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Via Email
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City of San Diego, City Council
c/o Diana J.S. Fuentes, Interim City Clerk
202 C Street, Second Floor
San Diego, CA 92101

Re: *Objections and Correction Regarding the Effect of Repeal of "Footnote 7" in Development Regulations Table 131-04D for the RS-1-2 Residential Zone in the Southeastern San Diego and Encanto Neighborhoods Community Planning Areas*
March 4, 2025, City Council, Agenda Item No. 330, Subitem-B: (0-2025-86)

To the Honorable City Council President Joe LaCava and Members of the San Diego City Council:

This office has been hired by and represents the Chollas Valley Community Planning Group ("CVCPG").

This comment letter **generally supports** the proposed action and staff report in Item 330, Subitem-B to repeal and remove footnote 7 ("Footnote 7") from Development Regulations Table 131-04D for the RS-1-2 Residential Zone in the Southeastern San Diego and Encanto Neighborhoods and re-establish the minimum lot size for the RS-1-2 zones to 20,000 square feet.

However, this comment letter also **objects and advises** that the City Council must correct statements in Item 330's staff materials that are both misguided and misstatements of law, because the effect of the repeal of Footnote 7 – on existing and unapproved "applied for" projects in the subject *Southeastern San Diego and Encanto Neighborhoods Community Planning Areas* – requires that unapproved "applied for" projects must comply with the corrected revised zoning.

A. UNAPPROVED "APPLIED FOR" PROJECTS DO NOT HAVE VESTED RIGHTS UPON THE REPEAL OF FOOTNOTE 7

City Council should repeal of Footnote 7 based on the reasons as stated in the Staff Report, which are supported and elaborated on in this comment letter. However, CVCPG requests that City correct a misinterpretation and determination of the non-effect (no retroactivity) of the repeal of Footnote 7 on any projects for housing that are currently applied for but for which a building permit has not been issued, and construction has not commenced, including, but not limited to, the two below identified projects.

1. Klauber Development Project

The Klauber Development Project ("Klauber Project") is an application for a Neighborhood Development Permit, Site Development Permit and Tentative Map for the subdivision of one lot into 25 lots and the development of 25 single-story, single-family homes in the RS-1-2 zone. This project was recently found to have a density inconsistent with local planning and is being re-evaluated at 23 single family homes. However, the Klauber Project still exceeds the density of the RS-1-2 zone and cannot be approved with the repeal of Footnote 7. The applicant will have no vested rights to continue with this application as discussed below.

2. 5702 Old Memory Lane Development Project

The 5702 Old Memory Lane Development Project ("Old Memory Lane Project")[1] seeks Neighborhood Development Permit, Vesting Tentative Map, And Site Development Permit seeks approval for 131 single family residential homes in the RS-1-2 zone. While the Old Memory Lane Project seeks a vesting tentative map vested rights are not obtained until City "approves or conditionally approves a vesting tentative map." (Government Code § 66498.1, subd. (b).) Until such a time, this Project does not have vested rights and cannot be approved with the repeal of Footnote 7 because it will exceed allowed density in the RS-1-2 zone.

B. CORRECTING THE MISINTERPRETATION OF VESTED RIGHTS FOR APPLICATIONS MADE PURSUANT TO FOOTNOTE 7

1. Not All Development Applications Have Obtained Vested Rights

In the City Attorney Memo: "Legality of Footnote 7 in San Diego Municipal Code Table 131-04D and Proposed Amendment" that issued from the City Attorney on January 22, 2025 ("Memo MS 59"), the City Attorney asserts that, as a general matter of law "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." (Id. at p. 4.)

The assertion that – repeal of Footnote 7 would not apply to *any* development applications finally applied for, regardless of whether they have an approval or building permit – is contrary to longstanding California and federal law. The longstanding general rule of vested rights (grandfathering) is that *until and unless a permit and approval is granted, a change in zoning DOES NOT inure to the benefit or detriment of a pending application*. (*Stubblefield Constr. Co. v. City of San Bernardino* (*Stubblefield*), (1995) 32 Cal.App.4th 687, 707-708.)

[1] The Klauber and Old Memory Lane Projects are hereinafter referred to as "Projects."

A property owner must perform substantial work and incur substantial liabilities in good faith reliance upon a permit to acquire vested rights. (*Avco Community Developers, Inc. v. South Coast Regional Com.* (*Avco*), (1976) 17 Cal.3d 785, 791.) The California Supreme Court in *Avco,* held that no vested right exists based solely on an application or preliminary approval. A landowner cannot rely on prior zoning laws when applying for a building permit unless a vested right is established. (Id.)

The term "permit" means a building permit. (*Avco* at p. 793.) "[A] builder must comply with the laws which are in effect at the time a building permit is issued, **including the laws which were enacted after application for the permit."** (*Avco* at p. 795, bold added.)

The Supreme Court and subsequent California cases have applied this rule in a number of ways.

1. **An applicant has no vested right to develop their property in accordance with the zoning in existence at the time they submitted their review of plans application.** (*Stubblefield, supra*, 32 Cal.App.4th at p. 708.)

