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REPORT TO HONORABLE MEMBERS OF THE CITY COUNCIL

ANALYSIS OF SAN DIEGO STATE UNIVERSITY'S OFFER, DATED OCTOBER 28, 2019, TO PURCHASE THE SDCCU STADIUM SITE IN MISSION VALLEY

INTRODUCTION

In November 2018, local voters approved Measure G, the SDSU West citizens' initiative, the main substance of which is now codified in San Diego Municipal Code (Municipal Code or SDMC) section 22.0908. *See* Attachment A to the Staff Report dated November 6, 2019 (Staff Report), related to item 200 on the November 18, 2019, docket of the San Diego City Council (Council). Measure G contemplates that the City of San Diego (City) and San Diego State University (SDSU) will negotiate a purchase and sale agreement (PSA), as well as other necessary agreements, related to the sale of the City's real property located at 9449 Friars Road in Mission Valley, commonly referred to as the SDCCU stadium site (Property).

During the Council meeting on October 14, 2019, SDSU presented a written offer to purchase the Property. *See* Attachment L to the Staff Report. The Council requested that City staff and the Office of the City Attorney return to the Council with an analysis of SDSU's offer. On October 28, 2019, however, SDSU submitted to Mayor Kevin Faulconer a substantially revised offer (Revised Offer), which superseded the earlier offer of October 14. *See* Attachment B to the Staff Report. At its November 18, 2019, meeting, the Council will be asked to provide direction to the City's negotiating team¹ regarding the Revised Offer, including specific deal points to be addressed in preparing and negotiating the PSA.

The San Diego Charter requires the Mayor's office or a City department acting under the Mayor's direction (collectively, the Mayor) to conduct the City's contract negotiations, including real property negotiations. *See* City Att'y MS 2019-1 (Jan. 7, 2019). Therefore, the Mayor will negotiate the PSA, and this Office will advise on legal issues and risks and assist him in drafting the PSA. The Mayor will ultimately present the PSA to the Council for approval. At that time, the Council must determine whether the proposed sale, as memorialized in the negotiated PSA, complies with Measure G's requirements and is "at such price and upon such terms as the Council shall deem to be fair and equitable and in the public interest." SDMC § 22.0908(a).

¹ As confirmed in a press release issued by the Mayor's office on March 1, 2019, the City's negotiating team consists of the City's Chief Operating Officer, Assistant Chief Operating Officer, and several department directors and other City employees, and the negotiating team is advised by this Office.

ANALYSIS

The Revised Offer contains SDSU's summary of 25 main deal points to be memorialized in the PSA. SDSU's proposed deal points are not exhaustive or fully comprehensive, which means that SDSU and the City will need to negotiate, and memorialize in the PSA, many terms and conditions not addressed in the Revised Offer. The PSA will be a complex document that incorporates numerous deal terms and includes various detailed attachments. While the total purchase price or other financial arrangements may garner the most attention in a high-profile transaction of this nature, every term of the PSA will be important. If any term is not clearly and accurately memorialized, one party or the other could incur additional risk, or a future dispute could arise between the parties due to ambiguities in the PSA.

Notwithstanding the Council's request during the October 14 meeting, the Mayor has opted not to provide a written analysis of the Revised Offer. To ensure the Council has preliminary information necessary to evaluate the Revised Offer, this Office and the Independent Budget Analyst have provided an initial analysis that, while not fully comprehensive, reflects City staff's input on certain issues over the past ten months. As noted in Attachment 1, additional input from City staff and policy direction from the Mayor will be essential in determining whether the City's taxpayers and ratepayers are receiving a fair and equitable offer. In addition, as this Office prepares the PSA and the parties delve more deeply into the specifics of the transaction, we will need further input from the Mayor and the Council regarding various policy decisions to be reflected in the PSA.

This Office has evaluated the Revised Offer applying three main principles: (a) whether each deal point in the Revised Offer is consistent with Measure G, including both Municipal Code section 22.0908 (and related legislative findings and other provisions) and voter intent based on campaign promises made by SDSU and Measure G's proponents; (b) whether incorporating each deal point into the PSA will help provide a factual basis for the Council to make the required finding under Measure G that the negotiated transaction is fair and equitable and in the public interest; and (c) whether the Revised Offer is consistent with the preservation of the City's rights and responsibilities, through its Public Utilities Department (PUD) and other departments, to construct, operate, and maintain existing and planned future public facilities on or about the Property.

This Office's analysis is laid out in two separate spreadsheets. The first spreadsheet, entitled "Evaluation of SDSU's Proposed Deal Points," contains two columns. *See* Attachment 1. The left column recites verbatim each deal point in the Revised Offer. The right column consists of both a high-level summary of this Office's evaluation of each deal point and a more detailed analysis explaining background information and specific issues. The second spreadsheet, entitled "Additional Deal Points for the Council's Consideration," identifies deal points that are not specifically referenced in the Revised Offer, but are necessary in our view to achieve consistency with Measure G and adequately protect the City's interests. *See* Attachment 2. Due to time constraints and unavailable information, this Office's analysis may not comprehensively cover every topic and may need to be supplemented if additional information becomes available.

At previous public meetings regarding the City's potential sale of the Property to SDSU, several topics have been the focus of significant discussion or have been raised by multiple Councilmembers as areas of particular concern. Our analysis of those topics is summarized in the bullet points below. It is not our intent to diminish the importance of any other deal points in the PSA transaction by highlighting those topics below for the Council's consideration.

- Purchase Price: The Revised Offer includes a purchase price in the amount of \$86,200,000, plus a time-value adjustment using a 2.149 percent annual index factor from September 30, 2017, through the close of escrow, on the Water Utility Fund's 37 percent portion of the Property. *See* Attachment 1 (deal point 3). SDSU's proposed purchase price is generally consistent with Measure G because it is based on an independent appraiser's opinion of the Property's value before cost deductions related to River Park improvements and stadium demolition, as well as the appraiser's opinion of a reasonable time-value adjustment factor. We recommend that the Council evaluate the proposed purchase price in the context of all financial terms in SDSU's offer, some of which will cause the City to incur significant costs for public improvements supporting the Project. In the Revised Offer, SDSU has proposed that the City allocate approximately \$10 million of the purchase price proceeds (all of which must come from the General Fund portion) toward public improvements. *See* Attachment 1 (deal points 6 and 7). Those improvements, consisting of the Fenton Parkway Bridge and other unspecified improvements, will support both SDSU's development project and other existing or future developments in the vicinity. Based on City staff's input, we will need to clarify whether the City would be required to contribute financially toward those improvements instead of using development impact fees for that purpose.
- Murphy Canyon Creek: The Revised Offer includes SDSU's acquisition of the Murphy Canyon Creek parcel in its current condition, without any obligation to make improvements to the creek channel. *See* Attachment 1 (deal point 4). SDSU's proposal is generally consistent with Measure G. However, one necessary point of clarification is whether SDSU will acquire the entire Murphy Canyon Creek channel, or if the southernmost portion of the channel will remain in the City's fee ownership and be included in the River Park. Because SDSU is responsible for maintaining and operating the River Park, and therefore the portion of Murphy Canyon Creek within the River Park, it may be more practical in the long run for the City to transfer fee ownership of the entire channel (including its southernmost portion) to SDSU. In any event, we recommend that the PSA include a provision requiring SDSU to defend and indemnify the City against risks associated with the creek channel.
- Fenton Parkway Bridge: The Revised Offer includes a proposal wherein: (a) SDSU would construct a "2-lane, all weather, at grade with the trolley crossing (with turn lane) bridge" (Bridge) prior to reaching 65 percent of planned equivalent dwelling units, and provide up-front funding for all aspects of the Bridge, with SDSU's required contribution capped at approximately 25 percent of total Bridge costs; (b) the

City would design and permit the Bridge and complete related environmental review; and (c) the City would contribute up to \$8.5 million of the purchase price proceeds, plus \$1.3 million in existing capital improvement project funds previously allocated for a bridge at Fenton Parkway, and provide development impact fee credits. *See* Attachment 1 (deal point 6). The California Environmental Quality Act (CEQA) requires the completion of environmental review of Bridge construction. Until that environmental review is completed, the parties can only establish a preliminary agreement related to the Bridge. That agreement could not bind any party or commit a party to a definite course of action, restrict the lead agency from considering any feasible mitigation measures and alternatives, or restrict the lead agency from denying the Bridge project. *See* Cal. Code Regs., title 14, § 15004(b). The timing of potential construction of the Bridge will need to be coordinated with SDSU's construction of no more than 65 percent of its planned equivalent dwelling units. Thus, the Council, with City staff's input, may wish to consider whether it is more efficient for SDSU to be the lead agency on the Bridge project, meaning that SDSU would complete CEQA review and design, permit, and construct the Bridge.

- Potential Delay in Closing Date: The Revised Offer includes a target date to close escrow by March 27, 2020, which is highly optimistic and may not be feasible. The Revised Offer also provides for a new lease, at \$1.00 per month with an unspecified termination date, if the transaction fails to close by June 30, 2020, through no fault of either party. *See* Attachment 1 (deal points 24 and 25). Given that nothing in the Revised Offer specifies any conditions precedent to the closing, we presume that the only scenario in which a delay of the closing would occur is if a lawsuit is filed by a third party and a court issues a temporary injunction that prevents the parties from consummating the PSA transaction. The Council may wish to ask SDSU to clarify whether SDSU anticipates any conditions precedent to the closing. If the Council is inclined to agree with SDSU's proposed lease concept, we recommend including the pre-negotiated lease as an attachment to the PSA and also including provisions in the lease to confirm: (i) SDSU would be responsible to complete and pay for any rehabilitation costs and capital improvements related to the safe operation of the existing stadium; and (ii) SDSU would defend and indemnify the City against any claims related to the condition of the Property, including the stadium and the creek channel. Further, we recommend that the PSA establish a reasonable outside date for the closing, such as December 31, 2023, so that the closing is not delayed indefinitely.² Otherwise, the PSA could become inconsistent with Measure G's

² Measure G, at Section 7(A), states: "On or after the 20th Anniversary of the adoption of this Initiative, a vote of the people shall not be required to amend or repeal any portion of this Initiative, and this Initiative and the Amendments that it adopts, including all exhibits thereto, may be amended or repealed by any procedure otherwise authorized by law." This Measure G language does not signify that the City must allow the PSA transaction to remain in escrow indefinitely, or even for up to 20 years after the passage of Measure G. Rather, the language means that, if a legislative change to Municipal Code section 22.0908 is desired, the legislative change could occur during the first 20 years only if local voters approve the change. After the 20-year period elapses, a legislative change to Municipal Code section 22.0908 could occur through the Council's adoption of an ordinance, without a public vote.

requirement that the River Park and the Joint Use Stadium be constructed within seven years after the PSA is signed. SDMC § 22.0908(i), (j). Moreover, SDSU's proposal to lease the Property at \$1.00 per month would not adequately compensate the Water Utility Fund with respect to its 37 percent portion of the Property. If the rental amount is not increased, the City's General Fund will be required to compensate the Water Utility Fund for the interim use of its portion of the Property.

Our Office will continue to advise both the Mayor and the Council on options and recommendations throughout the negotiating process, but ultimately, we will need policy direction to resolve the issues identified in this Report and the attached spreadsheets.

CONCLUSION

As the Mayor indicated in a recent letter to SDSU, the Revised Offer represents a "significant step forward in allowing the parties to reach consensus on Purchase and Sale Agreement terms." *See* Attachment C to the Staff Report. As described in this Report and the attached spreadsheets, however, numerous significant issues must be resolved before the parties can finalize a PSA on mutually agreeable terms.

