

# Memorandum

**TO:** HONORABLE MAYOR  
AND CITY COUNCIL

**FROM:** Planning Commission

**SUBJECT:** SEE BELOW

**DATE:** November 17, 2006

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**COUNCIL DISTRICT:** Citywide  
**SNI AREA:** All

**SUBJECT: AN ORDINANCE OF THE CITY OF SAN JOSE AMENDING CHAPTER 21.04 OF TITLE 21 OF THE SAN JOSE MUNICIPAL CODE TO ADD A NEW SECTION AND AMENDING CHAPTER 21.06 OF TITLE 21 OF THE SAN JOSE MUNICIPAL CODE, ALL RELATED TO PROVIDING FOR APPEALS TO CITY COUNCIL OF ENVIRONMENTAL CLEARANCE DETERMINATIONS MADE PURSUANT TO TITLE 21 OF THE SAN JOSE MUNICIPAL CODE.**

## RECOMMENDATION

The Planning Commission voted 5-0-2, Commissioners Pham and Campos absent, to recommend the City Council approve the proposed ordinance amending Title 21, the Environmental Clearance Code, of the San Jose Municipal Code to continue to provide for appeals to City Council of environmental clearance determinations.

## OUTCOME

Approval of the proposed ordinance amending Title 21 of the Muni Code would allow for appeals of environmental determinations made pursuant to the California Environmental Quality Act (CEQA), and elimination of a current Title 21 process not required by CEQA that results in unnecessary project delays.

## BACKGROUND

On March 28, 2006, the City Council of the City of San José adopted an urgency ordinance, Ordinance No. 27686, to provide for certain appeals to City Council of determinations made by the Director of Planning or the Planning Commission under the California Environmental Quality Act of 1970 ("CEQA"). On March 28, 2006 at the same public hearing where the City Council considered the Urgency Ordinance, the City Council adopted Resolution No. 73120 that initiated consideration of amendments to Title 21 of the San José Municipal Code to provide for certain appeals to City Council of determinations made by the Director of Planning or the Planning Commission under CEQA, directed staff to develop a proposed regular ordinance and referred the proposed ordinance to Planning Commission for its report and recommendation.

On November 15, 2006, the Planning Commission held a public hearing to consider the proposed ordinance amending Title 21, the Environmental Clearance Code, of the San Jose Municipal Code to continue to provide for appeals to City Council of environmental clearance determinations.

The Director of Planning, Building and Code Enforcement recommended approval of the proposed ordinance changes to Title 21.

## **ANALYSIS**

The proposed ordinance amending Title 21 providing for appeals of environmental determinations to City Council will align San Jose's environmental review procedures with CEQA and will achieve substantial streamlining benefits, as outlined in staff's report to the Planning Commission.

At the hearing, Planning staff provided a summary presentation of the proposed ordinance's key points and reasons to amend Title 21:

1. **The proposed ordinance formalizes appeal procedures to City Council for all environmental determinations, i.e.. Not a Project, Exemption, Negative Declaration (ND), and EIR.**
2. **A key procedural change to Title 21 would eliminate the ND Protest process and achieve substantial streamlining benefits.** The ND Protest is not a procedural requirement in CEQA, but has been in Title 21 of the Muni Code for decades. The Council previously delegated authority to the Planning Commission to consider the adequacy of NDs, and when to require EIRs. However, given recent changes to CEQA, that delegation is no longer possible, and Council must be the final decision-maker as to the adequacy of all environmental determinations made pursuant to CEQA. The current ND protest process does not exist in other local jurisdictions, and appears to be a unique San Jose process, one that often creates unnecessary delays in scheduling the public hearing.
3. **There would be no change in the City's public outreach or public's ability to participate in the planning and related-CEQA process.** The proposed changes to Title 21 only affect the hearing process, and would not change the way the City conducts its environmental analysis or considers the substance of challenges to its environmental determinations. The Planning Commission retains ability to consider adequacy of environmental determinations (including NDs) prepared for projects that require PC action. What would change is the need to schedule a new public hearing to consider a challenge, regardless of the issues raised.
4. **The proposed new process is patterned after the existing EIR appeal process.** The Planning Commission would consider whether the environmental determination, i.e. Exemption, MND, or EIR, was adequate to inform its action on project. The Commission would consider comments from public, responses from staff, then decide whether the environmental determination was adequate. The decision of the Commission to rely on the environmental determination could then be appealed to City Council, as required by CEQA.

