

CITY OF SAN DIEGO WETLANDS ADVISORY BOARD

June 27, 2010

Mayor Jerry Sanders and Members of the City Council
City of San Diego
202 C Street
San Diego, CA 92101

SUBJECT: Amendments to the Land Development Code, Wetlands Deviations

Honorable Mayor and Members of the City Council:

The City is considering adopting a series of amendments to the Land Development Code which will allow deviations from Code provisions that are intended to protect wetlands. The Wetlands Advisory Board is concerned that the proposed amendments will result in an excessive loss of wetland function and value. Our region is said to have lost over 90% of its wetlands due to past development. We urge that the amendments be modified to avoid future excessive impacts.

These amendments provide three types of measures that will allow the development of wetlands. We will address each one in the following paragraphs:

ECONOMIC VIABILITY:

This measure will allow a wetland to be developed if it can be shown that avoiding destruction of the wetland is not "economically viable". The decision would require that the applicant provide a substantial list of financial information to support his claim. However, no criteria are provided for determining whether preserving the wetland is economically viable or not. We urge that this deviation be rejected in its current form

In earlier discussions, City staff has stated that the purpose of this deviation is to avoid a constitutional taking. The Wetlands Advisory Board recommends that the standard for allowing this deviation should be consistent with the standard for a constitutional taking. An extensive body of law exists to guide a decision on whether a taking has occurred. We urge that the proposed amendment be modified to assess whether requiring that a wetland be preserved would constitute a taking or not based on case law, using the financial data specified currently in the proposed amendment. This is the test that will guide state and federal agencies regulating that same wetland. We anticipate that this standard will be met only rarely, as city staff indicated that they are not aware of any applicants who had asserted that protecting a wetland would constitute a taking.

Use of the "economic viability" standard will establish an unnecessarily loose criterion that will be difficult for the City to implement fairly and consistently, will be subject to manipulation, and will involve the City in battles of experts, all of which will undermine the intended effects of the Code amendments.

Due to its lack of specificity, the proposed economical viability standard will be much easier to justify than a constitutional taking. Thus, it is very likely that a loss of wetlands will occur from this proposed weakening of our Land Development Code.

ESSENTIAL PUBLIC PROJECTS:

The proposed amendments also include an exception for what are referred to as "Essential Public Projects". These projects range from playing fields to sewer mains and will take a significant portion of our remaining wetlands and waterways. While all of the projects included

are important for our communities, none are wetland dependent (i.e., none need the wetlands resources to serve the project purpose), and most can be constructed in other locations. We urge that the Essential Public Project deviation be applied only to infrastructure which can not avoid wetlands, such as some gravity-flow sewer mains and stormwater pipes and major thoroughfares. The other facilities that are listed for this deviation should be located in other locations or modified through project design to avoid wetland impacts.

BIOLOGICALLY SUPERIOR ALTERNATIVES:

The proposed amendments would also allow a deviation from the protections of the Land Development Code in cases in which the Development Services Department deems that the wetlands are of relatively low value and the resulting mitigation would provide a greater biological benefit than preserving the wetland. We agree that some wetlands may be in locations and circumstances that would prevent them from ever again providing much of the functions and values that wetlands normally provide. But the criteria in the amendment are not protective enough to limit destruction to these kinds of wetlands. We urge that the criteria be revised to more clearly protect wetlands that can be enhanced or restored.

This proposed amendment requires a doubling of the City's normal mitigation ratio to qualify for the deviation for the biologically superior alternative, which is appropriate to make sure that it will actually provide superior values. But the amendment provides a loophole from these elevated ratios "if it results in less habitat fragmentation, fewer edge effects, and/or conserves the rarest and highest quality on-site biological resources," in which case only the normal mitigation ratios would be required. This loophole is totally inappropriate. All mitigation projects should have functional connectivity and minimal edge effect impacts and should fully offset the rare and high quality wetland resources, or they should not be used as mitigation for any project, let alone for one that claims to be biologically superior. We urge that the double mitigation ratios should be required for all projects that are allowed under the biologically superior alternative, and that monitoring and management in perpetuity be provided to assure that the outcome will actually be biologically superior in the long run.

MITIGATION FOR EACH DEVIATION:

We urge that the mitigation for projects under each of these deviations be required to replace any loss of wildlife connectivity due to the destruction of the initial wetland, as well as mitigating for the other wetlands functions and values lost.

CONCLUSIONS:

The Wetlands Advisory Board disagrees with the EIR's conclusion that these amendments would not result in a significant environmental impact. We recommend that the amendments be modified as described above, if they are adopted. If this is done appropriately, the modified amendments will provide reasonable protections for the remaining wetlands of our City.

In case of questions or comments, I can be reached at 619-224-4591 or peugh@cox.net.

Respectfully,



James A. Peugh, Chairman
City of San Diego Wetlands Advisory Board