HUSTON CARLYLE, CHIEF DEPUTY CITY ATTORNEY

CAROL LEONE, DEPUTY CITY ATTORNEY

OFFICE OF

THE CITY ATTORNEY

CITY OF SAN DIEGO

Michael J. Aguirre

CITY ATTORNEY

1200 THIRD AVENUE, SUITE 1100
SAN DIEGO, CALIFORNIA 92101-4178
TELEPHONE (619) 533-5800
FAX (619) 533-5856

MEMORANDUM OF LAW

DATE: September 15, 2006

TO: Honorable Mayor and City Council
Nancy Graham, President, Centre City Development Corporation

FROM: Huston Carlyle, Chief Deputy City Attorney
Carol Leone, Deputy City Attorney

SUBJECT: Navy Broadway Complex and the City's right of review over the consistency determination of Centre City Development Corporation

This Memorandum of Law ("MOL") was prepared in response to an initial request from Centre City Development Corporation ("CCDC") concerning the above-referenced topic. Prior to it being finalized, this office was advised of a similar request from the office of Council President Peters. Accordingly, this MOL has taken into account both requests and is submitted in response thereto.

BACKGROUND

Between 1914 and 1940 the City deeded several parcels of land to the United States Government including approximately 16 acres of downtown waterfront land. The subject parcels were deeded to the Navy for military use and historically served as the headquarters for the Navy Region Southwest. In 1987, The National Defense Authorization Act for Fiscal Year 1987, Public Law 99-661, authorized redevelopment of the Navy Broadway Complex and provided for the Secretary of the Navy to enter into a long term ground lease of the properties with a private developer in return for upgraded administrative facilities on the property. In June of that year the City and Navy entered into a Memorandum of Understanding, adopted by City Council Resolution No. R-268458, setting forth a process for the formulation of plans for development referenced in the Federal Legislation.

The United States brought an action against the City and others in Civil Action 90-1562-E seeking a determination that the Navy owns the subject parcels in fee simple. The District Court found that a 1922 statute had removed the parcels (consisting of filled area deposited during dredging of the Bay) from the tidelands trust, and that the grant deeds from the City to the

Navy did not reserve any reversionary rights if the properties were no longer used for military purposes.[1]

In 1992 the City and the Navy entered into a written agreement entitled "Agreement Between the City of San Diego and The United States of America Adopting a Development Plan and Urban Design Guidelines for the Redevelopment of the Navy Broadway Complex" (the "Development Agreement"). The Development Agreement (which incorporated the prior MOU) acknowledged that the City presently has no land use planning, regulatory or other authority/jurisdiction over redevelopment of the Navy Broadway Complex (Development Agreement at § 1.4). The Development Agreement "serves as a means whereby the City can be assured that the redevelopment planned by the Navy shall take place in accordance with the Plan and Guidelines which are consistent with the City's vision of Centre City San Diego." Id.

Section 1.7 states that the City Council finds the subject Agreement to be consistent with the Centre City Community Plan, the Local Coastal Plan, and other local planning requirements. The Development Agreement further vests the Navy with the present right to proceed with and complete development, to the extent that development rights are not presently vested in the Navy by reason of the sovereignty of the United States (§ 5.1), provided that such plans are submitted to CCDC for consistency review, and are not inconsistent with the Development Plan and Urban Design Guidelines attached as Exhibit "C" to the Development Agreement. (§ 5.2). Section 9.9 further states that a Final Environmental Impact Report has been certified, and that the Council has exercised its legislative discretion in entering the Development Agreement, and that no supplemental environmental review will be required.

Before the City's development approval process begins, the Navy must first select one or more developers who are capable of developing the Navy Broadway Complex property in accordance with the plans and terms set by the negotiated instrument. Development Agreement, § 4.4. Once a developer has been selected, the developer will then prepare a design proposal to send to CCDC for review. Development Agreement, § 5.2. CCDC is an agent of the City whose purpose is "to establish and adopt submittal requirements, review procedures, and standards and guidelines for development." San Diego Municipal Code ("SDMC") § 151.0302(a).