5. **The proposed process provides the Planning Director discretion to schedule the public hearing based upon the substantive issues raised in comments to the ND or other environmental determination.** If the Planning Director is prepared to respond to comments delivered prior to the hearing, the project would proceed to hearing, and the Commission would decide whether the ND or other environmental determination was adequate. The Commission also could continue the hearing to have staff prepare a more detailed response, or could direct staff to revise and re-circulate the ND or to prepare an EIR.
6. **The current ND Protest process leaves no discretion, and typically forces a 4-week schedule delay regardless of the issues raised.** In many cases, staff believes the issues raised can be adequately addressed at the scheduled public hearing, and that delaying the project to notice a new public hearing to address the ND Protest doesn't result in new information. A recent example of unnecessary delay is the protest of the ND prepared for the proposed Title 20 NBD parking ordinance. The ND protest, filed by a single individual, was limited to one paragraph of issues that staff felt could have been adequately addressed at the November 15, 2006 Planning Commission hearing. Instead, the current ND protest process forced an automatic deferral to a December Planning Commission, with no possibility to bring the proposed NBD parking ordinance to Council this year. In addition, the last-minute need for deferral inconvenienced many members of the public expecting to participate in the hearing.

Following the staff presentation, Commissioner Zito requested, and received from staff, confirmation that under the proposed ordinance appeals of environmental determinations would be filed after the public hearing on the project that was the subject of the environmental determination.

The Planning Commission voted 5-0-2, Commissioners Campos and Pham absent, to recommend approval of the proposed Ordinance amending Title 21 of the Muni Code to the City Council.

### **POLICY ALTERNATIVES**

If the City Council chooses to not amend Title 21 as proposed by Planning Commission and staff, environmental review will follow current Title 21 procedures, which include the ND protest process, which affords an opportunity not required by CEQA to delay public hearings and overall project schedules, regardless of the merits of the challenge to the environmental determination.

### **PUBLIC OUTREACH/INTEREST**

- Criteria 1:** Requires Council action on the use of public funds equal to \$1 million or greater. **(Required: Website Posting)**
- Criteria 2:** Adoption of a new or revised policy that may have implications for public health, safety, quality of life, or financial/economic vitality of the City. **(Required: E-mail and Website Posting)**

HONORABLE MAYOR AND CITY COUNCIL

Date: November 17, 2006

**Subject:** An Ordinance Amending Title 21 of the Muni Code Providing for Appeals to City Council of Environmental Determinations

Page 4

- Criteria 3:** Consideration of proposed changes to service delivery, programs, staffing that may have impacts to community services and have been identified by staff, Council or a Community group that requires special outreach. **(Required: E-mail, Website Posting, Community Meetings, Notice in appropriate newspapers)**

Although this item does not meet any of the above criteria, staff followed Council Policy 6-30: Public Outreach Policy for Pending Land Use and Development Proposals.

A public hearing notice for the proposed ordinance was published in the San Jose Post Record. This notice included the Planning Commission and City Council hearing dates for the proposed ordinance revision. As standard practice, staff posted the staff report and draft ordinance as well as the hearing dates on the Department of Planning, Building, and Code Enforcement's website. Staff has been available to answer questions from members of the public.

### COORDINATION

This proposed ordinance amendment was coordinated with the Office of the City Attorney.

