

**Office of
The City Attorney
City of San Diego**

**MEMORANDUM
MS 59**

(619) 533-5800

DATE: May 16, 2013
TO: Honorable Mayor and City Councilmembers
FROM: City Attorney
SUBJECT: Balboa Park Transportation Plan

INTRODUCTION

This memorandum is in response to various concerns raised at the City Council Park & Recreation budget hearing on May 5, 2013, regarding a budget proposal of \$300,000 for the proposed Balboa Park Transportation Plan (BPTP). The memorandum briefly highlights potential legal issues related to the BPTP, and is provided as preliminary legal guidance only. Upon further refinement or direction from the Mayor or City Council, this Office will provide additional legal review and analysis.

The May 5, 2013 budget hearing did not involve the approval of any specific project; therefore, the description of the project in this memorandum is based on a presentation made by the Mayor to the Balboa Park Committee as well as additional information regarding the project details that was contained in the Independent Budget Analyst's (IBA) Report. *See Attachments 1 and 2.*

The BPTP consists of three phases. Phase I is the closure of the Cabrillo Bridge to vehicular traffic on weekends and holidays beginning on Saturday May 25th. Phase II is the removal of parking from the Plaza de Panama, with traffic re-routed to flow through the southwest quadrant of the Plaza de Panama during the weekdays. On weekends and holidays, when the Cabrillo Bridge is closed, traffic heading north into the Plaza de Panama would have to make a u-turn upon entering the Plaza de Panama. Phase II is anticipated to occur in late June or early July 2013. Phase III is the expansion of the accessible parking in the Alcazar Parking Lot, along with the resurfacing of a portion of the lot. This Office is unaware of a timeframe for Phase III. The BPTP also includes the relocation of the valet parking drop-off from directly west of the House of Hospitality to the parking lot directly south of the Casa de Balboa, and the installation

of tables, chairs, and other amenities in the Plaza de Panama. It is unknown which phase of the BPTP will implement these aspects.

Should further details about the BPTP become available, or should the BPTP be revised, this Office is available to provide further analysis.

ANALYSIS

I. CLOSURE OF THE CABRILLO BRIDGE

A. CEQA Analysis of Effects

The primary concern with the proposed closure of the Cabrillo Bridge to vehicular traffic is whether the potential effects of the closure on the environment have been properly considered in accordance with the California Environmental Quality Act (CEQA). Unless otherwise exempt, CEQA applies to discretionary projects proposed to be carried out. Cal. Pub. Res. Code § 21080(a). A discretionary project is “a project which requires the exercise of judgment or deliberation when the public agency or body decides to approve or disapprove a particular activity, as distinguished from situations where the public agency or body merely has to determine whether there has been conformity with applicable statutes, ordinances, or regulations.”¹ CEQA Guidelines² § 15357. The closure of the Cabrillo Bridge is an exercise of judgment or deliberation by the Mayor.³

The Environmental Impact Report (EIR) that was certified by the City Council on July 9, 2012, for the Plaza de Panama project contained analyses of four alternatives to the Plaza de Panama project that included the closure of the Cabrillo Bridge.⁴ These alternatives, collectively called the “Pedestrianize Cabrillo Bridge Alternatives,” include the No New Parking Structure Alternative (Alt. 3A), Organ Pavilion Parking Structure Alternative (Alt. 3B), West Mesa Parking Structure Alternative (Alt. 3C), and Inspiration Point Parking Structure Alternative (Alt. 3D). EIR at 9-1 – 9-146. A comparison of the potentially significant environmental effects of the alternatives is summarized in Table 9-1 of the EIR. EIR at 9-17 – 9-26.

¹ By way of contrast, a ministerial project, which is not subject to CEQA, is defined as the “mere [] appli[cation of] the law to the facts as presented” involving “no special discretion or judgment in reaching a decision.” Cal. Pub. Res. Code § 21080(b)(1); CEQA Guidelines § 15369. A ministerial decision involves only the use of fixed standards or objective measurements; the public official cannot use personal, subjective judgment in deciding whether or how the project should be carried out. *Id.*

² Cal. Code Regs., title 14, §§ 15000 to 15387 (CEQA Guidelines).

³ CEQA applies to decisions by any person or group of people within a public agency permitted by law to approve or disapprove the project at issue. CEQA Guidelines § 15356.

