

DATE ISSUED: March 4, 2004

REPORT NO. 04-046

ATTENTION: Land Use and Housing Committee
Agenda of March 10, 2004

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

SUMMARY

Issue – Should the City amend Municipal Code Chapter 12 Article 6 Division 5 and the City of San Diego Biology Guidelines to include additional findings to clarify the deviation process for wetland impacts?

Manager’s Recommendation – Recommend adoption of the proposed additional findings for wetland deviations. Provide policy direction on three outstanding issues described in this report. Forward changes to the Municipal Code as part of the Land Development Code update process work program.

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 may be allowed within the City of San Diego. Currently, impacts to wetlands are not allowed under the Municipal Code unless the project meets certain criteria, known as deviation findings (§126.0504(c)). However, the current deviation findings for impacts to wetlands are non-specific and provide little guidance to the project applicant, staff and the 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 office, was formed to develop draft language to clarify the deviation process for wetland impacts. The working group met for several months and developed 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. The letter outlines conditions under which a biologically superior result could be attained from loss of certain low quality wetlands.

Unfortunately, before consensus could be reached on the draft language, a lawsuit was filed against the City regarding impacts to vernal pools (seasonal wetlands), forcing the City to postpone work on the wetland deviation findings until the lawsuit could be resolved.

A smaller working group was formed in 2001 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 reached consensus on draft deviation findings for wetland impacts. On February 13, 2002, the LU&H subcommittee directed staff to work with a larger committee of stakeholders, including those not represented due to the pending litigation.

In January 2003, a third working group was assembled to continue working on the wetland deviation language. Members of the working group included Keith Greer and Melanie Johnson of the Planning Department, Jim Whalen of the Alliance for Habitat Conservation, Jim Peugh of the San Diego Audubon Society, Matthew Adams of the Building Industry Association of San Diego County, David Hogan of the Center for Biological Diversity, David Gatzke of McMillan Land Development, Rikki McClintock-Alberson of RMA Consultants, John Ponder of Sheppard Mullin Attorneys at Law and Eric Bowlby of the Sierra Club.

This group met ten times between January 2003 and February 2004 and developed revised draft language (see Attachment 1) that, if approved, would be added to Findings of Deviations from the Environmentally Sensitive Lands Ordinance (ESL) regulations in the Municipal Code and the City of San Diego Biology Guidelines.

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 deviation findings must be made (see Attachment 2 and 3):

- There are no feasible measures that can further minimize the potential adverse effects on ESL; and
- The proposed deviation is the minimum necessary to afford relief from special circumstance or conditions 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 wetland impacts occurring only if one of three new deviation findings could be made: 1) Essential Public Project; 2) Economic Viability; and 3) Biologically Superior Alternative. Each type of the three new findings is described below.

Essential Public Project

Deviation from the strict application of ESL regulations may be warranted when an essential public project serving the needs of the community or region must be implemented and no feasible alternative exists which would avoid impacts to wetlands. 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 project is an essential public project identified in a City Land Use Plan adopted prior to January 1, 2000 (effective date of the updated ESL regulations) or is a linear project (e.g. roads, utility lines, etc.),
- The proposed project and all project alternatives are fully disclosed and analyzed in a CEQA document,
- Potential impacts to wetland resources have been minimized to the maximum extent practicable, and
- The proposed project will fully mitigate all its impacts in accordance with the mitigation requirements in the City of San Diego Biology Guidelines.

Economic Viability

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 finding 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 viability would be the minimum necessary to achieve economically viable use of the property, and would 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 information has been reviewed by an outside economic consultant and City staff, and the City Council make findings that all economically viable use of a property will be removed with strict application of the ESL, and
- The proposed project has avoided, minimized and 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 would develop a list of outside economic consultants to review economic viability determinations for proposed projects that request to use this finding. All consultants on the list will be required to fully disclose their employment history at the time of selection. Once a consultant is selected, the City will transfer the economic viability analysis information provided by the applicant to the independent 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 City staff.

