DATE ISSUED: July 7, 2004 REPORT NO. 04-141

ATTENTION: Honorable Mayor and City Council
Docket of July 13, 2004

SUBJECT: Environmental Appeals Regulations

SUMMARY

Issues - Should the City Council approve an ordinance amending Chapter 11, Article 2, Division 3 and Division 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?

Manager's Recommendation – Approve the proposed ordinance (Attachment No. 1), including provisions that would prohibit filing of appeals of environmental determinations that projects are statutorily exempt.

Other Recommendation - This item was considered and continued at the March 23, 2004 CPC meeting and approved at the April 27, 2004 CPC meeting. CPC comments and staff responses are attached as Attachment 2. This item was also considered by the Committee on Land Use and Housing (LU&H) on May 5, 2004 with an additional recommendation from staff to not allow appeals of statutory exemptions. The LU&H recommendation was as follows: 1) add language to ensure that any appeal hearing is decided by a majority vote, 2) direct the City Manager to address this new policy in noticing, 3) change ordinance language regarding remands to "reconsider the environmental determination in light of any direction or instruction given by the City Council", and 4) direct the Manager to indicate which types of actions are statutorily exempt from CEQA as opposed to categorically exempt.

Environmental Review – This activity is exempt from the California Environmental Quality Act per Section 15061(b)(3) of the State of CEQA Guidelines.

Fiscal Impact - The staffing costs and fiscal impact to prepare the proposed regulations are part of the Land Development Code Implementation work program. Future costs associated with processing environmental determination appeals on projects with Process 2 and Process 3 decisions will be borne by the project applicants through deposit accounts. Based upon staff recommendation to not allow future appeals of environmental determinations on projects that are statutorily exempt, there will be no fiscal impact other than to process appeals for the limited number of City Manager-approved public projects which require categorical exemptions, negative declarations, or Environmental.

Code Enforcement Impact - The proposed regulations will have no impact on code enforcement.
Housing Impact Statement - This code change, necessitated by a change to State Law, could result in increased costs for those housing projects that have environmental determinations appealed to City Council. Additional costs could result from processing costs associated with the appeal, delays in obtaining final approval, and possible resultant construction delays.

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 LU&H.

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.

DISCUSSION

City Attorney and Development Services staff has 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.

Format and Scope of Proposed Ordinance
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, the proposed ordinance also facilitates appeal of environmental determinations by others (e.g., City Manager and designees). 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 for a Process 1 project or a City Manager decision (i.e., when there is no public noticing associated with project approval). The 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. The proposed ordinance provides for appeals of 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. However, the Manager's recommendation also includes a recommendation to not allow appeals of statutory exemptions.
The state law specifically lists the type of CEQA documents which must be made appealable. Therefore, staff is not proposing to facilitate appeals of other types of actions under CEQA (e.g., re-use of a previously certified environmental document, addenda, etc.).

In addition, staff is proposing that the City Council reaffirm the 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. Unlike categorical exemptions, which require staff to make a determination of whether the project has a significant effect on the environment (CEQA Guidelines Section 15300.2), the State Legislature has decided that statutory exemptions should be exempt regardless of their impacts. Thus, the only grounds for appeal would be whether staff appropriately classified a project as being subject to a statutory exemption; the nature of the project's impacts would not be subject to debate. Lists of statutory and categorical exemptions are attached as Attachments 3 and 4.

If City Council agrees with this proposal, projects that are ministerial such as Substantial Conformance Review, electrical permits, plumbing permits, building permits, public right-of-way permits, grading permits, etc. would not be appealable since they were already determined by the elected decision maker to be exempt. Emergency projects, hiring of 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.

Noticing of Environmental Determinations
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 projects determined to be statutorily exempt. Filing a Notice of Exemption for statutorily exempt projects would continue to be voluntary.

Under the staff proposal, 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. CEQA requires Notices of Determination and, when filed, Notices of Exemption to be filed after project approval.

