

**CITY OF SAN DIEGO
M E M O R A N D U M**

DATE: April, 13, 2004

TO: Members of the Community Planners Committee

FROM: Chris Zirkle, Assistant Deputy Director, Development Services
Department (DSD)

SUBJECT: April 27, 2004 CPC Agenda – Environmental Appeals Regulations

This memo has been prepared in response to comments received via email and at the March 22, 2004 CPC meeting. Staff responses are in bold. Staff will be in attendance at the April 27, 2004 meeting to answer any further questions.

Issues Raised by CPC at the March 22, 2004 CPC Meeting

1. The proposed regulations fail to address the following discretionary activities as identified by Land Development Code §128.0202 (Actions That Require Compliance with CEQA).

(a) Activities undertaken by the City such as construction of streets, bridges, or other public structures

(b) Activities financed in whole or in part by the City of San Diego.

The staff reports states that the “appeal would be applicable to exemption determinations and to Process 2 decisions (a staff level decision that can now only be appealed to Planning Commission) and Process 3 decisions (a Hearing Officer decision that can now only be appealed to Planning Commission).

What about the construction of a fire station, police station or library, or the placement of new sewer or water lines, or the acquisition of land? What about the approval of Development and Disposition Agreements or the expenditure of Community Development Block Grant Funds? What about actions by the Park and Recreation Board, the Housing Commission, and the Redevelopment Agency, or a Department Director? In summary, there are many actions may not require permits by DSD yet are subject to CEQA.

The proposed regulations provide for appeals to the City Council of all environmental determinations required by Public Resources Code (PRC) section 21152(c)—decisions by decision makers other than the City Council. It should be noted that Process 4 and 5 decisions are not included as the San Diego Municipal Code currently allows an appeal to the City Council for Process 4 decisions; Process 5 decisions are already decided by the City Council. The March 10, 2004 staff report

was intended to explain that the code amendment is applicable to all environmental determinations except for those made in conjunction with Process 4 and 5 permit determinations or actions otherwise decided by the City Council. The staff report has been revised to make the scope of appeals clearer.

2. The definition of *environmental determination* is restricted to a decision by any non-elected City decision maker. What is it called when the determination is made by City Council? Why not have the definition read as follows:

Environmental determination means a decision to certify an environmental impact, adopt a negative declaration or mitigated negative declaration, or to determine that a project is not subject to the California Environmental Quality Act (Pub. Res. Code § 21000 et seq.; “CEQA).

And then have the regulations address an environmental determination made by a non-elected City decision maker.

This comment addresses the formatting of the code amendment, not its effects. The proposed language was chosen as it is consistent with the way in which the rest of the code is written. Moreover, as discussed above, PRC section 21152(c) requires appeals of environmental determinations by decision-makers other than the City Council, with the City Council making the final determination. With environmental determinations before the City Council, the intent of section 21152(c) has already been met—the City Council is the decision-maker.

3. As currently formatted subsections (d), (e), and (f) of §112.0510 add new restrictions on the appeal of Process Two and Process Three as well as the appeal of an Environmental Determination. And yet the Manager’s Report makes only references to appeal procedures for Environmental Determinations and makes no mention of revising the appeal procedures for Process Two and Three. Are subsections (d), (e), and (f) intended to be subsections of (c)?

Staff misread this section as having (d), (e), and (f) only applicable to appeals of environmental determinations. Staff has subsequently determined that this type of provision should not be limited to just environmental appeals. These subsections have, therefore, been removed from the proposed regulation.

4. §112.0510 (d) states that “any evidence submitted after the filing date may not be considered by the City Council as part of the appeal.” This seems contrary to CEQA which clearly allows evidence to be entered at the hearing as part of the record. And if this restriction is to be allowed, it would only be fair that staff should not be allowed to enter new evidence at the Council hearing. And yet we know from past experience that is exactly what they will do. There clearly is a double standard here.

See response number 3. The subject provision has been deleted.

5. Under §112.0510 (f) the City Council should be granted the authority to direct staff on the changes that must be made to the environmental document or to the type of document that must be prepared to comply with CEQA. Just remanding to the previous decision maker seems to put the matter in limbo.

Staff believes that it will be aware of the City Council's concerns with the environmental determination after the hearing. Nothing in the proposed regulations prohibit the City Council from directing staff to make specific changes to the environmental determination.

6. Under §112.0510 (h) the lower decision maker should not just "reconsider its environmental determination" but instead should be considering the new environmental document that has been prepared by staff as directed by City Council. And most likely there will be a new public review period.

The relevant sections of the proposed code language have been revised to indicate that the lower decision maker shall consider a "revised" environmental determination.

7. §112.0510 should include a new subsection entitled "Effect of Filing Appeal" and which includes the following language: "The filing of the appeal shall stay the proceedings and effective of the lower decision maker's decision pending resolution of the appeal."

This concern is addressed by Section 112.0520(h) which specifies that, "if the City Council grants the appeal, the lower decision maker's project decision shall be deemed vacated". The effect of granting the appeal, therefore, is to also rescind the project approval. The lower decision maker is subsequently required to "consider a revised environmental determination AND its project decision..." [emphasis added]. This is consistent with the CEQA requirements that project approvals must be preceded by CEQA compliance.

