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MEMORANDUM OF LAW

DATE: June 7, 2006

TO: Honorable Mayor and City Councilmembers

FROM: City Attorney

SUBJECT: Public Notice Requirements for Administrative Appeals of City Environmental Determinations under CEQA and the Municipal Code

INTRODUCTION

On or about December 2 and 9, 2005, the Affordable Housing Coalition of San Diego County and Citizens for Responsible Equitable Environmental Development (CREED), represented by attorney Cory Briggs, filed two Petitions for Writ of Mandate in the San Diego Superior Court, Central District, challenging the City's determination to categorically exempt past and future condominium conversion projects in the City of San Diego. *See* Case Nos. GIC 857723 and GIC 858098. *See also* Section 21167 of the California Public Resources Code and Sections 15062 and 15112 of the California Environmental Quality Act (CEQA) Guidelines. Plaintiffs allege, among other things, that the exemption of condominium conversions from CEQA environmental review will have a significant, cumulative impact on the physical environment, including impacts arising from or related to the further reduction of the stock of affordable rental housing for low income residents in San Diego. Plaintiffs allege that the exception criteria for Categorical Exemptions applies. *See* Section 15300.2 of the CEQA Guidelines.

Attorney Cory Briggs, on behalf of his clients, also filed with the City several hundred administrative appeals pursuant to Section 128.0207(b) of the City of San Diego Municipal Code [Municipal Code] and CEQA, California Public Resources Code Section 21151(c). Each appeal is a separate and distinct challenge to an environmental determination made by the City to categorically exempt from CEQA a project-specific condominium conversion. On or about the week of May 29, 2006, the City docketed eighty (80) of these appeals as separate agenda items for hearing. Cal. Pub. Res. Code § 21000 et seq. These eighty appeals are docketed for hearing before the City Council on June 13, 2006. On information and belief, mailed notice of the hearing date and other pertinent information (location, agenda items, etc.) was not provided to adjacent property owners, adjacent residents and residents of the subject property. The City

Attorney's office has also been informed that public notice was given by advertisement in a newspaper of general daily circulation and a copy was also mailed to the appellant, to each project applicant and/or to each project property owner.

QUESTIONS PRESENTED

1. Is the City required to provide to residents of the subject property and all persons, who reside within 300 feet of the boundary of a real property that is the subject of an application, a notice by mail of a hearing scheduled to address a challenge to the City's environmental determination on that project application?

2. Must notice be given at least 10 business days before the date of the public hearing?

SHORT ANSWERS

1. Yes. Pursuant to the requirements expressly provided for in the Municipal Code and consistent with case law, notice of the hearing is required by mail to residents of the subject property and persons who reside within 300 feet of the boundary of the real property that is the subject of an application and challenge to the environmental determination on that project application.

2. Yes. Pursuant to the requirements expressly provided for in the Municipal Code, notice must take place at least 10 business days before the date of public hearing.

ANALYSIS

I. Is the City required to provide to residents of the subject property and all persons, who reside within 300 feet of the boundary of a real property that is the subject of an application, a notice by mail of a hearing scheduled to address a challenge to the City's environmental determination on that project application?

A determination that a project is exempt from CEQA is an environmental determination under the provisions of Sections 113.0103, 128.0207 and 128.0208 of the Municipal Code. *See also* CEQA Guidelines Section 15062. An environmental determination may be appealed pursuant to Sections 112.0520 and 128.0207 of the Municipal Code and Section 21151(c) of the California Public Resources Code. A timely appeal will trigger the requirements for an appeal hearing pursuant to Section 112.520(c) of the Municipal Code.

The Municipal Code requires that for appeals of an environmental determination (including exemptions), the notice requirements of Section 112.0301(c)(1)(2) and (3) and Section 112.0302(a), (b) and (c) of the Municipal Code apply. *See also* Municipal Code Section 128.0207 and 112.0308.

Section 112.0302(a) and (b) expressly require that for a Notice of Public Hearing, the notice shall be postage prepaid and addressed to the following persons:

(1) The applicant;

(2) All addresses located within 300 feet of the boundary of the real property that is the subject of the application, including each address within a condominium or apartment complex;

(3) The owners of any real property, as shown on the latest equalized property tax assessment roll of the San Diego County Assessor, located within 300 feet of the boundary of the property that is the subject of the application;

(4) The officially recognized community planning group, if any, that represents the area in which the proposed development is located; and

(5) Any person who has submitted a written request for notification of the proposed development to the City staff person named in the Notice of Future Decisions.

See also similar provisions found in California Planning and Zoning Laws (Cal. Gov't Code Sections 65090-65095).

