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MEMORANDUM OF LAW

DATE: July 28, 2006

TO: Honorable Mayor and City Councilmembers

FROM: City Attorney

SUBJECT: Review of the Final Environmental Impact Report [EIR] for University City North/South Transportation Corridor Study, Project No. 27445

INTRODUCTION

I. Project Purpose:

On June 13, 2006, the City of San Diego Development Services Department finalized an Environmental Impact Report [EIR] for the University City North/South Transportation Corridor Study, Project No. 27445. The stated purpose for this project is to "improve traffic flow between the southern and northern portions of the community of University City." Page S-1, Final EIR, University City North/South Transportation Corridor Study, Project No. 27445. No other purpose is given. To accomplish this purpose, seven project alternatives are proposed in the EIR, one of which includes the construction of the Regents Road Bridge that would bi-sect and cut through the Rose Canyon Open Space Park Preserve and directly impact the Rose Creek below.

Both the United States Fish and Wildlife Service [USFWS] and the California Department of Fish and Game [DFG] suggest in their comments on the EIR that it is questionable whether the improvement in traffic congestion, as a stated project purpose, warrants the associated loss of sensitive biological resources and the fiscal expense of biological mitigation. *See* Joint Comment Letter of USFWS and DFG, April 14, 2005. Exhibit A.

II. Additional Facts:

On July 24, 2006, the Office of the City Attorney was provided for the first time a copy of the Final Environmental Impact Report [EIR] for the University City North/South Transportation Corridor Study, Project No. 27445. The City Attorney's Office only had a few

days to write this comprehensive memo. Therefore, the City Council members and Mayor are receiving this memo at this late date.

The EIR was prepared by Project Design Consultants, a consultant hired by the City in 2003, to develop the EIR and respond to public comments. The City's designated representative for the contract is and was the Engineering and Capital Projects Department. The Engineering and Capital Projects Department utilized the legal services of outside counsel, Theresa McAteer, in the development of the EIR, without City Council approval, without a contract, and in violation of the provisions of City Charter section 40. This may very well explain why the Office of the City Attorney was denied an opportunity to review the Final EIR and was not provided a copy until expressly requested.

The City Attorney comments that follow are a summary of key issues and are not intended to reflect a comprehensive review of the administrative record nor the Final EIR. Nevertheless, the Office of the City Attorney has engaged in review of the Final EIR, the EIR record, comments of various federal and state agencies as reflected in the EIR, and the Letter of July 24, 2006 submitted by the law firm of Shute Mihaly & Weinberger LLP on behalf of "Friends of Rose Canyon." With respect to the concerns raised in this July 24, 2006 letter and the concerns raised by the United States Department of Fish & Wildlife, the California Department of Fish and Game and the Regional Water Quality Control Board, the City Attorney concurs with these concerns. Exhibits A, B, C, D.

III. Description of Rose Canyon and its Documented Importance to the City:

Rose Canyon is one of the few remaining open space parks in and around the communities of University City and La Jolla, and was specifically acquired by the City as a land acquisition exchange with a land developer who wished, among other things, to acquire land in and around University City for an industrial park. One of the City's express primary purposes for the land exchange was to "preserve" Rose Canyon. In fact, the November 1979 Ordinance No. 0-15073 expressly sets aside and dedicates Rose Canyon as "Rose Canyon Open Space Preserve." Exhibit E. By doing so, very specific conditions apply to its use; namely, City Charter section 55. Section 55 expressly states:

All real property owned in fee by the City heretofore or hereafter formally dedicated in perpetuity by ordinance of the Council or by statute of the State Legislature for park, recreation or cemetery purposes shall not be used for any but park, recreation or cemetery purposes without such changed use or purpose having been first authorized or later ratified by a vote of two-thirds of the qualified electors of the City voting at an election for such purpose.

Whenever the City manager recommends it, and the City Council finds that the public interest demands it, the City Council may, without a vote of the people, authorize the opening and maintenance of streets and highways over, through and across City fee-owned land which has heretofore or hereafter been formally dedicated in perpetuity by ordinance or statute for park, recreation and cemetery purposes.

Although it would appear that the above language would allow for the construction of a highway or street through Rose Canyon, the qualifying language is "if the public interest demands it." The qualifying language may very well trigger an analysis and determination of whether such a use is consistent with the purposes of the dedication or whether such a use would substantially interfere with the carrying out of such purpose. *See City Att'y MOL No. 90-17 (January 26, 1990)*. Exhibit F. It is NOT clear from a reading of the Final EIR or supporting documents that this particular analysis, in light of the case law, has been adequately addressed.

