

Memorandum

TO: Community and Economic
Development Committee

FROM: RICHARD DOYLE
City Attorney

SUBJECT: Memorandum dated February
13, 2018 from Hopkins Carley

DATE: March 21, 2018

BACKGROUND AND PURPOSE OF THIS MEMORANDUM

The law firm of Hopkins Carley has submitted a memorandum dated February 13, 2018 to the Community and Economic Development Committee proposing that the City pursue "an off-site advertising program for downtown separately from . . . a city-wide sign plan." The memorandum asserts that the City could receive revenue sooner by pursuing such a program instead of pursuing the approach for City-owned only sites and non-City owned sites that was approved by the City council on December 19, 2017. This memorandum responds to the issues raised by the February 13, 2018 Hopkins Carley memorandum.

ISSUES AND ANALYSES

1. Question

Can the City eliminate the need to amend the General Plan for a Downtown only sign program by relying on the existing Envision 2040 General Plan goals and policies for Downtown?

Response

No.

Analysis

The General Plan must be amended to allow an off-site advertising program Downtown because the General Plan Attractive Gateways Policy CD-10.4 explicitly prohibits "billboards at Gateway locations and along freeways (including U.S.101, I-880, I-680, I-280, SR17, SR85, SR237, and SR87) and Grand Boulevards within San José." Downtown Grand Boulevards include, among other streets, Santa Clara, North 1st, and San Carlos. It should be noted that the staff proposal is not to amend the General Plan to explicitly allow off-site advertising, but to revise or eliminate the existing prohibition so that the City Council can consider amendments to the San José Municipal Code that might allow permits to be issued for such signs in some locations.

2. Question

- a. Can the City simplify environmental review by restricting location or function so that a project that can be approved based on a CEQA Negative Declaration or Addendum?

Response

The City may be able to simplify environmental review by restricting location or function so that a project that can be approved based on a CEQA Negative Declaration or Mitigated Negative Declaration. We are unable to evaluate whether an Addendum might be possible because the February 13, 2018 Hopkins Carley memorandum doesn't identify an existing document that would be appropriate for an Addendum for changes in the City's regulation off-site advertising.

Analysis

The City can only use a CEQA Addendum to approve a project where minor technical changes are being made to a project based on a prior CEQA document (Negative Declaration or EIR) and there are no new environmental impacts that need to be evaluated. Since the February 13, 2018 Hopkins Carley memorandum doesn't identify the prior CEQA document that might be used, we cannot evaluate whether an Addendum would be possible. The City can use a Negative Declaration or Mitigated Negative Declaration to approve a project where the project will not have significant environmental effects.

Staff is in the process of developing a City-owned sites only project description with a goal of allowing the City Council to approve the project based on a Negative Declaration or Mitigated Negative Declaration. Restricting the initial project to City-owned sites, will help the City determine whether and how it may want to allow and regulate off-site advertising on non-city owned sites. The advantage to a City-owned sites only project is that specific potentially eligible sites and contractual limitations can be identified to reduce the environmental effects of the project, thereby allowing the project to be approved based on a Negative Declaration or Mitigated Negative Declaration.

b. Question

Could the City approve a downtown only project using a Negative Declaration, Mitigated Negative Declaration or Addendum by using the criteria provided in the February 13, 2018 Hopkins Carley memorandum to restrict function or location of new off- site advertising?

Response

The criteria provided in the February 13, 2018 Hopkins Carley memorandum are not sufficiently detailed to assure that the City could approve a downtown only project using a Negative Declaration or Mitigated Negative Declaration. We are unable to evaluate whether an Addendum might be possible because the February 13, 2018 Hopkins Carley memorandum doesn't identify an existing document that would be appropriate for an Addendum.

Analysis

The February 13, 2018 Hopkins Carley memorandum mentions only 4 criteria beyond limiting the project area to downtown that would be related to location or function of the proposed downtown only project. CEQA on a project that includes up to 40 potential sites downtown would either require staff to develop very robust criteria for eligible sites to limit the universe of sites, or assume in the CEQA analysis that any site downtown might be eligible. Developing criteria for non-city owned site selection for signage is more complicated than developing criteria for other types of land use, due to First Amendment restrictions. In addition, the project description for non-city-owned sites downtown would need to include the proposed regulatory scheme that would mitigate any significant environmental impacts from the new signs.

3. Question

Can the City proceed with environmental review for a Downtown project separately from the environmental review for a potential citywide project?

Response

The City could proceed with environmental review for a Downtown project separately from the environmental review for a potential citywide project, but such an approach would delay getting a project to the City Council for consideration and would not provide the certainty for generation of revenue that a City-owned site only program will provide.

Analysis

The February 13, 2018 Hopkins Carley memo assumes that environmental review could be limited to a Negative Declaration or Addendum simply by setting the maximum number of signs at 40, limiting the new signs to attached signs and imposing nighttime operational controls. Significantly, the memorandum doesn't address how the 40 sites would be selected. We note that the West Hollywood Sunset Boulevard Off-Site Sign Policy, cited by Hopkins Carley in a prior memorandum as an example of how a Negative Declaration could be used to approve new off-site signage, involved only 20 signs. Approval of that project has not moved forward due to West Hollywood city council direction for staff to consider 11 additional issues not previously addressed.

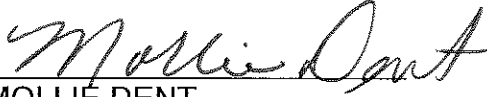
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The February 13, 2018 Hopkins Carley memorandum cites two cases on the issue of project "segmenting" or "piecemealing" to support the argument that the City could proceed with environmental review for a Downtown project separately from the environmental review for a potential citywide project. These cases, as well as others, also support the Council decision to proceed with any City-owned sites only project, even though there may be related future activities (non-City owned sites project.) Courts have upheld deferring environmental review of future activities where meaningful information necessary to evaluate the future activities is "remote and speculative," e.g. criteria for non-City owned site selection is not yet developed; or if the future activities are not a reasonably foreseeable consequence" of the initial approval," City Council may decide not to proceed with non-City owned sites, depending on outcome of City-owned site program and additional information gathering re: potential non-City owned sites.

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By 
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