

**Problems with the City's Contracting Procedures  
And the  
Use and Misuse of North U.C. FBA Funds**

**Prepared for Greg Levin, Deputy Comptroller, City of San Diego**

**Friends of Rose Canyon  
by  
Deborah Knight and Charles Pratt**

**March 7, 2007**

## **Friends of Rose Canyon**

P.O. Box 221051  
San Diego, CA 92192-1051  
858-597-0220  
rosecanyon@san.rr.com  
www.rosecanyon.org

Greg Levin  
Deputy Comptroller, City of San Diego  
Office of the Auditor and Comptroller  
202 C Street  
San Diego, CA 92101

March 7, 2007

Dear Mr. Levin,

Thank you for your interest in investigating the issues raised by my call to KPMG about mismanagement of the North U.C. Facilities Benefit Assessment Fund (FBA). Friends of Rose Canyon appreciates the opportunity to provide you with additional information.

Clearly, a city in financial straits in its general fund would be tempted by a large pot of money with a separate and steady funding source such as the FBA. Without strict internal controls and full public disclosure, such funds could be misused. We believe this has happened.

You requested further information about two items:

1. Our concerns about the management of FBA funds
2. The adequacy of the City of San Diego's response to my Public Records Act (PRA) request for information on the use of FBA funds

### **1. Management of FBA funds**

The enclosed report raises numerous deeply troubling issues about the management of FBA funds. This was not an issue Friends of Rose Canyon set out to investigate. Rather, it was one we stumbled on due to our long-standing efforts to preserve a major city resource, Rose Canyon Open Space Park. What we have learned about the mismanagement of millions of dollars in FBA funds for the Regents Road bridge project raises even larger questions: how well have funds for other FBA projects been managed? And are there similar problems with the management of other developer impact funds in other areas of the city?

### **2. PRA requests**

In response to our two Public Records Act requests for financial information on the FBA (letters attached), the City provided an assortment of seemingly haphazardly collected documents with fragments of information. This response leaves the distinct impression that the city is either hopelessly disorganized and incompetent in its management and oversight of FBA funds, or it is hiding something.

Moreover, the City's response to these PRA requests is part of a pattern we have encountered. Beginning in February, 2006 and continuing to as recently as February 23, 2007, Friends of Rose Canyon has submitted to the City numerous Public Record Act requests. In response, the City has indeed provided many items, and much of the documentation in this report is based on those documents. However, the City has consistently dragged its feet in responding, taking at times months to respond to a request, and consistently failed to provide a complete response, even after numerous re-submittals of the same request.

**The origin and purpose of this report:**

Friends of Rose Canyon is a non-profit organization dedicated to the protection, preservation and restoration of Rose Canyon and the Rose Creek watershed. We co-sponsor with the City's Park and Recreation Department numerous educational events and volunteer native plant restoration projects in Rose Canyon. These events engage hundreds of people a year, including scout groups, school groups and the general public. Our efforts also help preserve and restore Rose Canyon Open Space Park, which is one of the city's dedicated open space parks and a part of the City's core area commitment to the Multiple Species Conservation Program. Further, in accepting a 1998 Habitat Conservation Fund grant from the state of California, the City committed to preserve this area in perpetuity.

For the past five years Friends of Rose Canyon has been deeply involved in the issue of a proposed road project that would seriously impact Rose Canyon Open Space Park, the proposed Regents Road bridge project. During that time, we have:

- Submitted extensive scoping comments, Notice of Preparation comments, and Draft EIR comments on the UC North/South EIR (the EIR included equal analysis of the Regents Road bridge project and a number of alternatives).
- Served on the City-appointed Public Working Committee on the EIR that met over the course of seven months in 2003. Key staff members from Project Design Consultants, their sub-contractors and the City's Engineering and Capital Projects Department all participated in these meetings.
- On September 1, 2006, we, along with three other organizations, filed suit against the City of San Diego over its decision to certify the UC North/South EIR and proceed with the Regents Road bridge project.

This report is thus based on our extensive knowledge of the facts and the key players in the EIR projects and the FBA. The report is hardly comprehensive. It is intended as a starting point for investigation: to raise questions and point to problems we see as deeply troubling.

FBA funds are supposed to provide public benefits for the residents of North University City: parks, libraries and roads. The public should have every confidence that they are being used exclusively for their approved purposes and managed well. That confidence will come only with full public financial disclosure about the FBA funds and the projects they contribute toward, and open public accountability for the management of those funds and projects.

