

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

**MEMORANDUM
MS 59**

(619) 533-5800

DATE: January 8, 2015

TO: Honorable Mayor and City Councilmembers

FROM: City Attorney

SUBJECT: Environmental Appeals of Proposed Medical Marijuana Consumer Cooperatives

INTRODUCTION

On March 11, 2014, the City Council adopted an ordinance to provide for the zoning of medical marijuana consumer cooperatives (MMCC), generally allowing MMCCs in certain commercial and industrial zones with a conditional use permit (MMCC Zoning Ordinance). San Diego Ordinance O-20356 (Mar. 25, 2014). Since the MMCC Zoning Ordinance became effective, numerous applications for MMCC conditional use permits (the Projects) have been submitted to the City's Development Services Department. As part of the normal development application process, the Environmental Analysis Section (EAS) of the Development Services Department reviewed the applications to determine whether each project was exempt from the California Environmental Quality Act (CEQA). In accordance with San Diego Municipal Code (Municipal Code or SDMC) section 128.0207, EAS determined that numerous projects were exempt from CEQA pursuant to CEQA Guidelines section 15303 (New Construction or Conversion of Small Structures). ¹Appeals of EAS' environmental determinations have since been filed on some of these determinations (the Projects). Pursuant to Municipal Code section 112.0520, a number of these appeals are scheduled to be heard by the Council on January 13, 2015. This memorandum provides a brief overview of the legal issues to be considered for each of the appeals as Council considers the facts of each of the Projects

¹ Cal. Code Regs., title 14, §§ 15000 to 15387.

ANALYSIS

A. The Council Must Determine Whether EAS' Determination that Each of the Projects Is Categorically Exempt Under CEQA Guidelines Section 15303 Is Supported By Substantial Evidence

EAS determined that each of the Projects is categorically exempt from CEQA pursuant to CEQA Guidelines section 15303. No further environmental review is required if a project is categorically exempt, unless an exception applies. CEQA Guidelines § 15061(b)(2). Under CEQA Guidelines section 15303, projects that involve the construction of new small facilities or structures and the “*conversion of existing small structures from one use to another* where only minor modifications are made in the exterior of the structure” are exempt. CEQA Guidelines § 15303 (emphasis added).

Examples of projects exempt under section 15303 include, but are not limited to²:

- “[a] store, motel, office, restaurant or similar structure not involving the use of significant amounts of hazardous substances, and not exceeding 2500 square feet in floor area.”

CEQA Guidelines § 15303(c).

Also included are:

- “up to four . . . commercial buildings in urbanized areas not exceeding 10,000 square feet in floor area on sites zoned for such use if not involving the use of significant amounts of hazardous substances where all necessary public services and facilities are available and the surrounding area is not environmentally sensitive.”

CEQA Guidelines § 15303(c); *Fairbank v. City of Mill Valley*, 75 Cal. App. 4th 1243, 1258 (1999).

² The examples set forth in CEQA Guidelines section 15303 are not finite examples. The phrase “including, but not limited to” is generally one of enlargement, not limitation, and indicates that the statute is not restricted to the listed examples. *City of Arcadia v. State Water Resources Control Board*, 191 Cal. App. 4th 156 (2010). However, when considering a project that does not fall within one of the listed examples, the exemption categories are not to be expanded beyond the reasonable scope of their statutory language. *Dehne v. County of Santa Clara*, 115 Cal. App. 3d 827 (1981); *Mountain Lion Foundation v. Fish & Game Comm’n.*, 16 Cal. 4th 105 (1997). Therefore, a project that is similar in kind to the examples listed in CEQA Guidelines section 15303 may also be exempt.

Therefore, using the example in Guidelines section 15303(c), a project would be exempt under CEQA Guidelines section 15303(c) if it:

- (1) involves the conversion of an existing small structure from one use to another;
- (2) involves only minor modifications to the exterior of the structure;
- (3) does not involve significant amounts of hazardous substances; and
- (4) is located in a structure not exceeding 2,500 square feet in floor area, or not exceeding 10,000 square feet in floor area if it is located in an urbanized area and certain other criteria are met.

CEQA Guidelines § 15303(c).

To be exempt under this example, a project that would be located in a structure that exceeds 2,500 square feet in an urbanized area and does not exceed 10,000 square feet in floor area, must also be:

- (1) located on a site zoned for the use;
- (2) located on a site where all necessary public services and facilities are available; and
- (3) not be located in an environmentally sensitive area.

Id.

The substantial evidence test would govern review of the City's factual determination that a project falls within a categorical exemption. *California Unions for Reliable Energy v. Mojave Desert Air Quality Management Dist.*, 178 Cal. App. 4th 1225, 1239 (2009). Substantial evidence means "enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached." CEQA Guidelines §15384(a). Substantial evidence includes facts, reasonable assumptions based on facts, and expert opinion supported by facts. Cal. Public Res. Code §§21080(e), 21082.2(c); CEQA Guidelines §§15064(f)(5)-(6), 15384. Substantial evidence does not include argument, speculation, unsubstantiated opinion or narrative, evidence that is clearly inaccurate or erroneous, evidence that is not credible, or evidence of economic or social impacts that do not contribute to or are not caused by physical environmental impacts. *Id.*

Each of the Projects involves the conversion of an existing structure from one use to an MMCC, which is another use. *See* SDMC § 141.0614. However, the Council must also determine whether each Project involves only minor modifications to the structure, and does not involve the use of significant amounts of hazardous materials. If the Project would be located in a building that does not exceed 2,500 square feet, and the Council determines – based on substantial evidence in the record – that it only involves minor modifications to the structure, and does not involve the use of significant amounts of hazardous materials, then the exemption likely applies.

