

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

**MEMORANDUM
MS 59**

(619) 236-6220

DATE: October 4, 2006

TO: Honorable Mayor and Members of the City Council

FROM: City Attorney

SUBJECT: Applicability of Public Resources Code Sections 21166 and 21151(c) to the Navy Broadway Complex Project.

INTRODUCTION

In 1992 the City and the United States, Department of Defense, Naval Facilities Engineering Command [Navy], entered into a written agreement entitled “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].

Prior to entering into this Development Agreement, in October 1990, the City prepared and certified an Environmental Impact Report [1990 EIR] under California Environmental Quality Act [CEQA] and the Navy prepared an Environmental Impact Statement [EIS] under the National Environmental Policy Act [NEPA] to evaluate the environmental impacts of the Navy Broadway Complex Project. The City of San Diego was identified as the lead agency for purposes of the EIR. CCDC was one of the City entities, among others, consulted in the preparation of the EIR. In 2006, the Navy selected Manchester as the Master Developer for the Navy Broadway Complex Project.

The City Council and the Centre City Development Corporation [CCDC] previously requested clarification on the role of the City of San Diego [City] in reviewing or overseeing the consistency determination of CCDC for the Navy Broadway Complex Project. In response to that prior request, the Office of the City Attorney issued a Memorandum of Law on September 15, 2006. An Addendum to the Memorandum of Law was issued by the City Attorney on September 18, 2006 explaining the City’s role in the development of the Navy Broadway Complex Project. On September 19, 2006, the San Diego City Council heard Item 330 where the Navy Broadway Complex Project was discussed. During this discussion, the City Attorney was requested to clarify the applicability of CEQA, Public Resources Code Sections 21166 and 21151(c), to the proposed Navy Broadway Complex Project. *See* Attachment A.

In addition, a Final Environmental Impact Report for the Proposed San Diego Downtown Community Plan, the CCDC Planned District Ordinance [PDO], and the 10th Amendment to the Downtown Redevelopment Plan, SCH No. 2003041001, was prepared and finalized by CCDC in March 2006 [2006 EIR]. It has yet to be determined whether the 2006 EIR may or may not be used as the additional EIR for the Navy Broadway Complex Project if a 21166 evaluation determines that further documentation is necessary due to changed circumstances. In 2006, the City adopted as its own this 2006 EIR when it approved the Downtown Community Plan, the PDO, and the 10th Amendment to the Downtown Redevelopment Plan.

The Navy has already determined that a second look at the environmental impacts of the Navy Broadway Complex Project is justified and has performed a subsequent environmental analysis under NEPA, including traffic and air quality studies. This Memo analyzes the requisite steps necessary for the City to fulfill its CEQA responsibilities in relation to the Navy Broadway Complex Project.

QUESTIONS PRESENTED

1. As lead agency for the Navy Broadway Complex Project, is the City responsible for evaluating the current adequacy of the 1990 EIR under the provisions of CEQA [Public Resources Code Section 21166]?
2. Would a 21166 evaluation have to be completed before CCDC completes a consistency determination for the City?
3. Is a CEQA determination associated with CCDC's consistency determination appealable to the San Diego City Council under the provisions of CEQA [Public Resources Code Section 21151(c)]?

SHORT ANSWERS

1. Yes. As lead agency for the Navy Broadway Complex Project, the City is responsible for evaluating the current adequacy of the 1990 EIR under the provisions of CEQA [Public Resources Code Section 21166].
2. Yes. A 21166 evaluation will have to be completed before CCDC completes a consistency determination for the City.
3. Yes. 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)].

LEGAL ANALYSIS

- 1. As lead agency for the Navy Broadway Complex Project, the City is responsible for evaluating the current adequacy of the 1990 EIR under the provisions of CEQA [Public Resources Code Section 21166].**

The City retained CEQA responsibilities under the Development Agreement. The City only subcontracted out to CCDC its responsibility for completion of its contractual obligation under the Development Agreement to perform a consistency determination and the terms of the contract spell out the duties and responsibilities of CCDC as subcontractor. The City, for purposes of the 1990 EIR, was the express designated lead agency for the Navy Broadway Complex Project. A “lead agency” under CEQA is the public agency which has the principal responsibility for carrying out or approving a project which may have a significant effect upon the environment. *See* Public Resources Code Section 21067. For purposes of entering into and carrying out the Development Agreement, the City remains the lead agency. This responsibility has not been and could not be delegated away.

