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MEMORANDUM

TO: John Arntz
Director of Elections

FROM: Joshua S. White
Deputy City Attorney

DATE: July 22, 2013

RE: Validity of Initiative Petition Entitled "8 Washington Parks, Public Access and Housing Initiative"

Questions Presented

On July 8, 2013, proponents of the initiative titled 8 Washington Parks, Public Access and Housing Initiative submitted a petition (the "Petition") seeking to qualify the proposed initiative for the ballot in November 2013. The Petition responds to a referendum petition that qualified for the same ballot protesting the passage of certain City approvals for a mixed-use development project at 8 Washington Street (the "Referendum"). The Petition would essentially reaffirm those approvals. The Department of Elections (the "Department") recently received a letter from opponents of the Petition (and proponents of the Referendum) alleging that the Petition violates the California Elections Code. You have asked our Office for advice about whether the Petition complies with the requirements of the Elections Code. Specifically, you have asked three questions: Does the Petition satisfy the California Elections Code's requirement that an initiative petition contain "the text of the measure" given that the Petition includes the full text of the proposed measure and all incorporated exhibits? Does the fact that the proposed measure omits three zoning maps that the Petition would amend cause it to violate the Elections Code's requirement? Finally, must the Department reject the Petition because, in one of the proposed measure's exhibits, the permitted height of one of the buildings is illegible?

Short Answer

California law, which governs here, places special emphasis on the right of voters to circulate and file initiative petitions and holds that right as one of the most important aspects of our democratic form of government. California Elections Code section 9201 mandates that an initiative petition include the text of the proposed measure. The law does not require that a petition include every section of the City code or map that the proposed measure will affect. A petition complies with section 9201 as long as it "does not omit the text of any incorporated exhibit or any other portion of the proposed amendment" because the "inclusion of the text of the measure is by itself sufficient to reduce confusion to a practical minimum." *We Care-Santa Paula v. Herrera*, 139 Cal. App. 4th 387, 390, 391 (2006). Here, the Petition complies with the law because it includes the full text of the proposed measure and all incorporated exhibits. While the Petition does not incorporate the zoning maps, all the relevant information in those maps, including most significantly the maximum height and bulk of permitted development, is included elsewhere in the text of the measure that was circulated with the Petition.

Even if the zoning maps were part of the legal text of the measure—which they are not—the Petition still would be legally valid for purposes of qualifying for the ballot because it

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substantially complies with section 9201. A petition substantially complies with section 9201 if it contains "sufficient information so that registered voters can intelligently evaluate whether to sign the initiative petition and to avoid confusion." *Mervyn's v. Reyes*, 69 Cal. App. 4th 93, 99 (1998). Here, the omission of the zoning maps does not deprive the voters of any material information because the Petition contains all of the material information from the omitted zoning maps, and as such, the omission of the maps did not affect voters' ability to decide whether to sign the Petition.

Finally, our conclusion does not change because on one of the exhibits attached to the proposed measure the height of one of the proposed buildings is illegible. Because the height of that building is described elsewhere in the proposed measure, voters considering whether to sign the Petition had all the information they needed to understand the effect of the measure.

California law does not require that an initiative ordinance include all documents that the ordinance cross references or may affect. Rather, it requires that the ordinance include the full text of the measure. In contrast to the proposed referendum on the Bayview Hunters Point Redevelopment Plan, which did not include the plan itself that the challenged ordinance adopted and incorporated by reference, here the Petition includes the full text of the measure, including the relevant information about height and bulk of a permitted project.

For all of these reasons, a court would likely find that the Petition meets the full text requirements of the Elections Code and qualifies for the ballot.

Background**A. The Board Of Supervisors' Approval Of The 8 Washington Project.**

8 Washington Street is a 3.2 acre site bordered by The Embarcadero, Washington Street and Drumm Street (the "Site"). Most of the Site is private property that Golden Gateway Center owns and uses as a private tennis and swim club and surface parking lot. The remainder is public property that the City and County of San Francisco's Port Commission owns and uses as a surface parking lot.

