



CITY COUNCIL AGENDA STATEMENT



May 15, 2007 Item 12

ITEM TITLE: DISPOSITION OF INITIATIVE PETITION
REGARDING ALLOWABLE BUILDING HEIGHT
LIMITS

SUBMITTED BY: PLANNING AND BUILDING DIRECTOR *[Signature]*

REVIEWED BY: INTERIM CITY MANAGER *[Signature]*

4/5THS VOTE: YES NO **X**

BACKGROUND

On April 17, 2007 the City Council referred the Initiative Petition Regarding Allowable Building Height Limits to staff for review and analysis, pursuant to Elections Code Section 9215. This report documents staff's analysis.

ENVIRONMENTAL REVIEW

The Environmental Review Coordinator has reviewed the proposed activity for compliance with the California Environmental Quality Act (CEQA) and has determined that the activity is not a "Project" as defined under Section 15378(b)(3) of the State CEQA Guidelines; therefore, pursuant to Section 15060(c)(3) of the State CEQA Guidelines the activity is not subject to CEQA.

RECOMMENDATION

That the Council accept the report and select one of the following options, pursuant to Elections Code Section 9215:

1. Direct staff to place the ordinance, as proposed by the proponents, without alteration, on a Council Agenda for adoption within ten days; or
2. Direct staff to prepare a resolution for Council adoption, placing the ordinance on the ballot at the next regular municipal election (June 3, 2008).

BOARDS/COMMISSION RECOMMENDATION

None.

DISCUSSION

Staff has conducted an impartial review of the proposed initiative. Staff's comments are grouped into three topic areas: (1) summary of the initiative proposal, (2) review of the practical effects and questions raised by the initiative language, and, (3) review of the initiative per the specific criteria contained in Elections Code Section 9212, including issues raised by Councilmembers at the meeting of April 17.

Summary of the Proposed Initiative

The full text of the proposed initiative is attached (Attachment 1). The City Attorney's summary of the chief purpose and points of the initiative (Attachment 2) indicates that it provides two primary land use controls:

1. Except as permitted under the General Plan Update as approved on December 13, 2005, an amendment to the General Plan which would have the purpose or effect of increasing the allowable building height within any area to exceed 84 feet, will not be effective until approval by the majority of the registered voters in the City. Voter approval would not be required for General Plan changes affecting the Bayfront Planning areas as identified in the Land Use Element of the 1989 General Plan; and,
2. The General Plan would be amended to provide that no building that is a part of any development of the frontage of Third Avenue between E and G Streets shall exceed 45 feet in height. The allowable height shall be calculated as an average height above existing grade, and shall include garages and rooftop appurtenances.

The areas as defined for these two criteria are mapped in Attachment 3.

In addition, the initiative sets forth the process for voter consideration of General Plan Amendments where the prescribed heights would be exceeded as well as the means and timing of adding the foregoing provisions to the existing General Plan.

Practical Effects and Questions

If enacted, the initiative could only be amended by the voters in a city election. Thus, staff in its review has attempted to broadly consider practical issues and effects of the regulations on existing regulations, policies and processes. The following general observations are offered:

- o The first provision of the initiative proposal establishes an 84-foot height limitation over most of the City ("Citywide Provision"). This provision controls only the height of buildings. It does not restrict the number of dwelling units in residential buildings or the square footage of commercial or industrial development other than as that may

*NOTE
THE ZONING
HAS NOT YET
BEEN CHANGED
TO BE
CONSISTENT
WITH THE
GENERAL PLAN
APPROVED
DEC 2005

occur due to the height limitation. The proposed Citywide Provision would be more restrictive than existing zoning for four zone classifications. The commercial zones C-B and C-C have no height limits [See Table, Attachment 4]. Together, these two zones apply to a total of 234 acres. A third zoning category, the I zone, comprises 299 acres, but occurs entirely within the Bayfront planning area, which is excepted from the Citywide Provision. The fourth classification, PC, comprises 1,961 acres underlying Otay Ranch and other eastern neighborhoods. However, as a practical matter, heights greater than 84 feet are not usually at issue in the PC zone, since specific regulations, adopted at the time of the approvals of Sectional Planning Area plans, nearly universally limit heights in the PC zone to less than 84 feet.

The Citywide Provision includes exceptions ("Excepted Areas") (Map, Attachment 3). These areas include three locations that were designated for highrise development in the 2005 General Plan. They comprise two Transit Focus Areas in the Urban Core, and the Eastern Urban Center in Otay Ranch. The fourth Excepted Area is the Bayfront planning area as set forth in the 1989 General Plan, generally comprising all lands west of I-5 northward of the extension of Palomar Avenue. The Bayfront planning area includes lands within the incorporated limits of the City, both those in the jurisdiction of the City, and those owned by the Port District. Because heights in excess of 84 feet are allowed without voter approval within the Excepted Areas, the proposed initiative would not control heights or restrict development within the areas that the General Plan envisions for the City's highest buildings and greatest intensity of future development.