### FISCAL/POLICY ALINMENT

The proposed Title 21 amendment conforms with the policy objectives of Getting Families Back to Work and Making Government Work Better by achieving the substantial process streamlining benefit of timely project decisions informed by a deliberate consideration of environmental issues.

### COST SUMMARY/IMPLICATIONS

Not applicable.

### BUDGET REFERENCE

Not applicable.

### CEQA

Not a project. This ordinance sets forth a process only and does not involve any change to or impact upon the physical environment such that this ordinance does not constitute a project under the provisions of the California Environmental Quality Act.

*for*   
JOSEPH HORWEDEL, SECRETARY  
Planning Commission

For questions please contact Akoni Danielsen at 535-7823.



# Memorandum

**TO:** HONORABLE MAYOR AND  
CITY COUNCIL

**FROM:** Joseph Horwedel

**SUBJECT:** SEE BELOW

**DATE:** November 15, 2006

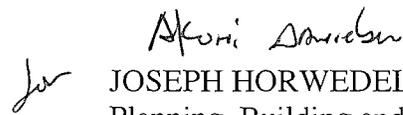
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## TRANSMITTAL MEMO

**COUNCIL DISTRICT:** Citywide  
**SNI AREAS:** All

**SUBJECT: AN ORDINANCE OF THE CITY OF SAN JOSE AMENDING CHAPTER 21.04 OF TITLE 21 OF THE SAN JOSE MUNICIPAL CODE TO ADD A NEW SECTION AND AMENDING CHAPTER 21.06 OF TITLE 21 OF THE SAN JOSE MUNICIPAL CODE, ALL RELATED TO PROVIDING FOR APPEALS TO CITY COUNCIL OF ENVIRONMENTAL CLEARANCE DETERMINATIONS MADE PURSUANT TO TITLE 21 OF THE SAN JOSE MUNICIPAL CODE.**

The Planning Commission will hear this project on November 15, 2006. The memorandum with Planning Commission recommendations will be submitted under different cover. We hope the submittal of this staff report is of assistance in your review of this project.

  
JOSEPH HORWEDEL, DIRECTOR  
Planning, Building and Code Enforcement

For questions please contact Akoni Daniels at (408) 535-7823.



PC AGENDA: 11/15/06  
ITEM: 4.a

# Memorandum

**TO:** PLANNING COMMISSION

**FROM:** Joseph Horwedel

**SUBJECT:** SEE BELOW

**DATE:** November 9, 2006

COUNCIL DISTRICT: Citywide  
SNI AREAS: All

**SUBJECT: AN ORDINANCE OF THE CITY OF SAN JOSE AMENDING CHAPTER 21.04 OF TITLE 21 OF THE SAN JOSE MUNICIPAL CODE TO ADD A NEW SECTION AND AMENDING CHAPTER 21.06 OF TITLE 21 OF THE SAN JOSE MUNICIPAL CODE, ALL RELATED TO PROVIDING FOR APPEALS TO CITY COUNCIL OF ENVIRONMENTAL CLEARANCE DETERMINATIONS MADE PURSUANT TO TITLE 21 OF THE SAN JOSE MUNICIPAL CODE**

## RECOMMENDATION

Planning staff recommends that the Planning Commission recommend that the City Council approve the proposed ordinance amending Title 21, the Environmental Clearance Code, of the San Jose Municipal Code to continue to provide for appeals to City Council of environmental clearance determinations.

## BACKGROUND

On March 28, 2006, the City Council of the City of San José adopted an urgency ordinance, Ordinance No. 27686, to provide for certain appeals to City Council of determinations made by the Director of Planning or the Planning Commission under the California Environmental Quality Act of 1970 ("CEQA").

On March 28, 2006 at the same public hearing where the City Council considered the Urgency Ordinance, the City Council adopted Resolution No. 73120 that initiated consideration of amendments to Title 21 of the San José Municipal Code to provide for certain appeals to City Council of determinations made by the Director of Planning or the Planning Commission under CEQA, directed staff to develop a proposed regular ordinance and referred the proposed ordinance to Planning Commission for its report and recommendation. This staff report and proposed ordinance are intended to fulfill that Council direction.

