis added)); *see also Hollander v. Denton*, 69 Cal. App. 2d 348 (1945). Specifically, the Municipal Code includes "the procedures used in the application of land use

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[2] Recommendation 4.2.9 - "Maintain the community's small-scale character. Evaluate exceptions to zoning regulations on a case-by-case basis to determine if the exceptions would:

- not adversely affect the goals of the Community Plan Urban Design recommendations,
- implement the purpose and intent of the zones, and
- adhere to the established development regulations of the zones, including Floor Area Ratios (FARs) to the maximum extent possible under the law."

Staff Report, Attachment 5, Memorandum Ocean Beach Community Plan Update (OBCPU) Revisions to Public Draft (June 13, 2014).

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.

The land use regulations in the Municipal Code are adopted by ordinance making them local laws, which is a distinct legislative act. *City of Sausalito v. County of Marin*, 12 Cal. App. 3d 550 (1970); *see also McPherson v. Richards*, 134 Cal. App. 462, 466 (1933) ("An ordinance is a local law which is adopted with all the legal formality of a statute."); *Monterey Club v. Superior Court of Los Angeles*, 48 Cal. App. 2d 131, 147 (1941) (when a city passes an ordinance, it involves a command or prohibition and has the force of law). Any limitation or amendment to those laws must be made in the same mode as the original enactment. *City of Sausalito*, 12 Cal. App. 3d at 564. The failure to follow the original enactment will cause the limitation or amendment to be deemed invalid. *Id.* at 566-67. Therefore, in order for any amendments to the land use regulations in the Municipal Code to be valid, they must be done by ordinance, rather than by resolution, which is how community plans are approved.

While the City's Charter does not require all ordinances to be codified in the Municipal Code, there are inherent flaws with the inclusion of or amendment to land use regulations through a community plan. Land use regulations control land use by rule or restriction. Community plans, as part of the Land Use Element of the City's adopted General Plan, are policy documents containing specific development policies adopted for a smaller defined geographical region within the overall General Plan area. Cal. Gov't Code § 65300 (state law requires cities to adopt a comprehensive, long-term general plan for the physical development of the city); *see also* City of San Diego General Plan, Land Use and Community Planning Element, at LU 21 – LU 24 (Mar. 2008). The community plans identify measures to implement those specific policies, including designating land uses for different neighborhoods, infrastructure, and other improvements. *Id.* The inclusion of land use regulations in a community plan would exceed and possibly contradict the plan's purpose of providing a long-range planning vision for development of a particular community.

In addition, courts have routinely held in inverse condemnation claims that the approval of a general plan and community plan "is no more than planning and does not affect the landowners' interest." *Rancho La Costa v. County of San Diego*, 111 Cal. App. 3d 54, 61 (1980). This is based upon the fact that such plans are "tentative and subject to change." *Selby Realty Co. v. City of San Buenaventura*, 10 Cal. 3d 110, 118 (1973). Community plans include "policies," which are defined as "[t]he general principles by which a government is guided in its management of public affairs." Black's Law Dictionary 1178 (7th ed. 1999); *see also Cruz v. HomeBase*, 83 Cal. App. 4th 160, 167 (2000). By including land use regulations in the plan, it could subject the plans to inverse condemnation challenges because they would no longer be merely planning documents not affecting a landowner's interest, but would instead include regulations that could impact properties in the community and could affect a landowner's interest.

Furthermore, to include regulations in these documents would be confusing and could result in unnecessary legal challenges. Since the community plan would consist of both policy language and regulations, it may be difficult to distinguish between the two. An argument could be made that language intended to be a regulation is actually a policy and vice versa. It would also

provide another source of regulations, which in this case would conflict with the codified Municipal Code. As mentioned above, the land use regulations are currently consolidated into the Municipal Code, which allows for City staff, any property owner, or decision maker to easily reference which regulations apply in a particular situation. If the City were to include land use regulations in additional documents such as community plans, it could present issues as to which regulations applied to different properties and how to reconcile the regulations in the community plans and the Municipal Code.

II. A LAND USE REGULATION PROHIBITING VARIANCES IN ONE PARTICULAR AREA MAY BE PERMISSIBLE IF THE ENACTMENT COMPLIES WITH THE STANDARDS OF EQUAL PROTECTION

A land use regulation prohibiting variances for a particular area based upon that community's aesthetics may be permissible if the regulation complies with the standards of equal protection. Courts have determined that a land use regulation is a valid exercise of a city's police power if it bears a substantial and reasonable relationship to the public welfare. *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926). It is invalid if it is arbitrary, discriminatory, and without a reasonable relationship to public health, safety, morals, or general welfare. *Id.* Public welfare as it relates to local land use regulations has been determined to include aesthetics and other quality of life concerns. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 129 (1978) (a city may use police power to preserve landmarks to enhance quality of life by preserving character and desirable aesthetic features).