2. **Preparatory work (demolition, grading etc.) done in anticipation or preparation of the issuance of a building permit does not confer a vested right.** (*Avco Community*, *supra*, 17 Cal.3d at p. 793.)

3. **City cannot create a policy that applications under Footnote 7 are not bound to zoning changes because City may not infringe on its right to exercise police power in the future.** (*Discovery Builders, Inc. v. City of Oakland*, (2023) 92 Cal.App.5th 799, 811.)[2]

4. **Due Process is not implicated in denying an applicant who has not obtained a building permit vested rights.** (*Stubblefield, supra*, 32 Cal.App.4th at p. 708**,** citing *Usery v. Turner Elkhorn Mining Co.*, (1976) 428 U.S. 1, 15. [rejections of development projects and refusals to issue building permits do not ordinarily implicate substantive due process.].)

The below defined Staff Slideshow cites the Housing Crisis Act of 2019 – SB 330 (Government Code 66300) (Id. at p. 15.) However, Government Code 66300 does not contain any provision providing an exception to the general rule for vested rights:

> [D]oes not allow a city to change the general plan (community plan) land use designation or zoning of a property to a less intensive use or reduce the intensity of land use within an existing land use designation, or zoning below what was allowed under the land use designation and zoning, as in effect on January 1, 2018, in a manner that would result in a net loss of residential capacity.

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[2] Subject to certain exceptions such as development agreements under Government Code 65865 for land that is intended to be annexed under specific requirements and regulations.

The application of Government Code 66300 is limited to the reduction in density in a plan, use designation, or zoning below what was in effect January 1, 2018. The history of footnote 7 is that it was added in 2020, well after the effective date of 66300. Therefore, Government Code 66300 does not provide a legislative exception to the general rule of vested or grandfathered rights.

Memo MS 59 addresses "Statutory vested rights" as being 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." (Id. at p. 7 citing Cal. Gov't Code §§ 65864-65869.5, 66498.1; Cal. Stats. 2019, ch. 654 (Sen. Bill 330) [Government Code 66300], bold added.) However, these are limited categories of vested rights, and a development agreement is clearly NOT applicable to ALL development projects.

Development agreements under Government Code 65865 are not applicable to all development projects and are limited. Vesting tentative maps similarly are limited to projects that fit the qualifications under the Subdivision Map Act and Government Code § 66498.1.[3] Finally, the Legislative Counsel's Digest of the Housing Crisis Act of 2019 ("Act") is specific for "housing development project[s] for very low, low-, or moderate-income households or an emergency shelter. . ." The above two Projects – Klauber and Old Memory Lane are not such projects and, regardless, they are excepted because they require subdivisions. Government Code section 66300 simply does not create a legislated premature vested right for the above two Projects.

The Staff Report dated February 26, 2025, did NOT contain any report or advisement regarding the effect that City's repeal of Footnote 7 would have on recent or prior project applications made that attempted to apply the improvident and wrong Footnote 7 zoning standards to the *Southeastern San Diego and Encanto Neighborhoods Community Planning Areas*. On February 28, 2025, staff uploaded and made available a background and informational slideshow ("Staff Slideshow") with an incorrect statement regarding the effect of rescinding Footnote 7. To wit, Page 16 of the Staff Slideshow states:

> When a housing development application is deemed complete it must be reviewed and processed under the rules and regulations in effect at the time of submittal.
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> **Any changes to the regulations after the application is deemed complete do not apply, even if the changes occur before the building permit is issued.**

(Id., bold in original)

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[3] This section may apply to the Old Memory Lane Project but, regardless, the zoning change in the repeal of Footnote 7 will precede any approval of a vesting tentative map and therefore the applicant will not have vesting rights.

The statements made on this slide of the Staff Slideshow are partially correct and incorrect. The first statement is generally correct. Projects are reviewed under the laws in place at the time the applications are deemed complete. However, a change and repeal of zoning regulations under Footnote 7 does apply to projects that have not been approved and permitted. Thus, the statement on page 16 of the Staff Slideshow is an incorrect statement and application – as a matter of law. Assuming the subject Staff Slideshow is a result of the Memo MS 59, the comment letter further objects and responds below to that memorandum.

2. The City Attorney Did Not Evaluate Multiple Arguments that Footnote 7 is Invalid

Memo MS 59 specifically declined to address many of the community concerns, shared by CVCPG, of the legality of the implementation of Footnote 7, including but not limited to (1) process followed to amend Table 131-04D to add Footnote 7 and effectively rezone areas from RS-1-2 to RS-1-7; (2) possible conflict with the Encanto Community Plan regarding park spaces; (3) possible conflict with the Equity, Environmental Justice Element(s) of the City's General Plan; and (4) violation of the California Environmental Quality Act (CEQA). (Memo MS 59 at 3, fn. 2.)

