



COASTAL APPEAL FORM

SAN LUIS OBISPO COUNTY DEPARTMENT OF PLANNING AND BUILDING
976 OSOS STREET • ROOM 200 • SAN LUIS OBISPO • CALIFORNIA 93408 • (805) 781-5600

Promoting the Wise Use of Land • Helping to Build Great Communities

Please Note: An appeal should be filed by an aggrieved person or the applicant at each stage in the process if they are still unsatisfied by the last action.

PROJECT INFORMATION Name: SHERIDAN IND. PK. File Number: DRC2005-00073

Type of permit being appealed:

- Plot Plan
- Site Plan
- Minor Use Permit
- Development Plan/Conditional Use Permit
- Variance
- Land Division
- Lot Line Adjustment
- Other: _____

The decision was made by:

- Planning Director (Staff)
- Building Official
- Planning Department Hearing Officer
- Subdivision Review Board
- Planning Commission
- Other _____

Date the application was acted on: Nov 3, 2011

The decision is appealed to:

- Board of Construction Appeals
- Board of Handicapped Access
- Planning Commission
- Board of Supervisors

BASIS FOR APPEAL

State the basis of the appeal. Clearly state the reasons for the appeal. In the case of a Construction Code Appeal, note specific code name and sections disputed). (Attach additional sheets if necessary)

SEE ATTACHED

List any conditions that are being appealed and give reasons why you think it should be modified or removed.

Condition Number 18, 67 Reason for appeal (attach additional sheets if necessary)

SEE ATTACHED

APPELLANT INFORMATION

Print name: ALEX PAUL

Address: 804 SHERIDAN RD., ARROYO GRANDE, CA 93420

Phone Number (daytime): (805) 343-4033

We have completed this form accurately and declare all statements made here are true.

Signature: [Handwritten Signature]

Date: 11/17/11

OFFICE USE ONLY

Date Received: _____

By: _____

Amount Paid: _____

Receipt No. (if applicable): _____

TO: San Luis Obispo County Board of Supervisors

RE: Appeal of Conditions 18 and 67 of DRC2005-00073

I (the applicant) am appealing Conditions of Approval Nos. 18 and 67 of our project, DRC2005-00073, as stated in Attachment 2 – EXHIBIT B - Conditions of Approval of the November 3, 2011 Memorandum from Murry Wilson to the Planning Commission.

CONDITION No. 18: Standby water capacity (second well) required

Basis for Appeal: The project impact is not proportional to the required mitigation

The local water company does not currently have a standby well operating to standard. This pre-existing deficiency needs to be fixed regardless of the applicant's project. The applicant's project uses a fraction of the district's total water yet the applicant is being asked to provide a second source of water to all customers of the water district. This mitigation is not proportional to the benefit accruing to the project and is not reasonably related to any impact caused by the project¹.

CONDITION 67: Indemnity Agreement

Basis for Appeal: The condition represents a fee that is being imposed without proper legislative authority. It also fails to comply with AB1600, The Mitigation Fee Act.

San Luis Obispo County has not enacted an ordinance authorizing the use of indemnity clauses as a condition of issuing development permits. California Attorney General Opinion No. 01-701² expressed the following view on indemnity requirements:

Accordingly, we view it as a matter of public policy for a county to determine whether the litigation costs associated with the granting of a coastal development permit should be borne by the permit holder or by the general taxpayers of the county. A court will not interfere with a county's decision in this regard. No statute precludes a county from making such determination in the present circumstances. Hence, a county may exercise its constitutional police power authority to enact the ordinance in question."

While the county has power to impose an indemnity clause, when applied to a broad class of projects, legislative enactment is required.³ At the Nov. 3 Planning Commission hearing, Planning Staff explained "[an indemnity clause is] a condition we use fairly routinely on controversial projects.", "We routinely do it on appeals." An example of such an ordinance adopted by the City of Newport Beach is attached.

¹ The mitigation measure must be "roughly proportional" and have a "Reasonable relationship" to the impacts of the project. (*Dolan v. City of Tigard* (1994) 512 U.S. 374 S.Ct.). (*Ehrlich v. City of Culver City* (1996) 12 Cal.4th 854, (*Nollan v. California Coastal Comm'n* (1987) 483 U.S. 825S. Ct.)

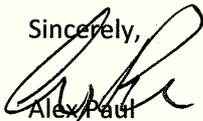
² Opinion of Attorney General No. 01-701 February 4, 2002, 85 Ops.Cal.Atty.Gen. 21, 24 (2002).