In 2012 the Board of Supervisors (the "Board") approved a mixed-use development project for the Site involving construction of two mixed-use buildings containing up to 134 residential units, ground floor restaurants and retail, a fitness and swim facility, public parks and open space, and underground parking (the "Project"). The approvals included General Plan amendments; a Zoning Map amendment increasing Site height limits along Drumm Street from 84 feet to 92-136 feet and changing bulk limits; a conditional use permit; and a land sale and other agreements between the Port and the Site's developer, including a covenant to limit the fitness facility's height to 35 feet.

Opponents of the Project circulated the Referendum challenging the ordinance amending the Zoning Map that the Board had approved. Enough voters signed the Referendum to suspend the Zoning Map amendment ordinance and qualify that measure for the ballot. At the November 5, 2013 municipal election, the City's voters will decide whether to approve the Zoning Map amendment.

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B. The Petition.

On April 22, 2013, the proponents filed the Petition with the Department. The Petition contains the full text of the proposed measure that the Petition is asking the voters to adopt. Attached to the Petition are two exhibits, which the proposed measure incorporates by reference. The proposed measure refers to the zoning maps but does not incorporate by reference the zoning maps it seeks to amend.

The proposed measure would allow a development project similar to the Project approved by the Board, including the creation of a new special use district for the Site "known as the 8 Washington Parks, Public Access and Housing District (the 'District'), as designated on Sectional Map SU01 of the Zoning Maps of the City and County of San Francisco." Sectional Map SU01 simply states that there is currently no special use district in the area where the Site is located.

Section 3(b)(9) of the Petition sets forth the parameters for the height and bulk of buildings within the District: "No buildings contained within the Plan shall exceed the applicable height limits for the District as set forth on Sectional Map HT01 of the Zoning Maps of the City and County of San Francisco, as amended by the 8 Washington Parks, Public Access and Housing Initiative approved by the voters. . . ."

Section 4 of the Petition would amend the General Plan as follows:

Map 2 – Height and Bulk Plan of the Northeastern Waterfront Area Plan of the General Plan of the City and County of San Francisco is hereby amended to change the height and bulk district classification of two areas of the western portion (along the Drumm Street frontage) of the property located at Block 0201, Lot 012 that is currently set at 84-E to 92-E in one area measuring 88 feet by 86 feet, and to 136-E in another irregular, roughly rectangular area measuring 15,370 square feet.¹

The map referred to in Section 4 (Map 2) shows that the current height and bulk limit for the Site is 84-E—just as Section 4 of the proposed measure says.

Section 4(b) sets forth the proposed amendments to the City's Zoning Map and states, in relevant part,

(1) Part II, Chapter II of the San Francisco Municipal Code (Planning Code) is hereby amended consistent with the map attached hereto as Exhibit B by amending the Zoning Map to enact an amendment to Zoning Map Sheet HT01 of the City and County of San Francisco, to change the height and bulk classification of two areas of the western portion (along the Drumm Street frontage) of the property located at Block 0201, Lot 012 that is currently set at 84E to 92E in one area measuring 88

¹ Section 250 of the City's Planning Code divides the City into height and bulk districts, which are set forth in the City's Height and Bulk District Maps. The meaning of an "E" bulk designation is explained in Section 270 of the Planning Code.

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feet by 86 feet, and to 136-E in another irregular, rectangular area measuring 15,370 square feet:

<u>Description of Property</u>	<u>Height and Bulk to be Superseded</u>	<u>Height and Bulk to be Approved</u>
Assessor's Block 0201, Lot 012	84-E	<u>92-E and 136-E</u>

Sectional Map HT01 simply indicates that the current height and bulk limit for the area where the Site is located is 84-E. Again, this height limit is reflected in the text of the proposed measure excerpted above.

