MEMORANDUM OF LAW

DATE: July 30, 1985

TO: Diana L. Dugan, Planning Department

FROM: City Attorney

SUBJECT: Requirement for Final Environmental Report for Planning Director Hearings

On June 21, 1985, we met and amongst other things discussed a practice which the Planning Department has allowed to occur which involves the scheduling of hearings before the decision-making body when it was known that the environmental report would not be final as of the hearing date. The department has followed this practice notwithstanding the fact that it and the applicant knew that the project would have to be disapproved as a matter of law for failure to comply with the California Environmental Quality Act (CEQA) because the environmental report would not be final as of the hearing date. The department has relied upon Section 21080(b)(5) of the Public Resources Code, a provision contained

in CEQA, as authority for this practice. It was my opinion that this practice should be discontinued and that the environmental report be final prior to the commencement of the hearing by the decision-making body. The purpose of this memorandum is to memorialize that opinion.

The applicable law which relates to this question is Section 21080(b)(5) of the Public Resources Code which states that CEQA does not apply to "projects which a public agency rejects or disapproves." Section 15270(a) of the State CEQA Guidelines reiterates this provision and provides in Section 15270(b) as follows:

> This section is intended to allow an initial screening of projects on the merits for quick disapproval prior (emphasis added) to the initiation of the CEQA process where the agency can determine that the project cannot be approved.

The statement of reasons for amending the CEQA guidelines to provide for Section 15270 can be found in the California EIR Monitor, Volume 9, No. 15, Page 130. The statement provides:

> This section identifies and interprets the exemption for disapprovals. This exemption was originally added to CEQA because some applicants claimed

that a public agency could not turn down a permit application without first preparing an EIR or negative declaration. The agencies believed that they should be able to reject an application if they could determine from a quick initial screening that the project was incompatible with existing zoning or some other requirement so that the agency would be without legal authority to approve the project. The guidelines codify this interpretation that was the common understanding among people involved with the bill that created the exemption. . . .

Also, note that the term "public agency" is used in Section 21080(b)(5) and Section 15270 rather than the term "decision-making body." The term "public agency" is defined in Section 21063 of the Public Resources Code and incorporates any "city" as a public agency. In our opinion, the use of the term "public agency" in these sections was purposeful to the extent that the denial of the project must be one which is clearly required by the "public agency" not just a "decision-making body" within the "public agency."

In other words, Section 21080(b)(5) and Section 15270 should not be used as a basis to schedule a matter before a "decision-making body" in contemplation of a project disapproval but in

anticipation of a project approval at a later time by an adminis-
trative appellate body. Once it has been determined that a project is subject to environmental review, the environmental report should be final prior to the commencement of a hearing by the decision-making body.

Please call me at extension 6220 should you have any questions.

JOHN W. WITT, City Attorney

By

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Deputy City Attorney

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