

05 JUL -7 PM 4:08

CITY OF OAKLAND



ONE FRANK H. OGAWA PLAZA • 6TH FLOOR • OAKLAND, CALIFORNIA 94612

Office of the City Attorney  
John A. Russo  
City Attorney

July 19, 2005

(510) 238-3601  
FAX: (510) 238-6500  
TTY/TDD: (510) 238-3254

HONORABLE CITY COUNCIL  
Oakland, California

**RE: EXTENSION OF EMERGENCY ORDINANCE NO. 12566 C.M.S.,  
PURSUANT TO CHARTER SECTION 213, RELATING TO INTERIM  
CONTROLS FOR CONDITIONAL USE PERMITS AND VARIANCE AND  
RELATED FINDINGS FOR SIGNS AND SUSPENDING CONFLICTING  
PROVISIONS, TO TAKE EFFECT IMMEDIATELY UPON  
INTRODUCTION AND ADOPTION**

President De La Fuente and members of the City Council:

The City Attorney's Office recommends extension of Emergency Ordinance No. 12566 C.M.S., which established interim controls for conditional use permits ("CUP"), variances and related findings for signs. The extension of the interim controls will last eighteen (18) months, or until 90 days after a final decision of the Court of Appeals regarding the subject matter of this ordinance, whichever occurs first. As explained below, the extension of the ordinance needs to be adopted immediately.

**BACKGROUND**

The Oakland Municipal Code and the Oakland Planning Code ("OPC") regulate various types of signs and the OPC prohibits new Advertising Signs. The OPC allows variances as exceptions to the strict requirements of the zoning regulations.

The City is currently involved in litigation challenging the constitutionality of Oakland's sign regulations (Desert Outdoor Advertising, Inc. vs. City of Oakland (Federal District Court Case No. C-03-1078MJJ)). During the course of the litigation, questions have arisen concerning the constitutionality (violations of the First Amendment) of the variances and CUP provisions as they relate to signs. In papers filed with the court,

15  
ORA/COUNCIL

JUL 19 2005

the City has represented that it will be amending the OPC to address the constitutional issues.

In addition, the City of Oakland has received applications for Advertising and other signs that would require a CUP or variance from the OPC; and there is therefore an urgent need to revise the regulations in order to avoid a direct threat to health, safety, and welfare of the surrounding community and to remove (moot) the issue from the current litigation.

As a result of the foregoing, the City Council adopted Emergency Ordinance No. 12566 C.M.S. on December 16, 2003 (Emergency Ordinance). The Emergency Ordinance technically expired one year from the date of its adoption, but the City has continued to process applications as if the Emergency Ordinance was still in full force and effect.

It does not appear prudent to adopt permanent amendments to the Oakland Municipal Code, due to the time and expense of processing such permanent amendments (including presenting them to the City Planning Commission, Community and Economic Development Committee, and have two readings before the City Council) until the courts finally rule on the matter.

Desert Outdoor has appealed the District Court's decision and recently contended in its opening appellate brief that the Emergency Ordinance expired and therefore it has no effect on this case. Because there is insufficient time to develop permanent controls, it is in the best interests of the City to immediately extend the Emergency Ordinance.

## **DISCUSSION**

At the time of the initial enactment of Emergency Ordinance No. 12566 CMS, then existing CUP and variance provisions contained language that, under the First Amendment, arguably vested too much discretion in City officials when they make decisions related to signs. Signs are a form of expression and are thus subject to more stringent constitutional requirements than other activities/facilities, such as major development projects or alcohol retailers. Therefore, the CUP and variance findings, in the Planning Code, that the City has used to evaluate applications for signs may need to be different from the findings the City uses for other activities/facilities.

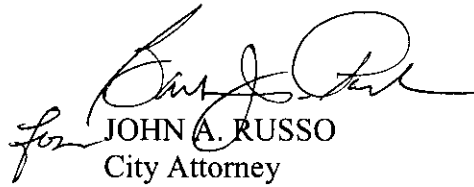
The Planning Code criteria for evaluating sign applications (i.e., the findings) both for CUP and variances contained language that courts have ruled violate the First Amendment. Specifically, findings that require the application "not be detrimental to the public welfare" (see OPC § 17.148.050A3, Attachment A) have been struck down with respect to signs.

Emergency Ordinance No. 12566 C.M.S. deleted the questionable provisions for signs. In addition, the Emergency Ordinance provided in the limited circumstances where signs require a CUP, that a variance be required instead.

**RECOMMENDATION**

This Office recommends the City Council extend the Emergency Ordinance.