If the City uses its police power to enact a land use regulation, equal protection under the federal and state constitutions requires that governmental decision makers treat parties equally under the law if those parties are, in all relevant respects, alike. U.S. Const. amend. XIV, § 1; Cal. Const. art. I, § 7; *Las Lomas Land Co., LLC v. City of Los Angeles*, 177 Cal. App. 4th 837, 857 (2009). In analyzing whether an equal protection claim is valid, a court would first determine whether the City adopted a classification that affects two or more similarly situated groups in an unequal manner for purposes of the law that is challenged. *People v. Cruz*, 207 Cal. App. 4th 664, 674 (2012) ("'This initial inquiry is not whether persons are similarly situated for all purposes, but "whether they are similarly situated for purposes of the law challenged."'") (citations omitted). In the land use context, courts have recognized that it may be impossible for a property owner to provide evidence that another property is similarly situated because land is unique. *Kawaoka v. City of Arroyo Grande*, 17 F.3d 1227, 1240 (9th Cir. 1994); *see also Stubblefield Const. Co. v. City of San Bernardino*, 32 Cal. App. 4th 687 (1995).

If a classification does not involve inherently suspect classifications or fundamental rights, it must only satisfy rational basis review if challenged on equal protection grounds. Zoning and land use issues typically do not implicate suspect classifications or fundamental rights and would not invoke strict scrutiny. *Kawaoka*, 17 F.3d at 1239; *Christian Gospel Church, Inc. v. City & County of San Francisco*, 896 F.2d 1221, 1225 (9th Cir. 1990). Rational basis review requires that the classification at issue bear a rational relationship to a legitimate state interest. *Id.* The classification must also be non-arbitrary and founded upon pertinent and real differences. *Walters v. City of St. Louis, Mo.*, 347 U.S. 231, 237 (1954). While a classification will be

presumed valid, it must rest upon some ground of difference that has a fair and substantial relation to the object of legislation. *City of Cleburne, Tex. v. Cleburne Living Center*, 473 U.S. 432, 432 (1985); *Old Dearborn Distributing Co. v. Seagram-Distillers Corp.*, 299 U.S. 183, 197 (1936). If it is at least fairly debatable that the action is rationally related to a legitimate government interest, it must be upheld. *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976).

At different times throughout the community planning process, the community has identified different areas that they proposed be prohibited from obtaining an FAR variance,[3] including a specific street block, a specific zone, and a land use designation in the Ocean Beach community. Depending on which area is proposed, there must be a material difference between the proposed area and other similarly situated areas that are excluded from that classification. To be material, this difference should be related to the underlying purpose for adopting the classification. This classification must not be arbitrary and must be rationally related to a legitimate government interest to be legally defensible. This analysis is fact-specific, depending on the classification and the purpose for the regulation. In order for this Office to analyze any proposed language prohibiting variances for legal sufficiency, additional facts are needed, including the proposed area, the governmental interest, whether there are other similarly situated areas and properties and how those areas and properties are potentially different from the area proposed classification.

CONCLUSION

Community plans are policy documents that provide guidance on development for a community within the City and do not contain or amend land use regulations. The Municipal Code contains all of the City's codified land use regulations. The inclusion or amendment of land use regulations in community plans would not only exceed the purpose of community plans, but could subject them to various legal challenges. Furthermore, any land use regulation prohibiting variances in one particular area based upon that community's aesthetics would only be permissible if the enactment complies with the standards of equal protection.

JAN I. GOLDSMITH, CITY ATTORNEY

By _____
Corrine L. Neuffer
Deputy City Attorney

CLN:dkr
Enclosures
MS-2014-12
Doc. No.: 787294_6

[3] At one point, the proposed community plan language stated variances of any kind would be prohibited.

Office of
The City Attorney
City of San Diego

MEMORANDUM
MS 59

(619) 533-5800

DATE: December 7, 2011

TO: Councilmember Kevin Faulconer, San Diego City Council District 2

FROM: City Attorney

SUBJECT: Ocean Beach Development Projects Receiving Floor Area Ratio Variances

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This memorandum responds to your memorandum of September 1, 2011, in which you stated that the Ocean Beach Planning Board has expressed concerns to you regarding Floor Area Ratio (FAR) variances being granted in the Ocean Beach RM 2-4 zone. You have asked "whether the cumulative effect of granting multiple development variances has the same effect as a rezone, and whether this process legally adheres to City rezoning procedures." As discussed below, the cumulative effect of granting multiple development variances does not have the same effect as a rezone.

To answer your question, it is necessary to define and provide background concerning rezoning and variances. "Zoning is a separation of the municipality into districts, and the regulation of buildings and structures, according to their construction, and the nature and extent of their use, and the nature and extent of the uses of land." *O'Loane v. O'Rourke*, 231 Cal. App. 2d 774, 780 (1965). The zones and their requirements that govern land use in Ocean Beach, and the City generally, are found in Chapter 13 of the San Diego Municipal Code.