Sincerely,

Deborah Knight  
President, Friends of Rose Canyon

**Problems with the City's Contracting Procedures  
and the  
Use and Misuse of North U.C. FBA Funds**

**Executive Summary**

**Glossary:**

**ECP:** Engineering and Capital Projects Department

**PDC:** Project Design Consultants – Contractor for the U.C. North/South EIR

**DSD:** Development Services Department

**UC North/South EIR:** the EIR that studied a number of alternative ways to relieve congestion between north and south U.C., including the **Regents Road bridge project**, the widening of Genesee Avenue, a grade separation at Genesee and Governor Drive, and a series of smaller intersection projects. **The EIR took three years and cost up to \$3 million dollars in contractor and city staff costs** (full cost has never been disclosed).

**Section I: Problems with Engineering and Capital Project's contracting procedures with Project Design Consultants: major conflicts of interest, lack of public disclosure, and waste of millions of dollars in public funds.**

- ECP contracted with PDC for c. \$1.9 million to do the U.C. North/South EIR, which included equal analysis of a number of alternatives, including the **Regents Road bridge project**. City staff billed the FBA for an undisclosed *additional* amount for the EIR (an estimated \$1.1 million in addition costs according to one internal email).
- ECP secretly promised PDC a large design contract for the Regents Road bridge project, thus providing a major incentive to PDC to underplay and omit from the EIR major environmental impacts and other problems with the **Regents Road bridge project**. This led to the waste of millions of dollars on an EIR that was harshly criticized as inadequate by the U.S. Fish and Wildlife Service, the California Department of Fish and Game, and the Regional Water Quality Control Board.
- ECP now proposes a new, no-bid contract with PDC for \$5.8 million to conduct a new EIR and simultaneously do final design of the **Regents Road bridge project**. ECP thus puts at high risk millions of dollars *more* by putting the cart before the horse and proceeding to full design *before even doing the EIR*. Incredibly, they even propose hiring the *same company* that produced the previous inadequate EIR. Once again, city staff would bill an undisclosed additional amount to the FBA – perhaps millions – to work on the project. And, once again, by hiring PDC to simultaneously design the project and do the EIR, ECP is building in a major incentive not to disclose in the new EIR the enormous environmental, legal and other problems with the Regents Road bridge project.

**Section II: Contradictory and false statements by PDC, ECP, and DSD about the California State Parks grant for Rose Canyon Open Space Park in relation to the proposed Regents Road bridge project: deception of multiple federal and state agencies, and provision of false information to San Diego Park and Recreation staff to send to California State Parks.**

- PDC and ECP lied to federal and state agencies, the City Council and the public about a major impediment to the **Regents Road bridge project**: in receiving a California State Parks grant for

Rose Canyon Open Space Park in 1998, the city signed assurances that it *would maintain the area in perpetuity except by act of the legislature*.

- PDC and ECP provided to San Diego Park and Recreation Department false information to send to California State Parks, claiming the **Regents Road bridge project** would *avoid* the grant area, when in fact they acknowledged in the EIR that it *would* impact the grant area.
- ECP and PDC failed to disclose to the City Council before the August 1, 2006 vote on the **Regents Road bridge project** that California State Parks had informed the city that the state could not relieve them of their commitment to preserve the grant area except by act of the legislature. Hence, proceeding with the Regents Road bridge project is not legal.

### **Section III: ECP's past and continuing misuse of FBA funds.**

- ECP has used the FBA account as a cookie jar, billing large amounts of money to it for staff time with no public disclosure and few if any internal controls. City staff bill the FBA at rates as high as \$272/hour!
- ECP continues to bill the FBA for work on projects that are (a) not on the list of FBA projects (b) not even in the FBA "area of benefit" and (c) supposed to be paid for by other sources of funds.
- ECP failed to disclose to the City Council or the public *any* financial information about the **Regents Road bridge project's** costs or sources of funding. In fact, very preliminary estimates put the cost at almost \$40 million! Yet an internal memo from August 2006 shows that only \$6 million has been collected in FBA funds.

### **Section IV: Liability considerations.**

- The City could be required to repay the FBA account for expenditures on projects that are not on the list of FBA projects or supposed to be paid for by other funding sources.
- The City could be required to repay the FBA for funds spend on a project that faces an unresolved legal impediment. Despite learning in 2003 about the city's commitment to California State Parks to preserve the Rose Canyon Open Space Park area in perpetuity, ECP continued to spend almost \$3 million on an EIR that included the **Regents Road bridge project**. They now propose to spend millions more on a new EIR plus final design without resolving the legal impediment. The city could be required to repay the FBA for costs incurred for an illegal project.
- If the mismanagement of FBA funds related to the UC North/South EIR and the **Regents Road bridge project** is indicative of broader issues of FBA mismanagement, the city could be required to repay costs for other FBA projects. Further, these problems could indicate problems with similar developer impact funds elsewhere in the city.
- City staff are charging to the FBA for time they spend related to litigation issues on the Regents Road bridge project, and the City Council voted to spend up to \$250,000 and charge it to the FBA. Legal costs could mount significantly higher.

