

November 5, 1990

REPORT TO THE HONORABLE
MAYOR AND CITY COUNCIL
POMERADO ROAD

Background

On October 3, 1988, the City Council voted 5-3 to amend the Scripps Ranch Community Plan to close Pomerado Road during reconstruction and until Alternative 8A was completed. Earlier this year Councilmember Bernhardt inquired of our office if it was legally possible to continue the closure once reconstruction was completed. Our response was that the required findings to keep the road closed would be difficult to make.

On October 15, 1990 the City of Poway, via their counsel, communicated with our office indicating that if the City of San Diego did not re-open Pomerado Road when the reconstruction was completed, they would consider filing an action to compel the City to do so. On October 16, 1990 at a closed session pursuant to California Government Code section 54956.9(b)1, the San Diego City Council agreed to open the road upon completion of construction and directed the City Manager and City Attorney to take such action as was appropriate to cause that re-opening in due course.

A discussion of the opening of Pomerado Road is now on the Docket of November 5th as Item S405.

Historical Perspective

In the 1979 San Diego City General Plan, Pomerado Road was described as a major street. According to City standards a major street is normally a four lane road configuration. The Scripps Ranch Community Plan provides for a two lane design. The City staff proposed a four lane design, but in 1984 the City Council approved several two lane improvements and realigned Pomerado Road to the boundary of the County Island. It should be noted that the two lane design of the road contributes to the low level of service on Pomerado Road.

On June 29, 1987 the City Council amended the Scripps Miramar Ranch Community Plan to provide conditions for the annexation of the County Island. This was the first of two actions taken by the Council on the closure of Pomerado Road. The 1987 amendments added several conditions to the Plan relating to Alternative 8A, one of which being "Pomerado Road shall be closed upon the annexation of the County Island. It shall not be

re-opened until Alternative 8A is completed as a paved four lane road from Pomerado Road to Interstate 15," Exhibit A, Resolution No. R-268716. It should be noted that there was no environmental analysis of the road closure portion of this amendment to the community plan in 1987.

However, the City staff subsequently prepared a separate Environmental Impact Report to address the issues relating to the closure of Pomerado Road, EQD No. 88-0558. One of the significant adverse impacts identified in the EIR was the extended closure of Pomerado Road after reconstruction. This EIR was considered by the City Council on October 31, 1988, at which time the Council again voted 5 to 3 to close Pomerado Road until Alternate 8A was completed. The Council also adopted findings of overriding consideration to address the unmitigated adverse impacts of the extended closure. After this action, an ordinance authorizing a development agreement with BCED was adopted allowing development of Miramar Ranch North and requiring the construction of Alternative 8A. Subsequently a referendum petition was circulated regarding this ordinance. The City Clerk reported to the City Council that the referendum petition qualified, and the City Council elected to repeal the ordinance adopting the development agreement rather than place it on the ballot.

Basic Legal Issue:

On what basis may the City of San Diego continue the closure of the reconstructed portion of Pomerado Road when its reconstruction is complete?

Answer:

It is our view that unless the City Council can make the findings required by California Vehicle Code section 21101(a) it does not have the authority to continue the closure.

Reasoning:

Local agency authority to close streets such as Pomerado Road to traffic is found in California Vehicle Code (21100 et seq.) or the Streets and Highways Code (8700 et seq.). *Rumford v. City of*

Berkeley, 31 Cal. 3rd 545 (1983). The statutory authority for temporary closings of this nature is found in the Vehicle Code. Vehicle Code section 21101(a) provides that a highway may be temporarily or permanently closed when it is no longer needed for vehicular traffic. Section 21101(f) provides that barriers can be erected to implement the circulation element of a general plan. It seems to be clear from the City's own findings that Pomerado Road is still needed. See EIR 88-0558. Therefore Section 21101(a) does not appear to provide sufficient authority to continue the closure.

The City of San Diego's general plan currently shows Pomerado Road as a major street. The road's continued closure would be inconsistent with and not an implementation of the City's current general plan, therefore 21101(f) also appears to provide no relief.

It is possible to close a portion of a street when it is necessary for the safety of persons using the closed portion during the temporary closing, Vehicle Code section 21101(e). Once the construction has been completed, the authority for closure under this section expires.

At the time of preparation of the EIR in 1988, it was contended that the ongoing construction of Alternative 8A provided a basis for continued closure of Pomerado Road. This argument appears appropriate only if the Alternative 8A's completion was concurrent with the completion of reconstruction of Pomerado Road. (See California Vehicle Code section 21101(f)) The repeal of the development agreement to which we alluded above and has made simultaneous or near simultaneous completion impossible.

Other considerations and contentions

We have been presented with some of the theories espoused by advocates of continued closure. We now describe the theories as we know them and outline our position on these theories.

