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

**MEMORANDUM
MS 59**

(619) 236-6220

DATE: September 7, 2006
TO: Planning Commission and Development Services Acting Director
FROM: David E. Miller, Deputy City Attorney
SUBJECT: Dinofia Residence - Certificate of Compliance

QUESTION PRESENTED

Was the Lot Line Adjustment a lawful method to increase the size of Parcel 1, so that Parcel 1 complied with the minimum lot size requirement of the Planned District Ordinance?

SHORT ANSWER

Yes. As there were two legal lots, a lot line adjustment may be used to increase the size of one of the lots.

STATEMENT OF FACTS

The property located at 7157-7159 Country Club Drive in La Jolla contained a single-family dwelling, which was located primarily on 7157 Country Club Drive (referred to as Parcel 1 in the Staff Report and sometimes referred to as a "portion of Lot 17"). A small part of the dwelling crossed the property boundary with 7159 Country Club Drive (referred to in the Staff Report as Parcel 2 or Lot 16). On August 15, 2002, the City issued a building permit to Mr. DiNofia. The building permit authorized the remodel of the existing home and the removal of that portion of the house located on Parcel 2, such that the remodeled structure exists today

exclusively on Parcel 1. The permit indicated that it was issued for Lot 16 and the "portion of Lot 17".

In February of 2005, the City approved a revised set of plans for 7157 Country Club Drive. The plans clearly showed that all of the measurements, such as setbacks, were calculated based on the "portion of Lot 17" as a separate lot, rather than using the combined yards and measurements that would have applied had Parcel 1 and 2 been joined. Staff approved the plan change and requested that applicant modify the legal description of the property on the permit to describe that the development was entirely on a portion of Lot 17 and to delete the reference to Lot 16.

On July 14, 2005, recognizing that as drafted, the revised building permit had been approved for Parcel 1, staff issued a Certificate of Compliance [COC] under the provisions of the Subdivision Map Act and local ordinances adopted pursuant thereto for 7157 Country Club Drive. The COC recognized said property to be a separate and legal parcel that may be legally sold, leased, or financed without further proceedings. The COC was recorded at the San Diego County Recorder on July 21, 2005.

On October 18, 2005, in response to community concerns that the property owner had built the home on an undersized lot¹, the City issued a Notice of Intention to Determine Status with the intention of determining whether the lots should be merged. On the Notice to Determine Status a parenthetical comment was written "(Certificate of Compliance Rescinded)". The Notice of Intention to Determine Status was issued and recorded by the San Diego County Recorder. Though a Notice of Intention to Determine Status was issued, the City did not issue a Notice of Intent to Revoke the Certificate of Compliance, nor did the City comply with the requirements to revoke the Certificate of Compliance.

At the merger hearing, the applicants asked for a continuance and waived the time for the hearing to a time not certain. The applicants requested a meeting with the City to determine if there was an alternative procedure to merger that would satisfy the City's concerns that Lot 1 was undersized. The Hearing Officer agreed to the continuance. A meeting was held on February 23, 2006 with staff and representatives of the applicants. At the meeting staff was informed by the City Attorney that staff used the incorrect process to revoke the Certificate of Compliance. The City Attorney informed staff that the Certificate of Compliance was still in effect. With this knowledge, staff suggested alternatives to rescission/merger, including an application for a lot line adjustment, which would address staff's concerns as well as requirements of the PDO.

On April 11, 2006, the project was modified and resubmitted to the City as a Process 3 Coastal Development Permit for a Lot Line Adjustment to make 7157 Country Club Drive (Parcel 1) 10,004.72 square feet in order to comply with the minimum lot size of 10,000 square

¹ The relevant Planned Development Ordinance requires a minimum lot size of 10,000 square feet. Parcel 1, prior to the Lot Line Adjustment measured approximately 5000 square feet.

feet for the RS-1-4 zone and a variance to allow 52.56 linear feet of street frontage where at least 65 feet of street frontage is required. In addition, application was made for a Coastal Development Permit and Site Development Permit for 7159 Country Club Drive (Parcel 2) for the construction of a new 3,729 square-foot single family residence (2,442 square feet of basement area excluded from gross floor area, for a total of 6,171 square feet) within environmentally sensitive land, on a vacant 16,063 square-foot lot. A variance to allow no street frontage where at least 65 feet of street frontage is required was also requested as part of the application. On July 26, 2006, the Hearing Officer moved to approve Report No. HO 06-183 as presented; all variances were granted.

On August 9, 2006, the Hearing Officer decision to approve Project No. 5596 (Attachment M) was appealed by James J. Eischen, Jr. Attorney for Kathleen Vaughan and John Treadway as set forth in Attachment I 'Development Permit Appeal Application'.

Subsequent to the application for the appeal, Brian S. Kim, the attorney for Kathleen Vaughan and John Treadway, submitted a letter to Ken Teasley and the City Attorney's office claiming that the City had revoked the rescission of the Certificate of Compliance in a "Closed Session" meeting in violation of the Brown Act.

This memo will address the issue of the Certificate of Compliance as it also resolves the claim related to the violation of the Brown Act.

