News from

Council President Todd Gloria

City of San Diego ▪ District Three

NEWS RELEASE

For immediate release: April 4, 2013 Contact: Katie Keach, 619-235-5268

Council President on the Future of Balboa Park's Plaza de Panama

City Attorney Clarifies Options for Future Action

SAN DIEGO, CA (April 4, 2013) – San Diego City Council President today released the following statement about the future of Balboa Park's Plaza de Panama after reading the City Attorney's related Memorandum of Law (attached).

"The City Attorney makes clear in his memorandum that a City Councilmember cannot sponsor the project and bring it back for consideration. If an applicant comes forward to advocate for the project, I would docket the request for the City Council's consideration at a future public hearing. While it is helpful to understand there is a course to pursue, it is unfortunately apparent that the improvements could not be complete in time for the 2015 Centennial Celebration because of the likelihood of additional litigation and the project's complexity and construction timeline," said Council President Todd Gloria.

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MARY JO LANZAFAME
ASSISTANT CITY ATTORNEY

SHANNON M. THOMAS
DEPUTY CITY ATTORNEY

HEIDI K. VONBLUM
DEPUTY CITY ATTORNEY

OFFICE OF

THE CITY ATTORNEY

CITY OF SAN DIEGO

Jan I. Goldsmith

CITY ATTORNEY

1200 THIRD AVENUE, SUITE 1620

SAN DIEGO, CALIFORNIA 92101-4178

TELEPHONE (619) 236-6220

FAX (619) 236-7215

MEMORANDUM OF LAW

DATE: April 3, 2013

TO: The Members of the City Council

FROM: City Attorney

SUBJECT: Options and Processes for Approving the Site Development Permit for the Plaza de Panama Project

INTRODUCTION

The Plaza de Panama Committee submitted an application to the City for a Site Development Permit (SDP) and community plan amendment to allow the construction of a bridge in Balboa Park, a new road, and a parking garage, known as the Plaza de Panama Project (Project). The City Council approved the Project, after certifying an Environmental Impact Report (EIR) for the Project. Save Our Heritage Organisation (SOHO) challenged the City Council's approval of the Project in court, and the court determined that there was not substantial evidence to support one of the required SDP findings for a deviation to historical resources. In light of that ruling, our office has been asked to address options the City may have for allowing the Project to move forward.

QUESTIONS PRESENTED

1. May the City adopt an ordinance to exempt the Project from the SDP findings?

2. If the City were to exempt the Project from SDP findings, what process must be followed to approve the Project?

SHORT ANSWERS

1. Yes. The City may adopt an ordinance to exempt the Project from SDP findings.

2. The first step in processing an exemption is an application. The Plaza de Panama Committee, or some other applicant, would need to amend the Project application to request the additional approvals discussed in this memorandum. The applicant may not be a Councilmember. The approval options discussed in this memorandum were not previously included in the Project development permit application, and therefore were not analyzed by this Office. A Planning Commission hearing, followed by two City Council hearings would be required to adopt an ordinance that sets forth the exemptions and a new SDP for the Project must be approved. Additional procedural considerations are discussed below.

BACKGROUND

On March 15, 2011, the Plaza de Panama Committee filed an application for an SDP and a community plan amendment to change vehicle access and parking within Balboa Park. On July 9, 2012, the City Council certified an EIR, adopted an amendment to the Balboa Park Master Plan and Central Mesa Precise Plan and approved an SDP for the Project.

San Diego Municipal Code section 126.0504(i)(3) requires that the decision maker make a supplemental finding that "[t]he 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." Other findings were also made relating to Environmentally Sensitive Lands and historic resources and deviations sought from those regulations; however, SOHO did not challenge any of those findings.

On February 4, 2013, Judge Taylor issued his final ruling on the Project. While Judge Taylor ruled in the City's favor with respect to the CEQA and 1870 state statute issues, he found that the City violated San Diego Municipal Code section 126.0504(i)(3) because there is "no substantial evidence in the record as a whole supporting the determination that there is no reasonable beneficial use for the project area absent approval of the project." He did not rule on whether or not the City violated San Diego Municipal Code section 126.0504(a) in approving the Project.

