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THE CITY OF SAN DIEGO

MANAGER'S REPORT

DATE ISSUED: July 29, 2005 REPORT NO. 05-169

ATTENTION: Committee on Government Efficiency and Openness
Agenda of August 8, 2005

SUBJECT: Update on the Environmental Appeals Regulations

SUMMARY

THIS IS AN INFORMATION ITEM ONLY. NO ACTION IS REQUIRED ON THE PART OF THE COMMITTEE OR THE CITY COUNCIL.

BACKGROUND

Effective January 1, 2003, Section 21151 (c) of the Public Resources Code (a portion of the California Environmental Quality Act or "CEQA") was amended as follows:

(c) *If a nonelected decisionmaking body of a local lead agency certifies an environmental impact report, approves a negative declaration or mitigated negative declaration, or determines that a project is not subject to this division, that certification, approval, or determination may be appealed to the agency's elected decisionmaking body, if any.*

This change provides for an appeal to City Council of a lower decision maker's decision to certify an environmental impact report, approve a negative declaration or mitigated negative declaration, or determine that a project is not subject to CEQA. In response, the City Council adopted the "Environmental Appeals Regulations" via Ordinance 19303 on July 13, 2004. In conjunction with approving the regulations, the Council also moved to have staff return with an update on implementation of the regulations after one year had passed.

As of July 20, 2005, the following environmental determinations have been appealed since the Environmental Appeals Regulations became effective:

Project Number	Project Name	Determination	Disposition
5170	Rashid Residence	Negative Declaration	Appeal Pending
33137	Beizai Residence	Negative Declaration	Appeal Pending
19148	Cingular St. Davids	Negative Declaration	Appeal Pending
4859	La Jolla YMCA	Mitigated Negative Declaration	Appeal Denied
6199	Olsen Residence	Negative Declaration	Appeal Denied

DISCUSSION

Format and Scope

The Environmental Appeals Regulations are formatted in a manner consistent with the Land Development Code (LDC), procedures established for Process 2-5 appeals, including who may file an appeal, the required content of an appeal, the types of notice that must be given for an appeal, the type of information that must be included in the appeal notice, and the procedures and decision process for the appeal hearings. In that environmental determinations are often made outside of the LDC permitting process, the regulations also facilitate appeal of environmental determinations by others (e.g., City Manager and designees).

The regulations allow anyone to appeal CEQA exemptions and environmental determinations associated with approvals for which there is no public hearing (i.e., Process 1 and other City Manager approvals). Only "interested persons" can appeal environmental determinations made by the Planning Commission. Most of the appeal criteria and content of the appeal notice are also the same. Appeal hearings are noticed in the same manner as other public hearings.

The regulations provide for appeals of environmental determinations except those made by the City Council and Process 4 decisions, where projects are already considered by or appealable to the City Council.

The state law specifically lists the type of CEQA documents which must be made appealable. The Environmental Appeals Regulations do not facilitate appeals of other types of CEQA documents or processes (i.e., re-use of a previously certified environmental document, addenda, etc. are not appealable).

In addition, the regulations do not facilitate appeals of statutory exemptions. Unlike categorical exemptions, which require staff to make a determination of whether the project has a significant effect on the environment (CEQA Guidelines Section 15300.2), the State Legislature has decided that statutory exemptions should be exempt regardless of their impacts. Thus, the only grounds for appeal would be whether staff appropriately classified a project as being subject to a statutory exemption; the nature of the project's impacts would not be subject to debate. Statutory

exemptions include actions/approvals such as ministerial approvals (e.g., construction permits) and certain classes of discretionary approvals (e.g., pipelines less than a mile in length, emergency projects).
The regulations do not facilitate a second appeal of the same type of environmental determination for the same project.

Noticing of Environmental Determinations
State law revisions included no new noticing provisions. In addition to noticing appeals hearings as indicated above, the City's regulations mandate the filing a "Notice of Right to Appeal" for all exemption determinations except those made for projects determined to be statutorily exempt. As required by the regulations, these notices are posted in the third floor lobby of the Development Services Center. In addition, staff in early 2005 began posting these notices on the City Clerk's Public Notice web page.