During the November 18 meeting (or a subsequent meeting, if necessary to allow further deliberation), the Council may provide direction regarding an appropriate resolution of specific issues to ensure that the PSA transaction, in the Council's estimation, will be fair and equitable and in the public interest.

It is also important to note that we recently engaged the law firm of Schwartz Semerdjian Cauley & Moot LLP to undertake an independent review of the proposed PSA transaction from the perspective of the City's water and sewer ratepayers.³ We believe this independent review will help ensure that the Water Utility Fund is fairly compensated in the PSA transaction for its property ownership and that PUD's interests are met with respect to the construction, operation, and maintenance of existing and planned future public facilities on or about the Property.

³ The engagement of this law firm is based on the Council's prior approval of a competitively-solicited list of outside law firms in specific "as needed" topic areas. The cost of the law firm's independent review has been set at a maximum of \$50,000, payable entirely by the Water Utility Fund.

This Office stands ready to assist the Mayor and the Council in advancing the proposed transaction to the next stage.

MARA W. ELLIOTT, CITY ATTORNEY

By /s/ Kevin Reisch
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Attachments

cc: Mayor Kevin Faulconer
Kris Michell, Chief Operating Officer
Cybele Thompson, Director, Real Estate Assets Department
Mike Hansen, Director, Planning Department
Andrea Tevlin, Independent Budget Analyst

ATTACHMENT 1 TO CITY ATTORNEY REPORT

Evaluation of SDSU's Proposed Deal Points

Attachments: All references to attachments in this document are to the attachments accompanying the Staff Report dated November 6, 2019, with respect to item 200 docketed for the Council's consideration on November 18, 2019.

Defined Terms:

CEQA = California Environmental Quality Act

Charter = San Diego Charter

Closing Date = the future date on which SDSU's acquisition of the Property is completed, as evidenced by a recorded deed

DIF = development impact fees

Measure G = the voter-approved ballot measure that contemplates the City's sale of the Property to SDSU or its affiliate

Project = SDSU's proposed future development project on the Property, as envisioned by Measure G.

Property = the City-owned real property at 9449 Friars Road in Mission Valley, commonly known as the SDCCU stadium site

PSA = Purchase and Sale Agreement

PUD = the City's Public Utilities Department

SDMC or Municipal Code = San Diego Municipal Code

SDSU = San Diego State University

SDSU's Proposed Deal Point	Analysis for Consistency with Measure G and Protection of City's Interests
<p>1. <u>Parties</u>: The City of San Diego, as seller, and San Diego State University / California State University ("CSU"), as buyer."</p>	<p><u>Summary</u>: SDSU's identification of the two contracting parties is consistent with Measure G. If the Council desires to approve the eventual PSA transaction, then to comply with Charter section 221, the Council will need to adopt an ordinance to approve the negotiated PSA and make a finding that the PSA transaction will achieve "bona fide governmental purposes."</p> <p><u>Analysis</u>:</p> <p>Measure G contemplates the City's potential sale of the Property to SDSU, subject to the Council's approval and subject to the PSA terms being in compliance with the provisions</p>

	<p>of Measure G. SDMC § 22.0908(a), (x)(12). SDSU's identification of the two contracting parties in the PSA is consistent with Measure G.</p> <p>Charter section 221 applies to the PSA transaction because the Property consists of more than 80 contiguous acres. Charter section 221 generally provides that the City's sale of 80 or more contiguous acres of real property requires the Council's adoption of an authorizing ordinance and subsequent ratification by local voters. Charter section 221 creates an exception to the requirement for subsequent ratification by the voters if the sale is "to a governmental agency for bona fide governmental purposes." For purposes of the exception, SDSU is a "governmental agency." If the Council desires to approve the eventual PSA transaction, Charter section 221 requires that the Council adopt an ordinance approving the negotiated PSA and making a finding that the PSA transaction will achieve "bona fide governmental purposes."</p>
<p>2. "<u>Property</u>: Contains 135.12 acres, as generally depicted on the map attached to the Measure G initiative and in the appraisal from David Davis dated October 11, 2019 ("Property")."</p>	<p><u>Summary</u>: SDSU's identification of the Property is consistent with Measure G, subject to the clarification in deal point 4 below related to Murphy Canyon Creek.</p> <p><u>Analysis</u>:</p> <p>Measure G states that the Property (defined as the "Existing Stadium Site") consists of approximately 132 acres at 9449 Friars Road, between Interstates 15 and 8, as depicted on a site map in Section 8 of Measure G. SDMC § 22.0908(x)(3).</p> <p>David Davis, MAI, the independent appraiser mutually selected by the parties, prepared an appraisal report dated October 11, 2019, in which he appraised the September 2017 value of a site consisting of 135.12 acres, including approximately 2.6 acres in Murphy Canyon Creek. SDSU's identification of the Property encompasses the appraised site. Further, SDSU's identification of the Property is consistent with the narrative text in Measure G and the site map of the Property in Measure G.</p>
<p>3. "<u>Purchase Price</u>: \$86,200,000, plus a time value adjustment on the Public Utilities Department 37% portion of the Property, using a 2.149% annual index factor from 9/30/17 through the actual</p>	<p><u>Summary</u>: The Council will need to determine whether SDSU's proposed purchase price is "fair and equitable and in the public interest," as required by Measure G. The proposed purchase price is generally consistent with the independent appraisal of the Property, as well as the provisions of Measure G and related campaign promises allocating River Park and stadium demolition costs to SDSU. However, the Council may wish to consider whether to apply the annual index factor of 2.149% to the entirety of the Property, not</p>

close of escrow (“Closing Date”) (estimated adjustment of \$1,500,000).”

only PUD’s 37% portion. We recommend that the Council evaluate the proposed purchase price in the context of all financial terms in SDSU’s offer, some of which will cause the City to incur significant costs for public improvements supporting the Project.

Analysis:

The negotiated PSA transaction must be “in compliance with the conditions” set forth in Measure G. SDMC § 22.0908, introductory paragraph. Measure G contemplates that the City and SDSU will negotiate a PSA related to the City’s sale of the Property. Measure G does not require, but allows, the City to sell the Property to SDSU if the Council approves the City’s sale of the Site “at such price and upon such terms as the Council shall deem to be fair and equitable and in the public interest.” *Id.* § 22.0908(a). Similarly, the “findings” portion of Measure G (Finding B.1) provides: “The People of the City of San Diego desire to authorize and direct the sale of the [Property] to SDSU, but only if such sale is at such price and upon such terms as the City Council shall deem to be fair and equitable.”

Measure G states that the City’s potential sale of the Property to SDSU “shall be based on the Fair Market Value of the [Property], and the City may fairly consider various factors, adjustments, deductions, and equities” in arriving at the fair and equitable purchase price. *Id.* § 22.0908(d). Within the context of Measure G, “Fair Market Value” means the price at which a willing seller would sell the Property to a willing buyer in a hypothetical, open market transaction between two private parties, disregarding any effect on property value arising from adoption of Measure G. *Id.* § 22.0908(x)(5). The parties then must negotiate a fair and equitable purchase price that is based on the appraised Fair Market Value and implements both the specific provisions of Measure G and related campaign promises. Finally, the Council must make a determination that the negotiated transaction in the PSA, including the final purchase price, is “fair and equitable and in the public interest.” *Id.* § 22.0908(a).

SDSU retained a qualified appraiser, David Davis, MAI, to prepare an independent appraisal of the Property. On October 11, 2019, Mr. Davis provided the parties with a final version of the appraisal. *See* Attachment E. The appraised site consists of approximately 135 acres, including approximately 2.6 acres in Murphy Canyon Creek; the appraised site excludes the 34-acre River Park, which will be retained in the City’s ownership, but will be designed, constructed, and maintained by SDSU. Within the

appraised site, the City owns 85 acres (63% of the land area) through its General Fund. The City also owns 50 acres (37%) through its Water Utility Fund, which consists of revenues received from the City's water ratepayers. We understand that the City's Sewer Fund also owns property in the vicinity of the Project, although that property is located south of San Diego River and will not be part of the Property or the River Park.

In the appraisal, Mr. Davis expressed his opinion as to the Fair Market Value of the appraised site, in a hypothetical open market transaction between two private parties, as of September 30, 2017, using a valuation approach that determines the anticipated net income (i.e., cash flow) to be generated by future development of the site and discounts the value of the cash flow to the valuation date. In reaching this opinion, Mr. Davis deducted, from the estimated value of development-related cash flow, the estimated value of various development-related costs that he believes private parties would typically allocate as a cost burden to the seller in a typical transaction, without regard to any contrary provisions in Measure G. The deducted items total \$253.2 million in future development-related costs, including entitlement expenses (\$8 million), stadium demolition costs (\$10.5 million), costs to remediate the floodway elevation (\$6 million), other on-site costs (\$133.9 million), off-site costs (\$36.1 million), costs to improve the River Park (\$25.9 million), and foundation costs (\$32.7 million).

According to City staff's calculations, the Fair Market Value of the appraised site as of September 30, 2017, is \$86,246,651 before deducting any River Park costs and stadium demolition costs (discounted to 2017 figures) at the values assumed in Mr. Davis' appraisal. However, Mr. Davis assumed that all costs of building and maintaining the River Park and demolishing the existing stadium would be allocated to a seller in a typical private sector transaction – in the absence of Measure G. Applying a value deduction for those costs, Mr. Davis opined that the Fair Market Value in a typical private sector transaction would be \$68,200,000. More specifically, according to City staff's calculations, the relevant value deductions for River Park and demolition costs, amounting to \$18,046,651, include:

- **\$12,291,655** = total cost to build the adjacent River Park (discounted to 2017 value from a future value of \$25,947,330).
- **\$4,970,094** = total cost to demolish, dismantle, and remove the existing stadium (discounted to 2017 value from a future value of \$10,481,111).

- **\$784,902** = total cost to maintain the adjacent River Park (discounted to 2017 value from a future value of \$3,026,931).

Measure G states: "River Park improvements shall be made at no cost to the City General Fund." SDMC § 22.0908(i). Measure G further states: "Such sale, upon completion, shall ensure that the City does not pay for any stadium rehabilitation costs, stadium demolition or removal costs, stadium cost overruns . . ." SDMC § 22.0908(n). In addition, Measure G proponents and SDSU representatives made various public statements before and after the voters approved Measure G committing SDSU to pay the entire cost of building and maintaining the River Park and demolishing the existing stadium at the Property, without causing any fiscal impact to the City.

As confirmed by Mr. Davis in an email to the parties on October 8, 2019, his appraisal evaluated the Fair Market Value of the site that he would expect to be paid by a "hypothetical private sector buyer in an open market transaction," without taking into account whether Measure G or related campaign promises actually allocated certain development-related costs to SDSU. He further confirmed: "If the City accepts the Fair Market Value [\$68.2 million] as the purchase price, [the City] will, in effect be paying for the demolition and River Park improvements as an off-set to the purchase price." See Attachment G. In that scenario, the City would absorb the estimated River Park and demolition costs at the outset, and SDSU would be able to apply the cost savings in the form of a reduced purchase price toward its payment of actual River Park and demolition costs, resulting in no net expense to SDSU for those items except in the event of cost overruns largely within SDSU's control.

