



Memorandum

TO: HONORABLE MAYOR
AND CITY COUNCIL

FROM: Planning Commission

SUBJECT: SEE BELOW

DATE: August 1, 2019

SUBJECT: FILE NO. PP17-008, AN ORDINANCE OF THE CITY OF SAN JOSE DELETING SECTION 21.07.080 OF CHAPTER 21.07 OF TITLE 21 OF THE SAN JOSE MUNICIPAL CODE RELATING TO REQUEST FOR RECONSIDERATION OF CERTIFICATION OF ENVIRONMENTAL IMPACT REPORTS

RECOMMENDATION

The Planning Commission voted (5-0-1, Oliverio absent) to recommend that the City Council adopt an ordinance to delete Section 21.07.080 of Chapter 21.07 of Title 21 of the San José Municipal Code relating to the request for reconsideration of City Council certification of Environmental Impact Reports.

OUTCOME

Approval of the proposed Title 21 Municipal Code amendment will remove the reconsideration process for environmental impact reports (EIRs), streamline the environmental approval process for EIRs under the California Environmental Quality Act (CEQA), and make the City Council's certification of an EIR a final decision. This action is in full compliance with the CEQA statutes, and its approval will align the provisions of Title 21 of the Municipal Code with CEQA and its implementing guidelines.

BACKGROUND

The item was on the Consent Calendar of the July 24, 2019 Planning Commission agenda. The item was removed from the Consent Calendar to allow for public comment.

One member of the public spoke in opposition of the proposed ordinance. The speaker stated that she understood that the ordinance would either reduce or remove the review of environmental impacts for projects. The speaker stated that the ordinance should not be approved because the world is in an ecological collapse, therefore any effort to reduce or remove environmental review is detrimental to life on earth.

Staff provided a brief overview of the proposed ordinance and clarified that the ordinance would not remove or change how projects are analyzed under CEQA; it would only remove the process by which an interested party can petition the City Council to reconsider their decision on a Final EIR and streamline the CEQA process for EIRs. Since the inception of this ordinance petitions for reconsideration have been filed for only two projects and in both cases, the party filing for reconsideration submitted the same information that they had submitted to the Planning Commission and City Council hearings. The process is not required by CEQA and is unique to the City of San José as staff is unaware of any other public agency in California with a similar reconsideration process. Commissioner Leyba asked staff if CEQA lawsuits had been filed on the two projects for which petitions for reconsideration had been filed. Staff responded that lawsuits had been filed by the party who petitioned for reconsideration on both projects and clarified that removing the reconsideration process does not preclude the ability for a party to file a lawsuit. Commissioner Leyba asked if this ordinance was being brought forward by request of the City Council or initiated by staff. Staff responded that staff had identified the opportunity to streamline the environmental review process and initiated this ordinance.

ANALYSIS

A complete analysis of the proposed amendment to the Environmental Clearance Ordinance is contained in the attached Planning Commission Staff Report that provides the analysis, public outreach, and the coordination conducted on the proposed item.

EVALUATION AND FOLLOW UP

If the proposed Municipal Code amendments are approved by Council, the new Ordinance will be effective 30 days after the second reading.

PUBLIC OUTREACH

Public outreach for this proposal complies with the City Council's Public Outreach Policy and the Municipal Code. A public hearing notice, including the Planning Commission and City Council hearing dates was published in the San José Post-Record and emailed to a list of interested groups and individuals. Staff posted the hearing notice, staff report, and draft ordinance on the PBCE Department website. Staff has been available to discuss the proposal with interested members of the public.

HONORABLE MAYOR AND CITY COUNCIL

August 1, 2019

Subject: File No. PP17-008 - Environmental Clearance Streamlining Ordinance

Page 3

COORDINATION

The preparation of the proposed ordinance and this memorandum were coordinated with the City Attorney's Office.

CEQA

Not a Project, File No. PP17-008, General Procedure & Policy Making resulting in no changes to the physical environment.

/s/

Rosalynn Hughey, Secretary
Planning Commission

For questions please contact Martina Davis, Supervising Planner, at (408) 535-7888.

Attachment



Memorandum

TO: PLANNING COMMISSION

FROM: Rosalynn Hughey

SUBJECT: SEE BELOW

DATE: July 12, 2019

SUBJECT: File No. PP17-008. AN ORDINANCE OF THE CITY OF SAN JOSE DELETING SECTION 21.07.080 OF CHAPTER 21.07 OF TITLE 21 OF THE SAN JOSE MUNICIPAL CODE RELATING TO REQUEST FOR RECONSIDERATION OF CERTIFICATION OF ENVIRONMENTAL IMPACT REPORTS

RECOMMENDATION

Staff recommends that the Planning Commission recommend the City Council adopt an ordinance to delete Section 21.01.080 of Chapter 21.07 of Title 21 of the San José Municipal Code relating to the request for reconsideration of City Council certification of Environmental Impact Reports.

