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MEMORANDUM OF LAW

DATE: June 3, 2013

TO: Honorable Mayor and City Council

FROM: Paul E. Cooper, Assistant City Attorney

SUBJECT: Illegality of “Administrative Holds” to Stop Work on Permitted Development Projects

INTRODUCTION

Earlier this year, San Diego Mayor Bob Filner through the use of an “administrative hold” unilaterally shut down a development project despite the prior issuance of development permits by the City. The Mayor exercised this asserted power in connection with a project which resulted in a lawsuit against the City. This office defended the City in that lawsuit and successfully negotiated a settlement. The lawsuit having been dismissed, the purpose of this Memorandum is to address the Mayor’s authority. This memo only addresses the situation where permits have already been issued.

QUESTIONS PRESENTED

1. Can the Mayor or his designee unilaterally stop a development project after issuance of development permits by use of an “administrative hold?”
2. What are the legal risks if the City’s process for stopping a permitted development project is not followed?

SHORT ANSWERS

1. No. San Diego Municipal Code section 121.0309 sets forth the process for stopping a development project after issuance of permits. The proper action calls for a “stop

work order.” Under Section 121.0309¹, a stop work order may not be issued without approval of the City Attorney’s office unless irreparable harm is imminent so as to warrant an emergency. In such case of an emergency, the City Attorney’s office is to be provided “immediate subsequent review.” In addition, the process provides the developer with a right to appeal.

There is nothing in the law that permits the Mayor to bypass this process and circumvent the required approval of the City Attorney’s office as set forth in the Municipal Code. This check and balance is consistent with the City Attorney’s sign of authority under City Charter section 40. The “Strong Mayor” form of government did not alter the City Attorney’s role.

2. Failing to follow the proper process when stopping an otherwise permitted development project may subject the City to liability and damages. The process for issuing a stop work order (and subsequent permit revocation hearing under appropriate circumstances) affords developers due process and provides an appropriate check and balance on the Mayor’s power. Bypassing the stop work order process could result in a potential violation of due process. The City can be held liable for failing to afford a developer due process even if there would have otherwise been a legitimate basis for issuing a stop work order had the process been followed. In addition, there is a risk that those who participate in an effort to bypass the City’s stop work order process may be denied defense and indemnification in future litigation.

ANALYSIS

I. SHORT OF A PERMIT REVOCATION HEARING, A STOP WORK ORDER IS THE ONLY PROCESS FOR STOPPING A PERMITTED DEVELOPMENT PROJECT

Mayor Filner has used a so-called “administrative hold” to stop a development project after issuance of necessary development permits. By placing an “administrative hold” on an active project, City inspectors will not conduct project related inspections nor sign off on work that has been completed. By withholding inspections of such things as foundation, framing, etc., construction is effectively stopped until inspections resume.

There is no process under the law for the use of an administrative hold to stop construction on an already permitted project. We understand from Development Services Department that administrative holds have been used in situations where a developer has failed to pay required fees. The justification is similar to being unable to park without paying the meter. The service is not provided without payment of the fees and this narrow justification has merit. However, there is no justification where the fees are paid and the goal is to stop further development on the project. The law is very clear that the process for stopping work is issuance of a valid stop work order.

The method by which to properly stop work on a development project is set forth in San Diego Municipal Code section 121.0309, entitled “Procedure for Issuing a Stop Work Order.”

¹ Unless otherwise stated, all section references are to the San Diego Municipal Code.

San Diego Municipal Code section 121.0309 states:

(a) Issuing a Stop Work Order. Whenever any work is being performed that is contrary to the provisions of the Land Development Code, the City Manager may order the work stopped by issuing a Stop Work Order. The Stop Work Order shall be in writing and shall be served on any person engaged in the work or causing the work to be performed. The person served with the Stop Work Order shall stop the work until authorized by the City Manager to proceed.

(b) City Attorney Review. Where a permit has been issued, the City Attorney shall approve all Stop Work Orders before issuance except where irreparable harm is imminent so as to warrant an emergency Stop Work Order. Where emergency circumstances exist, the order shall be issued according to the discretion of the City Manager or designated Code Enforcement Official with immediate subsequent review by the City Attorney.

(c) Appeal of Order. A Stop Work Order may be appealed to the City Manager. When the alleged violation involves the Building, Electrical, Plumbing, or Mechanical Regulations, the appeal shall be reviewed by the Building Official. All other appeals shall be reviewed by the Development Services Director. The decision maker will provide informal rapid access for appellants in these matters in order to minimize unnecessary disruption of construction activities.

