THE CITY OF SAN DIEGO

REPORT TO THE CITY COUNCIL

DATE ISSUED: August 26, 2009 REPORT NO: 09-118

ATTENTION: Committee on Land Use and Housing, Agenda of September 2, 2009

SUBJECT: AMENDMENTS TO THE SUBSTANTIAL CONFORMANCE REVIEW PROCESS.

REQUESTED ACTION: Consideration of an amendment to Municipal Code Section 126.0112 to elevate all Substantial Conformance Reviews to a Process-Two decision.

STAFF RECOMMENDATION: Do not adopt an amendment to Municipal Code Section 126.0112 to revise the current Substantial Conformance Review process. Support utilization of the "Guidelines for Measurement of Substantial Conformance Review" as contained within the Development Services Department's Information Bulletin 500 (see Attachment 2).

SUMMARY:

The City of San Diego's Land Development Code (Section 113.0103) defines Substantial Conformance (S.C.R.) as a revision to a development project that was approved through a permit or tentative map, that complies with the objectives, standards, guidelines, and conditions for that permit or tentative map.

The Land Development Code (Section 126.0112) goes on to state that a proposed minor modification to an approved development permit may be submitted to the City 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.

Currently an S.C.R. decision outside the Coastal Zone is a Process-One staff level decision. Although a public notice is not provided, as a courtesy the S.C.R. application is distributed to the affected Community Planning Group. A Process-One staff-level decision is not appealable.

Within the Coastal Zone an S.C.R. determination is a Process-Two decision, which is a publicly noticed staff level decision with appeal rights to the Planning Commission. Under a Process-Two decision, the City distributes the S.C.R. application to the affected Community Planning Group for their review, consideration, and action. All Process-Two decisions are staff-level decisions, and include up to three separate public notices: a Notice of Future Decision is mailed out to all properties within 300-feet of the project at least 11 days prior to the staff decision; that

Notice of Future Decision is posted on the project site; and a Notice of Decision (if one is requested) is mailed to any interested persons.

The Process-Two procedure also includes an appeal component that allows any member of the public to appeal the decision for any reason to the Planning Commission, regardless of any involvement that appellant may have had with the project previously.

The S.C.R. process is fundamental to the land development review process, and has been a standard practice within the Development Services Department for at least a decade. The S.C.R. process has generally been an efficient and effective practice for the majority of all projects throughout the years, however in the 2001-2002 timeframe City staff approved four S.C.R. applications which triggered some controversy within the community.

Between 2002 and 2005 three Grand Jury reports were issued which in part addressed the City's S.C.R. process. One of those Grand Jury reports found that the City's S.C.R. process is flawed if it precludes public input. Part of the City's response to that finding indicated that City staff would forward to the City Council amendments to the Municipal Code to elevate a S.C.R. to a Process-Two decision. The draft Municipal Code amendment elevating a S.C.R. to Process-Two is included in Attachment 1.

Purpose of Substantial Conformance Review

S.C.R. is triggered by an applicant's desire to revise a project's design after the City has approved the original discretionary permit/project. This can result from a variety of factors including but not limited to: encountering unknown field conditions; from a property owner's desire to make improvements to the development proposal; from a change request by a potential buyer; as result of changes in the marketplace; from unexpected project construction costs; or because of a change in project ownership.

These changes can be requested at various points in the review or construction process. Many S.C.R.'s are processed as construction changes that occur once construction is underway and are often time-sensitive. Others are done well in advance of an applicant submitting plans for construction permits.

Staff begins an S.C.R. by first determining the nature and extent of the change being proposed by comparing it to the approved discretionary permit/project, including the approved permit conditions. Staff then determines if the changes are consistent with the prior approval. Appropriate land use plans (e.g. the General Plan, community plans, etc.) are then reviewed to determine if the proposed S.C.R. is still consistent with applicable guidelines and objectives.

Staff then consults with the public record for the initial approval including project notes, written correspondence, testimony at decision hearings (through reviewing the minutes and/or the hearing video archives), and discussions with staff involved in the original approval. Staff also reviews applicable regulations to insure that the proposed modifications would still comply. Professional judgment is then used, as well as the guidelines contained within Information

Bulletin 500, to make the determination of whether the revised project is in substantial conformance with the original approved project.