3. Footnote 7 Likely Violates Fair Housing, Equal Protection and Due Process Requirements

Memo MS 59 further fails to acknowledge that, despite the presumed correctness of legislative actions and land use regulations (Id. at p. 3 citing *Village of Euclid, Ohio v. Ambler Realty Co.*, (1926) 272 U.S. 365, 395), City cannot take action in violation of separate and preemptive federal and state laws.

The Fair Housing Act ("FHA") (42 U.S.C. § 3601 et seq.) and California Fair Employment and Housing Act ("FEHA") (Gov. Code § 12900 et seq.), prohibits discrimination in housing policies and practices. A zoning ordinance, even if presumed valid, can be challenged under the FHA and FEHA if it has a disparate impact on protected classes. (*Sisemore v. Master Fin., Inc.*, (2007) 151 Cal.App.4th 1386, 1423.)

A disparate impact does not require a discriminatory intent or motive, rather it is based on a challenge of a "disproportionately adverse effect on minorities [or other protected class]" that is not justified by a legitimate rationale. (*Texas Dep't of Hous. & Cmty. Affs. v. Inclusive Communities Project, Inc.*, (2015) 576 U.S. 519, 524.) "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 disparate impact is established when a facially neutral practice causes a disproportionate adverse impact on a protected class. (*Darensburg v. Metro. Transp. Comm'n*, (9th Cir. 2011) 636 F.3d 511, 519; *see also Villafana v. Cnty. of San Diego*, (2020) 57 Cal.App.5th 1012, 1018.) In such a case City would be required to justify the implementation of Footnote 7, but even so, it is a violation if there is a less discriminatory alternative. (*Id.*)

As noted in the Staff Report, City must affirmatively further fair housing and take meaningful actions to address significant disparities in housing needs and access to opportunities. (Id. at p. 3.) Central to this is the removal of segregated living patterns with integrated and balanced communities to eliminate racially and ethnically concentrated areas of poverty. Footnote 7 *only* applies to Encanto and Southeastern San Diego Community Planning areas, with the acknowledged caveat that Southeastern San Diego Community does not have lots zoned RS-1-2 and therefore as a practical matter *only* applies to Encanto. (Memo MS 59 at p. 2, and fn. 1.)

Considering Encanto's racial diversity and lower median household income compared to other San Diego neighborhoods with similarly high levels of RS-1-2 zoned lots (La Jolla), singling out Encanto for extremely high-density development is a suspect and a prima facie case of disparate impact under federal and California fair housing laws.

Further, the implementation of Footnote 7 (as a footnote) and the failure to follow proper planning practices raises questions of equal protection and due process under the United States and California Constitutions. (Staff Report at p. 4.)

5. Vested Rights Cannot be Obtained for an Unconstitutional and Unlawful Zoning Ordinance

Based the limitations of the Memo MS 59, and admissions that Footnote 7 only applies and affects the racially diverse Encanto area (and specifically not other more affluent and less diverse neighborhoods with RS-1-2 zoned lots), the legality and validity of the implementation of Footnote 7 is doubtful. Because of this, applications relying on Footnote 7 have not obtained vested rights because Footnote 7 was a discriminatory and unlawful action and void. (*Millbrae Ass'n for Residential Survival v. City of Millbrae*, (1968) 262 Cal.App.2d 222, 246.) Further, any permit that is not obtained in good faith reliance on the validity of Footnote 7 cannot impart vested rights. (*Autopsy/Post Servs., Inc. v. City of Los Angeles*, (2005) 129 Cal.App.4th 521, 526–527.)

5. The Enactment of Footnote 7 is Nullified by Legal Infirmities and Political Influence Nullify any Equitable Considerations for the Klauber and 5702 Old Memory Lane Projects

As stated above, CVCPG clearly states how the law does not meet or nullifies any state vesting laws for the Klauber or 5702 Old Memory Lane Projects.

In addition, there is a significant timing issue and implication of campaign contributions and lobbying by land use practitioners for the Klauber and 5702 Old Memory Lane projects beginning in 2021, on or about the time when the Footnote 7 anomaly was instituted, that result in direct benefits for those project applicants, and consulting staff, involved in the alleged illegality and improvidence arising from Footnote 7.

It is also remarkably apparent that City officials, including DSD leader Gary Geiler, helped bury and hide the Footnote 7 anomaly by agreeing in 2022 and 2021 to place it in the zoning code table as a footnote rather than include it in the base-layer zoning maps. (Email chain April 29, 2020; confirmed again in April 20, 2021 email chain.)

Therefore, notwithstanding state standards for vesting and date-of-application limitations, there are multiple equitable and factual considerations that clearly weigh against Klauber and/or 5702 Old Memory Lane Projects getting any inappropriate or illegal protected status from the repeal of the improvident Footnote 7.

C. CONCLUSION

CVCPG requests that City Council adopt staff's recommendation to repeal the enactment of Footnote 7, but disavow and not adopt or endorse staff's interpretation that exiting "applied for" projects will and cannot be affected by City's instant action under its zoning authority.

Should you have any questions or would like this letter or any of the supporting materials or attachment in any other form, please do not hesitate to contact my office.

Sincerely,

Craig A. Sherman

cc: all Councilmembers (via email)