Under the Development Agreement, all plans and specifications for the construction of any portion of the Project are to be submitted to CCDC for review and a determination by CCDC of whether the plans and specifications are consistent with the Development Plan and Urban Design Guidelines. Development Agreement, § 5.2. Such a determination by CCDC shall not be unreasonably withheld and may not require any change which is inconsistent with the Environmental Impact Statement for the Project or which modifies allowable land uses, intensity of uses, parking standards, building heights and design criteria which have been established by the Development Plan and Urban Design Guidelines. Id.

---

[1] July 1, 1991 Memorandum Decision in *United States v. 15,320 Acres of Land, etc, et. al.*

A consistency review involves an analysis of whether the proposed development conforms to those rules, regulations, and policies specifically enumerated in the Development Agreement. Id. Such benefits include, but are not limited to, the creation of the opportunity to develop a significant waterfront open space in downtown San Diego; creation of a balanced mixture of public-oriented uses that will be attractive to nearby residents, employees and visitors alike; the opportunity for one or more museums; and, the creation of a sensitively-scaled development that will reinforce the existing skyline. Development Agreement, § 6.1.

The process of submittal, review, and determination has four steps that involve the submission of plans and specifications in the following order: (1) The designated developer must submit the Basic Schematic Drawings along with a narrative explanation of the design to CCDC; (2) The developer must then refine the drawings to include more precise design elements of the project including site surveys, floors plans and materials; (3) Fifty percent (50%) of the construction drawings must be completed and any issues raised by CCDC are to be resolved; and (4) All conditions imposed in connection with previous submissions must be accommodated and the drawings must be in sufficient detail as if the developer were required to obtain a city building permit. Development Agreement, § 5.2(a)-(d).

No development on each phase of the Project may proceed “unless and until” a consistency determination has been made by CCDC. Development Agreement, § 5.2(e). In an effort to deal in good faith, neither party may unreasonably withhold consent or approval. Development Agreement, § 9.5. Furthermore, the Development Agreement recognizes the Navy’s choice for a developer was selected from a competitive bidding process under federal law and that the criteria for selection included the quality of the developer’s design proposal. Development Agreement, § 5.2. If any of the covenants under the Development Agreement are not upheld, either party may institute legal action. Development Agreement, § 7.3. Remedies for breach, or attempted breach, include injunctive relief or other remedies consistent with the purpose of the Agreement. Id. However, under no circumstance, is the Navy obligated to redevelop any part of the Navy Broadway Complex or enter into any developer lease. Development Agreement, § 4.2.

The Development Agreement has been extended twice. A Second Amendment was approved by the City Council by an Ordinance on January 7, 2003. The Second Amendment amended § 4.3 to keep the Agreement in full force and effect for a period of time deemed adequate to bring the Agreement into consistency with the North Embarcadero Alliance Visionary Plan, an inter-governmental planning effort.

The Development Agreement is set to expire by its own terms on January 1, 2007 if the Secretary of the Navy does not enter into a long-term ground lease by that date. So far the Navy has allowed plans to privatize redevelopment of the Broadway Complex to proceed outside the Base Realignment and Closure process (“BRAC”). However, the BRAC Commission has

indicated that if the previously authorized legislative option is not implemented, the next best alterative would be closure of the Navy Broadway Complex through the BRAC process.

CCDC is finalizing its consistency review of development plans for the Broadway Complex submitted by Manchester Financial Group. Objections raised during the public review process and in the press include, among others, density, architectural design and open space allocation, with allegations that the developer is "walling off the bay" by reducing public access to the waterfront in favor of commercial development.

QUESTION PRESENTED

Do the City Council and/or the Redevelopment Agency have the right of review over the Centre City Development Corporation's consistency determination for the development plans for the Navy Broadway Complex pursuant to the Development Plan and Urban Design Guidelines and conditions set forth in the 1992 Development Agreement between the City and the Navy?

SHORT ANSWER

No. Under the Property Clause of the United States Constitution the federal government's power to administer its own property is virtually unlimited. The Navy has through the Development Agreement consented to limited City authority over redevelopment of the Navy Broadway Complex. That authority is strictly limited to that expressed under the terms of the Development Agreement. The City Council as the legislative body of the City exercised its discretion and delegated the determination of consistency review to CCDC. Any further right of review over CCDC's determination is not authorized by the Development Agreement.

