Office of
The City Attorney
City of San Diego

MEMORANDUM
MS 59

(619) 236-6220

DATE:	January 22, 2025
TO:	Honorable Mayor and Councilmembers
FROM:	City Attorney
SUBJECT:	Legality of Footnote 7 in San Diego Municipal Code Table 131-04D and Proposed Amendment

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INTRODUCTION

On November 12, 2024, the San Diego City Council (Council) heard an appeal of an environmental determination for a proposed residential project in the Encanto Community. While hearing that appeal, concerns with the San Diego Municipal Code (Municipal Code or SDMC), specifically Footnote 7 to Table 131-04D, Development Regulations for RS [Residential – Single Unit] Zones (Footnote 7), were raised. Footnote 7 requires lots in the Encanto Neighborhoods and Southeastern San Diego Community Planning areas (Encanto and Southeastern San Diego areas) zoned RS-1-2 to be a minimum of 5,000 square feet, and all development regulations of the RS-1-7 zone apply to subdivisions. The 5,000 square foot minimum required by Footnote 7 corresponds to the RS-1-7 zone. Without Footnote 7, the lot size in these community planning areas for the RS-1-2 zone would be a minimum of 20,000 square feet, similar to the rest of the City of San Diego. City Planning Department is now bringing forward an ordinance to repeal Footnote 7. This memorandum addresses allegations that Footnote 7 is invalid because it violates federal and state equal protection, due process, and fair housing laws. It also provides additional legislative options for consideration.

QUESTION PRESENTED

Is Footnote 7 unconstitutional and therefore invalid because it violates federal and state equal protection, due process, and fair housing laws?

SHORT ANSWER

No. Footnote 7 does not violate federal and state equal protection, due process, and fair housing laws based on legislative deference, the lack of specific data or details provided, and case law. Legislative enactments, including zoning ordinances, are presumed to be valid. 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. Evidence has not been provided

demonstrating that the ordinances enacting and amending Footnote 7 do not rationally relate to a legitimate government interest or were a violation of the City's police power. There is no evidence that substantive or procedural due process were violated in the enactment of the ordinances and Footnote 7 does not contradict fair housing principles.

BACKGROUND

On November 16, 2015, the Council adopted the Encanto Neighborhoods Community Plan and the Southeastern San Diego Community Plan Update (Update). San Diego Resolution R-310078 (Dec. 2, 2015). The Update redesignated certain land uses to Residential – Very Low (0-4 dwelling units per acre). On December 7, 2015, the Council approved the rezone of certain lots designated Residential – Very Low to the RS-1-2 base zone associated with the Update. San Diego Ordinance O-20580 (Dec. 15, 2015). The RS-1-2 base zone allows 0-2 dwelling units per acre. SDMC § 131.0431, Table 131-04D.

On January 7, 2020, the Council approved the 12th Update (Phase 2) to the Land Development Code and Local Coastal Program, adding Footnote 7 to Table 131-04D in Section 131.0431 of the Municipal Code. San Diego Ordinance O-21164 (Jan. 8, 2020). Footnote 7 reduced the required minimum lot size in the RS-1-2 base zone within the Encanto and Southeastern San Diego areas from 20,000 square feet to 5,000 square feet.

On January 11, 2022, the Council approved the 2021 Land Development Code Update to the Municipal Code and Local Coastal Program, amending Footnote 7. San Diego Ordinance O-21416 (Jan. 27, 2022). The amendment to Footnote 7 applied the development regulations of the RS-1-7 base zone to subdivisions of sites zoned RS-1-2 in the Encanto and Southeastern San Diego areas, which includes reduced minimum lot dimensions and setback requirements consistent with a 5,000 square foot minimum lot.

Currently, Footnote 7 states: "In the Encanto and Southeastern San Diego Community Planning areas, the *lot* size shall be a minimum of 5,000 square feet, and all *development* regulations of the RS-1-7 zone shall apply to subdivisions."

Footnote 7 only applies to lots zoned RS-1-2 in the Encanto and Southeastern[1] San Diego areas. It provides lot sizes in the RS-1-2 zones in these community planning areas are a minimum of 5,000 square feet and the development regulations of the RS-1-7 zone apply to subdivisions. Without Footnote 7, the lot size in these areas for the RS-1-2 zone would be a minimum of 20,000 square feet, similar to the rest of the City.