⁴ Although the Plaza de Panama project EIR contained an analysis of these alternatives and has been certified in accordance with CEQA, before any project with significant, unmitigated impacts can be approved, findings and a statement of overriding considerations must be made. CEQA Guidelines §§ 15091, 15093. While the City Council adopted findings and a statement of overriding considerations for the Plaza de Panama project, the City Council did not do so for any alternative discussed in the EIR. Therefore, if a different project is considered that would have significant, unmitigated impacts, the decision-maker must adopt additional findings and a statement of overriding considerations before that project could be approved.

Each of the Pedestrianize Cabrillo Bridge Alternatives has significant, unmitigated impacts related to traffic capacity. EIR at 9-20 – 9-21. The traffic mitigation for impacts to the intersections was based on weekend counts (worst case), to provide a more accurate indicator of actual traffic, although roadway segments were analyzed and mitigated for weekday impacts. EIR at 9-75, 9-94, 9-115, 9-134 – 135.

Regarding the traffic capacity impacts in 2015, the significant, unmitigable traffic capacity impact would be to A Street, between Sixth Avenue and Park Boulevard (except for the Inspiration Point Parking Structure Alternative). EIR at 9-76, 9-94, 9-116, 9-135. In addition, the traffic analyses for all of the Pedestrianize Cabrillo Bridge Alternatives demonstrate that there would be various other traffic capacity impacts that could be mitigated to below a level of significance. EIR at 9-76, 9-94, 9-115, 9-135. This Office is not aware whether any review of potential traffic impacts has occurred for the BPTP. Therefore, there could be additional, significant, unmitigated traffic capacity impacts due to the implementation of the BPTP.

There are also numerous significant, unmitigable traffic capacity impacts in 2030. However, at the Budget hearing, it was represented that the BPTP was a temporary plan, and that re-evaluation of the BPTP would occur when the Cabrillo Bridge is re-opened after the seismic retrofit scheduled to be completed by Caltrans in approximately May 2014. For that reason, the 2030 impacts are not discussed herein.⁵

It has been suggested that because the BPTP is temporary, CEQA review need not occur. The definition of “significant effect” does not directly take into account the duration of a project; instead, public agencies are to consider the “substantial, or potentially substantial, adverse change in any of the physical conditions within the area affected by the project” CEQA Guidelines § 15382.

Although the duration of an environmental effect is one fact that may affect the significance of that effect, short term effects may nevertheless be of such significance as to require an EIR. *No Oil, Inc. v. City of Los Angeles*, 13 Cal. 3d 68, 85 (1974). Recently, the San Diego Unified School District’s argument that a project’s parking impacts did not constitute a significant impact on the physical environment because the impact was temporary was rejected. *Taxpayers for Accountable Sch. Bond Spending v. San Diego Unified Sch. Dist.*, No. D060999, 2013 WL 1767674 (Cal. App. Mar. 26, 2013). The court determined that temporary impacts caused by parking are appropriately reviewed under CEQA, because the vehicles “constitute physical conditions in an area that may be affected by the proposed project, thereby requiring a lead

⁵The significant, unmitigable 2030 traffic capacity impacts are to the intersection of Park Boulevard/Space Theater Way, Sixth Avenue between Robinson and Upas Street, Sixth Avenue between Upas Street and Quince Drive, Robinson Avenue between Vermont Street and Park Boulevard (except for the West Mesa Parking Structure Alternative), and A Street between Sixth Avenue and Park Boulevard. EIR, pg. 9-76, 9-94-95, 9-116. In addition, the Inspiration Point Parking Structure Alternative will have significant, unmitigable impacts to the intersection of Park Boulevard and the SR-163 Northbound on-ramp, and the intersection of Park Boulevard and Space Theater Way. EIR at 9-135.

agency to study whether a project's impacts on parking may cause a significant effect on parking and thus the environment."⁶ *Id* at 22.