We have been asked to advise on the City's options for approving the Project, as currently proposed. Some have suggested that the City exempt the Project from the requirement that the decision maker find that denial of the project would result in economic hardship to the City under San Diego Municipal Code section 126.0501(i)(3). In addition, because Judge Taylor did not rule on whether or not the City violated San Diego Municipal Code section 126.0504(a), and because it is known that SOHO alleges that the findings made under section 126.0504(a) are inadequate, exempting the Project from this requirement should also be considered. Exempting

the Project from these various findings that would otherwise be required is referred to throughout this memorandum as the "Findings Exemption."[1]

The options addressed below require City Council action wherein the Councilmembers would act in a quasi-judicial capacity to approve a new SDP for the Project. Therefore, in order to avoid any allegations of bias, a Councilmember should not act as an applicant. *See Cohan v. City of Thousand Oaks,* 30 Cal. App. 4th 547 (1994); *BreakZone Billiards v. City of Torrance,* 81 Cal. App. 4th 1205 (2000); *Withrow v. Larkin*, 421 U.S. 35, 47 (1975).

ANALYSIS

I. THE CITY COUNCIL MAY ADOPT THE FINDINGS EXEMPTION

A. The City May Exempt a Specific Project from Otherwise Applicable Municipal Code Regulations

Special legislation that creates a specific exemption from otherwise applicable laws is permissible so long as that legislation does not violate the principles of equal protection.[2] The California Constitution, Article 1, Section 7, guarantees the equal protection of the law, and is interpreted co-extensively with the federal Constitutional provision. 13 Cal. Jur. *Constitutional Law* § 339 (2012); *Landau v. Superior Court*, 81 Cal. App. 4th 191 (1998). Simply put, equal protection requires that people who are similarly situated to others be treated the same under the law. *People v. Cruz*, 207 Cal. App. 4th 664, 674 (2012). A threshold requirement of any meritorious equal protection claim is a showing that the government has adopted a classification that affects two similarly situated groups unequally for the purposes of the law that is challenged. *Id.* If the persons are not similarly situated, then the equal protection claim fails without further analysis. *People v. Buffington*, 74 Cal. App. 4th 1149, 1155 (1999). As one court stated when denying a claim that a zoning ordinance violated equal protection in its applicability to the plaintiff, evidence that property is similarly situated may be impossible to provide, in that the plaintiff's land is unique. *Stubblefield Const. Co. v. City of San Bernardino*, 32 Cal. App. 4th 687 (1995). Here, the Project is located within the City's largest park and proposes development that would result in a civic use. In other words, the Project is distinctly unique, and therefore, it is

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[1] Under the Findings Exemption, the Project would still be subject to the findings under Sections 126.0504(b), 126.0504(c), and 126.0504(e) regarding environmentally sensitive lands, because any exceptions to those findings would require approval from the United States Fish and Wildlife Service and the California Department of Fish and Game. As we understand the imminent need to begin construction, such approvals would not be timely. In addition, the Project would still be subject to the findings required under San Diego Municipal Code sections 126.0504(i)(1)-(2). Under this Findings Exemption, the City could approve a new SDP for the Project making only the findings required under sections 126.0504(b), 126.0504(c), 126.0504(e), and 126.0504(i)(1)-(2), thus removing the risk of a challenge to the sufficiency of the findings under sections 126.0504(a) and 126.0504(i)(3).

[2] The California Constitution prohibits the state legislature from enacting special legislation if general legislation can be made applicable. Although this prohibition has been held not to apply to cities, equal protection is nevertheless applicable. Cal. Const. art. IV, § 16(b); *Ex parte Lyons*, 27 Cal. App. 2d 182 (1938).

unlikely that other projects could show that they are similarly situated to the Project such that a claim for a violation of equal protection could proceed.