ANALYSIS

A. Federal Supremacy and Property Clauses

The United States Constitution provides in the Property Clause that Congress has the power "to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." U.S. Const. art. IV, § 3 cl. 2. Congress' power under the Property Clause to administer its own property is virtually unlimited. *Kleppe v. New Mexico,* 426 U.S. 529, 539 (1976); *U.S. v. Gardner* 107 F.3d 1314, 1320 (9th Cir. 1997).

The question of whether the United States has obtained exclusive jurisdiction can be a complicated one, depending on underlying state statutes dealing with jurisdiction. (See e.g., 57 Ops. Cal. Atty. Gen 42 (1974); 23 Ops. Cal. Atty Gen. 14 (1954). However, Congress may obtain exclusive jurisdiction over public land use regulation through the supremacy clause which provides that the laws of the United States "shall be the supreme law of the land." U.S. Const.

art. VI, cl. 2. The supremacy clause prohibits states from hindering the constitutional exercise of power by the federal government or its instrumentalities, unless Congress affirmatively consents to such control. As noted by the Supreme Court in *Kleppe,*

> Absent consent or cession a State undoubtedly retains jurisdiction over federal lands within its territory, but Congress equally surely retains the power to enact legislation respecting those lands pursuant to the Property Clause … And when Congress so acts, the federal legislature necessarily overrides conflicting state laws under the Supremacy Clause. Id. at 543.

For the purposes of federal preemption analysis, both federal laws and federal regulations may preempt state laws, and local ordinances are analyzed in the same manner as statewide laws. *Hillsborough County v. Automated Med. Labs,* 471 U.S. 707, 712-713 (1985). Local laws are preempted when federal agencies have promulgated regulations that completely control a particular field. *City of Rancho Palos Verdes v. Abrams,* 101 Cal.App.4th 367 (2002). When there is no indication that federal law occupies a particular field, local regulations will stand. *City of San Jose v. Department of Health Services,* 66 Cal.App.4th 35 (1998).

The underlying rationale of the preemption doctrine is that "the supremacy clause invalidates state laws that interfere with or are contrary to federal law (citation omitted.) The corollary of this doctrine is that activities of the federal government are free from regulation by any state." *Smith v. County of Santa Barbara*, 203 Cal.App.3d 1415, 1422 (1988) (citing *Hancock v. Train,* 426 U.S. 167, 178 (1976).) In *County of Santa Barbara* the court explained that whether or not the federal government is subject to local land use building and permit restraints (on land it did not own) depends on whether the activity the government is engaged in constitutes a "federal project" under federal law (See e.g. 41 C.F.R. 101-19.100(a)). The California Attorney General has concluded that local regulations do not apply whenever a federal "function" is being carried out, covering most instances in which the federal government develops its own property. See 57 Ops. Cal. Atty. Gen 42 (1974). Exceptions are limited to where by statute the government has divested itself of sovereignty by explicit congressional directive to comply with local law.

In the present case, Section 1.2 of the Development Agreement acknowledges the Navy's/Federal Government's near total control of development of the Navy Broadway Complex as federal property. It states:

> "City Jurisdiction. The City presently has no land use, planning, regulatory or other authority/jurisdiction over the redevelopment of the Navy Broadway Complex. Such redevelopment shall not require any discretionary permits from the City. Building and similar ministerial permits shall be obtained by the Developer of

> the Broadway complex only for those structures which are not to be occupied, in whole or in substantial part, by the Navy. This Agreement serves as a means whereby the City can be assured that the redevelopment planned by the Navy shall take place in accordance with said Plan and Guidelines which are consistent with the City's vision of Centre City San Diego."

Consistent with the federal authority contained Property and Supremacy Clauses of the Constitution discussed above, Section 1.2 states the City's clear lack of authority/jurisdiction over redevelopment of the Navy Broadway Complex. However, consistent with *Kleppe* and federal legislation like the Federal Urban Land and Intergovernmental Cooperation Act, the Navy through the Development Agreement has voluntarily allowed limited "consent" over redevelopment of Navy Broadway Complex.