SDSU's offer to purchase the Property for a base purchase price of \$86,200,000 is consistent with the valuation approach used by Mr. Davis, coupled with the provisions of Measure G mandating that the City will not pay for the River Park and stadium demolition costs. As noted above, after discounting future River Park and stadium demolition costs to 2017 value, City staff has calculated the 2017 fair market value at \$86,246,651, which is \$46,651 greater than SDSU's proposed base purchase price. However, the parties have recognized that different calculation methods could be used to discount those future costs to 2017 value, resulting in a slight upward or downward adjustment to the 2017 fair market value. Given this circumstance, the Council may determine it is appropriate to arrive at a negotiated base purchase price of \$86,200,000.

Mr. Davis also prepared a restricted appraisal, which contains sensitivity analyses as requested by the City and SDSU. See Attachment F. In the restricted appraisal, Mr. Davis evaluated an appropriate index adjustment factor that will allow the City to convert the appraised Fair Market Value (after backing out deductions inconsistent with SDSU's Measure G obligations), as of September 30, 2017, into the final purchase price likely payable in 2020 or later. The appraiser believes an index of 2.149% per year would properly account for the time-value of money. The precise Closing Date for SDSU's acquisition of the Property is unknown at this time, although projected to occur by March 27, 2020, under SDSU's proposal. The closing could be delayed beyond a stated target date in the PSA if, for example, a future court injunction postpones the closing.

SDSU's offer includes an increase to the base purchase price that would apply the annual index adjustment factor of 2.149% to the Water Utility Fund's 37% of the Property acreage from September 30, 2017 (i.e., the date of valuation in the appraisal), through the actual Closing Date. This approach will ensure that PUD, through its Water Utility Fund, is made whole financially on the sale of its portion of the Property. As noted in a recent report prepared by the Independent Budget Analyst, if no index adjustment factor is applied, then the City could be vulnerable to a legal challenge from the City's water ratepayers. As discussed with respect to deal point 25 below, SDSU's offer also includes an increase to the base purchase price that would apply the annual adjustment factor to the City General Fund's 63% of the Property acreage from July 1, 2020, through the actual Closing Date, if the closing does not occur by June 30, 2020.

The Council may consider whether the index adjustment factor of 2.149% should be applied to the General Fund's 63% ownership of the Property acreage from September 30, 2017, through the actual Closing Date. Absent this factor being applied, the General Fund (unlike the Water Utility Fund) will not be made whole financially on the time-value of money in the transaction, except as described with respect to deal point 25 below. In that scenario, a prohibited gift of public funds could result unless the Council makes a valid finding that allowing a reduced price will effectuate one or more public purposes. (Note that, while not relevant to SDSU's offer, this same finding regarding public purposes could not protect against a ratepayer challenge if the City is not receiving full value for the Water Utility Fund's 37% ownership.)

	<p>We recommend that the Council evaluate the proposed purchase price in the context of all financial terms in SDSU's offer, some of which will cause the City to incur significant costs for public improvements supporting the Project. SDSU has proposed that the City contribute a collective total of \$10 million toward certain Project improvements, as described with respect to deal points 6 and 7 below. Absent the PSA transaction, it is uncertain whether the City would be required to contribute financially toward Project improvements supporting SDSU's development (other than the City's collection of DIF to cover the anticipated cost of improvements), although the City would realize some public benefits from the completion of those improvements.</p> <p>Finally, we note that, in accordance with Charter section 77, the City's purchase price proceeds from the PSA transaction must be used exclusively for the acquisition and construction of permanent public improvements. The General Fund's portion of the purchase price proceeds may be used to reimburse the General Fund for prior capital expenditures and related financing costs (e.g., payment of the City's bond debt owed with respect to previous stadium rehabilitation efforts).</p>
<p>4. <u>Murphy Canyon Creek</u>: The Murphy Canyon Creek parcel will be included in the sale "as is", and SDSU will not be required to make any improvements to Murphy Canyon Creek."</p>	<p><u>Summary</u>: SDSU's proposal regarding the Murphy Canyon Creek channel is generally consistent with Measure G and will likely benefit the City's interests. However, one necessary point of clarification is whether SDSU will agree to acquire the entire Murphy Canyon Creek channel, including the southernmost portion of the channel south of Rancho Mission Road, or, if not, whether SDSU will agree to maintain (at its own expense) the entire channel, including its southernmost portion. In either event, we recommend that the PSA include a provision requiring SDSU to defend and indemnify the City against risks associated with the channel.</p> <p><u>Analysis</u>:</p> <p>The Murphy Canyon Creek channel is shown in the illustration and narrative text of Measure G as being included within the Property to be acquired by SDSU, and/or within the 34-acre River Park immediately south of the Property (to be constructed and maintained by SDSU). SDMC § 22.0908(x)(3); Measure G, § 8.</p> <p>SDSU's proposal is generally consistent with Measure G in that SDSU will acquire the portion of the Murphy Canyon Creek channel within the Murphy Canyon Creek parcel in</p>

its "as-is" condition and, as the channel owner, SDSU will be responsible for maintaining the channel after the Closing Date.

One key point of clarification is necessary, however. The southernmost portion of the Murphy Canyon Creek channel, south of Rancho Mission Road, may not be included in SDSU's offer because it is outside of the Murphy Canyon Creek parcel. If SDSU's offer includes the City transferring fee ownership of the entire channel to SDSU, then presumably the Property to be acquired by SDSU will be greater than 135.12 acres because the appraised site of 135.12 acres did not appear to include the southernmost portion of the channel, south of Rancho Mission Road. The southernmost portion of the channel appears to be part of the 34-acre River Park, to be retained in the City's ownership and improved/maintained by SDSU. SDSU will be responsible for maintenance of the River Park and, therefore, the portion of Murphy Canyon Creek within the River Park. SDSU's acquisition of the entire Murphy Canyon Creek channel, including its southernmost portion, is an approach that could achieve more consistency with Measure G and more practical benefits to the City in the long term.

If SDSU's offer does not include the City's transfer of the entire channel, and if the Council is not inclined to counter this offer, then the City should clarify in the PSA that SDSU will agree to maintain (at its own expense) all of the channel, including its southernmost portion. However, if the southernmost portion of the channel is not properly maintained and still exists within the City's ownership, the City could incur liability for any flooding and related consequences, such as water pollution.

In addition, given that SDSU is not committing in its offer to improve the condition of the channel, City staff anticipates that the channel will overflow and cause temporary flooding on park portions of the Property during significant storm events. Although our understanding is that the City does not have current plans of its own to improve the channel, SDSU's future development of various project features adjacent to the channel could elevate the risk of damages and regulatory penalties arising from flooding.

We recommend that the PSA include a provision requiring SDSU to defend and indemnify the City against any damages, losses, or penalties arising from SDSU's maintenance (or lack of proper maintenance) of the channel.

5. Stadium Demolition and Maintenance:
Upon the Closing Date, SDSU will assume responsibility for ongoing maintenance, up-keep and demolition of the existing stadium.”

Summary: SDSU’s proposal regarding stadium demolition and maintenance is partially consistent with Measure G. The proposal omits certain important details in Measure G regarding SDSU’s commitment to pay expenses for existing stadium rehabilitation costs, new stadium capital improvements, all stadium cost overruns, public safety, and traffic management-related activities. SDSU may have intended these additional items to be implied in the general wording of its offer, but the items should be explicitly included in the PSA to protect the City’s interests and achieve full consistency with Measure G.

Analysis:

Unless otherwise negotiated in a PSA, it is standard practice for a buyer to assume all maintenance and operating expenses associated with the acquired property immediately upon the Closing Date. The stadium is still operational, and continues to operate at a loss (to the City’s financial detriment), due to the City’s lease allowing SDSU to utilize the stadium for football games through December 31, 2020, on terms favorable to SDSU.

For Fiscal Year 2020, City staff has confirmed that the City’s budgeted revenue for the stadium is \$5,465,292 and the City’s budgeted operational expenses are \$10,335,860, for a budgeted operational loss of \$4,870,568. In addition to this operational loss, the City owes bond debt service in Fiscal Year 2020 totaling \$4,405,907. Together, the operational loss and the debt service create a loss of \$9,275,475 for the City in Fiscal Year 2020 related to the stadium. The City’s Fiscal Year 2020 revenue projection includes SDSU’s annual rent payment of \$1,100,000 to the City, and SDSU’s annual game-day reimbursement to the City of approximately \$700,000.

Measure G states: “Such sale . . . shall ensure that the City does not pay for any stadium rehabilitation costs, stadium demolition or removal costs, stadium cost overruns, Joint Use Stadium operating costs, Joint Use Stadium maintenance, or Joint Use Stadium capital improvement expenses; and that the City be reimbursed for reasonable costs incurred by the City in providing public safety and traffic management-related activities for games or other events at the [Property].” SDMC § 22.0908(n).

SDSU’s written offer does not explicitly require SDSU to comply with all aspects of section 22.0908(n). To achieve full consistency with Measure G, the PSA should clarify that, in addition to SDSU’s commitment to maintain and then demolish/remove the existing stadium (at its own expense), SDSU is accepting the existing stadium in its “as-

	<p>is" condition and is committed to complete (at its own expense) any rehabilitation of the existing stadium and new stadium capital improvements, to pay for all stadium cost overruns, and to reimburse the City for its reasonable costs in providing public safety and traffic management-related activities for games or other events at the Property. The PSA will need to identify a method to calculate the City's reasonable costs and an enforceable mechanism to ensure that SDSU reimburses the City for those costs.</p>
<p>6. <u>Fenton Parkway Bridge</u>: The Draft Environmental Impact Report ("DEIR") does not include the Fenton Parkway Bridge ("Bridge") as a Project component. Nevertheless, SDSU understands the City desires the Bridge as a separate facility, that is party of its long-term traffic circulation plan for the Mission Valley Community Plan area, and the City therefore believes that the Bridge has independent utility without regard to the Project. SDSU does not have detailed information from the City regarding the Bridge. With the cooperation, collaboration and support of SDSU, the City will pursue the Fenton Parkway Bridge as a separate City facility in the future and the Bridge must be and remain a separate City project for CEQA and all other purposes. Subject to the necessary CEQA compliance having been completed by or through the City and all other necessary parties, SDSU will construct a 2-lane, all weather, at grade with the trolley crossing (with turn lane) Bridge and fund its environmental review, design, permitting and construction. SDSU</p>	<p><u>Summary</u>: SDSU's proposal for future completion and joint funding of the Fenton Parkway Bridge includes many facets that will require further analysis and discussion between the parties, as discussed below.</p> <p><u>Analysis</u>:</p> <p>As a threshold matter, it is unclear whether SDSU intends for the proposed City obligations under this deal point to be included in the PSA or memorialized in some other fashion. Appropriate CEQA review must be completed before either party will be able to commit to a specific project involving construction of the Fenton Parkway Bridge (Bridge Project). The parties will need to discuss further how to memorialize the intentions of the parties related to this topic. The parties can establish a preliminary agreement for how construction of the Bridge Project may be accomplished following appropriate CEQA review, but such an agreement could not bind any party or commit a party to a definite course of action, restrict the lead agency from considering any feasible mitigation measures and alternatives, or restrict the lead agency from denying the Bridge Project. <i>See</i> Cal. Code Regs., title 14, § 15004(b).</p> <p>During the Mission Valley Community Plan Update, the City reaffirmed that the Fenton Parkway Bridge, extending Fenton Parkway over the San Diego River to Camino Del Rio North, would be necessary for long-term local and regional circulation for vehicles, transit, bicycle, and pedestrians. SDSU's offer requires the Bridge Project – a two-lane, all weather, at grade with the trolley crossing (with turn lane) bridge – to be reviewed as a separate City project under CEQA outside of the current Draft EIR for SDSU's development project. If the Bridge Project is approved after considering the environmental impacts, effectuating the Bridge Project will require a combination of funding sources per SDSU's proposal.</p>

believes the Project's share of future traffic under the DEIR's "with bridge" scenario is approximately 25%, and on that basis, SDSU's allocated contribution for Bridge costs would be approximately 25% of the total costs. SDSU will receive development impact fee credits. SDSU will also be entitled to use the City's existing capital improvement project funds allocated to the Bridge (approximately \$1.3 million) for Bridge costs. The City will grant SDSU an easement, license and/or other rights necessary for SDSU to construct the Bridge. SDSU agrees it will construct the Bridge before occupancy of more than 65% of planned equivalent dwelling units for the Project. SDSU requests that the City allocate a maximum \$8.5 million of the purchase price proceeds towards construction of the Bridge. This represents the maximum City contribution for the bridge apart from applicable DIF credits."

