

**Office of
The City Attorney
City of San Diego**

**MEMORANDUM
MS 59**

(619) 533-5800

DATE: June 28, 2017

TO: Honorable Mayor and Councilmembers

FROM: City Attorney

SUBJECT: Discretionary Land Use Permit Findings and Standard of Review

INTRODUCTION

On June 28, 2017, the Public Safety and Livable Neighborhoods Committee will consider providing a recommendation on the acquisition of 1788 Palm Avenue (Super 8 Motel) for the San Diego Misdemeanants At-Risk Track (SMART) Program. While the item before Committee and eventually City Council is confined to the acquisition of the Palm Avenue property, several questions have been raised concerning the land use entitlement process. It is anticipated that this project may require discretionary approvals, including a discretionary land use permit. However, since an application for a development project has not been submitted to the Development Services Department, the typical review process has not occurred to determine all of the necessary approvals. As such, the purpose of this memorandum is to provide general guidance on discretionary land use permits and findings.

ANALYSIS

I. DISCRETIONARY LAND USE PERMITS

Discretionary land use permits are generally required for those types of development and uses that the local authority does not want to allow by right, but may decide to allow with the flexibility of additional conditions and restrictions. 7 Miller & Starr, Cal. Real Estate § 21.9 (4th ed. 2017). In the City of San Diego, “findings” must be made to support the approval of discretionary land use permits. Findings, as defined in the San Diego Municipal Code (Municipal Code or SDMC) are “determinations based upon a statement or set of statements of factual evidence that are used as the criteria for making a decision on a discretionary action.” SDMC § 113.0103. For example, the findings necessary for a Conditional Use Permit approval are:

- (a) The proposed *development* will not adversely affect the applicable *land use* plan;

- (b) The proposed *development* will not be detrimental to the public health, safety, and welfare;
- (c) The proposed *development* will comply with the regulations of the Land Development Code including any allowable deviations pursuant to the Land Development Code; and
- (d) The proposed use is appropriate at the proposed location.

SDMC § 126.0305.

Findings need to adequately articulate the factors upon which the decision is based so as to allow meaningful review. *Gallegos v. State Bd. of Forestry*, 76 Cal. App. 3d 945, 951 (1978). They must “bridge the analytic gap between the raw evidence and ultimate decision or order” and must be supported by substantial evidence. *Topanga Assn. for a Scenic Community v. County of Los Angeles*, 11 Cal. 3d 506, 513-17 (1974). This substantial evidence may include staff reports, public comment, any environmental document, and any other information in the record. *Id.* at 515. The evidence “must be reasonable in nature, credible, and of solid value” *Phelps v. State Water Resources Control Board*, 157 Cal. App. 4th at 89, 99 (2007) (quoting *DiMartino v. City of Orinda*, 80 Cal. App. 4th 329, 336 (2000)). There needs to be enough relevant information and reasonable inferences from this information to support the conclusion reached, even if other conclusions can be made. *San Franciscans Upholding the Downtown Plan v. City & County of San Francisco*, 102 Cal. App. 4th 656, 675 (2002), *see* Cal. Code Regs., title 14, § 15384(a).

II. FINDING THAT A PROJECT WILL NOT ADVERSELY AFFECT THE APPLICABLE LAND USE PLAN

All of the City’s discretionary permits require the decision maker to find that the particular project will not adversely affect the applicable land use plan. San Diego Municipal Code Chapter 12, Article 6, Divisions 1-8. The Municipal Code defines “Land use plans” as “the General Plan and adopted community plans, specific plans, precise plans, and sub-area plans.” SDMC § 113.0103. These land use plans can consist of several hundreds of pages and usually address various elements such as the overall land uses, mobility, conservation, recreation, and economic prosperity.