Consequently, stopping work on a project alleged to be in violation of the San Diego Municipal Code after permits have been issued, requires the following: (1) a written stop work order, (2) served on the violator, (3) after City Attorney approval, and (4) with the requisite right to appeal. Anything short of this process exposes the City to liability for violation of the right to due process and equal protection under the law.

The obligation to obtain the City Attorney's approval is consistent with the signoff power of the City Attorney under San Diego Charter section 40. The City Attorney is an elected officeholder who serves as an independent check and balance with regard to legal matters. The Charter expressly states that the "Strong Mayor" does not add or subtract from the City Attorney's power. See San Diego Charter § 265(b)(2).

Additionally, if the responsible party fails to remedy the violation after a valid stop work order is issued, San Diego Municipal Code section 121.0314 should be followed if and as applicable. San Diego Municipal Code section 121.0314 entitled "Permit Revocation Hearing Procedures" states:

The hearing provisions of Process Three, in addition to the requirements of this section, apply when determining whether to revoke or modify a development permit, a construction permit, or any other approval.

(a) Notice. The City Manager shall mail a notice of the revocation hearing to the permit holder and to any persons who request the notice at least 10 business days before the date of the revocation hearing. A Notice of Application is not required.

(b) Presentation of Evidence. The City Manager shall present evidence of any violations at the hearing, and the permit holder shall be provided a reasonable opportunity to rebut the evidence.

(c) Findings. The permit or approval may be revoked or modified if the Hearing Officer finds any of the following:

(1) The permit or approval was obtained by misrepresentation or fraud;

(2) The permit or approval was approved in error;

(3) One or more of the conditions of the permit or approval have not been satisfied or have been violated;

(4) The use permitted by the permit or approval violates an applicable statute, ordinance, law, or regulation; or

(5) The use permitted by the permit or approval is detrimental to the public health, safety, or welfare or constitutes a public nuisance. The Hearing Officer's decision may be appealed under San Diego Municipal Code section 121.0315 to the Planning Commission, and upon recordation of the permit revocation the permit "shall be void" pursuant to San Diego Municipal Code section 121.0316.

Accordingly, the proper method to stop work on a permitted project is by issuing a stop work order in full compliance with San Diego Municipal Code section 121.0309. If the responsible party fails to remedy the violation after a valid stop work order is issued, a public revocation hearing in accordance with section 121.0309 may be held as applicable.

In sum, there is no authority anywhere in the City's laws allowing for an "administrative hold" in lieu of a proper stop work order for alleged violations of the San Diego Municipal Code. Failing to abide by the applicable stop work order process unnecessarily exposes the City to liability for violation of the right to procedural due process.

II. FAILURE TO ABIDE BY THE LEGAL PROCESS FOR ISSUANCE OF A STOP WORK ORDER MAY BE DEEMED A VIOLATION OF DUE PROCESS

The rights to due process and equal protection under the law require the City to abide by its laws and apply those laws uniformly. See *Mathews v. Eldridge* 424 U.S. 319 (1976) and *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977). Arbitrary actions outside the City's legal parameters will not withstand legal challenge. The potential impacts of such actions may result in damages (including attorney's fees) against the City and potential personal liability for responsible individuals named in a civil lawsuit.

Generally, public employees acting within the scope of their employment are entitled to defense and indemnity when sued in their official capacities.² The duty for a public entity to defend and indemnify public employees is controlled by the provisions of the California Government Claims Act (Cal. Gov't Code §§ 810-006.6).

California Government Code section states:

Except as otherwise provided in Sections 995.2 and 995.4³, upon request of an employee or former employee, a public entity shall provide for the defense of any civil action or proceeding brought against him, in his official or individual capacity or both, on account of an act or omission in the scope of his employment as an employee of the public entity.⁴

California Government Code section 995.2 states:

(a) A public entity may refuse to provide for the defense of a civil action or proceeding brought against an employee or former employee if the public entity determines any of the following:

(1) The act or omission was not within the scope of his or her employment.

(2) He or she acted or failed to act because of actual fraud, corruption, or actual malice.

(3) The defense of the action or proceeding by the public entity would create a specific conflict of interest between the public entity and the employee or former employee. For the purposes of

² Designated officials charged with enforcement of the Land Development Code are generally provided this protection when discharging their duties in good faith and without malice under San Diego Municipal Code section 121.0206.

³ This provision applies to actions brought by the public entity against its own employees.

⁴ Similarly, California Government Code section 825 protects public employees from personal liability for acts or omissions occurring within the public employee's scope of employment.