Appeals Procedures and Remands
In addition to the above 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. The proposed ordinance also facilitates adoption by the Council of a superceding environmental determination or findings.

Revisions to the Ordinance
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.

As a result of input from LU&H, staff again revised the ordinance to 1) add language clarifying that a majority vote of the City Council would be required in order to make a decision on an appeal and 2) reverted to original language requiring a lower decision maker on remand to "reconsider the environmental determination" rather than "consider a revised environmental determination". Staff has also clarified the various actions that staff classifies as statutorily and categorically exempt (See Attachments 3 and 4). At LU&H's request, staff also verified that Notices of Public Hearing and Notices of Decision (except for Process 4 and 5 decisions) include language advising that certain environmental determinations are appealable.

CONCLUSION

Staff believe the proposed regulations, as revised , respond 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,

Tina P. Christiansen, A.I.A.
Development Services Director

Approved by: George Loveland
Assistant City Manager

CHRISTIANSEN/KGB/CZ

Note: Attachment 1 is not available in electronic format. A copy is available for review in the Office of the City Clerk.

Attachments:
1. Environmental Determinations Ordinance
2. CPC Comments and Staff Responses
3. List of Statutory Exemptions
4. List of Categorical Exemptions

Attachment 2
Responses to CPC Comments
On the March 10, 2004 Manager's Report
Concerning Environmental Appeals Regulations

Issues Raised by CPC at the March 22, 2004 CPC Meeting

ISSUES

1. The proposed regulations fail to address the following discretionary activities as identified by Land Development Code §128.0202 (Actions That Require Compliance with CEQA).
(a) Activities undertaken by the City such as construction of streets, bridges, or other public structures . . . .
(b) Activities financed in whole or in part by the City of San Diego.
The staff reports states that the "appeal would be applicable to exemption determinations and to Process 2 decisions (a staff level decision that can now only be appealed to Planning Commission) and Process 3 decisions (a Hearing Officer decision that can now only be appealed to Planning Commission).

What about the construction of a fire station, police station or library, or the placement of new sewer or water lines, or the acquisition of land? What about the approval of Development and Disposition Agreements or the expenditure of Community Development Block Grant Funds? What about actions by the Park and Recreation Board, the Housing Commission, and the Redevelopment Agency, or a Department Director? In summary, there are many actions may not require permits by DSD yet are subject to CEQA.

The proposed regulations provide for appeals to the City Council of all environmental determinations required by Public Resources Code (PRC) section 21152(c)—decisions by decision-makers other than the City Council. It should be noted that Process 4 and 5 decisions are not included as the San Diego Municipal Code currently allows an appeal to the City Council for Process 4 decisions; Process 5 decisions are already decided by the City Council. The March 10, 2004 staff report was intended to explain that the code amendment is applicable to all environmental determinations except for those made in conjunction with Process 4 and 5 permit determinations or actions otherwise decided by the City Council. The staff report has been revised to make the scope of appeals clearer.

2. The definition of *environmental determination* is restricted to a decision by any non-elected City decision-maker. What is it called when the determination is made by City Council? Why not have the definition read as follows:

> *Environmental determination* means a decision to certify an environmental impact, adopt a negative declaration or mitigated negative declaration, or to determine that a project is not subject to the California Environmental Quality Act (Pub. Res. Code § 21000 et seq.; "CEQA).

Then have the regulations address an environmental determination made by a non-elected City decision-maker.

This comment addresses the formatting of the code amendment, not its effects. The proposed language was chosen as it is consistent with the way in which the rest of the code is written. Moreover, as discussed above, PRC section 21152(c) requires appeals of environmental determinations by decision-makers other than the City Council, with the City Council making the final determination. With environmental determinations before the City Council, the intent of section 21152(c) has already been met—the City Council is the decision-maker.