While SDSU's proposal is not reflective of the maximum build-out at a four-lane extension contemplated by the Community Plan Update, we are informed that SDSU is conducting additional engineering and analysis for improvements and will work with the City to ensure that the design would meet roadway volumes and maintain transit access during non-event conditions. With respect to special events, SDSU has prepared a traffic management plan for directional signage and traffic control. The proposed bicycle facility under this design is a buffered, but not physically separated, facility. According to City staff, while the City's objective with new bicycle facilities is to provide physically separated bike lanes whenever possible, the proposed Bridge Project would need to maintain flexibility for use of bike facilities during an emergency to ensure adequate emergency ingress and egress can be achieved, and therefore, painted buffering would be compatible with the two-lane configuration proposed by SDSU.

SDSU proposes to complete the Bridge Project after the City achieves future CEQA compliance for the Bridge Project. It is our understanding that City staff believes it is more appropriate for SDSU to maintain all responsibility for permitting, environmental compliance, and construction of the Bridge Project. According to City staff, that approach would best ensure construction of the bridge will be completed in a cost-effective manner and, consistent with SDSU's commitment, prior to 65% of planned equivalent dwelling units for the SDSU Campus Master Plan Update. In any event, the PSA (or a separate signed document, such as a memorandum of understanding) should confirm a timing requirement for completion of the environmental review and consideration of the Bridge Project for approval by both parties.

If the Bridge Project is approved in the future, SDSU further proposes to contribute an amount equal to approximately 25% of the total cost of bridge construction. The amount of SDSU's contribution is a policy decision. The Council should seek City staff's input regarding whether the contribution amount is adequate and consistent with the approach that would be used for a private development project, given the traffic analysis of SDSU's development project.

SDSU further proposes to cover the balance of the Bridge Project costs, if the Bridge Project is approved, through the City's contributions of approximately \$1.3 million in existing capital improvement project funds allocated to the bridge, up to \$8.5 million in purchase price proceeds (from the General Fund portion), and DIF credits. The amount

of the City's financial contribution is a policy decision. The Council should seek City staff's input regarding whether the City's contribution amount is fair and equitable, given the traffic analysis of SDSU's development project, and whether it would advance a valid public purpose. City staff also may be able to help clarify whether, in the absence of a voluntary contractual commitment, the City would be required to contribute financially toward the Bridge Project instead of using DIF.

Further, if the Council is otherwise inclined to have the City negotiate with SDSU to create a project labor agreement (PLA) for the Project, the allocation of City funds to assist with completion of the Project might prevent this approach in light of Proposition A. Passed by local voters in 2012, Proposition A amended the Municipal Code to prohibit the City from requiring a PLA on construction projects paid for in whole or in part with City funds, subject to limited exceptions.

If the Bridge Project is approved in the future after the completion of CEQA review, the City would need, in conjunction with the Bridge Project approval, to encumber any City funds allocated for the Bridge Project. Depending on how the City's funding is structured, this Office would need to evaluate if Charter section 99, which pertains to financial obligations extending beyond five years, would require the Council's approval of any future agreements for the Bridge Project by adoption of an ordinance with six affirmative votes.

If the Bridge Project is approved in the future, we recommend that SDSU agree to comply with the City's competitive bidding requirements for the Bridge Project, given that substantial City funds would be used to finance the construction. In the event that State and City competitive bidding rules are in conflict, the PSA should address how to resolve the conflict.

According to City staff, the City's planning documents envision Fenton Parkway bridge as a four-lane collector with a community benefit estimated at approximately 40% for DIF calculation purposes. The SDSU proposal reflects a two-lane collector. To the extent that Fenton Parkway bridge mitigates a Project impact, it may not be eligible for DIF reimbursement. City staff will need to evaluate whether the SDSU-proposed Bridge Project is eligible for the requested credit against DIF. Should the facility be deemed

	<p>eligible, the City's normal process to provide a credit, or other form of reimbursement, is through a Developer Reimbursement Agreement. SDMC § 142.0640(f).</p>
<p>7. <u>Additional Project Improvements:</u> SDSU requests that the City allocate \$1.5 million of the purchase price proceeds in a separate account jointly controlled by the City and SDSU to be held for other related Project improvements."</p>	<p><u>Summary:</u> We recommend that the Council evaluate SDSU's proposed deal point for the City's contribution of \$1.5 million toward additional Project improvements in the context of the overall financial package in SDSU's written offer. If the Council agrees with this deal point, the City's \$1.5 million contribution should be subject to appropriate controls in the PSA to ensure that the City's money is used for a valid public purpose.</p> <p><u>Analysis:</u></p> <p>As noted above with respect to deal points 3 and 6, we recommend that the Council evaluate all of the financial terms in SDSU's offer in their totality, as opposed to evaluating any single financial term in isolation.</p> <p>SDSU's proposal for the City to allocate \$1.5 million of the purchase price proceeds toward additional Project improvements is general and vague. It is unclear whether SDSU proposes for the additional Project improvements to be identified specifically in the PSA or to be determined at a future date. It is also unclear whether the additional Project improvements will be evaluated in SDSU's Final EIR to ensure that CEQA compliance is achieved for those improvements. We note that this \$1.5 million contribution appears to be in addition to, and not inclusive of, the \$1.3 million contribution toward the Bridge under deal point 6.</p> <p>If the Council is inclined to agree to the City's \$1.5 million General Fund contribution toward additional Project improvements, we recommend that the PSA include appropriate controls to ensure that the City's money is used for a valid public purpose, that the City's money is not used for environmental mitigation that otherwise would be the responsibility of SDSU, and that the expenditure complies with applicable City laws, including competitive bidding rules. For example, the PSA should precisely identify the improvements and a timeline for SDSU's completion of the improvements. Under Measure G, the City-funded Project improvements could not consist of River Park</p>

improvements, stadium demolition, or other obligations assigned to SDSU under Measure G.

We further recommend that, to protect the City's financial interests, the PSA should require the City's additional contribution to be held in a separate City-controlled account (rather than a jointly-controlled account) and used by the City to reimburse SDSU for costs actually incurred in building the identified improvements. Also, the identified improvements should have one or more demonstrated public benefits, as opposed to benefitting any private development components in the Project. City staff may be able to help clarify whether, in the absence of a voluntary contractual commitment, the City would be required to contribute financially toward the improvements instead of using DIF. Finally, similar to the discussion above with respect to deal point 6, once the final funding structure is known, this Office will need to evaluate if Charter section 99 would require Council approval of the PSA by an ordinance with six affirmative votes.

8. Transportation Improvements: In addition to the transportation mitigation responsibilities under the Final Environmental Impact Report ("FEIR"), SDSU will provide \$5,000,000 for additional traffic improvements in coordination with the City."

Summary: The Council could determine that SDSU's proposed deal point is reasonable and consistent with Measure G, but additional information and traffic analysis is required. To ensure consistency with Measure G, the PSA should identify, and secure the performance of, SDSU's commitment to complete specific on-site and off-site traffic improvements, including specific trolley and other public transportation improvements.

Analysis:

Measure G imposes an "environmental commitment" on SDSU to "take steps to reach agreements with the City of San Diego and other public agencies regarding the payment of fair-share mitigation costs for any identified off-site significant impacts related to campus growth and development associated with the [Property]." SDMC § 22.0908(h). Measure G also states that the Project must include "[t]rolley and other public transportation uses and improvements to minimize vehicular traffic impacts in the vicinity." *Id.* § 22.0908(c)(5)(I).

SDSU refers to its transportation mitigation measures under the Final EIR, without quantifying its monetary contribution toward those mitigation measures. SDSU also commits to provide \$5 million in additional traffic improvements. We note that the appraiser assumed a typical developer of the Property would incur off-site costs of \$36.1 million, and did not provide a figure for on-site traffic improvements. It is not clear from

SDSU's offer how much money SDSU proposes to contribute toward the completion of traffic improvements and how much money will be allocated to on-site vs. off-site improvements. SDSU will need to clarify this point.

SDSU is still in the process of completing its Final EIR for the Project. Thus, where SDSU's deal point refers to traffic mitigation measures in the Final EIR, the City cannot presently confirm which traffic mitigation measures SDSU proposes to complete. Until SDSU completes the Final EIR and provides it to the City for review, the City will not be able to fully evaluate whether the proposed \$5 million in additional traffic improvements is sufficient to cover SDSU's fair-share mitigation costs for any identified off-site significant cumulative impacts resulting from the Project.

Based on information contained in the Draft EIR, City staff has informed us that SDSU should pay 100% of the cost of all improvements listed in a recent memo provided by SDSU to the City and estimated by SDSU to total \$22 million. See Attachment H. All of those improvements are necessary to mitigate direct environmental impacts associated with the Project, for which a fair-share payment is not appropriate mitigation under CEQA. City staff is presently coordinating with SDSU to clarify the analysis, and through that coordination, additional feasible mitigation may be identified for both non-event (daily) circulation impacts, as well as special event related circulation impacts.

To ensure consistency with Measure G, the PSA should identify, and secure the performance of, SDSU's commitment to complete specific on-site and off-site traffic improvements, including specific trolley and other public transportation improvements.

9. "River Park: SDSU will design, construct and maintain in perpetuity, the 34-acre River Park, and pay 100% of those costs. The River Park improvements will be completed no later than seven (7) years after the Purchase and Sale Agreement's ("PSA") effective date and prior to occupancy of any building on the Property, other than the new stadium."

Summary: SDSU's proposal regarding River Park commitments is generally consistent with Measure G and related campaign promises, with two caveats. First, the PSA should identify the elements of the River Park specified in Measure G and should include adequate mechanisms to secure SDSU's performance of its construction and long-term maintenance obligations related to the River Park. Second, SDSU's proposal to build and maintain three storm water treatment facilities, or basins, in the City-owned River Park to treat on-site runoff could pose a significant liability risk to the City.

Analysis:

Measure G requires SDSU to construct the 34-acre River Park, containing certain specified elements, such as active and passive park uses, walking and biking trails, a river buffer of native vegetation, and measures to mitigate drainage impacts and ensure compliance with water quality standards. SDMC § 22.0908(f). Measure G further requires SDSU to complete construction of the River Park within seven years after the signature date of the PSA. *Id.*

SDSU's offer to design, construct, and maintain (in perpetuity) the 34-acre River Park, at SDSU's sole cost, and to complete construction within seven years of the PSA effective date (i.e., signature date) and before occupancy of any building on the Property other than the new stadium, is consistent with Measure G and SDSU's related campaign promises, as long as the specific elements identified in Measure G are included in the River Park. To ensure consistency with Measure G, the PSA should identify, and secure the performance of, SDSU's commitment to complete specific elements within the River Park and to maintain the River Park in perpetuity. An up-front monetary endowment may be appropriate to secure SDSU's long-term maintenance obligation; if SDSU does not fulfill that obligation in the future, the City, as fee owner of the River Park, will become responsible for maintenance. Therefore, the PSA should include language ensuring that SDSU's promise to maintain the park in perpetuity is enforceable and complies with State law, and that SDSU has the requisite authority to bind the State in this manner.

