



SAN FRANCISCO PLANNING DEPARTMENT

MEMO

DATE: January 24, 2013
TO: Honorable Members of the Planning Commission
FROM: John Rahaim - Director of Planning
STAFF CONTACT: Daniel A. Sider - Planning Department Staff
RE: Proposed Commission Policy on
Timing of Project Implementation

1650 Mission St.
Suite 400
San Francisco,
CA 94103-2479

Reception:
415.558.6378

Fax:
415.558.6409

Planning
Information:
415.558.6377

On January 31, 2013, the Planning Commission will conduct a public hearing on a proposed Planning Commission Policy primarily concerning time frames for the implementation of projects requiring Commission approval.

This Planning Commission Policy, like others, is adopted through Commission Resolution and can be amended or rescinded by the Commission at any properly noticed public hearing. It does not require approval by the Board of Supervisors or other bodies. This proposed policy contains a "soft-sunset" - it states the Commission's intent to conduct a hearing one year from adoption to review the policy and consider changes or revocation.

Because many projects that were approved by the Commission during the economic downturn have only recently secured financing, and in response to suggestions that current conditions establishing these time frames are ambiguous and no longer reflective of the current development environment, the Department has decided to bring this matter to the Commission.

Conditions of approval for Planning Commission authorizations generally include "performance conditions," which are specific time limits within which a Building Permit to implement the project must be obtained. Based on an interpretation made by the Zoning Administrator in 1983, typical Commission authorizations contain time limits of three years. Performance conditions are a useful planning tool in that they require a project to move forward expeditiously, thereby promoting the improvement of the City and preventing the reservation of land for future purposes. However, in the three decades since the three-year performance condition was implemented, the development process - both regulatory review and implementation - has become dramatically more complex. Additionally, the global economic crisis from which San Francisco is now beginning to recover has significantly impacted the availability of capital to execute many projects that received Commission approval immediately prior to, and during, the crisis.

Nearly one-quarter of all development projects authorized by the Commission in the last five years have already exceeded the time frames set forth in their authorizations, including 30 residential projects accounting for 1,600 dwelling units and 10 significant non-residential projects (e.g. new construction or additions of at least 10,000 square feet). An additional 20 projects - including 650 dwelling units and 5 significant non-residential projects - will exceed the time frames set forth in their authorizations in 2013 if no permit is obtained. During that same five-year period, 31 extensions of performance periods have been requested from the Commission. Only one - an affordable senior housing project with no demonstrable progress over more than seven years - has been disapproved.

Additionally, while the clarity and consistency of the current “boilerplate” three-year performance condition has improved over the years, it continues to be imperfect. In particular, it remains ambiguous by suggesting that a Commission authorization becomes invalid (1) immediately upon expiration of the three-year period *and* (2) only if the Commission revokes the authorization at a public hearing. This confusion is exacerbated by the number of projects now seeking to move forward which were approved more than three years ago but for which no revocation hearing has occurred. As a result, the Department’s current practice of requiring a hearing to advance a project after the three-year period has been questioned.

The proposed Planning Commission Policy addresses four key areas:

- The proposed policy would provide guidance in the interpretation of standard performance conditions such that a Building Permit Application seeking to implement a Planning Commission authorization after the specified time frame would generally be approved by staff without a Commission hearing so long as no more than six years have passed since the original authorization. When more than six years have passed, a hearing would be required so that the Commission may consider extending or revoking the authorization.
- The proposed policy would update “boilerplate” performance conditions for new projects in order to unambiguously set a time frame of six years, after which Commission action would be required to implement the project. This would not preclude the Commission from using its discretion to impose a different time frame on a particular project.
- Under current practice, if as-of-right Building Permit Applications that have been subject to neighborhood notice prior to approval are not issued by the Department of Building Inspection within three years, they are returned to the Planning Department for re-notification. The proposed policy would cause this time frame to be increased to six years.
- The proposed policy would communicate and record longstanding advice from the City Attorney’s Office regarding the “law of the day.” Specifically, regardless of any performance condition, an implementing Building Permit Application must not only conform to all the terms of the underlying Commission authorization but also must conform to all provisions of the Planning Code in effect at the time of approval of that Building Permit Application, *regardless of whether such provision was in effect at the time of the approval of the Commission’s authorization*. For example, a project within the Market and Octavia Plan Area that received Conditional Use authorization prior to that plan’s effective date but that did not obtain a Building Permit to implement the project until after the plan’s effective date would nonetheless be subject to all new provisions of that plan – including provision such as impact fees.