The importance of Rose Canyon to the City of San Diego was re-emphasized again in 1997 when the City obtained a competitive Habitat Conservation Fund [HCF] Grant from the California Department of Parks and Recreation to "maintain and operate in perpetuity the property acquired, developed, restored or enhanced with these funds." Section H.2., *HCF Grant Agreement Between the City of San Diego and the State of California*. Exhibit G. The City delineated its purpose and intent in seeking out this Grant in its 1997 Application. In response to the following questions in the Grant Application, the City committed as follows:

Why should this particular project be funded?

The Rose Canyon Open Space Park is home to several pairs of gnatcatchers.

Rose Canyon Open Space Park is located in an area surrounded by urban encroachment. It is recognized as one of the last natural canyons in the area that contain the receding coastal sage scrub communities. The canyon mesa tops are completely developed and provide a continual source of exotic non-native plant material for the canyon. The several community groups that, along with San Diego City, administer this canyon have long held that Rose Canyon is a living museum and natural classroom. It therefore should be maintained in that capacity along with its recreational aspect for future generations to enjoy.

Is there a deficiency of similar opportunities?

Yes! Due to the location of the canyon and the type of environment displayed, it stands as a very recognizable natural treasure. As mentioned above, Rose Canyon is one of the last examples of the natural environment that once covered the entire area.

To encourage people to visit and learn from this living museum, large kiosks will be installed at the Elivira site, which is west of Regents Road. The Elivira sites are where the railroad workers of the first railroad in the late 1800's lived. The kiosks at the site will illustrate the flora and fauna that have existed in the park since that time.

Describe any existing or potential threats to the project site or area and what will happen if the project is not funded.

As has been the case in other locations relative to our environment, the danger of non-natives becoming dominant is no fiction. The potential for a monoculture of giant reed (*Arundo Donax*) is real. The many other listed non-natives pose a real time threat as well.

See Pages 4 and 7, City of San Diego Application for Riparian Habitat, Rose Canyon Open Space Park. Exhibit G.

By accepting this Grant and acknowledging its importance to the residents of the City of San Diego, the City committed to the State of California that it would fully comply with the spirit and intent of the contract between the respective entities. To act contrary to the terms, covenants and conditions of this contract, would demonstrate not only to the City's residents, but also to the State of California, that the City is not capable of following through on its legally binding obligations. Specifically, the Grant Agreement states:

H. Use of Project Area

1. Applicant agrees that the property acquired or developed with grant moneys under this agreement shall be used by the Applicant only for the purposes of the California Wildlife Protection Act of 1990 and no other use, sale, or other disposition of the area shall be permitted except by specific act of the Legislature.

See Section H.2., HCF Grant Agreement Between the City of San Diego and the State of California. See also email correspondence from July 24 to 28, 2006, between the City Parks and Recreation Department and the California Department of Parks and Recreation indicating that State Legislative act would be required for this project. Exhibit D.

Furthermore, this particular provision of the Grant Agreement suggests that the "property" (the Rose Canyon Open Space Park and not just the improved areas) that was developed with grant moneys is now subject to the use restrictions of the California Wildlife Protection Act of 1990 [Act]. This clause does not appear to limit application of this provision to only those portions of the "property" that were subject to specific restoration efforts--namely, the project area described in the application: "The program requested here revolves around the actual removal of the more virulent species of non-natives where Rose Creek runs through Rose Canyon." The City's purpose for applying for the grant, as stated throughout, is to maintain and restore riparian habitat. The Grant is for the express benefit of Rose Canyon Open Space Park Preserve--the subject property. By accepting these funds, arguably, the City may have committed the entire Park (the entire property) to these restrictions and not just those lonely portions allocated specific mitigation. *See page 1, City of San Diego Application for Riparian Habitat, Rose Canyon Open Space Park.* The legislative intent behind these grant monies is expressly stated in the Act [*Section 2780 of the California Fish & Game Code*]:

The people of California find and declare all of the following:

- (a) Protection, enhancement, and restoration of wildlife habitat and fisheries are vital to maintaining the quality of life in California. As the state's human population increases, there is an urgent need to protect the rapidly disappearing wildlife habitats that support California's unique and varied wildlife resources.

