



Administrative Report

P.2., File # 21-2511

Meeting Date: 5/18/2021

To: MAYOR AND CITY COUNCIL
From: MICHAEL W. WEBB, CITY ATTORNEY

TITLE

DISCUSSION AND POSSIBLE DIRECTION TO STAFF REGARDING THE APPEAL REQUIREMENTS FROM PLANNING COMMISSION OR HARBOR COMMISSION TO COUNCIL

EXECUTIVE SUMMARY

At the April 20th meeting, on a motion made by Councilmember Nehrenheim, the City Council directed staff to bring back the CEQA Ordinance 10-3.901 regarding appeal requirements and procedures. Further direction was given that no staff report was needed it was just for discussion.

10-3.901 CEQA appeal requirements and procedures.

(a) **“CEQA appeal”** shall mean an appeal to the City Council from a non-elected decision-making body’s or a non-elected decision-maker’s decision approving, certifying, denying approval, or denying certification of an environmental impact report (“EIR”), a negative declaration (“ND”) or mitigated negative declaration (“MND”), a determination that a project is exempt from CEQA pursuant to a statutory or categorical exemption, a subsequent or supplemental EIR, ND, or MND, addenda to a previously prepared CEQA document, master EIRs, focused EIRs, joint CEQA and NEPA documents, CEQA findings, CEQA statements of overriding considerations, or CEQA mitigation monitoring and reporting programs (collectively referenced as “CEQA documents” in this section). Each and every party wishing to challenge the approval of a CEQA document must file a separate CEQA appeal in compliance with this section. The appellants identified in subsections (a)(1) through (a)(3) of this section may file a CEQA appeal:

(1) Any person may appeal to the City Council the decision of either a non-elected decision-making body or a non-elected decision-maker approving or certifying (“approving” or “approval”) a CEQA document; provided, however, that the person must have objected to the approval or certification of the project’s CEQA document orally or in writing during either the public comment period provided with respect to the project pursuant to CEQA, or prior to the close of the final public hearing on which the CEQA document was acted upon by the non-elected decision-making body or the non-elected decision-maker. If no public hearing or other opportunity was provided to members of the public to raise objections, either orally or in writing, prior to the approval of the CEQA document, then the “objection” requirement of this subsection shall not apply. An appeal filed pursuant to this subsection shall not relieve any third party from filing their own CEQA appeal.

(2) Any project applicant may appeal to the City Council the decision of a non-

elected decision-making body or a non-elected decision-maker denying the approval or certification ("denying" or "denial") of a CEQA document for their project. An appeal filed pursuant to this subsection shall not relieve any third party from filing their own CEQA appeal.

(3) The Mayor or any member of the City Council may appeal on their own behalf any decision of a non-elected decision-making body or a non-elected decision-maker approving or denying certification of a CEQA document without fulfilling the requirements of subsection (a)(1), (a)(2), or (c) of this section; provided, however, that the City Council member or Mayor requesting the appeal shall disqualify him or herself from hearing the appeal unless he or she can certify in writing that he or she has no predisposition against or in favor of the project. An appeal filed pursuant to this subsection shall not relieve any third party from filing their own CEQA appeal.

(b) **Time to file an appeal.** Unless otherwise mandated by State law, an appeal of the approval or denial of a CEQA document by a non-elected decision-making body or a non-elected decision-maker shall be filed by the appellant and received by the City by 5:00 p.m. of the tenth (10th) calendar day following the decision on the CEQA document (or the next working day if the tenth (10th) calendar day falls on a weekend, holiday, or a day the City's offices are closed). In computing ten (10) calendar days, the day the non-elected City Body acts on the CEQA document shall be excluded.

For purposes of determining whether a CEQA appeal has been timely filed, the appeal will be deemed filed on the date upon which the CEQA appeal has been filed and received by the City Clerk, provided that the CEQA appeal complies with all the requirements set forth in this section, including, but not limited to, payment of the filing fee if any and fulfilling all the content requirements for a CEQA appeal. An appeal that is not timely or where the appellant fails to comply with all their requirements contained in this section, shall not be heard by City Council.

