THE CITY OF SAN DIEGO

REPORT TO THE CITY COUNCIL

DATE ISSUED: June 6, 2007 REPORT NO. 07-101

ATTENTION: Honorable Council President and City Council
Docket of June 12, 2007

SUBJECT: APPEAL OF ENVIRONMENTAL DETERMINATION FOR TWO TENTATIVE MAPS FOR CONDOMINIUM CONVERSIONS (ATTACHMENT 1)
Council Districts 1 and 6

OWNERS: Multiple – Reference Attachment 1

APPELLANT: Citizens for Responsible Equitable Environmental Development, c/o Cory J. Briggs, Briggs Law Corporation

SUMMARY

Issues - Should the City Council AFFIRM staff's environmental determination of exemption prepared for the two tentative maps for condominium conversions listed in Attachment 1?

Staff Recommendations – 1. Deny the appeals and uphold the Environmental Determination for each of the subject projects. 2. Make an express finding that the information provided by the appellant and his experts should be excluded from the record because it is argument, speculation, unsubstantiated opinion or narrative, evidence that is clearly inaccurate or erroneous, or evidence of social or economic impacts that do not contribute to, or are not caused by, physical impacts on the environment.

Environmental Review – The City of San Diego as Lead Agency under the California Environmental Quality Act (CEQA) has determined that the subject projects are exempt pursuant to State CEQA Guidelines Section 15301(k).

Fiscal Impact Statement: Due to the two appeals for this general single issue, staff has consolidated the format in this one appeal request. The processing of these appeals and for each individual project to a decision is being charged to a deposit account established by the applicant. Should the City Council remand the matter back to the Development Services Department or direct a Program Environmental Impact Report be prepared, significant unreimbursed costs could be incurred.

Code Enforcement Impact – None with this action.

Housing Impact Statement – No impact with this action. With the proposed conversion of existing apartments to condominiums, there would be a loss and gain of an equal number of rental units and for-sale units. These projects are subject to all current regulations regarding inclusionary housing and tenant relocation assistance.

BACKGROUND

Note that this is a batch of condominium conversion appeals similar to the batch of 76 such appeals heard and denied by the City Council on July 31, 2006, as well as the batch of 18 such appeals heard and denied by the City Council on March 20, 2007. Accordingly, the Executive Summary, Staff Report, and Attachments are nearly identical to those already provided in the prior hearing.

The subject projects are Tentative Maps to convert existing residential units to condominiums. Although each project listed in Attachment 1 has separate ownerships and characteristics, the appeals by Briggs Law Corporation are the same for each and the reasons for the appeals are more global in nature and not specific to each project. In the interest of efficiency and productivity, this one Report is being issued which encompasses each individual project.

Staff conducted the initial reviews of the proposed Tentative Maps in accordance with the process set forth in Sections 15060 and 15061 of the California Environmental Quality Act (CEQA) Guidelines, and using the City's CEQA Significance Thresholds. Several issues were considered during the reviews, including traffic, parking, and visual quality. Physical impacts related to the loss of affordable housing was also raised as a question to be considered by the department in the evaluation of all of the discretionary condominium conversions.

To date, no substantial evidence has been identified by or presented to staff that would support a fair argument that these particular condominium conversions could result in significant physical impacts on the environment, either singly or cumulatively. Staff therefore determined that the projects would not result in a direct or reasonably foreseeable indirect physical change in the environment. City staff have determined that the projects are exempt from CEQA pursuant to State CEQA Guidelines Section 15301(k), and these determinations were appealed to the City Council by Citizens for Responsible Equitable Environmental Development, c/o Cory J. Briggs, Briggs Law Corporation. The individual dates of environmental determinations and appeals are listed in the table in Attachment 1.

While these Process 4 activities have not yet been to public hearings for the purpose of deciding whether to approve or deny the projects, these appeals are before the City Council because CEQA allows people to appeal categorical environmental exemption determinations to City Council (Section 21151(c) of the Statutes).