The proposed policy addresses only Conditional Use Authorizations, Downtown Project Authorizations, and Eastern Neighborhoods Large Project Authorizations under Planning Code Sections 303, 309 and 329, respectively. It does not address large office projects or tower projects in Rincon Hill, which are subject to the specific timing requirements of Planning Code Sections 321(d) and 309.1(e), respectively. Projects that are beyond the Commission’s jurisdiction – such as those within Mission Bay or on Port property – along with some projects approved by the Planning Commission using non-standard performance conditions, are similarly unaffected.



SAN FRANCISCO PLANNING DEPARTMENT

Planning Commission Draft Resolution

HEARING DATE: JANUARY 31, 2013

Date: January 24, 2013
Staff Contact: Daniel A. Sider – (415) 558-6697
dan.sider@sfgov.org

1650 Mission St.
Suite 400
San Francisco,
CA 94103-2479

Reception:
415.558.6378

Fax:
415.558.6409

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PLANNING COMMISSION POLICY REGARDING (1) THE TIMING OF IMPLEMENTATION FOR PROJECTS WHICH HAVE ALREADY BEEN APPROVED BY THE PLANNING COMMISSION AND (2) PERFORMANCE CONDITIONS FOR TYPICAL PROJECTS SEEKING NEW APPROVALS FROM THE PLANNING COMMISSION.

WHEREAS, When the Planning Commission (“Commission”) grants a Conditional Use authorization under Planning Code Section 303, a Downtown Project Authorization under Planning Code Section 309, or a Large Project Authorization in the Eastern Neighborhoods under Section 329 (“Authorization” or, collectively, “Authorizations”), these Authorizations convey no independent right to construct the project. Rather, the Department of Building Inspection (“DBI”) must issue a Building or Site Permit subsequent to the Authorization in order to implement the project; and

WHEREAS, Conditions of approval for Authorizations typically include specific time limits within which a Building Permit for the project must be obtained (“Performance Conditions”); and

WHEREAS, Planning Code Section 303(d) states that the conditions of approval of any Conditional Use authorization “may include time limits for exercise of the conditional use authorization; otherwise, any exercise of such authorization must commence within a reasonable time.” A published interpretation of this Code Section in April of 1983 established three years as a “reasonable time” because “this reflected the abandonment period for nonconforming uses under Section 183.” As such – and in the absence of unusual circumstances – Planning Department (“Department”) practice has been to draft, and Commission practice has been to adopt, Performance Conditions that reflect this three year time frame; and

WHEREAS, Performance Conditions are appropriate, necessary and desirable in that they require a project to move forward toward execution on a reasonable basis and thereby promote the improvement of our neighborhoods and prevent the reservation of land for future purposes when the project sponsor has no good faith intent to diligently commence the proposed project; and

WHEREAS, The precise language used in Performance Conditions has varied over the years. First in 2004 and then again in 2011 the Department implemented increasingly standardized Performance Conditions, but the language in these more recent Performance Conditions has also varied; and

WHEREAS, The Commission recognizes the importance of consistency and fairness in the application of conditions of approval, especially in the absence of the Commission's clear intent to apply unique conditions; and

WHEREAS, Current language used in most Performance Conditions typically states that "the authorization and right vested by virtue of this action is valid for three years from the effective date of the Motion... The Planning Commission may, in a public hearing, consider the revocation of the approvals granted if a site or Building Permit has not been obtained within three (3) years of the date of the Motion approving the Project"; and

WHEREAS, The Commission acknowledges the contradictory nature of these two sentences. Specifically, this language suggests both (1) that the Authorization remains valid only for a specific period of time and (2) that the Authorization remains valid beyond that period of time and until the Commission affirmatively revokes it; and

WHEREAS, The Commission has been advised that in order to revoke or rescind an Authorization, it must hold a hearing at which it considers the matter along with testimony from interested parties; and