If the Project would be located in a building that exceeds 2,500 square feet, the exemption could still apply so long as the building does not exceed 10,000 square feet and is located within an urbanized area. CEQA Guidelines § 15303(c); *Fairbank*, 75 Cal. App. 4th at 1258. CEQA

Guidelines section 15387 defines an “urbanized area” as “a central city or a group of contiguous cities with a population of 50,000 or more, together with adjacent densely populated areas having a population density of at least 1,000 persons per square mile.” According to the 2010 United States Census, the City has a population of 1,307,402. U.S. Census Bureau, 2010 Census of Population and Housing, *Summary Population and Housing Characteristics* at 98, CPH-1-6, California (Dec. 2012). Therefore, because the City has a population that exceeds 50,000, the city as a whole meets the definition of an urbanized area. Furthermore, the Project sites are specifically located within areas that are identified as “urbanized” in the 2008 City of San Diego General Plan. San Diego General Plan, Land Use and Community Planning Element, Figure LU-4. Because each of the Projects is located in an urbanized area, the exemption applies to structures not exceeding 10,000 square feet in floor area. Thus, for each of the Projects that exceed 2,500 square feet in floor area, the Council must determine whether the Project: (1) is located in a building not exceeding 10,000 square feet; (2) is located on a site zoned for the proposed use; (3) does not involve the use of significant amounts of hazardous substances; (4) is located where all necessary public services and facilities are available; and (5) is not located in an area that is environmentally sensitive. The Council’s determination must be supported by substantial evidence.

B. A Project that Is Exempt Under CEQA Guidelines Section 15301 May Also Qualify for Another Exemption

Some of the appeals state that another CEQA exemption may apply or should have been used. Specifically, some of the appeals state that EAS should have determined the Projects to be exempt pursuant to CEQA Guidelines section 15301 (Existing Facilities).³ Projects may be exempt under multiple categorical exemptions. See *Surfrider Found. v. California Coastal Comm’n*, 26 Cal. App. 4th 151 (1994). Additionally, the City is not limited to asserting only the exemptions that were asserted in the administrative record, in the absence of prejudice. See *California Farm Bureau Fed’n v. California Wildlife Conserv. Bd.*, 143 Cal. App. 4th 173, 190-91 (2006) (listing the project as exempt only under one class did not necessarily preclude the agency from defending its exemption determination by asserting other categorical exemptions where there was no claim or showing of prejudice). Thus, whether another exemption may also apply is not relevant, so long as the exemption that EAS used was appropriate. To the extent that the Council determines that another exemption may also apply, the Council must ensure that there is substantial evidence in the record to support that determination.⁴

³ Under CEQA Guidelines section 15301, projects that involve the “operation, repair, maintenance, permitting, leasing, licensing, or minor alteration of existing public or private structures . . . involving negligible or no expansion of use beyond that existing at the time of the lead agency’s determination” are exempt from CEQA.

⁴ If the Council determines that CEQA Guidelines section 15303 does not apply, but that another exemption applies instead of CEQA Guidelines section 15303, then the Council must grant the appeal and set aside the environmental determination. SDMC § 112.0520(d)(2). The Planning Director would then reconsider the environmental determination and make a new environmental determination, in consideration of any direction from the Council. SDMC § 112.0520(e)(2). The City Council would retain jurisdiction to act on the revised environmental determination and associated project at a subsequent public hearing. SDMC § 112.0520(e)(1).

C. The Council Must Determine Whether There Is a Fair Argument that One of the Exceptions to the Categorical Exemptions Under CEQA Guidelines Section 15300.2 Is Applicable

If a project is categorically exempt from CEQA, the exemption may nevertheless be inapplicable because there is an exception to the exemption. An exception to the exemption exists if there is a reasonable possibility of a significant effect on the environment due to unusual circumstances, significant cumulative impacts from projects of the same type will result, or the project would have impacts on a uniquely sensitive environment. CEQA Guidelines § 15300.2.

The written appeal for EJ Marketing MMCC (Project No. 368343) states that the exemption does not apply because “there is a reasonable possibility that the activity will have a significant effect on the environment due to unusual circumstances.” It states that due to the “proximity to interstates [sic] 15 and I-805, an unreasonable amount of traffic would result” and that the “additional traffic flow would create the possibility of an increase in the amount of collisions and automobile air emissions in the area.” It also states that the proposed onsite cultivation would involve the use of chemicals and “raises issues with the higher consumption of water.” Under the cited unusual circumstances exception, any categorical exemption is inapplicable if there is a “reasonable possibility that the activity will have a significant effect on the environment due to unusual circumstances.” CEQA Guidelines §15300.2(c).

