

DATE ISSUED: April 30, 2004

REPORT NO. 04-094

ATTENTION: Land Use and Housing Committee
Agenda of May 5, 2004

SUBJECT: Environmental Appeals Regulations

SUMMARY

Issues - Should the Committee recommend City Council approval of an ordinance amending Chapter 11, Article 2, Divisions 3 and 5 and Chapter 11, Article 3, Division 1 of the Land Development Code to clarify how the City will administer the change to Public Resource Code Section 21151 (c) regarding appeals of environmental determinations?

Managers Recommendation – Approve the proposed ordinance (Attachment No. 1).

Community Planners Committee Recommendation - The item was considered at the March 23, 2004 Community Planners Committee (CPC) meeting and was continued after comments were provided to staff. The comments and staff responses are attached as Attachment 2. Staff returned to CPC on April 27, 2004 and CPC recommended approval of the proposed ordinance by a vote of 14-1-3._

Environmental Review – This activity is not a project and is exempt per Section 15061(b)(3) of the State of California Environmental Quality Act Guidelines.

Fiscal Impact - The staffing costs and fiscal impact to prepare the proposed regulations are part of the Land Development Code Implementation work program.

Code Enforcement Impact - The proposed regulations will have no impact on code enforcement.

Housing Impact Statement - This code change, necessitated by change to State Law, could result in increased costs for those housing projects that have the environmental determination appealed to City Council. Additional costs could result from processing costs associated with the appeal and from delays in obtaining final approval and, thus, could delay construction of the project.

BACKGROUND

This item was originally brought to the City Council on March 15, 2004. At that time, it was continued, with direction given to staff to solicit input from the Community Planners Committee (CPC) and then bring the item back to Council via the Land Use and Housing Committee. The item was considered at the March 23, 2004 CPC meeting and continued after comments were provided to staff. The written comments and staff responses are attached as Attachment 2. At its April 27, 2004 meeting, CPC recommended approval of the proposed ordinance by a vote of 14-1-3.

A change to the California Public Resources Code regarding the California Environmental Quality Act (CEQA) has necessitated a change to the City's Land Development Code. Public Resource Code Section 21151 (c) was amended as follows:

- (c) *If a nonelected decisionmaking 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 decisionmaking body, if any.*

This change became effective January 1, 2003 and provides for an appeal to City Council of a lower decision-maker's decision to certify an environmental impact report, approve a negative declaration or mitigated negative declaration, or determine that a project is not subject to CEQA. Appeals could be made on all environmental determinations except those made by the City Council and Process 4 decisions, where projects are already considered by or appealable to the City Council.

DISCUSSION

City Attorney and Development Services staffs have drafted the attached ordinance (Attachment No. 1) to clarify the procedures and rules that the City will apply in implementing this change to state law.

Under the current Land Development Code (LDC), procedures are established for Process 2-5 appeals, including who may file an appeal, the required content of an appeal, the types of notice that must be given for an appeal, the type of information that must be included in the appeal notice, and the procedures and decision process for the appeal hearings. These procedures are standardized for all Process 2-5 decision-making processes. In that environmental determinations are often made outside of the LDC permitting process for administrative actions that don't involve a permit, the proposed ordinance also facilitates appeal of all environmental determinations except as noted below. The proposed revision to the LDC for this new appeal utilizes most of these same standards and, therefore, the new language is proposed to be located in the same section of the code. It allows anyone to appeal an environmental determination when there is no public hearing associated with project approval. The same time frame for allowing an appeal is the same as the other appeals. Most of the appeal criteria and content of the appeal notice are also the same. In addition, the same property owners and tenants get noticed of the appeal hearing.

CEQA has always required posting of a “Notice of Determination” after negative declarations are approved and EIRs certified, while posting of a “Notice of Exemption” has always been voluntary when projects are determined to be exempt. The new state legislation requires no new noticing provisions. The proposed ordinance would mandate the filing of Notices of Exemption for all exemption determinations except those made for ministerial projects and for projects determined to be statutorily exempt. These notices, which start the state statute of limitation for filing lawsuits, would also serve as the start of the statute of limitations for filing an appeal to the City Council. Although Notices of Determination would continue to be filed after the hearing at which the environmental document is approved or certified in conjunction with project approval, determinations that projects are exempt from CEQA are made by staff prior to project approval; the decision-maker for the project does not make a CEQA determination in these cases. The proposed ordinance requires Notices of Exemption to be filed immediately upon the staff decision that a project is exempt; therefore, the time within which to appeal could expire before the project is approved. Staff believes that this procedure will reduce the number of “late hits” and result in less delay to projects that are exempt from CEQA.

In addition to these changes, the new regulations establish how the various decisions that City Council can make will affect the subject project associated with the environmental document or determination. For projects where the appeal of the environmental determination is denied, the decision of the lower decision-making body is upheld and becomes effectively immediately. For projects where the appeal of the determination is upheld, the Council will vacate the project approval and remand the environmental determination back to the lower decision-making body for reconsideration based on the issues determined by the City Council.

Given the specific list of CEQA documents listed in the state law as appealable, staff is not proposing to facilitate appeals of other types of actions under CEQA (e.g., re-use of a previously certified environmental document or addenda. In addition, staff is proposing to ask City Council to reaffirm their determination made in LDC Section 128.0203 (b) that exemptions granted by statute under CEQA (State CEQA Guidelines, Article 18, commencing with Section 15260) are exempt as a class of project and therefore not subject to environmental appeals. If City Council agrees with this proposal, projects that are ministerial such as electrical permits, plumbing permits, building permits, public right-of-way permits, grading permits, etc. would not be appealable since they were determined by the elected decision-maker to be exempt. Additionally, necessary emergency projects, hiring of contractors or consultants, and other statutory exemptions would also not be appealable under the same proposal. All other determinations that projects are categorically exempt under CEQA (State CEQA Guidelines, Article 19, commencing with Section 15300) would be appealable under the provision for appeals of determinations that projects are not subject to CEQA.

As a result of input from the CPC, staff has revised the originally proposed regulations to 1) delete references to additional requirements for filing appeals, 2) clarify that a lower decision-maker would consider a revised environmental determination after an appeal is granted, and 3) clarify the remand procedures.

CONCLUSION

Staff believes the proposed regulations, as revised in response to input from the Community Planners Committee, implement the revision to State law, maintain consistency with other appeal processes within the City and make it clear to project applicants and the public how the various actions that City Council can take will affect the project in the future.

Respectfully submitted,

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Deputy City Manager for
George Loveland
Assistant City Manager

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Attachments: 1. [Environmental Determinations Ordinance](#)
2. [CPC Comments and Staff Responses](#)