Examples of typical S.C.R. applications include the following: Construction of individual structures pursuant to previously approved master permits or plans (i.e. build-out of shopping centers, technology parks, master planned communities, business parks, etc.); Replacement of similarly sized antennae on existing wireless telecommunication facilities; Minor architectural modifications and/or minor additions to single-family homes and multi-family projects; Changes in driveways and or parking lot layouts internal to a project; Modifications to signage and sign plans; Landscaping modifications; etc.

City Staff reviews an average of 80 Substantial Conformance Review applications per year. Since 2002, City staff has processed over 300 Process-One S.C.R. applications without significant controversy, argument, or debate from the community.

City Staff Recommendation:

The City staff recommendation is to maintain the status quo in regards to the current S.C.R. process, which includes the following components:

A. Require a Process-Two approval for all S.C.R.'s within the Coastal Zone.

B. Maintain the current Process-One approval for all S.C.R.'s outside the Coastal Zone, and continue to send S.C.R. applications (for both Process-One and Process-Two) to the affected Community Planning Group.

C. When reviewing S.C.R. applications, staff will utilize the "Guidelines for Measurement of Substantial Conformance Review" as contained within the Development Services Department's Information Bulletin 500.

Community Planners Committee Recommendation:

The Community Planners Committee recommendation (see Attachment 3-Memo from Dave Potter) is to require a Process-Two Approval for all S.C.R. requests. This change would require amendments to Municipal Code Section 126.0112 (see Attachment 1-Draft strike-out/underline Ordinance). CPC also recommended that the City publish specific criteria for determining if modifications substantially conform to the approved permit/project. This recommendation has been incorporated into Information Bulletin 500 (see Attachment 2).

Technical Advisory Committee Recommendation:

The Technical Advisory Committee Recommendation is identical to the City staff recommendation to make no changes to the current S.C.R. process, and to utilize "Guidelines for Measurement of Substantial Conformance Review" as contained within the Development Services Department's Information Bulletin 500.

CONCLUSION:

The fundamental purpose of the S.C.R. process is to evaluate minor modifications to previously approved discretionary projects that have no material impact beyond the project's boundaries. Because these types of applications are typically minor in scope and generate no new impacts, a Process-One decision is the most practical, efficient, and effective review process.

Staff does not believe that elevating the S.C.R. (outside the Coastal Zone) to a Process-Two is warranted given the following: 1) Over the past 6-7 years there is little evidence of any fundamental problem with the current S.C.R. process. 2) Since the Grand Jury Reports were issued, the S.C.R. process has proven to be a very effective land use regulatory mechanism due in part to staff training and the distribution of S.C.R. applications to the affected community planning groups. 3) Imposing supplemental regulatory requirements on the S.C.R. process will generate financial impacts for applicants, and will necessitate longer processing times. 4) The publication of written review guidelines (within Information Bulletin 500) will help achieve staff consistency in S.C.R. determinations and will clarify in advance (for all stake-holders) how S.C.R. applications will be reviewed.

For these reasons City staff is recommending no changes to the current Substantial Conformance Review process.

FISCAL CONSIDERATIONS: The imposition of a Process-Two decision for all S.C.R.'s will result in additional financial costs and increased processing times for affected applicants.

PREVIOUS COUNCIL and/or COMMITTEE ACTION: The City Manager presented S.C.R reports to the Land Use and Housing Committee on the following dates: June 26, 2002; October 9, 2002; and July 2, 2003 (see Attachment 3).

COMMUNITY PARTICIPATION AND PUBLIC OUTREACH EFFORTS:

Community Planners Committee: At their meeting on September 23, 2008, The Community Planners Committee (CPC) recommended that all S.C.R. applications be managed through a Process-Two decision. This recommendation was approved again by CPC during their meeting of July 28, 2009, by a vote of 16-7-2.

CPC also recommended that the City publish specific criteria for determining if modifications substantially conform to the approved permit/project. On July 28, 2009, City staff presented specific S.C.R. review guidelines to CPC (See Attachment 2 - Information Bulletin 500-Substantial Conformance Review). CPC considered a motion to remove the word "significant" from the Land Use section of those review guidelines, however that motion failed by a vote of 8-16.

Technical Advisory Committee: At their meeting on August 12, 2009, The Technical Advisory Committee of the Land Use and Housing Committee voted (11-0-0) to approve the staff recommendation with the following change: That the word "only" be removed from the Parking/Circulation section of the Guidelines for Measurement of Substantial Conformance

Review as follows: "Typically, ~~only~~ minor changes to an approved project's parking and traffic circulation should be considered or approved under substantial conformity review".