Based upon concerns with Footnote 7 raised by the community, City Planning Department is bringing forward for Council consideration an ordinance repealing Footnote 7. The Planning Commission considered the ordinance on December 19, 2024, and recommended 5-1-0 Council adopt the ordinance.

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[1] City Planning Department has stated that no lots in the Southeastern Community are currently zoned RS-1-2.

ANALYSIS

The community has raised concerns that Footnote 7 is invalid and unconstitutional because it violates federal and state equal protection, due process, and fair housing laws.[2]

I. ZONING ORDINANCES ARE LEGISLATIVE ACTS SUBJECT TO A HIGHLY DEFERENTIAL RATIONAL BASIS TEST AND PRESUMED VALID UNLESS CLEARLY ARBITRARY, DISCRIMINATORY, AND WITHOUT A REASONABLE RELATIONSHIP TO PUBLIC HEALTH, SAFETY, MORALS, OR GENERAL WELFARE

Legislative enactments, including zoning ordinances, are presumed to be valid. 66 Cal. Jur. 3d *Zoning and Other Land Controls* § 128 (2024). 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*. The party challenging the validity of the ordinance will have the burden of proving the ordinance arbitrary, discriminatory, or unreasonable. 66 Cal. Jur. 3d *Zoning and Other Land Controls* § 128. Although concerns have been expressed that the laws below may have been violated, no specific details or data has been presented other than Footnote 7 only applies in two specific community planning areas. Application of Footnote 7 to two community planning areas, without additional evidentiary support, does not overcome the validity presumption and prove a violation of the law.

A. Equal Protection

Generally, equal protection means that similarly situated people are treated 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. v. City of Los Angeles*, 177 Cal. App. 4th 837, 857 (2009); 13 Cal. Jur. 3d *Constitutional Law* § 328 (2024). 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 and internal quotation marks 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).

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[2] Other community concerns raised include: the process followed to amend Table 131-04D to add Footnote 7 and effectively rezone areas from RS-1-2 to RS-1-7; possible conflict with the Encanto Community Plan regarding park spaces; possible conflict with the Equity, Environmental Justice Element(s) of the City's General Plan; and violation of the California Environmental Quality Act (CEQA). Those issues are not addressed in this memorandum.

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 bears 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).

Notably, equal protection does not require zoning uniformity and different treatment was found to be rationally related to a legitimate government purpose where a project was approved that complied with some general plan policies, but not others. *Sacramentans for Fair Planning v. City of Sacramento*, 37 Cal. App. 5th 698 (2019). No evidence has been provided demonstrating that the ordinances enacting and amending Footnote 7 do not rationally relate to a legitimate government interest or were a violation of the City's police power.[3] From the Planning Commission staff report, the footnote was enacted to facilitate and match the densities designated in the Encanto Neighborhoods Community Plan of 0-4 dwelling units per acre. Report to Planning Commission No. PC 24-061 at 3 (Dec. 10, 2024). State law requires consistency between zoning ordinances and general and specific plans. Cal. Gov't Code § 65860. A court would likely find that the enactment of Footnote 7 to meet consistency requirements was rationally related to a legitimate government interest and consistent with the City's police power and equal protection laws.

B. Due Process

The due process clause of the federal and California constitutions prohibits the government from taking life, liberty, or property without the due process of law; due process has both substantive and procedural components. U.S. Const. amend. XIV, § 1; Cal. Const. art. 1, § 7; 1 Rathkopf's The Law of Zoning and Planning § 2:3 (4th ed. 2024). Substantive due process is essentially the same as the rational relationship standard above. 1 Rathkopf's The Law of Zoning and Planning § 2:3 The zoning police power must be enacted in furtherance of a legitimate governmental purpose and operate to reasonably further the purpose for enactment. *Id*. Procedural due process applies when a quasi-judicial hearing is held to determine the rights of a particular party to develop a particular property using established law. *Id*. Notice and a fair hearing are fundamental aspects of procedural due process. *Id*. There is no indication from the legisltive record during the enactment of Footnote 7 that substantive or procedural due process were violated.

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[3] If challenged, a court would analyze any evidence provided to determine whether it could overcome the applicable legal standard.