Furthermore, when distinctions are not based on a suspect classification or a fundamental interest, then the government must only demonstrate a rational relationship to a legitimate governmental purpose. *Id.* at 713. In particular, claims that individual land use permit decisions violate equal protection are reviewed under the rational relationship test. *Breneric Associates v. City of Del Mar*, 69 Cal. App. 4th 166, 187 (1998). When applying the rational relationship test, the court is to uphold the classification "if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *Cruz*, 207 Cal. App. 4th at 675. A claim will be rejected if "the "'wisdom [of the decision] is at least fairly debatable and it bears a rational relationship to a permissible state objective.'"" *Breneric*, 69 Cal. App. 4th at 187 (citation omitted). In *Breneric*, the court upheld the City of Del Mar's denial of a permit for a two story addition to a home. *Id.* at 172. The permit was denied because the proposed design was inconsistent with the residence's architectural style and was not in harmony with the surrounding neighborhood. *Id.* The applicant claimed that the denial violated equal protection, because other similar projects had been approved. *Id.* at 186. The court found that the aesthetic considerations expressed by the City of Del Mar were legitimate government objectives for treating the project differently from other property. *Id.* at 187. Here, the purpose of any exemptions from otherwise required findings is to create a beautified pedestrian plaza within Balboa Park in time for the Centennial Celebration, which is a rational basis for such an exemption. Therefore, in any ordinance adopting the Findings Exemption, the City should state this reason and any other applicable reasons.

B. Neither State nor Federal Law Requires a Finding that There is No Reasonable Beneficial Use for the Property Absent Approval of the Project

Balboa Park is a National Historic Landmark District and is also on the California and City of San Diego Register of Historic Resources. The City of San Diego is a Certified Local Government (CLG) under the National Historic Preservation Act of 1996 (NHPA)[3] because it has been certified by the State Historic Preservation Officer (SHPO) to administer historic preservation responsibilities under federal law.[4] As explained in more detail below, as a CLG, the City's historic preservation ordinances are subject to approval by the SHPO; however, the

[3] The NHPA "seeks to accommodate historic preservation concerns with the needs of Federal undertakings through consultation among the agency official and other parties with an interest in the effects of the undertaking on historic properties, commencing at the early stages of project planning. The goal of consultation is to identify historic properties potentially affected by the undertaking, assess its effects and seek ways to avoid, minimize or mitigate any adverse effects on historic properties." 36 C.F.R § 800.1(a). The section 106 process requires federal agencies to consult with local governments both directly and through the SHPO. 36 C.F.R. § 800.2.

[4] To certify the local government, the SHPO must, among other things, ensure that the local government "has established an adequate and qualified historic preservation review commission by State or local legislation." 16 U.S.C. § 470a(c). The SHPO must also ensure that the local government provides a process for designation of historical resources and the enforcement of laws that protect historic properties. *Id.*

finding that there is no reasonable beneficial use for the property, absent approval of the Project, is not required by either federal or state law.

In 1986, the City entered into a Certification Agreement with the State of California as part of the process to become a CLG for purposes of historic preservation. Under the Certification Agreement, the City is required, among other things, to "enforce appropriate state and local legislation for the designation and protection of historic properties . . . ." In addition, the City is required to "enforce its historic preservation ordinance, a copy of which is incorporated herein as Exhibit B . . . ." According to the terms of the Certification Agreement, the City is only required to obtain prior approval from the SHPO for any amendments to the ordinance that was attached to the Certification Agreement. When the City entered into the Certification Agreement, the City's historical resources-related code provisions did not include the requirement that the City find that the denial of proposed development would result in economic hardship to the owner.

We do not currently know whether the City obtained prior approval from SHPO when it added the 126.0504(i)(3) finding. However, opponents to an amendment would argue that removing the 126.0504(i)(3) finding with respect to the Project would be an amendment to our historic preservation ordinance and would thus require SHPO approval. The City's usual practice is to simply solicit SHPO's comments on a draft ordinance in advance of the City Council's approval.

The California Office of Historic Preservation (OHP) has numerous local ordinances posted on their website. A review of several of these ordinances shows that there is a wide range of ordinances that have been accepted by OHP. While some ordinances that have been accepted by OHP require findings related to economically viable use of the property, others do not or they provide exceptions for government-owned property. *See, e.g.,* County of San Diego Administrative Code §§ 396.5; 396.7 (no findings related to economic viability); Los Angeles Municipal Code § 12.20.3.K.5 (requires a finding that the owner would be deprived of all economically viable use of the property, if the requested demolition, removal, or relocation of the historic element were denied, but exempts property owned or leased by a public entity); City of Sacramento Municipal Code § 17.134.330 (contains an economic hardship finding, but that finding is just one of several findings that may be made to approve a project).

