

THE PLANNING PROCESS

IMPROVING REVIEW AND HEARING PROCEDURES

SUMMARY

The Grand Jury conducted an investigation into various complaints about review, scheduling and hearing processes or procedures used by the San Luis Obispo County Department of Planning and Building ("the Planning Department") and the Planning Commission. The investigation identified a failure of the Planning Department Staff to advise applicants at the earliest appropriate time in the review process that they needed to address the cumulative aspects of their projects as well as assess the environmental impacts of each individual project. The investigation also identified problems with the scheduling of public hearings on projects and the allowable time period for submitting written comments on a project scheduled for public hearing. Finally, the investigation determined that there is no legal or other compelling reason to allow public comment on revised findings that are being considered and discussed by the Planning Commission after closing a public hearing and reaching a decision on an application.

The Grand Jury recommends that applicants be advised of the cumulative environmental impacts issue at the earliest appropriate time after their applications are first discussed or submitted for review. It also recommends that public hearings not be scheduled shortly after or before the end of public comment periods and that deadlines be established for the submission of written comments so they can be adequately reviewed and considered by the Planning Commission during a public hearing. Finally, it recommends that public comment not be permitted on revised findings being considered by the Planning Commission after it has closed a public hearing and made a decision on an application.

METHOD

In conducting the investigation that resulted in this report, the Grand Jury did the following:

- Interviewed nine (9) individuals with personal knowledge of and involvement in one or more of the review, scheduling and hearing processes or procedures which were the subject of the complaints, including the following:
 - Three of the applicants for Conditional Use permits and one of their representatives who made the complaints.
 - Two staff members of the Environmental Division of the Department of Planning and Building. ("the Planning Department")
 - Three current or former members of the San Luis Obispo County Planning Commission.
 - A representative of the California Department of Fish & Game ("DF&G")
- Reviewed Environmental Division files and documents relating to the review process for the Conditional Use Permit applications discussed in this Report.
- Attended or watched video recordings of public hearings conducted by the Planning Commission and reviewed published viewpoints of two planning commissioners on the hearing procedure discussed in this Report.
- Reviewed the Rules of Procedure of the San Luis Obispo County Planning Commission.
- Reviewed the California Environmental Quality Act ("CEQA") and the state and county CEQA guidelines relating to Environmental Division review of and public comment on projects which may have significant environmental impacts

NARRATIVE

Environmental Division Review Process

The environmental review process complaints investigated by the Grand Jury were made publicly by applicants for Conditional Use Permits to establish sand and gravel mines in the Salinas River or one of its tributaries. The Environmental Division of the Planning Department (the Environmental Division") received applications from three of these applicants within the one-year period between October 2005 and September 2006. Each of the projects described in these applications had potentially significant environmental impacts that required them to be

reviewed and studied by the Environmental Division in accordance with established state and county CEQA guidelines. The review and study process for all three applications proceeded on a concurrent basis during the last quarter of 2006, all of 2007 and the first quarter of 2008. The purpose of this review and study process is to enable the Environmental Division to determine the nature and extent of any potentially significant environmental impacts of a project and to further determine if those impacts can either be mitigated to insignificance through measures agreed to by the applicant or require further evaluation through the preparation of an Environmental Impact Report ("EIR").

San Luis Obispo County is apparently the only California county that has established a separate Environmental Division within its Planning Department that is staffed by an Environmental Coordinator and environmental resource specialists who have specific knowledge, training and experience in environmental issues, CEQA requirements and the CEQA review process. The sole task of these specialists is to conduct and/or coordinate this CEQA review and study process and develop the required environmental documents. As part of this review and study process, San Luis Obispo County has adopted its own CEQA Guidelines to supplement the state CEQA Guidelines in the California Code of Regulations. There is both a state and a county CEQA guideline indicating that the Environmental Division must consider both the individual and the cumulative aspects of a project in determining whether or not it may have a significant impact on the environment. A state CEQA guideline also provides that a project may have a significant impact on the environment if its possible environmental effects "are individually limited but cumulatively considerable." In order to determine if a project may have environmental effects that are cumulatively considerable, the Environmental Division must view its effects in connection with the effects of other current projects and probable future projects.

