MEMORANDUM OF LAW

DATE: August 28, 1996

NAME: Councilmember Juan Vargas

FROM: City Attorney

SUBJECT: Use of the Welfare Office at 25th Street and Imperial Avenue for a Food Market

BACKGROUND

At your request, I have reviewed in additional detail the facts relating to the County welfare office at 25th Street and Imperial Avenue.

As you know, the County's sublease expired July 31, 1996, and a new food market is proposed in the existing building similar to the food market which existed prior to the County's use of the building in 1974 as a welfare office. Cynthia Eldred, who represents the proposed lessor for the market use, provided me with various documents which indicate as follows:

In 1961, Fourth Monitor Realty, Inc., a Delaware corporation, (apparently the owner of the property) leased the property to Safeway Stores under a lease with an initial term of 20 years with six five-year options to extend.

In May 1974, Safeway Stores subleased the property to Frank M. Goldberg. Frank M. Goldberg thereupon in July 1974 sub-subleased the property to the County which sub-sublease, as amended, expired July 31, 1996.

The County made substantial modifications and utilized the site as a welfare office from 1974 until this year.

Frank M. Goldberg, as an incidental matter, apparently assigned his interest as sublessee to Sea Financial, Inc., a California corporation, in or before 1991. Therefore, we now have a situation where Fourth Monitor Realty owns the property, Safeway Stores leased the property for a term of up to 50 years which would end, if all five options are exercised, in August 2011. Safeway subleased to Frank M. Goldberg, i.e., now Sea Financial, who sub-subleased the property to the County. Sea Financial now wishes to sub-sublease the property to a new food market operator.

The basic problem is that, in 1987, the property was rezoned, with the parking lot area going from an M-1 zone to CSR-2, and the portion of the property on which almost the entire building sits going from M-2 to I-1. The CSR-2 zone would allow continued commercial uses such as a food store. The I-1 use is an industrial zone which would not allow a food store.

ISSUES

A review of the documents, together with discussions with City staff and Attorney Eldred, indicates that the primary issues to be addressed in connection with authorized uses of the site are as follows:

a. When the County operation ceases, what is the "grandfathered" use which is allowed on the site, in view of the fact that the zoning on the property has changed?

b. Since the property was developed as a single project, does the property owner have the right to continue use of the site as a single project for any use authorized under either of the two different zones that now apply to the site?

I asked Attorney Eldred to provide me with her legal arguments to the effect that a food store use should now be allowed, as a matter of right, on the subject site. Attached as Attachment 1 is her letter giving her legal basis for a renewed food market use. I feel that Ms. Eldred's legal position as stated in Attachment 1 is persuasive.

CONCLUSIONS

The first issue raised above is, what use should be considered the "grandfathered" use? A "grandfathered" use is a preexisting use of property which does not conform to new zoning, but which is allowed to continue since the use was in conformance with zoning when originally constructed. My initial review resulted in a conclusion that, since the entire property was developed and used as a food market prior to the governmental use by the County, the nongovernmental food market use would be the "grandfathered" use upon termination of the County lease. The reasoning is that the County is not subject to the zoning regulations and that, therefore, the preexisting food market use would be the appropriate use to be considered the "grandfathered" use.

Upon further review, it occurred to me that perhaps the County use should be considered the "grandfathered" use, since the County use, incidentally, being basically an office use, was also a legal use under the preexisting zoning.

However, the situation is complicated by the fact that, during the County's use of the site, the Southeast San Diego Planned District Ordinance was adopted, and differentiates between general office uses and "Public-Body operated buildings and uses." Under the Planned District Ordinance and the changed zoning, "Public-Body operated buildings and uses" would require a special permit, whereas private business and professional offices would be allowed as a matter of right. The "grandfathered" use would thus be limited to "Public-Body operated buildings and uses."

There is no case law or statutory authority available on this specific point. Arguments could be made on either side as to whether the proper use to be considered "grandfathered" is the preexisting food market use or the "Public-Body operated" building. Since governmental agencies are not generally subject to zoning restrictions, the "Public-Body operated" building right is of very limited value. While there is, therefore, no certainty as to how the courts would resolve the issue it seems that there is a significant chance that the court would determine that the proper use to be considered "grandfathered" is the food market use.

The second issue is whether property, developed as a single project and subsequently rezoned into two different zones, should be allowed to be used for any purpose authorized by either zone applicable to the cumulative lots making up the single project? Once again there is no specific case law nor statutory authority on this issue. However, on basic equitable principles it appears that the owner of a project which is later split basically in half by two inconsistent zones must have the right to continue use of his property as a single project.

For example, the subject property was developed with the building basically sitting on property which is now zoned industrial, and with the parking lot area needed to service the customers for the building on the property which is still zoned for commercial use. Since the two parts of the property were approved and developed for a single use, it appears under the basic legal principles described in Attachment 1 that, despite the rezoning, the property should be allowed to continue to be used as one project. Since there is no logical way to determine which zoning should apply to the entire project, my conclusion is that the property owner can now use the property as one project for any use authorized under either of the current zones which apply. Therefore, the owner of the property can now use the entire project area for either uses allowed in the CSR-2 zone or uses allowed in the I-1 zone. Since the CSR-2 zone allows food markets it is our conclusion that the food market use originally developed on the site can be reinstated.

SUMMARY

In summary, the property at 25th and Imperial represents a relatively unique fact situation in that (1) it is private property which has been in use by a public agency not subject to the City's zoning restrictions, and (2) during the governmental use, the property which has been developed as one project, has been split basically in half into two different and inconsistent zones. In our unique fact situation it appears that a good and perhaps persuasive argument could be made that the original use for which the property was developed is the appropriate use to be considered "grandfathered" and, under the provisions of the Municipal Code, specifically section 101.0303, the property owner has two years from the termination of the County use to place the property back into the preexisting food market use. Secondly, when property consisting of several lots is developed as one project, if the City subsequently splits the property into two different and inconsistent zones, it is our conclusion that the courts would find that the property owner has a legal right to utilize the then existing project improvements as a whole for any use allowed under either zone applicable to the site. This second conclusion is limited to fact situations where, as in this case, the property is split basically in half with neither half of the existing improvements being physically independent, for practical use purposes, of the other half.

If you wish to discuss this matter in additional detail, please contact me at 236-7728.

JOHN W. WITT, City Attorney

By
Harold O. Valderhaug
Head Deputy City Attorney

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Attachment 1
ML-96-44