

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

**MEMORANDUM  
MS 59**

**(619) 533-5800**

**DATE:** June 13, 2007

**TO:** Honorable Mayor and City Councilmembers

**FROM:** City Attorney

**SUBJECT:** In Relation to the Appeal of the Planning Commission's Decision to Approve the Issuance of a Site Development Permit for the Stebbins Residence, Project No. 51076

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**INTRODUCTION**

On March 1, 2007, the Planning Commission approved a Coastal Development Permit [CDP] and Site Development Permit [SDP], certified the Mitigated Negative Declaration [MND] and adopted a Mitigation Monitoring and Reporting Program [MMRP] for the Stebbins Residence—a project involving the demolition of an existing single-story duplex and the construction of a 1,749 square-foot three-story single-family residence on a 2,500 square-foot lot. A Site Development Permit is needed because the project includes a request to deviate from the applicable Environmentally Sensitive Lands (ESL) Regulations to allow a portion of the new structure to be located below the base flood elevation for below grade parking (subterranean two-car garage with storage area). The property is located within a 100 year floodplain and is within a Special Flood Hazard Area [SFHA]. *See* San Diego Municipal Code [SDMC] sections 143.0110 Table 143-01A, 126.0504(a)(b)(c) & (d) and 143.0150(a) & (b); Staff Report to Planning Commission, Report No. PC-07-010 (January 30, 2007).

On or about March 14, 2007, the determination of the Planning Commission was appealed to City Council. A hearing is currently scheduled for June 19, 2007, at which time the City Council will be asked to decide whether to grant or deny the appeal. Pursuant to San Diego Municipal Code section 112.0508(c), grounds for appeal of this Process Four Decision may include:

1. *Factual Error.* The statements or evidence relied upon by the decision maker when approving, conditionally approving, or denying a permit, map, or other matter were inaccurate;
2. *New Information.* New information is available to the applicant or the interested person that was not available through that person's reasonable efforts or due diligence at the time of the decision;

3. *Findings Not Supported.* The decision maker's stated findings to approve, conditionally approve, or deny the permit, map, or other matter are not supported by the information provided to the decision maker;
4. *Conflicts.* The decision to approve, conditionally approve, or deny the permit, map, or other matter is in conflict with a land use plan, a City Council policy, or the Municipal Code; or
5. *Citywide Significance.* The matter being appealed is of citywide significance.

On appeal of the Mitigated Negative Declaration, the City Council, per Section 112.0520(d), shall, by majority vote:

1. Deny the appeal, uphold the environmental determination and adopt the CEQA findings of the previous decision-maker, where appropriate; or
2. Grant the appeal and make a superceding environmental determination or CEQA findings; or
3. Grant the appeal, set aside the environmental determination, and remand the matter to the previous decision-maker, in accordance with section 112.0520(f), to reconsider the environmental determination that incorporates any direction or instruction the City Council deems appropriate.

One of the issues on appeal is whether the Federal Emergency Management Administration [FEMA] Regulations, Section 60.6(a) of Title 44 of the Code of Regulations [44 CFR Section 60.6(a)] (and as expressly referenced in Council Policy 600-14), apply to this project; and if so, whether these standards have been complied with. *See Report To City Council, May 16, 2007, Report No. 07-091.* In determining whether to approve the Site Development Permit for this project, the Planning Commission did not make the findings of 44 CFR Section 60.6(a), which are identified in Council Policy 600-14.<sup>1</sup>

### **QUESTION PRESENTED**

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<sup>1</sup>Although normally the Development Services Department [DSD] makes a written recommendation to City Council on appeal, DSD is not required to do so in every case. Section 112.0401(b) only requires a written recommendation where feasible. Given the nature of this appeal and the determinations to be made based upon the applicability of federal standards to these particular facts (e.g. exceptional hardship), it may not be feasible for DSD to make a written recommendation at this time.

Do the findings of 44 CFR Section 69.6(a) (as incorporated into Council Policy 600-14) need to be made in order to approve an SDP for this project?

### **SHORT ANSWER**

Yes. The findings of 44 CFR Section 69.6(a) (as incorporated into Council Policy 600-14) need to be made in order to approve an SDP for this project.