The proposed measure also contains two exhibits incorporated by reference as part of the legal text. Exhibit A includes a map of the proposed development project and diagrams that set forth the height and bulk of the proposed residential buildings. Exhibit B is another map entitled, "Map Showing Height Designations." In Exhibit B, the building on the corner of Drumm Street and Washington Street is indicated by a gray rectangle, within which is the number 136, although that number is difficult to read because of the darkness of the rectangle. The building just to the north is indicated by a dark gray square. There appears to be a number inside of it, but that number cannot be read due to the darkness of the square.

On May 7, 2013, the City Attorney's Office prepared a title and summary of the Petition, as required by state law. The title and summary states that the Petition "would allow a project that includes . . . a height limit of 92-136 for the residential building along Drumm Street." On July 8, 2013, the proponents submitted the Petition to the Department with approximately 27,000 signatures. On July 12, 2013, the Department certified that the proponents gathered sufficient signatures to place the proposed measure on the ballot.

C. Letter Demanding That The Proponents Of The Petition Not Submit It To The Department Of Elections.

On July 5, 2013, attorney James R. Sutton of the Sutton Law Firm transmitted a letter on behalf of San Francisco voter Geraldine Crowley to the attorney representing the Petition proponents. On the same day the City Attorney's Office and the Department also received copies.

In the letter Mr. Sutton alleges that the Petition violates the Election Code's requirement to include "the text of the measure." Relying principally upon *Mervyn's v. Reyes*, 69 Cal. App. 4th at 99, and *Defend Bayview Hunter's Point Committee v. City and County of San Francisco*, 167 Cal. App. 4th 846 (2008) ("*Defend Bayview*"), Mr. Sutton argues that the Petition is deficient because it fails to include three maps—Zoning Maps SU01 and HT01 and Map 02 of the City's Height and Bulk Plan—and because the heights of the proposed buildings shown on Exhibit B are illegible. The absence of the maps and the illegibility of Exhibit B "not only deprive the voters from having access to critical information about where or whether the Initiative seeks to increase existing height limits, the central purpose of the Initiative, it also could be characterized as misleading voters into believing that the height limit for the property

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will remain the same." As discussed in detail below, Mr. Sutton is incorrect, and the proposed measure at issue here is fundamentally different from the proposed measures rejected by the courts in *Mervyn's* and *Defend Bayview*.

Mr. Sutton's letter asked the proponents not to submit the Petition to the Department for signature verification without curing these alleged deficiencies. After the proponents submitted the Petition, you asked us to evaluate Mr. Sutton's letter and to advise the Department as to whether the Petition actually or substantially complies with the "text" requirement of the Elections Code.

Analysis**A. The Importance Of The Right Of Initiative.**

The right of citizens to circulate and file initiative petitions is "one of the most precious rights of our democratic process." *Mervynne v. Acker*, 189 Cal. App. 2d 558, 563 (1961). The Elections Code's procedural requirements are designed to substantiate that right by ensuring that individuals presented with an initiative petition have the opportunity to decide whether to sign based on complete and accurate information. The statutory procedural requirements "should be liberally construed to permit the exercise by the electors of this most important privilege." *Chase v. Brooks*, 187 Cal. App. 3d 657, 663 (1986). At the same time, "statutes designed to protect the elector from confusing or misleading information should be enforced so as to guarantee the integrity of the process." *Id.*