Finally, the OHP publishes a guide called "Drafting Effective Historic Preservation Ordinances" (Historic Preservation Guide), which includes a section on "Consideration of Economic Effects." This section includes a discussion on the economic hardship finding that should be included in a historic preservation ordinance to avoid a takings claim under the federal or state constitutions. The Historic Preservation Guide's suggestion to allow development in spite of impacts to historical resources is based on the need to avoid a regulatory taking by allowing an owner to develop his or her historic property upon a showing that relief from the regulations is necessary to allow reasonable economic return for the property. Historic

Preservation Guide at 73. The Guide recognizes that "[l]ocal governments must determine when and what types of such relief might be appropriate." *Id.*

After a review of some of the municipal codes posted on OHP's website and the Historic Preservation Guide, it appears there is not one fixed set of findings that is required by the SHPO when certifying a local agency as a CLG. Therefore, it is likely that the SHPO would approve the Historical Finding Exemption.

II. PROCEDURES TO IMPLEMENT THE FINDINGS EXEMPTION AND APPROVE THE PLAZA DE PANAMA PROJECT

To adopt the Findings Exemption and approve the Project, the City must adopt an ordinance for the Finding Exemptions, and approve a new SDP for the Project. Doing so would require a Planning Commission hearing, followed by two City Council hearings. The Project may be approved through either one ordinance that exempts the Project from certain SDP findings, makes the remaining SDP findings, and grants a new SDP; or one ordinance that exempts the Project from certain SDP findings, and one resolution that makes the remaining findings and grants a new SDP. In either event, a determination as to whether the actions are quasi-judicial or legislative, and thus subject to the Mayoral veto and the referendum processes, will turn on the dominant concern of the matter, not the form of the approvals.

A. The Findings Exemption May be Adopted through an Uncodified Ordinance

If the City Council decides to adopt the Findings Exemption, that legislation would not be required to be codified. Charter section 20 states that "[t]he Council *may* by ordinance codify all of the ordinances of a general nature of the City into a Municipal Code. . . ." (emphasis added). Previously, this section stated that the City Council "shall" cause to be printed all ordinances of a general nature and was held to be merely directory, not mandatory, and the City's failure to publish the code section at issue did not invalidate that provision. *Hollander v. Denton*, 69 Cal. App. 2d 348 (1945). In 1953, Charter section 20 was amended to remove the word "shall" and replace it with the word "may," thus making it even clearer that codification is not mandatory. [5] Therefore, because the Findings Exemption would not have any utility once the Project is complete, and because codification is not required, an uncodified ordinance is recommended.

B. The SDP May Be Approved Through the Same Ordinance that Adopts the Findings Exemption

A new SDP for the Project may either be approved by the same ordinance that adopts the Findings Exemption, or the City Council may adopt an ordinance adopting the Findings

[5] The City Council recently passed uncodified special legislation on September 1, 2009, when it approved extensions of time on a limited class of development permits and tentative maps that were set to expire. *See* San Diego Ordinance O-19894 (Sept. 28, 2009).

Exemption and pass a separate resolution that makes the remaining required findings and approves a new SDP. However, an act must be passed with the same formality as the act it intends to amend or repeal. 6 McQuillin Muni. Corp. § 21:13 (3d ed. 2012). When interpreting statutes or regulations that are of equal dignity, the courts will construct the enactments in a manner to harmonize the two. *Leslie v. Superior Court*, 73 Cal. App. 4th 1042, 1049 (1999). Therefore, whether the City Council takes action to approve the Project by one ordinance, or one ordinance and one resolution, the decision by the City Council to exempt the Project from the otherwise required SDP findings must be made by ordinance, to result in a decision that is of equal dignity with the adopted San Diego Municipal Code. The method of the approval of the Project will not affect the results of any of the following analyses regarding Mayoral veto, noticed hearing requirements, effective dates, or a referendum requirement.

