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MEMORANDUM OF LAW

DATE: August 18, 2006
TO: Betsy McCullough, Deputy Planning Director
FROM: City Attorney
SUBJECT: Voluntary Thematic Warehouse District

INTRODUCTION

On September 9, 1999, a Settlement Agreement [Agreement] was entered into between various Public Entities (the City of San Diego, the Redevelopment Agency of the City of San Diego, and the Centre City Development Corporation), various Developers (the San Diego Padres, JMI Realty, Inc., and Burnham Real Estate Services), and various Preservationists (the National Trust for Historic Preservation [Trust], Save Our Heritage Organization [SOHO], Bruce Coons, David Swarens, and Maureen Steiner) in order to avoid litigation relating to the environmental document prepared for the ballpark development project [Project]. More specifically, the purpose of the agreement was to settle disputes between the Preservationists, Developers, and Public Entities about the adequacy of the environmental document pertaining to the treatment and evaluation of historic resources in the vicinity of the Project, which the Preservationists maintained comprised a potential warehouse historic district. Pursuant to the Agreement, the presence of a potential warehouse historic district was to be evaluated and brought forth as a nomination under the federal, state, and/or local historic preservation laws and programs.

In an attempt to perform under that Agreement, SOHO introduced a Voluntary Warehouse Thematic District [District] to the San Diego Historical Resources Board [HRB] on October 27, 2005. At the October meeting, the HRB granted a continuance on the item until the February 2006 HRB meeting. At the February 23, 2006 meeting, a number of owners of properties that would otherwise be considered contributors or potential contributors to the proposed District came forward objecting to designation as contributors and requesting to be excluded from the District. In subsequent meetings among HRB staff and Parties to the Agreement, legal questions arose regarding whether voluntary districts are legal, and if so, the extent to which they are voluntary in light of the California Environmental Quality Act [CEQA], the San Diego Land Development Code [LDC], and the terms of the Settlement Agreement. This memorandum is in response to those questions.

QUESTIONS PRESENTED

1. Is the creation of a voluntary historical district legal? In the alternative, is the creation of a non-voluntary historical district legal?
2. Is the owner of a property, regardless of his or her consent to designation as a contributor to an historic district, potentially limited by the provisions of CEQA in his or her ability to develop said property?
3. Is the owner of a property, regardless of his or her consent to designation as a contributor to an historic district, potentially limited by the provisions of the LDC in his or her ability to develop said property?
4. Does the Settlement Agreement at issue require, implicitly or explicitly, that SOHO and Trust nominate a non-voluntary district? Once nominated, are the Developers prohibited from objecting to the nomination?

SHORT ANSWER

1. Yes. While not recommended by the state Office of Historic Preservation because it may result in the loss of historic resources, consent based ("voluntary") historic preservation programs are legal. Non-voluntary districts are also legal.
 2. Yes. Any proposed demolition or substantial alteration of property located within an historic district that meets the eligibility criteria for listing on the State Register for Historic Preservation requires full environmental review and imposition of all feasible mitigation measures.
 3. Yes. Properties within an historic district are subject to the LDC which prohibits demolition or substantial alteration of historic resources located therein absent findings that: (1) there are no feasible, less damaging alternatives; (2) the deviation is the minimum necessary to afford relief; and (3) the owner would otherwise be denied all reasonable beneficial use of the property.
 5. Yes. The terms of the Settlement Agreement require SOHO and Trust to nominate a non-voluntary district and said terms prevent the Developers from objecting to
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nomination.¹

ANALYSIS

A. VOLUNTARY DISTRICTS ARE NOT ILLEGAL

An historical district is defined by the Land Development Code as:

[A] significant concentration, linkage, or continuity of sites, buildings, structures, or objects that are united historically, geographically, or aesthetically by plan or physical development and that have a special character, historical interest, cultural or aesthetic value, or that represent one or more architectural periods or styles in the history and development of the City.

