

**Office of
The City Attorney
City of San Diego**

**MEMORANDUM
MS 59**

(619) 236-6220

DATE: November 22, 2006

TO: Honorable Mayor and Members of the City Council

FROM: City Attorney

SUBJECT: Navy Broadway Complex Project Environmental Appeal Hearings

INTRODUCTION

Based upon the attached email, it is our understanding that President Peters' Office will schedule the Navy Broadway Complex Project environmental appeal hearings for January 9, 2007. These hearings involve (1) the appeal filed by Mr. Ian Trowbridge as an individual and on behalf of the Broadway Complex Coalition on October 26, 2006 challenging the adequacy of the Analysis prepared by the Development Services Department ("DSD") pursuant to Public Resources Code Section 21166, and (2) the appeal dated November 3, 2006 (revised November 7, 2006) filed on November 6, 2006 by Ms. Katheryn Rhodes and Mr. Conrad Hartsell, M.D., addressed to both the City of San Diego and the Centre City Development Corporation ("CCDC"). At its October 25 meeting, CCDC did in fact adopt a resolution as a responsible agency regarding the CEQA analysis for the Navy Broadway Complex Project. The resolution in essence adopted the Analysis of DSD. Subsequent to adoption of said resolution, CCDC commenced its consistency determination deliberations. This office is not aware of any other appeals which were filed relative to this environmental issue.

On a separate but somewhat parallel track, it should be noted that the environmental analysis that considers the Navy's actions in relation to the Navy Broadway Complex Project (e.g., the Lease) is one that occurs under the provisions of the National Environmental Policy Act ("NEPA") and is initiated, overseen, and addressed by the Navy. Under this separate but parallel track, the Navy has performed a subsequent environmental analysis under NEPA to review the environmental impacts of the Navy Broadway Complex Project. That analysis is yet to be formally released and when it finally is, it will be subject to the provisions of NEPA and not the provisions of CEQA.

As previously stated in this office's Memorandum of October 4, 2006, while the consistency determination of CCDC is not appealable, a "CEQA determination associated with CCDC's consistency determination is appealable to the San Diego City Council under the provisions of CEQA [Public Resources Code Section 21151(c)]." This section provides as follows:

If a nonelected decision-making 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 decision-making body, if any.

In other words, as they relate to the Navy Broadway Complex Project, both the Analysis prepared by DSD and the CEQA resolution adopted by CCDC are separate appealable actions under CEQA. Any other appeals properly filed on or before November 14, 2006 (pursuant to San Diego Municipal Code Section 112.0520(b)) should also be docketed for the same January 9, 2007 City Council meeting. It is recommended that the appeal hearings should be docketed separately, back-to-back, with the appeal of the 21166 Analysis by DSD being listed first. There should be separate documentation for each agenda item so as to provide the City Council with sufficient information for their consideration. The City Council then has the latitude to permit speakers on one appeal to comment in the same presentation on any other appeal. This would seem to effectively provide to the City Council a manageable approach for arriving at its decision after the completion of the appeal hearing process.

The bottom-line decision of the City Council at the end of the appeal hearing process will be dispositive of both the action taken by DSD and by CCDC; that is, "Is the Analysis prepared by DSD adequate under CEQA?" If the answer to this question is "yes," then no further environmental documents are needed and the adoption of the resolution by CCDC is sufficient since it adopted DSD's Analysis. If the answer to this question is "no," then further CEQA processing would be required by DSD, CCDC's adoption of its resolution is inadequate, and CCDC's consistency determination is held in abeyance pending completion of the additional necessary environmental documents. It is further recommended that after the City Council concludes the appeal hearing process and arrives at its decision(s), the City Attorney is then directed to prepare the appropriate resolution(s) memorializing said decision(s) and bring them back for City Council action at its meeting two weeks hence. This will permit appropriate findings to be included in the resolution(s) based upon the public testimony and information received during the appeal hearing process. Of course, any decision of the City Council is subject to subsequent judicial action.

In the context of the appeal hearing process, questions have arisen concerning its impact and effect on any lease which might be entered into between the Navy and Manchester Pacific Gateway, LLC ("Manchester"). This Memorandum addresses those questions.

QUESTIONS PRESENTED

1. Does the filing of an appeal challenging the environmental actions of DSD and/or CCDC in connection with the Navy Broadway Complex Project stay or prevent the Navy and Manchester from entering into a Lease?
2. If the Navy and Manchester enter into a Lease prior to the scheduled date of the appeal hearings, what is its effect/impact on the appeal hearings, if any?

ANSWERS

- 1. The filing of an appeal challenging the environmental actions of DSD and/or CCDC in connection with the Navy Broadway Complex Project does not stay nor prevent the Navy and Manchester from entering into a Lease.**

The appeal hearings scheduled for January 9, 2007 are pursuant to Public Resources Code Section 21151(c). Neither that section nor any other relevant section in CEQA regarding the appeal of DSD's Analysis or of CCDC's adoption of a CEQA resolution on the Navy Broadway Complex Project imposes an automatic stay or has the effect of preventing the Navy and Manchester from entering into a Lease. As of November 21, 2006, the Navy and Manchester had not executed a Lease. It is important to note that the City is not a party to the Lease so the City's approval is not necessary for such a Lease to be entered into.

- 2. If the Navy and Manchester enter into a Lease prior to the scheduled date of the appeal hearings, they do so knowing that an adverse decision to their position by the City Council at the conclusion of the appeal hearings may very well impact the terms and conditions of their Lease.**

The Agreement Between the City Of San Diego And The United States Of America Adopting A Development Plan And Urban Design Guidelines For The Redevelopment Of The Navy Broadway Complex ("Development Agreement"), as amended, will be of no further force and effect unless a Developer Lease is recorded by January 1, 2007. There is nothing in the Development Agreement which requires that a consistency determination must first be made by CCDC or that all environmental appeals must first be completed as a condition precedent before a Developer Lease can be entered into. A "Developer Lease" is defined as "the leasehold estates conveyed in all or portions of the Navy Broadway Complex to one or more Developers." As noted previously herein, the City is not a party to the Lease and, from what we can tell, has not been privy to the terms and conditions to be contained in such a Lease. Given the wide dissemination of news relative to this project and the appeals which have been filed, the Navy and Manchester are on notice that the environmental actions of DSD and CCDC are being challenged. Accordingly, it would be reasonable to assume that any executed Lease between the parties will have contingencies and will reflect the uncertainty associated with appeal hearings affecting the Navy Broadway Complex Project to be held in the future. However, that is a contract decision between the Navy and Manchester.

CONCLUSION

There is nothing at the City level which prevents the Navy and Manchester from entering into a Lease. The City of San Diego is not a party to such a Lease. It is reasonable to assume that a Lease entered into between the Navy and Manchester prior to the scheduled date of the appeal hearings will contain terms and conditions addressing future contingencies which may result from the decision of the City Council.

MICHAEL J. AGUIRRE, City Attorney

By
Huston Carlyle
Chief Deputy City Attorney

HC:sc
cc: Elizabeth Maland, City Clerk
Development Services Department Director
Centre City Development Corporation

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