In determining whether to invalidate a petition for failure to comply with the procedural requirements of the Elections Code, courts apply a "substantial compliance" standard. This standard requires a two-step inquiry. First, the Court must determine whether the petition *technically* complies with the requirements of the Elections Code. *See Hebard v. Bybee*, 65 Cal. App. 4th 1331, 1338-39 (1998). If the petition technically complies, then the inquiry ends and the petition passes muster. Second, even if the petition does not technically comply with the statutory requirements, the petition still survives if it *substantially* complies with those requirements. A defective petition substantially complies with the Elections Code if it fulfills "the fundamental purposes underlying the applicable . . . statutory requirements" in spite of "relatively minor defects that . . . could not have affected the integrity of the electoral process *as a realistic and practical matter*." *Costa v. Superior Court*, 37 Cal.4th 986, 1013 (2006) [emphasis in original].) Where there is a defect in a circulated petition, courts must consider whether the defect goes to "the very heart" of the purpose of the particular statutory requirement at issue." *Id.* at 1017 [citing *Assembly v. Deukmejian*, 30 Cal. 3d 638, 648 (1982)].

B. The California Elections Code Requires That An Initiative Petition Include The Full Text Of The Proposed Measure.

At issue here is Elections Code section 9201, which mandates that an initiative petition include the text of the proposed measure. "The purpose of the full text requirement is to provide sufficient information so that registered voters can intelligently evaluate whether to sign the initiative petition and to avoid confusion." *Mervyn's*, 69 Cal. App. 4th at 99.

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C. The Petition Complies With The California Elections Code Requirement Because The Petition Includes The Full Text Of The Proposed Measure.

The Petition complies with the Elections Code because it includes the entire text of the proposed measure and all incorporated exhibits. Mr. Sutton's letter claims that the Petition should have included the three zoning maps that the proposed measure would amend, but the Elections Code does not require a petition to include every map or code section that a proposed measure might affect, particularly where, as here, the proposed measure fully describes all of the amendments it would make to City maps. A petition complies with section 9201 as long as it "does not omit the text of any incorporated exhibit or any other portion of the proposed amendment," because the "inclusion of the text of the measure is by itself sufficient to reduce confusion to a practical minimum." *We Care-Santa Paula*, 139 Cal. App. 4th at 390, 391.²

In *We Care-Santa Paula*, the court considered an initiative measure that would have required a popular vote to approve large development projects. The City of Santa Paula argued that the initiative petition should have included the portions of the city's general plan as part of the measure's "text" because the measure would affect the general plan and "voters would want to know" which properties would be affected by the measure. *Id.* at 391. The court rejected that argument, concluding that section 9201 "does not require that a petition include the text of every plan, law or ordinance that the measure might affect." *Id.* at 390. Because section 9201 requires only that the petition include "the text of the measure proposed to be enacted," the court concluded that the petition was valid. *Id.* at 391.

Similarly, here, the Petition includes the complete text of the proposed measure and the two exhibits it incorporates. These documents show that the proponents are seeking to increase the height limit for the two proposed residential buildings along Drumm Street from 84 feet to 92 and 136 feet. Section 4 of the proposed measure states that it seeks to "change the height and bulk district classification of two areas of the western portion (along the Drumm Street frontage) . . . that is currently set at 84-E to 92-E in one area measuring 88 feet by 86 feet, and to 136-E in another irregular, roughly rectangular area measuring 15,370 square feet." The exhibits to the proposed measure contain diagrams that reflect the proposed maximum height of these buildings.

Because the Petition contains the text of the measure proposed to be enacted and all of the exhibits it incorporates, the Petition complies with the "text" requirement of Section 9201.

D. In Addition To Technically Complying With The Text Requirement, The Petition Substantially Complies With That Requirement.

Even if the zoning maps were part of the legal text of the measure—which they are not—the Petition would still substantially comply with the "text" requirement. As discussed in section

² Elections Code section 9238 contains a similar rule for referendum petitions, requiring that they include "the text of the ordinance or the portion of the ordinance that is the subject of the referendum." In both types of measures—a referendum and an initiative—the petition must include the full text of the measure that the proponents are asking the voters to act upon. In the context of a referendum, the petition must include the ordinance voters are being asked to repeal; in the context of an initiative, the petition must include the ordinance the voters are being asked to adopt.