8. Under §112.0510 (h)(2) why is the matter remanded to the Planning Commission? What about other lower decision makers including staff?

Section 112.0520(h)(3) has been added to the proposed ordinance to clarify that approval of Mitigated Negative Declarations and Negative Declarations and certification of Environmental Impact Reports by the City Manager (which includes City Manager designees, i.e., Department Heads) would be remanded to the City Manager. All environmental determinations that a project is not subject to CEQA are considered to be made by staff and are therefore remanded to the Development Services Director.

9. §112.0520 (c) states that “an application to appeal a determination that a project is not subject to CEQA shall be filed in the Office of the City Clerk within 10 business day from the date of the staff decision that the project is not subject to CEQA, as provided in Public Resources Code section 21080.” How and when will the public be notified of the staff’s decision that the project is not subject to CEQA?

Staff concurs that notices of environmental determinations for discretionary actions (i.e., not building permits) should be made available. Staff continues to work on specific language to address this in the proposed regulation.

10. Although not stated in the Ordinance or City Manager’s Report, the City Attorney has apparently opined that the CEQA Appeal does apply to Addenda, Supplemental EIRs, reuse of an environmental document, or categorical or statutory exemptions. What is the basis of this opinion? By choosing to prepare a Supplemental EIR staff has precluded the public from appealing an environmental determination.

As stated during the March 24, 2004, meeting, the City Attorney has advised City staff that the proposed regulations are consistent with the minimum requirements of state law. Certification of an Environmental Impact Report (EIR), to wit: Project EIR’s, Master EIR’s, Program EIR’s, Staged EIR’s, Subsequent EIR’s and Supplement to an EIR; approval of Mitigated Negative Declarations and Negative Declarations; and determinations that a project is not subject to CEQA (including, for example, categorical and statutory exemptions) are the types of actions that may be appealed to the City Council where the initial decision is made by a non-elected decision-maker. Staff is recommending appeal provisions for the minimum number of types of environmental determinations; however, the City Council could adopt language that would make other types of determinations subject to appeal.

11. *Vedanta Society of Southern California v. California Quartet, Ltd.* (2000) states that “under CEQA and its regulations, an appeal from the certification by an unelected Planning Commission must be decided by the Majority Vote of the Elected Body.” It is the opinion of Terry Roberts, Director, State Clearinghouse, Governor’s Office of Planning and Research¹, that the case would set a precedent for an appeal of a Negative Declaration as well. This determination should be codified in the Land Development Code.

City staff believes the proposed regulations address the issue raised in *Vedanta*. Section 112.0520(f) mandates that the City Council hear the appeal and make a decision.

12. Wouldn’t it make more sense to address the appeal of an environmental determination by a non-elected decision maker in Article 8 (Implementation Procedures for the

¹ E-mail of 3/23/04 from Terry Roberts to Randy Berkman

California Environmental Quality Act and the State CEQA Guidelines)? Perhaps after Section 128.0311 (Certification of an Environmental Document). Certification of an EIR or approval of a Negative Declaration is not the issuance of a permit.

This comment addresses the formatting of the code amendment, not its effects. The proposal would co-locate the environmental determination appeal process with other appeal matters.

RECOMMENDATIONS

In view of the substantial deficiencies/questions, it is recommended that the Ordinance be rewritten to address the above comments as well as other comments provided by CPC members and the public at tonight's hearing and that the revised Ordinance be brought back to CPC.

It is also recommended that after subsequent review by CPC that the matter be referred to the Natural Resources and Cultural Committee (since that committee is tasked with CEQA/NEPA issues) prior to returning to City Council.

Staff will attend the next CPC meeting to discuss this memo and any other CPC comments on the proposed regulation. Consultation with the Committee Consultant concluded that the City Council direction is to next present the proposal to LU&H, rather than NR&C, before returning the item to the City Council.

Issues Raised by CPC member Paul David at the March 22, 2004 CPC Meeting

The project applicant, not the appellant, should bear all fees and costs for appeals of environmental determinations.

The current appeal fee only recovers minor administrative staff costs associated with docketing of the appeal. All technical review staff processing costs are borne by the project applicant.

Issues Raised by Sierra Club Representative Peter David at the March 22, 2004 CPC Meeting

1. The appeal should apply to project decisions.
See response to comment 7 above.
2. The intent of the remand procedures is unclear. Can the final decision be made by an unelected decision maker?
No. An environmental determination made by and on remand to a lower decision maker could be appealed again to the City Council.
3. Notices of all environmental determination should be made public.

See response to CPC comment 9.

Issue Raised by CPC member Alex Sachs in a March 17, 2004 email to Kelly Broughton

I would really like to see CPC and the DSD consider requiring the applicant to list at least a phone number. As chair of a planning group in a busy area, I cannot tell you how many calls I get that should really be addressed to the applicant.

In my view, the applicant has a duty to make him or herself available to the community to answer questions, same as we are required to list a phone number.

For purposes of protecting privacy interests, the municipal code does not mandate that the applicant's phone number be included in a public notice. However, with the applicant's consent, the information could be provided.