Issue:

It has been contended that the language of the community plan is controlling and the Council must amend that plan prior to re-opening Pomerado Road.

Response:

If our views on this matter, as expressed above, are followed, the language prohibiting the Pomerado Road re-opening has no current valid legal basis. We do not believe that a community plan provides the City with authority greater than the Vehicle Code. A City's authority over the public highways is specifically limited to the powers granted in the California Vehicle Code, *Rumford v. City of Berkeley*, 31 Cal. 3rd 545 (1983), Vehicle Code section 21. Vehicle Code section 21101(a) provides that a road may be closed by the City Council only if it finds that the road is no longer needed.

Thus, if it is not within the City's statutory authority to keep the road closed, the language in the Plan cannot be implemented. To adopt the position being contended would be tantamount to asserting that the City has the power to supersede state highway regulations by inserting language into its community plans.

"The right of control over street traffic is an exercise of a part of the sovereign power of the State."

Ex Parte Daniels (1920) 183 Cal. 636, 639.

Except as otherwise expressly provided, the provisions of this code are applicable and uniform throughout the State and in all counties and municipalities therein, and no local authority shall enact or enforce any ordinance on the matters covered by this code unless expressly authorized herein.

Vehicle Code section 21

Issue:

It has been suggested the City must comply with the procedural requirements of the California Environmental Quality Act (Public Resources Code sections 21000 et seq.) before it makes a decision to re-open Pomerado Road.

Response:

EIR 88-0554 prepared for this closure has been certified and fully addressed the alternative of opening Pomerado Road upon the completion of construction. The

conclusions in that document make it clear that this alternative was considered in the decision.

Alternative B involves the earlier re-opening of Pomerado Road (after completion of Pomerado Road reconstruction, yet prior to the opening of Alternative 8A). Re-opening of Pomerado Road immediately after its reconstruction would serve to bring the levels of service on impacted intersections along Poway Road and at the I-15 intersection back up to an acceptable level. This Alternative would result in a reduction in the level of significance of impacts associated with traffic and air quality impacts as identified for the overall road closing project. However, this Alternative would create new significant traffic impacts associated with the potential addition of 14,300 trips to Pomerado Road through the Scripps Ranch community.

EIR 88-0558 conclusions.

CEQA provides that:

"When an environmental impact report has been prepared for a project pursuant to this division, no subsequent or supplemental environmental impact report shall be required by the lead agency or by any responsible agency, unless one or more of the following events occurs: (a) Substantial changes are proposed in the project which will require major revisions of the environmental impact report. (b) Substantial changes occur with respect to the circumstances under which the project is being undertaken which will require major revisions in the environmental impact report. (c) New information, which was not known and could not have been known at the time the environmental impact report was certified as complete, becomes available."

Public Resources Code section 21166

CEQA has been complied with. The EIR identified the continued closure of Pomerado Road as a significant unmitigated adverse impact. There is no requirement in CEQA that an agency continue to engage in an adverse activity while it studies whether to cease doing it.

Issue:

It has been asserted that the re-opening of Pomerado Road is a project under CEQA. Because of this, CEQA procedures and rules should apply and the City should give public notice and conduct all procedures required by CEQA before opening the road.

Response:

(a) CEQA applies to discretionary decisions of a local agency. A purpose of CEQA is to provide discussion of feasible alternatives in the exercise of a discretionary act. Public Resource Code section 21102. Since we believe that in these circumstances the legislature has preempted this field and the City has very limited powers to keep road closures in effect. Vehicle Code section 21. The discretion the Council exercised in closed session was whether to open the road or expose the City to litigation.

CEQA would not provide any guidance to the Council in that decision.

(b) Since CEQA has been complied with, and no further action under CEQA is required, there is no legal requirement to circulate or notice any further proceedings.

(c) CEQA gives an agency no additional authority to perform acts.

In mitigating or avoiding a significant effect of a project on the environment, a public agency may exercise only those express or implied powers provided by law other than this division. However, a public agency may use discretionary powers provided by such other law for the purpose of mitigating or avoiding a significant effect on the environment subject to the express or implied constraints or limitations that may be provided by law.

Public Resources Code section 21104 (Emphasis added)

As we see it, the only potentially significant change from the circumstances of the original EIR is the now more distant likelihood of Alternative 8A's construction. This item is listed as a significant unmitigated adverse impact in the EIR. We fail to see this fact as a basis for requiring a new environmental review.

Final Action:

In order to finalize this matter we respectfully suggest you direct us to prepare an appropriate resolution memorializing the repeal of the prior resolution which directed the closure and return it to you for your formal consideration on November 13, 1990.

Respectfully submitted,
JOHN W. WITT
City Attorney

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