The “unusual circumstances” exception requires a two-pronged analysis: (1) whether unusual circumstances are present; and (2) whether a reasonable possibility of significant environmental impact results from those circumstances. *Voices for Rural Living v. El Dorado Irrig. Dist.*, 209 Cal. App. 4th 1096 (2012); *Wollmer v. City of Berkeley*, 193 Cal. App. 4th 1329, 1351 (2011); *Banker’s Hill*, 139 Cal. App. 4th at 261; *Fairbank*, 75 Cal. App. 4th at 1259. If either question is answered in the negative, the exception does not apply. *Santa Monica Chamber of Commerce v. City of Santa Monica*, 101 Cal. App. 4th 786, 800 (2002). Circumstances are deemed unusual if they deviate from those in typically exempt projects. *Id.* Courts will also look to comparable facilities in the area and existing area uses. *Bloom v. McGurk*, 26 Cal. App. 4th 1307, 1316 (1994). For example, the court in *Wollmer* found that the project location near a crowded intersection was not unusual, particularly because the exemption challenged in that case, CEQA Guidelines section 15332, Infill Development Projects, was only applicable when substantially surrounded by urban uses. *Wollmer*, 193 Cal. App. 4th at 1351. Similarly, in *Fairbank*, the court found that the addition of a small building to a fully developed downtown commercial area did not create traffic concerns unique enough to meet the “unique circumstances” requirement, meaning no further analysis under a significant effects exception was necessary. *Fairbank*, 75 Cal. App. 4th at 1260; *but see Voices for Rural Living v. El Dorado Irrig. Dist.*, 209 Cal. App. 4th 1096 (2012) (holding that an agreement to extend water use from small structures totaling 85 equivalent dwelling units to a new casino project totaling 261 equivalent dwelling units was a unique circumstance).

In determining whether unusual circumstances apply, the Council may wish to consider factors such as the surrounding uses, uses allowed by the existing zone, and whether the proposed project creates any significant effects on the physical environment. Some courts apply a

substantial evidence test to an agency's determination that an exception to an exemption does not apply; however, the Fourth District Court of Appeal in San Diego has applied the fair argument standard when reviewing an agency's determination whether there is a reasonable possibility of a significant effect on the environment due to unusual circumstances. *Banker's Hill, Hillcrest, Park West Community Preservation Group v. City of San Diego*, 139 Cal. App. 4th 249, 261-67 (2006). While there is a split of authority on the appropriate standard of review for an agency's decision on whether there is an exception to an exemption, given that the Fourth District Court of Appeal has applied the more stringent standard of review, the conservative approach is for the Council to apply the fair argument standard and determine whether there is substantial evidence to support a fair argument that there is a reasonable possibility of a significant effect on the environment due to unusual circumstances.⁵ See *No Oil, Inc. v. City of Los Angeles*, 13 Cal. 3d 68, 83 (1974); CEQA Guidelines § 15064(f)(1). Therefore, if unusual circumstances exist and there is a fair argument that a reasonable possibility of significant environment impacts resulting from those circumstances exists, then the categorical exemption would not apply.

CONCLUSION

If a Project would be located in a building that does not exceed 2,500 square feet, and the Council determines – based on substantial evidence in the record – that it only involves minor modifications to the structure, and does not involve the use of significant amounts of hazardous materials, then the City's determination that the Project is exempt under CEQA Guidelines section 15303 would likely be upheld by a court. If a Project would be located in a building that exceeds 2,500 square feet, the CEQA Guidelines section 15303 exemption could still apply so long as the Project also: (1) is located in a building not exceeding 10,000 square feet; (2) is located on a site zoned for the proposed use; (3) is located where all necessary public services and facilities are available; and (4) is not located in an area that is environmentally sensitive.

Whether another exemption may also apply is not relevant so long as the exemption that EAS used was appropriate. To the extent that the Council determines that another exemption may also apply, the Council must ensure that there is substantial evidence in the record to support that determination. For each of the Projects, the Council must also determine whether there is a fair argument that there is a reasonable possibility of a significant effect on the environment due to unusual circumstances. If unusual circumstances exist, and there is a fair argument that a

⁵ When there is a conflict of opinions between appellate districts, a superior court will ordinarily follow an appellate opinion from its own district even though it is not bound to do so. *McCallum v. McCallum*, 190 Cal App. 3d 308 (1987).

Honorable Mayor and City Councilmembers

January 8, 2015

Page 7

reasonably possibility of significant environment impacts resulting from those circumstances exists, then the categorical exemption would not apply.

JAN I. GOLDSMITH, CITY ATTORNEY

By /s/ Heidi K. Vonblum
Heidi K. Vonblum
Deputy City Attorney

By /s/ Shannon M. Thomas
Shannon M. Thomas
Deputy City Attorney

HKV/SMT:nja

cc: Robert Vacchi, Director, Development Services Department

Andrea Tevlin, Independent Budget Analyst

MS-2015-1

Doc. No.: 921298_4