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A, a petition substantially complies with the "text" requirement if the petition fulfills "the fundamental purposes" underlying that requirement, which are to ensure that a voter will have all of the information needed to fully evaluate whether to sign the petition and not be confused about the meaning or effect of the petition. *Mervyn's*, 69 Cal.App. 4th at 101-02 (citing *Hayward Area Planning Ass'n v. Superior Court*, 218 Cal. App. 3d 53, 57 (1990); *Creighton v. Reviczky*, 179 Cal.App. 3d 1225, 1232 (1985).)

Here, the omission of the zoning maps did not deprive voters of any information needed to evaluate whether to sign the Petition, nor did the omission of those maps confuse the voters. The only relevant information contained in the omitted maps is the fact that the existing height limitation is 84 feet, and that before the creation of a special use district on the Site, there was no special use district there. But that information can be found elsewhere in the Petition. Section 4 explicitly states that the proposed measure would increase the height limit "that is currently set at 84-E to 92-E in one area measuring 88 feet by 86 feet, and to 136-E in another irregular, roughly rectangular area measuring 15,370 square feet." This information is also contained in Section 4(b). The Petition also designates the specific area within the City where the special use district would be located. This information is included in the maps on pages 2 and 3 and in Exhibit A-2. As to the creation of a special use district, Section 3(a) states that the proposed measure would create one. Thus, even without the zoning maps, the voters had all of the information they needed to evaluate whether to sign the Petition.

In support of the contention that the Petition does not substantially comply with the "text" requirement, Mr. Sutton relies upon *Mervyn's v. Reyes*, 69 Cal. App. 4th at 99, but that case is inapposite. At issue in *Mervyn's* was an initiative petition that sought to change the land use designation of four to five acres of land from industrial to open space. *Id.* at 96-97. The petition did not include the 17 pages of the general plan that the proposed initiative would have amended, nor did it include any maps to indicate what land would be affected. *Id.* at 97. According to the court, those 17 pages were the "key element of the initiative" without which a registered voter could not intelligently evaluate whether to sign the petition. *Id.* at 104. For this reason, the court held that the initiative petition ran afoul of the "text" requirement *Id.* at 105.

Unlike in *Mervyn's*, the omitted zoning maps are not a "key element" of the proposed measure, as their absence would not affect a voter's ability to evaluate whether to sign the Petition. Unlike in *Mervyn's*, a voter would know exactly which land would be affected by the proposed measure and exactly how that land would be affected. All of the relevant information in the omitted zoning maps is in the Petition itself, and the omission of those zoning maps would not confuse voters. Zoning Map SU01 indicates that there is currently no special use district area, but the text of the proposed measure says as much. The Petition states, "There is hereby created a special use district . . ." Similarly, Zoning Map HT01 and Map 02 of the City's Height and Bulk Plan indicate that the existing height and bulk limit for the Site is 84-E, but that fact is found on page 8 of the proposed measure.

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E. The Petition Substantially Complies With The Elections Code Even Though The Proposed Height Of One Of The Residential Buildings Is Illegible In One Of The Exhibits, Because That Information Is Located Elsewhere In The Initiative.

Mr. Sutton argues that the Petition should be rejected because Exhibit B is so dark that a voter could not see the height of either of the proposed residential buildings. Mr. Sutton is incorrect about the building at the corner of Drumm Street and Washington Street, where the height of that building—136 feet—is visible within the grey rectangle.³ Even if a voter could not read that number, the Petition would still satisfy the "text" requirement because the height of that building is available in the text of the proposed measure, such as throughout Exhibit A-2 and in Section 4(b)(1). As to the other building, a voter cannot see the proposed height on Exhibit B, but again, a voter can find that information in the text of the Petition, specifically in Exhibit A-2 and in Section 4(b)(1). Accordingly, even though Exhibit B may not technically comply with the full text requirement, the Petition as a whole substantially complies. The fact that the height of this proposed building is illegible in Exhibit B does not deprive registered voters of their ability to "intelligently evaluate whether to sign the petition." *Mervyn's*, 69 Cal. App. 4th at 99.