CEQA contains a categorical exemption for minor alterations to land for "minor public or private alterations in the condition of land, water, and/or vegetation which do not involve removal of healthy, mature, scenic trees except for forestry and agricultural purposes," such as the "use of land having negligible or no permanent effects on the environment, including carnivals, sales of Christmas trees, etc." CEQA Guidelines § 15304(e). However, a categorical exemption cannot be used when an exception to the exemptions applies. CEQA Guidelines § 15300.2. A possibly relevant exception in this case is that a categorical exemption may not be used where there is a reasonable probability that the activity will have a significant effect on the environment due to unusual circumstances. CEQA Guidelines § 15300.2(c). Although the City has no proactive duty to determine that the exceptions to the exemptions are inapplicable, the City cannot ignore evidence of unusual circumstances. Stephen L. Kostka & Michael H. Zischke, *Practice Under the California Environmental Quality Act*, § 5.71 (Cont. Ed. Bar 2012). The exception to the exemption is a two step inquiry into whether there are unusual circumstances, and if there is a reasonable possibility of a significant effect on the environment due to the unusual circumstances. *Banker's Hill, et al. v. City of San Diego*, 139 Cal. App.4th 249 (2006). A determination as to whether the circumstances regarding the proposed application of an exemption are unusual will be based on whether there is some feature of the project that distinguishes it from others in the exempt class. *Voices for Rural Living v. El Dorado Irr. Dist.*, 209 Cal. App.4th 1096, 1109 (2012). In considering whether there is any reasonable possibility that the project may have a significant effect on the environment, the court will consider whether the record contains any substantial evidence supporting a fair argument that the project will have a significant effect on the physical environment. *Banker's Hill*, 139 Cal. App.4th at 281. There already exists substantial evidence before the City that closure of the Cabrillo Bridge would result in significant, unmitigable traffic capacity impacts based on the analysis in the Plaza de Panama Project EIR. In addition, the Metro San Diego Community Development Corporation recently submitted a letter to the City Council regarding the BPTP and the significant, unmitigable traffic and parking impacts to the communities adjacent to Balboa Park, in the event of the closure of Cabrillo Bridge. *See* Attachment 3.

The potential traffic impacts caused by Phase I, the closure of the Cabrillo Bridge, are discussed in this memorandum separately from the potential environmental impacts caused by other phases of the proposed BPTP. However, CEQA requires the analysis of the entire project, that is, the whole of the action, which has a potential for resulting in either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment. CEQA Guidelines § 15378. There is some discretion in CEQA regarding the timing of the analysis, so that the analysis may be performed early enough in the decision making to influence the project,

⁶ It has also been suggested that the closure of the Cabrillo Bridge for the BPTP is no different than the closure of the Bridge for various Special Events. This comparison is not at all helpful; the City is currently in litigation regarding its pattern and practice of failing to perform CEQA review before issuing Special Event Permits. *Coastal Environment Rights Foundation, Inc. (CERF II) v. City of San Diego*, No. 37-2010-00102574-CU-WM-CTL (San Diego Super. Ct.)

but late enough to provide meaningful information for the analysis, however, breaking the environmental review of the significant impacts of a larger project into smaller components, “piecemealing,” is forbidden by CEQA. CEQA Guidelines § 15004; *Banning Ranch Conservancy v. City of Newport Beach*, 211 Cal. App.4th 1209, 1222 (2012). The CEQA analysis must include “the environmental effects of future expansion or other actions if (1) it is a reasonably foreseeable consequence of the initial project; and (2) the future expansion or action will be significant in that it will likely change the scope or nature of the initial project or its environmental effects.” *Laurel Heights Improvement Ass’n v. Regents of the University of California*, 47 Cal. 3d 376, 396 (1988). Nevertheless, separate environmental review of projects which seem related may be conducted when the two projects serve separate purposes or can be implemented independently. *Banning Ranch Conservancy*, 211 Cal. App.4th at 1223. A key factor in determining whether the CEQA analysis has been improperly piecemealed is whether one project is a reasonably foreseeable consequence of another. *Laurel Heights*, 47 Cal. 3d at 396. Regardless of whether the projects could be undertaken independently of each other, they will likely not be found to have independent utility if they are actually implemented together. *Tuolumne County Citizens for Responsible Growth, Inc. v. City of Sonora*, 155 Cal. App.4th 1214, 1229-31 (2007). The components of the BPTP could be implemented separately; however, they have been presented as one project, to be implemented in phases. CEQA requires a review of the entire BPTP.

B. Closure of the Bridge Pursuant to the Authority in the Vehicle Code

California Vehicle Code section 21101(e) allows the temporary closure of a street for “celebrations, parades, local special events, and other purposes when, in the opinion of local authorities having jurisdiction or a public officer or employee that the local authority designates by resolution, the closing is necessary for the safety and protection of persons who are to use that portion of the street during the temporary closing.” Cal. Veh. Code § 21101(e). A street is defined in the Vehicle Code as “a way or place of whatever nature, publicly maintained and open to the use of the public for purposes of vehicular travel. Street includes highway.” Cal. Veh. Code § 590. The Cabrillo Bridge is publicly maintained and is currently open to the public for the purposes of vehicular traffic.⁷ Neither the California Vehicle Code nor the courts have defined the word “temporary.” However, a standard definition of “temporary” is “[l]asting, used, or enjoyed for a limited time.” Webster’s II New College Dictionary 1163 (3d ed. 2005).