Regulations under CEQA have been revised in a manner that may expand opportunities to appeal determinations regarding environmental clearance under CEQA. Historically, CEQA regulations have provided that when a non-elected decision-making body certifies an environmental impact report ("EIR") under CEQA, then that determination may be appealed to the lead agency's elected decision-making body (if one exists). So, for example, in San Jose, the Planning

Commission's determination to certify an EIR can be appealed to the City Council, as the City's elected decision-making body. This appeal provision in CEQA has been modified to include express references to other types of CEQA clearance determinations, such as negative declarations, mitigated negative declarations, and determinations that a project is exempt, by statute or category, or is not subject to CEQA.

Although the City Council already currently reviews and considers the environmental clearance actions taken for each project prior to taking any action upon a project, the proposed ordinance would similarly amend the environmental clearance provisions contained within the Municipal Code to make express a process under which an environmental clearance determination can be appealed to the City Council. A copy of the proposed ordinance is attached to this memorandum for convenient reference.

## **ANALYSIS**

The Director of Planning, Building, and Code Enforcement is designated as the City's administrator of environmental clearance under Title 21 of the San José Municipal Code. In that capacity, the Director determines whether a project is subject to CEQA. If subject to CEQA, the Director then determines the appropriate environmental review process under CEQA for a given project, depending upon its nature, manner of implementation, and the environmental setting in which the project will be undertaken.

Projects subject to CEQA typically fall into one of three primary environmental clearance processes: exempt, negative declaration (ND), or environmental impact report (EIR). The proposed ordinance would retain the City's current appeal processes allowing for an appeal of the Planning Commission's determination, following a noticed public hearing, to certify an EIR. The proposed ordinance would create an opportunity to appeal the Director's determination that a project is not subject to CEQA, or that a project is exempt from environmental review under a statutory or categorical exemption. The proposed ordinance would modify the appeals process for NDs to more closely match the EIR process, as described in more detail below.

The ND process currently consists of a 20 or 30 day public review period, as required by CEQA, prior to the ND becoming final. During the public review period individuals, groups, or other public agencies may submit to the Director written comments regarding the adequacy of the ND and/or 'protest' the ND. The protest of an ND during the public comment period is a procedural step currently found within Title 21 of San Jose Muni Code, but is not a requirement in CEQA.

Currently, when an ND protest is filed, the Director must decide whether 1) to revise and recirculate the ND to address issues raised in the protest, 2) adopt the ND and schedule a public hearing at Planning Commission to consider the protest, or 3) require preparation of an EIR. This process has frequently been used by project opponents to file appeals for reasons unrelated to significant, substantive environmental issues. The need to defer planned public hearings and schedule an additional hearing to consider the ND protest at Planning Commission has unnecessarily delayed project schedules. The CEQA process can be a complex, lengthy process, and the current Title 21 ND protest process adds an additional layer of procedural complexity and delay not required by CEQA.

When a challenge to an ND is based on a substantive environmental issue, staff believes a process patterned after the EIR appeal process would achieve both a deliberate consideration by City Council of the environmental issues and a more streamlined process that results in timely

project decisions. Under the proposed ordinance, an appeal of the ND adopted for a project would be filed after the public hearing and initial project action which relied upon the ND, and not during the public comment period. This is consistent with the EIR process, which includes opportunity for public comment while the EIR circulates during the public review period, and an appeal after the Planning Commission hearing to certify the EIR.

Consistent with the EIR process, appeals of the Director's other environmental clearance determinations (i.e. 'not a CEQA project', exempt, or ND, respectively) would be accepted within three business days following the project public hearing. For projects approved without a public hearing, such as an administrative private development permit approval by the Director of Planning or the administrative approval by the Director of Public Works of a construction contract in an amount not requiring City Council approval, an appeal must be filed within three business days of commencement of the project.