## Issues Covered by this Report

Section I covers problems with ECP's contracting procedures with Project Design Consultants (PDC): major conflicts of interest, lack of public disclosure, and waste of public funds.

Section II describes PDC's, ECP's and DSD's contradictory and false statements on the state Habitat Conservation Fund grant issue, deception of federal and state agencies, and provision of false information for San Diego Park and Recreation staff to send to California State Parks.

Section III details ECP's misuse of North UC FBA funds.

Section IV describes liability considerations.

### Section I. Flawed Contracting Approach

#### A. Major problems with ECP's past contract and proposed new no-bid contract with PDC

##### 1. Original contract with PDC: Scope of services for Phase I/Phase II

**Background.** In June, 2002 the city advertised a Request for Qualifications (RFQ) with a July 15, 2002 deadline for the University City North/South Transportation Corridor Project (**Attachment 1**). The project was described as consisting of two phases:

a. Phase I included "preparation of all CEQA environmental documentation" for four listed alternatives (there were seven alternatives in the final EIR), and sufficient preliminary design to support the EIR. The estimated consultant fee for Phase I was \$500,000.

b. Phase II included "final design plans, specifications and engineers estimate (PS&E package)." The estimated consultant fee for Phase II "will not exceed \$1,500,000."

Candidate companies were interviewed in July, 2002. Interviewers gave PDC the second highest score. The records received through our PRA request do not indicate why they were selected for the contract over the company that received the highest score.

**2. Final contract language.** Nine months later, on April 21, 2003, the City Council approved a lump sum contract with PDC. In that contract, the task descriptions and scope of services for Phase I and Phase II had changed considerably and no longer contained final design. (see **Attachment 2**, Exhibit A.1-scope of services, Phase I; Exhibit A.2-scope of services, Phase II; Exhibit B.1-Phase I compensation schedule; Exhibit B.2-Phase II compensation schedule).

Phase I, now greatly expanded, included data collection, mapping, geotechnical studies, identification and analysis of alternatives, conceptual plans for up to six alternatives, analysis of traffic, and environmental concerns, including biological, cultural, noise and aesthetics, and providing for public participation in the project (this included a public working group meeting nine times over seven months). The Phase I compensation schedule allowed a total of \$960,300 + \$100,000 (if required for additional services) for a total of \$1,060,000.<sup>1</sup>

---

<sup>1</sup> Curiously, some of the data collection and analysis scope of services proposed for Phase I now seems to be repeated in ECP's proposed new contract with PDC for \$5.8 million. When a contractor fails to provide adequate services, it is a waste of public funds for the City to hire that same contractor again for any reason; under no circumstances should they be paid again to repeat the services.

Phase II was now limited to preparing and releasing a draft EIR, responding to public comment and preparing and releasing a final EIR; \$503,000 was allocated for Phase II. Developing the final design plans and specifications was no longer a task in Phase II and nowhere mentioned in the contract. The budgets for Phases I and II in the City's original 2002 RFQ (maximum \$2 mil) and for the actual Phases I and II in the 2003 contract (\$1.77 M) remained similar.<sup>2</sup>

On Dec. 5, 2005 the City Council approved an amendment to the contract for an amount not to exceed \$187,836 to complete the EIR. The increase was for unanticipated costs due to the extensive public comment on the Draft EIR.

## **B. Secrecy and a Fundamental Conflict of Interest**

**1. Without advertising for a new RFQ, ECP now proposes to offer a new, non-competitive contract to PDC for \$5.78 million for a suite of new services.** ECP proposes to do this by simply categorizing it as a “contract amendment” to the original \$1.79 million contract. ECP claims that all along they had promised PDC this new contract, although such a promise was never publicly disclosed and only uncovered via a PRA request. This secret promise undermines public credibility in the integrity of the process. But worse, it undermines the entire premise of the UC North/South EIR and the millions of dollars spent on it: that it was a full and unbiased assessment of a range of alternatives. The bridge project is by far the largest, most prestigious and most expensive of those alternatives. Obviously, if PDC was promised a design contract on the bridge project, they had a major financial stake in underplaying the EIR’s disclosure of the project’s major negative impacts. This secret deal represented extraordinarily bad judgment on the part of ECP, and in fact has wasted millions of dollars on an EIR that doesn’t meet legal standards.

To make matters worse, ECP now proposes a new contract with PDC that includes:

- Regent Road Bridge project final design costs (\$3,198,387.49)
- Limited Roadway Changes final design costs (the three intersection projects) (\$1,424,565.15)
- A new project level EIR and CEQA permit processing costs (\$1,157,163.85).

