

Attachment 38

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Michael J. Aguirre
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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

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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 advice 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 reburial 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 15091(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 15091.

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

-18-

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,

MICHAEL J. AGUIRRE, City Attorney

SE:KH;jb
ML-2006-15

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

Attachment 39

charles pratt

From: Bruce McIntyre [BruceM@ProjectDesign.com]
Sent: Tuesday, March 21, 2006 3:57 PM
To: 'Nitsuh Aberra'
Cc: Kris Shackelford; Gordon Lutes; 'Martha Blake'; Mike Mezey
Subject: RE: Grant Encroachment
Attachments: regents-aerial2005-topo-reveg-base2.pdf

Nitsuh,

Here is the revised exhibit for you for forward to Heidi Lang to accompany the letter. We have redrawn the limits of disturbance to assume a retaining wall to avoid the restoration area and have deleted the stairway up to Regents Road.

Bruce

From: Nitsuh Aberra [mailto:Naberra@sandiego.gov]
Sent: Monday, March 20, 2006 9:37 AM
To: BruceM@ProjectDesign.com
Subject: RE: Grant Encroachment

Bruce,

No. You did send me the letter. If you look in the letter, it includes an enclosure of the aerial photo. Is there any areal that you want to send to Heidi? Thanks

>>> "Bruce McIntyre" <BruceM@ProjectDesign.com> 3/20/2006 9:26 AM >>>
Nitsuh,

Sorry, I guess I forgot to include the letter. Let's try this again.

Bruce

From: Nitsuh Aberra [mailto:Naberra@sandiego.gov]
Sent: Monday, March 20, 2006 6:38 AM
To: BruceM@ProjectDesign.com
Subject: Re: Grant Encroachment

Hi Bruce,

Is there any attached to the letter?

>>> "Bruce McIntyre" <BruceM@ProjectDesign.com> 3/15/2006 5:03 PM >>>
Nitsuh,

We have reviewed the preliminary plans and determined that a wall could be constructed to avoid the restored areas. We aren't sure what the cost would be but it could be successfully engineered. Apparently, a non-ADA compliant stairway from Rose Canyon is included in the current design for people who didn't want to navigate the ramp. We would suggest eliminating this stairway. If shortcuts were determined to be desirable, stair connections could be incorporated between the ramp switchbacks but certainly the encroachment from the currently proposed location can be avoided.

Assuming this is the approach we want to take, I have drafted the attached letter to Heidi Lang for your

10/12/2006

charles pratt

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Sent: Tuesday, March 21, 2006 3:57 PM
To: 'Nitsuh Abera'
Cc: Kris Shackelford; Gordon Lutes; 'Martha Blake'; Mike Mezey
Subject: RE: Grant Encroachment
Attachments: regents-aerial2005-topo-reveg-base2.pdf

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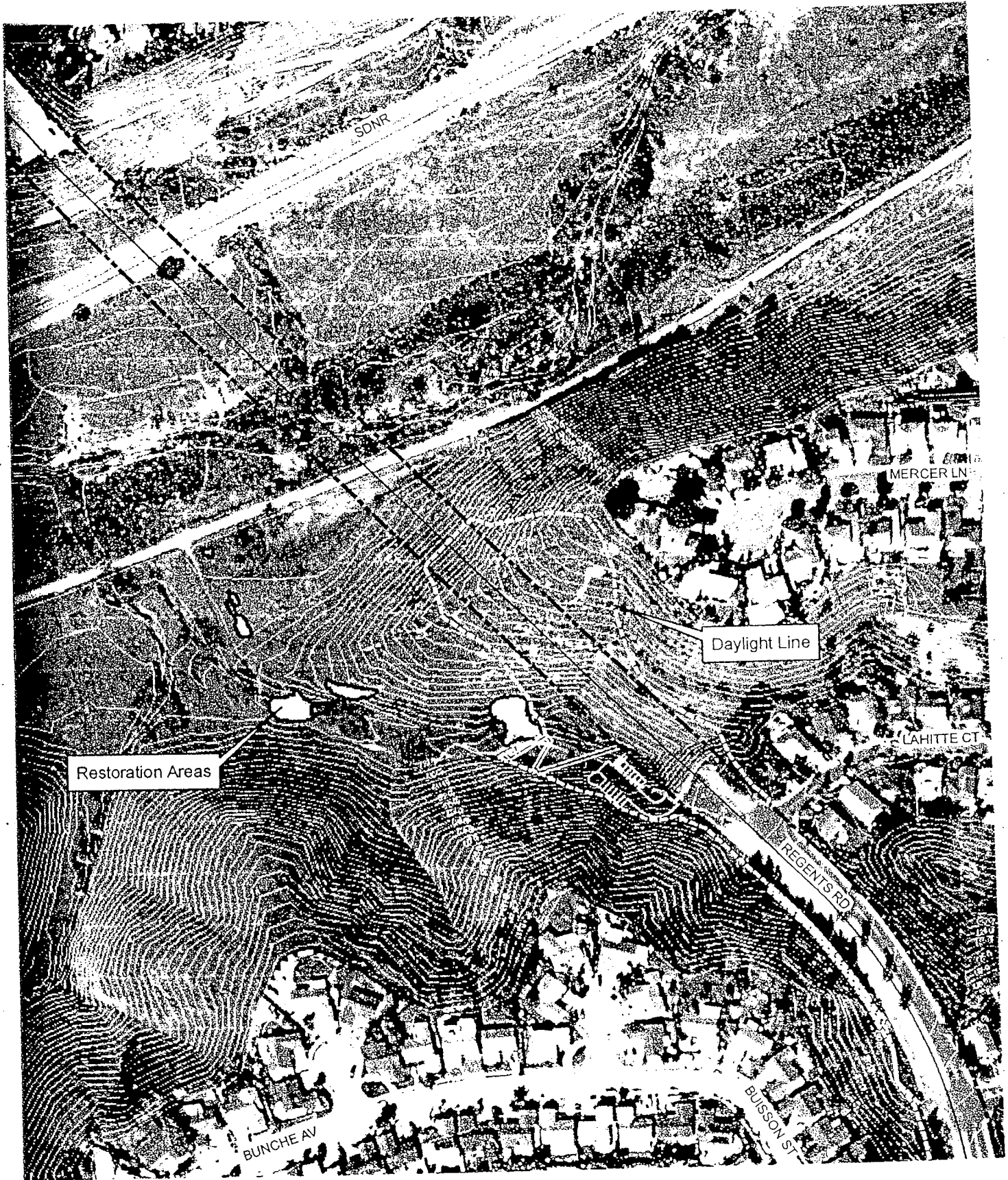
10/12/2006