The City of San Diego does not, as a matter of course, circumvent or violate local, state or federal law, nor is it the practice to knowingly breach a contractual agreement. However, nowhere in the EIR is it clear that the Grant Agreement commitments will be fulfilled or are expected to be fulfilled in their entirety. In fact, in recognition that the Draft EIR failed to address the Grant Agreement terms, the City included for the first time additional new mitigation in the Final EIR that had never been previously disclosed to the public. This new mitigation, as outlined in a letter from City staff sent in April 2006 to the California Department of Parks and Recreation, was intended to avoid any impacts to that portion of the Park improved or restored under the terms of the Grant Agreement. Exhibit D. The new mitigation, as identified in the Final EIR (App. V.C., Attachment 2B), requires a wall structure that could potentially reach 33 feet in height. The impacts of this new construction, have yet to be fully be evaluated. *See July 24, 2006, Letter from Shute, Mihaly & Weinberger for a full discussion of these related issues.* Said discussion is incorporated by reference. Exhibit C.

QUESTION PRESENTED

Should the City Council adopt and certify the EIR and Statement of Overriding Considerations, select and adopt the Regents Road Bridge Alternative, and adopt the Mitigation, Monitoring and Reporting Program?

SHORT ANSWER

No. For all the reasons outlined herein, including those incorporated by reference, the City Attorney recommends that the City Council take the following steps to address these serious deficiencies:

1. Decline approval and certification of the EIR and Statement of Overriding Considerations;
2. Deny the Selection of the Regents Road Bridge Alternative as it is premature;
3. Deny approval of the Mitigation, Monitoring and Reporting Program [MMRP];
4. Refer the EIR back to the Development Services Department and the Engineering and Capital Projects Department for additional environmental review, study and analysis and for re-circulation of the revised and amended EIR to ensure an adequate opportunity for public comment and participation; and,
5. Direct the Development Services Department and the Engineering and Capital Projects Department to complete consultation with the United States Fish and Wildlife Service, the California Department of Fish & Game and the California Department of Parks and Recreation on the issues raised in their comments and issues related to the City's Habitat Conservation Fund Grant.

LEGAL ANALYSIS

I. New Significant Impact and Mitigation Not Previously Analyzed:

A. New Mitigation for Lands Restored Within the Rose Canyon Open Space Park Preserve:

As described above, the new mitigation proposed for the Regents Road Bridge Alternative has not been fully analyzed and discussed in the Draft EIR, in the Final EIR, nor in the supporting documents. This new mitigation, which really is a significant modification to the alternative proposed, justifies recirculation.

In support of CEQA's fundamental public participation principle, EIRs must be recirculated if "significant new information" is added after the release of the draft EIR for public review, but prior to certification. Public Resources Code Section 21092.1; CEQA Guidelines § 15088.5; *Laurel Heights Improvement Association of San Francisco, Inc. v. Regents of the University of California [Laurel Heights II]*, 6 Cal. 4th 1112 (1993). The test for the significance of new information is that "the EIR is changed in a way that deprives the public of a meaningful opportunity to comment upon a substantial adverse environmental effect of the project or a feasible way to mitigate or avoid such an effect." *Laurel Heights II*, 6 Cal. 4th at 1129-1130.

As is clearly applicable here, CEQA Guidelines section 15088.5(a)(1) unambiguously states that "significant new information" includes "A new significant environmental impact [resulting] from the project or from a new mitigation measure proposed to be implemented." The City Attorney's office incorporates by reference the related issues addressed in the July 24, 2006 Letter of Shute, Mihaly & Weinberger. Exhibit C.

B. Impacts Associated with the Recent Airport Site Selection of the San Diego County Regional Airport Authority:

In or about May 2006, the San Diego County Regional Airport Authority selected MCAS Miramar Marine Base as a Joint Use Site for the development of a proposed commercial use airport for San Diego County. This proposed airport would ultimately replace and/or supplement flights out of San Diego International Airport at Lindbergh Field. Because of the likely traffic associated with the use of this site as the new airport, if developed, these considerations should be addressed in the EIR in relation to future traffic and/or future cumulative impacts, if any.