### **LEGAL ANALYSIS**

Under FEMA's National Flood Insurance Program [NFIP], the City of San Diego qualifies for the sale of federally-subsidized flood insurance if the City adopts and enforces its floodplain management requirements that meet or exceed the minimum NFIP standards and requirements. *See* 44 CFR Section 59.2(b) and Part 60. The City's floodplain management requirements must, at a minimum, be designed to reduce or avoid future flood, mudslide (i.e., mudflow) or flood-related erosion damages and must include effective enforcement provisions. *See* FEMA's *Floodplain Management Requirements A Study Guide and Desk Reference for Local Officials*, Page 5-4.

FEMA Regulations [44 CFR Section 60.6(a)] expressly identify the procedures for communities to follow when granting a variance, or in this case a deviation:

1. Variances shall not be issued by a community within any designated regulatory floodway if any increase in flood levels during the base flood discharge would result;
2. Variances may be issued by a community for new construction and substantial improvements to be erected on a lot of one-half acre or less in size contiguous to and surrounded by lots with existing structures constructed below the base flood level, in conformance with the procedures of paragraphs (a)(3), (4), (5) and (6) of this section;
3. Variances shall only be issued by a community upon
  - i. a showing of good and sufficient cause,
  - ii. a determination that failure to grant the variance would result in exceptional hardship to the applicant, and
  - iii. a determination that the granting of a variance will not result in increased flood heights, additional threats to public safety, extraordinary public expense, create nuisances, cause fraud on or victimization of the public, or conflict with existing local laws or ordinances;

4. Variances shall only be issued upon a determination that the variance is the minimum necessary, considering the flood hazard, to afford relief;
5. A community shall notify the applicant in writing over the signature of a community official that
  - i. the issuance of a variance to construct a structure below the base flood level will result in increased premium rates for flood insurance up to amounts as high as \$25 for \$100 of insurance coverage and
  - ii. such construction below the base flood level increases risks to life and property. Such notification shall be maintained with a record of all variance actions as required in paragraph (a)(6) of this section; and
6. A community shall (i) maintain a record of all variance actions, including justification for their issuance, and (ii) report such variances issued in its annual or biennial report submitted to the Administrator.

FEMA interprets these requirements to mean that, “[a] review board hearing a variance request must not only follow procedures given in the NFIP criteria, it must consider the NFIP criteria in making its decision.” See FEMA’s *Floodplain Management Requirements A Study Guide and Desk Reference for Local Officials*, Page 7-45. In interpreting its own standards, FEMA has provided guidance to assist communities in determining whether the applicant for a project has demonstrated good and sufficient cause and hardship to justify a deviation:

**Good and sufficient cause.** The applicant must show good and sufficient cause for a variance. Remember, the variance must pertain to the land, not its owners or residents. Here are some common complaints about floodplain rules that are NOT good and sufficient cause for a variance:

- The value of the property will drop somewhat.
- It will be inconvenient for the property owner.
- The owner doesn’t have enough money to comply.
- The property will look different from others in the neighborhood.
- The owner started building without a permit and now it will cost a lot to bring the building into compliance.

**Hardship.** The concept of unnecessary hardship is the cornerstone of all variance standards. Strict adherence to this concept across the country has limited the granting of variances.

The applicant has the burden of providing unnecessary hardship. Reasons for granting the variance must be substantial; the proof must be compelling. The claimed hardship must be exceptional, unusual and peculiar to the property involved. Financial hardship, inconvenience, aesthetic considerations, physical handicaps, personal preferences or the disapproval of one's neighbors do not qualify as exceptional hardships.

The local board must weigh the applicant's plea of hardship against the purpose of the ordinance. Given a request for a variance from floodplain elevation requirements, the board must decide whether the hardship the applicant claims outweighs the long-term risk to the owners and occupants of the building would face, as well as the community's need for strictly enforced regulations that protect its citizens from flood danger and damage.

When considering variances to flood protection ordinances, local boards continually face the difficult task of frequently having to deny requests from applicants whose personal circumstances evoke compassion, but whose hardships are simply not sufficient to justify deviation from community-wide flood damage prevention requirements.