consideration.

Bruce

Bruce McIntyre
Senior Vice President
Project Design Consultants
701 B Street, Suite #800
San Diego, CA 92101
Phone: 619.881.3300
Fax: 619.234.0381
Email: brucem@projectdesign.com

10/12/2006



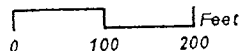
Restoration Areas Relative to Regents Road Alternative

City of San Diego

File Name: n:\2399\mxd\regents-aerial\2005-topo-reveg-base2.mxd
Date: 3/21/06

Source: Aerial - AirPhotoUSA2005

GIS exhibits may be composed from various sources with different levels of accuracy. For details on accuracy of this exhibit, please refer to Meta Data provided.



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Dear Ms. Lang,

This letter is intended to respond to your letter dated February 8, 2006 regarding the relationship of a potential connection of Regents Road over Rose Canyon and the impact it could have on areas restored near the future roadway as part of a grant from the State Department of Parks and Recreation.

In order to avoid the potential conflict with the terms of the grant on these areas, the City has decided to work around the restored areas. For the record, these areas are depicted on the attached map. The locations were determined based on previous air photograph documentation and confirmed in the field with the City's Park Ranger, Carla Frogner.

Should the City Council decide to pursue construction of a bridge connecting Regents Road over Rose Canyon, the final design will incorporate a wall or other structural feature to avoid disturbing the restored areas. Similarly, the ADA trail access ramp would be redesigned to avoid the restored area and the stairway connecting the base of the ADA ramp with Rose Canyon would be eliminated to avoid impacting the restored area.

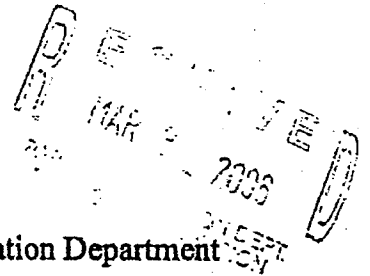
Should you have any questions, please give me a call at _____

Sincerely,

Enclosure: Air photo showing restored areas in relationship to Regents Road footprint

Attachment 40

CITY OF SAN DIEGO
M E M O R A N D U M



DATE: March 28, 2006
TO: Heidi Lang, Assistant Grants Administrator, Park & Recreation Department
FROM: Nitsuh Abera, Associate Engineer - Civil, Transportation Engineering Division
SUBJECT: Rose Canyon Open Space Park - Restoration Area

This letter is intended to respond to your fax sent to me on February 8, 2006 regarding the relationship of a potential connection of Regents Road over Rose Canyon and the impact it could have on areas restored near the future roadway as part of a grant from the State Department of Parks and Recreation.

In order to avoid the potential conflict with the terms of the grant on these areas, staff (Transportation Engineering) and the design consultant (Project Design Consultant) decided to work around the restored areas. For the record, these areas are depicted on the attached map. The locations were determined based on previous air photograph documentation and confirmed in the field with Carla Frogner, Senior Park Ranger.

Should the City Council decide to pursue construction of a bridge connecting Regents Road over Rose Canyon, the final design will incorporate a wall or other structural feature to avoid disturbing the restored areas. Similarly, the ADA trail access ramp would be redesigned to avoid the restored area and the stairway connecting the base of the ADA ramp with Rose Canyon would be eliminated to avoid impacting the restored area. In addition, the need for the parking lot is to provide parking spaces for the park users. Currently, there are no designated parking spaces that have been used by the public.

Should you have any questions, please give me a call at (619) 533-3785.