II. Consultation with Trustee and Responsible Agencies and Future CEQA and/or NEPA Analysis:

Page 3 to 43 of the EIR identifies no less than eight (8) Responsible and/or Trustee Agencies from whom the City may have to obtain permits or other approvals before moving forward with this project. Three of these named agencies have expressly stated that they disapprove of and do not recommend the construction of the Regents Road Bridge Alternative. *See* Letters from United States Fish & Wildlife Service, California Department of Fish & Game and San Diego Regional Water Quality Control Board enclosed. Exhibit A. It is very likely that any or all of these eight agencies will require some form of CEQA and/or NEPA review and approval. This would mean additional delay in moving forward with this project. If there is already disagreement on the adequacy of this EIR by these agencies, it is unlikely the City's EIR will be used as their CEQA document for these other agencies.

III. City Response to Trustee and Responsible Agency Comments on EIR:

The following comments were made by various agencies:

From California Regional Water Quality Control Board:

Overall, the draft EIR fails to provide sufficient information to support the conclusion that the project will not have a significant effect on water quality and beneficial uses. Furthermore, the draft EIR fails to identify project-specific measures that will mitigate significant impacts. The Regional Board requests that the Final EIR address the following specific concerns....

See Page 1, CRWQCB Comment Letter, February 28, 2005. Exhibit A.

From California Regional Water Quality Control Board:

The response to our comments and the Final EIR do not describe the project in sufficient detail, answer our questions, or alleviate our concerns. We urge the City not to certify this EIR until these shortcomings are corrected.

It appears from the Final EIR that the project has the potential to cause significant unmitigable impacts. This is likely to greatly complicate issuance of Clean Water Act Section 401 certification by the Regional Board.

See CRWQCB Comment Letter, July 25, 2006. Exhibit B.

From Joint Comments of the United States Fish & Wildlife Service [USFWS] and the California Department of Fish & Game [DFG]:

Based on the information provided herein, the Wildlife Agencies strongly recommend that the City eliminate the Regents Road Bridge [RRBA] from further consideration as a viable alternative to address the traffic congestion in the UC North/South Transportation corridor. Accordingly, the City should process an amendment to the University Community Plan to remove this bridge from the Plan's Transportation Element.

See Page 1, USFWS and DGE Comment Letter, April 15, 2005. Exhibit A. On mitigation, USFWS and DFG recommend the following if the Regents Road Bridge Alternative is selected:

1. We are concerned about the difficulty of finding adequate mitigation sites for the amount of wetland mitigation that would be needed for the GAWA and/or the RRBA [Regents Road Bridge Alternative]. The DEIR provides no details about where the mitigation might occur. We agree with, and incorporate by reference, the Regional Water Quality Control Board's comments (February 28, 2005, letter on the DEIR) regarding the inappropriate deferral of identifying specific mitigation measures, as the comments apply to the omission of adequate specific information on mitigation sites for habitat losses.
2. If the proposed mitigation could cause biological impacts (e.g., removal of sensitive upland habitats for the creation of wetlands), additional CEQA analysis and review would be warranted [CEQA Guidelines, section 15126.4(a)(D)], and additional mitigation may be necessary.

Again, it is unclear how the City Council will be fully informed to make a decision about which alternatives, if any to select without this information.

3. The DEIR indicates that the mitigation for the temporary loss of wetlands would be at a ratio of 1:1. It is likely that the Department will require at least a 2:1 ratio for the temporary losses of wetlands, particularly considering the duration and nature of the temporary losses. For example, the construction access and staging areas for the RRBA would disrupt the functions and values of the mainstem of Rose Creek and its associated riparian habitat during the construction of the RRBA, which would last at least one year.
4. Depending on the duration of the temporary loss of coastal sage scrub and other sensitive upland habitats, particularly within the MHPA, it may be appropriate to mitigate at a ratio greater than 1:1 and to fulfill any off-site mitigation requirement prior to or during project construction.
5. The final EIR should require and fully describe methods to attenuate project-related construction and operational noise levels in excess of ambient levels at the edge of sensitive habitats to avoid or minimize further degradation of habitat for wildlife, particularly avian species.
6. The proposed mitigation measure to protect raptors during the breeding season may be insufficient. In southern California, Cooper's hawks are known to lay their eggs as early as the end of January (Unitt 2004), which indicates that they start building their nests earlier. Therefore, since this species likely nests on site (page 22 of the biological resources report), the construction avoidance period should be adjusted to begin at the latest by January 1. In addition, the MSCP Subarea Plan requires that area specific management directives for the Cooper's hawk must include a 300-foot impact avoidance areas around active nests and minimization of disturbance in oak woodlands and oak riparian forests. These requirements apply to both construction and post-construction (i.e., once the bridge is being used) impacts.