Appeals Procedures and Remands

The Environmental Appeals Regulations establish deadlines for filing appeals of environmental determinations. The deadlines are based on when the environmental determination is made and whether it is made by the City Manager (or designee) or by the Planning Commission. The appeals period runs from the date the environmental determination is made. For exemptions, staff makes the determination on behalf of the City Manager, typically well before a project is considered for approval. The appeal period then runs the earlier of 10 business days from the date the Notice of Right to Appeal is posted or 15 days from the date the determination is made. For environmental determinations, other than exemptions, made by the Planning Commission or City Manager, appeals must be filed within 10 days of the Planning Commission or City Manager decision. These appeal periods do not affect the State-mandated time limits within which lawsuits may be filed on CEQA matters.

At an appeals hearing on an environmental determination, the regulations provide the Council with three alternative actions: 1) Deny the appeal, uphold the environmental determination and, where appropriate adopt the CEQA findings of the previous decision-maker, 2) Grant the appeal and make a superceding environmental determination (in this case, any entitlement granted by lower decision maker's decision becomes effective immediately), or 3) Grant the appeal, set aside the environmental determination and remand the matter to the previous decision maker (in this case, the entitlement granted by the lower decision maker is deemed vacated and the lower decision maker must reconsider its decision on the environmental determination and entitlement). CEQA exemptions are remanded to the Development Services Director for reconsideration, while other determinations are remanded to the Planning Commission or City Manager.

A majority vote by the Council is required in order to make a decision on an appeal of an environmental determination.

At the Council hearing for the adoption of the Ordinance, staff was given direction to require appellants to base appeals on the same criteria as are currently required to appeal Process 4 entitlement decisions. Staff is working on adding this language as part of the 6th Land Development Code Update.

The ordinance requires that all entitlement-related appeals be resolved prior to appealing the associated environmental determination. In the case of entitlements subject to Process 2 decisions, such appeals are to be filed within 10 business days of the Planning Commission's decision on the project entitlements. However, when at least four Commissioners don't vote the same way, the Planning Commission is not able to reach a decision. In this situation, the ordinance provides no time for filing an appeal of the environmental determination. Staff is not aware of any environmental determination appeal that has not been filed because of this shortcoming in the ordinance, but recommends clean up language to address the issue in the event it does occur. As part of the 6th Land Development Code Update, the proposed language would replace "Planning Commission's decision" with "Planning Commission's decision or inability to overturn the lower decision". Similar language could be considered for other sections where the same problem exists with appeals of entitlements to the Planning Commission.

On a second matter, the 6th Land Development Code Update will also be proposing language to clarify that use of Section 15060(c)(3) of the State CEQA Guidelines, a determination that an action is not a "project" as defined by CEQA, is an environmental determination that is subject to appeal. Development Services' past practice has been to have decision-makers "review and consider" previously-certified environmental documents when acting on approvals that are within the scope of the previously-certified document. Recently, however, at the suggestion of the City Attorney, staff has begun to call these approvals "not a project" in accordance with Section 15378(c) of CEQA. Therefore, as part of the 6th Land Development Code Update, cleanup language will be recommended to specifically add these "15060(c)(3)" determinations to the definition of "environmental determinations" that can be appealed and to the types of environmental determinations for which Notices of Right to Appeal must be posted.

CONCLUSION

Current ordinance language requires that appeals of environmental determinations (other than exemptions) made for Process 2 decisions and appeals to the Planning Commission of entitlement decisions be filed within 10 days of the Planning Commission "decision" on an appeal of the project entitlement. As part of the 6th Update to the Land Development Code, staff is working to improve the ordinance by adding language to indicate that the appeal must be filed

within 10 days of the Planning Commission decision or inability to overturn the lower decision. Current ordinance language does not facilitate appeals of the environmental determination that an action is not a project and therefore not subject to CEQA; therefore, staff will also be proposing to add language to indicate that such a determination is appealable.

Respectfully submitted,

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Development Services Director

Approved by: Ellen Oppenheim
Acting Deputy City Manager

KGB/CZ

Attachments: 1. Statutory Exemptions Used or Potentially Used by the City of San Diego
2. Categorical Exemptions Used or Potentially Used by the City of San Diego

Attachment 1
Statutory Exemptions Used or Potentially Used by The City of San Diego
(California Environmental Quality Act Guidelines Sections 15260 et seq.)