Sincerely,

Nitsuh Abera

cc: Kris Shackelford, Senior Civil Engineer, Transportation Engineering Division
Mike Mezey, Senior Environmental Planner, Transportation Engineering Division
Martha Blake, Senior Environmental Planner, Development Services Department

Enclosure: Air photo showing restored areas in relationship to Regents Road footprint

Attachment 41

MESSAGE CONFIRMATION

04/19/2006 09:40
ID=S.D./FIRE ALARM

DATE	S,R-TIME	DISTANT STATION ID	MODE	PAGES	RESULT	S.C.
04/19	01'12"	916 653 6511	TX	005	OK	0000

04/19/2006 09:38 S.D./FIRE ALARM → STATE PKS GRANT

NO.646 0001

**CITY OF SAN DIEGO
PARK AND RECREATION DEPARTMENT
Development Office**

FAX MESSAGE

DATE : 4/19/06
TO : Bill Boston
FAX # : (916) 653-6511
FROM : Heidi Lang, Assistant Grants Administrator, (619) 525-8218
hlang@sandiego.gov

TOTAL PAGES INCLUDING THIS PAGE: 5

SUBJECT: Response to Your Questions Re: Rose Canyon

ADDITIONAL COMMENTS:

Hello Bill,

I will send the original via regular mail.

Heidi

City of San Diego, Park and Recreation Department
Development Office
202 C Street, MS 37-C, San Diego, CA 92101
VOICE: (619) 525-8213
FAX: (619) 525-8220

"We enrich lives through quality parks and programs"





THE CITY OF SAN DIEGO

April 17, 2006

Mr. Bill Boston
California State Parks
Office of Grants & Local Services
PO Box 942896
Sacramento, CA 94296-0001

Re: Rose Canyon Open Space Park, HR-37-005

Dear Mr. Boston:

This letter is in response to your request for information on February 8, 2006 concerning the grant funded riparian restoration area in Rose Canyon Open Space Park and the City of San Diego's EIR underway for the University City North/South Transportation Corridor study. As mentioned in our previous letter, one option is to build a bridge across Rose Canyon to connect the north and south portions of Regents Road.

A parking lot and ADA access are needed for this site. At present, there are informal parking spaces in a dirt area and no ADA access. This side canyon trail is a main access point to the main trail in Rose Canyon which runs west/east.

Based on your questions, staff in our Transportation Engineering Division and the design consultant have taken a second look at the parking lot and ADA access layout, and redesigned them to avoid the riparian restoration area. Please see attached map.

We have received comments from the Department of Fish and Game and the U.S. Fish and Wildlife Service; these agencies recommend against the Regents Road Bridge from further consideration as a viable alternative to address traffic congestion in the UC North/South Transportation corridor. Their comments will be included and addressed in the Final EIR.

Office of the Director • Park and Recreation

202 C Street, MS. 98 • San Diego, CA 92101-3864
Tel (619) 236-6643 Fax (619) 236-6219
www.sandiego.gov

Community Parks I • Community Parks II • Developed Regional Parks
Open Space • Park Planning & Development • Balboa Park, Mission Bay and Torrey Pines Golf Complexes


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Page 2
Mr. Bill Boston
April 14, 2005

If you have any questions, please call Heidi Lang at (619) 525-8218.