SDMC § 113.0103. The HRB Historical District Policy further recognizes Voluntary/Traditional Districts “where the contributing site nominations are voluntarily made at the discretion of the property owner.” *HRB Policy* § 4.1. In addition, a number of other historic preservation laws currently in effect allow owners to exempt themselves from designation by refusing to consent to the designation. Some examples include: (1) the City of Burbank Procedure for Designation Section 31-928 which requires the owner’s prior written consent to the designation; (2) the City of Monterey’s Landmark Overlay Zoning Section 38-75 H-1 which requires owner consent for designation of most historical resources, but important historical landmarks may be designated without owner consent; and (3) under 16 U.S.C. 470(a)(6), designations for the National Register of Historic Places may be vetoed by an owner who submits a written objection stating his refusal to consent to designation. While preservation programs that require owner consent tend to allow the loss of significant historic resources, sometimes “practical and political considerations may dictate that owner consent provisions be present in order to ensure passage of a preservation ordinance.” *Office of Historic Preservation State of California, Technical Assistance Bulletin #14—Drafting Effective Historic Preservation Ordinances: A Manual for California’s Local Governments*. Thus, owner consent provisions are legal. However, consent provisions are limited by the due process clause of the Fourteenth Amendment, which prohibits the improper delegation of police power.²

¹This memo does not attempt to address the issue of whether a person who subsequently acquires a property from a Party to the Settlement Agreement is also subject to the terms of the Settlement Agreement.

² The cases that have addressed this issue involved ordinances allowing a certain percentage of neighboring property owners to restrict the use of another’s property. The courts in those cases were concerned about “the use of a person’s property to be held hostage by the will and whims of neighboring landowners without adherence or application of any standards or guidelines.” *Cary v. City of Rapid City, South Dakota*, 559 N.W.2d 891, 894-896 (1997); *see also, Eubank v. City of Richmond*, 226 U.S. 137 (1912). Thus, where citizens are given the ability to place restrictions on the use of neighboring properties, there must be clear standards and guidelines for

Additionally, preservation programs that do not require owner consent and/or do not allow owners to object to the designation of their properties as historical resources are legal. The California Constitution allows a city to “make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws.” *Cal. Const. art. XI, § 7*. California courts presume the constitutionality of land use restrictions, and uphold their validity upon challenge so long as there is a rational relationship to the public welfare. *Associated Home Builders, etc. Inc. v. City of Livermore*, 18 Cal.3d 582, 604-605 (1976). A land use restriction is valid “if it is fairly debatable that the restriction in fact bears a reasonable relation to the general welfare.” *Id.* So long as there is a “question upon which reasonable minds might differ,” the courts will not interfere with a municipality’s policy decision. *Id.* Land restrictions are invalid if they are arbitrary or capricious. *Klajic v. Castaic Lake Water Agency*, 90 Cal.App. 4th 987, 995 (2001).

The LDC sets forth the purpose of development regulations pertaining to historical resources:

The purpose of these regulations is to protect, preserve and, where damaged, restore the historical resources of San Diego, which include historical buildings, historical structures or historical objects, important archaeological sites, historical districts, historical landscapes, and traditional cultural properties. These regulations are intended to assure that development occurs in a manner that protects the overall quality of historical resources. It is further the intent of these regulations to protect the educational, cultural, economic, and general welfare of the public, while employing regulations that are consistent with sound historical preservation principles and the rights of private property owners.

SDMC § 143.0201. Thus, there is a reasonable relation to the general welfare in our preservation of San Diego’s historical resources. Moreover, the HRB was established in accordance with San Diego City Charter Section 43, and the LDC provides for the basis of the HRB decisions:

- (e) Historical Resources Board Decision. The Historical Resources Board shall review the Research Report and shall make a decision on whether to designate a historical resource based on the criteria specified in, and consistent with the procedures of the Historical Resources Guidelines of the Land Development Manual. The action to designate shall require the affirmative vote by six members of the Board.
- (f) Findings. The decision to designate a historical resource shall be based on written findings describing the historical significance of the property.

SDMC § 123.0202(e)-(f). When the HRB decisions are based on set criteria, Guidelines, and findings as provided in the LDC, its decisions are not arbitrary and are valid restrictions on land use. Currently, the HRB is authorized to accept nominations for

designations of historical resources from the City Council as well as any member of the public. *Id.* at 123.0202(a). So long as the public notice and hearing requirements are met pertaining to the owner of the nominated property as well as other interested parties, a property may be designated over the objection of the property owner and without his or her consent. *Id.* at 123.0202(b).³

B. CEQA APPLIES TO PROPERTIES THAT ARE ELIGIBLE FOR LISTING REGARDLESS OF CONSENT TO DESIGNATION

The California Environmental Quality Act (CEQA) “Section 21060.5 defines the ‘environment’ to include ‘historic’ conditions within an area which will be affected by a proposed project.” *League for Protection of Oakland’s Architectural and Historic Resources v. City of Oakland*, 52 Cal.App.4th 896, 905 (1997). “According to section 21084.1, a ‘project that may cause a substantial adverse change in the significance of an *historical resource* is a project that may have significant effect on the environment.” *Id.* (Emphasis in original). Section 21084.1 of CEQA defines what an historical resource is for the purposes of the statute. As the court in *City of Oakland* explained:

[T]hree categories of historical resources have been created by section 21084.1. First, the mandatory provision of the statute specifies that buildings ‘listed in, or determined to be eligible for listing in, the California Register of Historical Resources must in all cases be granted status as historical resources. Second, buildings included in a local register of historical resources...or deemed significant pursuant to criteria set forth in subdivision (g) of section 5024.1, are presumptively historical resources unless the preponderance of the evidence demonstrates otherwise. Third, buildings which do not fall within the mandatory or presumptive categories may still be deemed historical resources at the discretion of the lead agency.

Id. at 906-907. The California Code of Regulations relating to Historic Resources recognizes historic districts as eligible for listing in the California Register of Historic Resources. *California Code of Regulations, Title 14, Ch. 11.5, Sec. 4852(a)(5)*. All resources that are deemed “eligible for listing” are considered historic resources under CEQA and must follow all laws regulating historic resources. *CEQA § 15064*. Thus, even though an individual property owner may not consent to designation as a contributing resource to the historic district, if that property has the characteristics that would make it a contributor to the historic significance of the district, and it is so included, then it too is part of the designated resource and subject to

³ HRB Policy 4.1 states that a request for historical district designation “should also include a petition endorsed by a substantial number of the affected property owners...” However, the language pertaining to the petition is not mandatory, and once a Thematic or Traditional district is designated the Policy allows for contributors within said district to be designated without owner consent. *See HRB Policy § 4.1*.

applicable laws with respect to alteration or demolition. Under CEQA, it must be treated as an eligible contributor because it meets the criteria to be eligible for listing in the state Register of Historical Resources regardless of owner consent.

Section 5020.1(q) of CEQA specifies that “substantial adverse change” means “demolition, destruction, relocation, or alteration such that the significance of an historical resource would be impaired.” *Id.* Proposed demolition of an historical resource “can hardly be considered anything less than a significant effect” regardless of whether the resource to be demolished is officially designated an historical resource. *Id.* at 909; *see also, Architectural Heritage Association v. County of Monterey*, 122 Cal.App.4th 1095, 1103-1104, 1118-1120 (2004). The effect of the demolition of an historical resource normally cannot be mitigated below a level of significance by photos, reports, and/or commemorating plaques. *Id.* at 1122. The CEQA analysis may focus on whether the removal of this contributing building indirectly or directly significantly impacts the overall historic characteristic of the Historic District. As a practical matter in this case, certain property owners are objecting to their consideration as contributors to the Warehouse Thematic District because they want to demolish the buildings on their properties. This type of proposed substantial change requires the preparation of an Environmental Impact Report in most cases.⁴ *Id.* at 1121-1123. In addition, CEQA has substantive requirements such that a project should not be approved by a public agency “if there are feasible alternatives or feasible mitigation measures available which would substantially lessen the significant environmental effects” unless “specific economic, social, or other conditions make infeasible such project alternatives or such mitigation measures.” *CEQA § 21002.*

C. SAN DIEGO LAND DEVELOPMENT CODE (LDC)

The LDC incorporates CEQA by reference in section 128.0102. In addition, the LDC creates a separate legal framework relating to the proposed demolition of historical resources. The purpose of the Historical Resources Regulations “is to protect, preserve and where damaged, restore the historical resources of San Diego, which include historical buildings, historical structures or historical objects, important archeological sites, historical landscapes, and traditional cultural properties...” *SDMC § 1430.0201.*

A Site Development Permit in accordance with Process Four is required for the proposed development of historical resources and/or historical districts, regardless of existence of designation or type of designation. *SDMC § 126.0502.* Moreover, the regulatory provisions of the Municipal Code pertaining to historic resources apply to “proposed development when ... historical resources are present on site, whether or not a Neighborhood Development Permit or Site Development Permit is required.” *SDMC § 143.0210.* The specific regulations (Municipal Code Provisions) that apply to historical resources and districts make it “unlawful to