Thus, under the terms of the Development Agreement the Navy has consented to conditions such as accommodating the public's right of access to the waterfront, by agreeing to a long-term no-cost lease to the City of a 1.9 acre open-space parcel (Development Agreement at § 5.9), providing a public museum (§ 6.2) and agreeing to consistency review and approval by CCDC in accordance the North Embarcadero Visionary Plan (which provides for pedestrian boardwalks and access to the bay).

C. The City Council Has Delegated Review Authority to CCDC

In *Shapiro v. Board of Directors of Centre City Development Corporation,* 134 Cal.App.4th 170, 174-175 (2005), the court reviewed the history of CCDC, which was created as a nonprofit corporation by the City to provide various services . . . to the Redevelopment Agency. CCDC's articles of incorporation state: "The specific and primary purpose for which this corporation is formed is to provide redevelopment services by contract with the Redevelopment Agency of the City of San Diego." The City created the Redevelopment Agency in 1958 and designated the City Council as the Agency's governing body. CCDC is a separate local agency which provides services to the Redevelopment Agency with respect to projects in the Centre City Redevelopment Project, which covers most of downtown, adopted by the City Council in 1992. *Id.*

As a charter city, the city has "police powers" over its municipal affairs, including land use matters, subject only to constitutional limitations and matters of statewide concern. (Cal. Const., Art. XI, § 7.) The City Council, as the legislative body of the City pursuant to the Charter and Municipal Code, has the power to enter into binding contracts, and to delegate its power over land use decisions to other boards and agencies. This type of delegation of power has been held not to violate the "judicial powers" doctrine of Cal. Const. Art. VI § 1, as long as the

ultimate power to adjudicate claims remains in the courts by writ of mandate. *McHugh v. Santa Monica Rent Control Bd.,* 49 Cal.3d 348 (1989).

In the Development Agreement between City and Navy, the City delegated authority to CCDC to make a consistency determination relating to the project. The City Charter, at Section 11.1, prohibits delegation of the legislative power of the City in any action that "raises or spends public monies, including but not limited to the City's annual budget ordinance or any part thereof, and the annual ordinance setting compensation for City employees, or any ordinance or resolution setting public policy." However, in this situation, a determination of consistency will not expend public monies. In addition, the determination of consistency does not require Counsel approval of any ordinance or resolution setting public policy. Consequently, the City's delegation of authority to CCDC to make the consistency determination is in conformance with the Charter.

By Ordinance, the City Council approved and adopted the Development Agreement which contains a finding that the Development Agreement is consistent with the Center City Community Plan, LCP, and other planning documents. (Development Agreement at § 1.7). The Development Agreement vests the right in the Navy to develop the property pursuant to the Development Plan set forth in said Agreement (§ 5.1). Section 5.2 requires that all plans be submitted to CCDC to make a determination of consistency review (5.2(a)) and makes this consistency determination a condition precedent to beginning development (5.2(e)). Accordingly, the Development Agreement by its express terms gives the Navy a vested right to develop the property pursuant to the terms and conditions set forth, subject only to CCDC's final consistency determination. Nowhere in the Development Agreement does it state the City Council reserves any right to review or supersede CCDC's final determination.

In the Operating Agreement between the Redevelopment Agency of the City of San Diego and CCDC, CCDC covenants to perform under the direction of the Agency and abide by actions taken, directives given, and policies adopted by the Agency. Also in the Operating Agreement, the Agency covenants to consider the advice and recommendations of CCDC in formulating its policies on projects. The present situation is unique in that the Development Agreement clearly indicates that the City authorizes CCDC to make the consistency determination. In other words, CCDC is not giving advice nor making a recommendation which is subject to review by the Redevelopment Agency; it is making a determination delegated to it by the City. As noted previously herein there is no stated appeal process in the Development Agreement.