Also, the proposed language is clear that under the economic viability 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 findings do not allow consideration of a biologically superior benefit to justify impacts. This can result in preservation of low quality wetlands with little or no long-term biological benefit.

The deviation would only be granted if it is determined that impacts to lower quality biological resources are acceptable in exchange for the extraordinary mitigation offered to not only offset the loss of the resources, but to also appreciably increase the overall long-term 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, including a no project alternative, a wetlands avoidance alternative, and a biologically superior alternative, are fully disclosed and analyzed in an appropriate CEQA document,
- The wetland resources being impacted by the proposed project are of low biological quality,
- The proposed project and mitigation result in a biologically superior net gain in overall functions and values for the type of wetland resource being impacted, and
- 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 original criteria outlined in the Wetlands Advisory Board letter (see 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 can not 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 by providing mitigation at the standard ratios and providing an endowment for management of the mitigation lands in perpetuity.

Unresolved Policy Issues

Over the past year the stakeholders have reached consensus on a variety of outstanding issues; however, three issues remain unresolved which City Manager staff seeks policy direction from the Council Subcommittee. The unresolved issues are: 1) Limiting the Essential Public Project finding to linear infrastructure, 2) Precluding use of Economic Viability finding where an acquisition offer at fair market value has been made, and 3) Allowance for a perpetual management endowment to be considered towards achieving a Biologically Superior Alternative.

The working group could not reach consensus on the definition of essential public service projects in its application to the wetlands deviation findings. Some members of the stakeholder group would like essential public service projects to be limited to linear infrastructure projects (e.g. waterlines, roads and sewers). This would eliminate use of this finding for fire and police stations, libraries, parks and other essential public projects. Staff recommended a compromise which would define an essential public project as those identified in an adopted City Land Use Plan adopted prior to January 1, 2000 (effective date of the ESL regulations), or is a linear project. This would establish a grandfather date for essential public projects that are included in Land Use Plans that were adopted prior to the provisions of the ESL regulations of the Land Development Code.

The second unresolved policy issue is the use of the Economic Viability finding where the owner of the property has been made an offer to acquire the property at market value. Some members of the stakeholder group would like any offers of compensation at market value to preclude the use of the Economic Viability finding by a project applicant. On March 6, 2003, staff from the City Attorney's Office met with the working group to discuss provisions of the Economic Viability finding. Concern was raised by the City Attorney's office that precluding an applicant from seeking to use the Economic Viability finding if an offer to acquire the property has been made, is potentially setting the stage for a private property "takings" lawsuit. City Manager staff agrees and is recommending instead, that "Any offers to acquire the property and the results of the offer will be presented to the City decision-maker at the time they consider the Economic Viability Finding."

The final unresolved policy issue is the allowance for a perpetual land management endowment to be considered towards achieving a Biologically Superior Alternative. Some members of the stakeholder group have argued that perpetual land management is a requirement of all lands being set aside as mitigation, and the property owner or the City is required to bear this cost. At the same time there is no disagreement about the fiscal hardships of the City and the financial burden to manage land in perpetuity. City Manager's staff is recommending that a perpetual endowment for land management does contribute to a more biologically superior alternative.

CONCLUSION

The proposed additional findings for wetland impacts would clarify when impacts could be allowed through the ESL deviation process. While consensus on many outstanding issues has been achieved by the stakeholder working group, three outstanding policy issues remain. City Manager staff is seeking policy direction on these issues. Staff respectfully submits the proposed language with a recommendation that the amendment to the Municipal Code and City of San Diego Biology Guidelines be included as proposed Municipal Code revisions as part of the Land Development Code update work program.

Respectfully submitted,

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Planning Director

Approved: P. Lamont Ewell
Assistant City Manager

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

- Attachments:
1. [Proposed Additions to the Deviation Findings](#).
 2. Supplemental Findings – Environmental Sensitive Lands Deviations.
 3. Land Development Manual – Biology Guidelines Section IV Findings and Deviations.
 4. Wetlands Advisory Board Letter to City Manager dated September 20, 2000