Given its knowledge, training and experience in environmental issues, CEQA requirements and the CEQA review process, the Environmental Division staff are or should be aware of the state and county CEQA guidelines referencing the cumulative effects of individual projects. By September 2006, the Environmental Division had received and was concurrently reviewing three applications for Conditional Use permits to establish sand and gravel mines in the same river system. It also received a June 2007 letter from the expert it hired to peer review the

geomorphology studies for these three applications that recommended the applicants consider the cumulative impacts of their projects on extraction levels from the river system. In spite of these facts and circumstances, the Grand Jury investigation determined that the Environmental Division never raised the issue of the cumulative effects of these three projects with any of the applicants and never asked any of them to address the cumulative effects of their projects in any of the studies they were required to complete during the concurrent review and study process of their projects, a process that went on for approximately eighteen months.

The Environmental Division also held monthly meetings with a representative from the DF&G to discuss the Conditional Use Permit applications for the three sand and gravel mines. DF&G reviewed and commented extensively on various studies and reports prepared by the applicants during the approximately eighteen month period in which the Environmental Division concurrently conducted or coordinated reviews and studies of their projects. The Environmental Division kept detailed notes of these meeting and the topics discussed through May 2007. The notes reviewed by the Grand Jury indicate that DF&G reviews and comments related only to biological reports and studies prepared by the applicants' consultants and not to possible cumulative effects of the projects. DF&G advised the Grand Jury that it brought the issue of the cumulative effects of these three projects to the attention of the Environmental Division staff at a meeting in December 2007. However, there are no notes of any Environmental Division meetings with DF&G in this time period which confirm or refute this statement. In its September 16, 2008 report to the Board of Supervisors in response to the applicants' complaints about the planning process, the Environmental Division stated that these cumulative impact issues were first raised by DF&G with the Environmental Division in the DF&G letter of May 7, 2008 concerning one of the sand and gravel mine applications. Environmental Division staff confirmed this statement to the Grand Jury.

Scheduling of Public Hearings

The Environmental Division initially recommended that the Planning Commission approve each of the three Conditional Use Permit applications to establish sand and gravel mines in the Salinas River or its tributaries based on an environmental document known as a Mitigated Negative Declaration. ("MND") Under state and county CEQA guidelines, an MND must be circulated to

specified state and local agencies for review and comment. Under county CEQA guidelines, it must also be circulated to the public for review and comment and for the possible filing of Requests for Review. The involved state and local agencies generally have a 30 day period from their receipt of the MND in which to provide their comments and the public has 14 days from the date the MND is circulated to file a Request for Review. The Environmental Division had received enough public inquiry during its review and study process to know that these three applications had and would continue to generate significant public interest and concern. Given this level of public input and concern, the Environmental Division also should have known that recommending approval of these three application based on MNDs was likely to generate a larger than usual number of comments and/or Requests for Review. This is particularly significant with respect to Requests for Review because the Environmental Division's staff report to the Planning Commission for the public hearing on the applications must respond to the issues raised in all Requests for Review that are filed within the permitted time period.

The Environmental Division and the Planning Department scheduled two of these three applications for Planning Commission hearings on dates that were less than one week after the end of the 30 day period following circulation of the MND and scheduled the other application for a Planning Commission hearing more than one week **before** the end of this 30 day period. Not surprisingly, Environmental Division staff did not have adequate time to complete its required responses to the number of Requests for Review that it received for two of these applications. As a result, the Environmental Division had to request continuances of the public hearings for these two applications. These continuances delayed one public hearing for almost four months and the other for six months. The third application received only two Requests for Review and the Environmental Division did not request a continuance of its scheduled public hearing. Unfortunately, this was of no benefit to the applicant because his application was the subject of the May 7, 2008 letter from DF&G that was delivered the night before the scheduled Planning Commission hearing on his application. He was forced to request a continuance of his public hearing to deal with the issues in the letter and the continuance delayed his public hearing for five months.

