

DATE ISSUED: February 7, 2002

REPORT NO. 02-033

ATTENTION: Land Use and Housing Committee
Agenda of February 13, 2002

SUBJECT: Proposed Amendments to the Municipal Code and City of San Diego
Biology Guidelines Language for Wetland Deviation Findings

SUMMARY

Issue– Should the City amend the Municipal Code and City of San Diego Biology Guidelines to include additional findings to clarify the use of the deviation process for wetland impacts?

Manager's Recommendation – Recommend adoption of the proposed additional findings for wetland deviation.

Environmental Impact – This action will require environmental review to be completed prior to action by the City Council.

Fiscal Impact – None with this action

BACKGROUND

The proposed amendments to the Municipal Code and City of San Diego Biology Guidelines would clarify when impacts to wetlands can be allowed within the City of San Diego (Attachment 1). Currently, impacts to wetlands are not allowed under the Municipal Code unless the project meets certain criteria, known as deviation findings. However, the current deviation findings for impacts to wetlands (Attachments 2 and 3) are non-specific and provide little guidance to the project applicant and decision maker. During the public hearing for the Cousins Market Center project on August 14, 1998, the City Council directed staff to examine the current deviation findings in the Municipal Code and recommend language to clarify when impacts to wetlands could be allowed.

An ad hoc working group of environmental and development industry stakeholders, including the Building Industry Association, Southwest Center for Biological Diversity, Endangered Habitats League, and staff from former Mayor Golding's and Councilmember Kehoe's offices, was formed to develop draft language to clarify the deviation process for wetland impacts. The working group met for several months in developing the draft wetland deviations, and on November 6, 1998, staff requested that the City's Wetlands Advisory Board review the draft language. A response letter from the Wetlands Advisory Board was provided to the City Manager on September 20, 2000 (Attachment 4), that outlines conditions under which a biologically superior result could be attained from loss of certain low quality wetlands. The intention was that once input was obtained from the Wetlands Advisory Board, the working group could review and develop final recommendations for the City Council.

Unfortunately, before the Wetlands Advisory Board provided their input, a lawsuit was filed against the City regarding impacts to vernal pools (seasonal wetlands). The lead plaintiffs of the lawsuit were also members of the working group. Staff was advised to postpone any work on the wetland deviation findings until the lawsuit could be resolved.

Although the lawsuit has not yet been resolved, a smaller working group was formed last summer made up of representatives from the Planning Department, development industry, environmental groups not involved in the vernal pool lawsuit, and the Mayor's office. This working group has met on a regular basis to discuss improvements to the deviation process under the Environmentally Sensitive Lands (ESL) regulations as it pertains to wetland impacts. This working group has proposed language that, if approved, would be added to Findings of Deviations from the ESL regulations in the Municipal Code and the City of San Diego Biology Guidelines. The amendments would clarify when deviations for wetland impacts would be considered. The proposed language (Attachment 1) has been submitted to a variety of agencies and stakeholder groups including the U.S. Fish and Wildlife Service, California Department of Fish and Game, California Coastal Commission, Wetlands Advisory Board, and various environmental groups. Comments received from agency staff and stakeholder groups have been reviewed and incorporated into the proposed clarification language, where there was consensus of the working group.

DISCUSSION

Under the current ESL regulations, the City does not have the ability to approve projects with any wetland impacts except through the deviation process. In order to impact wetlands under the current regulations the following wetland deviation findings must be made:

- There are no feasible measures that can further minimize the potential adverse effects on environmentally sensitive lands; and
- The proposed deviation is the minimum necessary to afford relief from special circumstance or conditions applicable to the land and not of the applicant's making.

These deviation findings are vague and would benefit from specific clarification regarding their appropriate use. The proposed clarification language would not replace the current language but would instead require additional deviation findings when impacts to wetlands are proposed.

The proposed revisions to the San Diego Municipal Code and City of San Diego Biology Guidelines envision three project types where wetland impacts could occur if the appropriate deviation findings could be made: essential public project, economic hardship, and biologically superior alternative. Each scenario is described below.