So significant is the role of the lead agency that CEQA proscribes delegation. This prohibition was articulated in *Kleist v. City of Glendale* (1976) 56 Cal. App. 3d 770, 779 [128 Cal. Rptr. 781]: “Neither the CEQA nor the state guidelines authorize the city council to delegate its review and consideration function to another body. Delegation is inconsistent with the purpose of the review and consideration function since it insulates the members of the council from public awareness and possible reaction to the individual members’ environmental and economic values. Delegation is inconsistent with the purposes of the EIR itself.”

Planning and Conservation League et al, v. Department of Water Resources, Central Coast Water Authority (2000) 83 Cal. App. 4th 892, 907, 100 Cal. Rptr. 2d 173. *See Robert T. Sundstrom v. County of Mendocino* (1988) 202 Cal. App. 3d 296, 307, 248 Cal. Rptr. 352; *see also Hayward Area Planning Association v. City of Hayward* (2005) 128 Cal. App. 4th 176, 184, 26 Cal. Rptr. 3d 783; *L.R. Hubbard, Jr. v. City of San Diego* (1976) 55 Cal. App. 3d 380, 127 Cal. Rptr. 587.

Contractually, the Development Agreement is clear as to the role of the City and the role of CCDC. It is clear that CCDC is responsible for performing the consistency determination, but it is also clear by the contract terms that the City retained its CEQA responsibilities. *See* Sections 5.2 and 9.9 of the Development Agreement. Section 9.9 of the Development Agreement expressly states:

[T]he City agrees, consistent with California Public Resources Code Section 21166, that no subsequent or supplemental environmental impact report shall be required by the City for the subsequent implementation of the Project unless required by the criteria set forth in Section 21166.

Furthermore, Attachment 4 of the Development Agreement references, in a footnote, the possibility of additional environmental analysis to be performed by the Navy and the City:

Interfering portions of the Pacific Highway median, if any, shall be removed and other traffic mitigation measures and street

modifications required in the Final Environmental Impact Report and Final Environmental Impact Statement for the Navy Broadway Complex Project shall be implemented unless the City and Navy subsequently find that the traffic circulation and air quality considerations discussed in the EIR/EIS and which led to the inclusion of the requirements for such improvements in the Project are found to be insignificant, are mitigated to a level of insignificance through other actions, or findings are made that override these considerations.

Given that these CEQA duties remain with the City, the question to be determined is whether the City need do anything more than what it did in 1990 when it certified the EIR. The provisions of CEQA provide for a subsequent review of the adequacy of the 1990 EIR where subsequent discretionary actions are to occur. Subsequent discretionary actions by the City may, and on behalf of the City will, take place. The 1990 EIR is presumed to comply with the provisions of CEQA for purposes of its use by responsible agencies “unless the provisions of Section 21166 are applicable.” See Public Resources Code Section 21169.2. A Section 21166 review by the City will determine whether there have been substantial changes justifying supplemental or additional environmental documentation/review. Section 21166 comes into play now because in-depth review has already occurred in 1990, the time for challenging the sufficiency of the original EIR has expired, the question remaining is whether circumstances have changed enough to justify repeating a substantial portion of the process, and a subsequent discretionary action is imminent. See *River Valley Preservation Project v. Metropolitan Transit Dev. Bd.* (1995, 4th Dist.) 37 Cal. App. 4th 154, 43 Cal. Rptr. 2d 501. See also Section 15162 of the CEQA Guidelines.

Subsequent actions by and on behalf of the City are contemplated in the Development Agreement. “Building and other related permits for the development of the Property shall be issued by the City in a timely manner.” See Section 5.6 of Development Agreement. The Development Agreement, however, also expressly states in Section 1.2 that the redevelopment at the Navy Broadway Complex “shall not require any discretionary permits from the City. Building and similar ministerial permits shall be obtained by the Developer of the Broadway Complex only for those structures which are not to be occupied, in whole or in substantial part, by the Navy.” See Section 1.2 of Development Agreement. However, agreeing by contract that no further discretionary permits will be needed (and thus no further CEQA review would follow), does not supercede the City’s responsibilities under the law where a discretionary permit or approval is in fact needed and CEQA compliance is required.