F. This Case Is Distinguishable from the Referendum Petition At Issue In *Defend Bayview Hunters Point v. City and County of San Francisco*.

This case is distinguishable from the referendum petition that the City rejected in *Defend Bayview*. In that case the court agreed with the City and this Office's advice that the referendum violated the full text requirement.

At issue in *Defend Bayview* was an ordinance that adopted a 57-page redevelopment plan expanding by 1,400 acres the previously 137-acre Hunter's Point redevelopment project area. *Id.* at 849. The ordinance incorporated by reference the redevelopment plan. *Id.* In fact, "the critical text enacted into law by the Ordinance was the text of the plan, not the printed words of the Ordinance." *Id.* at 857. The ordinance itself did not include such critical information as "the boundaries of the redevelopment project area, the allowed use of and limitations on eminent domain, the development of affordable housing, the promotion of jobs and business opportunities for local residents, and communities role in the planning process." *Id.* A referendum petition challenging that ordinance did not attach or include any part of the redevelopment plan. *Id.* at 850. On September 19, 2006, this Office issued Opinion No. 2006-01, which advised the Clerk of the Board of Supervisors to reject the petition because it did not include the text of the redevelopment plan.

The court upheld the City's rejection of the referendum petition and concluded that the petition neither technically nor substantially complied with the Elections Code's text requirement. The court held that "when the central purpose of the ordinance is to adopt and enact into law the contents of an incorporated or attached document, the referendum petition on the ordinance does not satisfy Elections Code section 9238 unless it includes a copy of that document." *Id.* at 858. The court reasoned that without the plan, which "supplied vital information about the effect of the ordinance," a voter could not possibly make a fully informed decision about whether to sign the petition. *Id.* at 857. Further, without the plan, the petition did

³ A copy of that exhibit is attached to this memorandum.

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not substantially comply with the requirements of the Elections Code because omission of that critical document from the petition "entirely frustrated the purpose of the text requirement." *Id.*

Here, the omission of the zoning maps is distinguishable from the omission of the redevelopment plan at issue in *Defend Bayview*. Unlike in *Defend Bayview*, the Petition does not incorporate by reference the zoning maps, and unlike *Defend Bayview*, all of the material information contained in the zoning maps is available in the Petition itself. A voter who read the Petition could tell that the proposed measure would create a special use district where one did not exist before. A voter could also ascertain from the Petition that the proposed measure would increase the height and bulk limits for the proposed residential buildings from 84-E to 96-E and 136-E. And the Petition indicates where within the City these changes would be made. With this information, a voter could make a fully informed decision about whether to sign the Petition, and therefore the Petition complies with the Elections Code's "text" requirement.

Conclusion

The California Elections Code requires that an initiative petition include the text of the proposed measure. The Petition does so. The law does not obligate the proponents to attach copies of the zoning maps that would be affected by the proposed measure. Even if the Petition should have attached the maps, this omission does not require rejection of the Petition because the Petition substantially complies with the "text" requirement. All the relevant information contained in the zoning maps including the height and bulk of the permitted development appears in the Petition, and as a result, a voter could still evaluate whether to sign it. Finally, the Petition substantially complies with section 9201 even though the height of one of the proposed buildings is not visible in Exhibit B, as the height of that building is set forth elsewhere in the Petition. For all of these reasons, the Director of Elections has a ministerial duty to accept initiative petitions that substantially comply with the Elections Code. *Billig v. Voges*, 223 Cal. App. 3d 962, 968-69 (2006). Because the Petition does so, you should accept it.