A "rezoning" of a property involves a reclassification of zoning applicable to the property, which changes the use or intensity of use allowed on the property. Rezoning is governed by the zoning and rezoning provisions of the San Diego Municipal Code. *See* SDMC §§ 123.0101 through 123.0111. Rezoning a property requires that the City Council adopt an ordinance approving the rezoning. *See* SDMC §§ 123.0105(a). For example, the City Council on November 15, 2011 adopted an ordinance rezoning a property in Mira Mesa from one multi-family residential zone to another multi-family residential zone that allows for higher density. *See* O-20112, Rezoning 4.5 Acres from RM-2-5 Zone into RM-3-7 Zone – Mira Mesa Rezone Project No. 158201.

A variance is issued to allow a property owner to deviate from development regulations otherwise applicable to the property. The procedures and requirements for granting a variance are provided in Chapter 12, Article 6, Division 8 of the Municipal Code. Section 126.0804 provides that a decision on an application for a variance is made under Process Three, which necessitates a noticed public hearing before a Hearing Officer. The decision of the Hearing Officer can then be appealed to the Planning Commission, unless otherwise specified by the Municipal Code. *Id.* As with other land use decisions, if a request for a variance is combined with other permits that require Process Four or Process Five decisions, the Planning Commission or City Council respectively would be making the decision on the variances. *See* SDMC § 112.0103.

Under the Municipal Code, variances may be granted only if the decision maker is able to make the following four findings:

(a) There are special circumstances or conditions applying to the land or *premises* for which the variance is sought that are peculiar to the land or *premises* and do not apply generally to the land or *premises* in the neighborhood, and these conditions have not resulted from any act of the *applicant* after the adoption of the applicable zone regulations;

(b) The circumstances or conditions are such that the strict application of the regulations of the Land Development Code would deprive the *applicant* of reasonable use of the land or *premises* and the variance granted by the City is the minimum variance that will permit the reasonable use of the land or *premises*;

(c) The granting of the variance will be in harmony with the general purpose and intent of the regulations and will not be detrimental to the public health, safety, or welfare; and

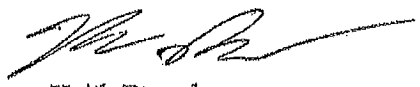
(d) The granting of the variance will not adversely affect the applicable *land use plan*. If the variance is being sought in conjunction with any proposed *coastal development*, the required finding shall specify that granting of the variance conforms with, and is adequate to carry out, the provisions of the certified *land use plan*.

SDMC § 126.0805. As with all findings, these must be supported by substantial evidence. *Topanga Association For A Scenic Community v. County of Los Angeles*, 11 Cal. 3d 506, 514 (1974).

The granting of FAR variances for properties in the RM 2-4 zone therefore does not have the same effect as a rezone. The granting of FAR variances does not reclassify the zoning applicable to the specific properties receiving the variances because it does not change the use or intensity of use allowed on the properties.

This office understands that you are also concerned that the proper level of public input is being provided in the decisions to grant variances in Ocean Beach. As stated above, the Municipal Code requires that variances be granted only after a noticed public hearing before a Hearing Officer, Planning Commission, or City Council, depending on the approvals sought. It is our understanding that all officially recognized planning groups receive notices of all public hearings for projects within their respective planning areas. If you have additional questions, please do not hesitate to contact our office.

JAN I. GOLDSMITH, City Attorney

By 
Keith Bauerle
Deputy City Attorney

KB:hm
cc: Kelly Broughton, Director, Development Services Department

Exhibit

2

BOB FILNER
MAYOR

January 31, 2013

Jane D. Gawronski, Ph.D.
Ocean Beach Planning Board, Inc.
P.O. Box 7090
San Diego, CA 92167

Re: Ocean Beach Planning Board's request for a moratorium on variances

Dear Jane:

Thank you very much for your recent letter regarding the zoning variances granted by the City in response to development applications along a particular block on West Point Loma Boulevard.

I share your concern that approval of these variances has compromised the planning objectives which underlie your community plan, as well as introduced design elements into new construction which deviate from the standards adopted by the community.

I understand that my staff has already shared with you the three steps I have suggested which, I believe, will resolve the issue. These measures are:

1) The Development Services Department will no longer approve or recommend to the Planning Commission approval of zoning variances on the affected block;
2) The update of the Ocean Beach Community Plan, which is currently underway, will incorporate policy language which will preclude later approval of variances on this block. That is, the OBCP will, for example, include language stating that: a) there are no special circumstances or conditions applying to this block that do not apply generally to other land in the neighborhood, b) strict application of the regulations would not deprive

a property owner of reasonable use of the land, and c) granting of a variance will adversely affect the Ocean Beach Community Plan. I urge you to work with the City staff to tailor the precise language of the community plan to address this issue appropriately.

3) In the event that variance requests are approved by the Planning Commission, the OBPB will appeal the project's associated environmental (CEQA) document. As you know, this step will automatically elevate the variance request beyond the Planning Commission to the City Council. I anticipate the City Council will respond in an informed and understanding manner to the issues raised by the community.

Thank you again for having presented the issue to me; I am delighted that we have been able to develop an effective solution.

Best wishes.

Sincerely,

BOB FILNER
Mayor

BF/aj