Submission of Written Comments

The late submission of the May 7, 2008 letter from DF&G demonstrates the difficulties that are created for applicants, Planning Department Staff and the Planning Commission by the current practice of the Planning Department and the Planning Commission to allow submission of written comments on applications at any time prior and up to the time at which the Planning Commission makes its decision on an application. Environmental Division staff advised the Grand Jury that it was reluctant to change this process because it did not want to limit the opportunity for public comment on an application. The goal of not limiting public comment is understandable and is shared by the Grand Jury. However, the public has the opportunity to make oral comments during the Planning Commission's public hearing on the application. The timely conduct of public hearings usually requires that oral comments from the public be time limited, but the opportunity is not denied to anyone requesting to make a comment.

Late or last minute written comments can have significant adverse impacts for applicants as evidenced by the impact of the May 7, 2008 letter from DF&G on one applicant. They also create situations that make it impossible for Planning Department staff and/or the Planning Commission to adequately review, consider and respond to written comments or other materials that are provided to them shortly before and even during a public hearing. During one Planning Commission public hearing observed by the Grand Jury, a frustrated planning commissioner held up a collection of papers that had been delivered to the planning commissioners during a brief lunch break and justifiably complained about the impossibility of being able to review and respond to material received in this manner. In contrast, our courts establish deadlines for the filing of written documents so they can be adequately reviewed and considered by the court and these deadlines do not generally violate the due process rights of parties to the judicial proceeding.

Public Comment on Revised Findings

At the last session of the Planning Commission hearing on the Santa Margarita Ranch project in October 2008, a procedural issue created a difference of opinion between two planning commissioners. The specific issue in dispute was the right of the Chair to move the Santa Margarita Ranch agenda item from the last item to the first item without the approval of a majority of the Planning Commission. The underlying question that made this specific issue

significant was whether or not the public has a right to comment on revised findings being considered by the Planning Commission. Revised findings are findings brought back to the Planning Commission by Planning Department staff after the public hearing on a matter has been closed and the Planning Commission has reached a decision, subject to reviewing and approving the revised findings to support the decision. Due to the length of Planning Commission agendas, the last agenda item is usually not heard until the afternoon, so moving the Santa Margarita Ranch matter to the first agenda item meant that members of the public expecting to observe the Planning Commission proceedings on this agenda item would probably not arrive until the afternoon session of the Planning Commission, only to find that the item had been concluded during the morning session. One planning commissioner opposed to the agenda change argued that this action would deny the public its right to comment on the revised findings. With regard to the question of whether or not the public has a right to comment on revised findings being considered for adoption by the Planning Commission, the Grand Jury investigation established the following facts:

- At the time the Planning Commission considers and acts on revised findings all members of the public desiring to speak on the application have had the opportunity to speak, the public comment portion of the hearing has been closed and the Planning Commission has reached a decision on the application.
- The Rules of Procedure for the Planning Commission currently have no provision concerning the right of the public to comment on revised findings.
- The Planning Commission was advised by County Counsel that the public has no legal right to comment on revised findings being considered by the Planning Commission and that any decision to allow such public comment was at the discretion of the Chair.
- On September 11, 2008, the Planning Commission considered revised findings for its August 28, 2008 decision to deny one of the Conditional Use Permit applications to establish a sand and gravel mine in a tributary of the Salinas River. The Planning Commission did not offer the applicant or the public an opportunity to comment on these revised findings and no planning commissioner expressed any concern about a denial of the public's right to comment on revised findings.