San Diego Regional Chamber of Commerce-Housing Committee: On August 14, 2009, the Housing Committee of the Chamber of Commerce voted unanimously to support the City staff recommendation. The vote included adding the following language to the review guidelines: "For mixed-use projects, the density/intensity of each use approved within the project may be transferred (but not eliminated) between uses provided the overall traffic generation for the site is not exceeded and no other environmental impacts are generated".

KEY STAKEHOLDERS AND PROJECTED IMPACTS: Stakeholders include all applicants for Substantial Conformance Review, Community Planning Groups, the Public, and the Development Services Department. Adoption of this amendment to the Municipal Code will further regulate the SCR process, resulting in addition costs and timing impacts for the building industry.

Kelly Broughton
Director, Development Services Department

Jay Goldstone
Chief Operating Officer

Attachments:

1. Draft Amendment to Municipal Code Section 126.0112.
2. Information Bulletin 500 with Draft Attachment A – Guidelines for Measurement of Substantial Conformance Review.
3. Memorandum from Dave Potter to the Community Planners Committee.

STRIKEOUT ORDINANCE

OLD LANGUAGE: ~~STRIKEOUT~~
NEW LANGUAGE: UNDERLINE

ORDINANCE NUMBER O-_____ (NEW SERIES)
ADOPTED ON _____

AN ORDINANCE OF THE COUNCIL OF THE CITY OF SAN DIEGO AMENDING CHAPTER 12, ARTICLE 6, DIVISION 1, BY AMENDING SECTION 126.0112, OF THE SAN DIEGO MUNICIPAL CODE, ALL RELATING TO MINOR MODIFICATIONS TO A DEVELOPMENT PERMIT.

§126.0112 Minor Modifications to a Development Permit

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 Zone,~~ a<u>A</u>ny substantial conformance determination shall be reached through a Process Two review.

THE CITY OF SAN DIEGO

MINIMUM STANDARDS FOR

Substantial Conformance Review

CITY OF SAN DIEGO DEVELOPMENT SERVICES
1222 FIRST AVENUE, MS 302, SAN DIEGO, CA 92101-4101
CALL (619) 446-5300 FOR APPOINTMENTS AND (619) 446-5000 FOR INFORMATION

INFORMATION BULLETIN

500

JULY 2009

The goal of Substantial Conformance Review (SCR) is to determine if the proposed project is consistent and in conformance with a previously approved permit. This includes a review of the revised project against the approved exhibits, permit conditions, environmental documentation, applicable land use policies and the public record for the prior permit. Staff will recommend approval of the modified project (utilizing the guidelines for measurement - see Attachment A) if the change falls within the parameters of the prior approval. A Substantial Conformance Review decision is either at staff-level (Process 1) or is a decision by staff that requires input from the Community Planning Group and is appealable to the Planning Commission (Process 2). (Please note that all Process 1 SCR applications are distributed to the affected community planning group as a courtesy notification). If the only prior discretionary action, however, was a tentative map or vesting tentative map and a final map for the project has been approved, then this service is not available.
For Wireless Communication Facility SCR's see information bulletin 536.

Documents referenced in this Information Bulletin

- Information Bulletin 512, How to Obtain Public Noticing Information
- Information Bulletin 536, Submittal Requirements and Procedures for Wireless Communication Facilities
- General Application, DS-3032
- Deposit Account/Financially Responsible Party, DS-3242

I. SUBSTANTIAL CONFORMANCE REVIEW -PROCESS 1

Unless otherwise stated as a permit condition or as required by the Municipal code, Substantial Conformance Review is an optional service available to customers who are proposing to modify their project after a discretionary permit has been approved by the City. This optional service is offered to allow customers to provide only the information needed to make a conformance determination without having to go to the expense of preparing complete construction documents. The process does not include a review for conformance with other City regulations, which is performed when an application for a construction permit approval such as a building, grading, or public improvement permit is made.

Instead of a SCR, customers may choose to include their project changes as part of a complete construction permit application (building permit, grading permit, public improvement permit, etc.). Staff will review the project change for conformance with the prior permit as part of the process of checking the plans against applicable regulations. If the project changes are not deemed to be in conformance with the previously approved discretionary permit, minor to significant project redesign or an amendment to the previously approved permit may be required. The customer makes the choice to risk a full construction permit submittal or to opt for the more tailored SCR service.

II. SUBSTANTIAL CONFORMANCE REVIEW -PROCESS II

Some prior approvals require Substantial Conformance Review to go through a Noticed Decision process (Process 2). This higher decision process is either a condition within the development permit itself or is required by the Municipal Code (e.g., SCR's within the Coastal Overlay Zone).

