

6732 11:03:11
CITY OF OAKLAND



1 FRANK H. OGAWA PLAZA • 6TH FLOOR • OAKLAND, CALIFORNIA 94612

Office of the City Attorney
John A. Russo
City Attorney

June 19, 2007

(510) 238-3601
FAX: (510) 238-6500
TTY/TDD: (510) 238-3254

HONORABLE CITY COUNCIL
Oakland, California

President De La Fuente and Members of the City Council

Subject: Legal Opinion Regarding Appeal of CEQA Determination of a
Categorical Exemption for Case File Number CD06-604 (Construction of Six
Dwelling Units Over Ground Floor Commercial at 5253 College Avenue)

I. INTRODUCTION

Councilmember Brunner has asked the City Attorney's office to provide this memorandum regarding the scope of the City Council's review of the above-referenced appeal, filed by Bert Verrips ("Appellant") under the California Environmental Quality Act (Pub. Res. Code 21000, *et seq.*) ("CEQA").

Please note that we have not been asked to opine on and, accordingly, this memorandum does not address, the merits of this appeal. We note, however, that our review of the appeal does not raise evidence of a significant environmental impact or other grounds that would invalidate the CEQA determination.

II. QUESTION PRESENTED

Does the state law requirement that the nonelected Planning Commission's CEQA exemption determination may be appealed to the City Council supersede City ordinance provisions that related Minor Conditional Use Permit ("CUP") and Design Review approvals are not appealable to City Council?

III. SUMMARY OF ANSWER

No. The City Council's review is limited to the validity of the CEQA determination. Although CEQA specifies that an appeal to the City Council must be available regarding

Item _____
ORA/City Council
June 19, 2007

the Planning Commission's CEQA exemption determination, it does not authorize the final Planning Commission determinations on the Minor CUP or Design Review to be reopened.

IV. RECOMMENDATIONS

Recommendation 1: If the Council rejects the appeal and determines the CEQA determination is correct, the CEQA determination will become final, and the project approvals will stand.

Recommendation 2: If, however, the Council decides the CEQA determination is improper, the matter must be referred back to staff for a *de novo* evaluation of the project. This Council decision would invalidate the Minor CUP and Design Review, and staff would review the application anew, based on CEQA documentation pursuant to the Council's direction.

V. BACKGROUND

The appeal concerns the CEQA determination for a project that would demolish an existing commercial building and construct a mixed use building containing six dwelling units over two ground floor commercial spaces.

On February 28, 2007, the Zoning Manager approved the application for Minor CUP and Design Review for the proposed construction and a Minor Variance to allow the proposed open space to be located on the roof top. Staff determined that the project was exempt from review under CEQA Guidelines section 15303 (new construction of small structures) and section 15183 (projects consistent with community plan, general plan or zoning).¹

On March 9, 2007, these staff-level approvals were appealed to the Planning Commission in accordance with Oakland Planning Code sections 17.134.060 (Appeal to Planning Commission for Minor CUP), 17.136.080 (Appeal to Planning Commission for Design Review) and 17.148.070 (Appeal to Planning Commission for Minor Variances).

On May 2, 2007, the Planning Commission heard the appeal and upheld staff's environmental determination and staff's approval of a Minor CUP and Design Review. The Planning Commission did not address the appeal with respect to the Minor Variance, as the applicant voluntarily relinquished the Minor Variance.

¹ The project appears exempt from CEQA on additional grounds, for example, CEQA Guidelines section 15332 (In-Fill Development Projects).

At May 2, 2007, Planning Commission hearing, the Appellant's attorney asserted that the decision before the Planning Commission was appealable to the City Council due to Public Resources Code section 21151(c), which specifies that when a nonelected decisionmaking body (such as the Planning Commission) determines a project is not subject to CEQA, that determination may be appealed to the agency's elected decisionmaking body. Appellant's counsel submitted a letter at the hearing that stated that "[s]ince legally the approval of the project is dependent upon the CEQA determination, the entire matter is appealable to the Oakland City Council."

In response, staff and this Office stated at the Planning Commission meeting that the CEQA determination is appealable to the City Council under Public Resources Code section 21151(c). However, in accordance with the Oakland Planning Code, the Planning Commission's decision on the Minor CUP and Design Review are not appealable.

On May 10, 2007, Appellant Bert Verrips filed this appeal of the CEQA determination to the City Council.

VI. DISCUSSION

A. *The Planning Commission's Determination that the Project is Exempt from CEQA is Appealable to the City Council Under Public Resources Code 21151(c)*

The Appellant's assertions are based an amendment to CEQA that became effective January 1, 2003. The amendment establishes the right to appeal a CEQA exemption determination to the City Council notwithstanding City ordinances that empower non-elected officials to make final decisions on the merits of a project. The provision states:

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 this division, that certification, approval, or determination may be appealed to the agency's elected decisionmaking body, if any.

Pub. Res. Code § 21151(c).

As applied to the to the 5253 College Avenue project, section 21151(c) provides the right to appeal to the elected City Council the Planning Commission's CEQA determination. The statute addresses only a project's CEQA determination, not appeals on project approvals made in reliance on a CEQA determination, such as the Minor CUP and Design Review.