- o In light of the Excepted Areas, the 234 acres where the Citywide Provision would be more restrictive than existing zoning, and the absence of controls on other development standards, the Citywide Provision would not significantly reduce potential yields in residential dwelling units and commercial or industrial square footage, though it would place a ceiling on development heights. The primary effect of the Citywide Provision would be on the 234 acres of C-B and C-C commercial zoning.
- o The Citywide Provision controls only height. It excepts high residential density areas and would not be in conflict with existing residential zoning development criteria. For these reasons it would not appear to be an impediment to meeting Housing Element Goals. In its own words, the proposed initiative is not intended to impede affordable housing. The proposed initiative would not appear to prevent housing density bonuses related to development regulations, including height. Thus, it would not appear to present an adverse effect to providing affordable housing.
- o The second provision of the proposed initiative would limit development on parcels fronting Third Avenue between E Street and G Street (the "Third Avenue Provision"). This provision is in conflict with the development regulations of the V-3 Village subdistrict classification of the Urban Core Specific Plan (approved on first reading), applied to seven parcels within the area covered by the Third Avenue Provision. The V-3 classification provides for a maximum Floor Area Ratio (ratio of

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building floor area to lot size), a maximum coverage of the building over the lot, and a maximum building height. Maximum development as provided by the floor area and lot coverage standards of V-3 subdistrict regulations would result in, at minimum, a five-story building. The Third Avenue Provision limiting height to 45 feet would effectively limit the building to a maximum of four stories, or 80 percent of the floor area that might otherwise be allowed by the V-3 classification. Practical effects will reduce this yield further, so the Third Avenue Provision would result in a loss of more than 20 percent of the development potential for the seven parcels. This magnitude of reduction, along with the need to provide on-site parking and other practical considerations, would be a substantial factor in the overall development project feasibility for these seven parcels.

* Both ENAs WITHDRAWN DUE TO ECONOMY →

○ The Third Avenue Provision would effect two projects subject to Exclusive Negotiating Agreements with the Redevelopment Agency, since the projects described by the agreements exceed the proposed height limitation. The potential elimination of two Exclusive Negotiating Agreement development proposals could result in a loss or delay of development investment and tax increment revenues.

- The proposed initiative would apparently remain permanently in the City's General Plan unless the initiative is amended or repealed by the voters at a City election, even though it is based on factors and locations set forth in General Plans adopted in 1989 and 2005. As such, it would apply to future comprehensive updates of the General Plan and limit the City Council's normal legislative discretion to amend the General Plan.

In addition to the foregoing observations, staff has generated questions that may have procedural and legal implications that cannot be definitively addressed at this time:

THE New Initiative calls for simple MAJORITY vote →

- The proposed initiative provides that projects and plans proposing greater building heights than set forth in the initiative, "will not be effective until approval by the majority of the registered voters in the City" (underline added). This appears to require that project proposals or General Plan Amendments seeking voter approval must achieve fifty percent plus one of the total registered voters of the City, regardless of the voter turnout at the election. This is a much higher standard than the normal standard of a majority of those voting.

THIS WAS reworded to BE IDENTICAL to THE City →

- In regard to the limitation set forth for Third Avenue, the proposed initiative text says, "For the purposes of this section, the allowable height shall be calculated as the average above existing grade,..." The intent of this statement is unclear. What may have been intended was that the grade be averaged to achieve the datum from which height would be measured, as is common in many municipal zoning ordinances. However, the proposed initiative actually states that it is the height that is to be averaged. Thus, a building would conform if its overall average height did not exceed 45 feet. By this method, development applicants may argue that lower elements or vacant spaces on the site be averaged against the highest portions of the building(s) to achieve actual maximum heights in excess of 45 feet.