The proposed new contract’s total costs for PDC and its subcontractors is \$5,780,207.49 (**Attachment 3**).

## **2. Major problems in the way that ECP and the City are approaching this contract:**

a. PDC had no contractual guarantees that it would be the contractor that designs the chosen alternative. Given the size of this new contract, the selection of the contractor should be subject to a competitive process.

b. The Regents Road Bridge project was by far the most expensive project studied in the UC North/South EIR. To give PDC a secretly-promised non-competitive contract to design the bridge raises the specter of a glaring conflict of interest: PDC all along had a secret financial stake in the bridge being chosen, and hence a financial stake in minimizing the environmental impacts disclosed about the bridge in the EIR.

---

<sup>2</sup> The contract amount for Labor was \$1.552 M plus reimbursable costs for a total of \$1.773 M approved by the City Council on April 21, 2003.

c. PDC's inherent incentive to bias the EIR analysis may well have been a major factor in their creation of an EIR that the U.S. Fish and Wildlife Service, the California Department of Fish and Game and the Regional Water Quality Control Board all resoundingly condemned for its inaccuracies, omissions, and deficiencies.

d. While ECP is proposing to pay for this new contract with FBA funds, much of the scope of services is for work that is not in compliance with the FBA. The FBA contains a public process to review and approve changes. Both the public and developers have a right to participate in this public review. ECP's proposed new contract with PDC envisions changes in the FBA – but to make those changes unilaterally before the City's annual FBA update occurs would bypass the public review process established by the City. (See Section III for a more detailed discussion of misuse of FBA funds.) Furthermore, some of the FBA changes envisioned in this contract may well not comply with the requirements to be funded by the FBA.

e. The city hired PDC to perform an objective analysis of EIR alternatives but secretly promised PDC a no-bid contract to design the bridge. This deal was uncovered via the following emails discovered in response to a PRA request:

- A February, 2006 email by Kris Shackelford to Patti Boekamp stated that if the “project” was selected, PDC would get a “large contract.” Shackelford expressed concern about protecting the appearance of PDC's impartiality on the bridge, saying: “We are too close to the end, and I can't afford for things to go south at this point.” (**Attachment 4**)
- An April 2006 email from Mike Mezey (ECP) to Patti Boekamp and Kris Shackelford made it clear exactly what “project” the above email was referring to: ECP was recommending to the Mayor that the EIR alternative selected be Regents Road bridge plus Genesee widening (the “community plan alternative”), with bridge built first. (**Attachment 5**).
- A May 22, 2006 email from Kris Schackelford to Patti Boekamp detailed ECP's plan: get City Council approval, quickly amend PDC's contract, and have them begin design of the Regents Road bridge project within a few months. (**Attachment 6**).

f. Rush to Spend: ECP now plans to do a new EIR due to the inadequacies of the previous one. Recklessly, they now propose to spend millions of dollars on the final bridge design before the new EIR is done, thus putting at high risk millions of dollars in public funds for design costs for a project that is illegal without an act of the legislature and whose numerous environmental approvals are far from certain. Beneficiaries of this contract are PDC, its subcontractors and ECP, who will all draw a large amount of money from the FBA account – losers are the public on whose behalf these funds are supposed to be spent.<sup>3</sup>

- **Scheduling problems: putting the cart before the horse.** The proposed new contract between the City and PDC has been prepared as a fixed fee agreement (date stamped December 6, 2006). Exhibit C (**Attachment 7**) indicates a schedule in which the design process begins first, followed by the CEQA process and final design done simultaneously. Completion of the EIR does not happen

---

<sup>3</sup> North University City Public Facilities Financing Plan and Facilities Benefit Assessment, Fiscal Year 2007: “The FBA is established to provide public facilities which will benefit the North University City Community.” (p. 1). Public facilities categories include: Transportation, Park and Recreation, and Library. (p. 14).

until full design has also been completed. The schedule then has construction starting immediately. This schedule gives the appearance of a desperate rush to construction. It is a perversion of the CEQA process, in which environmental review comes first.

