

MEMORANDUM

DATE: September 23, 2008
TO: Community Planners Committee
FROM: Dave Potter
SUBJECT: SUBSTANTIAL CONFORMANCE REVIEW
Item #5

INTRODUCTION

On January 22, 2007, Community Planners Committee (CPC) members briefly discussed perceived problems in their communities regarding Substantial Conformance Review (SCR). I'm pleased that CPC has scheduled the issue for discussion and action.

This memorandum provides 1) a brief explanation of SCR; 2) recent legal challenges to SCR determinations; 3) Grand Jury Reports addressing SCR; 4) efforts to amend the SCR process; 5) a summary of the SCR process in other California cities and counties; 6) a recent legal opinion regarding SCR under Process 2; 7) conclusions; and 8) recommendation.

1) WHAT IS SUBSTANTIAL CONFORMANCE?

Land Development Code §113.0103 (Definitions) states "Substantial Conformance means that a revision to a development that was approved through a permit or tentative map complies with the objectives, standards, guidelines, and conditions for that permit or tentative map."

Land Development Code §126.0112 (Minor Modifications to a Development Permit) states the following:

A proposed minor modification to an approved development permit may be submitted to the City Manager to determine if the revision is in substantial conformance with the approved permit. If the revision is determined to be in substantial conformance with the approved permit, the revision shall not require an amendment to the development permit. Within the Coastal Overlay Zone, any substantial conformance determination shall be reached through a Process Two review.

Information Bulletin 500¹ (Substantial Conformance Review) discusses the goal, process, and submittal requirements for SCR.

¹ Updated July 2008 March 2009.

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2) LEGAL CHALLENGES TO SCR

In 2002 Development Services Department (DSD) approved the Pacific Centre, the Applied Molecular Evolution, Inc. (AME), and the Nexus projects located in the Torrey Hills Community, as substantially conforming to the Torrey Hills PID/PRD Permit requirements.

Torrey Hills Community Coalition (THCC) filed petitions for a writ of mandate to set aside the City's approval of the three projects because the projects would exceed the maximum square footage of 570,000 square feet as allowed by the Torrey Hills PID/PRD Permit.

On May 19, 2005, the Fourth District Court of Appeal found in favor of THCC. In its ruling, the court found that "the City acted unlawfully in approving the Pacific Centre, AME, and Nexus projects as substantially conforming to the Torrey Hills PID/PRD Permit." The justices agreed that the City's approval of these projects was arbitrary and/or capricious and granted THCC's writs of mandate to require the City to rescind its approvals of the projects.²

3) GRAND JURY REPORTS

San Diego County Grand Juries of 2002-2003, 2003-2004, and 2004-2005 issued reports critical of the substantial conformance review process. Excerpts from these reports and responses from the City of San Diego follow.

Grand Jury 2002-2003 Report

On April 16, 2003, San Diego County Grand Jury 2002-2003 released a report entitled "City of San Diego Development Services Department: a Case Study in Complaint-Resolution (Gone Awry)". The report addressed the DSD determination of September 25, 2001, that modifications to the Seabreeze Farms Equestrian Center were in substantial conformance with the approved development plan. Following are the findings from the Grand Jury report.

Findings

- The Development Services Department staff exhibited insensitivity, given the mixed land use character of this specific project, in performing a substantial conformance review process on September 25, 2001, thereby disallowing any input from the 18-20 homeowners most affected by the revised facility layout. The results of this process triggered the ensuing complaints. If the SCR level one process precludes public input in all cases, the Grand Jury finds that the process is flawed and needs to be amended.

² Torrey Hills Community Coalition v. City of San Diego, Case No. GIC 786702

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City Response to Grand Jury Report 2002-2003

On July 16, 2003, the City Manager issued a report responding to the above Grand Jury Finding. In the report the City Manager replies:

The respondent appreciates the view of the Grand Jury regarding the City's substantial conformance review (SCR) process and partially agrees with the findings. Specifically staff agrees with the finding that the process could be improved by amending the regulations. The SCR process was created to allow for project changes that normally occur between a concept approval ...and final construction plan approval. Changes that often get requested by property owners are due to unexpected field conditions, financing issues, or changes to the property owner's plans to use their property. City staff, to the best extent possible, review change requests through the SCR process to determine if they are in compliance with applicable rules that applied to the originally approved concept and any other information from the public record of that original approval process in order to determine if the requested changes are in substantial conformance and can be approved. As the process is currently, the decision to approve is a ministerial decision and no public notice is required by the code. For the past two years, however, City staff has provided a courtesy copy of any SCR requests to the City Council recognized community planning group that represents the area where the change is being requested.