- The proposed initiative uses the phrase “building height of development.” This description would potentially apply to all forms of buildings, which the Municipal Code does not distinguish from ‘structures’. Thus, it would appear to restrict not only residential and commercial buildings, but also other unique structures such as spires, antennas, the auto park sign, stadiums, hospitals or sports lighting -- all of which frequently exceed 84 feet in height -- in most areas of the City.
- The method of height calculation proposed for the Third Avenue area is prescribed by the proposed initiative and uses ‘existing grade’ as a reference. This method differs from that described in the Municipal Code, which uses ‘average contact ground level’ (Municipal Code Section 19.04.038). Because the Third Avenue parcels are relatively flat, this is not particularly troublesome other than its inconsistency with normal practice. But the measurement of height from ‘existing grade’ in other circumstances could prove exceedingly difficult.
- The General Plan is, as defined by the Government Code, a policy document. The regulation of development is a function of the City Municipal Code’s Zoning Title. The proposed initiative states that, “Any provision of City law inconsistent with the amendment inserted by this initiative shall be unenforceable to the extent of the inconsistency.” Actions taken to amend the zoning code must generally be consistent with the adopted General Plan, but the proposed initiative does not prescribe those actions. Thus, literal implementation of the proposed initiative would not place the proposed restrictions within the Municipal Code, but would apparently invalidate certain provisions within the Code. This would at minimum jeopardize their ready availability to project applicants and could commit the City to a project of zoning amendments to assure their applicability as an enforceable development regulation.
- The proposed initiative indicates that, “Nothing in this initiative shall be construed to interfere with rights to obtain density bonuses under affordable housing laws or limit rights or entitlements under affordable housing laws.” It is unclear as to whether the height limitation is a development regulation that could be exceeded in return for the construction of affordable housing pursuant to Government Code Section 62915, which obligates such concessions.

Elections Code Section 9212 Review

The April 17, 2007 agenda report listed eight topic areas warranting review under Elections Code Section 9212. Each item is set forth below and a response as to the effect of the proposed initiative is given.

1. Its fiscal impact.

The Citywide Provision limitation may limit flexibility of design options for new development or require development proposals to be submitted for approval by a majority of registered voters. It is difficult to quantify the potential for fiscal impact from such potential impediments. The Third Avenue Provision would limit the development

potential of seven properties by about twenty percent or more, due to an inability to achieve the maximum building square footage as allowed by coverage and floor area ratio, imposed by an average building height limitation of 45 feet. The Third Avenue provision may jeopardize two current Exclusive Negotiating Agreements that were drafted in anticipation of building heights greater than the proposed limitation. This increment of potential lost development capacity and current development proposals could result in a reduction of tax increment revenues.

2. Its effect on the internal consistency of the city's general and specific plans, including the housing element, the consistency between planning and zoning, and limitations on city actions under section 65008 of the Government Code and Chapters 4.2 (commencing with Section 65913) and 4.3 (commencing with Section 69515) of Division 1 of Title 7 of the Government Code.

The internal consistency of the Citywide Provision with the existing general plan, adopted specific plans and zoning totals 234 acres outside the Excepted Areas, where existing zones could allow for heights in excess of 84 feet. The Third Avenue Provision is inconsistent with the V-3 classification applied to seven parcels within the first reading approval of the Urban Core Specific Plan. The defined measurement of height for the initiative's Third Avenue Provision is in conflict with the definition used within the Municipal Code. The measurement of height prescribed for Third Avenue differs from that used elsewhere. Municipal Code amendments could be processed to address these conflicts. The other Government Code sections cited in the paragraph above deal with discrimination and design restrictions that would have the effect of limiting housing opportunities. It would not appear that the proposed initiative presents an adverse effect related to discrimination or housing opportunities.

3. Its effect on the use of land, the impact on the availability and location of housing, and the ability of the city to meet its regional housing needs.

The proposed initiative would not appear to prevent the City from substantially achieving its goals of housing production and diversity, since it limits only the height of buildings and not the number of dwellings that can be built. The Citywide Provision does not restrict heights in the Excepted Areas, and is in conflict with existing zoning mostly in commercial districts. In its own words it is not intended to impede affordable housing. The proposed initiative would not appear to prevent housing density bonuses related to development regulations, including height. Thus, it would not appear to present an adverse affordable housing effect.

4. Its impact on funding for infrastructure of all types, including, but not limited to, transportation, schools, parks, and open space. The report may also discuss whether the measure would be likely to result in increased infrastructure costs or savings, including the costs of infrastructure maintenance, to current residents and businesses.

The proposed initiative would not appear to prevent the City from achieving its goals of facilities financing. New development projects would still be obligated to provide for infrastructure funding in accordance with established programs of the City and the school districts, and through mitigation required as a result of environmental review. If projects in redevelopment areas are impeded by either the Citywide Provision or the Third

Avenue Provision, related tax increment funds that could be collected and used for transportation and park deficiencies might not be realized.

5. Its impact on the community's ability to attract and retain business and employment.

As discussed above, the Citywide Provision of the proposed initiative would not appear to significantly reduce overall development capacity, and thereby would not prevent the City from achieving its General Plan goals of job creation and balanced land use mix. In certain instances, absent approval by a majority of registered voters, it could preclude future project design features related to structures which may functionally need to be designed in excess of 84 feet, such as university development, hospitals, signs, or stadiums, which could have business and employment impacts.