Pursuant to Section 21151(c) of the CEQA statutes, Mr. Cory Briggs filed the appeals of the City of San Diego staff's determinations of environmental exemption for the projects (Attachment 2). These appeals apply only to the environmental determination.

DELEGATION OF RESPONSIBILITIES

In keeping with Section 15025 of CEQA, Section 128.0103 of the City's Land Development Code assigns the responsibility for implementation of CEQA to the Development Services Department (DSD). The Environmental Analysis Section (EAS) of DSD evaluates all discretionary project proposals, including condominium conversions, to determine whether there is a potential for such actions to result in physical impacts on the environment. Anyone can submit information to EAS to assist in its evaluation; but by law, the evaluation must be impartial and independent of any outside influences.

BURDEN OF PROOF

The City has the burden of proving that condominium conversions fall into one of the classes of categorical exemptions. In this case, substantial evidence supports all of the elements of the Class 1 categorical exemption (15301), which states "Class 1 consists of the operation, repair, maintenance, permitting, leasing, licensing, or minor alteration of public or private structures, facilities, mechanical equipment, or topographical features, involving negligible or no expansion of use beyond that existing at the time of the lead agency's determination." Specifically, the subject projects meet the definition contained in Section 15301(k); that is, "Division of existing multiple family or single-family residences into common-interest ownership and subdivision of existing commercial or industrial buildings, where no physical changes occur which are not otherwise exempt." There is significant evidence (i.e., it is self-evident) that the subject condominium conversions are a division of existing multiple family residences into common-interest ownership.

The appellant has the burden to prove that the exemption has been inappropriately applied to the subject condominium conversion projects, as he has claimed in his appeals. As stated in *Practice under the California Environmental Quality Act* (Continuing Education of the Bar, Oakland, California), "When an agency finds that a proposed project is subject to a categorical exemption, it is not required to also determine that none of the exceptions applies. A determination that an activity is categorically exempt constitutes an implied finding that none of the exceptions to the exemptions exists." (Note: staff did consider the exceptions and found that none apply to these projects.)

"Once an agency determines that a project falls within one of the categorical exemptions, the burden shifts to the objecting party to produce substantial evidence showing that the project has

the potential to have a significant adverse environmental impact that will trigger an exception." Vague and unsubstantiated expert opinion and public controversy were not sufficient to trigger application of an exception.

DISCUSSION

The Fair Argument standard requires substantial evidence that impacts *will* occur; the threshold is low relative to whether those impacts *may* be significant. The evidence submitted by the appellant suggests that impacts *may* occur, not that they *will* occur or that they may be significant. If there is no evidence that the impacts will occur, then it cannot be concluded that they may be significant. Noticeably absent from the entirety of the appellant's presentation is any comparison of the appellant's evidence to the City's thresholds of significance.

On the appeal forms for each project, the appellant states that "The project does not qualify for exemption under the CEQA Guidelines. Furthermore, the project does not qualify for exemption under the CEQA Guidelines based on exceptions to exemption arising from the cumulative and other potentially significant adverse environmental impacts of converting apartments to condominiums, especially in light of the numerous proposed conversions and the serious decline in affordable housing that the City of San Diego is facing." Staff response follows:

The California Secretary of Resources has determined that 33 categories of activities (Sections 15301 through 15333 of the State CEQA Guidelines) are generally exempt from CEQA because these activities do not have the potential to result in physical impacts. However, if there is a reasonable possibility that the activity will have a significant environmental effect due to unusual circumstances, or that there will be a significant cumulative impact from successive projects of the same type in the same place over time, the categorical exemptions may not be used (Section 15300.2).

One of the Class 1 CEQA categorical exemptions is Section 15301(k), **"Division of existing multiple family or single-family residences into common-interest ownership and subdivision of existing commercial or industrial buildings, where no physical changes occur which are not otherwise exempt."** The exemption specified in Section 15301(k) is used by EAS staff for condominium conversions of existing structures or proposed structures that have been permitted but not yet built, as long as there is no expansion of existing use and there are no physical changes involved that would not otherwise be exempt, and when the project would not contribute considerably to a significant cumulative impact.