The San Diego Municipal Code authorizes the City Manager to close streets temporarily “upon a determination that a public or community event, including a block party, sponsored by a non-profit community or civic organization or business improvement organization, town council, recreation council, civic planning group, city-sponsored organization or any similar organization is to take place,” with the issuance of a Special Event Permit. SDMC § 82.23. Other than this authority, which is contingent on the issuance of a Special Event Permit under certain circumstances, this Office is not aware of any other general delegation of the authority provided

⁷ These provisions of the California Vehicle Code apply to roads within parks. 1988 City Att’y MOL 117 (88-163; Feb. 25, 1988); 1988 City Att’y MOL 236 (88-16; Mar. 28, 1988).

in California Vehicle Code section 21101(e) to temporarily close roads. In addition, specific road closures pursuant to this authority have received City Council approval in the past. *See, e.g.*, San Diego Resolution R-261185 (July 16, 1984); San Diego Resolution R-277332 (Feb. 11, 1991). The provisions of the California Vehicle Code are binding on municipalities, which may not enact any ordinance or resolution on matters covered by the California Vehicle Code, except as expressly authorized. Cal. Veh. Code § 21; *Rumford v. City of Berkeley*, 31 Cal. 3d 545 (1982).

II. ALCAZAR LOT IMPROVEMENTS

A. Site Development Permit

There are no details regarding the extent of the improvements to the Alcazar Lot, although the IBA Report states that the parking lot would be expanded and reconfigured to accommodate ADA accessible parking. IBA Report at 157, attached as Attachment 2. The Plaza de Panama project also included improvements to the Alcazar Lot, which impacted .001 acres of environmentally sensitive lands. EIR at 4.1-22. That impact triggered the requirement to obtain a Site Development Permit. SDMC § 126.0504. If improvements to the Alcazar Lot as envisioned pursuant to the BPTP will also impact environmentally sensitive lands, a Site Development Permit will be required. A Site Development Permit that is triggered based on deviations to the environmentally sensitive lands regulations must be approved by the Planning Commission in accordance with Process Four. SDMC § 126.0502(d).

B. ADA

Under the Americans with Disabilities Act (ADA) and related regulations, the City is permitted to remove the accessible parking from Plaza de Panama if it is removing all parking spaces from that lot. However, the accessible parking proposed to be relocated to the Alcazar Parking Lot must meet accessible parking requirements and have an accessible path of travel from the parking spaces to the area of alteration (Plaza de Panama) and any other areas of the park served by the Alcazar Parking Lot. 28 C.F.R. § 35.151(b)(4); 2010 ADA Standards for Accessible Design § 208.3.1. There is also potential liability for the City if accessible parking that meets accessibility standards is removed from Plaza de Panama and replaced with noncompliant parking in another area.

The ADA and other Federal civil rights laws require that accessible features be maintained in working order so that they are accessible to and usable by those people they are intended to benefit. 28 C.F.R. § 35.133(a). The City may not take parking spaces that were accessible out of Plaza de Panama and remove them without first putting in new fully compliant spaces, as doing so could be construed as failing to maintain previously accessible parking spaces. If regrading the new parking spaces in the Alcazar Parking Lot is required to meet access standards, the lot must be regraded prior to the relocation of the disabled parking spaces. Accessible parking spaces are also required to have cross slopes and surfaces that are stable and slip resistant with no changes in level. 2010 ADA Standards for Accessible Design § 502.4. Additionally, the access aisles connected to disabled parking spaces must be level to provide a surface for wheelchair transfer to and from vehicles. *Id.*

Not only are the parking spaces themselves required to be accessible, but also the path of travel to and from the parking spaces and the altered area, Plaza de Panama. 28 C.F.R. § 35.151(b)(4). In this situation, the path of travel to and from the parking spaces to other primary function areas within the park (i.e. museums, gardens, etc.), would also need to be accessible, in keeping with general accessible parking requirements. 2010 ADA Standards for Accessible Design § 208.3.1. Additionally, in parking facilities that do not serve a particular building or facility, such as the Alcazar Parking Lot, parking spaces must be located on the shortest accessible route to an accessible pedestrian entrance to the parking facility. *Id.* The path of travel adjacent to the proposed accessible parking spaces in the Alcazar Parking Lot would need to be evaluated, and slope and cross slope issues addressed, in conjunction with relocating the parking spaces.