(c) **Filing fee.** The appellant shall pay a filing fee as set by resolution or ordinance, if any, to the office of the City Clerk, which shall also be submitted concurrently with the CEQA appeal.

(d) **Place to file.** The CEQA appeal and supporting documents must be filed in the office of the City Clerk. The appellant shall also notify the project applicant identified in the CEQA document of the CEQA appeal by mailing the applicant a copy of the materials identified in subsection (e) by certified mail. Notification for the applicant must have been mailed by the tenth (10th) calendar day following the decision on the CEQA document. The appellant shall provide the City with a copy of the certified mail receipt at least seven (7) calendar days before the hearing on the CEQA appeal. Failure to timely mail the notification to the applicant shall be grounds for dismissal of the appeal.

(e) **Content requirements for a CEQA appeal.** All CEQA appeals shall be in writing and shall contain the following information:

(1) A cover sheet that:

a. Identifies the filing as a CEQA appeal pursuant to this section.

b. Identifies the non-elected decision-making body or non-elected decision-maker that made the decision on the CEQA document.

c. Identifies the CEQA document which is the subject of appellant's CEQA appeal and the date on which the non-elected decision-making body or non-elected decision-maker

made the decision on the CEQA document.

d. If appellant has filed a concurrent appeal, then the cover sheet shall also include the information described in subsection (k).

(2) The name, mailing address, email address, and telephone number of the person filing the CEQA appeal.

(3) All grounds and issues for the CEQA appeal, specifying in detail why the appellant contends that the decision on the CEQA document does not comply with CEQA, and the supporting documentation. General environmental concerns without reference to the CEQA document or the non-elected decision-making body's actions shall not fulfill the requirements of this subsection. Where the appellant has submitted comments and the City has prepared responses, the appellant may not attach or incorporate by reference their past comments to fulfill the requirements of this subsection, and must identify their specific outstanding allegations related to the CEQA document.

(f) **Hearing.** Before the City Council acts on the CEQA appeal, a hearing on the matter shall be held in a timely fashion. However, such a hearing may be continued from time to time upon consent of the project applicant whose project is subject to the CEQA appeal. City Council shall conduct a de novo review of the decision on the CEQA document.

(g) **Notice of hearing on a CEQA appeal.**

(1) The City Clerk shall provide notice of the hearing to the appellant and the project applicant at least fourteen (14) calendar days before the hearing. Notice may be provided using any method reasonably calculated to provide notice to the appellant and the project applicant, including, but not limited to, mailing (posted marked at least fourteen (14) calendar days before the hearing), email, or telephone. Notice may be combined with other notices related to the same project. In the event of a continuance or adjournment, no additional noticing is required pursuant to this subsection. Failure of the City to comply with subsections (g)(1) or (g)(2) shall not constitute grounds for invalidating any action on a CEQA appeal unless the error was prejudicial and the party complaining suffered substantial injury from that error and that a different result would have been probable if the error had not occurred. The City shall also provide notice by any one of the following methods:

a. By publication at least once in a weekly newspaper of general circulation in the City not less than ten (10) calendar days prior to the date of the hearing;

b. By mailing a written notice thereof, not less than ten (10) days prior to the date of such hearing to the applicant, to the owner of the subject property and to the owners of properties within 300 feet of the exterior boundary of the subject property or properties; such notices shall be sent by first class mail, with postage prepaid, using the addresses from the last adopted tax roll, if available;

c. By posting such notice not less than ten (10) days prior to the date of such hearing to the applicant in at least one prominent place on or about each parcel which is the subject of the proposed action, or upon utility poles or sticks along or about the street line of such parcel. In the event more than one parcel is the subject of such hearing, and such parcels comprise 200 or more feet of street frontage, at least one such notice shall be posted on or about the street

line at intervals of not less than 200 feet, starting at either end of the subject properties where the property line intersects the street line; or

d. In the case of amendments to the text provisions of Title 10, and/or projects not dealing with any specific parcel of land, notification shall be by the method set out in subsection (g)(1)(a) of this section only.