- **This contract defies logic and puts at risk millions of dollars in public funds.** It is a clear misuse of public funds to spend millions of dollars on final design before the EIR is certified and other major impediments to this project resolved.
- **Questions raised by this flawed approach**
  - What if the City Council does not certify the new EIR?
  - What if there is no act of the legislature passed to undo the City’s contractual commitment to the State of California to preserve the Habitat Conservation Fund grant area? (**Attachment 8** – August 2006 letter from California State Parks)
  - What if the new EIR has major flaws and does not survive a legal challenge?
  - What if the necessary permits are not received from federal and state agencies?<sup>4</sup>
  - What if the EIR uncovers impacts that could be mitigated by design? Doing final design before the EIR is completed eliminates the opportunity to modify the project. The proposed contract does not start the CEQA process until final design begins, which is too late for many modifications. It states: “Changes to the project approach; site layout and design requirements are not anticipated once final design has begun.” (Contract, p. 14.) (**Attachment 9**).

g. Far more in FBA funds is at risk than just the contract amount – possibly millions of dollars more would be charged to the FBA by city staff. For each dollar spent in this proposed contract with PDC, city staff would bill an additional undisclosed amount to the FBA in costs and staff time – at high hourly rates. In the UC North/South Study, a \$1.77 million contract with PDC led to an additional estimated \$1.1 million in staff time and costs charged by city staff to the FBA. City departments (notably ECP and DSD, but others as well) billed an undisclosed amount. Despite a PRA request for a full accounting of all charges for this project, we have received only piecemeal documents. (See **Attachments 10 and 11**, discussed on page 7 of this memo).

## **Section II. Deception about the State Grant Commitment**

### **A. PDC and ECP engaged in blatant deception vis-à-vis the issue of the state Habitat Conservation Fund grant issues. DSD must also have known.**

**1. Background.** In September, 1997 the City applied for a Habitat Conservation Fund grant from the California Department of Parks and Recreation to restore a riparian area in Rose Canyon. The city applied for \$21,000, and agreed to provide matching funds in the form of 2600

---

<sup>4</sup> This is certainly a possibility given that the U.S. Fish and Wildlife Service, the California Department of Fish and Game and the Regional Water Quality Control Board so soundly criticized the Regents Road bridge project in their 2005 and 2006 comment letters. (**Attachments 12 and 13**). The project will also need an Army Corps of Engineers permit. In highly unusual and starkly worded joint letters the U.S. Fish and Wildlife Service and the California Dept. of Fish and Game have repeatedly strongly recommended that the City discontinue any further consideration of the Regents Road Bridge Project and remove it from the Community Plan.

hours of volunteer labor and 375 hours of ranger time, for a total project budget of \$68,000. **(Attachment 14).** The City was awarded the grant in September 1998 and in accepting it, agreed to maintain the restored area in perpetuity "except by specific act of the Legislature." **(Attachment 15).** The project was completed in December, 2002. **(Attachment 16).**

Numerous comment letters raised the issue that impacts from the Regents Road project violated the city's commitment to maintain the area in perpetuity, including letters by the Cal. Dept. of Fish and Game, the U.S. Fish and Wildlife Service and the Regional Water Quality Control Board. In 2003, ECP reviewed the terms of the commitment in the grant agreement and dismissed the legal significance of the term "in perpetuity." **(Attachment 16 A).**

**2. In seeking to find a way out of this dilemma, PDC and ECP concocted two different contradictory versions of their response, both false.** They used one version in their response to comments in the FEIR and used the other version to provide the San Diego Park and Recreation Department with false information to send to the California Department of Parks and Recreation. Finally, they failed entirely to disclose either in the EIR or to the public or the City Council the City's legal commitment to the State of California to preserve the area in perpetuity.

**a. False Statement # 1:** In its Response to Comments (2.20) in the FEIR, PDC, ECP and DSD admitted that the bridge project *would* impact the grant area (which it clearly would). However, they wrote, the City would make "restitution." **(Attachment 17).** They failed to disclose that under the terms of the state HCF grant, restitution was not an option, and that an act of the legislature would be necessary. The grant terms had been brought to the attention of PDC, ECP and DSD repeatedly, starting in Scoping Comments submitted by Friends of Rose Canyon in November 2003. Yet PDC and ECP ignored the issue for over two years, then made up the "restitution" solution despite restitution clearly not being an option. In July 2006, Carol Wood, Grants Administrator for San Diego Park and Recreation Department, informed Richard Haas by e-mail that California State Parks had determined such restitution is not permissible without a specific act of the Legislature. **(Attachment 18).**<sup>5</sup> (See also **Attachment 8** for letter from California State Parks). The City Attorney, in a July 28, 2006 memo also concluded that because the application for the grant was based on improvement to Rose Canyon Open-Space Park, no invasion of the park was permissible without legislative approval. **(Attachment 19).**

**b. False Statement # 2:** PDC crafted a second and contradictory (and absurd) response that claimed the bridge *would not* impact the grant area. PDC and ECP provided this false information to the San Diego Park and Recreation Department to forward to California State Parks, presumably to entice the state to send them a letter saying the Regents Road bridge project would be in compliance with the terms of the grant. PDC even concocted a map that purposefully misrepresented the extent of the grant area, implying that the grant area consisted of a few small isolated patches of habitat.