Sincerely,

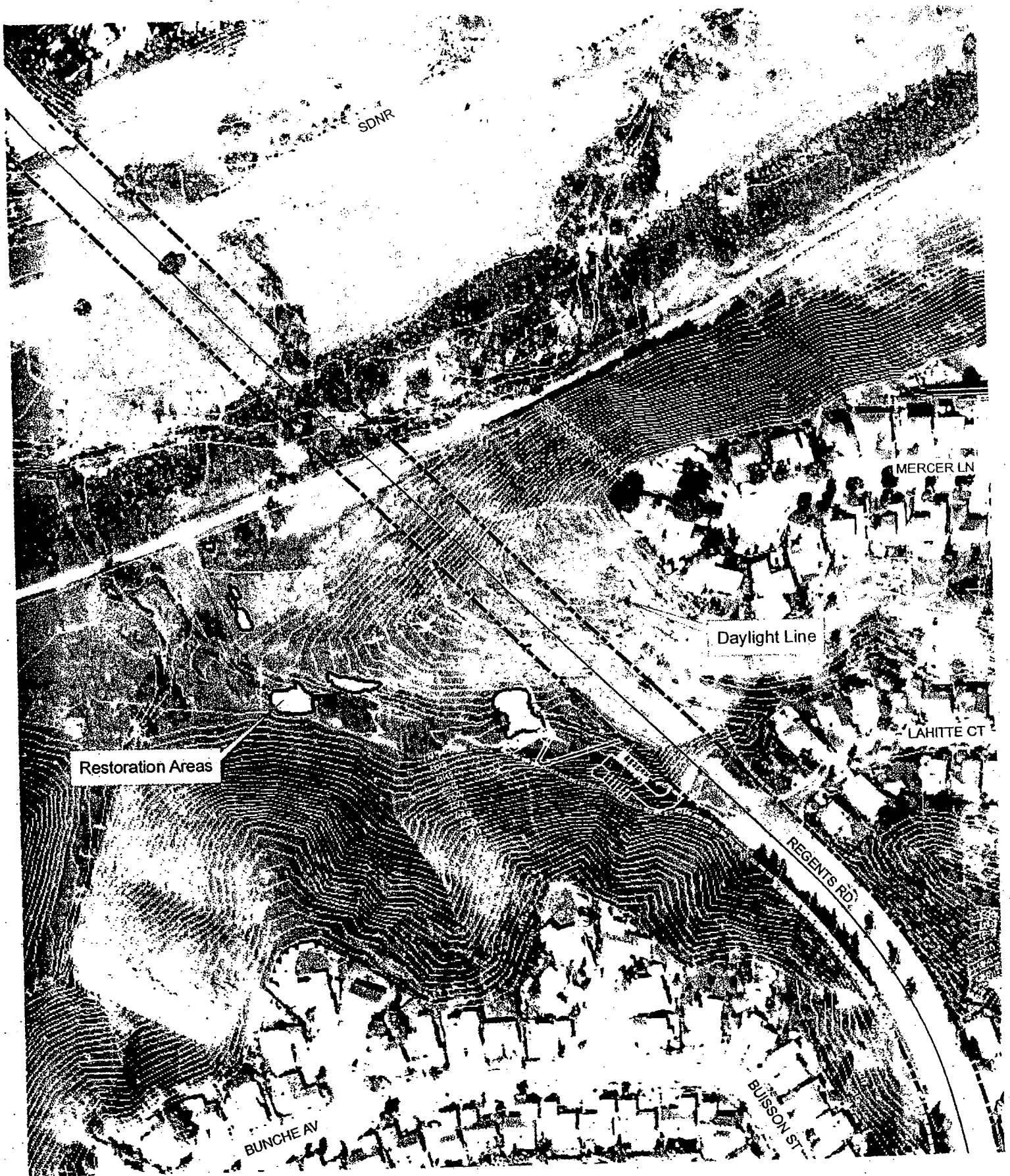

iw Ted Medina
Park and Recreation Director

TM:hl

Attachments

C:\My Documents\Rose Canyon Response Bill Boston.doc

cc: David Monroe, District Manager, Park and Recreation
Paul Kilburg, Senior Planner, Park and Recreation
Kris Shackleford, Senior Civil Engineer, Transportation Engineering Division
Mike Mezey, Senior Environmental Planner, Transportation Engineering Division
Nitsuh Abera, Associate Engineer - Civil, Transportation Engineering Division



Restoration Areas Relative to Regents Road Alternative

City of San Diego

File Name: n:2399\mxd\regents-aerial2005-topo-reveg-base2.mxd

Date: 3/21/06

Source: Aerial - AirPhotoUSA2005

GIS exhibits may be composed from various sources with different levels of accuracy. For details on accuracy of this exhibit please refer to Meta Data provided

0 100 200 Feet



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Attachment 41A

**CITY OF SAN DIEGO
M E M O R A N D U M**

Date: July 31, 2006

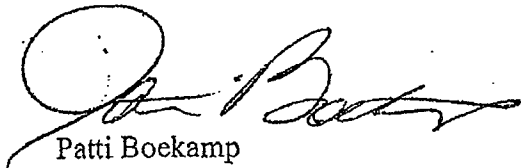
To: Honorable Mayor and City Council

From: Patti Boekamp, Director, Engineering & Capital Project Department

SUBJECT: Final Environmental Impact Report and related documents for the University City North/South Transportation Corridor Study and City Attorney Memorandum dated July 28, 2006

Upon receipt of the memorandum of law from the City Attorney, dated July 28, 2006, I asked the City's consultants, Project Design Consultants, to prepare a response concerning the alleged inadequacies in, and other issues related to, the FEIR and related documents for this effort. Attached is their response.

If you have any questions, please do not hesitate to call me at 236-6274.



Patti Boekamp
Director
Engineering and Capital Projects

cc: Michael J. Aguirre, City Attorney



PROJECT DESIGN CONSULTANTS

701 B STREET, SUITE 800
SAN DIEGO, CA 92101

619.235.6471 TEL
619.234.0349 FAX

WWW.PROJECTDESIGN.COM

File: 2399.10

July 31, 2006

Kris Shackelford
Transportation Engineering-Engineering and Capital Projects
CITY OF SAN DIEGO
1010 Second Avenue, Suite 1200
San Diego, CA 92101-4907

SUBJECT: University City N/S Corridor Study EIR

Dear Ms. Shackelford:

Per your request, we have asked our legal consultant, McAteer & McAteer, to review and comment on the letter from the City Attorney Office dated July 24, 2006 regarding the above-referenced document. A copy of their letter is enclosed.

Please call me if you have any questions or comments.

Sincerely,

Bruce McIntyre
Senior Vice President

Enclosure: Letter from McAteer & McAteer dated July 30, 2006

C: Theresa McAteer

McATEER & McATEER

A PROFESSIONAL LAW CORPORATION

FOUNDED 1993

110 WEST "C" STREET, SUITE 1500

SAN DIEGO, CALIFORNIA 92101

TELEPHONE (619) 338-9790 • FACSIMILE (619) 338-0105

CHRISTOPHER E. McATEER

BUSINESS LAW

REAL ESTATE

CONSTRUCTION LAW

THERESA C. McATEER

MUNICIPAL LAW

PUBLIC-PRIVATE TRANSACTIONS

LEGAL PROJECT MANAGEMENT

TO: Gordon Lutes & Bruce McIntyre
Project Design Consultants, Inc.