OUTCOME

Approval of the proposed Title 21 Municipal Code amendment will remove the reconsideration process for environmental impact reports (EIRs), streamline the environmental approval process for EIRs under the California Environmental Quality Act (CEQA), and make the City Council's certification of an EIR a final decision.

BACKGROUND

On September 30, 2013, the Sixth Appellate District Court of Appeal of the State of California issued a decision holding that the San José Municipal Code improperly delegated authority to the Planning Commission to certify EIRs in cases where the City Council is the decision-making body on the project for which the EIR has been prepared, *California Clean Energy Committee v. City of San José* (2013) 220 Cal.App.4th 1325. On April 8, 2014, the City Council adopted Ordinance No. 29390 amending Chapters 21.04 and 21.07 of Title 21 of the Municipal Code to align the City's environmental clearance process for EIRs with the requirements of CEQA as set forth in the California Clean Energy Committee decision. This ordinance changed the certifying body of an EIR to be the City Council if the City Council is the decision-making body for the project or if the EIR identifies a significant environmental effect(s), requiring findings under Section 15091(a)(3) of the CEQA Guidelines related to unmitigated significant environmental effects or a statement of overriding considerations under Section 15093 of the CEQA Guidelines.

As part of updating Title 21 in 2014, the City adopted a reconsideration process for EIRs (SJMC Section 21.07.080). Pursuant to this reconsideration process, after the City Council certifies an EIR as the initial-decision maker on a proposed project, an interested person or party may request the City Council to reconsider its decision to certify an EIR prior to seeking judicial review of that decision. If a timely request is made within three business days of the City Council certification of an EIR, a hearing for reconsideration must be held by the City Council no later than sixty days after the filing of a reconsideration request. Grounds for reconsideration are limited to:

1. An offer of relevant evidence which was improperly excluded at any prior City public hearing.
2. Proof of facts which demonstrate that the City Council proceeded without, or in excess, of its jurisdiction.
3. Proof of facts which demonstrate that the City Council failed to provide a fair hearing.
4. Proof of facts which demonstrate that the City Council abused its discretion by:
 - a. Not proceeding in a manner required by law; or
 - b. Rendering a decision which was not supported by findings of fact; or
 - c. Rendering a decision in which the findings of fact were not supported by the evidence.

At the conclusion of the hearing for reconsideration, the City Council may affirm, reverse, or modify its original decision, and may adopt additional findings of fact based upon the evidence submitted at the reconsideration hearing or any prior City Council hearing on the project. The purpose for providing a reconsideration procedure is to require project opponents to give Council the opportunity to reconsider its decision before litigation is initiated.

ANALYSIS

The reconsideration process is not required under CEQA statute or guideline. Staff has not identified any other municipality in the State of California that has a similar reconsideration process and staff has not identified any benefits to this process since its adoption in 2014. In the nearly five years of implementing the EIR reconsideration process, petitions for reconsideration have been filed for only two projects.

It is important to note that an EIR process generally takes approximately two years with many opportunities for public input. At the outset of the EIR process, a Notice of Preparation (NOP) is issued to inform agencies and the public that an EIR will be prepared. A scoping meeting is then held to solicit input from other agencies and the public on the scope and content of the EIR, including information needs, project effects, and possible alternatives and mitigation measures. After the draft EIR is prepared, there is generally a public review and comment period of at least 45 days. All interested person or entity may review the draft EIR and provide comment during the comment period. The Planning Commission would then hold a public hearing to review and consider the draft EIR, which,

PLANNING COMMISSION

July 12, 2019

Subject: Environmental Clearance Streamlining Ordinance

Page 3 of 3

provides another opportunity for public comment. The last step would be for the City Council to hold a public hearing to review and consider the draft EIR and proposed project. Again, any interested person or entity can provide comment at the City Council public hearing.

As discussed above, there are at least four (often times many more) opportunities for other agencies or the public to provide comment on a draft EIR. In addition to the public meetings and hearings, anyone can call, e-mail or write to the City throughout the EIR process. By the time the City Council certifies an EIR, it is very unlikely that any "new" information will be discovered necessitating the City Council to reconsider its decision. In staff's experience, the reconsideration process has caused delay in implementing projects without any benefit under CEQA. Moreover, given the provisions under Section 15094 of the State CEQA Guidelines, which requires a lead agency to file a Notice of Determination within five working days after deciding to carry out or approve a project, and the associated 30-day statutes of limitations on court challenges to the approval under CEQA, the reconsideration process under Title 21 of the City's municipal code is redundant and meaningless. Deleting the EIR reconsideration process will streamline the EIR approval process under CEQA while ensuring there is still ample opportunities for other agencies and the public to provide input.