---

<sup>5</sup> Attachment 18 is shocking: Wood's email appears to have been forwarded to Erik Bruvold, who states that "my understanding is that Beaucamp's [sic] team has designed around the area so no impacts." It would appear that Patti Boekamp or someone on her "team" misled the Mayor's office by telling them that the Regents Road bridge project would not impact the grant area and thus would not require an act of the legislature to make it legal. ECP's ignoring and covering up of this legal issue should certainly qualify as mismanagement of public funds.

- On March 21, 2006, Bruce McIntyre (PDC) emailed to Nitsuh Abera (ECP) a draft letter and the misleading map to be sent to California State Parks implying that the Regents Road bridge project WOULD NOT impact the grant area. (**Attachment 20**).
- On March 28, 2006 a memorandum from Nitsuh Abera (ECP) forwarded the information to Heidi Lang, San Diego Park and Recreation Department. (**Attachment 21**).
- On April 19, 2006, San Diego Park and Recreation Director Ted Medina faxed a letter to Bill Boston, California State Parks. Medina used the false information supplied by PDC and ECP to imply the Regents Road bridge project would avoid the grant area. (**Attachment 22**).

**3. The City's deception:** Thus, in the spring of 2006, PDC was writing responses to comments in the FEIR admitting that there would be an impact to the grant area but restitution would be made while they were *at the same time* sending the San Diego Park and Recreation Department information for California State Parks claiming there would be no impact to the grant area. While the San Diego Park and Recreation Department may have been unaware the information they were sending to the State was false, *certainly ECP and DSD must have been well aware that not only was the information provided to California State Parks false, it was contradicted by the response to comments in the FEIR and an absurd contortion of the facts.*

Instances of deception include:

- a. PDC and ECP conspired to lie to California State Parks, knowingly providing to San Diego Park and Recreation false information, which the City then provided to the California Department of Parks and Recreation. **Patti Boekamp, or someone under her, appears to have provided this false information to the Mayor's office.**
- b. PDC and ECP provided very different (but also false) information in response to comments by the U.S. Fish and Wildlife Service, California Department of Fish and Game and Regional Water Quality Control Board.
- c. PDC and ECP failed to acknowledge in the EIR or at the August 1 City Council hearing that an act of the legislature was required to impact the grant area. Thereby, they deceived federal and state agencies, the City Council and the Public.
- d. For years PDC, ECP and DSD hid the fact that the construction of the bridge would be illegal without an act of the Legislature and proceeded to spend millions of dollars on the EIR. In the grant application, the City assured the state that the restoration site was adjacent to "significant protected habitat" and was "within the protected boundaries of Rose Canyon Open Space Park." In answering the question about "any potential threat to the project site or area," they did not mention the road project.

### **Section III. The City Misused the FBA**

**Background.** Facilities Benefit Assessment (FBA) funds are generated by a fee paid by developers for development in North University City and are used for a defined list of projects that have been phased over 25+ years (ending in 2015). Annually, the city is supposed to update the costs and phasing of these projects as required by the municipal code and applicable city

ordinance. This is a public process, with disclosure of the draft update and opportunities for public input. The update is reviewed and voted on by the University Community Planning Group, the Land Use and Housing Committee and the City Council. FBA funds must be used within the area of benefit, defined as North UC (the boundary being the north rim of Rose Canyon), or for projects with a close nexus to the area of benefit.

**A. ECP is a major beneficiary of FBA funds with inadequate public disclosure or accountability**

**1. City charges the FBA without sufficient oversight:** City departments charge the FBA account an hourly rate for city staff to work on FBA projects and for other costs. Unfortunately, the FBA appears to function as a cookie jar that city departments can charge to with little or no public oversight or disclosure. There are no apparent limits on how much city staff may bill to a given FBA project, probably because each year the city can simply raise the developer fees in order to pay for the project cost increases. Whether the FBA is subsidizing the general fund is a question perhaps worthy of analysis.

FBA funds were used to fund the U.C. North/South Transportation Corridor Study EIR. Some of these funds (\$1.77+ million) funded the PDC contract and were approved by the City Council. However, a large amount of additional money was also billed to the FBA by city staff who worked on the project. There seems to be little oversight or public accountability for the amount city staff have billed for this project – or for the millions of dollars they have billed to other FBA projects. Despite Friends of Rose Canyon’s PRA request for full records of this billing, we have received only fragmented records. (**Attachment 23** letters from Nov. 13, and Nov. 22, 2006). Examples are:

**a. Total charges for staff time** levied against the FBA as of November 15, 2005 were described by Nitsuh Aberra (ECP) in a memo to Kris Shackelford as exceeding \$1 million (presumably much more has been charged as of February, 2007.) Again, the FBA seems to provide an open charge account for city staff. No report is ever made to the University Community Planning Group or the public as to how much the city bills the FBA for staff time. A recent request by the Chairperson of the planning group for a full audit resulted in a very general summary of the finances of the FBA. (**Attachment 10**).