FROM: Theresa C. McAteer
McAteer & McAteer, APLC

DATE: July 30, 2006

RE: Final Environmental Impact Report and related documents, for the
University City North/South Transportation Corridor Study
Response to City Attorney Memorandum dated July 28, 2006

Project Design Consultants [PDC] was retained by the City to prepare the environmental documents [the FEIR] for the University City North/South Transportation Corridor Study [the Study]. You have been asked by the City to respond to the memorandum issued by the City Attorney on July 28, 2006 [the CA Memo], concerning alleged inadequacies in, and other issues related to, the FEIR and related documents for this effort. At your request, we have prepared the following to assist you in your response.

1. Retention of McAteer & McAteer, APLC. Preliminarily, we recommend you correct the City Attorney's mistaken assertion, that City staff has "utilized the 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." (CA Memo, page 2). This firm (represented by Ms. McAteer) was retained by PDC in June of 2004 to provide legal advice as part of PDC's role in the development of the EIR. Thereafter, any advice received by City staff was given in furtherance of PDC's obligation to work with City staff in preparing the document. No effort was ever made by this firm or PDC, to deny the City Attorney's office access to or involvement in the process.

We note the City Attorney's Office was involved in the process in February of 2005, when it reviewed and offered written comments upon the Draft EIR. We cannot offer any insight into the interaction between City staff and the City Attorney's office after that review, except to note that the City Attorney's comments were taken into consideration in revising the draft document.

2. Degree of Specificity in the FEIR. Many of the comments in the CA Memo echo those criticisms found in the July 24, 2006 letter from Shute, Mihaly & Weinberger, LLP (attorneys for opponents of the Regents Road Bridge Alternative), asserting that the FEIR does not provide enough specific information about project design features, and impacts or mitigation measures that may be related to specifics that will be revealed in the final design of the chosen alternative. In this regard, we believe both Shute, Mihaly and the City Attorney have misapprehended the objective of this FEIR.

Both Shute, Mihaly and the City Attorney apparently expect this FEIR to fulfill all the requisites of a standard project-level EIR. (Shute, Mihaly first raised this concern in response to the Draft EIR, see FEIR Volume V.A, comments 18.11 and 18.12 and responses thereto, attached to this memorandum as Exhibit "1"). As was explained in response to those comments, CEQA does not require the City to pick one type of environmental document, to the exclusion of others. Instead, the CEQA Guidelines expressly provide that the list of types of EIRs in the Guidelines "... are not exclusive. Lead Agencies may use other variations consistent with the CEQA Guidelines *to meet the need of other circumstances.*" [CEQA Guidelines, section 15160; emphasis added].

The "project" for this FEIR was the Study that endeavored to find a remedy for the traffic-related issues confronting the University City community. Based on the alternative solutions developed by the City and the community, the FEIR was able to identify several impacts of each alternative, and propose corresponding mitigation measures, that substantially improved the information the City Council has to consider in deciding which alternative to pursue. This FEIR accordingly has many features of a program EIR, because at the time it was prepared, the overarching objective was to assist the City Council in selecting an alternative from among many – there was no detailed construction project, which would allow for the kind of project-specific analysis demanded by the City Attorney and Shute Mihaly. Importantly, *this FEIR does not preclude the more project-specific analysis that would be required once a specific alternative is selected.* In fact, it has been repeatedly stated, (most recently at page 5 of the City's Conclusions at the front of the FEIR) that:

"... additional environmental review may be required as one, or a combination of, project alternatives is selected for construction. Additional mitigation measures with a higher degree of specificity could be required, together with other discretionary permits not known at this time."

This is the process envisioned by CEQA (see, Public Resources Code section 21166 and Guidelines, section 15162).

3. Concerns Regarding the use of Rose Canyon and the Habitat Conservation Program Grant (CA Memo, pages 2-5). The CA Memo questions the public interest to be served by the Regents Road Bridge (or any other) alternative. We express no opinion on the policy decision advocated by the City Attorney, but note it is not a CEQA issue. Moreover, the FEIR is not the appropriate vehicle for determining whether "the public

interest demands" construction of the Regents Road Bridge (see CA Memo, page 3). As explained to several public commenters, the role of the EIR is not to recommend, or "justify" any particular alternative, but rather to evaluate the environmental effects of the identified alternatives, for accomplishing objectives that have already been articulated by the City and other interested parties. In this case, there is an existing community plan, which was evaluated in an extensive public process, all of which the City Council may consider in determining whether the public interest warrants any action at all. The FEIR provides substantial environmental information that, in conjunction with other relevant information, can guide the City Council in deciding what will serve the public interest.

The balance of the CA Memo's discussion of this topic adopts the Shute, Mihaly position that there is no remedy for resolving any conflicts between the Regents Road Bridge Alternative and the terms of the HCP grant agreement, short of relief by way of legislative enactment. (CA Memo pages 4-5; Shute, Mihaly letter, page 8). First, we note that the assertion of such a conflict is premature -- there is no final design yet, and as such no grounds for concluding that there will necessarily be a conflict.¹ Second, any legal conflict between the proposal and the HCP grant agreement is not a CEQA issue -- the FEIR already identifies the kinds of *physical* impacts to sensitive resources that could occur from the Regents Road Bridge Alternative, and identifies mitigation measures to address those impacts.