The Planning Commission is legally required to approve findings in support of a decision. In the judgement of the Grand Jury, this is a function that should be performed solely by the

Planning Commission, with the assistance of County Counsel as necessary. This function does not require any additional public comment beyond that which has already been provided on the record during the public comment portion of the Planning Commission hearing and which may provide the basis for one or more of the revised findings adopted by the Planning Commission. In addition, allowing public comment on revised findings being considered by the Planning Commission has the potential to further extend and delay an already lengthy review and approval process and add to the existing time management problems of the Planning Commission when there is no legal or other compelling reason to do so.

FINDINGS

1. San Luis Obispo County is the only California county with an Environmental Division that is separately staffed for and dedicated solely to the review and analysis of environmental planning issues.
2. Both state and county CEQA Guidelines specifically require the Environmental Division to consider both the individual and cumulative environmental effects of projects.
3. Within a one year period, the Environmental Division of the Planning Department received three applications for Conditional Use Permits to conduct sand and gravel mining operations in the Salinas River or its tributaries and it concurrently reviewed and studied all of these applications from September 2006 through March 2008.
4. While concurrently reviewing and studying these three applications over a period of approximately eighteen months, the Environmental Division staff never raised or asked the applicants for studies to address the possible cumulative environmental effects of these applications.
5. Public hearings on the Conditional Use Permit applications for these three applications were scheduled so close to, and even before, the end of the applicable public comment periods that Environmental Division staff requests for continuances were almost a certainty and were, in fact, requested for two of the applications.

6. Continuances of the Planning Commission public hearings for the two applications referenced in Finding 5 resulted in a four to six month delay of a process that had already taken approximately two years before the public hearings were scheduled.
7. The Planning Department and the Planning Commission permit the submission of written comments by applicants and the public at any time before or during the public hearing process up to the point in time that the Planning Commission makes a decision on a project.
8. The Planning Commission Rules of Procedure have no provision concerning public comment on revised findings being considered by the Planning Commission after it has closed a public hearing and reached a tentative decision on a matter and there is no legal requirement that public comment be allowed on such revised findings.

RECOMMENDATIONS

1. The Planning Department and its Environmental Division should institute procedures and training to assure that its environmental resource specialists consider the issue of cumulative environmental effects and advise applicants of this issue at the earliest appropriate time when reviewing applications for projects that may have significant environmental impacts.
2. The Planning Department and its Environmental Planning Division should institute procedures to assure that public hearings on applications involving possible environmental impacts are scheduled not less than 30 days before the end of any applicable public comment period or period for filing Requests for Review.
3. The Planning Commission Rules of Procedure should be revised to establish a deadline for the filing of written comments on applications that is not less than three days before the scheduled public hearing and to provide that any written comments filed after the deadline will not be considered by the Planning Commission and will not be part of the record of the public hearing.
4. The Planning Commission Rules of Procedure should be revised to specifically provide that public comment will not be allowed on revised findings that have been presented to and are being considered by the Planning Commission after the public hearing on the application has been closed and the Planning Commission has made a tentative decision on the project.

REQUIRED RESPONSES

Responses to the Finding are required as follows:

Findings 1-8: The San Luis Obispo County Board of Supervisors and the Department of Planning and Building.

Responses to the Recommendations are required as follows:

Recommendations 1-4: The San Luis Obispo County Board of Supervisors and the Department of Planning and Building.

The responses from the Department of Planning and Building shall be submitted to the Presiding Judge at the San Luis Obispo Superior court by August 3, 2009. Please provide a copy of all responses to the Grand Jury as well.

The responses from the San Luis County Board of Supervisors shall be submitted to the Presiding Judge at the San Luis Obispo Superior court by September 2, 2009. Please provide a copy of all responses to the Grand Jury as well.

The mailing addresses for delivery are:

Presiding Judge	Grand Jury
Presiding Judge Martin Tangeman Superior Court of California 1035 Palm, Room 385 San Luis Obispo, CA 93408	San Luis Obispo County Grand Jury P.O. Box 4910 San Luis Obispo, CA 93403