...City staff agrees that the SCR process can be improved. In recognition of this, a revision is currently being considered by City Council to elevate the SCR process in the future to a Process Two level decision in accordance with the City of San Diego Municipal Code. This would provide public notice of any future SCR requests to all property owners with (sic) 300 feet of the property requesting the SCR, and if appealed, allow a fully noticed public hearing before the City Planning Commission, In addition criteria for City staff to use in making these decisions are also being considered by City Council as part of this action. (A copy of the proposed changes to the SCR process is attached in the City Manager's Report.)

Grand Jury 2003-2004 Report

On June 29, 2004, San Diego County Grand Jury 2003-2004 released a report entitled "Torrey Hills: A Chapter in the Development of San Diego." The report addressed the DSD determination of substantial conformance for the projects addressed above under "Legal Challenges to SCR." Following are the facts, findings, and recommendations from the Grand Jury report.

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Facts

- On November 29, 2001, DSD denied an application for an SCR approval of a development proposal citing numerous deficiencies in the proposal. On January 18, 2002, the proposal was granted SCR approval. There is no record that the deficiencies were remedied.
- On April 30, 2002 and August 21, 2002, DSD gave SCR approval for development projects that involve biotech work in the vicinity of an elementary school.

Findings

- When DSD grants SCR approval of a project on a second or later submission, the record should clearly indicate how earlier objections have been satisfied.
- Proper environmental considerations should precede any SCR approval.

Recommendations

The Grand Jury recommends that San Diego City Council:

- Require the Development Services Department adopt policies to assure that the record of an SCR approval is complete. When a project is approved after a second or later submission, the record should clearly indicate how earlier objections had been satisfied.
- Require the Development Services Department to make sure no SCR approval is given without adequate environmental review.

City Response to Grand Jury Report 2003-2004

On September 24, 2004, the Assistant City Manager issued a report responding to the first Finding and first Recommendation of the Grand Jury Report. In the report the Assistant City Manager replied:

The City of San Diego agrees with this finding. This recommendation will be implemented. In the future when DSD grants SCR approval of a project on a second or later submission, the City record will indicate how earlier objections have been satisfied. The City of San Diego has three active consolidated appeals and two cases without judgments related to SCR approvals. The City of San Diego desires a judicial ruling before implementing any policy. Final judgments are expected within six months. The City will prepare appropriate policies following those judgments with any necessary further analysis in light of the judicial determinations.

In response to the Grand Jury's second Finding and second Recommendation, the Assistant City Manager replied:

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The City of San Diego agrees with the finding. The recommendation has been implemented. Once an application has been deemed complete, the CEQA Guidelines require a lead agency to determine whether an activity is subject to CEQA §15060(b). An activity is not subject to CEQA if it does not involve the exercise of discretionary powers by a public agency CEQA §1506(c)(i). Moreover, if the lead agency determines that an activity is a project subject to CEQA, the “lead agency shall determine whether a project is exempt from CEQA per §15060(a). A project is exempt from CEQA if it is a ministerial project according to public Resources Code §21080(b)(i) and CEQA Guidelines §1528(a).

SDMC §126.0112 describes the process by which an applicant may propose minor modifications to their development, commonly referred to as “SCR.” The decision to approve or deny a minor modification is made by the City Manager and is therefore a ministerial action. See SCMC §126.0112 and §113.0111. In the Torrey Hills projects the SCR process was provided for in the PID/PRD Permit to assure consistency between the proposed developments and the adopted Design Guidelines and Development Standards and other terms of the PRD/PID Permit.

As described above, the City must evaluate an application to propose minor modifications in conformance with CEQA. However, it should be noted that the level of “environmental review” required for a ministerial act, such as “SCR,” is a determination that the project is exempt. Under CEQWA (sic) this is deemed “adequate environmental review. Conversely if the SCR application is denied, this means that any proposed modifications would require a discretionary act and therefore further environmental review in accordance with Public Resources Code §21080 (c) or (d).