III. SUBMITTAL REQUIREMENTS

Phone (619) 446-5300 to schedule a submittal appointment for SCR. At this appointment, provide the information in the quantities shown below. You may provide one copy of everything for a determination by staff of the final number of copies that would be required as the quantities may vary depending upon the magnitude of the change:

A. Provide twelve (12) copies of the following:

1. A letter detailing the modifications being proposed to the project that was previously approved;
2. The final approved permit and resolution(s) of the subject permit;
3. The approved Exhibit A drawings and documents that are being affected by the proposed project modifications.
4. Marked up Exhibit A drawings and documents or new drawings at the same scale as the approved exhibits that

clearly show and highlight the proposed project modifications.

5. Plans with 6 sheets or less may be bound (stapled) and folded to 8 1/2" x 11" with the Title Block facing out. Plans with 7-19 sheets must be folded separately to 8 1/2" x 11" with the Title Bock facing out. Plans with 20 or more sheets may be bound (stapled) and do not need to be folded.

B. General Application (DS-3032) Part I

C. Deposit Account / Financially Responsible Party (DS-3242)

D. For SCR's in the Coastal Zone or when a Process 2 SCR is required by a previously approved development permit, a Public Notice Package is required. See Information Bulletin 512, "How to Obtain Public Noticing Information," for more details.

IV. FEES

The following fees/deposits are required at the time of project submittal with the exception of the Fire Plans Officer Review Fee (applicability of this fee to be determined during project review).

A. General Plan Maintenance Fee
This fee is charged for projects with plans and documents to be reviewed for compliance with the general plan or land development code provisions.
General Plan Maintenance Fee ..... $ 88

B. Mapping Fee
This fee is charged when there are plans, drawings, maps or other geographical documents utilized for project review.
Mapping Fee ..... $ 10

C. Discretionary Project Close Out Fee
This fee is charged to pay for plan processing, notarizing documents, permit recordation, and archiving the project file after final hearing or appeal is completed.
Discretionary Project Close Out Fee... $ 500

D. Fire Plan Review Fee
This fee is charged for the Fire Plans Officer review of most development permit projects.
Fire Plans Officer Review Fee ..... $ 300

E. Substantial Conformance Review Deposit
A Trust Fund account is established with an initial deposit. This initial deposit is drawn against to pay for the review of your project. During project review, the Financially Responsible Party (as identified on the Deposit Account / Financially Responsible Party, DS-3242) will receive a monthly deposit statement reflecting the charges made against the account.

The Financially Responsible Party may receive invoices for additional deposits for subsequent reviews of the project in order to maintain the minimum balance as shown below. The payment of this invoice will be required in order to continue processing your project. At the end of the project, any remaining funds will be returned to the Financially Responsible Party.
Initial Deposit $2,000
Subsequent
Review/Minimum Balance..... $1,000

ATTACHMENT A

GUIDELINES FOR MEASUREMENT OF SUBSTANTIAL CONFORMANCE REVIEW

BACKGROUND:

At the time a discretionary project is approved by the City, it is acknowledged by both the Development Services Department and the developer that the plans being approved are "conceptual plans." The plans are of sufficient detail to show department staff and citizens what the project will be and how it will look. However, the developer, because of cost and the uncertainty of whether the project will be approved, does not prepare construction documents for the discretionary review phase of the project. After a project is approved, a developer may find it necessary to modify the project. These guidelines give some guidance as to the limits that such projects can be modified without requiring a formal amendment to the project.

A FINDING OF SUBSTANTIAL CONFORMITY CANNOT BE MADE IF CHANGES OR MODIFICATIONS TO A PROJECT ARE INCONSISTENT WITH FACTORS OR ISSUES THAT WERE SPECIFICALLY DISCUSSED AND/OR ADDRESSED BY STAFF AND/OR THE DECISION-MAKER AT A PUBLIC HEARING.

GENERALLY, THE MORE SIGNIFICANT THE CHANGE, THE MORE DIFFICULT IT WILL BE TO DETERMINE SUBSTANTIAL CONFORMITY. CONVERSELY, IT CANNOT BE ASSUMED THAT SEEMINGLY MINOR CHANGES WILL BE FOUND IN SUBSTANTIAL CONFORMITY IF IT WAS A SPECIFIC PROJECT ISSUE IDENTIFIED WITHIN THE PROJECT FILE, STAFF REPORT, RESOLUTION OF APPROVAL, AND/OR IN THE PUBLIC HEARING MINUTES.

