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**MEMORANDUM OF LAW**

**DATE:** September 29, 2006

**TO:** Honorable Mayor and Members of the City Council

**FROM:** City Attorney

**SUBJECT:** Response to Request of City Council for Legal Opinion on the Applicability of Public Resources Code Sections 21166 and 21151(c) to the Navy Broadway Complex Project.

The City Council and the Centre City Development Corporation [CCDC] previously requested clarification on the role of the City of San Diego [City] in reviewing or overseeing the consistency determination of CCDC. In response to this prior request, the Office of the City Attorney issued a Memorandum of Law on September 15, 2006 providing this clarification. A subsequent Memorandum of Law was issued by the City Attorney on September 18, 2006 identifying and explaining the City's contractual retention of other specified controls in the development of the Navy Broadway Complex. This Memorandum of Law [MOL] is prepared in response to a request by the San Diego City Council at a September 19, 2006 City Council meeting, relative to the role of the City under the California Environmental Quality Act [CEQA].

**BACKGROUND**

In 1992 the City and the United States, Department of Defense, Naval Facilities Engineering Command [Navy], entered into a written agreement entitled "Agreement Between the City of San Diego and the United States of America Adopting a Development Plan and Urban Design Guidelines for the Redevelopment of the Navy Broadway Complex" [Development Agreement]. Prior to entering into this Development Agreement, in October 1990, the City prepared and certified an Environmental Impact Report [1990 EIR] under CEQA and the Navy prepared an Environmental Impact Statement [EIS] under the National Environmental Policy Act [NEPA] to evaluate the environmental impacts of the Navy Broadway Complex Project. The City of San Diego was identified as the lead agency for purposes of the EIR. CCDC was one of the City entities, among others, consulted in the preparation of the EIR.

Section 5.2 of the Development Agreement expressly states:

All plans and specifications for the construction of any portion of the Project shall be submitted to the Centre City Development Corporation (CCDC) or its successor public corporation for review and a determination whether or not such plans and specifications are consistent with the Development Plan and Urban Design Guidelines. Such a determination shall not be unreasonably withheld and shall recognize that the Developer was selected through a competitive process required by federal law and that the criteria for selection included the quality of the design proposal. Such a determination shall not require any change which is inconsistent with the Environmental Impact Statement for the Project or which modifies allowable land uses, intensity of uses, parking standards, building height and design criteria which have been established by Exhibit C.

Section 5.2e. of the Development Agreement states that “[n]o development under this Agreement shall proceed unless and until a determination of consistency has been made.”

The City has delegated its authority to perform this consistency determination to CCDC. The City, however, did not delegate, through the Development Agreement or otherwise, its responsibilities to comply with CEQA. Section 9.9 of the Development Agreement expressly states:

[T]he City agrees, consistent with California Public Resources Code Section 21166, that no subsequent or supplemental environmental impact report shall be required by the City for the subsequent implementation of the Project unless required by the criteria set forth in Section 21166.

Furthermore, Attachment 4 of the Development Agreement references, in a footnote, the possibility of additional environmental analysis to be performed by the Navy and the City:

Interfering portions of the Pacific Highway median, if any, shall be removed and other traffic mitigation measures and street modifications required in the Final Environmental Impact Report and Final Environmental Impact Statement for the Navy Broadway Complex Project shall be implemented unless the City and Navy subsequently find that the traffic circulation and air quality considerations discussed in the EIR/EIS and which led to the inclusion of the requirements for such improvements in the Project are found to be insignificant, are mitigated to a level of insignificance through other actions, or findings are made that override these considerations.

The City retained its CEQA responsibilities. Although in 2006 the Navy has performed an updated environmental analysis under the National Environmental Policy Act [NEPA] for traffic, air quality and other impacts associated with the Navy Broadway Complex Project, the City has yet to perform any subsequent environmental analysis that is specific to the Navy Broadway Complex Project. The Navy has not and will not release to the public or to the City its updated environmental determination at this time; as a consequence, the Navy's environmental analysis could not at this time be relied upon by the City in performing any evaluation under the CEQA provisions of Public Resources Code Section 21166.

A Final Environmental Impact Report for the Proposed San Diego Downtown Community Plan, the CCDC Planned District Ordinance [PDO], and the 10<sup>th</sup> Amendment to the Downtown Redevelopment Plan, SCH No. 2003041001, was prepared and finalized by CCDC in March 2006 [2006 EIR]. In 2006, the City adopted as its own this 2006 EIR when it approved the Downtown Community Plan, the PDO, and the 10<sup>th</sup> Amendment to the Downtown Redevelopment Plan. Although not analyzed here, a question remains whether the 2006 EIR adequately addresses any environmental issues associated with the Navy Broadway Complex.

### **QUESTIONS PRESENTED**

1. Are the provisions of 21166 of the Public Resources Code applicable to the Navy Broadway Complex Project?
2. As lead agency for the Navy Broadway Complex, is the City responsible for evaluating the current adequacy of the 1990 EIR under the provisions of Section 21166?
3. Is a CEQA determination associated with CCDC's consistency determination appealable to the San Diego City Council under the provisions of Section 21151(c) of the Public Resources Code?

### **SHORT ANSWERS**

1. Yes. The provisions of Section 21166 of the Public Resources Code are applicable to the Navy Broadway Complex Project.
2. Yes. As lead agency for the Navy Broadway Complex, the City is responsible for evaluating the current adequacy of the 1990 EIR under the provisions of Section 21166.
3. Yes. A CEQA determination associated with CCDC's consistency determination is appealable to the San Diego City Council under the provisions of Section 21151(c) of the Public Resources Code.