3. As currently formatted subsections (d), (e), and (f) of §112.0510 add new restrictions on the appeal of Process Two and Process Three as well as the appeal of an Environmental Determination. And yet the Manager's Report makes only references to appeal procedures for Environmental Determinations and makes no mention of revising the appeal procedures for Process Two and Three. Are subsections (d), (e), and (f) intended to be subsections of (c)?

Staff misread this section as having (d), (e), and (f) only applicable to appeals of environmental determinations. Staff has subsequently determined that this type of provision should not be limited to just environmental appeals. These subsections have, therefore, been removed from the proposed regulation.

4. §112.0510 (d) states that "any evidence submitted after the filing date may not be considered by the City Council as part of the appeal." This seems contrary to CEQA which clearly allows evidence to be entered at the hearing as part of the record. And if this restriction is to be allowed, it would only be fair that staff should not be allowed to enter new evidence at the Council hearing. And yet we know from past experience that is exactly what they will do. There clearly is a double standard here.

See response number 3. The subject provision has been deleted.

5. Under §112.0510 (f) the City Council should be granted the authority to direct staff on the changes that must be made to the environmental document or to the type of document that must be prepared to comply with CEQA. Just remanding to the previous decision-maker seems to put the matter in limbo.

Staff believes that it will be aware of the City Council's concerns with the environmental determination after the hearing. Nothing in the proposed regulations prohibit the City Council from directing staff to make specific changes to the environmental determination.

6. Under §112.0510 (h) the lower decision-maker should not just "reconsider its environmental determination" but instead should be considering the new environmental document that has been prepared by staff as directed by City Council. Most likely there will be a new public review

period.

The relevant sections of the proposed code language have been revised to indicate that the lower decision-maker shall consider a "revised" environmental determination.

7. §112.0510 should include a new subsection entitled "Effect of Filing Appeal" and which includes the following language: "The filing of the appeal shall stay the proceedings and effective of the lower decision-maker's decision pending resolution of the appeal."

This concern is addressed by Section 112.0520(h) which specifies that, "if the City Council grants the appeal, the lower decision-maker's project decision shall be deemed vacated". The effect of granting the appeal, therefore, is to also rescind the project approval. The lower decision-maker is subsequently required to "consider a revised environmental determination AND its project decision…" [emphasis added]. This is consistent with the CEQA requirements that project approvals must be preceded by CEQA compliance.

8. Under §112.0510 (h)(2) why is the matter remanded to the Planning Commission? What about other lower decision-makers including staff?

Section 112.0520(h)(3) has been added to the proposed ordinance to clarify that approval of Mitigated Negative Declarations and Negative Declarations and certification of Environmental Impact Reports by the City Manager (which includes City Manager designees, i.e., Department Heads) would be remanded to the City Manager. All environmental determinations that a project is not subject to CEQA are considered to be made by staff and are therefore remanded to the Development Services Director.

9. §112.0520 (c) states that "an application to appeal a determination that a project is not subject to CEQA shall be filed in the Office of the City Clerk within 10 business days from the date of the staff decision that the project is not subject to CEQA, as provided in Public Resources Code section 21080." How and when will the public be notified of the staff's decision that the project is not subject to CEQA?

Staff concurs that notices of environmental determinations for discretionary actions (i.e., not building permits) should be made available. Staff continues to work on specific language to address this in the proposed regulation.

10. Although not stated in the Ordinance or City Manager's Report, the City Attorney has apparently opined that the CEQA Appeal does apply to Addenda, Supplemental EIRs, reuse of an environmental document, or categorical or statutory exemptions. What is the basis of this opinion? By choosing to prepare a Supplemental EIR staff has precluded the public from appealing an environmental determination.

As stated during the March 24, 2004, meeting, the City Attorney has advised City staff that the proposed regulations are consistent with the minimum requirements of state law.