In order to recognize and maintain the ongoing efforts of the City to streamline development approval processing, the proposed ordinance also contains a provision that would allow the Council to hear the project that is related to a particular underlying environmental clearance determination immediately after its determination on the underlying environmental clearance issue, rather than forcing the project to go back through the approvals process once again.

The additional appellate procedures contained in the proposed ordinance by and large mirror those appeal provisions that the City already has in place in connection with appeals of EIR certifications by the Planning Commission to City Council. The reason for this is to facilitate the quick implementation of the provisions contained within the proposed ordinance through consistency of process.

### **PUBLIC OUTREACH**

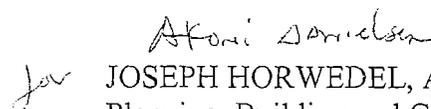
A public hearing notice for the proposed ordinance was published in the San Jose Post Record. This notice included the Planning Commission and City Council hearing dates for the proposed ordinance revision. As standard practice, staff posted the staff report and draft ordinance as well as the hearing dates on the Department of Planning, Building, and Code Enforcement's website.

### **COORDINATION**

This memorandum and the proposed ordinance have been coordinated with the Office of the City Attorney.

### **CEQA**

Not a project. This ordinance sets forth a process only and does not involve any change to or impact upon the physical environment such that this ordinance does not constitute a project under the provisions of the California Environmental Quality Act.

  
JOSEPH HORWEDEL, ACTING DIRECTOR  
Planning, Building and Code Enforcement

Attachments

**ORDINANCE NO. \_\_\_\_\_**

**AN ORDINANCE OF THE CITY OF SAN JOSE AMENDING CHAPTER 21.04 OF TITLE 21 OF THE SAN JOSE MUNICIPAL CODE TO ADD A NEW SECTION AND AMENDING SECTION 21.06.030 OF CHAPTER 21.06 OF TITLE 21 OF THE SAN JOSE MUNICIPAL CODE, ALL RELATED TO PROVIDING FOR APPEALS TO CITY COUNCIL OF ENVIRONMENTAL CLEARANCE DETERMINATIONS MADE PURSUANT TO TITLE 21 OF THE SAN JOSE MUNICIPAL CODE**

**WHEREAS**, this ordinance sets forth a process only and does not involve any change to or impact upon the physical environment such that this ordinance does not constitute a project under the provisions of the California Environmental Quality Act of 1970, as amended, those certain Guidelines for the California Environmental Quality Act of 1970 set forth in Title 14, Chapter 3 of the California Code of Regulations, as amended, nor Title 21 of the San José Municipal Code, as amended (collectively, "CEQA"); and

**WHEREAS**, on March 28, 2006, the City Council of the City of San José adopted an urgency ordinance, Ordinance No. 27686, to provide for certain appeals to City Council of determinations made by the Director of Planning or the Planning Commission under CEQA (the "Urgency Ordinance"); and

**WHEREAS**, on March 28, 2006 at the same public hearing where the City Council considered the Urgency Ordinance, the City Council adopted Resolution No. 73120 that initiated consideration of amendments to Title 21 of the San José Municipal Code to provide for certain appeals to City Council of determinations made by the Director of Planning or the Planning Commission under CEQA, directed staff to develop a proposed regular ordinance and referred the proposed ordinance to Planning Commission for its report and recommendation; and

**WHEREAS**, the Council direction in connection with this ordinance has been duly followed, the Planning Commission held a duly noticed and conducted public hearing on this ordinance on August 9 at which all interested persons were afforded an opportunity to provide testimony on this ordinance and the Planning Commission recommended \_\_\_\_\_ of this ordinance; and

**WHEREAS**, on August 23, 2006, the City Council held a duly noticed and conducted public hearing on this ordinance at which all interested persons were afforded an opportunity to provide testimony on this ordinance.