See Pages 13-14, USFWS and DGE Comment Letter, April 15, 2005. Exhibit A. The City failed to incorporate any of the mitigation measures into the proposed Mitigation, Monitoring & Reporting Program [MMRP] in disregard of the expert advise offered by these agencies.

Many of the responses to agency comments appear to ignore or second-guess the significance of the suggestions of agency experts. Frequently, the City's response to these comments included boilerplate language: "No response is necessary as the comment raises no

issues regarding the adequacy of the DEIR." Exhibit A. In other instances, the City responses disagree with and contradict the expert statement of these other approving agencies without taking the time to consult over these disagreements. The responses appear to minimize the role these other agencies play in future project approval and the need to ensure consensus, cooperation and ultimate project approval at all levels. If roles were reversed and it were the City whose role was that of Responsible or Trustee Agency, it would seem that such treatment by the Lead Agency would be seen as callous or without due regard for future City involvement, approval or oversight of the project. In similar instances, the City has elected the option of initiating lawsuit (filing a Petition for Writ of Mandate) against the Lead Agency (e.g., recently, the City did so with respect to San Diego State University's Campus Master Plan, Case No. GIC-855701, Oct. 20, 2005).

IV. Impacts to Culturally Sensitive Lands, Resources and Native American Burial Sites:

The provisions of California Public Resources Code section 5097.98 and California Health and Safety Code section 7050.5, any related provisions, and any subsequent amendments, are applicable to the discovery or recognition of any human remains in any location other than a dedicated cemetery. If human remains are discovered or recognized, per these applicable provisions, there can be no further excavation or disturbance of the site or any nearby area reasonably suspected to overlie adjacent remains until the statutory requirements are met.

Express duties are provided by statute for the Native American Heritage Commission. In this role, the following comments to the EIR were provided by the Native American Heritage Commission:

1. Lack of surface evidence of archeological resources does not preclude their subsurface existence.
2. Lead agencies should include in their mitigation plan provisions for the identification and evaluation of accidentally discovered archeological resources per California Environmental Quality Act (CEQA) section 15064.5(f).
3. In areas of identified archaeological sensitivity, a certified archaeologist and a culturally affiliated Native American with knowledge in cultural resources, should monitor all ground-disturbing activities.
4. Lead agencies should consider avoidance, as defined in Section 15370 of the CEQA Guidelines.
5. Lead agencies should include in their mitigation plan provisions for the disposition of recovered artifacts, in consultation with culturally affiliated Native Americans.

See Comment Letter of State of California Native American Heritage Commission, January 5, 2005. These mitigation recommendations are not fully addressed and incorporated into the mitigation proposed in the EIR nor in the MMRP. Clearly, the importance of the comments and weight that should be given them, is evidenced by the designated statutory role given to the Native American Heritage Commission as reflected in the CEQA Guidelines and the Public Resources Code.

The mitigation recently added to the Final EIR and included in the proposed MMRP is inadequate with respect to the requirements for the handling, identification and protection of Native American Remains in that it is not wholly consistent with the following CEQA Guidelines and above-cited Public Resource Code provisions:

(e) In the event of the accidental discovery or recognition of any human remains in any location other than a dedicated cemetery, the following steps should be taken:

(1) There shall be no further excavation or disturbance of the site or any nearby area reasonably suspected to overlie adjacent human remains until:

(A) The coroner of the county in which the remains are discovered must be contacted to determine that no investigation of the cause of death is required, and

(B) If the coroner determines the remains to be Native American
:

1. The coroner shall contact the Native American Heritage Commission within 24 hours.

2. The Native American Heritage Commission shall identify the person or persons it believes to be the most likely descended from the deceased Native American.

3. The most likely descendent may make recommendations to the landowner or the person responsible for the excavation work, for means of treating or disposing of, with appropriate dignity, the human remains and any associated grave goods as provided in Public Resources Code section 5097.98, or

(2) Where the following conditions occur, the landowner or his authorized representative shall rebury the Native American human remains and associated grave goods with appropriate dignity on the property in a location not subject to further subsurface disturbance.

- (A) The Native American Heritage Commission is unable to identify a most likely descendent or the most likely descendent failed to make a recommendation within 24 hours after being notified by the commission.
- (B) The descendant identified fails to make a recommendation; or
- (C) The landowner or his authorized representative rejects the recommendation of the descendant, and the mediation by the Native American Heritage Commission fails to provide measures acceptable to the landowner.