4. There is no "New Mitigation" Requiring Recirculation. The CA Memo also adopts Shute, Mihaly's contention that your efforts -- to identify a design for the new ADA-accessible pathway, which could avoid any potential conflicts with the HCP grant agreement -- amount to "new mitigation" requiring re-circulation and review. (CA Memo, pages 6-7). Shute, Mihaly's position, in turn, relies on Public Resources Code section 21092.1, which provides that "When significant new information is *added to an environmental impact report . . .*" after public review but prior to certification, recirculation is required. [emphasis added]. Shute Mihaly and the City Attorney apparently consider your efforts to anticipate a potential conflict and describe a way to avoid it, as "significant new information" requiring re-circulation.

It is not. The re-design effort has not been "added to" the FEIR, and is not one of the mitigation measures being submitted to the City Council for approval. Rather, as stated in the memorandum from Nitsuh Abera to Heidi Lang (see CA Memo, Exhibit "D"), the re-design intended to avoid conflicts with the HCP grant areas would be made a part of the final design of the Regents Road Bridge alternative -- actually, Ms. Abera stated that "the final design would incorporate a wall *or other structural feature* to avoid disturbing the restored areas." [emphasis added]. As explained above, that final design -- including any feature designed to avoid restored areas -- will be subject to environmental review as part of the approval process. If there are additional or more significant impacts

¹ The concern that there may be a conflict between the Bridge design and the HCP agreement appears to arise from certain efforts by your firm and City staff, to proactively address potential conflicts that will be fleshed out in the final design. The facts surrounding these efforts are addressed in Section 4 of this memorandum.

not identified in the FEIR, they will be addressed at that point. CEQA contemplates and authorizes exactly this approach.

6. The FEIR Need Not Assume an Airport at MCAS Miramar. The City Attorney suggests the FEIR should consider the potential impacts of the Regional Airport Authority's selection of MCAS Miramar as a site for a joint use airport. Based on, among other things, the well-publicized rejection of this proposal by the military, consideration of any such proposal is speculative. An EIR is not required to include speculation as to future environmental consequences of future development that is unspecified and uncertain. *National Parks & Conserv. Ass'n v. County of Riverside* (1996) 42 Cal. App. 4th 1505, 1520; *Del Mar Terrace Conservancy, Inc. v. City Council* (1992) 10 Cal. App. 4th 712, 730.

7. Concerns of Other Responsible Agencies. The CA Memo recites concerns that other agencies voiced in response to the Draft EIR. We have not, however, ignored or slighted those comments, as the City Attorney suggests. In some cases, the comments pointed out discrepancies between the DEIR and the biological resources report; the responses to those comments acknowledged and explained the discrepancies and pointed out where they had been reconciled (see, e.g. FEIR Volume V.A, Responses to Comments Nos. 2.15, 2.16, 2.23). In other cases, the agencies were seeking more specifics regarding the mitigation measures. As illustrated by Response to Comment No. 2.12, it was explained that once an alternative were selected, further environmental review would be conducted as required by Public Resources Code section 21166 and Guidelines section 15162. Moreover, the City pledged to "coordinate with state and federal agencies during final design of any alternative which is ultimately selected to assure that the impacts to sensitive biological resources are reduced to the greatest degree feasible." (Response to Comment No. 2.12).

The lack of more project-related specifics is not a flaw in the FEIR. On the contrary, courts consistently recognize that in some situations, the formulation of precise mitigation measures is infeasible or impractical at the time of EIR certification. For example, in *No Oil, Inc., v. City of Los Angeles* (1987) 196 Cal. App. 3d 223, 234-237, the court found that an EIR adequately informed of the environmental risks of an exploratory oil drilling project, notwithstanding the deferral of in-depth consideration of the environmental impacts of each proposed pipeline route until an application was made for a specific route. As the court found, the additional environmental review that would be required when the specific permits were sought, would be sufficient to address any impacts associated with the specific pipeline route. See also *National Parks & Conserv. Ass'n, supra*, 42 Cal. App. 4th at 1518 [in an EIR for a landfill project, evaluation of the environmental impacts of specific materials recovery facilities – prospective facilities that would process the trash -- was appropriately deferred where the specifics were unknown but would be subject to environmental review in the course of permitting specific facilities]. The same is true in this situation – once the specifics of the chosen alternative are fleshed out in final design, additional impacts – if any – will be addressed.

Courts also hold that it is sufficient for an agency commit itself to working out feasible specific measures at a later date, so long as the impacts are treated as significant at the time of certification. Further, where practical considerations prevent devising specific measures early in the process, an agency may commit itself to devising measures that will satisfy specific performance criteria articulated at the time of certification. *Defend the Bay v. City of Irvine* (2004) 119 Cal. App. 4th 1261, 1275-1276; *Sacramento Old City Ass'n v. City Council* (1999) 229 Cal. App. 3d 1011, 1028-1030. The FEIR in this case identifies and commits the City to specific measures, including but not limited to compliance with specific ratios and criteria for the creation/restoration of habitat; adherence to the City's Biology Guidelines and Land Use Adjacency Guidelines of the MSCP; and strict construction limitations to avoid impacts to sensitive songbirds and raptors. The exact quantities and location of the mitigation will be determined when the final design is prepared, but in any event the City is committed to comply with the criteria and limitations described in the mitigation measures.