WHEREAS, The Commission is aware that certain types of projects are subject to specific provisions of the Planning Code that deal with commencement of construction project implementation. For example, Planning Code Section 321(d) provides that most office projects of more than 25,000 square feet commence construction within 18 months of the Commission's approval; and

WHEREAS, In March of 2009, Commission Resolution numbers 17846A, 17846B and 17846C were adopted in order to establish policy regarding commencement of construction for certain types of projects that have exceeded the time frames set forth in their Authorizations. The Commission chose to (1) monitor but not affirmatively revoke office projects, (2) to consider Rincon Hill projects on a case-by-case basis while acknowledging that extensions would "serve the City well," and (3) to review Conditional Use and Downtown Project Authorizations which contain only affordable housing, meet LEED Gold standards, or are City-sponsored a case-by-case basis. The final of the three resolutions contained a sunset provision such that it became inoperative in March of 2011; and

WHEREAS, The Commission acknowledges that when presented with an application for a Building Permit that would implement an Authorization that exceeds the time frame set forth in that Authorization, the Department's practice has been to require the filing of a new application to 'extend' the Authorization and then to calendar the matter before the Commission so that it may grant or deny such extension; and

WHEREAS, The Commission acknowledges that, in the case of Building Permits which would be issued by DBI more than three years after Planning Department approval, the Department has asked DBI to "re-route" the application to the Planning Department prior to issuance so that projects which are subject to neighborhood notification under Planning Code Sections 311 or 312 can be re-noticed; and

WHEREAS, The Commission recognizes that the global economic crisis from which San Francisco is now beginning to recover has exceeded the depth and breadth of recent economic downturns, resulting in a

profound impact on the liquidity and stability of credit markets and the availability of financing for a range of development projects; and

WHEREAS, The nascent recovery from that economic crisis along with a general increase in the level of regulation and scrutiny applicable to all scales of development projects relative to conditions in the 1980's (when three years was found to be a "reasonable" amount of time to execute a development project) is suggestive of a re-evaluation of the three-year time frame; and

WHEREAS, Many projects that were entitled immediately prior to and during this crisis are now able to secure financing and proceed toward implementation; and

WHEREAS, Of the approximately 180 projects that were entitled by the Commission over the past five years, 60 are either built or are currently under construction, 20 have obtained permits and are able to commence construction, 40 have applied for but have not yet obtained permits, and 60 have not yet applied for permits; and

WHEREAS, Of the approximately 100 projects that were entitled in the past five years but which have not yet obtained a permit, 40 have exceeded the time frames set forth in their Authorizations, 20 will exceed the time frames set forth in their Authorizations in less than one year, and 40 have more than one year to meet the time frames set forth in their Authorizations; and

WHEREAS, Of the approximately 40 projects that have exceeded the time frames set forth in their Authorizations, there are roughly 30 residential projects accounting for 1,600 dwelling units and 10 significant non-residential projects (such as those adding at least 10,000 square feet or constructing major new buildings); and

WHEREAS, Of the approximately 20 projects that will exceed the time frames set forth in their Authorizations in less than one year if no permit is obtained, there are roughly 15 residential projects accounting for 650 dwelling units and 5 significant non-residential projects (such as those adding at least 10,000 square feet or constructing major new buildings). These 15 residential projects exclude those within the Rincon Hill Downtown Residential District, where specific Planning Code provisions apply to project implementation; and

WHEREAS, In the past five years, 31 extensions of Authorizations have been sought from the Commission. One of those is still under review by the Department, one was disapproved, and the remaining 29 have been approved. The single disapproval was for an affordable housing project for senior citizens approved seven years prior to the consideration of the extension where the developer had not secured any of the necessary subsidies, arranged for any partnerships, or maintained the subject property in a nuisance-free condition; and

WHEREAS, The Department has expended more than 750 hours of staff time to review these 30 adjudicated cases and present them to the Commission; and

WHEREAS, The Commission acknowledges that, in most cases, until a Building Permit is issued to implement an Authorization, the "law of the day" applies to such permit. Specifically, a permit seeking to implement an Authorization must not only conform to all the terms of that Authorization but also must

conform to all provisions of the Planning Code in effect at the time of approval of that permit, regardless of whether such provision was in effect at the time of the approval of the original Authorization; and

WHEREAS, The Commission acknowledges the ability of the Zoning Administrator to interpret conditions of approval associated with a Commission approval.