Staff proposes that these exemptions not be appealable. The State Legislature has determined that the following activities are exempt from the California Environmental Quality Act regardless of their potential impacts.

15261 – Ongoing Projects – Project which were initiated prior to the enactment of CEQA.
15262 – Feasibility and Planning Studies
15265 – Adoption of Local Coastal Plans and Programs
15266 – General Plan Time Extensions
15267 – Financial Assistance to Low and Moderate Income Housing
15268 – Ministerial Projects – Process 1 Decisions including Construction Permits (Building Permits, Electrical Permits, Plumbing/Mechanical Permits, Demolition/Removal Permits, Grading Permits, Public Right-of-Way Permits, and Sign Permits), Substantial Conformance Reviews, Classification of Use
15269 – Emergency Projects – Actions to respond to or prevent emergencies
15270 – Projects Which Are Disapproved
15273 – Rates, Tolls, Fares, and Charges – Obtaining Funding; purchasing/leasing of supplies and equipment
15274 – Family Day Care Homes
15275 – Specified Mass Transit Projects
15276 – Transportation Improvement and Congestion Management Programs
15279 – Housing for Agricultural Employees
15280 – Lower-Income Housing Projects – Subject to several conditions
15282(e) – Construction of Housing or Neighborhood Commercial Facilities – in urbanized area and pursuant to an adopted Specific Plan
15282(f) – Conversion of a rental mobile home park to condominium ownership
15282(h) – Railway grade separation projects
15282(j) – Adoption of ordinances allowing second units in certain residential zones
15282(k) – Projects which re-stripe streets or highways to relieve traffic congestion
15282(l) – Installation, maintenance, repair, etc. of pipelines less than one mile in length
15282(m) – Initiation of General Plan Amendments
15282(q) – Adoption of a nondisposal facility element
15282(s) – Determinations made regarding regional housing needs
15282(t) – Actions needed to bring a General Plan into compliance pursuant to a court order
15282(u) – Industrial Development Authority activities
15282(w) – Adoption of Urban Water Management Plans

Attachment 2
Categorical Exemptions Used or Potentially Used by The City of San Diego
(California Environmental Quality Act Guidelines Sections 15300 et seq.)

Staff proposes that these exemptions be appealable. The State Legislature has determined that the following classes of activities are exempt from the California Environmental Quality Act unless:

1. The cumulative effect of successive projects of the same type in the same place over time is significant.

2. There is a reasonable possibility that the activity will have a significant effect on the environment due to unusual circumstances.

3. The project may result in damage to scenic resources.

4. The project is located on a hazardous waste site.

5. The project may cause a substantial adverse change in the significance of a historical resource.

15301 – Existing Facilities – Operation, repair, maintenance or minor alteration
15302 – Replacement or Reconstruction – of existing structures and facilities
15303 – New Construction or Conversion of Small Structures -
15304 – Minor Alterations to Land
15305 – Minor Alterations to Land Use Limitations
15306 – Information Collection
15307 – Actions by Regulatory Agencies for Protection of Natural Resources
15308 – Actions by Regulatory Agencies for Protection of the Environment
15309 - Inspections
15311 – Accessory Structures
15312 – Surplus Government Property Sales
15313 – Acquisition of Lands for Wildlife Conservation Purposes
15315 – Minor Land Divisions
15316 – Transfer of Ownership of Land in order to Create Parks
15319 – Annexations of Existing Facilities and Lots for Exempt Facilities
15320 – Changes in Organization of Local Agencies
15321 – Enforcement Actions by Regulatory Agencies
15323 – Normal Operations of Facilities for Public Gatherings
15325 – Transfer of Ownership of Interest in Land to Preserve Existing Natural Conditions and Historical Resources
15326 – Acquisition of Housing for Housing Assistance Programs
15327 – Leasing of New Facilities

15329 – Cogeneration Projects at Existing Facilities
15330 – Minor Actions to Prevent, Minimize, Stabilize, Mitigate or Eliminate the Release or Threat of Release of Hazardous Waste or Hazardous Substances
15331 – Historical Resource Restoration/Rehabilitation
15332 – In-Fill Development Projects – under certain conditions