³ Distinction between legislative and adjudicatory acts discussed in *Horn v. County of Ventura* (1979) 24 Cal.3d and *Landi v. County of Monterey* (1983) 139 Cal. App.3d 934. "As a legislative enactment, it becomes public policy" (*Topanga Assn. for a Scenic Community v. County of Los Angeles* (1989) 214 Cal.App.3d 1348.)

The applicant further contends that Condition 67 represents a fee that is not in compliance with AB1600, The Mitigation Fee Act. This type of "regulatory fee", as described in A.G. Op. No. 01-701⁴, may fall under Government Code 65909.5 which is subject to the fee adoption procedures of section 66016 of the Government Code⁵.

For the above stated reasons, I respectfully request that conditions 18(paragraph 2) and 67 be removed as conditions of approval for our project, DRC2005-00073.

Sincerely,



Alex Paul

Applicant, DRC2005-00073

⁴ "Regulatory fees include fees designed to cover a county's reasonable costs for processing land-use permits and applications", *Mills v. County of Trinity* (1980) 108 Cal.App.3d 656, cited by Opinion of Attorney General No. 01-701.

⁵ "fees for the processing of use permits", Gov. Code, § 65909.5; Gov. Code, § 66016, Fees for Specific Purposes.

Indemnification from Third Party Challenges

**CITY OF NEWPORT BEACH
CITY COUNCIL STAFF REPORT**

Agenda Item No. 18
(November 28, 2006)

TO: HONORABLE MAYOR AND MEMBERS OF THE CITY COUNCIL

FROM: Robin Clauson, City Attorney
(949) 644-3131, rclauson@city.newport-beach.ca.us
Aaron Harp, Assistant City Attorney
(949) 644-3131, aharp@city.newport-beach.ca.us

SUBJECT: INDEMNIFICATION FROM THIRD PARTY CHALLENGES TO CALIFORNIA ENVIRONMENTAL QUALITY ACT DETERMINATIONS AND OTHER DISCRETIONARY APPROVALS

ISSUE:

Should the City require persons requesting California Environmental Quality Act determinations and discretionary approvals, indemnify, defend and hold harmless the City and its representatives from third party judicial challenges to these determinations and approvals?

RECOMMENDATION:

Introduce Ordinance No. 2006-____ and pass to second reading.

DISCUSSION:

Background:

Currently, the City does not require an applicant who is seeking California Environmental Quality Act ("CEQA") determinations and discretionary approvals to indemnify, defend and hold the City harmless from third party judicial challenges to these determinations and approvals. Defending against these challenges is costly and time consuming. In addition, project opponents often seek an award of attorneys' fees in such challenges. As applicants are the primary beneficiaries of such approvals, many cities in California have adopted ordinances that impose a condition that requires the applicants to reimburse the city its costs of defending against any such judicial challenge, and bear the responsibility for any costs, attorneys' fees, and damages which may be awarded to a successful challenger.

Authority to Regulate:

Whether the City can require a project applicant to indemnify and defend the City from CEQA determinations is not specifically addressed by the applicable CEQA statutes and regulations. The California Attorney General, however, has opined that a public agency has the power to require a project applicant to indemnify, defend and hold the public agency harmless from third

Indemnification from Third Party Challenges

party challenges to discretionary approvals. (See, 85 Op. Cal. Atty. Gen. 21, (2002).)

Environmental Review:

No environmental review is required.

Public Notice: Public notice was provided in accordance with all applicable laws.

Prepared by:

Submitted by:

SIGNATURE

SIGNATURE

Aaron C. Harp,
Assistant City Attorney

Robin Clauson,
City Attorney

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Indemnification from Third Party Challenges

ORDINANCE NO. 2006-_____

AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF NEWPORT BEACH ADDING CHAPTER 1.07 TO TITLE 1 OF THE NEWPORT BEACH MUNICIPAL CODE PROVIDING FOR THE INDEMNIFICATION OF THE CITY OF NEWPORT BEACH FOR THIRD PARTY CHALLENGES TO DISCRETIONARY APPROVALS

NOW THEREFORE, the City Council of the City of Newport Beach, California, **HEREBY ORDAINS** as follows:

SECTION 1: Chapter 1.07 entitled "Indemnification of the City for Third Party Challenges," of the Newport Beach Municipal Code is hereby added to Title 1 and shall read as follows:

Chapter 1.07

INDEMNIFICATION OF THE CITY FOR THIRD PARTY CHALLENGES

Sections:

- 1.07.010 Purpose and Findings.**
- 1.07.020 Definitions.**
- 1.07.030 Indemnification Required.**
- 1.07.040 Conditions**
- 1.07.050 Indemnification - Payment on Demand.**