Respectfully Submitted,

  
for JOHN A. RUSSO  
City Attorney

Attorney Assigned:  
MARK P. WALD

Attachments  
Planning Code Excerpt  
December 16, 2003 City Council Agenda Report and Emergency Ordinance

316282.2

  
ORA/COUNCIL  
JUL 19 2005

## ATTACHMENT A

### PLANNING CODE VARIANCE FINDINGS, HIGHLIGHTING “OBJECTIONABLE” CRITERIA, RELATING TO SIGNS

#### 17.148.050A Variance Findings required.

A. With the exception of variances for adult entertainment activities, a variance may be granted only upon determination that all of the following conditions are present:

1. That strict compliance with the specified regulation would result in practical difficulty or unnecessary hardship inconsistent with the purposes of the zoning regulations, due to unique physical or topographic circumstances or conditions of design; or, as an alternative in the case of a minor variance, that such strict compliance would preclude an effective design solution improving livability, operational efficiency, or appearance.

2. That strict compliance with the regulations would deprive the applicant of privileges enjoyed by owners of similarly zoned property; or, as an alternative in the case of a minor variance, that such strict compliance would preclude an effective design solution fulfilling the basic intent of the applicable regulation;

3. That the variance, if granted, will not adversely affect the character, livability, or appropriate development of abutting properties or the surrounding area, and will not be detrimental to the public welfare or contrary to adopted plans or development policy;

4. That the variance will not constitute a grant of special privilege inconsistent with limitations imposed on similarly zoned properties or inconsistent with the purposes of the zoning regulations.

316282.2

6 VOTES REQUIRED FOR PASSAGE

05 JUL -7 PM 4:08

Approved as to form and legality

INTRODUCED BY COUNCILMEMBER \_\_\_\_\_

*Mark P. Wald*

CITY ATTORNEY

**Ordinance No. \_\_\_\_\_ C.M.S.**

**EXTENSION OF EMERGENCY ORDINANCE NO. 12566 C.M.S., PURSUANT TO CHARTER SECTION 213, EXTENDING INTERIM CONTROLS FOR CONDITIONAL USE PERMITS, VARIANCE AND RELATED FINDINGS FOR SIGNS AND SUSPENDING CONFLICTING PROVISIONS, TO TAKE EFFECT IMMEDIATELY UPON INTRODUCTION AND ADOPTION**

**WHEREAS**, the Oakland Municipal Code and the Oakland Planning Code (“OPC”) regulate various types of signs and the OPC prohibits new Advertising Signs; and

**WHEREAS**, the OPC allows variances as exceptions to the strict requirements of the zoning regulations; and

**WHEREAS**, the City is currently involved in litigation challenging the constitutionality of Oakland’s sign regulations; and

**WHEREAS**, questions have arisen concerning the constitutionality of the variances and conditional use permit (“CUP”) provisions as they relate to signs; and

**WHEREAS**, the City has represented to the federal court that it is amending the OPC to address the constitutional issues; and

**WHEREAS**, the City of Oakland has received applications for Advertising and other signs that would require a CUP or variance from the OPC; and there is therefore an urgent need to revise the regulations in order to avoid a direct threat to health, safety, and welfare of the surrounding community and to remove (moot) the issue from the current litigation; and

**WHEREAS**, based upon the foregoing, the City Council adopted Emergency Ordinance No. 12566 C.M.S. on December 16, 2003 (Emergency Ordinance); and

**15**  
**ORA/COUNCIL**  
**JUL 19 2005**

**WHEREAS**, the Emergency Ordinance technically expired one year from the date of its adoption, pursuant to Section 5, but the City has continued to process applications as if the Emergency Ordinance was still in full force and effect; and

**WHEREAS**, the City believed that it would not be prudent to adopt permanent amendments to the Oakland Municipal Code, due to the time and expense of processing such permanent amendments, until the courts finally ruled on the matter; and

**WHEREAS**, Desert Outdoor has appealed the District Court's decision and recently contended in its opening appellate brief that the Emergency Ordinance expired and therefore it has no affect on this case; and

**WHEREAS**, there is insufficient time to develop permanent controls and present them to the City Planning Commission and City Council for review, recommendation, and adoption; and

**WHEREAS**, it is in the best interests of the City to immediately extend the Emergency Ordinance; and

**WHEREAS**, for the reasons set forth above, pursuant to City Charter section 213, the Council declares that this ordinance is necessary to preserve the public peace, health, or safety and to avoid a direct threat to the health, safety, and welfare of the community, and the "Whereas" clauses above taken together constitute the City Council's statement of the reasons constituting such necessity and emergency.