6. Its impact on the uses of vacant parcels of land.

Vacant parcels affected by the Citywide Provision exist largely in Otay Ranch. Vacant Excepted Area parcels include the Eastern Urban Center and certain parcels within the Bayfront planning area. It is possible that certain unique structures, which may in the future be proposed within the remaining villages of Otay Ranch, would be affected by the Citywide Provision.

7. Its impact on agricultural lands, open space, traffic congestion, existing business districts, and developed areas designated for revitalization.

The proposed initiative would, to a limited extent, reduce design options that might be used to avoid development impacts on open space. Because the proposed initiative does not significantly limit the intensity of development that could be achieved in either the number of dwelling units or square footage of commercial or industrial development, it is unlikely to have an effect on present or projected future traffic congestion. The Third Avenue Provisions would limit the height of buildings in that area. To the extent that this limitation removes design flexibility and impedes reuse and investment, it could have a long-term adverse effect on that existing business district. Conversely, to the extent that it would limit new development and retain existing businesses, it may be seen by some business owners as an effective way to protect existing businesses and community character. The loss of flexibility or requirement to seek approval by a majority of registered voters may discourage redevelopment proposals. However, the intensity of development and overall development capacity within redevelopment areas is not substantially reduced by the Citywide Provision.

8. Any other matters the legislative body requests to be in the report. [In their April 17 discussion and action, the City Council raised the issues discussed below]

a. General Plan Consistency – Refer to the overview and analysis in Item #2 above.

b. Future Redevelopment – The proposed initiative would limit projects and planning or zoning amendments that would be in conflict with the Citywide Provision or the Third Avenue Provision. The loss of flexibility or requirement to seek approval of the majority of registered voters may discourage redevelopment

proposals. The Third Avenue Provision conflicts with two current Exclusive Negotiating Agreements. However, the intensity of development and overall development capacity within redevelopment areas is not substantially reduced by the proposed initiative.

c. Financial cost of redevelopment of the Scripps Hospital—No redevelopment proposal has been submitted for the Scripps Hospital site at this time. Staff is aware of the need for hospitals to achieve compact, vertical design that may require building heights in excess of that allowed by the Citywide Provision. Such design would be prohibited without approval of the majority of registered voters.

d. Employment – The Citywide Provision would limit 234 acres that would currently allow buildings in excess of 84 feet in height. The height limitation would not significantly restrict the intensity of development on these parcels. Development intensity in the Excepted Areas would be as currently envisioned by the General Plan. On the basis of these facts, it does not appear that the proposed initiative would prevent the City from substantially achieving the employment goals and development projections contained in the General Plan.

e. Affordable Housing – No current residential zoning is affected by the Citywide Provision. The proposed initiative does not restrict residential development densities or capacities. The highest density areas of the City are within the Excepted Areas. The proposed initiative indicates that it is not intended to conflict with affordable housing provisions, and density bonus provisions of the Government Code are expected to apply.

f. Community Character – The proposed initiative places key character-driving development locations within its Excepted Areas. There may be effects associated with the Third Avenue Provision on the feasibility of new development in that area, but the resultant effect on community character is unclear.

g. Preventing inconsistent projects prior to the Municipal Election -- Nothing in the proposed initiative would restrict development projects seeking approval and commencing construction prior to the June 2008 election. An interim control could be referred to staff by the Council as a separate matter. Projects with the potential to exceed the limitations of the proposed initiative would require discretionary review and notice, and would be subject to City Council action either as a matter of course or through appeal.

h. Bayfront Master Plan – As discussed above, the Bayfront Master Plan lies within the Bayfront Planning Area, which is one of the Excepted Areas. Thus, building in excess of the Citywide Provision limitation in that area would not be subject to approval by the majority of registered voters.

DECISION MAKER CONFLICT

Staff has reviewed the decision contemplated by this action and has determined that it is not site specific and, consequently, the 500-foot rule found in California Code of Regulations Section 18704.2(a)(1) is not applicable to this decision.

FISCAL IMPACT

The cost to include the measure on the June 3, 2008 ballot is estimated at \$35,000. Future applicants, or the City, would be required to pursue a ballot proposition and face a similar expense, should amendments to the General Plan for the purpose of exceeding the height be proposed. Municipal Code amendments may be required to achieve consistency with the proposed initiative, at a cost to the General Fund. The increment of lost development capacity for parcels on Third Avenue could affect the feasibility of projects on seven parcels and would be inconsistent with two current Exclusive Negotiating Agreements, resulting in a potential loss of tax increment revenues. It is difficult to quantify the potential for fiscal impact based on lost opportunities that might result from the Citywide Provision.

ATTACHMENTS

1. Text of the Proposed Initiative
2. City Attorney's Summary
3. Maps of Areas of Applicability of Initiative Provisions
4. Table of Height Limitations by Zone

Prepared by: Jim Hare, Assistant Planning Director, Planning and Building Department