The alternative to this mailed notice requirement is found in Section 112.0302(c) which states:

> If the number of tenants and owners to whom notice would be mailed in accordance with Section 112.0302(b) is greater than 1,000, notice may be given by placing a display advertisement of at least one-eight page in a newspaper of general daily circulation within the city in lieu of mailing, unless the noticing is required for a Coastal Development Permit.

The clear meaning and intent of subsection (c) is to provide an alternative noticing procedure where one particular project (agenda item) involves more than a thousand mailed notices, and not in a case where there are a number of separate agenda items (separate project challenges) that happen to share a common subject.

An item-by-item (project-by-project) specific analysis is also consistent with a California Supreme Court decision where the Court considered the notice and hearing requirements that are triggered when a governmental entity undertakes CEQA review and approval for a project. *Horn v. County of Ventura* 24, Cal. 3d 605 (1979).

In *Horn v. County of Ventura* 24, Cal. 3d 605 (1979), the California Supreme Court made clear that a notice and opportunity for hearing are constitutionally compelled. This due process principle is applicable to government decision-making, adjudicative in nature, which may deprive a person of a significant property interest, including CEQA determinations. 24 Cal. 3d 605, 612-613. Where prior notice of a potentially adverse decision is constitutionally required, that notice must, at a minimum, be reasonably calculated to afford affected persons the realistic opportunity to protect their interests. *Id.* at 617. In this case, the County of Ventura had prepared a Negative Declaration and provided notice by posting the document at central public buildings and mailing the notice to those persons who specifically requested it. The County did not provide mailed notice to adjacent property owners. *Id.* at 617-618. The California Supreme Court expressly stated:

> The notice provided by the county's CEQA regulations fails to meet the foregoing standard. By limiting itself to the posting of environmental documents at central public buildings, and mailings of notice to those persons who specifically request it, the county has manifestly placed the burden of obtaining notice solely on the concerned individuals themselves. While such posting and mailing may well suffice to encourage the generalized public participation in the environmental decision making contemplated by CEQA, they are inadequate to meet due process standards where fundamental interests are substantially affected. Those persons significantly affected by a proposed subdivision cannot reasonably be expected to place themselves on a mailing list or "haunt" county offices on the off-hand chance that a pending challenge to those interests will thereby be revealed….[D]epending on the magnitude of the project, and the degree to which a particular landowner's interests may be affected, acceptable techniques might include notice by mail to the owners of record of property situated within a designated radius of the subject property, or by the posting of notice at or near the project site or both. Notice must, of course, occur sufficiently prior to a final decision to permit a "meaningful" predeprivation hearing to affected landowners.

24 Cal. 3d at 617-618.

The application of the mailing requirements of Section 112.0302(b) is consistent with *Horn* in that it provides for mailed notice to adjacent property owners and residents. The type of notice given should not depend on a consideration of the number of notices required if one were to consolidate all agenda items scheduled for hearing on a particular day. Each project for which an appeal of an environmental determination has been filed and for which an agenda item has been assigned must be evaluated separately to determine the appropriate noticing requirements for that particular project (agenda item) (i.e., whether 112.0302(b) or 112.0302(c)).

II. Must notice be given at least 10 business days before the date of the public hearing.

Section 112.0301(c) requires notice of public hearing for environmental determinations. Section 112.0301(c)(3) expressly provides the time requirements for mailing a notice of public hearing to persons described in section 112.0302(b) and reads as follows:

> Distribution. Except as otherwise provided by the Municipal Code, the City Manager shall publish the Notice of Public Hearing in accordance with section 112.0303 and shall mail the Notice of Public Hearing to persons described in section 112.0302(b), at least 10 *business* days before the date of the public hearing. (emphasis in original).

Thus, notice is required at least 10 business days before the date of the public hearing. Business day is defined in Section 113.0103 of the Municipal Code. Where notice has not been so given, such notice is deficient and in violation of the Municipal Code.

CONCLUSION

Pursuant to the requirements expressly provided for in the Municipal Code and consistent with case law, notice of the hearing is required by mail to residents of the subject property and persons who reside within 300 feet of the boundary of the real property that is the subject of an application and challenge to the environmental determination on that project application. Pursuant to the requirements expressly provided for in the Municipal Code, notice must take place at least 10 business days before the date of public hearing. The City should therefore continue the public hearings to allow for adequate public notice consistent with applicable law as outlined above. A failure to provide adequate public notice may expose the City to unnecessary litigation where a court of law may be asked to consider the adequacy of the public notice, whether there was an abuse of discretion or whether there was prejudicial error.

Please note, this Memorandum does not address other due process and related concerns, including those associated with holding eighty appeals in one day. These other legal concerns will be addressed by separate memoranda or other available alternatives.

MICHAEL J. AGUIRRE, City Attorney

By
Karen Heumann
Assistant City Attorney

SE:KH:jb
ML-2006-10
cc: Gary Halbert, Development Services Director
Elizabeth Maland, City Clerk