**NOW, THEREFORE, the Council of the City of Oakland does ordain as follows:**

**SECTION 1.** The City Council finds and determines the foregoing recitals to be true and correct and hereby makes them a part of this ordinance.

**SECTION 2.** The City Council finds and determines, for the reasons stated in the recitals, the extension of this ordinance is exempt from CEQA under Sections 15061(b)(3), 15301, 15302, 15303, 15307, 15308 and 15311 of the State CEQA Guidelines.

**SECTION 3.** The duration of the Emergency Ordinance is extended for eighteen (18) months, or until 90 days after a final decision from the Court of Appeals when the City Council will adopt permanent amendments to the Planning Code and/or Municipal Code regarding the subject matter of this ordinance for codification.

**SECTION 4.** All other provisions of Emergency Ordinance No. 12566 C.M.S. shall remain in full force and effect.

**SECTION 5.** The City has interpreted Emergency Ordinance No. 12566 C.M.S. to require that a variance be applied for instead of a conditional use permit and that

interpretation shall continue for the term of this ordinance.

**SECTION 6.** This ordinance shall be effective immediately upon its adoption by the City Council, subject to the provisions of Section 216 of the Charter of the City of Oakland.

**SECTION 7.** This Ordinance is enacted pursuant to the City of Oakland's general police powers, Sections 106 and 213 of the Charter of the City of Oakland, and Article XI of the California Constitution.

In Council, Oakland, California, July 19, 2005, Passed By The Following

Vote:

AYES-

NOTES-

ABSENT-

ABSTENTION-

Attest: \_\_\_\_\_

LATONDA SIMMONS

CITY CLERK AND CLERK OF THE COUNCIL  
OF THE CITY OF OAKLAND, CALIFORNIA

**EXTENSION OF EMERGENCY ORDINANCE NO. 12566 C.M.S., PURSUANT TO CHARTER SECTION 213, EXTENDING INTERIM CONTROLS FOR CONDITIONAL USE PERMITS, VARIANCE AND RELATED FINDINGS FOR SIGNS AND SUSPENDING CONFLICTING PROVISIONS, TO TAKE EFFECT IMMEDIATELY UPON INTRODUCTION AND ADOPTION**

**NOTICE AND DIGEST**

By this ordinance, the Oakland City Council extends interim controls, for an eighteen (18) month period, for conditional use permit and variance and related findings for signs.



FILED  
OFFICE OF THE CITY CLERK  
OAKLAND

2003 DEC -4 AM 11:59  
CITY OF OAKLAND



ONE FRANK H. OGAWA PLAZA • 6TH FLOOR • OAKLAND, CALIFORNIA 94612

Office of the City Attorney  
John A. Russo  
City Attorney

(510) 238-3601  
FAX: (510) 238-6500  
TTY/TDD: (510) 238-3254

December 16, 2003

HONORABLE CITY COUNCIL  
Oakland, California

**RE: AN EMERGENCY ORDINANCE, PURSUANT TO CHARTER SECTION 213, ESTABLISHING INTERIM CONTROLS FOR CONDITIONAL USE PERMITS AND VARIANCE AND RELATED FINDINGS FOR SIGNS AND SUSPENDING CONFLICTING PROVISIONS, TO TAKE EFFECT IMMEDIATELY UPON INTRODUCTION AND ADOPTION**

President De La Fuente and members of the City Council:

The City Attorney's Office recommends adoption of the Emergency Ordinance establishing interim controls for conditional use permits ("CUP"), variances and related findings for signs. The interim controls will last one year, or until permanent controls are adopted, whichever occurs first. As explained below, these amendments need to be adopted immediately.

**BACKGROUND**

The Oakland Municipal Code and the Oakland Planning Code ("OPC") regulate various types of signs and the OPC prohibits new Advertising Signs. The OPC allows variances as exceptions to the strict requirements of the zoning regulations.

The City is currently involved in litigation challenging the constitutionality of Oakland's sign regulations (Desert Outdoor Advertising, Inc. vs. City of Oakland (Federal District Court Case No. C-03-1078MJJ)). During the course of the litigation, questions have arisen concerning the constitutionality (violations of the First Amendment) of the variances and CUP provisions as they relate to signs. In papers filed with the court, the City has represented that it will be amending the OPC to address the constitutional issues.

In addition, the City of Oakland has recently received applications for Advertising and other signs that would require a CUP or variance from the OPC; and there is therefore

~~17  
ORA/COUNCIL~~

an urgent need to revise the regulations in order to avoid a direct threat to health, safety, and welfare of the surrounding community and to remove (moot) the issue from the current litigation. Because there is insufficient time to develop permanent controls and present them to the City Planning Commission and City Council for review, recommendation, and adoption, it is in the best interests of the City to immediately amend the CUP and variance provisions on an interim basis while permanent controls are developed.