C. The Council's Approval of the Project, Including the Adoption of the Findings Exemption and Approval of a New SDP Is Not Likely Subject to Mayoral Veto

Approval of the Project, including adoption of the Findings Exemption and the approval of a new SDP, would not likely be subject to a mayoral veto because the dominant concern of the action would be approval of the SDP, which is a quasi-judicial matter. While no cases were found that were directly on point, the following provides an overview of the relevant law related to the provisions of the San Diego Charter sections regarding the Mayor's veto power. San Diego Charter section 280(a)(2) provides that:

> "[t]he Mayor's veto shall not extend to those matters where the Council has acted as a quasi-judicial body and where a public hearing was required by law implicating due process rights of individuals affected by the decision and where the Council was required by law to consider evidence at the hearing and to make legal findings based on the evidence presented."

Therefore, discretionary land use permits that require the City Council to (1) act as a quasi-judicial body, (2) hold a public hearing required by law implicating due process rights of individuals affected by the decision, and (3) consider evidence at the hearing and make legal findings based on the evidence presented, are not subject to mayoral veto.

1. Project Approval Would Require the Council to Act as a Quasi-Judicial Body

A quasi-judicial matter is one in which the decision maker applies existing standards and rules to determine rights, while a legislative act establishes what the rules will be for future decisions. *City of Rancho Palos Verdes v. City Council of the City of Rolling Hills Estates*, 59 Cal. App. 3d 869, 883 (1976) (disapproved on other grounds). As a general statement, the granting of conditional land use permits or variances is a quasi-judicial action, while the

approval of zoning ordinances is a legislative act. *Essick v. City of Los Angeles*, 34 Cal. 2d 614 (1950); *Arnel Dev. Co. v. City of Costa Mesa*, 28 Cal. 3d 511 (1980). In those cases where the matter to be decided is a mix of quasi-judicial and legislative, the courts will look primarily to the "dominant concern" of the action. *Rancho Palos Verdes*, 59 Cal. App. 3d at 883-85.

In deciding the dominant concern of an action, the courts determine whether the action primarily affects individuals, or more generally affects the public at large in its application; if the former, then the dominant concern is more quasi-judicial, and if the latter, the dominant concern is more legislative. *Ratchford v. County of Sonoma*, 22 Cal. App. 3d 1056 (1972); *Rancho Palos Verdes*, 59 Cal. App. 3d 869; *Horn v. County of Ventura*, 24 Cal. 3d 605, 615 (1979); *Oceanside Marina Towers Ass'n v. Oceanside Community Dev. Comm'n*, 187 Cal. App. 3d 735 (1986); *Del Mar Terrace Conservancy, Inc. v. City Council of the City of San Diego*, 10 Cal. App. 4th 712 (1992); *Citizens for Improved Sorrento Access, Inc. v. City of San Diego*, 118 Cal. App. 4th 808 (2004); *Kaahumanu v. Maui County*, 315 F.3d 1215 (9th Cir. 2003). Another relevant inquiry is whether the action requires the application of existing law, which is quasi-judicial in nature, or whether it involves the creation of new law or formulation of new policy, which is more legislative in nature. *California Aviation Council v. City of Ceres*, 9 Cal. App. 4th 1384 (1992); *Pacifica Corp. v. City of Camarillo*, 149 Cal. App. 3d 168 (1983); *Kaahumanu*, 315 F.3d 1215.

The Findings Exemption would involve approval of the Project, which proposes development in a specific location, without some of the findings that the City Council would otherwise be required to make pursuant to the existing San Diego Municipal Code. Although the Project would be available for use by the public, the Findings Exemption does not necessarily affect the public at large in that it would be limited in application to the Project only; it would not be applicable to any other projects in the City, and would not affect any other development applicants in the City. In other words, while the project site may be geographically large, relative to other development in the City, the effects of the Findings Exemption would be localized and specific to this development application. The Findings Exemption would not create new law for all future development applications. In addition, approving a new SDP would require the application of the other applicable Municipal Code regulations to the Project. Therefore, the dominant concern of the Project, including the Findings Exemption, could be considered to be more quasi-judicial than legislative.[6]

[6] When approvals that would otherwise be legislative are considered along with discretionary land use permits that are quasi-judicial, it is the City's practice that all of those actions are not subject to mayoral veto. For example, if a project includes a rezone and community plan amendment for an applicant's specific parcel, along with a development permit, all three items would not be subject to veto. To do otherwise would result in some of the project approvals being subject to veto, while other project approvals would not be subject to veto, thus defeating the purpose of the provision of Charter section 280(a)(2), which makes quasi-judicial matters not subject to veto.