Council Policy 600-33 requires developers to complete the City's General Development Plan process for design and development of any park within the City, including specific requirements for public engagement and outreach. According to City staff, SDSU has conducted outreach with identified stakeholders, as well as the public, in the development of the River Park design. While SDSU's process is not entirely consistent with Council Policy 600-33, the Council will be taking action to approve the PSA and, in its discretion, may elect to waive application of this policy to the Project.

SDSU's most recent renderings propose to locate three storm water treatment facilities, or basins, in the City-owned River Park to treat on-site runoff, as well as potential flooding from both Murphy Canyon Creek and the San Diego River. According to City staff, those three basins are located within the proposed 100-year floodplain, and in some instances located as low as the 25-year floodplain. Under the City's normal development

	<p>requirements, SDSU would be required to treat storm water runoff from the development parcel outside of the 100-year floodplain and on property owned in fee by SDSU instead of on City property (i.e., the River Park). According to City staff, SDSU's relocation of the basins to its own development site (i.e., the Property) is an approach more consistent with Measure G – including SDSU's obligation to mitigate drainage impacts and ensure compliance with water quality standards – and offering more practical long-term benefits to the City.</p> <p>If the Council is not inclined to counter SDSU's offer and require the basins to be relocated to SDSU's own development parcel, this Office recommends clarifying in the PSA that SDSU will agree to indemnify the City and maintain (at its own expense) the basins. However, even if SDSU agrees to indemnify the City, if the basins are not properly maintained and still exist within the City's ownership, the City could incur liability for any improper maintenance or flooding and related consequences, such as pollutants washing out of the basins during flood events.</p>
<p>10. <u>“Additional 22 Acres of Parks: SDSU will design, construct and maintain at least 22 acres of population-based park facilities, owned by SDSU and available for general community use and enjoyment.”</u></p>	<p><u>Summary:</u> SDSU's proposal for the additional 22 or more acres of park facilities is generally consistent with Measure G, although the PSA should identify the precise location of the park facilities, confirm that the park facilities will be publicly-accessible active recreation space in perpetuity, and provide an enforceable mechanism to ensure SDSU's successful long-term maintenance and management of the park facilities.</p> <p><u>Analysis:</u></p> <p>Measure G states that, in addition to the River Park, SDSU must reserve and improve at least 22 acres of publicly-accessible active recreation space. SDMC § 22.0908(i).</p> <p>SDSU's offer includes a minimum of 22 additional acres of population-based park facilities within the SDSU Campus Master Plan Update. The offer appears to be consistent with the general objective of Measure G, as long as all of the additional acreage will be accessible to the public for active recreation as expressly required by Measure G. SDSU will need to provide a detailed map of the areas to be included in the proposed 22 acres. According to City staff, the additional park space should reflect the level of park standards the voters anticipated for this area, as demonstrated by City-qualifying parks and recreation spaces, and should be maintained at a level consistent with, or greater than, the standards of the City's Parks and Recreation Department.</p>

	<p>Further, if flooding occurs in the additional park space, SDSU should commit to restore the area immediately to a usable state.</p> <p>This Office recommends that the PSA include a comprehensive and enforceable plan, acceptable to City staff, governing SDSU's long-term maintenance and management of the public park spaces. As with deal point 9, the PSA should include language ensuring that SDSU's commitment to maintain the 22 acres in perpetuity complies with State law, and that SDSU has the requisite authority to bind the State in this manner.</p>
<p>11. <u>Future City Recreation Center Site:</u> SDSU will reserve an approximately one-acre site upon which the City may construct and operate a recreation center in the future, as called for in the Mission Valley Community Plan.”</p>	<p><u>Summary:</u> It is our understanding that City staff generally agrees with SDSU's proposal to reserve a one-acre site for a future recreation center. The parties will need to coordinate additional details for inclusion in the PSA to implement appropriate long-term management, maintenance, and protection of the recreation center site.</p> <p><u>Analysis:</u></p> <p>SDSU has offered to reserve a one-acre site for the recreation center, to be set aside for the City to develop at a later date. It is unclear whether SDSU proposes to lease or transfer fee ownership of this site, but in any event, we will presume SDSU's proposal is to allow the City to gain control of the site for nominal consideration and for the local community's long-term benefit.</p> <p>The City has communicated to SDSU that SDSU must raise the footprint for the recreation center site in its Campus Master Plan to an elevation that would be outside of the 100-year flood level based on post-construction conditions. The PSA should integrate a detailed stormwater maintenance and management plan to ensure that on-site Best Management Practices (BMPs) do not result in unforeseen conditions of flooding or erosion adversely affecting the recreation center site.</p> <p>Also, the parties will need to discuss whether any interim uses of this one-acre site will be permitted pending the eventual construction of a recreation center and, if so, which party will be responsible for site maintenance during the interim period and any demolition and-site preparation work once construction of the center is ready to proceed.</p>

12. Development Impact Fees: SDSU's non-state private development partners constructing non-SDSU facilities will pay development impact fees ("DIF"), but SDSU and other publicly developed and occupied facilities will be exempt. Because of the timing of construction of the River Park and the additional park improvements, it is anticipated the Project will contain completed parks in excess of the City's requirements and therefore it is anticipated no party constructing any improvements in the Project will be required to pay park DIF fees. SDSU shall be entitled to cash reimbursement or DIF credits for the reimbursable costs expended by SDSU and approved by the City in accordance with the PSA and the Mission Valley Impact Fee Study."

Summary: SDSU's proposal regarding DIF will need to be discussed further between the parties to achieve consistency with Measure G and ensure that the PSA clearly spells out the parties' mutual expectations with respect to DIF credits, exemptions, and the like.

Analysis:

Measure G states: "Such sale and ultimate development shall require development within the [Property] to comply with the City's development impact fee requirements, parkland dedication requirements, and housing impact fees/affordable housing requirements." SDMC § 22.0908(1). Measure G does not explicitly provide any exemption from DIF for publicly developed and occupied facilities.

SDSU's proposal does not clearly distinguish between the types of facilities that would be considered SDSU/public facilities (and thus exempt from DIF under SDSU's proposal) vs. non-SDSU facilities (and thus subject to DIF). SDSU recently relayed a general estimate that, within the Project, 80 percent of the 4,600 dwelling units and 80 percent of the 1.6 million square feet of non-residential campus development uses would be anticipated to pay DIF. The parties may need to make a clear distinction in the PSA, and possibly identify specific improvements in the exempt vs. non-exempt categories, to avoid future disputes, assuming the Council concludes that exempting certain public improvements on the Property from DIF is consistent with Measure G.

If SDSU's proposed park facilities meet City standards, SDSU may be eligible for DIF credits for the cost of the park projects. To the extent those facilities are in the Mission Valley Impact Fee Study and are completed in accordance with the City's development standards, the City could consider SDSU's request to reduce or waive the park component of DIF in an amount equal to the cost of the park projects.

The City's process to provide facilities in-lieu of paying the park component of DIF is typically captured in a Park Development Agreement (PDA) to be considered by the Council. The terms of the PDA can include: amount of DIF reduction, cost of the proposed facilities, site access, General Development Plan preparation, design, construction, schedule, procurement process, turnover/acceptance, etc. The parties will need to consider whether to include the PDA as an attachment to the PSA or state in the PSA that the future completion of a PDA is a condition to SDSU's receipt of any reduction or waiver in the park component of DIF.

13. Affordable Housing: SDSU will provide onsite, 10% of the total number of housing units developed to be set aside as affordable housing units, which may include student housing units. Affordable housing units will be reasonably phased in to coincide with market-rate units.”

Summary: SDSU’s proposal to develop on-site affordable housing is generally consistent with Measure G, although the PSA should (a) confirm details regarding the product type and targeted income levels applicable to the affordable restricted units, (b) identify a specific phasing plan for construction and occupancy of affordable units relative to market-rate units, and (c) include one or more effective mechanisms to secure SDSU’s completion of its affordable housing development obligations.

Analysis:

Measure G states that the Project must include affordable homes, among other development components. SDMC § 22.0908(c)(5)(H). Measure G further states: “Such sale and ultimate development shall require development within the [Property] to comply with the City’s . . . housing impact fees/affordable housing requirements.” *Id.* § 22.0908(l). Affordable housing units constructed within the City must comply with the City’s inclusionary housing regulations and density bonus regulations (if utilized), including timing, comparability, performance security, targeted area median income requirements, and affordability terms.

SDSU’s proposal is very general, without any specifics as to whether the affordable housing units will be for-sale vs. rental units, which income eligibility restrictions will apply to the units (e.g., moderate income, low income, very low income, extremely low income), and what quantities of different product types will be offered (e.g., the percentage of affordable units that is targeted to families, seniors, and income-eligible students, and the variation in bedroom counts among the units). A student is not normally eligible for occupancy in an affordable housing unit, unless the student meets certain income and independent household requirements.

We note that SDSU’s earlier, October 14 offer involved providing a hybrid of the types of on-site affordable units – both rental units and for-sale units – that would be required under the City’s inclusionary housing ordinance in Chapter 14, Article 2, Division 13 of the Municipal Code. SDSU will need to clarify whether it still intends to use this hybrid approach. The City typically does not allow this hybrid approach in a single project. Normally, if a developer opts to produce on-site affordable housing units, the developer must comply with the City’s on-site inclusionary affordable housing requirements in

effect at the time of issuance of building permits (or equivalent permits) for residential units.

SDSU proposes a reasonable phasing of affordable housing units relative to market-rate units in the Project. We recommend that the parties discuss, and then incorporate into the PSA, a specific phasing plan under which the affordable housing units in the Project must be constructed and available for occupancy in a timely manner relative to the market-rate housing units. For example, SDSU could agree to a phasing plan in which SDSU causes a certain percentage of total affordable housing units, at specified income levels, to be developed by specified milestones in the evolution of the Project.

The PSA should secure SDSU's completion of its affordable housing development obligations through a combination of performance bonds, letters of credit, recordable covenants, and/or other long-term protections. If the PSA does not contain adequate security for performance of SDSU's development obligations, SDSU could unilaterally modify its Campus Master Plan in the future, without the City's consent, thereby depriving local voters of their reasonable expectations in approving Measure G. In a typical development project, the City imposes long-term affordability covenants against the site and provides for monitoring and enforcement of the affordability covenants (normally, the San Diego Housing Commission will monitor compliance upon the developer's payment of established monitoring fees).

14. Groundwater Management: SDSU will grant appropriate easements to the City, without expense to the City, to install groundwater wells and related facilities within the agreed upon easement location on the Property, and to allow retention of two existing monitoring wells. SDSU will also acknowledge the City's continued retention of its Pueblo water rights."

Summary: SDSU's proposal related to groundwater management appears to be consistent with Measure G, and to our knowledge, is acceptable to City staff. The PSA will need to include appropriate provisions to protect the City's interests.

Analysis:

Measure G states: "Such sale shall acknowledge that portions of the [Property] are currently owned by the City's Public Utilities Department, which has reserved rights to extract subsurface water, minerals, and other substances (excluding those under permanently erected structures)" SDMC § 22.0908(u).