8. Cultural Resources. The CA Memo contends that the FEIR mitigation measures for the handling, identification and protection of Native American Human Remains is not "wholly consistent" with state law². On the contrary, Mitigation Measure 4.11-8 expressly incorporates and requires adherence to the provisions of state law (sections in the Public Resources Code and Health and Safety Code) cited by the CA Memo. Specifically, the CA Memo concludes, without analysis or example, that the mitigation measure in the FEIR differs enough from that set forth in state law, apparently because it does not expressly include a provision for "accidental discovery" of human remains. Mitigation Measure 4.11-8, however, addresses the discovery of any human remains (accidental or otherwise) and provides for the cessation of all work in the area of the discovery, notification and involvement of the Medical Examiner and the Native American Heritage Commission, as required by state law.

The mitigation measure in the FEIR is the City Standard mitigation measure for the handling of archaeological remains (including Native American human remains) on any site. If the City determines that measure needs to be changed, we can envision no change that would create a new impact, make an impact more significant than already identified, or otherwise create a situation requiring re-circulation of the FEIR.

9. Use of Preliminary Engineering Plans. The CA Memo is critical of the use of preliminary plans for analyzing the alternatives (CA Memo, pages 12-13). The response to this contention is the same as set forth above – the FEIR acknowledged that there were no project-specific details, and there would not be such detail until the City Council decided which alternative to pursue. The FEIR in that regard followed the direction of the City Council and has provided substantial environmental information to assist the City Council in taking the next step. As explained above, CEQA recognizes the utility of this kind of approach and expressly provides for future environmental review upon the

² The CA Memo implies that the letter from the Native American Heritage Commission (FEIR Volume V.A, letter #3) was critical of the DEIR. It was not; rather, the Commission helpfully made two recommendations. The response to that comment letter shows that the City followed those recommendations.

development of further details that may (or may not) reveal additional or more significant impacts. [Public Resources Code section 21166; Guidelines section 15162].

10. Wetlands Impacts. At pages 13-14, the CA Memo reiterates its objections to the "additional environmental review" that the City has pledged to perform once final design produces more detailed plans for evaluation. In asserting that "additional environmental review would not be necessary of [sic] these impacts were addressed in the FEIR," the CA Memo once again misses the point of the Study and the FEIR. The City Council did not expect a full-blown project-specific analysis because it had not yet chosen which project to undertake. The FEIR candidly and repeatedly acknowledges this status of the endeavor.

11. Traffic Study. The CA Memo complains that the traffic analysis used the "Revenue Constrained" forecast model for future traffic, rather than the "Reasonably Expected" scenario preferred by SANDAG based on the passage of the TransNet extension. As explained in Response to Comment No. 9.4 (FEIR Volume V.A, letter #9), the use of the Revenue Constrained model was preferred by the Public Working Committee as the more conservative assumption. The City has retained the use of that more conservative set of assumptions. As we understand it, however, the difference between the Revenue Constrained and Reasonably Expected models is that there are fewer freeway improvements assumed in the former, but the assumed transit improvements (e.g. the Super Loop, Red Car BRT Service on Genesee, the Nobel Drive Coaster Station, extension of the Trolley to UCSD and UTC, and additional local and express bus service) are fundamentally the same as between the two scenarios. We anticipate that you will be prepared to respond to any questions the City Council may have, as to how the assumptions under each scenario apply to the traffic-related environmental conclusions in the FEIR.

12. Adequacy of the Findings and Statement of Overriding Considerations. We respectfully disagree with the City Attorney's assertion (CA Memo, page 14) that the record is inadequate to support the Findings and Overriding Considerations. The administrative record in this matter is substantial and will include (among other things) all the records of the Public Working Committee, the technical reports of the various experts whose work supports this FEIR, the 373 comment letters received and the responses given to the comments, and documentation and evidence received throughout the process. Again, there is no citation in the CA Memo to any particular inadequacy. It appears the CA Memo may reach this general conclusion based on the absence of more project-specific detail, but that issue has been addressed several times already in this memorandum and we need not reiterate it here.

Conclusion

The City Council is not being asked to make any decision that allows construction to start; what is before the City Council is to approve proceeding with the design of a particular alternative. The City has repeatedly acknowledged that continuing compliance

with CEQA requires further environmental review once that design is complete -- which may or may not thereafter require further environmental documentation.

There seems to be a fundamental misunderstanding, shared by Shute, Mihaly and the City Attorney, as to the nature and agreed-upon scope of the Study and associated FEIR. The City Council wanted sufficient environmental information to help them decide how to proceed, to provide the kinds of traffic relief and remedies sought by the University City community. It now has that information, by way of an environmental document that candidly discloses the myriad environmental impacts ascertainable at this level of detail for each alternative, and advises on the mitigation measures that would be required for each identified impact. The City Council can now, based on the FEIR and other non-environmental considerations, decide which road to take.

McAteer & McAteer, APLC


Theresa C. McAteer

Attachment 42

September 2006

San Diego Highway Development Association Newsletter



Highway Development Association

Mission Statement

To foster the timely, orderly, and efficient development of all planned transportation facilities in the San Diego region and to promote appropriate means to finance and maintain these facilities.

Tribute to 9/11



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Letter from the President

Dear SDHDA Members and Colleagues:

Since our last meeting in July, the Highway Development Association participated in a tremendous success: the City of San Diego's decision to move forward with the Regents' Road bridge over Rose Canyon. In the weeks leading up to the August 1st City Council meeting, SDHDA members met with the Mayor's office, Council President Scott Peters and his staff, and several other council members.