Certification of an Environmental Impact Report (EIR), to wit: Project EIRs, Master EIRs, Program EIRs, Staged EIRs, Subsequent EIRs and Supplement to an EIR; approval of Mitigated Negative Declarations and Negative Declarations; and determinations that a project is not subject to CEQA (including, for example, categorical and statutory exemptions) are the types of actions that may be appealed to the City Council where the initial decision is made by a non-elected decision-maker. Staff is recommending appeal provisions for the minimum number of types of environmental determinations; however, the City Council could adopt language that would make other types of determinations subject to appeal.

11. Vedanta Society of Southern California v. California Quartet, Ltd. (2000) states that "under CEQA and its regulations, an appeal from the certification by an unelected Planning Commission must be decided by the Majority Vote of the Elected Body." It is the opinion of Terry Roberts, Director, State Clearinghouse, Governor's Office of Planning and Research[1], that the case would set a precedent for an appeal of a Negative Declaration as well. This determination should be codified in the Land Development Code.

City staff believes the proposed regulations address the issue raised in *Vedanta*. Section 112.0520(f) mandates that the City Council hears the appeal and make a decision.

12. Wouldn't it make more sense to address the appeal of an environmental determination by a non-elected decision-maker in Article 8 (Implementation Procedures for the California Environmental Quality Act and the State CEQA Guidelines)? Perhaps after Section 128.0311 (Certification of an Environmental Document). Certification of an EIR or approval of a Negative Declaration is not the issuance of a permit.

This comment addresses the formatting of the code amendment, not its effects. The proposal would co-locate the environmental determination appeal process with other appeal matters.

RECOMMENDATIONS

In view of the substantial deficiencies/questions, it is recommended that the Ordinance be rewritten to address the above comments as well as other comments provided by CPC members and the public at tonight's hearing and that the revised Ordinance be brought back to CPC.

It is also recommended that after subsequent review by CPC that the matter be referred to the Natural Resources and Cultural Committee (since that committee is tasked with CEQA/NEPA issues) prior to returning to City Council.

Staff will attend the next CPC meeting to discuss this memo and any other CPC comments on the proposed regulation. Consultation with the Committee Consultant concluded that the City Council direction is to next present the proposal to LU&H, rather than NR&C, before returning the item to the City Council.

[1] E-mail of 3/23/04 from Terry Roberts to Randy Berkman

Issues Raised by CPC member Paul David at the March 22, 2004 CPC Meeting

The project applicant, not the appellant, should bear all fees and costs for appeals of environmental determinations.

The current appeal fee only recovers minor administrative staff costs associated with docketing of the appeal. All technical review staff processing costs are borne by the project applicant.

Issues Raised by Sierra Club Representative Peter David at the March 22, 2004 CPC Meeting

1. The appeal should apply to project decisions.
See response to comment 7 above.

2. The intent of the remand procedures is unclear. Can the final decision be made by an unelected decision-maker?
No. An environmental determination made by and on remand to a lower decision-maker could be appealed again to the City Council.

3. Notices of all environmental determination should be made public.
See response to CPC comment 9.

Issue Raised by CPC member Alex Sachs in a March 17, 2004 email to Kelly Broughton

I would really like to see CPC and the DSD consider requiring the applicant to list at least a phone number. As chair of a planning group in a busy area, I cannot tell you how many calls I get that should really be addressed to the applicant.

In my view, the applicant has a duty to make him or herself available to the community to answer questions, same as we are required to list a phone number.

For purposes of protecting privacy interests, the Municipal Code does not mandate that the applicant's private telephone number be included in a public notice. However, with the applicant's consent, the information could be provided. Staff is available to respond to inquiries from the pubic on the project.

Attachment 3
Statutory Exemptions Used or Potentially Used by The City of San Diego
(California Environmental Quality Act Guidelines Sections 15260 et seq.)

Staff proposes that these exemptions not be appealable. The State Legislature has determined that the following activities are exempt from the California Environmental Quality Act regardless of their potential impacts.