PUD has prepared a map delineating a limited area within the Property where PUD anticipates needing to install groundwater wells and supporting infrastructure to facilitate the City's long-term groundwater management and use and management of the aquifer,

including groundwater extraction. The supporting infrastructure would include new pipelines to provide a connection from existing sewer lines north of the San Diego River to the City's future Pure Water treatment plan to be located south of the San Diego River. The City would need an easement through the delineated portion of the Property to install, operate, and maintain groundwater wells and supporting infrastructure where necessary for the success of the Pure Water program and the City's groundwater management purposes. See Attachment I.

It is our understanding that SDSU's proposal is consistent with PUD's expectations in terms of providing the City with easement rights to install, operate, and maintain groundwater wells and supporting infrastructure, and acknowledging that the City retains the reserved rights identified in Measure G, including Pueblo rights to access and use the water aquifer beneath a portion of the Property. The City and SDSU will need to coordinate further on specific project details to ensure, to the extent feasible, that the Project does not adversely impact the City's groundwater management activities and Pueblo water rights, and vice versa. Those details can be memorialized in the PSA.

Finally, the City maintains several of its own wells on the Property and intends to retain two of its existing monitoring wells. SDSU's proposal includes granting an easement related to the ongoing operation and maintenance of those monitoring wells. The parties will need to determine a process for the City's future removal of those wells, if the City eventually opts to remove them, in compliance with applicable regulations governing the wells. Those details can be memorialized in the PSA.

15. Removal of Kinder Morgan Wells:
The City will use reasonable efforts to cause Kinder Morgan to timely remove and close all monitoring and extraction wells and related facilities on the Property."

Summary: It is our understanding that City staff agrees with SDSU's proposal regarding the removal of wells from the Property by Kinder Morgan Energy Partners, L.P. (Kinder Morgan). The timing for Kinder Morgan's completion of well removal cannot currently be predicted with any certainty. The PSA should reflect that the City can use reasonable efforts, but has limited ability to "cause" well removal. Also, the PSA language should be consistent with the current plan to remove certain existing wells, vaults, and facilities from the Property and to abandon in place other existing facilities.

Analysis:

The City is not responsible for the removal of wells installed on the Property by third parties, such as Kinder Morgan, and has limited ability to "cause" their removal. On June

	<p>27, 2019, the City signed a Right of Entry Permit with Kinder Morgan, permitting Kinder Morgan to remove certain existing wells, vaults, and facilities from the Property or otherwise abandon in place certain existing facilities. See Attachment J. The City has made, and will continue to make, its best efforts to ensure Kinder Morgan completes the required work on a timeline and in a manner reasonably acceptable to SDSU; however, the City cannot guarantee a completion date, as the work is being performed by Kinder Morgan. As SDSU is aware, the City has sought a written determination from the California Department of Industrial Relations (DIR) regarding whether Kinder Morgan's work on the Property under the terms and conditions of the Right of Entry Permit requires that Kinder Morgan pay prevailing wages for that work. Pending receipt of the DIR's determination, Kinder Morgan is not undertaking any work, despite having previously signed the Right of Entry Permit in which it agreed to pay prevailing wages for the work.</p> <p>We recommend that the PSA reflect the City's limited ability to "cause" well removal and specify the current plan to remove certain existing wells, vaults, and facilities from the Property and to abandon in place other existing facilities.</p>
<p>16. <u>Environmental Contamination</u>: SDSU will purchase the Property "as is", with all faults. SDSU will defend and indemnify the City against all claims regarding Property's condition and waive all environmental claims against the City. Without incurring any expense or liability, the City will tender written claims to Kinder Morgan for reimbursement of any Property remediation costs arising from Kinder Morgan's environmental contamination."</p>	<p><u>Summary</u>: SDSU's proposal to acquire the Property in its "as-is" condition, with all faults, and to waive all environmental claims against the City, is consistent with the City's normal approach in selling its real property. The City can tender a written claim to Kinder Morgan for reimbursement of environmental remediation costs, as long as the PSA is carefully drafted to ensure that, by doing so, the City is not incurring any expense or liability whatsoever.</p> <p><u>Analysis</u>: Measure G states: "Such sale and ultimate development shall not impair the City's ability to continue its plan of environmental remediation of the [Property] and River Park based on its existing agreements with responsible parties." SDMC § 22.0908(p). Measure G, at Finding 14, states: "The City has entered into settlement agreements with certain adjacent landowners to address the [environmental] contamination, and these agreements govern the allocation of costs for mitigation or remediation work on, under, or in the vicinity of the [Property] and San Diego River Park. This Initiative will not alter any</p>

obligations under existing settlement agreements that pertain to the [Property] and the San Diego River Park.”

The only agreement in place with a responsible party related to environmental remediation of the Property and the River Park site is the Settlement Agreement and General Release signed in June 2016 (Settlement Agreement) between the City and Kinder Morgan. See Attachment K. The Settlement Agreement resolved two federal lawsuits filed by the City against Kinder Morgan related to the historical accidental release of petroleum from the adjacent Mission Valley Terminal site owned and operated by Kinder Morgan.

The Settlement Agreement requires Kinder Morgan to indemnify the City for any additional redevelopment costs that are “(1) actually incurred by the City related to the Redevelopment of the Qualcomm Stadium Property, and (2) would not have been incurred but for Historical Releases” of environmental contaminants. Under the Settlement Agreement, the City is not liable for any existing environmental contamination from the historical releases.

Kinder Morgan has remediated the environmental contamination on the Property to the satisfaction of the applicable regulatory agencies for the existing stadium use, as evidenced by two “no further action” letters issued by the California Regional Water Quality Control Board in 2011 and 2016 (referenced in Recital D of the Settlement Agreement). No environmental remediation is currently ongoing or required at the Property to support the current uses. Since early 2019, the City has enabled SDSU to conduct extensive due diligence on the Property, including environmental tests/sampling, pursuant to a right-of-entry agreement. Therefore, SDSU should have a reasonable sense of whether any environmental remediation may be required in connection with the Project. Moreover, SDSU is the current primary tenant of the Property.

The City could tender a written claim to Kinder Morgan for reimbursement of environmental remediation costs under the Settlement Agreement. However, the PSA will need to be carefully drafted so that the City’s obligation ceases once the City has tendered a written claim; and if Kinder Morgan rejects the claim, the City is not accepting any expense or liability whatsoever by undertaking the effort of tendering the claim. Further, consistent with SDSU’s waiver of environmental claims against the City, the PSA will need to include language by which SDSU agrees to hold the City harmless

<p>17. <u>Compliance with CEQA</u>: The execution and closing of the PSA is conditioned upon compliance with CEQA, which will include the Board of Trustees of the California State University's certification of the Mission Valley Campus Master Plan FEIR and the City's making of responsible agency findings under the FEIR, among other things. SDSU, by delivering this offer, and the City, by accepting this offer, are not bound or committed to a definite course of action with respect to the PSA or the Project. Consistent with CEQA Guidelines 15004(b)(4), nothing in this offer shall commit or be interpreted to commit SDSU or the City formally or as a practical matter to a definite course of action, to preclude the consideration of feasible mitigation measures and alternatives, or to restrict denial of the PSA or the Project, prior to the certification or approval of said FEIR. The terms proposed in this offer are subject to CEQA compliance through the DEIR and FEIR, and do not constrain meaningful consideration during the CEQA review process of all feasible mitigation measures</p>	<p>from, and defend and indemnify the City against, any future liabilities related to the Property's existing condition. If SDSU acquires the Property and encounters any environmental contamination issues that Kinder Morgan refuses to reimburse under the Settlement Agreement with the City, SDSU could pursue its own future claim for monetary damages against Kinder Morgan.</p>
<p><u>Summary</u>: CEQA compliance will be required before the governing body of each party considers approval of the final, negotiated PSA. We do not perceive any compelling need for the parties to sign a term sheet at this stage, but if the Council wishes to consider formal approval of a term sheet (which could include a counteroffer based on the Council's evaluation of relevant factors), then City staff and the City Attorney's Office could draft specific language in the term sheet to confirm that it is non-binding in nature and thus does not trigger the need for immediate CEQA review.</p> <p><u>Analysis</u>:</p> <p>The Council will evaluate the potential environmental impacts of the Project under CEQA and consider approval of the PSA after the CSU Board of Trustees certifies the Final EIR and approves the PSA. The Council will make an independent judgment on the Project, reflective of environmental analysis required by the State CEQA statutes (Public Resources Code section 21000, et al.) and the State CEQA Guidelines, as well as any applicable City regulations related to the action on the PSA.</p> <p>Before approving the PSA and relying on the environmental analysis in the EIR, the Council could approve a non-binding term sheet that provides a framework for negotiating the complete PSA. If the Council wishes to approve a term sheet in advance of the PSA, the Council should first consider whether the term sheet needs to reflect revised deal points based on the analysis contained in this document and any input from City staff and the Independent Budget Analyst. If approval of a term sheet is pursued, City staff and the City Attorney's Office will need to prepare language to include in the term sheet to emphasize its non-binding nature and to achieve full compliance with CEQA. Otherwise, the Council's approval of the term sheet could trigger the need for immediate CEQA review, even though the Council does not yet have the benefit of reviewing SDSU's proposed Final EIR.</p>	<p><u>Summary</u>: CEQA compliance will be required before the governing body of each party considers approval of the final, negotiated PSA. We do not perceive any compelling need for the parties to sign a term sheet at this stage, but if the Council wishes to consider formal approval of a term sheet (which could include a counteroffer based on the Council's evaluation of relevant factors), then City staff and the City Attorney's Office could draft specific language in the term sheet to confirm that it is non-binding in nature and thus does not trigger the need for immediate CEQA review.</p> <p><u>Analysis</u>:</p> <p>The Council will evaluate the potential environmental impacts of the Project under CEQA and consider approval of the PSA after the CSU Board of Trustees certifies the Final EIR and approves the PSA. The Council will make an independent judgment on the Project, reflective of environmental analysis required by the State CEQA statutes (Public Resources Code section 21000, et al.) and the State CEQA Guidelines, as well as any applicable City regulations related to the action on the PSA.</p> <p>Before approving the PSA and relying on the environmental analysis in the EIR, the Council could approve a non-binding term sheet that provides a framework for negotiating the complete PSA. If the Council wishes to approve a term sheet in advance of the PSA, the Council should first consider whether the term sheet needs to reflect revised deal points based on the analysis contained in this document and any input from City staff and the Independent Budget Analyst. If approval of a term sheet is pursued, City staff and the City Attorney's Office will need to prepare language to include in the term sheet to emphasize its non-binding nature and to achieve full compliance with CEQA. Otherwise, the Council's approval of the term sheet could trigger the need for immediate CEQA review, even though the Council does not yet have the benefit of reviewing SDSU's proposed Final EIR.</p>

or alternatives, including the "No Project" alternative required by CEQA."

18. "Possessory Interest and Other Taxes: SDSU's non-state private development partners constructing improvements in the Project solely for private use and not for the benefit of or in support of SDSU's governmental mission will be required to pay sales tax, possessory interest tax, and/or transit occupancy tax, as required by applicable law. SDSU and other publicly developed property will be exempt from paying property or possessory interest taxes."

Summary: Measure G contemplates that the parties will negotiate specifics regarding tax payment obligations affecting development components on the Property. We view SDSU's proposal for payment of, vs. exemption from, the identified categories of taxes as a starting point in the negotiation of tax payment obligations. The parties should negotiate this point, and then the PSA should reflect specifics on the development components that will be subject to future payment of taxes. This approach will protect the City's interests and help avoid any future dispute regarding payment of taxes.