**b. Attachment 11 lists a summary for the time period 7/4/03-12/31/04**, broken out by department, individual staff member, hours worked, and amount charged. Excerpted from page 8, here are sample expenditure amounts and rates charged by city staff to FBA for work on UC North/South EIR:

_ Kris Shackelford (ECP) charged \$32,524	<b>(\$173/hour)</b>
_ Martha Blake (DSD) charged \$44,621	<b>(\$124/hour)</b>
_ Jeanne Krosch (Planning Dept) charged \$95	<b>(\$190/hour)</b>
_ George Varshock (DSD) charged \$137	<b>(\$272/hour)</b>
_ Timothy Daly (DSD) charged \$4,960	<b>(\$236/hour)</b>
_ Patrick Thomas (DSD) charged \$1,147	<b>(\$190/hour)</b>

Currently with the FBA account there is no public disclosure that provides: who is billing the FBA, at what hourly rate, for how many hours, and to do what. There is no public disclosure of: how hourly billing rates are set; what the limits are, if any, on the number of hours or total dollar amount city staff can bill a particular project; and what tasks they bill for.

**B. ECP improperly uses FBA funds to pay for: (1) projects not on the FBA list and not in the area of benefit, and (2) projects on the FBA list designated to be funded by other sources of funding**

**Background:** Every year, the City Council must approve an update to the FBA. This includes the list of projects, and indicates those completed, in progress, or delayed, as well as those deleted from or added to the list. Some projects are funded fully by the FBA, some are partially FBA-funded (supplemented by Transnet or other funding), and some have no FBA funding at all. FBA funds can only be spent for projects on this list and only to the extent they are designated to be funded by FBA funds. Furthermore, there must be sufficient FBA funds appropriated for a given project for the year in which the funds are proposed to be spent.

**1. Regents Road Bridge: ECP is proceeding with this *entire* project without funding for two of the three segments.** The Regents Road Bridge project is actually comprised of three projects (designated NUC 12, NUC 14, and NUC 18 in the FBA). (**Attachment 24**). FBA funds are slated to pay for *only* NUC 18. No FBA funds are listed to pay for NUC 12 or NUC 14. These three projects are:

**NUC 12** – Lahitte Court to Governor Drive - currently only half the street exists. (\$3,789,000 - **no FBA funds are allocated to this project.**)

**NUC 14** – southern end of bridge to Lahitte Court - 700' of *new* cut and fill road in the canyon. (\$1,172,612 - **no FBA funds are allocated to this project.**)

**NUC 18** – 871' bridge that ends about 55% of the way across the canyon, connecting to the 700' cut and fill road (\$31,027,258 – **FBA pays for all but \$142,385.**)

**2. Limited Roadway Changes: ECP is proceeding with these three intersection projects when 2 of 3 segments are not even on the FBA list or in the area of benefit.** Included in the EIR are three intersection projects, called together the “Limited Roadway Changes” alternative. Two of these are newly proposed projects that are *not* in any community plan, *not* on the FBA list and *not* even in the FBA area of benefit. These are:

**a. Regents/ Route 52 intersection.** – \$2.3 million

**b. Genesee Avenue/Governor Drive intersection** – not available

Thus, no FBA funds may currently be used for the above two intersection projects. Kris Shackelford at ECP told us they are charging them to NUC 18.

**c. Genesee Avenue/ Route 52 intersection** – not available

This intersection project is in the FBA, lumped in with the widening of Genesee Avenue from Route 52 to Nobel Drive (NUC A). However, since the City Council voted to remove the Genesee widening from the Community Plan, the Genesee/52 intersection project no longer has a nexus with the area of benefit, and no FBA funds should be spent for this project. NUC A is projected to cost \$ 24,129,700, all but \$172,000 funded by the FBA. (**Attachment 25**).

### C. Main points about using FBA funds:

**1. Until the FBA goes through its formal public annual update, FBA funds should only be spent on NUC 18 (the bridge itself).** Nevertheless ECP is proceeding with work on NUC 12, NUC 14, the Regents/52 intersection, the Genesee Avenue/Governor Drive intersection, *none* of which are funded by the FBA. We understand, moreover, that ECP is charging NUC 18 (the bridge itself) for all of these costs. This activity should be stopped. (See **Attachment 26** for ECP approval of \$31,000 for PDC to do overflights “for design purposes.”)