15261 – Ongoing Projects – Project which were initiated prior to the enactment of CEQA.
15262 – Feasibility and Planning Studies
15265 – Adoption of Local Coastal Plans and Programs
15266 – General Plan Time Extensions
15267 – Financial Assistance to Low and Moderate Income Housing
15268 – Ministerial Projects – Process 1 Decisions including Construction Permits (Building Permits, Electrical Permits, Plumbing/Mechanical Permits, Demolition/Removal Permits, Grading Permits, Public Right-of-Way Permits, and Sign Permits), Substantial Conformance Reviews, Classification of Use
15269 – Emergency Projects – Actions to respond to or prevent emergencies
15270 – Projects Which Are Disapproved
15273 – Rates, Tolls, Fares, and Charges – Obtaining Funding; purchasing/leasing of supplies and equipment
15274 – Family Day Care Homes
15275 – Specified Mass Transit Projects
15276 – Transportation Improvement and Congestion Management Programs
15279 – Housing for Agricultural Employees
15280 – Lower-Income Housing Projects – Subject to several conditions
15282(e) – Construction of Housing or Neighborhood Commercial Facilities – in urbanized area and pursuant to an adopted Specific Plan
15282(f) – Conversion of a rental mobile home park to condominium ownership
15282(h) – Railway grade separation projects
15282(j) – Adoption of ordinances allowing second units in certain residential zones
15282(k) – Projects which re-stripe streets or highways to relieve traffic congestion
15282(l) – Installation, maintenance, repair, etc. of pipelines less than one mile in length
15282(m) – Initiation of General Plan Amendments
15282(q) – Adoption of a nondisposal facility element
15282(s) – Determinations made regarding regional housing needs
15282(t) – Actions needed to bring a General Plan into compliance pursuant to a court order
15282(u) – Industrial Development Authority activities
15282(w) – Adoption of Urban Water Management Plans

Attachment 4
Categorical Exemptions Used or Potentially Used by The City of San Diego
(California Environmental Quality Act Guidelines Sections 15300 et seq.)

Staff proposes that these exemptions be appealable. The State Legislature has determined that the following classes of activities are exempt from the California Environmental Quality Act unless:

1. The cumulative effect of successive projects of the same type in the same place over time is significant.

2. There is a reasonable possibility that the activity will have a significant effect on the environment due to unusual circumstances.

3. The project may result in damage to scenic resources.

4. The project is located on a hazardous waste site.

5. The project may cause a substantial adverse change in the significance of a historical resource.

15301 – Existing Facilities – Operation, repair, maintenance or minor alteration
15302 – Replacement or Reconstruction – of existing structures and facilities
15303 – New Construction or Conversion of Small Structures -
15304 – Minor Alterations to Land
15305 – Minor Alterations to Land Use Limitations
15306 – Information Collection
15307 – Actions by Regulatory Agencies for Protection of Natural Resources
15308 – Actions by Regulatory Agencies for Protection of the Environment
15309 - Inspections
15311 – Accessory Structures
15312 – Surplus Government Property Sales
15313 – Acquisition of Lands for Wildlife Conservation Purposes
15315 – Minor Land Divisions
15316 – Transfer of Ownership of Land in order to Create Parks
15319 – Annexations of Existing Facilities and Lots for Exempt Facilities
15320 – Changes in Organization of Local Agencies
15321 – Enforcement Actions by Regulatory Agencies
15323 – Normal Operations of Facilities for Public Gatherings
15325 – Transfer of Ownership of Interest in Land to Preserve Existing Natural Conditions and Historical Resources
15326 – Acquisition of Housing for Housing Assistance Programs
15327 – Leasing of New Facilities
15329 – Cogeneration Projects at Existing Facilities
15330 – Minor Actions to Prevent, Minimize, Stabilize, Mitigate or Eliminate the Release or Threat of Release of Hazardous Waste or Hazardous Substances
15331 – Historical Resource Restoration/Rehabilitation
3. 15332 – In-Fill Development Projects – under certain conditions