PUBLIC OUTREACH/INTEREST

Staff followed Council Policy 6-30: Public Outreach Policy, in that notices for the public hearings were posted on the City's website and published in the San José Post-Record and emailed to a list of interested groups and individuals. This memo and attachments were posted on the City's website. Staff has been available to respond to questions from the public.

COORDINATION

The preparation of the proposed ordinance and this staff report were coordinated with the City Attorney's Office.

CEQA

Not a Project, File No. PP17-008, General Procedure & Policy Making resulting in no changes to the physical environment.

Michael Bellini
For

ROSALYNN HUGHEY, DIRECTOR

Planning, Building and Code Enforcement

Attachments:

- 1) Draft Ordinance

ORDINANCE NO. _____

**AN ORDINANCE OF THE CITY OF SAN JOSE DELETING
SECTION 21.07.080 OF CHAPTER 21.07 OF TITLE 21 OF
THE SAN JOSE MUNICIPAL CODE RELATING TO
REQUEST FOR RECONSIDERATION OF CERTIFICATION
OF ENVIRONMENTAL IMPACT REPORTS**

WHEREAS, pursuant to the provisions and requirements of the California Environmental Quality Act of 1970, together with related State CEQA Guidelines and Title 21 of the San José Municipal Code (collectively, "CEQA"), the Director of Planning, Building and Code Enforcement has determined that the provisions of this Ordinance do not constitute a project, under File No. PP17-008 (General Procedure & Policy Making resulting in no changes to the physical environment); and

WHEREAS, the City Council of the City of San José is the decision-making body for this Ordinance; and

WHEREAS, this Council has reviewed and considered the "not a project" determination under CEQA prior to taking any approval actions on this Ordinance;

NOW, THEREFORE, BE IT ORDAINED BY THE COUNCIL OF THE CITY OF SAN JOSE:

SECTION 1. Section 21.07.080 of Chapter 21.07 of Title 21 of the San José Municipal Code is hereby deleted in its entirety as follows:

~~21.07.080 Request for reconsideration of city council's certification as initial decision-making body.~~

- ~~A. Any interested person, prior to seeking judicial review on any of the grounds stated in Section 21.07.080.C of an EIR certification decision made by the city council under Sections 21.07.020 and 21.07.030, shall file a petition for reconsideration with the city clerk not later than three business days following the date of the decision.~~
- ~~B. Failure to file a petition for reconsideration constitutes a waiver of the right to request reconsideration and the city council's decision shall be final for all purposes. Upon timely receipt of a petition for reconsideration, the city clerk shall schedule a reconsideration hearing to be commenced by the city council no later than sixty days after the filing of the petition. At least ten days prior to the reconsideration hearing, written notice of the hearing shall be placed in the mail to the person filing the request for reconsideration and the applicant. At the conclusion of the hearing for reconsideration, the city council may affirm, reverse, or modify its original decision, and may adopt additional findings of fact based upon the evidence submitted in any and all hearings conducted by the city council concerning the matter.~~
- ~~C. A petition for reconsideration shall specify, in detail, each and every ground for reconsideration. Failure of a petition to specify any particular ground or grounds for reconsideration, precludes that particular omitted ground or grounds from being raised or litigated in a subsequent judicial proceeding.~~

~~The grounds for reconsideration are limited to the following:~~

- ~~1. An offer of relevant evidence which was improperly excluded at the prior city council certification hearing.~~
- ~~2. Proof of facts which demonstrate that the city council proceeded without, or in excess, of its jurisdiction.~~
- ~~3. Proof of facts which demonstrate that the city council failed to provide a fair hearing.~~

- ~~4. Proof of facts which demonstrate that the city council abused its discretion by:~~
- ~~a. Not proceeding in a manner required by law; or~~
 - ~~b. Rendering a decision which was not supported by findings of fact; or~~
 - ~~c. Rendering a decision in which the findings of fact were not supported by the evidence.~~
- ~~D. A petition for reconsideration is subject to a reconsideration fee as prescribed by resolution of the city council. At the conclusion of the reconsideration hearing, the city council may, in its sole discretion, refund all, or a portion, of the reconsideration fee to the petitioner.~~
- ~~E. If a decision is subject to reconsideration, the initial decision shall not be final until the later of the fourth business day after the date of the initial decision or if a petition for reconsideration is timely filed, the request for reconsideration is withdrawn prior to the conclusion of the reconsideration hearing.~~

PASSED FOR PUBLICATION of title this _____ day of _____, 2019, by the following vote:

AYES:

NOES:

ABSENT:

DISQUALIFIED:

SAM LICCARDO
Mayor

ATTEST:

TONI J. TABER, CMC
Acting City Clerk