(f) As part of the objectives, criteria, and procedures required by Section 21082 of the Public Resources Code, a lead agency should make provisions for historical or unique archaeological resources accidentally discovered during construction. These provisions should include an immediate evaluation of the find by a qualified archaeologist. If the find is determined to be an historical or unique archaeological resource, contingency funding and a time allotment sufficient to allow for implementation of avoidance measures or appropriate mitigation should be available. Work could continue on other parts of the building sit while historical or unique archaeological resource mitigation takes place.

See Section 15064.5(e) & (f), CEQA Guidelines; *See also, Citizens for Responsible Development in West Hollywood v. City of West Hollywood* (1995) 39 Cal.App.4th 490. A comparison of the above requirements with the actual provisions of the MMRP and Final EIR demonstrate the differences in language; these differences are significant enough to alter the likelihood of successfully avoiding and reducing effect to a level below significance. Mitigation Measure 6.1-8 in the proposed MMRP appears inadequate to appropriately address impacts after discovery in that is not wholly consistent with the Public Resources Code and CEQA Guidelines. The importance of these necessary changes cannot be over-stated. There is a real probability of discovery in Rose Canyon, given that recent discoveries have been made in and around the La Jolla area. Careful review and revision of mitigation to address these impacts is critical.

V. Reliance on Preliminary Engineering Plans:

In the EIR, the City justifies the lack of analysis and project description because there are no final engineering plans for any of the proposed alternatives. For example, the City states that additional analysis is not needed because no single project or preferred project is proposed:

City Response to Comment 8.3:

This EIR addresses a series of alternatives rather than a single project. Consequently, the project description is by necessity more protracted than in other EIRs....As the final design has not been completed for any of the alternatives, the description is based on conceptual plans which

results in less specificity than the commenter is seeking. Final engineering plans for any of the selected alternatives would be required to conform to the City's SUSUMP.

City Response to Comment 8.7:

The descriptions of the alternatives are based on preliminary engineering plans which were prepared to allow the physical environmental effects of each element of the alternatives to be assessed....it is concluded that Best Management Practices will be required and implemented, as necessary. Thus, detailed descriptions of the BMPs in the EIR are not required.

These excuses do not appear justified. A duty exists to provide adequate analysis and that requires an adequate description of the project alternatives, their impacts and the mitigation necessary to avoid impact. In the end, a failure to correct this deficiency may very well result in additional City time and expenditure devoted to correcting and addressing, in future EIRs, what was not and should have been considered in the first place.

VI. Wetlands:

As demonstrated below, the City acknowledges there will be wetlands impacts from the construction of the Regents Road Bridge, and the design specifications are not yet finalized so more impacts may be identified. At that point, the City commits, as expressed below, to undergo additional environmental review.

City Response to Comment 2.12:

Further environmental documentation will be prepared, if necessary as required by Public Resources Code Section 21166 and Guidelines section 15162.

City Response to Comment 2.29:

As indicated earlier, final design of the structures which could impact wetlands has not been completed so the exact number of acres of impacts or compensation cannot be determined in the EIR. If warranted, additional environmental review would be conducted which would identify mitigation for any additional wetland impacts associated with the final design in accordance with the City's Biological Guidelines. In addition, the City Council is not obligated to pick any of the alternatives. Thus, impacts to wetlands may not occur.

City Response to Comment 2.33:

The EIR need not provide a specific discussion of mitigation measures in the absence of detailed engineering design.

City Response to Comment 8.35:

The EIR acknowledges that impacts to wetlands would be significant . . . Construction of the Regents Road bridge without any impact to wetlands is not considered feasible due to the need for construction equipment to work beneath the bridge and cross the creek.

Additional environmental review would not be necessary if these impacts were addressed in the current EIR. In addition, as demonstrated in their comment letter, neither the U.S. Fish & Wildlife Service nor the California Department of Fish & Game concur with this deferment of analysis. Exhibit A. The City Attorney incorporates by reference wetlands impact issues addressed in the July 24, 2006, Letter of Shute, Mihaly & Weinberger. Exhibit C.