The California Public Resources Code requires staff to base its determination that a project will have a significant environmental impact on substantial evidence (Section 21082.2). As defined in Section 15384(b) of the CEQA Guidelines, "Substantial evidence shall include facts, reasonable assumptions predicated upon facts, and expert opinion supported by facts." Section 15384(a) states: "Argument, speculation, unsubstantiated opinion or narrative, evidence which is clearly erroneous or inaccurate **or evidence of social or economic impacts which do not contribute to or are not caused by physical impacts on the environment** does not constitute substantial evidence." According to Section 15360 of the Guidelines, "Environment" means the

physical conditions which exist within the area which will be affected by the proposed project including land, air, water, minerals, flora, fauna, ambient noise, and objects of historical or aesthetic significance. The area involved shall be the area in which significant effects would occur either directly or indirectly as a result of the project. The "environment" includes both natural and man-made conditions."

CEQA focuses on physical impacts on the environment. Where social and economic impacts are discussed, CEQA requires that those impacts be related to significant physical impacts on the environment. Even where evidence establishes the possibility of adverse social impacts, if there is no significant change in the environment, the exemption is still appropriate.

At the environmental determination appeal hearing of June 13, 2006 (for the Carroll Canyon Tentative Map project), the appellant presented a power point slide show and submitted an undated and unsigned "Study of Residents in Large Condominium Conversions in District Three," (Chief Investigator: J Gregg Robinson, Ph.D.) in support of his claim that condominium conversions result in physical environmental impacts. The power point presentation and Dr. Robinson's study, along with staff's responses, are included as Attachments 6 and 7. In these documents, the appellant is asking the Council to make a reasonable inference that there is a fair argument that condominium conversions have physical and growth inducing impacts. CEQA requires that such an inference be supported by facts. The appellant and his experts have provided some survey data regarding apartment renters' car ownership status, miles traveled to work, and use of public transportation. No comparative data was provided on condominium residents' (owners/renters) car ownership status, miles traveled to work, or use of public transportation. It is not possible to reach any reasonable balanced conclusion using only one-sided data. Therefore, staff requests that the Council find that this study is inaccurate or erroneous because it did not offer complete data and it should be excluded from the record. If excluded from the record, the appellant's argument is not substantiated with relevant facts and it does not support a fair argument that condo conversions result in environmental impacts.

The appellant and his experts also argue that "CEQA requires environmental review whenever the project may conflict with any applicable land-use plan, policy or regulation of the city (including but not limited to the city' general plan) adopted for the purpose of avoiding or mitigating an environmental effect." This statement is used as the authority for the statement that condominium conversions may conflict with the goal of affordable housing by making it harder to increase housing densities due to multiple owners. However, the appellant and his experts offer no evidence that the subject projects would in fact conflict with the applicable land use policy. There is no evidence that the City's density goals could not be met through the development of other high density structures, or that existing condominiums would not add units through adding additional floors and/or underground parking. In identifying land use impacts, staff uses significance thresholds. According to the City's Significance Determination Thresholds, a conflict with a land use plan is not in and of itself a significant impact – the conflict must result in a significant physical impact. No evidence of significant physical impacts on the environment has been identified by staff or presented by the appellant and his experts. Therefore, the appellant's and his experts' arguments do not have an adequate factual basis and are clearly erroneous and should be excluded from the record.

Staff acknowledges that there is not sufficient affordable housing in San Diego. After evaluation of these projects and consideration of the City Attorney's memorandum of November 10, 2005, regarding condominium conversions, staff found no substantial evidence of a connection between any socio-economic effects resulting from condominium conversions and any physical impact on the environment that would be considered significant. Therefore, for the reasons discussed above, it is staff's professional opinion that the subject projects qualify for Class 15301(k) categorical exemptions as specified in CEQA.

Please note also that several other large jurisdictions within California, including San Diego County, the City of Santa Barbara, and Los Angeles also apply CEQA exemptions to condominium conversions. Staff is not aware of any city in California that does not use the categorical exemption for condominium conversions. Apart from CEQA, several jurisdictions also have enacted ordinances to regulate condominium conversions.