Because of our association's reputation and our diligent efforts on this project, we were given a 15-minute speaker slot at the hearing. Our presentation seemed to be well received by the council, and a couple of them made reference to it in their remarks. At the end of a long and emotional hearing, with nearly two hours of testimony from each side, the City Council accepted the environmental document and one of our long-fought GAPS was saved from deletion!

There is a lot more work like this to be done in San Diego, and we will be watching for other threatened road segments to see how we can continue to help protect our planned roadway system, a core part of our association's mission.

Speaking of planned roadway systems, the County of San Diego is proposing significant changes to its Circulation Element as part of the General Plan 2020 Update. On Monday, September 11th, our speaker is Mr. Ivan Holler, Deputy Director of the County of San Diego's Department of Planning and Land Use. Mr. Holler will bring us up to speed on the proposed changes.

Hope to see you all at the meeting!



Clark Fernon, President

SEPTEMBER Transportation Calendar

- Sept 11th - HDA Luncheon
(12PM at Best Western 7 Seas)
- Sept 12th - CELSOC Transportation Liaison
Committee (closed committee; contact
Clark Fernon at 858.268.8080, if
interested)
- Sept 13th - APWA Transportation Group
(12:00PM at Best Western 7 Seas)
- Sept 14th - APWA General Meeting
(11:30AM at Four Points Hotel,
Aero Drive)
- Sept 15th - SANDAG Transportation Committee
(9:00AM at SANDAG)
- Sept 19th - CELSOC General Meeting
(11:30AM at Holiday Inn, Murphy
Canyon Road)
- Sept 26th - Chamber Transportation Committee
(7:30AM at Chamber, Emerald Towers)

Future SDHDA Meetings

- OCTOBER 16th - Joe Craver, San Diego Regional
Airport Authority
- NOVEMBER 13th - Mohamad Fakhreddine, County
of San Diego
- DECEMBER 11th - Holiday Party

Upcoming September 11th Meeting

Title of Program			
Speaker: <i>Ivan Holler</i> , Deputy Director, Department of Planning and Land Use, County of San Diego			
Topic: Proposed Changes to the County's Circulation Element			
AGENDA			
11:00 AM	Board Meeting	12:45PM	Presentation and Q&A
11:45 AM	Arrival and Sign-In	1:30 PM	Adjourn
12:00 PM	HDA Business:	Location:	Best Western Seven Seas 411 Hotel Circle South
	-- Agency Reports	Price:	\$20.00
	-- Committee Reports		
	-- Announcements		
Ivan Holler <i>Deputy Director, Department of Planning and Land Use County of San Diego</i>			
<p>Mr. Ivan Holler is the Deputy Director of the San Diego County Department of Planning and Land Use. Mr. Holler's area of responsibility includes overseeing all long range planning projects including the General Plan 2020 and the Multiple Species Conservation Plan. Having been with the county for almost 10 years, he has also served as Chief of the 2020 Division and the Building Division chief. A graduate of Cal Poly San Luis Obispo, he has a degree in Landscape Architecture and is a licensed landscape architect. Mr. Holler was in private practice prior to joining the County.</p>			

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HDA welcomes new members.

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Membership Benefits include:

- f Notification of Meetings
- f Our monthly newsletter
- f E-Mailed news articles related to transportation
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- f Eligibility to participate on committees and/or become an officer.

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Include an additional \$50.00 and your business card and we will include your card in our monthly newsletter.

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WILSON & COMPANY, INC. ENGINEERS & ARCHITECTS

Attachment 43

DRAFT

DEC - 6 2006

**EXHIBIT B
LIMITED ROADWAY CHANGES
DESIGN COSTS
GRAND TOTAL**

Consultant	Cost
Project Design Consultants	\$738,520.00
USA (includes 5% overhead)	\$169,758.75
GEOCON (includes 5% overhead)	\$61,080.60
Merkel and Associates (includes 5% overhead)	\$2,005.50
TYLIN (includes 5% overhead)	\$302,683.50
SRA (includes 5% overhead)	\$44,992.50
Parsons Brinckerhoff (includes 5% overhead)	\$81,696.30
Syska Hennessy (includes 5% overhead)	\$23,919.00
GRAND TOTAL	\$1,424,656.15

Attachment 44

DRAFT

DEC - 6 2006

**EXHIBIT B
REGENTS ROAD BRIDGE
DESIGN COSTS
GRAND TOTAL**

Consultant	Cost
Project Design Consultants	\$1,183,191.00
USA (includes 5% overhead)	\$67,362.75
GEOCON (includes 5% overhead)	\$51,387.00
Gallegos and Associates (includes 5% overhead)	\$926.10
Merkel and Associates (includes 5% overhead)	\$10,629.15
Katz and Associates (includes 5% overhead)	\$170,556.75
TYLIN (includes 5% overhead)	\$1,270,872.75
SRA (includes 5% overhead)	\$332,597.74
Parsons Brinckerhoff (includes 5% overhead)	\$62,023.50
Syska Hennessy (includes 5% overhead)	\$48,840.75
GRAND TOTAL	\$3,198,387.49