The Development Services Department will adopt more explicit policies assuring no SCR is approved inconsistent with the above referenced State and local laws and CEQA guidelines.

Grand Jury 2004-2005 Report

On May 18, 2005, the San Diego County Grand Jury 2003-2004 released a report entitled “City of San Diego Development Services Department – What Can Be Done?” The report addressed the issue of Substantial Conformance Review. Following are the facts, finding, and recommendation from the Grand Jury report.

Facts

- The SCR process allows DSD staff to approve a minor change to a development plan.
- Except for projects in the Coastal Overlay Zone, the staff SCR decision is not appealable.
- There have been instances where community members have felt a proposed change was not minor in nature and that DSD staff should not have approved the SCR.
- Community members dissatisfied with a staff SCR decision have filed complaints with the Grand Jury and even filed lawsuits to overturn a staff SCR decision.

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Finding

- Non-appealable SCR decisions are a source of community distrust of DSD staff.

Recommendation

The Grand Jury recommends that the San Diego City Council:

- Amend the Municipal Code to make all Substantial Conformance Review decisions subject to appeal.

City Response to Grand Jury Report 2004-2005

On August 10, 2005, the City Manager issued a report responding to the Grand Jury Report. In the report the Assistant City Manager replied:

The City agrees with this finding. The Grand Jury notes in the report that planning groups throughout the City distrust DSD staff decisions and City Council land use decisions. The Substantial Conformance Review (SCR) process stands out as a driver for this distrust. These reviews are typically a staff level decision that results in minor revisions to a project previously approved through the public hearing process. As such, there is the possibility of changes being approved that are not supported by the community planning group and there is no appeal process for them to raise their concerns in a public hearing. The Grand Jury recommends that all Substantial Conformance Reviews be raised to a Process 2 level decision (staff decision appealable to the Planning Commission).

Over the past year, DSD has begun to embrace the community as a customer. In the past, the community was seen by the department as a stakeholder with limited opportunities for partnering. Last year, DSD formed an ad hoc task force with both community and development industry representation to review Substantial Conformance Review process. The recommendations of the task force are moving forward to City Council for approval. The recommendations include requiring a Process 2 level decision on a wider range of Substantial Conformance Reviews and the publication of written guidelines for revisions that can be considered through the Substantial Conformance Review process. The Grand Jury's recommendation to make all Substantial Conformance Review decisions appealable will be presented as an alternative for Council consideration.

This Recommendation requires further analysis. Since June 2004, Substantial Conformance Review (SCR) procedure of the Municipal Code (126.0122) has been undergoing re-evaluation of the Code Monitoring Team update process. The current proposal would elevate to a Process 2 review those actions where the development permit specifies a Process Two review, or where the applicant proposes to modify a permit condition. Staff review guidelines would be published to help achieve consistency in determinations. A Notice of Decision would be published for SCR determinations which would clearly articulate the basis for the

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determination. Implementation of this Code change would be accompanied by training of staff, community planning groups, and industry groups. The Grand Jury recommendation to make all Substantial Conformance Review decisions appealable will be presented as an alternative for Council consideration.

4) EFFORTS TO AMEND SCR PROCESS

The following is a chronological presentation of a series of reports, meetings, and hearings intended to address potential amendments to the SCR process.

April 15, 2002

Councilmember Scott Peters (District 1) sent a memorandum to Councilmember Byron Wear (District 2, LU&H Chair) expressing concern "about certain projects in my communities that are being approved through the City's Substantial Conformance Review without the benefit of community input"; stating that he would like to see Substantial Conformance Review use a Process Two review in particular instances...to ensure that communities receive, review, give input, and take a position on projects directly influencing their quality of life"; and requesting the Chair to "docket this proposal for further discussions at the Land Use and Housing Committee."

June 21, 2002

A memorandum from Development Services Director to LU&H Committee provided information and background on the Substantial Conformance Review process.

June 26, 2002

The following item was on the LU&H agenda.

ITEM-1: Report from the City Manager on SUBSTANTIAL CONFORMANCE REVIEW.

ACTION: Direct the City Manager to recommend changes to the Substantial Conformance Review process and ask the Code Monitoring Team, the Land Use and Housing (LU&H) Committee's Technical Advisory Committee, and the Community Planners Committee to evaluate improvements to Substantial Conformance Review and return to the LU&H Committee in October 2002.

September 24, 2002

The following was on the CPC agenda.