DISCUSSION

I. The Lot Line Adjustment was a Lawful Method to Increase the Size of Parcel 1

A. A Lot Line Adjustment May Be Used to Increase the Size of a Parcel

A lot line adjustment is a method of taking land from one or more parcels and adding it to one or more adjacent parcels to increase the size of the adjacent parcel(s). *San Diego Municipal Code [SDMC] §125.0310*. While a lot line adjustment can be used to change the relative sizes of two adjacent parcels, it cannot be used to create a new parcel. *Id.* According to the San Diego Municipal Code, a lot line adjustment requires a Process I decision. *SDMC §125.0330*. In order to approve a lot line adjustment, a decision maker must make four findings: "(a) [t]he proposed adjustment complies with the applicable provisions of the Subdivision Map Act; (b) [b]efore adjustment, all lots or parcels are existing parcels of land...meeting the criteria for determination of a lot as specified in Section 113.0237; (c) [a]ll adjusted lots or parcels comply with the minimum requirements of the LDC...; and (d) [t]he Lot Line Adjustment will not result in the creation of any additional parcels." *SDMC §125.0340*.

In the current case, finding (b) is at issue – whether, prior to the lot line adjustment, Parcel 1 met the criteria of a lot specified in Section 113.0237. As section 113.0237(c) relies on

the issuance of a Certificate of Compliance as conclusive determination that a lot exists, any analysis must examine whether the Certificate of Compliance issued by the City was in effect at the time of the Lot Line Adjustment.

B. The Purported Rescission of the Certificate of Compliance was Ineffective and the Certificate of Compliance Remained Valid Until Lawfully Revoked.

Any person owning real property may request that the City certify whether a property complies with the provision of the Subdivision Map Act. *California Government Code [Cal. Gov't Code] §66499.35*. The method by which the City provides such certification is called a "Certificate of Compliance." Where an individual applies for a Certificate of Compliance, the City must either issue the certificate or issue a Conditional Certificate of Compliance and indicate in what manner the applicant may make the property comply with the Subdivision Map Act.² *Cal. Gov't Code §66499.35(a) and (b)*. If issued, the Certificate of Compliance [Certificate] is recorded with the County Recorder, and the lot to which the Certificate relates is deemed legal for the purposes of development. *San Diego Municipal Code §113.0237(a)(2)*.

If a Certificate is issued in error, the Certificate may be revoked. *San Diego Municipal Code §121.0313*. To lawfully revoke the Certificate, the City must provide the property owner with a "Notice of Intent to Revoke" the Certificate of Compliance. *Id.* The "Notice of Intent to Revoke" must inform the holder of the Certificate of the code violation(s) and provide a reasonable time to correct such violations, so that the property will comply with applicable codes and regulations. *Id.* If the Certificate holder fails to correct the violations with the specified period of time, the Mayor, through his/her designees, may schedule a hearing to revoke the certificate. *Id.* The hearing to revoke the Certificate would be a Process Three hearing before a hearing officer, during which the Certificate holder would have an opportunity to present evidence. *San Diego Municipal Code §121.0314*.

In the current case, a Certificate of Compliance was issued. At the point of issuance and recording, the lot became a legal lot for the purposes of development. *SDMC §113.0237(a)(2)*. Instead of issuing a Notice of Intent to Revoke the Certificate of Compliance, the City issued a Notice of Intent to Determine Status. In this Notice of Intent to Determine Status, the City stated unequivocally that the Certificate of Compliance was revoked. As stated above, in order to revoke a Certificate of Compliance, the City was required to issue a Notice of Intent to Revoke, provide time to correct violations, and hold a public hearing before the Certificate could be legally revoked. The City, however, did not provide the Notice of Intent to Revoke, did not allow the Certificate Holder time to correct the code violation, and did not provide the Process III hearing. The statement that the Certificate of Compliance was "revoked" was ineffective and

² Additionally, where a real property has been "approved for development" pursuant to California Government Code section 66499.34, the City must issue a Certificate of Compliance. *Cal. Gov't Code § 66499.35(c)*. Real property which has been "approved for development" for the purpose of California Government Code section 66499.35(c) means that a permit or grant of approval has been issued for the property. *Cal. Gov't. Code §66499.34*.

CONCLUSION

Since the issuance of a Certificate of Compliance is conclusive proof that a lot is lawful for the purposes of development, the fact that the Certificate of Compliance was never lawfully revoked means that the Lot in question was an "existing parcels of land...meeting the criteria for determination of a lot as specified in Section 113.0237" at the time of the Lot Line Adjustment. With existing parcels of land meeting the criteria for determination of a lot, the applicant could lawfully increase the size of Parcel 1 with a Lot Line Adjustment pursuant to San Diego Municipal Code section 125.0340. Furthermore, though appellants claim that there was a "Closed Session" hearing that rescinded the revocation of the Certificate of Compliance, no such action occurred, nor was such action necessary. As the City never lawfully revoked the Certificate of Compliance, the City's action with respect to a purported revocation of the Certificate of Compliance was void. Until lawfully revoked, the Certificate of Compliance remained valid throughout the processing of the application, and no hearing, public or otherwise, was required by the San Diego Municipal Code, the Subdivision Map Act, or the Brown Act to "rescind the revocation" as suggested by the attorney for the appellants. Finally, any challenge to the decision to issue a Certificate of Compliance must be made to the courts within 90 days of the decision, as there is no administrative appeal of a Process I decision. Since the appellants failed to file a notice of appeal, a writ, or any other action with the courts within the 90 day statute of limitations, the statute of limitations has run and no further action can be taken on the Certificate of Compliance by the appellants.

MICHAEL J. AGUIRRE, City Attorney

By

David E. Miller
Deputy City Attorney

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