2. Project Approval Would Include a Public Hearing Implicating Due Process Rights

When consideration is given regarding whether to grant a discretionary permit pursuant to a Process Three, Process Four, or Process Five decision, the Municipal Code requires that a hearing be held. SDMC § 112.0301(c). The Project as originally proposed was subject to a Process Five approval, because it was consolidated with a community plan amendment. SDMC §§ 112.0103; 122.0104.

Applicants processing requests for discretionary land use approvals are entitled to procedural due process.[7] *Burrell v. City of Los Angeles*, 209 Cal. App. 3d 568 (1989). Procedural due process generally consists of notice of the proposed action, the reasons for the action, a copy of the charges and materials on which the action is based, and the right to respond to an impartial decision maker. *Id.* at 581. When an SDP is proposed to be issued, notice of the hearing, including the general subject of the hearing must be provided to the applicant, and the decision maker is expected to be impartial. SDMC §§ 112.0302(b)(1); 112.0301(c); 1990 Op. City Att'y 2 (90-2; June 15, 1990). An SDP approved by Council for the Project would require a public hearing, implicating procedural due process rights.

3. Project Approval Would Require the Council to Consider Evidence and Make Legal Findings Based on the Evidence

To issue a SDP, the City Council is required by law to consider evidence presented at the public hearing, and to make legal findings based on that evidence. *See* SDMC §§ 126.0105; 126.0504.

In addition, it should be noted that the intent behind the passage of Proposition F, which placed the temporary strong-mayor form of government on the ballot in November, 2004, indicates that the Mayor was not to have any veto power in land use matters. The City Attorney's Impartial Analysis of Proposition F, stated in part, "[t]he veto power would not extend to matters of internal governance of the Council or to *the application of existing municipal rules to specific decisions of the Council, such as the issuance of land use permits*." (emphasis added).[8] Therefore, the matter is not likely subject to mayoral veto, in accordance with Charter section 280.

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[7] Applicants may only state a substantive due process right violation in the land use context if the agency lacked any discretion to deny the permit; a situation which is not present when the decision maker is required to hear evidence and make findings. *Breneric*, 69 Cal. App. 4th 166.

[8] In June, 2010, Proposition D was passed by the electorate; this made the strong-mayor form of government permanent in the City of San Diego, but did not make any changes to the veto provisions.

D. Noticed Hearings, Effective Date, and Referendum

We understand there is a desire for the Project to be constructed in time for the 2015 Centennial Celebration. This section summarizes the law affecting the timing of the City Council's consideration of the Project, including the Findings Exemption.

1. A Planning Commission Hearing and Two City Council Hearings Would Be Required

If the City chooses to move forward with the Findings Exemption, the Project must first be heard by the Planning Commission. California Government Code section 65854 requires that the Planning Commission "hold a public hearing" on a proposed amendment to a zoning ordinance. Therefore, the issue is whether an ordinance to exempt the Project from the supplemental finding set forth in San Diego Municipal Code section 126.0504(i)(3) would be a zoning ordinance amendment. There are two basic types of zoning ordinance amendments: (1) a "rezone," which reclassifies the zoning applicable to a specific property; and (2) text amendments, which change the permitted uses or regulations of the use and development on property within particular zoning districts. Adam U. Lindgren & Steven T. Mattas, California Land Use Practice § 4.31 at 157 (CEB 2012). California Government Code section 65850 identifies the "regulat[ion] [of] the use of buildings, structures, and land as between industry, business, residences, open space . . . and other purposes" as something that may be included in a zoning ordinance. Cal. Gov't Code § 65850(a). There are no cases on point that address whether amendments to required permit findings constitute a zoning ordinance amendment. However, because a project may not be approved, and thus, land not used, unless certain findings are made, it is our opinion that findings necessarily regulate the use of land. Therefore, an ordinance related to the Findings Exemption could constitute a zoning ordinance amendment, and would thus require a Planning Commission hearing under California Government Code section 65854. Thus, this Office recommends that the Findings Exemption be presented to the Planning Commission for its recommendation.