C. Fair Housing

Federal and state law both prohibit discrimination in housing through the federal Fair Housing Act (FHA) and the California Fair Employment and Housing Act (FEHA). 42 U.S.C. §§ 3601-3631; Cal. Gov't Code §§ 12900-12999. Both the FHA and FEHA prohibit discriminatory land use practices that make housing opportunities unavailable. Phyllis W. Cheng, et al., California Fair Housing and Public Accommodations § 2.6 (TRG 2023).

FHA prohibits acts with a discriminatory effect, even if no intent to discriminate is evident, unless the acts are supported by a legally sufficient justification, which itself is supported by evidence. 24 C.F.R. § 100.500. "A practice has a discriminatory effect where it actually or predictably results in a disparate impact on a group of persons or creates, increases, reinforces, or perpetuates segregated housing patterns because of race, color, religion, sex, handicap, familial status, or national origin." 24 C.F.R. § 100.500(a). Legally sufficient justifications exist when the act is necessary to achieve "one or more substantial, legitimate, nondiscriminatory interests" of the City and "[t]hose interests could not be served by another practice that has a less discriminatory effect." 24 C.F.R. § 100.500(b)(1). The party alleging unlawful discrimination has the burden of showing that the practice caused or will cause a discriminatory effect; a city would then need to demonstrate that the practice was necessary to achieve one or more substantial, legitimate, nondiscriminatory interests; the challenging party then must demonstrate that the challenged practice could be served by another practice that has a less discriminatory effect. 24 C.F.R. § 100.500(c). California has adopted this same three-part test. Robert D. Links, Cal. Civ. Prac. Civil Rights Litigation § 13:13 (2024).

FEHA prohibits discrimination in housing accommodation based on protected status, specifically race, color, religion, sex, gender, gender identity, gender expression, sexual orientation, marital status, national origin, ancestry, familial status, source of income, disability, veteran or military status, or genetic information. Cal. Gov't Code § 12955. Public land use practice that discriminates against a protected class or has the effect of discrimination against a protected class is prohibited. Cal. Code Regs. title 2, § 12161. Of relevance here is the prohibition against imposing "different requirements than generally imposed, or fails to enforce generally imposed requirements, in a manner that denies, restricts, conditions, adversely impacts, or renders infeasible housing opportunities or the enjoyment of residence, land ownership, tenancy, or any other land use benefit related to housing opportunities or existing or proposed dwellings." Cal. Code Regs. title 2, § 12161(b)(3). A violation of FEHA is not considered to have occurred if it can be established that the action or inaction is "necessary to achieve an important purpose sufficiently compelling to override the discriminatory effect and effectively carries out the purpose it is alleged to serve." Cal. Gov't Code § 12955.8(b). Additionally, consideration must be given to whether there are "feasible alternatives that would equally well or better accomplish the purpose advanced with a less discriminatory effect." Cal. Gov't Code § 12955.8(b)(1). Footnote 7 allows additional market-rate, single-family homes consistent with planned densities in the Encanto Neighborhoods Community Plan. It does not deny, restrict, condition, adversely impact, or render infeasible housing opportunities but rather provides additional housing opportunities. Thus, it does not contradict fair housing principles.

II. LEGISLATIVE OPTIONS REGARDING FOOTNOTE 7

A. Amend Table 131-04D to Repeal Footnote 7

City Planning Department is currently bringing forward an ordinance repealing Footnote 7. While state law generally prohibits the City from "downzoning," i.e., allowing a lower intensity of use, this does not apply to changes that are not below intensities in effect on January 1, 2018. Reducing the intensity of use "includes reductions to height, density, or floor area ratio, new or increased open space or lot size requirements, new or increased setback requirements, minimum frontage requirements, or maximum lot coverage limitations, or any other action that would individually or cumulatively reduce the site's residential development capacity." Cal. Gov't Code § 66300(b)(1)(A). City Planning Department has determined that removing Footnote 7 will not decrease the intensity of use in effect on January 1, 2018.

Additionally, in order to meet the City's state mandated Housing Element and Regional Housing Needs Assessment requirements, if the City relied on the greater densities created by the opportunity for smaller lots, then the City cannot reduce these densities without making findings that the reduced density is consistent with the General Plan (including the Housing Element) and that the remaining sites are adequate to meet the City's needs. Cal. Gov't Code § 65863(b). Quantitative information must be included in the findings. *Id*. If the remaining sites are not adequate, the City can identify other sites with additional density within 180 days. Cal. Gov't Code § 65863(c). City Planning Department has indicated the sites zoned RS-1-2 in the Encanto Neighborhoods Community Planning area were assessed based on the development potential allowed under the base zone regulations, without considering Footnote 7 and removing Footnote 7 would not reduce the residential density of any lot identified in the Adequate Site Inventory below its current allocation toward the regional housing need. Finally, any amendment to repeal Footnote 7 should include factual support that the repeal is consistent with the General Plan and the Encanto Neighborhoods Community Plan.