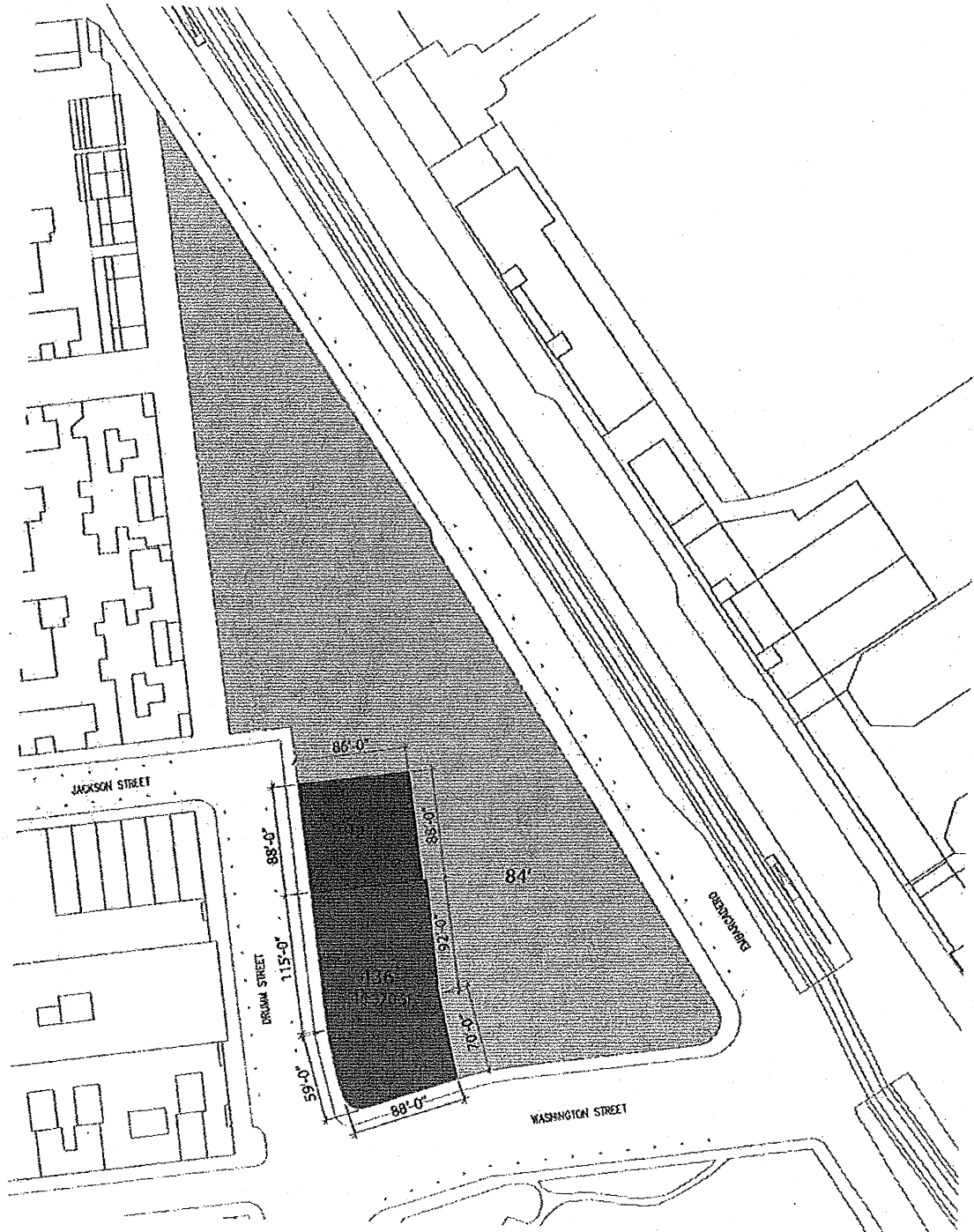
Very truly yours,

DENNIS J. HERRERA
City Attorney



Joshua S. White
Deputy City Attorney

**EXHIBIT B
MAP SHOWING HEIGHT DESIGNATIONS**



HEIGHT RECLASSIFICATION DIAGRAM