*See FEMA's Floodplain Management Requirements A Study Guide and Desk Reference for Local Officials, Pages 7-45 and 7-46.*<sup>2</sup>

Historically, the City of San Diego's approved floodplain management requirements were a combination of the City Municipal Code provisions, found at Sections 62.0423, 91.8901 and 101.0462, and Council Policy 600-14. Both Section 62.0423 and 91.8901 incorporated by reference Council Policy 600-14. After the Land Development Code [LDC] was streamlined and amended in January 2000, reference to Council Policy 600-14 was removed from the Municipal Code. Council Policy 600-14, both before and after the January 2000 LDC amendments, identified the criteria for granting a variance consistent with FEMA Regulations 44 CFR Section 60.6(a). Although Council Policy 600-14 is no longer incorporated by reference into the LDC, this Policy still remains in effect and, thus, City Council is subject to its terms. The last

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<sup>2</sup> The requirement for demonstrating good cause and exceptional hardship before granting a deviation dates to 1976. The federal regulatory history of 44 CFR Part 60 is found in the Federal Register at 40 Fed. Reg. 13419, 13420 (March 26, 1975) and 41 Fed. Reg. 46961, 46962, 46966 and 46979 (October 26, 1976). "The proposed regulations did not intend to set absolute criteria for granting of a variance, since it is the community which, after appropriate review, approves or disapproves a request. Rather, the regulations support FIA's authority to review the grounds on which variances were granted and to take action (including action to suspend) where a pattern of variance issuances indicates an absence of unusual hardship or just and sufficient cause. For example, in the instance of a community issuing a variance for a structure to be erected on a lot exceeding one-half acre, the final rule reflects FIA's position that the degree of technical justification required increases greatly and that extreme and undue hardship must be shown." 41 Fed. Reg. at 46966.

time Council Policy 600-14 was amended was in December 2000. In addition, Section 143.0145(d) of the LDC makes clear that "...all other applicable requirements and regulations of FEMA apply to all development proposing to encroach into a Special Flood Hazard Area, including both the floodway and flood fringe areas..." Therefore, the LDC on its fact incorporates by reference the requirements of 44 CFR Section 60.6(a).

Because a Special Flood Hazard Area is considered an environmentally sensitive lands [ESL] area, a Site Development Permit is necessary per SDMC section 126.0504(a) and (b). The normal findings for a Site Development Permit for projects on ESLs are:

1. The proposed development will not adversely affect the applicable land use plan;
2. The proposed development will not be detrimental to the public health, safety, and welfare;
3. The proposed development will comply with the applicable regulations of the Land Development Code;
4. The site is physically suitable for the design and siting of the proposed development and the development will result in minimum disturbance to environmentally sensitive lands;
5. The proposed development will minimize the alteration of natural land forms and will not result in undue risk from geologic and erosional forces, flood hazards, or fire hazards;
6. The proposed development will be sited and designed to prevent adverse impacts on any adjacent environmentally sensitive lands;
7. The proposed development will be consistent with the City of San Diego's Multiple Species Conservation Program (MSCP) Subarea Plan;
8. The proposed development will not contribute to the erosion of public beaches or adversely impact local shoreline sand supply;  
and
9. The nature and extent of mitigation required as a condition of the permit is reasonably related to, and calculated to alleviate, negative impacts created by the proposed development.

In addition to the above findings for a Site Development Permit, any deviation from the Environmentally Sensitive Land Regulations where the project is within a Special Flood Hazard Area also requires the following supplemental findings be made, pursuant to SDMC section 143.0150(a) & (b), 126.0504(c) & (d):

1. There are no feasible measures that can further minimize the potential adverse effects on environmentally sensitive lands;
2. The proposed deviation is the minimum necessary to afford relief from special circumstances or conditions of the land, not of the applicant's making;
3. The City Engineer has determined that the proposed development, within any designated floodway will not result in an increase in flood levels during the base flood discharge; and,
4. The City Engineer has determined that the deviation would not result in additional threats to public safety, extraordinary public expense, or create a public nuisance.

Therefore, in order to grant the deviation for this project under the Land Development Code, all 13 findings, as identified above, must be made, as supported by substantial evidence in the record. One of the express requirements is that "the proposed development will comply with the applicable regulations of the Land Development Code." In as much as the LDC incorporates by reference the FEMA standards, it is clear that FEMA standards will also apply to this project. This would include the provisions of 44 CFR Section 60.6(a). Council Policy 600-14 further demonstrates the need to ensure Section 60.6(a) is complied with before a deviation is granted since it expressly identifies this FEMA regulatory criteria.

### **CONCLUSION**

Among the many issues the City Council must consider in determining whether to grant or deny the appeal, the City Council must also decide whether substantial evidence in the record supports the findings for granting a Site Development Permit, which includes the findings of 44 CFR Section 60.6(a) of the FEMA Regulations (as incorporated by reference into the Land Development Code and as expressly referenced in Council Policy 600-14).

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By

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