**2. The Regents/52 intersection project would *only* be necessary were the bridge actually built.** (See **Attachment 27** for 2005 cost estimate of \$2.3 million for this project.) If the bridge is not built, this intersection project would not only be completely unnecessary, it would be completely illegal to fund it through the FBA, since it would have no nexus at all with the FBA area of benefit. Thus, proceeding with the Regents/52 intersection project while the EIR is in litigation and the future of the bridge not resolved, is putting the City at risk for having to repay the FBA millions of dollars. This intersection project should only be pursued once the bridge is actually under construction.

A PRA request revealed that ECP has taken actions since August 1 that illegally spend FBA funds, including work with PDC without any disclosed contract. This work includes: surveying with city crews (presumably billing to the FBA); working with PDC to do overflights (**Attachment 28**); and receiving a construction estimate from PDC for the three intersection projects.

In short, ECP has proposed a new contract to spend millions of dollars on final design activities before a project EIR has been completed and before an act of the Legislature makes it legal to construct the bridge. ECP is also spending FBA money that has not been allocated to the given projects, on activities that violate the current FBA rules.

**3. Most of the FBA money to pay for the Regents Road bridge Project has not yet been collected.** In a July 27, 2006 Planning Department email John Tracanna wrote to Cecilia Williams that about \$6 million has been collected out of an estimated \$31 million, with about \$25 million to be collected in 2009 and 2010 (**Attachment 29**). He states that canceling the project would allow reallocation of the money to other projects. These funds can be used for fire stations (two to three are needed in University City), parks, and other street projects, all of which are coming in way over budget.

Furthermore, Tracanna’s project estimate of \$31 million is for the bridge segment only (NUC 18). He leaves out the other two segments of the Regents Road bridge project, estimated at another \$5 million (with funding largely unidentified). The bridge project would also require the otherwise unnecessary Regents/52 intersection project for another \$2.9 million.

**This year-old estimate of the *total* projected cost of the Regents Road bridge and Regents/52 projects is \$39 million, of which only \$6 million has been collected.** This very preliminary estimate will certainly escalate, probably *significantly*. ECP misled the City Council and the public by not revealing the full cost of this project at the August 1 hearing.

<p><b>Now is the time for an independent auditor in the City to do a sober financial and cost/benefit analysis of the Regents Road bridge project.</b></p>
------------------------------------------------------------------------------------------------------------------------------------------------------------

## Section IV. Liability Considerations

Monetary liability for the City from mismanagement of FBA funds arises under a number of circumstances:

**A. The City general fund will be required to repay the FBA substantial amounts.**

1. The City has spent FBA funds on projects which have not yet been found eligible for FBA funds. Some of the projects for which FBA funds have been expended do not appear at all on the most recently approved Facilities Financing Plan for the NUC-FBA and some projects for which FBA funds are being expended do appear in the financing plan but under the terms of the plan are not financed with FBA funds.

2. In addition, with respect to a third category of projects the financing plan provides only partial FBA financing. However with respect to these projects the City has failed to secure the other funding and city staff has, without any amendment to the financing plan, shifted the entire burden of the projects to the FBA.

3. Failure to repay the FBA from the City General Fund for payments which are not authorized under the current financing plan may well jeopardize the continued validity of the FBA as an assessment based revenue program otherwise exempt from the limitations imposed by Proposition 13 on property taxes. (See *J. W. Jones v. City of San Diego* (1984), 157 Cal.App.3d 745, 754-756.)

**B. The FBA itself may be required to refund to developers amounts they have paid for a \$40 million project that it is unlawful for the city to build.** The City is currently charging FBA fees for the Regents Road Bridge project, which it is unlawful to build without an act of the legislature (due to the commitment to the state to preserve the state grant area). In fact, in 2004, the City significantly raised FBA rates largely due to projected, increased costs of this project and never disclosed that the project would require an act of the legislature to make it legal.

**C. The City could lose on both construction and restoration expenses.** If the City were to pursue design and construction of the bridge and the State required the City to undo work on the Regents Road Bridge project because it violates the City's commitment to preserve the area in perpetuity, the City not only would lose the amounts it spent but would incur substantial restoration costs.

**D. Legal fees and judgments against the City.** The City is already paying significant fees. ECP set up a \$10,000 account in the FBA and the City Council voted to spend up to \$250,000 on legal fees. Were the City to lose its case, the costs would likely be much higher because the City would be liable for Plaintiff's legal fees and costs.

**E. The larger picture.** Although the issues we raise apply to a specific set of projects in the North UC FBA, the City may be at much more extensive risk of monetary liability if the problems we point out are more widespread. This liability could result from:

1. other projects in the North UC FBA, and
2. projects in other assessment districts throughout the city.