Given this range of topics, it is not uncommon for land use plans to contain conflicting policies. In light of this, the courts have held that a project “need not be in perfect conformity with each and every [general plan] policy” since “no project [can] completely satisfy every policy stated in [a general plan].” *Sequoia Hills Homeowners Assn. v. City of Oakland*, 23 Cal. App. 4th 704, 718 (1993). Instead, a “project is consistent with the general plan if, considering all its aspects, it will further the objectives and policies of the general plan and will not obstruct their attainment.” *Corona-Norco Unified School Dist. v. City of Corona*, 17 Cal. App. 4th 985, 994 (1993). However, “the nature of the policy and the nature of the inconsistency are critical factors to

consider.” *Families Unafraid v. City of Corona*, 17 Cal. App. 4th 985, 994 (1993), to uphold *Rural El Dorado County v. El Dorado Bd. of Sup’rs.*, 62 Cal. 4th 1332, 1341 (1998).

A project is inconsistent with a land use plan if it is clearly incompatible with a fundamental, mandatory and specific policy of the land use plan, or if it is not compatible with and will frustrate the general plan’s goals and policies. 7 Miller & Starr, Cal. Real Estate § 20:24 (4th ed. 2017). The courts afford great deference to an agency’s determination of consistency and the determination will be upheld “unless no reasonable person could have reached the same conclusion on the evidence before it.” *Endangered Habitats League, Inc. v. County of Orange*, 131 Cal. App. 4th 777, 782 (2005). A project’s inconsistency may be avoided by an affirmative commitment to mitigate that inconsistency. See *Napa Citizens for Honest Government v. Napa County Bd. of Supervisors*, 91 Cal. App. 4th 342, 380 (2001) (a project that would increase traffic may avoid an inconsistency with a policy of reducing traffic by including traffic mitigation).

III. JUDICIAL REVIEW OF DISCRETIONARY PERMIT FINDINGS

If the City’s decision on a discretionary permit is challenged, a court will review the City’s decision and the applicable permit findings under an abuse of discretion standard. “Abuse of discretion is established if the respondent has not proceeded in the manner required by law, the decision is not supported by the findings, or the findings are not supported by the evidence.” Cal. Civ. Proc. Code § 1094.5(b); *Golden Gate Water Ski Club v. County of Contra Costa*, 165 Cal. App. 4th 249, 256-57 (2008). When a court is determining whether substantial evidence exists, it ““must resolve reasonable doubts in favor of the administrative finding and decision.”” *Laurel Heights Improvement Ass’n v. Regents of University of California*, 47 Cal. 3d 376, 393 (1988) (quoting *Topanga Ass’n for a Scenic Community v. County of Los Angeles*, 11 Cal. 3d 506, 514 (1974)). Unless the findings are so lacking in evidentiary support as to render them unreasonable, they may not be set aside. *N. Inyo Hosp. v. Fair Emp. Practice Comm’n*, 38 Cal. App. 3d 14, 24 (1974).

The court will give a finding made by the decision makers “substantial deference, presume it to be correct, and resolve reasonable doubts in favor of the administrative findings.” *Save Our Heritage Organisation v. City of San Diego*, 237 Cal. App. 4th 163, 179 (2015).

“It is, emphatically, *not* the role of the courts to micromanage these development decisions. Our function is simply to decide whether the city officials considered the applicable policies and the extent to which the proposed project conforms to those policies, whether the city officials made appropriate findings on this issue, and whether these findings are supported by substantial evidence.” *Save Our Heritage Organisation v. City of San Diego*, 237 Cal. App. 4th at 186 (citing *Sequoia Hills Homeowners Assn.*, 23 Cal. App. 4th at 719-20).

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For example, on this basis, the court upheld the City of San Diego's finding that the Plaza de Panama project did not adversely affect the applicable land use plans, notwithstanding the project's significant and unmitigable impact on historic resources and the resultant conflict with various historic preservation policies. The court noted that there was substantial evidence, nearly 50 pages of the Environmental Impact Report, supporting the City's determination. More recently, the City also prevailed in a challenge to a decision where the City Council determined that findings that a project would not adversely affect the land use plan could not be made. *Kutzke v. City of San Diego*, 11 Cal. App. 5th 1034 (2017). (The court noted that its role was to determine whether substantial evidence supported the City's findings, and whether those findings then supported its decision on the project).

CONCLUSION

This memorandum is intended to provide general guidance regarding discretionary land use permits and findings. Our Office stands ready to provide more specific advice related to the entitlement process when the review process for any development project on Palm Avenue begins.

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By /s/ *Shannon M. Thomas*

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cc: Erik Caldwell, Director, Economic Development Department