1.07.010 Purpose and Findings.

- A. The City Council finds that projects for which discretionary City approvals are necessary and for which project proponents make application to the City may, in addition to other legal requirements, require environmental review by the City pursuant to the California Environmental Quality Act ("CEQA"). Substantial City time and effort are expended in complying with CEQA's requirements and other legal requirements necessary before granting such approvals.
- B. Judicial challenges to the City's CEQA determinations for projects requiring discretionary approvals are costly and time consuming. In addition, project opponents often seek an award of attorneys' fees in such challenges. As project applicants are the primary beneficiaries of such approvals, it is appropriate that such applicants should bear the expense of defending against any such judicial challenge, and bear the responsibility for any costs, attorneys' fees, and damages which may be awarded to a successful challenger.

1.07.020 Definitions.

In this Chapter the following words or phrases shall have the following meanings:

"Application" shall mean an initial written request required by the City which commences the

Indemnification from Third Party Challenges

City's processing of the project that requires a discretionary approval and approval of a CEQA document.

"CEQA" means the California Environmental Quality Control Act (Public Resources Code section 21000 et seq.) and any action taken pursuant thereto including, but not limited to, an environmental impact report, subsequent environmental impact report, supplemental environmental impact report, mitigated negative declaration, negative declaration, addendum to an environmental impact report or negative declaration, categorical exemption, or a determination that no CEQA document is required.

"City" shall mean the City of Newport Beach, its City Council, boards and commissions, officials, officers, attorneys, employees, agents, and zoning administrator.

"Project" shall mean any amendment, modification permit, use permit, variance or other City issued permit that requires discretionary approval in accordance with this code.

1.07.030 Indemnification Required.

Any applicant for a discretionary permit under any provision of this code which also requires a determination under CEQA shall be provided notice of the provisions of this Chapter. Any project approval may, in the discretion of the approving body, be conditioned to indemnify the City according to the provisions of this Chapter, as follows:

- A. Defend, indemnify, release and hold harmless the City from and against any and all claims, demands, obligations, damages, actions, causes of action, suits, losses, judgments, fines, penalties, liabilities, costs and expenses (including without limitation, attorney's fees, disbursements and court costs) of every kind and nature whatsoever which may arise from or in any manner relate (directly or indirectly) to the project, the project's approval based on the City's CEQA determination and/or the City's failure to comply with the requirements of any federal, state, or local laws, including, but not limited to, CEQA, general plan and zoning requirements. This indemnification shall include, but not be limited to, damages awarded against the City, if any, costs of suit, attorneys' fees, and other expenses incurred in connection with such claim, action, or proceeding whether incurred by applicant, City, and/or the parties initiating or bringing such proceeding,

1.07.040 Conditions.

Any indemnification required under the provisions of this Chapter shall be subject to the following:

1. The City shall promptly notify applicant of any claim, action, or proceeding brought to attack, set aside, void or annul a discretionary Project approval, or approval of a related CEQA document;
2. The City shall retain the right to participate in the defense of the claim, action or proceeding including selection of defense counsel; and
3. The applicant shall not be required to pay or perform any settlement unless the settlement is approved by the applicant; and

Indemnification from Third Party Challenges

- 5. The applicant shall indemnify the City for all of City's costs, fees, and damages which City incurs in enforcing the indemnification agreement.

1.07.050 Indemnification - Payment on Demand.

The applicant shall pay to the City upon demand any amount owed to the City pursuant to the indemnification requirements prescribed in this chapter.

SECTION 2: If any section, subsection, sentence, clause or phrase of this ordinance is, for any reason, held to be invalid or unconstitutional, such decision shall not affect the validity or constitutionality of the remaining portions of this ordinance. The City Council hereby declares that it would have passed this ordinance, and each section, subsection, clause or phrase hereof, irrespective of the fact that any one or more sections, subsections, sentences, clauses and phrases be declared unconstitutional.

SECTION 3: The Mayor shall sign and the City Clerk shall attest to the passage of this ordinance. The City Clerk shall cause the same to be published once in the official newspaper of the City within fifteen (15) days after its adoption, and the ordinance shall be effective thirty (30) days after its adoption.

SECTION 4: This ordinance was introduced at a regular meeting of the City Council of the City of Newport Beach, held on the ___ day of _____, 2006, and adopted on the ___ day of _____, 2006, by the following vote, to wit:

AYES, COUNCILMEMBERS _____

NOES, COUNCILMEMBERS _____

ABSENT COUNCILMEMBERS _____

MAYOR _____

ATTEST:

CITY CLERK