⁴ On the other hand, restoration or rehabilitation of an historical resource pursuant to the Secretary of the Interior’s Guidelines is exempt from environmental analysis under CEQA. *CEQA Guidelines § 15331.*

substantially alter, demolish, destruct, remove, or relocate any designated resource or any historical building, historical structure, historical object or historical landscape located within a historical district except as provided in Section 143.0260. *SDMC § 143.0251(a)*. These provisions may very well require an analysis of the historicity of a property's buildings, structures, objects or landscape, or an analysis of whether actions taken with respect to the property (e.g., demolition) substantially alters an historic resource (e.g., the historic characteristic) of the District. "Development affecting designated historical resources or historical districts shall provide *full mitigation* for the impact to the resource, in accordance with the Historical Guidelines of the Land Development Manual, as a condition of approval." *SDMC § 143.0251(b)* (emphasis added). When development relating to historical resources does not meet the requirements of the LDC, limited deviations are allowed subject to the decision making authority making certain findings as explained in the LDC section 143.0260:

- (a) If a proposed development cannot to the maximum extent feasible comply with this division, a deviation may be considered in accordance with decision Process Four.
- (b) The minimum deviation to afford relief from the regulations of this division and accommodate development may be granted only if the decision maker makes the findings in Section 126.0504.

SDMC § 143.0206. A Site Development Permit may be approved or conditionally approved only if the decision maker makes all of the findings in Section 126.0504(a) and the supplemental findings in Section 126.0504(i) (1)-(3) which are:

- (1) There are no feasible measures, including a less environmentally damaging alternative, that can further minimize the potential adverse effects on the designated historical resource or historical district;
- (2) The deviation is the minimum necessary to afford relief and accommodate the development and all feasible measures to mitigate for the loss of any portion of the historical resource have been provided by the applicant; and
- (3) The denial of the proposed development would result in economic hardship to the owner. For purposes of this finding, "economic hardship" means there is no reasonable beneficial use of a property and it is not feasible to derive a reasonable economic return from the property.

Thus, demolition or substantial alteration of an historically significant contributing building within an historic district could potentially be precluded under the LDC.

D. THE SETTLEMENT AGREEMENT CONTEMPLATES A NON-VOLUNTARY DISTRICT

The Settlement Agreement was meant to avoid litigation relating to the environmental document prepared for the ballpark development project (Project) and to settle all disputes between the Parties as to the existence of a potential warehouse district. Specifically, the Recitals of the Agreement state in pertinent part:

WHEREAS, Preservationists have challenged, orally and in writing, the adequacy of the SEIR alleging that the SEIR does not comply with CEQA and have opposed the Project as proposed;

WHEREAS, Developers believe that the SEIR fully complies with CEQA . . .

WHEREAS, Preservationists assert that there is a potential warehouse historic district in the vicinity of the Project, and Developers and Public Entities dispute such assertion. . .

WHEREAS, the Parties have agreed that it is in their mutual interests to attempt to resolve the concerns of Preservationists through settlement, rather than through Potential Litigation;

WHEREAS, the purpose of this Agreement is to avoid litigation and to settle all legal disputes between Developers, Public Entities and Preservationists. . .

Id. at pp. 1-2. To effectuate that purpose, Section e. of the Agreement provides that, “a potential warehouse district shall be evaluated,” and:

If Trust and SOHO determine . . . that a potential warehouse district exists and may qualify for inclusion in the National Register, the California Register and/or as a local historic district, the Evaluation Consultant shall prepare nominations of the potential warehouse historic district for listing in the National Register, the California Register and/or as a local historic district.

Id. at p. 3. The Agreement goes on to create this prohibition relating to the district:

With regard to any property owned by Developers within this Project site, Developers shall not object to any listings in the National Register, California Register and/or as part of the local historic district.

Id. at pp. 3-4, Section e. The Agreement further states that, “This Agreement shall bind, and inure to the benefit of, the parties and their respective successors, assigns and legal representatives.” *Agreement*, p. 13, Section 15. Because under the terms of the Agreement, the Developers and their successors, assigns, and legal representatives are not allowed to object to any listings, the apparent intent of the Parties at the time the Agreement was made was to create something other than a voluntary district. If a voluntary district were contemplated by the Agreement, it would mean that the Developers could object to the listing by refusing to consent to designation. Thus, any voluntary warehouse historic district would not meet the requirements under the terms of the Agreement, and would not be what was contemplated by the Parties at the time it was entered into.

CONCLUSION

Voluntary districts are legal, but they are not recommended as the best method of preservation of historic resources. Even within a voluntary district, CEQA and LDC regulations may require the City and other approving agencies to impose mitigation which would limit the development of properties meeting the threshold criteria for historicity or which limit development that alters an historic resource of a designated historic district. Most importantly, the Settlement Agreement contemplates the nomination of a non-voluntary district.

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