A governmental entity cannot contract away its CEQA responsibilities. Contract terms do not supercede the requirements of CEQA. Furthermore, the provisions found in Section 1.2 of the Development Agreement assume that a “building permit” is a ministerial action. It is not the case, however, that in every instance a building permit is a ministerial action. It remains to be determined whether other permitting actions taken by the City will trigger CEQA because they may be discretionary. See *Sheila Donahue Miller v. City of Hermosa Beach* (1993) 13 Cal. App. 4th 1118, 17 Cal. Rptr. 2d 408; *Friends of Westwood v. City of Los Angeles et al* (1987) 191 cal.

App. 3d 259, 235 Cal. Rptr. 788. In addition, there may be other discretionary actions or approvals that the City may conduct with respect to the Navy Broadway Complex Project that do not involve the issuance of “permits.” It also remains to be seen what other discretionary approvals or actions will be triggered by other governmental agencies as they permit, authorize or otherwise approve any portion or all of this project moving forward. *See County of Orange v. Superior Court of Orange County; Vedanta Society of Southern California* (2003) 113 Cal. App. 4th 1, 7-8, 6 Cal. Rptr. 3d 286. Any one of these future discretionary approvals may trigger CEQA and a determination by the City or others under Section 21166 of whether the 1990 EIR, 16 or more years later, is good enough.

2. A 21166 evaluation will have to be completed before CCDC completes a consistency determination for the City.

Although not a permit, the consistency determination required by the Development Agreement and performed by CCDC on behalf of the City is a discretionary action and triggers CEQA compliance. The evaluation of the plans and specifications by CCDC will trigger some discretion and judgment. The City has not delegated its CEQA responsibilities to CCDC for this consistency determination. *See* Section 1.2 of Development Agreement. *See Sheila Donahue Miller v. City of Hermosa Beach* (1993) 13 Cal. App. 4th 1118, 17 Cal. Rptr. 2d 408; *Friends of Westwood v. City of Los Angeles et al* (1987) 191 Cal. App. 3d 259, 235 Cal. Rptr. 788. Before this discretionary action can occur, a 21166 evaluation by the City, and any subsequent environmental documentation, if any, will need to be completed. *See* Section 15162 of the CEQA Guidelines.

In a situation where the 21166 evaluation demonstrates the need to prepare subsequent environmental documentation, neither the lead agency nor any other responsible agency can grant a subsequent discretionary approval for the project until the subsequent environmental document has been adopted/certified. *See* Section 15162(c) of CEQA Guidelines. Once all discretionary approvals have been obtained, no further EIRs may be required by the public agency. *See Cucamongans United for Reasonable Expansion v. City of Rancho Cucamonga* (2000, 4th Dist.) 82 Cal. App. 4th 473, 98 Cal. Rptr. 2d 202. *See Santa Teresa Citizen Action Group v. City of San Jose* (2003, 6th Dist.) 114 Cal. App. 4th 689. Courts have set aside government actions where review of the current adequacy of an EIR, given changed circumstances, has not occurred first. *See El Morro Community Assn. v. California Dept. of Parks & Recreation* (2004, 4th Dist.) 122 Cal. App. 4th 1341; *see also* Section 15162 of the CEQA Guidelines.

The Navy has already determined that a second look at the environmental impacts of the Navy Broadway Complex Project is justified and has performed a subsequent environmental analysis under NEPA, including traffic and air quality studies. A 21166 review by the City, and any subsequent CEQA document determined to be necessary, if any, should cover any future discretionary actions associated with this project, unless and until any future substantial changes occur. A 21166 review now is also consistent with what the Navy has already determined is necessary under NEPA.

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3. 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)].

Pursuant to Section 21151(c) of the Public Resources Code:

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 this case, the local lead agency is the City of San Diego. Any CEQA determination associated with CCDC's consistency determination is appealable to the full City Council as provided for under Section 21151(c). *See Bakersfield Citizens for Local Control v. City of Bakersfield et al* (2004) 124 Cal. App. 4th 1184, 1201-1202, 22 Cal. Rptr. 3d 203, *citing Vedanta Society of So. California v. California Quartet, Ltd.* (2000) 84 Cal. App. 4th 517, 525-526, 100 Cal. Rptr. 2d 889.

CONCLUSION

Based upon the analysis provided herein, it is the recommendation of the Office of the City Attorney that before CCDC make its consistency determination, the City complete a 21166 evaluation to determine whether any further environmental documentation under CEQA is necessary for the Navy Broadway Complex Project.

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By

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SRE:pev

cc: Elizabeth Maland, City Clerk
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