VII. Traffic:

SANDAG provided the following suggestions as to how to analyze future traffic conditions:

When analyzing future (2030) traffic conditions, SANDAG recommends using a network based on the Reasonably Expected funding scenario from the Regional Transportation Plan. The Reasonably Expected funding scenario forms the basis for the adopted RTP, and is the most likely scenario given recent voter approval of extension of the 1/2 cent Transportation sales tax ("TransNet"). Basing the analysis on the Revenue Constrained scenario could lead to false conclusions. The Reasonably Expected scenario will provide a more realistic forecast.

See Comment Letter of SANDAG, January 25, 2005. Exhibit A. Rather than address this comment by correcting the analysis of future traffic conditions, the response to this comment seems to discuss an entirely different issue. *See* City Response to Comments 9.4. Thus, it is unclear whether these corrections were ever made and whether the traffic impact conclusions are accurate. *See* Page 4.2-9 of Final EIR, where contrary to the above recommendations, the EIR states the SANDAG Revenue-Constrained 2030 Regional Transportation Plan improvements were assumed for all alternatives.

VIII. City's Statement of Overriding Considerations:

The City proposes with this EIR to develop a project that, admittedly, has significant environmental impacts that will never be mitigated. The request before the City Council for August 1, 2006 is to allow these un-mitigated significant environmental impacts to occur for the sake of building a bridge even though other alternatives would allow substantially less impact.

What must the City Council demonstrate, under the law, in order to grant this request? Specifically, CEQA mandates the following:

Pursuant to the policy stated in Sections 21002 and 21002.1, **no public agency shall approve** or carry out a project for which an environmental impact report has been certified which identifies one or more significant effects on the environment that would occur if the project is approved or carried out **unless both of the following occur:**

(a) The public agency makes one or more of the following **findings with respect to EACH significant EFFECT:**

- (1) changes or alterations have been required in, or incorporated into, the project which mitigate or avoid the significant effects on the environment.
- (2) Those changes or alterations are within the responsibility and jurisdiction of another public agency and have been, or can and should be, adopted by that other agency.
- (3) Specific economic, legal, social, technological, or other considerations, including considerations for the provision of employment opportunities for highly trained workers, make infeasible the mitigation measures or alternatives identified in the environmental impact report.

(b) With respect to significant effects which were subject to a finding under paragraph (3) of subdivision (a), the public agency finds that specific overriding economic, legal, social, technological, or other benefits of the project outweigh the significant effects on the environment.

(emphasis added.) In addition, these very precise findings as stated above create a high burden; each finding must be established by "substantial evidence in the record." *See* Section 21081.5 of CEQA. It is not good enough to simply state that the substantial evidence exists. The City will need to demonstrate that this evidence exists as identified in the text of the EIR or in the records relied upon to develop the EIR. The CEQA Guidelines require that **EACH FINDING** be accompanied by a brief explanation of the rationale behind it [14 *Cal. Code Regs.* 15091(a)] and that findings stating that any alternative or mitigation measure is infeasible must be accompanied

by specific reasons for rejecting these specific alternatives or mitigation measures. 14 *Cal. Code Regs.* 15091(c). In summary, the following are required steps:

First, the City must make the ultimate finding called for by CEQA Section 21081 and CEQA Guideline Section 15091;

Second, **each** finding must be supported by substantial evidence in the record. CEQA Guideline Section 15901(b); and

Third, the **City** must present some explanation to supply the logical step between the ultimate finding and the facts in the record.

These three elements have been required by the California courts. *See Village Laguna of Laguna Beach, Inc. v. Board of Supervisors* (1982) 134 Cal. App. 3d 1022, 185 Cal. Rptr. 41; *Mountain Defense League v. Board of Supervisors* (1977) 65 Cal. App. 3d 723, 135 Cal. Rptr. 588; *City of Rancho Palos Verdes v. City Council* (1976) 59 Cal. App. 3d 869, 129 Cal. Rptr. 173.

As stated in the CEQA Guidelines, "The Legislature wanted agencies to deal directly with the facts presented in the EIR." *See* Discussion Section of CEQA Guideline Section 15901.

By requiring a "brief explanation" for each finding to "supply the logical step between the ultimate finding and the facts in the record," the CEQA Guidelines adopt the standard for administrative findings that was highlighted in *Topanga Ass'n for a Scenic Community v. County of Los Angeles* (1974) 11 Cal. 3d 506, 113 Cal. Rptr. 836.