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

**SECTION 1.** Part 2 of Chapter 21.04 of Title 21 of the San José Municipal Code is hereby amended by adding a new section to be numbered and entitled and to read in its entirety as follows:

**21.04.140 Appeals- General**

- A. ~~In addition to the procedures and appellate processes set forth in this Title, a~~Any determination regarding the appropriate environmental clearance for a project made by the Director or the Planning Commission may be appealed to the City Council or the Board of Directors of the Redevelopment Agency as set forth and described in this Section.
- B. Appeals of certifications of environmental impact reports shall follow and adhere to the procedures set forth in Chapter 21.07.
- C. Appeals of determinations on a negative declaration or a mitigated negative declaration shall ~~first~~ follow and adhere to the provisions of Chapter 21.06.—That

~~person may then file with the Director a written appeal of the Planning Commission's decision under Section 21.06.030 to the City Council or the Board of Directors of the Redevelopment Agency pursuant to the provisions of this Section.~~

- D. Appeals to City Council or Board of Directors of the Redevelopment Agency of environmental determinations that a project is not subject to CEQA or is exempt from CEQA under the provisions of CEQA or this Title shall follow and adhere to the provisions of this Section.
  
- E. Appeals of an environmental clearance determination allowed under this Section to the City Council or Board of Directors of the Redevelopment Agency shall proceed in accordance with and adhere to the following provisions and conditions:
  - 1. A person wishing to file a written appeal of a determination on environmental clearance with the Director under this Section shall file such appeal no later than 5:00 p.m. on the third (3<sup>rd</sup>) business day following the earliest to occur of the following events:
    - a. An initial action is taken on the environmental determination if that determination is made through or as a part of a public hearing; or
    - b. An initial action is taken after a public hearing on the project by an advisory-body making a recommendation on the project or a decision-making body making a decision on the project, whichever first occurs, which recommendation or decision relied upon the determination on environmental clearance at issue; or

- c. Commencement of the project if the project is undertaken without any public hearing.
2. The appeal shall be filed on a form prescribed by the Director. The appeal shall state with specificity the reasons that the environmental clearance determination should be found not to be complete or not to have been prepared in compliance with the requirements of CEQA or this Title.
3. No appeal shall be considered unless it is based upon issues that were raised previously either orally or in writing to a recommending body or a decision-making body at or prior to a public hearing whenever the underlying project is considered at a public hearing.
4. The City Council shall conduct appeal hearings under this ~~Section~~Chapter when the City is the lead agency.
5. The Board of Directors of the Redevelopment Agency shall conduct appeal hearings under this ~~Section~~Chapter when the Redevelopment Agency is the lead agency.
6. Upon receipt of a timely appeal under this Section, the Director shall schedule a hearing and transmit a hearing notice for the appeal hearing before the City Council or the Board of Directors of the Redevelopment Agency, as appropriate, utilizing the processes and timelines set forth in Section 21.07.050.
7. The maker of the environmental decision being appealed shall prepare a report and recommendation on the appeal to the City Council or Board of Directors of the Redevelopment Agency, as appropriate, and such report shall be provided to the appellant, applicant, and adjacent property

owner(s) in the same manner provided for hearing notices pursuant to provisions of Section 21.07.050.

7.8. The appeal hearing before the City Council or Board of Directors of the Redevelopment Agency under this Section shall be a hearing *de novo*.

8.9. The City Council or Board of Directors of the Redevelopment Agency may elect to hear an appeal of the environmental clearance determination with a public hearing on a related underlying project.

9.10. Upon the conclusion of the appeal hearing under this Section, the City Council or Board of Directors of the Redevelopment Agency, as appropriate, may find that the environmental clearance determination conforms to the requirements of CEQA and this Title or that the environmental clearance determination does not conform to the requirements of CEQA or this Title.