Prior City Council Action:

It should be noted that these same types of appeals were scheduled before the City Council on July 31, 2006. On that date, there were 76 appeals scheduled; the City Council concurred with staff and denied all 76 of the appellant's appeals. Similarly, there were 18 similar appeals heard by the City Council on March 20, 2007. Again, the City Council concurred with staff and denied all 18 of the appellant's appeals.

CONCLUSION

Staff agrees that limited availability of affordable housing in the City of San Diego is an issue of concern. However, the concerns with condominium conversions are policy issues within the purview of City Council. Revisions to appropriate policies and regulations are a better and more direct way to address the concerns raised by the Land Use and Housing Committee about condominium conversions. On January 24, 2006 and on June 13, 2006, the City Council unanimously approved significant revisions to the condominium conversion regulations.

While staff did evaluate the potential for physical impacts related to condominium conversions, it should be noted that the burden of proving that a categorical exemption has been inappropriately applied is on the appellant. The appellant has not proved his argument.

Overall, staff believes the information provided by the appellant is speculative. It does not contain relevant or complete quantitative and qualitative facts that could lead to any reasonable conclusion that condominium conversions result in significant physical impacts to the environment. The appellant's experts' opinions regarding physical environmental impacts are not supported by facts, as required in Section 21082.2(c) of the CEQA Statutes.

The City Attorney has opined that a Program Environmental Impact Report (PEIR) should be prepared to address the cumulative impacts of condominium conversions. However, there is no condominium conversion "program" to analyze, and no discretionary action to trigger a PEIR. Staff believes that such a document would likely be challenged in court based on the speculative nature of the unsubstantiated opinions provided regarding cumulative and growth inducing

impacts. In addition, CEQA states that lead agencies may not require EIRs for those projects described in the exemption categories unless the exceptions listed in Section 15300.2 are found to apply (Section 15300.4). Staff also notes that a PEIR would probably take approximately eighteen months to complete, and no funding source is currently available.

The subject projects do not include any physical changes in the environment that would not otherwise be exempt, or any intensification of use. The appellant and his experts have not produced any substantial evidence supporting a fair argument that growth inducement or significant cumulative physical impacts would result. Staff therefore recommends that Council deny the appeals and affirm staff's determination of environmental exemptions for the projects listed in Attachment 1 pursuant to Section 15301(k) of the State CEQA Guidelines. Staff also recommends that Council make an express finding that the information provided by the appellant and his experts in support of his claim that condominium conversions result in physical environmental effects should be excluded from the record because it is argument, speculation, unsubstantiated opinion or narrative, evidence that is clearly inaccurate or erroneous, or evidence of social or economic impacts that do not contribute to, or are not caused by, physical impacts on the environment.

ALTERNATIVES

1. Grant the appeals, set aside the environmental determinations, and remand the matter to the Development Services Director for reconsideration, with direction or instruction the City Council deems appropriate.

2. Grant the appeals and direct staff to prepare a Program Environmental Impact Report to assess the physical effects of condominium conversions. If Council chooses this alternative, staff respectfully requests direction from Council regarding the existence of substantial evidence, as required by Section 21082.2 of the California Public Resources Code, supporting a fair argument that condominium conversions result in significant environmental effects. Should this alternative be chosen, staff estimates the fiscal impact to be one full-time equivalent senior planner to complete the PEIR.

Respectfully submitted,

Marcela Escobar-Eck
Development Services Director

Approved: James T. Waring
Deputy Chief of Land Use and
Economic Development

Attachments:

1. List of specific projects which have been appealed by Briggs Law Corp./Individual Ownerships
2. Full Copy of Appeals
3. Determination of Environmental Exemption Forms
4. Memo from City Attorney's Office, dated 11/10/05
5. Memo from Robert Manis, Assistant Deputy Director, dated 11/17/05
6. Appellant's power point presentation/staff's responses
7. Dr. Robinson's study/staff's responses

PLEASE NOTE: Due to the size of the attachment(s), the distribution will be limited to the City Council Docket binders. A copy is available for review in the Offi of the City Clerk.