Thus, the City is required to trace the "analytic route" from raw evidence to its conclusions. 11 Cal. 3d at 515, 113 Cal.Rptr. at 841. As highlighted by the California Supreme Court, these findings requirements require a City to "draw legally relevant subconclusions supportive of its ultimate decision" that would "facilitate orderly analysis and minimize the likelihood that the agency will randomly leap from evidence to conclusions." 11 Cal. 3d at 516. Findings cannot simply contain bare conclusions. *See* CEQA Guideline Section 15091. *Rio Vista Farm Bureau Ctr. v. County of Solano* (1992) 5 Cal. App. 4th 351, 373, 7 Cal. Rptr. 2d 307; *Sacramento Old City Ass'n v. City Council* (1991) 229 Cal. App. 3d 1011, 1034; *Resource Defense Fund v. LAFCO* (1987) 191 Cal. App. 3d 886, 236 Cal.Rptr. 794; *Citizens for Quality Growth v. City of Mt. Shasta* (1988) 198 Cal. App. 3d 433, 440, 243 Cal. Rptr. 727; *Village Laguna of Laguna Beach, Inc. v. Board of Supervisors* (1982) 134 Cal.App. 3d 1022, 185 Cal.Rptr. 41. Findings can be supported by and incorporate by reference those facts found in the EIR or other documents in the record. However, this assumes that such facts exist in the record. Explicit written findings on an issue may be required when the record does not actually show the reason for the City's action. *See Resource Defense Fund v. LAFCO* (1987) 191 Cal.App.3d 886, 236 Cal.Rptr. 794. *See CEB's Practice Under the California Environmental Quality Act*, V. 1, Ch. 17, Sections 17.22-17.28 (Rev. Nov. 2005)

As explained above, an important element of this required analysis would include the existence of facts actually stated or found somewhere in the EIR and supporting documents-- facts demonstrating the existence of impacts, facts demonstrating the significance of these impacts, facts showing what mitigation was evaluated, and facts demonstrating the infeasibility of the mitigation and/or alternatives. Without this information, it is impossible and infeasible for the City to prepare adequate findings supported by the record and it would be impossible for the City Council to approve such findings without committing prejudicial error or abusing its discretionary authority. **Thus, if significant impacts or mitigation measures are not adequately addressed in the EIR or its record, then the analysis cannot be completed and the findings cannot be made at this time.** It is clearly apparent from the various state and federal agency comment letters (comments from Trustee and Responsible Agencies), and comments submitted by other experts in their field, that various other impacts and their significance have yet to be fully addressed or otherwise discussed in the EIR or elsewhere in the record. Thus, a decision on whether there are overriding considerations justifying the approval of the EIR is premature. These other impacts and their significance need to be adequately analyzed first. They currently are not.

Furthermore, the mitigation proposed and discussed in the findings statement as supportive of the conclusion that certain impacts have been mitigated is not supported by the record. Many of the mitigation measures proposed are either wholly inadequate, not fully analyzed and/or discussed, or are simply too vague to demonstrate the impacts could be brought to a level below significance. The Office of the City Attorney again refers the City Council to the various comments in the record prepared by experts in their field to demonstrate why further analysis and clarification on the mitigation proposed is critical to a determination of the adequacy of this project and its mitigation. At this juncture, a decision by the City Council certifying the EIR and adopting the MMRP would simply be premature and unwarranted based upon the record.

CONCLUSION

The Office of the City Attorney recommends that the City Council decline certification of the EIR, deny the project, and provide Development Services Department and Engineering and Capital Projects Department with appropriate direction necessary to address Council concerns. Specifically, the Office of the City Attorney recommends that the City Council refer the EIR back to the Development Services Department and the Engineering and Capital Projects Department for additional environmental review, analysis and study and for re-circulation to ensure an opportunity for public comment and participation. *See* San Diego Municipal Code section 128.0309.

Honorable Mayor and
City Councilmembers

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July 28, 2006

It is clear from a reading of the Final EIR and record that there are new significant impacts associated with this project. It is also clear that the mitigation proposed is insufficient and new mitigation will need to be developed. Recirculation is also justified per San Diego Municipal Code section 128.0309 which states:

When significant new information is added to an environmental document after notice is given of the availability of the document for public review but before it is certified, the Planning and Development Review Director shall recirculate the draft environmental document consistent with the State CEQA Guidelines, section 15088.5.

Respectfully submitted,

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SE:KH;jb
ML-2006-15

cc: Gary Halbert, Development Services Director
Patti Boekamp, Engineering & Capital Projects Department
Elizabeth Maland, City Clerk