### DISCUSSION

Existing CUP and variance provisions contain language that, under the First Amendment, arguably vests too much discretion in City officials when they make decisions related to signs. Signs are a form of expression and are thus subject to more stringent constitutional requirements than other activities/facilities, such as major development projects or alcohol retailers. Therefore, the CUP and variance findings the City uses to evaluate applications for signs may need to be different from the findings the City uses for other activities/facilities.

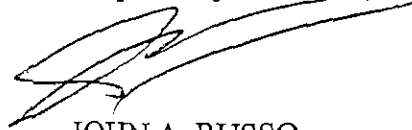
Currently, the criteria for evaluating sign applications (i.e., the findings) both for CUP and variances contain language that courts have ruled violate the First Amendment. Specifically, findings that require the application “not be detrimental to the public welfare” (see OPC § 17.148.050A3, Attachment A) have been struck down with respect to signs.

Therefore, this Office recommends that revision of the OPC to the delete questionable provisions for signs. In addition, in the limited circumstances where signs require a CUP, this Office recommends that the City require a variance.

### RECOMMENDATION

This Office recommends the City Council adopt the Emergency Ordinance.

Respectfully Submitted,



JOHN A. RUSSO  
City Attorney

Attorney Assigned:  
MARK P. WALD

Attachment

316282

## ATTACHMENT A

### EXISTING VARIANCE FINDINGS, HIGHLIGHTING “OBJECTIONABLE” CRITERIA, RELATING TO SIGNS

#### 17.148.050A Variance Findings required.

A. With the exception of variances for adult entertainment activities, a variance may be granted only upon determination that all of the following conditions are present:

1. That strict compliance with the specified regulation would result in practical difficulty or unnecessary hardship inconsistent with the purposes of the zoning regulations, due to unique physical or topographic circumstances or conditions of design; or, as an alternative in the case of a minor variance, that such strict compliance would preclude an effective design solution *improving livability, operational efficiency, or appearance.*

2. That strict compliance with the regulations would deprive the applicant of privileges enjoyed by owners of similarly zoned property; or, as an alternative in the case of a minor variance, that such strict compliance would preclude an effective design solution fulfilling the basic intent of the applicable regulation;

3. That the variance, if granted, will not adversely affect the character, livability, or appropriate development of abutting properties or the surrounding area, and will not be detrimental to the public welfare or contrary to adopted plans or development policy;

4. That the variance will not constitute a grant of special privilege inconsistent with limitations imposed on similarly zoned properties or inconsistent with the purposes of the zoning regulations.

FILED  
OFFICE OF THE CITY CLERK  
OAKLAND  
6 VOTES REQUIRED FOR PASSAGE  
2003 DEC -4 AM 11:59

Approved as to form and legality

INTRODUCED BY COUNCILMEMBER \_\_\_\_\_

*Mark P. Wolf*

CITY ATTORNEY

Ordinance No. 12566 C.M.S.

AN EMERGENCY ORDINANCE, PURSUANT TO CHARTER SECTION 213,  
ESTABLISHING INTERIM CONTROLS FOR CONDITIONAL USE PERMITS  
AND VARIANCE AND RELATED FINDINGS FOR SIGNS AND SUSPENDING  
CONFLICTING PROVISIONS, TO TAKE EFFECT IMMEDIATELY UPON  
INTRODUCTION AND ADOPTION

WHEREAS, the Oakland Municipal Code and the Oakland Planning Code ("OPC") regulate various types of signs and the OPC prohibits new Advertising Signs; and

WHEREAS, the OPC allows variances as exceptions to the strict requirements of the zoning regulations; and

WHEREAS, the City is currently involved in litigation challenging the constitutionality of Oakland's sign regulations; and

WHEREAS, questions have arisen concerning the constitutionality of the variances and conditional use permit ("CUP") provisions as they relate to signs; and

WHEREAS, the City has represented to the federal court that it is amending the OPC to address the constitutional issues; and

WHEREAS, the City of Oakland has recently received applications for Advertising and other signs that would require a CUP or variance from the OPC; and there is therefore an urgent need to revise the regulations in order to avoid a direct threat to health, safety, and welfare of the surrounding community and to remove (moot) the issue from the current litigation; and

WHEREAS, there is insufficient time to develop permanent controls and present them to the City Planning Commission and City Council for review, recommendation, and adoption; and

WHEREAS, it is in the best interests of the City to immediately amend the CUP and variance provisions on an interim basis while permanent controls are developed; and

WHEREAS, for the reasons set forth above, pursuant to City Charter section 213, the Council declares that this ordinance is necessary to preserve the public peace, health, or safety and to avoid a direct threat to the health, safety, and welfare of the community, and the "Whereas" clauses above taken together constitute the City Council's statement of the reasons constituting such necessity and emergency.