10.11. If the City Council or Board of Directors of the Redevelopment Agency, as appropriate, finds that the environmental clearance determination comports with CEQA and this Title, it shall uphold the environmental clearance determination and may then immediately take action upon the related project. If the City Council or Board of Directors of the Redevelopment Agency, as appropriate, finds that environmental clearance determination does not comport with CEQA and this Title, it shall require the Director to re-examine and process such environmental clearance determination and shall not take any approval actions on the related project.

11.12. All decisions of the City Council or the Board of Directors of the Redevelopment Agency under this Section shall be final.

**SECTION 2.** Section 21.06.010 of Chapter 21.06 of Title 21 of the San José Municipal Code is hereby amended to read in its entirety as follows:

**21.06.010 Consideration and approval of a negative declaration**

A. The Director shall cause the preparation and circulation of each negative declaration or mitigated negative declaration in a manner that comports with the provisions of CEQA and this Chapter.

B. The Director shall provide a negative declaration or mitigated negative declaration to the advisory body making a recommendation to the decisionmaking body on a project and to the decisionmaking body for a project, together with all comments received thereon and the Director's report on the negative declaration or mitigated negative declaration setting for the Director's responses to comments received on the negative declaration or mitigated negative declaration.

~~A.C.~~ ~~The director~~An advisory body to the decisionmaking body on a project shall consider the draft negative declaration or mitigated negative declaration, together with any comments received during the public review time period, and the Director's report thereon prior to making its recommendation on a project.

D. The decisionmaking body on a project shall consider the draft negative declaration or mitigated negative declaration, together with any comments received during the public review time period, the Director's report thereon and any recommendation of an advisory body.

~~B.E.~~ The decisionmaking body ~~director~~ shall ~~approve~~~~adopt~~ the negative declaration or mitigated negative declaration only if, on the basis of the initial study, ~~and any~~ comments received, the Director's report and the balance of the entire record before it, the ~~director~~decisionmaking body determines that there is no substantial evidence that the project will have a significant effect on the environment and that the negative declaration or mitigated negative declaration otherwise conforms with

CEQA. As alternatives to approving the negative declaration, the ~~director~~decisionmaking body may take any of the following actions:

1. Require the preparation of an EIR by the project applicant.
2. Require the draft negative declaration or mitigated negative declaration to be revised and undergo additional noticed public review.
3. Withdraw the draft negative declaration, if the project is withdrawn by the applicant.

~~C.F.~~ If a written protest is filed with the director within the noticed public review period for the negative declaration or mitigated negative declaration, the Director determines that a comment received raises an issue that would require recirculation of the negative declaration or mitigated negative declaration or would otherwise require substantial revision to the environmental analysis performed for a project, the Director may:

- ~~1. Approve the negative declaration and set a noticed public hearing on the protest before the planning commission.~~
- ~~2.1.~~ Require the preparation of an EIR by the project applicant and refund the filing fee to the protestant.
- ~~3.2.~~ Require the draft negative declaration to be revised and undergo additional noticed public review, and refund the filing fee to the protestant.
- ~~4.3.~~ Withdraw the draft negative declaration, if the project is withdrawn by the applicant, and refund the filing fee to the protestant.

~~D.G.~~ If the director elects to approve the negative declaration and set a noticed public hearing on the protest before the planning commission, the negative declaration or mitigated negative declaration shall not become final unless and until the decisionmaking body adopts the negative declaration or mitigated negative declaration and all appeals set forth in this Chapter have been exhausted. ~~planning~~

~~commission upholds the action of the director to approve the negative declaration pursuant to Section 21.06.030.~~

**SECTION 3.** Section 21.06.020 of Chapter 21.06 of Title 21 of the San José Municipal Code is hereby amended to read in its entirety as follows:

**21.06.020** ~~Protest of findings of a~~**Appeals of adoption of a draft negative declaration or mitigated negative declaration**