At least ten business days before the date of the Planning Commission and a decision on the Project at the City Council hearing, a Notice of Public Hearing must be provided in accordance with San Diego Municipal Code section 112.0301(c) and California Government Code section 65854. In addition, notice of the Planning Commission hearing must be published in accordance with San Diego Municipal Code section 112.0305 and California Government Code sections 65090 and 65091. Notice of the City Council hearing must also be given ten business days before the decision. SDMC § 112.0305. The notice for the City Council hearing must include the Planning Commission's recommendation on the matter, and therefore, the City Council hearing may not be noticed until after the Planning Commission hearing has occurred. *See Environmental Defense Project of Sierra County v. County of Sierra*, 158 Cal. App. 4th 877, 881 (2008).

Therefore, under the current Municipal Code, the earliest a regular City Council hearing for the introduction of an ordinance could occur would be approximately two weeks after the Planning Commission hearing. After approval of the introduction of the ordinance for the Findings Exemption and approval of a new SDP, the City Council would then need to adopt the ordinance at a second hearing held no sooner than twelve calendar days from the day of its introduction. San Diego Charter § 275(c).

2. Effective Date

A resolution is effective upon its final passage, unless a later effective date is set forth within the resolution. San Diego Charter § 295(c). With few explicit exceptions such as the annual appropriations ordinance, an ordinance takes effect no less than 30 days after its final passage. San Diego Charter § 295(d). The date of final passage of resolutions and ordinances that are not subject to mayoral veto is the date of passage by the City Council. San Diego Charter § 295(b). As discussed in Section II.C., the Project would not likely be subject to mayoral veto, and therefore, an ordinance adopting the Findings Exemption would be effective 30 days after the date of the final passage by the City Council.

3. Referendum

While legislative acts are subject to referendum, decisions that are administrative or quasi-judicial are not. *Fishman v. City of Palo Alto*, 86 Cal. App. 3d 506 (1978). As discussed above in Section II.C.1, when a matter is both a quasi-judicial and a legislative matter, the courts will look to the dominant concern of the action. Although there are no cases on point that involve a referendum of a matter that was of both a quasi-judicial and legislative nature, cases examining whether an action was legislative, and subject to referendum, or administrative, and therefore not subject to referendum, have noted the need for a case-by-case determination. *Id.*; *W.W. Dean & Assoc. v. City of South San Francisco*, 190 Cal. App. 3d 1368 (1987). As discussed in more detail in Section II.C.1, the dominant concern in adopting the Findings Exemption and approving a new SDP is approval of the SDP. Therefore, it is unlikely that a court would determine that the ordinance is subject to referendum.

Given the required procedures to adopt the Findings Exemption and approve a new SDP, depending on available Planning Commission and City Council hearing dates, approximately eight to ten weeks would be required before the City Council could approve the Project. The Findings Exemption, and thus the corresponding SDP for Project would not be effective for an additional 30 days after the ordinance's final passage.

CONCLUSION

The City Council may adopt an ordinance that exempts the Project from some of the SDP findings in the San Diego Municipal Code, makes the remaining required findings, and approves a new SDP for the Project. These approvals would likely not be subject to veto. The standard City process for development project approval should be followed, including required noticing, and a Planning Commission recommendation because the Findings Exemption is considered a zoning ordinance amendment. This Office is available to assist with the processing, assuming there is an applicant who desires to bring the Project forward again.

JAN I. GOLDSMITH, CITY ATTORNEY

By: Shannon M. Thomas
Shannon M. Thomas
Deputy City Attorney

By: Heidi K. Vonblum
Heidi K. Vonblum
Deputy City Attorney

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