Analysis:

Measure G lists various required elements of the Project and confirms that certain elements, "as applicable," must contribute sales tax, possessory interest tax, and/or transient occupancy tax for the City's benefit. SDMC § 22.0908(c)(5). Also, Measure G states that SDSU and the City must negotiate applicable taxes for development on the Property. *Id.* § 22.0908(s).

SDSU will need to provide more specifics on its opinion regarding which future facilities on the Property should be considered in support of SDSU's governmental mission and not solely for private use, and therefore, exempt from payment of local taxes. Without more specifics, the parties could become involved in a future dispute as to whether certain elements of the Project require the payment of local taxes, and SDSU could later contend that all elements of the Project will support its governmental mission and that the Project does not contain any non-SDSU facilities.

We recommend that the PSA confirm the specific development aspects that will be subject to future payment of local taxes, based on negotiations between the parties as contemplated by Measure G. The PSA could confirm, for example, that: (a) sales tax will apply to specified elements of the Project; (b) possessory interest tax will apply to SDSU's lease of any portion of the Property to a third party for specified private uses; and (c) the City's transient occupancy tax and tourism marketing district assessment will apply to specified elements of the Project, such as hotel uses and short-term rentals.

	<p>If the City agrees with SDSU that certain governmental use portions of the Property will be deemed exempt from paying taxes, the City could lose substantial future tax revenue as a result of this exemption – particularly if the exemption is applied broadly. If the City agrees with SDSU’s proposal, the City could negotiate for SDSU’s payment of an amount in lieu of taxes that would fully or partially compensate the City for the anticipated loss of future tax revenue.</p>
<p>19. “<u>Legal Challenges</u>: SDSU will defend and indemnify the City for all legal challenges with respect to approval of the FEIR, PSA, and Campus Master Plan.”</p>	<p><u>Summary</u>: SDSU’s proposal to defend and indemnify the City against all legal challenges is appropriate, given that the City’s sale of the Property will allow SDSU to pursue the Project and given further that SDSU is the entity preparing the Final EIR. SDSU’s proposal can be incorporated into the PSA with appropriate clarifying language.</p> <p><u>Analysis</u>:</p> <p>Where a project requires the City’s discretionary approval, it is typical for the developer of the project to agree to defend and indemnify the City against legal challenges related to the City’s approval of the project. The main rationale for this typical approach is that the developer stands to gain the most by pursuing the project, and the City is accommodating the developer’s completion of the project by the City’s approval. Here, by approving the sale of the Property to SDSU, the City is accommodating SDSU’s pursuit of the Project. SDSU’s proposal reflects the typical approach.</p> <p>To comply with San Diego Charter section 40, the PSA will need to clarify that the defense obligation will include SDSU’s payment of legal fees for the City’s defense of any lawsuit through the City Attorney’s Office and/or an outside law firm whose retention has been authorized by the Council.</p>
<p>20. “<u>Sovereignty</u>: Consistent with SDMC section 22.0908 and CSU’s status as a sovereign state public agency, nothing in the PSA will abrogate the authority of the California State University Board of Trustees. CSU alone will issue all development related permits and collect all DIFs (for disbursement to the City if</p>	<p><u>Summary</u>: SDSU’s proposal to have unilateral authority to issue development permits and collect DIF is not dictated by Measure G and is an appropriate matter for further discussion between the parties. In addition, we recommend that the PSA include a reliable mechanism for collection and payment to the City of all applicable fees that the City typically charges to commercial development and new residential development.</p>

required by SDMC section 22.0908) for all aspects of the Project.”

Analysis:

Measure G does not specifically address, one way or another, SDSU’s sovereignty with respect to the issuance of development permits and the collection of DIF.

If the Council wishes for SDSU to have unilateral permitting authority with respect to various aspects of the Project, we recommend that the parties memorialize controls and parameters in the PSA to govern SDSU’s permitting authority so that the City’s interests are fully protected. We recommend the recording of land use covenants on the Property, enforceable by the City, to hold SDSU accountable to deliver the Project in a manner consistent with Measure G and related campaign promises.

The Council may wish to explore with City staff whether there is any precedent for SDSU’s proposal to collect DIF on the City’s behalf. We view SDSU’s proposal as highly unusual and potentially problematic. If SDSU is delegated the function of collecting DIF and then disbursing an appropriate share to the City; and if the Council agrees that the public components of the Project should be exempt from DIF, then the City’s financial interests will be protected only if the PSA clearly distinguishes between the public vs. private components of the Project. The importance of this topic is discussed above with respect to deal point 12.

Measure G states: “Such sale and ultimate development shall require development within the [Property] to comply with the City’s development impact fee requirements . . . and housing impact fees/affordable housing requirements.” SDMC § 22.0908(1). If SDSU is allowed to exercise unilateral permitting authority for the Project, we recommend including a provision in the PSA that requires the collection and payment to the City of all applicable fees, which includes not only DIF, but also the following fees: (a) the City’s housing impact fee, also known as the commercial linkage fee, which is charged to commercial developments and provides funding administered by the San Diego Housing Commission for affordable housing purposes; and (b) the Regional Transportation Congestion Improvement Program fee, which is charged to new residential development and provides a funding mechanism to offset the negative impact of growth on congestion and mobility.

<p>21. <u>Measure G Compliance</u>: The PSA will incorporate all other conditions and requirements as required by SDMC section 22.0908 and related Measure G campaign promises.”</p>	<p><u>Summary</u>: It is appropriate for the PSA to incorporate all conditions and requirements of Measure G and related campaign promises.</p> <p><u>Analysis</u>: This topic is addressed in further detail in the separate spreadsheet prepared by this Office.</p>
<p>22. <u>CSU Approval</u>: The California State University Board of Trustees must accept and approve if at all, the FEIR, Campus Master Plan and PSA. The target date for such California State University Board of Trustees action is January 28, 2020.”</p>	<p><u>Summary</u>: Based on our experience with complex transactions, it is typically useful for the parties to establish target dates for the completion of negotiations and the presentation of final transaction documents for formal approval. SDSU’s target dates are highly optimistic and may not be feasible, however, due to the factors discussed below.</p> <p><u>Analysis</u>:</p> <p>We note that the City has requested that SDSU, since at least April 2019, provide a comprehensive, bona fide offer to purchase the Property. SDSU presented a written offer on October 14, 2019, during a Council meeting, and a revised offer on October 28, 2019. SDSU’s presentation of the written offer will allow the parties to negotiate specific deal points in good faith.</p> <p>The timing of completing PSA negotiations will depend mainly on how many versions of the PSA will need to be exchanged between the parties before they reach consensus on all terms. The PSA will be a complex document with numerous deal terms and various attachments. Every term of the PSA will be important. If any term is not clearly and accurately memorialized, one party or the other could incur additional risk, or a future dispute could arise between the parties due to ambiguities in the PSA. Typically, the detailed transaction documents for a complex real property transaction, such as this one, would take at least four months (often much longer) to draft and negotiate starting from the point at which the parties have agreed upon a comprehensive term sheet. A time projection of four months would assume only a moderate level of negotiation of PSA language on specific deal points. The risks associated with an unnaturally accelerated PSA negotiation could fall disproportionately on the City and its taxpayers.</p> <p>The timing of the Final EIR is within SDSU’s control and could be delayed if, for example, SDSU’s revisions to the Draft EIR in response to public comments already</p>

<p>23. <u>Council Approval</u>: The City Council must accept and approve if at all, the Final EIR findings and related mitigation measures, and PSA. The target month for such City Council action is February 2020. Such action will require the introduction and adoption of a Charter section 221 ordinance.”</p>	<p>received and to incorporate PSA deal points now being negotiated may trigger the need to recirculate a revised Draft EIR for additional public review and comment.</p> <p><u>Summary</u>: As stated above with respect to deal point 22, it is useful for the parties to establish target dates for completion and approval of the PSA.</p> <p><u>Analysis</u>:</p> <p>As noted in the above discussion with respect to deal point 1, to comply with Charter section 221, the Council will need to adopt an ordinance to approve the negotiated PSA and make a finding that the PSA transaction will achieve “bona fide governmental purposes.” The ordinance will need to be introduced and adopted during two separate Council meetings, and the ordinance will become effective 30 days after the date of its passage. This ordinance requirement is expected to add at least six weeks of processing time to the parties’ completion of the PSA transaction.</p> <p>The Council will need to make its own independent judgment as to whether the Final EIR adequately discloses the potential environmental impacts of the Project and mitigates identified environmental impacts to the extent feasible.</p>
<p>24. <u>Closing Date</u>: The closing will occur shortly after the parties enter into the PSA with a target Closing Date of no later than March 27, 2020.”</p>	<p><u>Summary</u>: We agree that the PSA should establish a target Closing Date. Whether a Closing Date by the end of March 2020 is feasible will depend on when the PSA is successfully negotiated and then presented for formal approval.</p> <p><u>Analysis</u>:</p> <p>We are encouraged that SDSU plans to consummate the closing immediately after the governing body of each party has approved the PSA. We interpret SDSU’s projected timing to mean that SDSU will not seek to impose any conditions precedent on the closing that could delay the closing. Earlier in 2019, SDSU had indicated to City representatives that the closing would need to be delayed until after all CEQA lawsuits are resolved, which could cause a delay of up to several years and impose risk on the City, as the City would rely upon an environmental document prepared by SDSU and its consultants. Based on SDSU’s written offer, the City presumes SDSU is no longer requesting a closing condition of that nature.</p>

25. "Potential Delay in Closing: If the Closing Date does not occur by June 30, 2020, through no fault (including unreasonable delays) of either party, (a) the City will lease the Property to SDSU for \$1.00 per month; (b) SDSU will assume all ongoing costs of maintaining and operating the Property, including the stadium; and (c) unless the delay is the City's fault, the purchase price will increase on prorated basis, applying an index factor of 2.149% from July 1, 2020 until the Closing Date."

Summary: The Council must make a policy decision as to whether SDSU's proposal for modified deal terms, in the event of a delayed closing, is fair and equitable and in the public interest. We recommend that, at a minimum, clauses (a) and (b) in SDSU's proposed deal point be modified to adequately protect the City's interests. Of utmost importance, we recommend that the PSA establish a reasonable outside Closing Date so that the closing is not delayed indefinitely and assurance is provided that SDSU will timely fulfill its obligation to local voters under Measure G to complete significant improvements beneficial to the public.

Analysis:

Measure G is silent with respect to any delays in the closing and any modified deal terms in the event of a delayed closing. However, Measure G requires that construction of the River Park and the Joint Use Stadium be completed within seven years after the signature date of the PSA. SDMC § 22.0908(i), (j). Also, a statement in Measure G suggests, and SDSU's recent public statements confirm, that the Joint Use Stadium would be constructed and operational in time for the commencement of the 2022 collegiate football season. *Id.* § 22.0908(t).

Because construction of the River Park and the Joint Use Stadium is likely to take several years, it is necessary to establish a reasonable outside Closing Date to ensure that the closing is not delayed indefinitely and that SDSU fulfills its obligation under Measure G to timely construct major improvements beneficial to the public. An outside Closing Date of December 31, 2023, for example, would likely provide sufficient time for SDSU to complete construction of the River Park and the Joint Use Stadium within the mandatory seven-year time frame.

Given that SDSU's offer does not specify any conditions precedent to the closing, we presume that the only scenario in which a delay of the closing would occur is if a lawsuit is filed by a third party and a court issues a temporary injunction that prevents the parties from consummating the PSA transaction.

With respect to clause (a) in SDSU's deal point, the Council will need to determine whether a rental amount of \$1.00 per month is reasonable in light of clauses (b) and (c). SDSU's proposal to lease the Property at \$1.00 per month would not adequately compensate the Water Utility Fund with respect to its 37% portion of the Property. If the

rental amount is not increased, the City's General Fund will be required to compensate the Water Utility Fund for the interim use of its portion of the Property.