D. Interpretation of the Development Agreement

Federal common law controls the interpretation of a contract entered pursuant to federal law when the United States is a party. *Smith v. Central Ariz. Water Conservation Dist.*, 418 F.3d 1028, 1034 (9th Cir. 2005); *Chickaloon-Moose Creek Native Ass'n v. Norton*, 360 F.3d 972, 980

(9th Cir. 2003). However, where there is no clear body of applicable federal common law, state law may still apply. See *United States v. California*, 932 F.2d 1346, 1349 (9th Cir. 1991). In determining whether to apply state or federal common law to an agreement, courts will generally adopt a two-step approach. See generally *Boyle v. United Technologies Corp*., 487 U.S. 500 (1988). First, the issue is whether a sufficient unique federal interest exists to choose federal common law over state law, where there may be conflict with either result. See *Id*. at 507 (finding a unique federal interest "merely establishes a necessary, not a sufficient, condition for the displacement of state law."). Second, the use of federal common law should only apply where (1) a "significant conflict exists between an identifiable federal policy or interest and the operation of state law," or (2) the "application of state law would frustrate specific objectives of federal legislation." *Id.*

In the present case, under ordinary principles of contract interpretation using either California state or federal law, the City is bound by the unambiguous terms of the Agreement. *International Union of Bricklayers & Allied Craftsman Local No. 20 v. Martin Jaska, Inc.,* 752 F.2d 1401, 1406 (9th Cir. 1985); (Civ. Code § 1638). Those terms clearly indicate CCDC's consistency determination is not subject to further City review. First, there is no express provision that states the City is to have final decision-making power over a consistency determination granted by CCDC. Section 5.2 of the Agreement expressly states "[T]he rules, regulations and official policies governing the development of the Navy Broadway complex shall be only those rules, regulations and policies specifically enumerated in this Agreement." A court will not "make a contract for the parties" if the term was not written into the agreement. *City of Springfield v. Washington Public Power System,* 752 F.2d 1457, 1427(9th Cir.1983); Restatement (Second) of Contracts § 201(1), comment c; *Industrial Indemnity v. Superior Court*, 224 Cal. App. 3d 828 (1990).

Second, a reasonable interpretation of the approval process suggests that immediately following an affirmative consistency determination, the developer has the final approval necessary to complete that development phase of the Project. The phrase "unless and *until* a consistency determination has been made" indicates the parties intended the approval process to be complete for that phase of the Project. Development Agreement, § 5.2 (emphasis added).

In short, the operative contract language does not appear to contain uncertain terms or language susceptible of more than one interpretation which would require a court to look outside the terms of the Agreement to determine the intent of the parties. *Chickaloon-Moose Creek Native Ass'n v. Norton,* 360 F. 3d 972, 983-984 (9th Cir. 2004); (Civ. Code § 1639). Any further review of CCDC's findings would seem to contradict the express terms of the Development Agreement, and would add new and additional terms also in contravention of the express terms of the Development Agreement.

The Development Agreement was amended twice before in the past. Both amendments were to extend the effective date of the Development Agreement. The last amendment extended

the term of the Development Agreement to January 1, 2007. An amendment to the Development Agreement requires written approval of the amendment signed by both parties. Although an amendment to the Development Agreement is possible by the terms of the Development Agreement, any change to the Development Agreement must be made in writing between the parties, and the Navy would have to be willing to enter into such change. For instance, if the City proposed to revoke the delegation authority it had previously granted to CCDC, that revocation (and consistency review by another entity) would require such an amendment. If the City proposed to have the consistency determination of CCDC subject to appeal by another entity, that appeal provision, which does not now exist in the Development Agreement, would require such an amendment.

CONCLUSION

In conclusion, under the terms of the Development Agreement, the City and/or the Redevelopment Agency do not have authority to review, modify or veto a consistency determination granted by CCDC. If the Development Agreement is not implemented the property reverts to some other federal use under the BRAC process. The City would lose the degree of control that the Navy has consented to voluntarily by entering into the Development Agreement. The City has already exercised its legislative discretion to approve a development proposal consistent with the Development Agreement, upon a finding by CCDC that the plans and specifications for any proposed project are consistent with the Development Plan and Urban Design Guidelines.

MICHAEL J. AGUIRRE, City Attorney

By______________________________
Huston Carlyle
Chief Deputy City Attorney

cc: Elizabeth S. Maland, City Clerk