Essential Public Project

Deviation from the strict application of ESL regulations may be warranted when an essential public project serving basic infrastructure needs of the community or region must be implemented and no feasible alternative exists which will strictly comply with the policies and regulations of ESL. Under the proposed language, a project may qualify for a wetland impact deviation as an essential public project if it meets all of the following requirements:

- The proposed project is identified in the General Plan or applicable community plan as an essential public service project.
- The proposed project and all alternatives are fully disclosed and analyzed in a CEQA document.
- The proposed project will minimize impacts to wetlands to the maximum extent practicable.
- The proposed project will fully mitigate all its impacts in accordance with the mitigation requirements in the City of San Diego Biology Guidelines

Economic Hardship

In order to preserve a private property owner's right to have economically viable use of their property, deviation from the strict application of ESL may be warranted. The purpose of this deviation process is to disclose, evaluate, and objectively determine the economic viability of a proposed project with and without granting a deviation for impacts to wetlands. Any deviation for economic hardship should be the minimum necessary to achieve economic viable use of the property and should not be used to offset economic circumstances of the project applicant's making, such as a poor investment decision by a landowner. Under the proposed language, a project may qualify for a wetland impact deviation under economic hardship if it meets all of the following requirements:

- The applicant has disclosed all the required information for the City to determine if the deviation is necessary to achieve economically viable use of the property.
- The proposed information has been reviewed by City staff and the City Council makes findings of economic infeasibility.
- The proposed project has mitigated to the maximum extent feasible under the City of San Diego Biology Guidelines.

Under the proposed language, there is a requirement to ensure that the economic viability determination is unbiased. The City shall develop a list of outside economic consultants to review economic viability determinations for proposed projects that request a wetland impact deviation under economic hardship. All consultants on the list will be required to fully disclose

their employment history at the time of selection and any consultants that have worked for the project applicant within one year will be disqualified. Once a consultant is selected, the City will transfer the economic viability analysis provided by the applicant to the consultant. The applicant will pay for the consultant through an account set up at the City, but any communication between the applicant and the City's economic consultant shall occur only in the presence of designated City staff.

Also, the proposed language is clear that under the economic hardship deviation, the project mitigation must conform to the City of San Diego Biology Guidelines or the lack of full mitigation must be justified as part of the economic viability determination. The deviation process cannot be used solely to reduce or eliminate mitigation as required by the City of San Diego Biology Guidelines.

Biologically Superior Alternative

A deviation from the strict application of ESL regulations may be warranted if an alternative achieves a superior biological result. The current deviation section and supplemental findings do not allow consideration of a biologically superior benefit to justify impacts. This can result in preservation of low quality wetlands with no long-term biological benefit.

It is the intent that the proposed deviation process for Biologically Superior Alternative only result in impacts to low quality wetlands. The deviation would only be granted if it is determined that impacts to lower quality biological resources is acceptable in exchange for the extraordinary mitigation offered to not only offset the loss of the resources, but to also appreciably increase the overall function and value of the type of resources being impacted. Under the proposed language, a project may qualify for a wetland impact deviation under the Biologically Superior Alternative if it meets all of the following requirements:

- The proposed project and all alternatives, including the biologically superior alternative, are fully disclosed and analyzed in a CEQA document.
- The wetland resources being impacted by the proposed project are of low biological quality.
- The proposed project and mitigation results in a biologically superior net gain in overall functions and values for the type of wetland resource being impacted.
- The United States Fish and Wildlife Service and California Department of Fish and Game have concurred that the alternative is indeed biologically superior.

Based upon the criteria outlined in the Wetlands Advisory Board letter (Attachment 4), detailed criteria have been developed by the working group to allow for the determination of low quality under the proposed deviation findings. Under the proposed language, if it is determined that a wetland is not low quality, impacts to that wetland cannot be considered under the deviation for biologically superior alternative.

Under the proposed language, a biologically superior net gain may be achieved by providing twice the mitigation as required under the City of San Diego Biology Guidelines or providing an endowment for management of the land in perpetuity. The endowment amount would be based

on the current cost of open space management and monitoring at the time of project approval. Final approval of the biologically superior alternative lies with the U.S. Fish and Wildlife Service and California Department of Fish and Game. A response detailing their support or lack of support for the biologically superior alternative would be expected in a comment letter on the project's CEQA document. However, if no response is received, concurrence would be assumed.

CONCLUSION

The proposed additional findings for wetland impacts would clarify when impacts could be allowed through the ESL deviation process. Staff respectfully submits the proposed language with a recommendation that the amendment to the Municipal Code and City of San Diego Biology Guidelines be forwarded to City Council after appropriate environmental review has been conducted pursuant to the California Environmental Quality Act.

Respectfully submitted,

S. Gail Goldberg, AICP
Planning Director

Approved: P. Lamont Ewell
Assistant City Manager

GOLDBERG/KG/HC

Note: Attachments 2, 3, and 4 are not available in electronic format. Copies of the attachments are available for review in the Office of the City Clerk.

Attachments:

1. [Proposed Additions to the Deviation Findings](#)
2. Deviations from Environmentally Sensitive Lands Regulations (current language)
3. Biology Guidelines: Findings for Deviation from ESL (current language)
4. Wetlands Advisory Board Letter to City Manager dated September 20, 2000.