With respect to clause (b), the Council may determine that, in a scenario where the sale transaction is delayed through no fault of either party, it is fair and equitable for SDSU to assume all ongoing costs of maintaining and operating the Property. We recommend that the PSA include the pre-negotiated lease as an attachment and that the lease include a provision confirming: (i) SDSU would be responsible to complete and pay for any rehabilitation costs and capital improvements related to the safe operation of the existing stadium; and (ii) SDSU would defend and indemnify the City against any claims related to the condition of the Property, including the stadium and the creek channel. This approach would be consistent with Measure G's requirement that the completion of the sale shall ensure the City does not pay for any stadium rehabilitation costs, by confirming that this requirement continues to apply during any prolonged escrow period. *Id.* § 22.0908(n).

With respect to clause (c), it is appropriate to apply the annual index factor of 2.149% to the General Fund's 63% portion of the Property commencing July 1, 2020. As discussed with respect to deal point 3 above, SDSU's purchase price proposal envisions that the annual index factor would be applied to the Water Utility Fund's 37% portion of the Property commencing September 30, 2017, though the actual Closing Date.

ATTACHMENT 2 TO CITY ATTORNEY REPORT

Additional Deal Points for the Council's Consideration

Potential Additional Deal Point and Related Analysis	
<p>Measure G states that the sale of the Property must provide for the development of a number of specific uses, including: the development of the Joint Use Stadium; the River Park; an additional minimum of 22 acres of publicly-accessible active recreation space on the Property; demolition, dismantling, and removal of the Existing Stadium; facilitating daily and efficient use of the Green Trolley Line transit station, accommodating the Purple Trolley Line, and enhancing the pedestrian connection to the existing light rail center; and facilities for educational, research, entrepreneurial, and technology programs with a "vibrant mixed-used campus village and research park." SDMC § 22.0908(c), (i), (j), (k). In addition, SDSU's campaign promises included a commitment to "build a world-class university research and innovation campus" on the Property.</p> <p>Unlike deal point 8 in SDSU's earlier, October 14 offer, SDSU's revised, October 28 offer does not identify the required elements of the Project in accordance with Measure G. To be consistent with Measure G, the PSA must provide for the development of each of the specific uses listed in Municipal Code sections 22.0908(c), (i), (j), and (k) and ensure SDSU's compliance with all other applicable requirements of the Municipal Code.</p> <p>According to City staff, the Draft EIR did not reflect the regional efforts to incorporate the recommended trolley alignment for the Purple Line into the Project to ensure that the site plan integrates two trolley stations and provides for a bus transit center and mobility hubs. City staff would need to evaluate whether the proposed trolley alignment may adversely impact recreational uses within the park areas of the Project.</p>	<p><u>Project Elements</u></p>
<p>SDSU made commitments during and after the Measure G campaign to incorporate certain environmental design and environmentally-friendly operational features into the Project, including, but not limited to: (a) the new stadium will be constructed to a standard of LEED Version 4 Silver or better; (b) all other construction activities on the Property will meet a standard of LEED Version 4 Silver or better; (c) the Project will include effective bio-retention basins with native shrubs and trees (no invasive plants); (d) the Project will apply best practices for bird-safe windows; (e) design guidelines will be established and enforced for architectural, park, and ecological design elements of the Project; (f) all lighting of recreational fields will follow current San Diego River guidelines; (g) to the maximum extent possible, trails through the bioswale area will be elevated; (h) the Project will include at least 80 acres of project open space; (i) SDSU will ensure that certain park areas adjacent to the San Diego River will</p>	<p><u>Environmental Design Features</u></p>

	<p>be completed before SDSU completes the vertical construction of any building structures within the Project, other than the joint use stadium and ancillary facilities; and (j) the Murphy Canyon Creek corridor will be enhanced to increase the ecological function of the creek buffer. We recommend including all of these development commitments in the PSA, with appropriate security to ensure that SDSU and/or its lessees eventually fulfill the commitments (see next item).</p>
<p><u>Security for Performance of Obligations</u></p>	<p>We recommend including provisions in the PSA to ensure that SDSU is accountable to complete all of its development obligations under Measure G and related campaign promises made to local voters. To ensure SDSU remains accountable in fulfilling voter expectations, we recommend that the PSA secure completion of all development obligations by SDSU and/or its lessees through a combination of performance bonds, monetary endowments, recordable covenants, and/or other long-term protections. If the PSA does not contain adequate security for performance of SDSU's development obligations, and if the City relies solely on the components in SDSU's Final EIR, SDSU could exercise its sovereign power to unilaterally modify its Campus Master Plan in the future, without the City's consent, thereby depriving local voters of their reasonable expectations in approving Measure G and likely depriving the City of anticipated future tax revenue.</p>
<p><u>Development Costs</u></p>	<p>To ensure consistency with Measure G, we recommend that the PSA include a broadly-worded provision confirming that SDSU has the sole responsibility and liability, at its sole cost, for all development and construction activities on the Property and the River Park site in accordance with all applicable laws, as well as for all mitigation measures associated with such development and construction activities.</p>
<p><u>Reduction of GHG Emissions</u></p>	<p>Measure G states: "Such sale and ultimate development shall require development within the [Property] to comply with the City's greenhouse gas (GHG) emission reduction goals." SDMC § 22.0908(m). SDSU's offer includes its commitment to comply with all applicable Municipal Code requirements, but does not expressly mention GHG reduction goals – a high priority for the Council in light of the City's Climate Action Plan. The Council may wish to ask SDSU to identify precisely how the City's GHG emission reduction goals, including compliance with the City's Climate Action Plan, will be met through the Project. The PSA could memorialize SDSU's obligation to achieve those goals through recordable covenants or other adequate security.</p>
<p><u>Prevailing Wage Compliance</u></p>	<p>Measure G sets forth certain requirements related to prevailing wage compliance and worker protections during construction of the Project. SDMC § 22.0908(w). SDSU's offer includes its commitment to comply with all applicable Municipal Code requirements, but does not expressly mention compliance with prevailing wage laws and worker protections. We recommend that the PSA confirm SDSU's commitment to comply with those specific requirements, and also confirm as follows: (i) the City's approval of the PSA is not an award of a construction contract with respect to any portion of the Project on the Property or the River Park site; (ii) the City will not be</p>

	<p>responsible for compliance with any prevailing wage requirements with respect to the Project, including the River Park improvements; and (iii) SDSU will indemnify and defend the City (with legal counsel of the City's choice) as to any alleged noncompliance with prevailing wage requirements. Moreover, if the final PSA includes any direct or indirect City financial subsidy toward SDSU's acquisition or development of the Property or the River Park site, the City will need to revisit whether additional prevailing wage language is needed in the PSA.</p>
<p><u>As-is Sale</u></p>	<p>We anticipate that the PSA will include broadly-worded language to confirm the "as-is" nature of the transaction. Measure G does not require the City to make any representations or warranties regarding the Property. The City normally includes detailed language in a PSA confirming that the buyer has conducted extensive due diligence, the sale will occur on an "as-is, where-is" basis, and the City has not made any representations, warranties, or guaranties of any kind except as expressly set forth in the PSA. This detailed language also includes the buyer's representation and warranty that it is a knowledgeable and sophisticated purchaser of real property and that it is relying solely on its own expertise and the expertise of its consultants and advisors and has made and relied upon its own inspections of all aspects of the Property. The detailed language also confirms that the City has furnished any due diligence materials to the buyer as a convenience only and that the City makes no representation or warranty as to the truth, accuracy, or completeness of any materials, data, or information delivered by or on behalf of the City in connection with the sale of the Property. We recommend that the PSA include these typical provisions for the City's protection. We also note that, if SDSU completes due diligence and is not satisfied with the physical condition of the Property or the suitability of the Property for SDSU's intended purposes, SDSU is under no obligation to acquire the Property.</p>
<p><u>Indemnity and Release Language</u></p>	<p>In a typical transaction, the PSA will state that the buyer indemnifies the City and defends the City (with legal counsel of the City's choosing) for all claims resulting from or related to the buyer's breach of the terms of the PSA and any claims related to the Property that arise on or after the Closing Date, including those related to defects of the Property, even where the defects existed prior to the Closing Date. The typical PSA also will include the buyer's general release of claims against the City and a related Civil Code section 1542 waiver, including for all claims related to environmental contamination on the Property. We recommend that the PSA include these typical provisions for the City's protection.</p>
<p><u>No New Taxes</u></p>	<p>Measure G states: "Such sale shall not raise or impose any new or additional taxes on City residents." SDMC § 22.0908(q). We recommend that the PSA include a confirmation to this effect.</p>
<p><u>Easements</u></p>	<p>To the extent not already addressed in this Office's analysis of SDSU's deal points, the PSA will need to provide for SDSU's conveyance of easements in the City's favor to ensure the City's successful operation and maintenance of any public facilities within or under the Property that will continue in effect after the Closing Date,</p>

	<p>as well as to ensure ongoing public access through any private streets within the Property so that the public enjoys the benefits of important public assets, such as trolley improvements and River Park improvements.</p>
<p><u>Privatization of Sewer System</u></p>	<p>Representatives of SDSU and the City have recently discussed SDSU's proposal to privatize the sewer system within the Property. SDSU believes its proposal would reduce its development costs and simplify its development of the Property. SDSU's proposal is unprecedented based on the City's experience because it would privatize sewers downstream of public sewers, meaning that if SDSU fails to properly maintain its sewers, sewer service to upstream City customers could be compromised. SDSU's proposal would require careful analysis to protect the interests of the City and its customers, and could cause a significant delay in documenting the PSA transaction.</p>
<p><u>Wetland Mitigation Plan</u></p>	<p>The City has existing obligations with respect to the Wetland Mitigation Project located immediately south of the Property to be acquired by SDSU. The Wetland Mitigation Project has been installed, and is being monitored and maintained, in accordance with an existing mitigation plan and regulatory authorizations granted by resource agencies, such as the Regional Water Quality Control Board, the U.S. Army Corps of Engineers, and the California Department of Fish and Wildlife. The City will need to carefully evaluate the applicable regulatory documents and the negotiated purchase terms to avoid any circumstance that could place the City in violation of its obligations with respect to the Wetland Mitigation Project.</p>
<p><u>Evidence of Financing</u></p>	<p>To ensure that SDSU fulfills all of its Measure G obligations and related campaign promises as memorialized in the PSA and for the public benefit, we recommend that the Council consider requiring SDSU to provide a financing plan reasonably acceptable to the City and included in the PSA. The financing plan would identify SDSU's source of funds to fulfill all of its financial obligations under the PSA and ancillary documents, including acquisition of the Property and construction and ongoing maintenance of various improvements. If SDSU cannot demonstrate its financial ability to fulfill all of its obligations, the Council may wish to consider whether it is prudent, and in the public interest, to dispose of the Property – a valuable public asset – to SDSU.</p>
<p><u>Apportionment of Purchase Price Proceeds</u></p>	<p>Whether in the PSA or in a separate document, the City will need to determine how to apportion the purchase price proceeds equitably between the General Fund and the Water Utility Fund, in a manner that makes the Water Utility Fund whole on its 37% ownership. The City could attribute a per-acre monetary value to each acre of the Property and also could attribute a monetary value to easements and aquifer-related rights retained by the City for the benefit of water and sewer ratepayers. We recommend that the City retain a qualified appraiser to provide a fair, objective basis for the apportionment of purchase price proceeds.</p>