- ~~A. Prior to approval by the director of a draft negative declaration,~~ Any person may file a written appeal to the City Council or the Board of Directors of the Redevelopment Agency of the City of San José, as appropriate, of a decisionmaker's decision to adopt a negative declaration or mitigated negative declaration in accordance with the provisions and conditions of this Section.
- ~~B. Any person shall file such an appeal on a form prescribed by the Director no later than 5:00 p.m. on the third (3<sup>rd</sup>) business day following the earliest to occur of the following events:~~
1. The decisionmaker adopts a negative declaration or mitigated negative declaration during or as a part of a noticed public hearing; or
  2. An action is taken after a public hearing on a project by an advisory body making a recommendation on the project or a decisionmaking body making a decision on the project, whichever first occurs, which recommendation or decision relied upon the adoption of the negative declaration at issue and the adoption of the negative declaration or mitigated negative declaration did not occur as a part of a public hearing; or
  3. Commencement of the project if the project is undertaken without any public hearing.

C. The appeal shall be filed on a form prescribed by the Director. The appeal shall state with specificity the reasons that the negative declaration or mitigated negative declaration should be found not to be complete or adequate or not to have been prepared in compliance with the requirements of CEQA or this Title.

D. No appeal shall be considered unless it is based upon issues that were raised previously either orally or in writing to an advisory body or a decisionmaking body at or prior to a public hearing whenever the negative declaration or mitigated negative declaration or underlying project is considered at a public hearing.

~~A. with the director a written protest to the finding in the draft negative declaration that the project will not have a significant effect on the environment. The protest shall be filed on a form prescribed by the director and shall be accompanied by a filing fee as set forth in the schedule of fees established by resolution of the city council. The protest shall specify the reasons which dispute the finding of nonsignificance.~~

~~B.E. The dDirector shall schedule a hearing on the appeal before the planning commission, City Council or Board of Directors of the Redevelopment Agency of the City of San José, as appropriate, and shall give at least ten (10) days prior written notice thereof to the protest appellant, the applicant, and the owners of property contiguous to the project as shown on the latest equalized assessment roll adopted by the County of Santa Clara.~~

~~C.F. No protest fee need be paid by a planning commissioner if three or more members of the planning commission, acting independently, file timely protests in compliance with this sSection.~~

**SECTION 4.** Section 21.06.030 of Chapter 21.06 of Title 21 of the San José Municipal Code is hereby amended to read in its entirety as follows:

**21.06.030 ProtestAppeal Hearing Procedure**

- A. The ~~Planning Commission~~City Council or Board of Directors of the Redevelopment Agency, as appropriate, shall hold a public hearing on an appeal of the adoption of protest to a negative declaration or mitigated negative declaration to consider all relevant information and materials concerning whether the project may have a significant effect on the environment.
- B. The action of the ~~Planning Commission~~City Council or Board of Directors of the Redevelopment Agency in considering the ~~protest~~appeal is limited to environmental issues.
1. If the ~~Planning Commission~~City Council or Board of Directors of the Redevelopment Agency finds that the project may have a significant effect on the environment, the ~~Commission~~Council or Board, as appropriate, shall require the preparation of an EIR in accordance with this Title prior to any consideration of whether the project should be approved. In such event, the Director shall thereafter refund the filing fee to the ~~protestant~~appellant.
  2. If the ~~Planning Commission~~City Council or Board of Directors of the Redevelopment Agency, as appropriate, upholds the action to adopt the negative declaration or mitigated negative declaration of the Director, the ~~negative declaration or mitigated negative declaration~~ shall become final ~~if no further appeal under Section 21.04.140 is timely filed on the matter.~~

RD:RNG:RNG  
8/1/2006

**DRAFT**

**PASSED FOR PUBLICATION** of title this \_\_\_\_\_ day of \_\_\_\_\_, 2006, by the following vote:

AYES:

NOES:

ABSENT:

DISQUALIFIED:

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RON GONZALES  
Mayor

ATTEST:

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LEE PRICE, MMC  
City Clerk