NOW, THEREFORE, the Council of the City of Oakland does ordain as follows:

SECTION 1. The City Council finds and determines the foregoing recitals to be true and correct and hereby makes them a part of this ordinance.

SECTION 2. The City Council finds and determines, for the reasons stated in the recitals, the adoption of this ordinance is exempt from CEQA under Sections 15061(b)(3), 15301, 15302, 15303, 15307, 15308 and 15311 of the State CEQA Guidelines.

SECTION 3. For the term of this Ordinance, as set forth in Section 5 hereof, the following shall apply:

A. Any time a conditional use permit is required for a sign, including without limitation Emergency Ordinance No. 12461 C.M.S., as it may be amended or extended, such sign shall now require a variance, pursuant to the criteria in subsection B below, and the appeal procedures in subsection C below.

B. A variance for signs shall be granted upon a determination that all of the following conditions are present:

1. That strict compliance with the specified regulation would result in practical difficulty or unnecessary hardship inconsistent with the purposes of the zoning regulations, due to unique physical or topographic circumstance or conditions of design;
2. That strict compliance with the regulations would deprive the applicant of privileges enjoyed by owners of similarly zoned property;
3. That the variance will not constitute a grant of special privilege inconsistent with limitations imposed on similarly zoned properties or inconsistent with the purposes of the zoning regulations.

C. The expedited appeal procedures contained in OPC § 17.148.070.B shall apply to all appeals to the City Council relating to all signs.

D. The City of Oakland, consistent with current policy and practice, does not intend to and does not discriminate against non-commercial speech and does not favor commercial over non-commercial speech. All OMC, OPC and other City codes, ordinances, resolutions or policies shall continue to be interpreted in such a manner.

SECTION 4. During the term of this ordinance as set forth in Section 5 hereof, no building, zoning or other permit that has been issued for any sign for which rights to proceed with said sign have not vested pursuant to the provisions of State law shall proceed, and no building, zoning or other permit for any sign shall be issued by any department, agency, employee or agent of the City of Oakland to allow for any signs, without complying with the requirements of section 3 above. No use which has not vested prior to the date of this Ordinance shall commence in violation of the provisions of this Ordinance.

SECTION 5. The interim controls imposed by this ordinance shall remain in place and be effective for a continuous one year from the effective date of this ordinance, or until the City Council adopts permanent controls resulting from the study referenced in Section 6 hereof, whichever occurs first.

SECTION 6. The Community and Economic Development Agency, in conjunction with the Office of the City Attorney, is directed, over the next one-year, to conduct a study and develop a draft set of permanent amendments to the Planning Code and/or Municipal Code regarding the subject matter of this ordinance for codification.

SECTION 7. For the term of this ordinance, as set forth in Section 5 hereof, the provisions of this ordinance shall govern, to the extent there is any conflict between the provisions of this ordinance and the provisions of any other City code, ordinance, resolution or policy, and all such conflicting provisions shall be suspended.

SECTION 8. This ordinance shall be effective immediately upon its adoption by the City Council, subject to the provisions of Section 216 of the Charter of the City of Oakland.

SECTION 9. This Ordinance is enacted pursuant to the City of Oakland's general police powers, Sections 106 and 213 of the Charter of the City of Oakland, and Article XI of the California Constitution.

SECTION 10. If any provision of this ordinance or the application thereof to any person or circumstances is held invalid, the remainder of this ordinance and the application of such provisions to other persons or circumstances shall not be affected thereby.

In Council, Oakland, California, December 16, 2003, Passed By The Following

Vote:

AYES- 7

NOTES- Ø

ABSENT- Ø

ABSTENTION- Ø

EXCUSED - RELO 1

Attest: *Ceda Floyd*  
CEDA FLOYD

CITY CLERK AND CLERK OF THE COUNCIL  
OF THE CITY OF OAKLAND, CALIFORNIA

~~5~~  
COMMUNITY & ECONOMIC  
DEVELOPMENT CMTE  
MAY 11 2004

~~14.2~~  
ORACOUNCIL  
JUN 1 2004

15  
ORACOUNCIL  
JUL 19 2005