C. Contracting of Work

Although there is no indication at this point that any contracts will be let for any portion of the BPTP, a review of the Mayor's contracting authority is provided. Minor public works contracts, which are those public works contracts valued at \$500,000 or less, are within the Mayor's authority to award. SDMC § 22.3102(d). A public works contract is a contract for the construction, reconstruction or repair of public buildings, streets, utilities and other public works, including design-build contracts, construction manager at risk contracts, and job order contracts. SDMC § 22.3003. Therefore, the described improvements to the Alcazar Lot would be a public works. However, public works projects are not required to be contracted out. In fact, some of the work described above may be able to be performed by City forces, thus requiring that the work be evaluated for any meet and confer requirements before a contract may be awarded. *Building Material & Constr. Teamsters' Union v. Farrell*, 41 Cal. 3d 651, 654 (1986).

Consultant contracts that do not exceed \$250,000 may be awarded by the City's Purchasing Agent. SDMC § 22.3207(a). A consultant contract is one in which expert or professional services are provided, including, but not limited to, accounting, architectural, engineering, marketing, public relations, management, financial, and legal services. SDMC § 22.3003. Consultant services may be necessary to provide engineering services relating to the expansion or reconfiguration of the Alcazar Lot.

III. OTHER CONSIDERATIONS

A. Other Environmental Impacts

Table 9-1 of the EIR indicates that the Pedestrianize Cabrillo Bridge Alternatives have significant, unmitigated impacts to land use (plan consistency) and noise (temporary construction noise). EIR at 9-17, 9-25. In addition, these four Pedestrianize Cabrillo Bridge Alternatives have significant and mitigated impacts to archeological resources and biological resources. EIR at 9-18, 9-22. As noted previously, this Office is not aware whether any review of potential traffic impacts has occurred for the BPTP. Therefore, there could be additional impacts due to the implementation of the BPTP.

B. Authority to Relocate Valet Parking

The lease for the House of Hospitality building requires the City to use its best efforts to designate a public parking lot in Balboa Park for the restaurant's customers' non-exclusive use, through a right-of-entry permit issued by the City's Park and Recreation Department at no charge, which is to designate a public parking lot in Balboa Park from which the lessee can operate valet parking or shuttle service to and from the restaurant. City Clerk Document RR-289141, Lease § 1.12. Further, the lease provides that the lessee "understands that it may not reserve parking spaces and that availability of parking spaces is not guaranteed," and upon prior notice, the City may designate a different public parking lot in Balboa Park, and the choice of parking lot shall be determined in the sole and absolute discretion of the Park and Recreation Department. *Id.* The restaurant and catering portion of the lease was later subleased with the consent of the City; the sublease specifically states that it is subject to the conditions set forth in the lease and Section 1.8, Parking, of the sublease reiterates section 1.12, Parking, of the lease.

A Right of Entry Permit was entered into between the City and the sublessee with an effective date of September 15, 2005 (ROE Permit). The ROE Permit, which expired on September 15, 2010, allowed the sublessee to use portions of the property located at Plaza de Panama and at the Organ Pavilion, Federal Building, and Inspiration Point parking lots. Specifically, the ROE allows the use of four loading zone lanes in the Plaza de Panama for loading and unloading of passengers, and use the Federal Building and Organ Pavilion parking lots, on a nonexclusive, first-come, first-served basis, for the storage of vehicles. In addition, during periods of high demand, the Inspiration Point parking lot may be used on a non-exclusive, first-come, first-served basis, for the storage of vehicles. The ROE Permit states that no other parking lots could be used but that upon prior written notice to the sublessee, the Park and Recreation Department may, in its sole discretion, designate an alternative parking lot in Balboa Park, or in close proximity, for valet/shuttle service.

Therefore, the City, through the Park and Recreation Department, may relocate the valet parking operations through a Right of Entry Permit and without any amendments to the existing leases.

CONCLUSION

This memorandum is intended to be a preliminary review of some of the topics that may arise during discussions about the BPTP and is based on currently known facts. Should further details about the BPTP become available, or should the BPTP be revised, this Office is available to provide further analysis.

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By /s/ Shannon M. Thomas
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Honorable Mayor and City Councilmembers

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SMT:als

Attachments: Attachment 1: Proposed Balboa Park Transportation Plan

Attachment 2: Independent Budget Analyst Report

Attachment 3: Metro San Diego CDC Letter to City Council

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