B. Amend the Land Development Code to Apply the Development Regulations of the RS-1-7 Zone to the RS-1-2 Zone Citywide

The City could also consider applying the development regulations of the RS-1-7 zone to the RS-1-2 zone citywide, i.e., apply Footnote 7 citywide. The application of Footnote 7 is a policy decision and would not contradict the legal principles above; however, the Office of the City Attorney cannot analyze any potential legal impacts without further information from City staff about where the greater density would apply and whether it would conflict with other City plans, goals, and policies. For example, without a full analysis of the impacts of where the higher density would apply, it is unknown if the application of Footnote 7 citywide would conflict with the City's Climate Action Plan by increasing density in areas without access to transit. It would also need to be analyzed for consistency with the General Plan and applicable community plans. Application of Footnote 7 citywide would require an amendment to the Municipal Code and

would require CEQA environmental review. Additionally, it would be a Local Coastal Program amendment so, similar to a repeal or amendment to Footnote 7, it would require certification by the California Coastal Commission prior to implementation in the certified Coastal Overlay Zone.

C. Amend Footnote 7 to Match the Density Designated in the Community Plans

The City could also consider amending Footnote 7 to match the density designated for the sites in the applicable community plans. In the Encanto Neighborhoods Community Plan, the RS-1-2 zoned lots have a Residential – Very Low (0-4 dwelling units / acre) community plan land use designation, which allows up to four homes per acre. It is this Office's understanding Footnote 7 currently provides for up to 9 dwelling units per acre. Footnote 7 could potentially be amended to match the community plan land use designation of up to 4 dwelling units per acre. If this density is analyzed in the Final Program Environmental Impact Report for the Southeastern San Diego and Encanto Neighborhoods Community Plan Updates (SCH NO. 20151006), additional environmental review may not be required.

III. ABILITY TO APPLY ANY ZONING CHANGE TO DEVELOPMENT APPLICATIONS THAT HAVE ALREADY BEEN DEEMED COMPLETE

Pursuant to state law, development applications that have been deemed complete are entitled to proceed under the law and policies in effect at the time the application was deemed complete. This is known as a "vested right." Statutory vested rights occur when a development agreement has been entered into, a vesting tentative map has been applied for, or an application is made pursuant to the Housing Crisis Act of 2019. Cal. Gov't Code §§ 65864-65869.5, 66498.1; Cal. Stats. 2019, ch. 654 (Sen. Bill 330). However, even if a development agreement exists, its terms must be modified to comply with any later-enacted state or federal laws. Cal. Gov't Code § 65869.5(a). A vesting tentative map will not prevent the City from imposing conditions or denying an application when necessary to protect the subdivision residents or the immediate community from a condition dangerous to their health or safety, or when necessary to comply with state or federal law. Cal. Gov't Code § 66498.1(c). In addition, the Housing Accountability Act prohibits a local agency from applying any ordinances, policies, and standards that were not in effect when a preliminary application for the project was initially submitted or once the project was deemed complete. Cal. Gov't Code § 65589.5.

In this instance, development applications deemed complete for housing and subdivision developments in areas utilizing Footnote 7 have a vested right to continue to rely upon Footnote 7 and the City is prohibited from applying new ordinances, policies, and standards. As such, any repeal or amendment to Footnote 7 cannot apply to any developments currently in process that have been deemed complete.

CONCLUSION

Adoption of a general zoning ordinance is a legislative act and, as such, will survive a substantive due process challenge so long as it is not clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare. Likewise, a zoning ordinance does not result in a denial of equal protection to any affected landowner merely because it treats similar projects or uses in a disparate manner; an ordinance may regulate such matters to advance a legitimate public purpose. In general, the validity of a zoning ordinance is subject to a "highly deferential" rational basis test. Application of Footnote 7 to two community planning areas, without additional evidentiary support, does not overcome the validity presumption and prove a violation of the law.

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By *__/s/ Lauren Hendrickson__*
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