ITEM-2: SUBSTANTIAL CONFORMANCE REVIEW.

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Presentation on Substantial Conformance Review by Deputy Director of Development Services Department.

October 9, 2002

The following item was on the LU&H agenda.

ITEM-2: Report from the City Manager regarding SUBSTANTIAL CONFORMANCE REVIEW.

ACTION: Accept the City Manager's PowerPoint report and direct staff to focus on the identified issues of:

- A. Mandatory SCR against Design Guidelines or involving Transfer of Development Rights – Process 2.
- B. SCR potentially modifying significant commitments from decision-making hearing or during the processing of a Discretionary Review Permit – Process 2 Option.
- C. Review the Coastal Process for SCR.
- D. Publish guidelines in Bulletin 500.
- E. Conduct a comprehensive fee study.
- F. Conduct outreach to, at least, community planning groups (including the Community Planners Committee, code monitoring team, Technical Advisory Committee, and interested industry groups.

May 27, 2003

The following item was on the CPC agenda.

ITEM-2: SUBSTANTIAL CONFORMANCE REVIEW.

DSD representative reported that "DSD proposes to amend LCD Section 126.0112 and amend Info Bulletin 500 to include staff review guidelines."

CPC ACTION: Recommend approval of the Substantial Conformance Review modifications.

June 30, 2003

City Manager's Report No. 03-141 recommended that LU&H "support the proposed revisions to the substantial conformity review process and direct Development Services Department staff to prepare the necessary amendments to the Land Development Code and associated reference

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guides in order to implement the proposed modifications to the Substantial Conformance Review process as outlined in this report.”

July 2, 2003

The following item was on the LU&H agenda.

ITEM-1: Report from the City Manager regarding SUBSTANTIAL CONFORMANCE REVIEW.

ACTION: a) Approve the City Manager’s recommendation to support the proposed revisions to the substantial conformity review process; b) Prepare a Notice of Determination for Community Planning Groups when substantial conformance review is utilized within their planning area; c) Clarify and give specific examples in the Parking/Circulation section of the Substantial Conformance General Staff Review Guidelines; and d) Provide training to Community Planning Groups regarding substantial conformance review.

March 22, 2006

Report to City Council No. 06-032 (Attention: Committee of Land Use and Housing Agenda of March 29, 2006) addressed the Land Development Code Update Work Program.

The staff report indicated that “some items previously listed on the work program are now being processed by other disciplines in Development Services or by other City Departments.” Included under Amendments under Consideration was Substantial Conformance Review.

5) SCR PROCESS IN OTHER CALIFORNIA CITIES AND COUNTIES

SCR regulations, policies and procedures of several California cities and counties, including Santa Barbara, Del Mar, Carlsbad, Poway, Murrieta, Oceanside, and County of Riverside were reviewed. The City of Poway does not provide for Substantial Conformance Review, and according to staff the applicant must reapply for a revision. With the exception of Poway, all of the other surveyed agencies provide for a Substantial Conformance Review process. The criteria established by Del Mar, Carlsbad, and Oceanside are attached.

6) RECENT LEGAL OPINION ADDRESSING SCR UNDER PROCESS 2

The attached City Attorney Memorandum dated April 26, 2007, states that a Substantial Conformance Review performed at a Process 2 level of review is a discretionary act and, therefore, requires public notice, allows a right of appeal, and requires compliance with CEQA.

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7) CONCLUSIONS

Contrary to the assertions made in reports to LU&H and three Grand Juries and the direction of LU&H, DSD staff has not prepared amendments to the Land Development Code and Information Bulletin 500 that address the SCR process. As evidenced by the comments made by the Community Planners Committee on January 27, 2007, SCR still continues to be a concern.

8) RECOMMENDATION

To address the issues raised by the public, the Grand Juries, and the lawsuits, recommend that staff return to CPC and the Committee on Land Use and Housing with the following:

1. Amendments to the Land Development Code that require all Substantial Conformance Review to be conducted in accordance with Process 2.
2. Specific criteria for determining if modifications substantially conform to the approved permit/project.

Attachments: A – City Attorney Memorandum dated April 26, 2007
B – City of Carlsbad Substantial Conformation Guidelines
C – City of Del Mar Guide to SCR Process
D – City of Oceanside Guidelines for Determining Findings of Substantial Conformance