NOW, THEREFORE BE IT RESOLVED, that the Commission urges that, when presented with a Building Permit Application that would implement an Authorization that exceeds the time frame set forth in that Authorization, the Zoning Administrator (a) should not submit the Authorization to the Planning Commission for consideration of revocation and (b) should approve such Building Permit, so long as all of the following conditions have been met:

1. The Building Permit Application complies with all other conditions of approval; and
2. The Building Permit Application complies with all Planning Code provisions currently in effect, including but not limited to use limitations, building form controls and development impact fees; and
3. No more than six (6) years have passed since the date of the Authorization; and
4. This six (6) year period may be extended at the discretion of the Zoning Administrator only where implementation of the project is delayed by an appeal or by a legal challenge and only by the length of time for which such appeal or challenge had caused delay.

BE IT FURTHER RESOLVED, that when presented with a Building Permit Application that would implement an Authorization that (1) exceeds the time frame set forth in that Authorization and (2) does not comply with all four conditions set forth above, the Commission urges the Zoning Administrator to require the project sponsor to seek a renewal of the Authorization through the filing of a new application for Authorization. Should the project sponsor decline to file such an application and decline to withdraw the Building Permit Application, the Commission urges the Zoning Administrator to cause a public hearing to occur in order for the Commission to consider revocation of the approvals granted. Should the Commission not revoke the approvals granted following the closure of the public hearing, the Commission shall determine the extension of time for the continued validity of the Authorization; and

BE IT FURTHER RESOLVED, that future Performance Conditions for typical projects (unless the Commission specifically directs otherwise and excepting those projects affected by specific provisions of the Planning Code dealing with commencement of construction) be as follows:

1. **Validity.** The authorization and right vested by virtue of this action is valid for six (6) years from the effective date of the Motion. The Department of Building Inspection shall have issued a Building Permit or Site Permit to construct the project and/or commence the approved use because this Authorization is only an approval of the proposed project and conveys no independent right to construct the project or to commence the approved use.
2. **Expiration and Renewal.** Should a Building or Site Permit be sought after the six (6) year period has lapsed, the project sponsor must seek a renewal of this Authorization by filing an application for an amendment to the original Authorization or a new application for Authorization. Should the project sponsor decline to so file, and decline to withdraw the permit application, the Commission shall conduct a public hearing in order to consider the revocation of the Authorization. Should the Commission not revoke the Authorization following the closure of the

public hearing, the Commission shall determine the extension of time for the continued validity of the Authorization.

3. Diligent pursuit. Once a site or Building Permit has been issued, construction must commence within the timeframe required by the Department of Building Inspection and be continued diligently to completion. Failure to do so shall be grounds for the Commission to consider revoking the approval if more than six (6) years have passed since this Authorization was approved.
4. Extension. All time limits in the preceding three paragraphs may be extended at the discretion of the Zoning Administrator only where implementation of the project is delayed by an appeal or by a legal challenge and only by the length of time for which such appeal or challenge has caused delay.
5. Conformity with Current Law. Regardless of this Authorization or previous Authorizations or approvals by the Commission or Department and regardless of the provisions of the Planning Code in place at the time of such approval or Authorization, no application for Building Permit, Site Permit, or other entitlement shall be approved unless it complies with all applicable provisions of the Planning Code in effect at the time of such approval; and

BE IT FURTHER RESOLVED, that the Commission urges the Zoning Administrator to only request re-routing from DBI and subsequent re-noticing of as-of-right Building Permit Applications that are subject to Planning Code Sections 311 or 312 when six (6) or more years have passed from the Department's or the Commission's original approval; and

BE IT FURTHER RESOLVED, that the Commission intends to conduct a public hearing roughly one year from the date of this Resolution regarding the merits of the six (6) year performance periods established through this Resolution, at which time it may choose to adjust performance periods for future development projects.

I hereby certify that the foregoing Resolution was adopted by the Commission at its meeting on January 31, 2013.

Jonas P. Ionin
Acting Commission Secretary

AYES:

NOES:

ABSENT:

ADOPTED: January 31, 2013