DETERMINATION:

Following are issues to be considered and evaluated when reviewing a Substantial Conformity Review Application.

Land Use – No significant change in land use (permitted uses) from that which was approved can be found to be in substantial conformity to the original permit. Unless the permitted uses section of permit specifies uses permitted by the underlying zone, only those land use categories identified on the permit are to be allowed.

Intensity of Development – No increase in density for residential projects may ever be granted under substantial conformance. A minor decrease in the residential density of a project may be considered, so long as it remains consistent with the minimum designations of the adopted policies and plans and does not affect the sizing of public facilities within the Community. The issues of concern here are consistency with the environmental document and permit which typically only analyze and permit maximum densities, and the ability to size and finance public facilities based on the approved density.

For commercial and industrial projects, no increase in Floor Area Ratio (FAR) or coverage maybe granted inconsistent with a permit or exhibits. Only a minor decrease in FAR or coverage (generally no more than 10 percent–so long as it does not affect the sizing of public facilities within the Community) can generally be found to be in substantial conformance.

The wholesale substitution of one type of housing product for another (e.g., going from an approved multi-family apartment building to an attached town-house design) is not generally in substantial conformance. Such a change is quite complex and would affect several other of the design issues discussed here.

Site Design – Site design changes can run the gamut from minor siting changes on a building to completely reorienting the footprint of one or more buildings or relocating parking, driveways, land-

scaping or some other approved element of a project.

This can be the most difficult of issues to evaluate. It could be possible to reverse the footprint of an entire shopping center and have no adverse results however doing the same for a single-family residence would adversely affect adjacent properties and be considered inappropriate without an amendment to the permit.

Site design changes proposed for an approved project should not significantly alter nor affect the other issues discussed here. Coordination of SCR review with other departments/divisions is generally necessary when there are site design changes proposed. Consultation with the Community Planning Group is critical in significant site design changes to ensure that the expectations of the Community during the original approval process are upheld. In many cases the modified site design is a result of more refined site studies, construction plans or specific tenant needs.

Parking/Circulation – Typically, only minor changes to an approved project's parking and traffic circulation should be considered or approved under substantial conformity review.

Architecture – Review of proposed changes to the architectural style of an approved project should weigh the significance that the department and/or the decision-maker(s) placed on the appearance/architectural style of the project when it was approved. Where findings of neighborhood compatibility were required to be made, even minor changes to architectural elements or materials could be considered significant. Though the City does not regulate private views, increasing the height of a flat roof structure to a gabled roof could affect neighbors and lead to some controversy over why the design change occurs after the public hearing. The overriding goal should be that the modified plans result in a project that is "better than or equal to" the conceptual plans that were approved. This is an aesthetic determination, not an economic one.

Accessory Uses/Structures – Proposed Changes to a project's accessory uses or structures need to be reviewed within the context of the significance given to them in the course of the project review and approval process. Applicants cannot propose an Olympic size swimming pool and then convert the area to an open grassy space. However, substituting facilities of a similar nature and size may be acceptable. The addition of accessory uses/structures needs to consider whether the use or structure is truly accessory in nature to the approved use and project design and how it physically fits into the project.

Environmental Documents

No projects can be found to be in substantial conformance if it exceeds the elements described and analyzed in an environmental document. Increased density, grading, traffic, biological impacts, etc., needs to be closely scrutinized and evaluated.

Landscaping

The overriding principle is that wholesale modification in the overall amount of landscaping should not be approved. Minor changes may be appropriate but these must be viewed in the context of the full landscape program for the project. Eliminating significant amounts or types of landscape treatment only because of the cost is not substantial conformance. However, the replacement of landscape materials with drought tolerant plants may be allowed if the resulting landscape complies with the regulations of the San Diego Municipal Code.

Conditions

Conditions contained within a permit cannot be changed through substantial conformance review. Substantial conformance review can be used to make minor changes to an approved project or facility as described in a permit or shown on an Exhibit "A" as long as those changes comply with all conditions of the permit. Any changes that are inconsistent with permit conditions are not allowed.

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 500[1] (Substantial Conformance Review) discusses the goal, process, and submittal requirements for SCR.

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[1] Updated ~~July 2008~~ March 2009.

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.

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

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.

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:

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 <u>further</u> 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.

<u>Grand Jury 2004-2005 Report</u>

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.

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

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.

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

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.

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