(h) **Exhaustion requirement.** All of the appellant's grounds or issues for the CEQA appeal must have been: (1) listed in the contents of the CEQA appeal described in subsection (e); and (2) presented to the non-elected decision-making body or the non-elected decision-maker orally or in writing by the appellant or another person during the public comment period provided by CEQA, or prior to the close of the public hearing on the project approval by the non-elected decision-making body or the non-elected decision-maker ("exhaustion requirement"). The failure to comply with this exhaustion requirement shall be grounds for denial of those portions of the CEQA appeal which were not exhausted. The exhaustion requirement contained in subsection (2) of this paragraph shall not apply where there was no public hearing or other opportunity for the appellant to raise objections to the project's CEQA document. The limits contained in this subsection shall not apply to documents prepared by the City. Where a City Councilmember or the Mayor has filed a CEQA appeal pursuant to subsection (a)(3), the limitations of subsections (h)(1) and (h)(2) shall apply to them individually as appellant, but not to the City as a whole.

(i) **Appellant's time to file additional documentation.** Any additional documents submitted by the appellant, such as presentations, must be filed with the City Clerk no later than seven (7) calendar days prior to the date set for the hearing by the City Council. Any additional documentation submitted under this subsection must also fulfill the exhaustion requirements contained in subsection (h). The appellant shall also notify the project applicant identified in the CEQA document of any additional documentation by mailing the applicant a copy of the additional documentation by certified mail no later than seven (7) calendar days prior to the date set for the hearing by the City Council. The appellant shall provide the City a copy of the certified mail receipt at the hearing on the CEQA appeal. Any additional documentation which fails to comply with this subsection shall not be considered by the City Council. The appellants may not rely upon additional documentation submitted by a third party unless it fulfills all the requirements of subsections (h) and (i).

The limits contained in this subsection shall not apply to documents prepared by the City, except where a Councilmember or the Mayor has filed an appeal pursuant to subsection (a)(3), in which case the limitations of this subsection shall apply to them individually as the appellants, but not the City as a whole.

(j) **Preemption of other appeal procedures.** The appeal procedures of this section preempt all other appeal procedures in the City's Municipal Code for the purposes of a CEQA appeal. This includes, but is not limited to, the appeal procedures contained in Title 1, Chapter 4, and Section 2-9.712 of Title 2, Chapter 9, Article 7.

(k) **Concurrent appeals.** "Concurrent appeal" is defined as an appeal not based upon compliance with CEQA, but related to the same project. Such appeals may include, but are not limited to, the appeal of a Conditional Use Permit, the appeal of Planning Commission Design Review, or the appeal of other land use entitlements. Where the appellant has filed a concurrent

appeal, the City Council shall consider the appeals concurrently at the same public hearing. An appeal pursuant to this section challenging a decision approving or denying a CEQA document, shall not constitute an appeal for any other actions taken by the non-elected decision-making body or the non-elected decision-maker unless:

(1) The “contents of the CEQA appeal” (described in subsection (e) of this section) specifies: (A) the other section of the Municipal Code or State law authorizing a concurrent appeal, and (B) the other action taken by the non-elected decision-making body or non-elected decision-maker which is contested by the appellant; and

(2) The appellant fulfills all other non-CEQA appeal requirements of the Municipal Code or State law, including, but not limited to, payment of appeal fees for the concurrent appeal, in addition to the requirements contained in this section.

(l) **Effect of a CEQA appeal.** The filing of a CEQA appeal will stay the effect of all of the following until the City Council renders a decision on the CEQA appeal: (1) the CEQA document; (2) any project approval made pursuant to the CEQA document; (3) any notice of determination; and (4) Section 10-3.104 of Title 10, Chapter 3, Article 1. This subsection is only applicable to the party that was specifically named as the appellant in the cover sheet specified in subsection (e)(2) of this section. This subsection shall not apply to any third party who has not filed their own CEQA appeal.