B. Oakland City Ordinances Specify that the Planning Commission is the Final Decisionmaker on the Minor CUP and Design Review

The Oakland Planning Code specifies the substantive standards, criteria, findings and detailed procedural requirements for CUPs and Design Review. See Planning Code sections 17.134.010-130 (Conditional Use Permit Procedures) and 17.136.010-130 (Design Review Procedures).

The Oakland Planning Code designates two separate categories of CUPs: (1) Major CUPs for proposed land uses that meet certain larger size thresholds and/or specified uses or characteristics; and (2) Minor CUPs for projects that do not trigger the thresholds applicable to Major CUPs. The Planning Code specifies that staff is the initial decisionmaker for Minor CUPs, and staff's decision may be appealed to the Planning Commission. See Planning Code section 17.134.060.² The Code states that the Planning Commission decision "shall be final."

Similarly, the Planning Code specifies that Design Review applications such as this, which was a staff-level decision reviewed under Planning Code section 17.136.060B (proposals requiring design review only because the project involves or results in three or more units) are "Not Ultimately Appealable to City Council." The Planning Code states that the staff's Design Review decision may be appealed to the Planning Commission, and the decision of the Commission on appeal "shall be final immediately."³

C. The Appealability of the CEQA Determination Does Not Reopen the Planning Commission Determinations on the Merits of the Minor CUP or Design Review

As noted above, the Appellant has asserted that the right to appeal the CEQA exemption determination under Public Resources Code section 21151(c) creates a right to appeal the Planning Commission's determinations on the merits of the Minor CUP and Design Review. We have not found legal support for this theory in either the appeal itself, or in our research.

Nothing in Public Resources Code section 21151(c), or CEQA generally, purports to supplant local ordinance-established procedures for evaluating and appealing decisions such as the Minor CUP and Design Review. Moreover, to read such an appeal right into section

² For Major CUPs, the Planning Code specifies that the Planning Commission is the initial decisionmaker, and Planning Commission decisions are appealable to the City Council. See Planning Code section 17.134.070.

³ Although the Planning Commission decision is now final, the Minor CUP and Design Review cannot be considered effective until the CEQA appeal is resolved.

21151(c) readily could lead to extreme circumstances that are unlikely to have been intended by the Legislature in amending CEQA. The vast majority of decisions made by staff and other nonelected officials of any city or county are not subject to CEQA. These include a great number of land use decisions as well as undoubtedly thousands of decisions that have no conceivable bearing on the physical environment. The logical extension of Appellant's assertions would make every such City decision by a nonelected official appealable to the City Council by virtue of a determination that CEQA does not apply. Any decision from a lot split to a dog license arguably could be appealed to the City Council under Appellant's theory.

We have found no reported cases that address the issue presented here. Other cases interpreting Public Resources Code § 21151(c) are not on point. *See, e.g., El Morro Community Ass'n v. California Dep't of Parks and Recreation*, 122 Cal.App.4th 1341 (2004) (requirement that exemption determinations be appealable to elected decisionmaking body does not apply to state agencies). Although not legally controlling, our informal inquiries with other cities have supported our reading of section 21151(c) and found no support for Appellant's interpretation.

Although this Office does not agree with Appellant's position that section 21151(c) reopens the Minor CUP and Design Review, this Office agrees that the Planning Commission decisions on the Minor CUP and Design Review are dependent upon a valid CEQA determination. As a result, if the City Council upholds the appeal on the CEQA determination, the Minor CUP and Design Review would be invalidated. The entirety of the application would need to be re-evaluated by staff according to the Planning Code requirements for a Minor CUP and Design Review, as if it were a new application. This remand to staff would be necessary to ensure that, if again approved, the Minor CUP and Design Review decisions are based on an accurate and complete environmental determination that addresses any flaws that identified by the City Council. *See e.g., Laurel Heights Improvement Ass'n v. Regents of University of California*, 47 Cal. 3d 376 (1988) (CEQA review must not be a *post hoc* rationalization to support an action already taken).⁴

VII. CONCLUSION AND RECOMMENDATIONS

For the reasons stated in this memorandum, the City Council's review of the 5253 College Avenue appeal is limited to determining the validity of the Planning Commission's affirmation of staff's environmental determination pursuant to CEQA.

⁴ Our recommended approach is analogous to that typically employed in judicial review of CEQA decisions. Courts routinely evaluate the record only with reference to a project's CEQA compliance, and either (1) uphold the CEQA determination, thereby allowing project approvals to stand; or (2) solely on the basis of finding the CEQA inadequate, vacating the project approvals and remanding the entire action to the local agency.

Honorable City Council
June 19, 2007
Page 6 of 6

If the Council rejects the appeal and finds the CEQA determination of staff and the Planning Commission is correct, the CEQA determination will become final, and the project approvals will stand. If, however, the Council decides the CEQA determination is improper, the matter must be referred back to staff for a *de novo* evaluation of the project. This Council action would invalidate the Minor CUP and Design Review, and staff would review the application anew, based on CEQA documentation prepared pursuant to the Council's direction.

Respectfully submitted,



JOHN A. RUSSO
City Attorney

Attorney Assigned:
Heather B. Lee