## LEGAL ANALYSIS

### 1. The provisions of 21166 of the Public Resources Code are applicable to the Navy Broadway Complex Project.

If the time for challenging the adequacy of an EIR has passed under the provisions of CEQA, an EIR is presumed to comply with the provisions of CEQA for purposes of its use by responsible agencies “unless the provisions of Section 21166 are applicable.” *See* Public Resources Code Section 21169.2.

Section 21166 requires an evaluation of whether additional environmental review is necessary **after** an EIR has been **certified**:

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.

*See also* Section 15162 of the CEQA Guidelines. This 21166 evaluation could conceivably take place at any time it appears warranted before a subsequent discretionary action is going to be taken. Once the Development Agreement was approved, the City’s role as lead agency in project approval was completed unless further discretionary approvals on that project were required. *See* Section 15162(c) of the CEQA Guidelines. Although a 21166 evaluation could be performed at any time prior to any further discretionary action, the requirement to actually complete any subsequent environmental impact report or negative declaration (determined necessary by the 21166 evaluation) would not be triggered until a governmental entity is ready to grant the next discretionary approval for the project. If no subsequent discretionary approvals are anticipated, then no additional CEQA document would need to be prepared regardless of changed circumstances. In a situation where the 21166 evaluation demonstrates the need to prepare subsequent environmental documentation, neither the lead agency nor any other responsible agency can grant a subsequent discretionary approval for the project until the subsequent EIR or negative declaration has been adopted/certified. *See* Section 15162(c) of

CEQA Guidelines. Once all discretionary approvals have been obtained, no further EIRs may be required by the public agency. *See Cucamongans United for Reasonable Expansion v. City of Rancho Cucamonga* (2000, 4<sup>th</sup> Dist.) 82 Cal. App. 4<sup>th</sup> 473, 98 Cal. Rptr. 2d 202.

The Development Agreement contemplates that the City will be taking other future actions associated with the Navy Broadway Complex Project. “Building and other related permits for the development of the Property shall be issued by the City in a timely manner.” *See* Section 5.6 of Development Agreement. The Development Agreement also expressly states in Section 1.2 that the redevelopment at the Navy Broadway Complex “shall not require any discretionary permits from the City. Building and similar ministerial permits shall be obtained by the Developer of the Broadway Complex only for those structures which are not to be occupied, in whole or in substantial part, by the Navy.” *See* Section 1.2 of Development Agreement. As a note, a governmental entity cannot contract away its CEQA responsibilities. Contract terms do not supercede the requirements of CEQA. Furthermore, the provisions found in Section 1.2 of the Development Agreement assume that a “building permit” is a ministerial permit. It is not the case, however, that in every instance a building permit is a ministerial permit. It remains to be determined whether other permitting actions taken by the City will trigger CEQA because they are considered discretionary. *See Sheila Donahue Miller v. City of Hermosa Beach* (1993) 13 Cal. App. 4<sup>th</sup> 1118, 17 Cal. Rptr. 2d 408; *Friends of Westwood v. City of Los Angeles et al* (1987) 191 cal. App. 3d 259, 235 Cal. Rptr. 788. In addition, there may be other discretionary actions or approvals that the City may conduct with respect to the project that do not involve the issuance of “permits.” It also remains to be seen what other discretionary approvals or actions will be triggered by other governmental agencies as they permit, authorize or otherwise approve any portion or all of this project moving forward. *See County of Orange v. Superior Court of Orange County; Vedanta Society of Southern California* (2003) 113 Cal. App. 4<sup>th</sup> 1, 7-8, 6 Cal. Rptr. 3d 286. Any one of these future discretionary approvals may trigger CEQA and a determination of whether the 1990 EIR, 16 or more years later, is good enough.

Furthermore, although not a permit, the consistency determination required by the Development Agreement and performed by CCDC on behalf of the City may be viewed as a discretionary action and may trigger CEQA compliance. The City will rely upon this consistency determination to take future action, including the issuance of subsequent permits (e.g., building permits), and the evaluation of the plans and specifications by CCDC will trigger some discretion and judgment by CCDC. *See* Section 1.2 of Development Agreement. *See Sheila Donahue Miller v. City of Hermosa Beach* (1993) 13 Cal. App. 4<sup>th</sup> 1118, 17 Cal. Rptr. 2d 408; *Friends of Westwood v. City of Los Angeles et al* (1987) 191 cal. App. 3d 259, 235 Cal. Rptr. 788.

A 21166 evaluation of the 1990 EIR and 2006 EIR would be justified now given that CCDC, on behalf of the City, will be making the consistency determination within the immediate future. The Navy has already determined that a second look at the environmental impacts is justified and has performed a subsequent environmental analysis under NEPA. A 21166 review, and any subsequent CEQA document determined to be necessary, if any, should cover any future

discretionary actions associated with this project, unless and until any future substantial changes occur.

Section 21166 comes into play because in-depth review has already occurred in 1990, the time for challenging the sufficiency of the original EIR has expired, and the question remaining is whether circumstances have changed enough to justify repeating a substantial portion of the process. *See River Valley Preservation Project v. Metropolitan Transit Dev. Bd.* (1995, 4<sup>th</sup> Dist.) 37 Cal. App. 4<sup>th</sup> 154, 43 Cal. Rptr. 2d 501. A reviewing court will normally uphold a governmental entity's decision not to require a subsequent or supplemental EIR after conducting a 21166 evaluation where the administrative record as a whole contains substantial evidence to support the determination that the changes in the project or its circumstances were not so substantial as to require major modifications of the EIR. *See Santa Teresa Citizen Action Group v. City of San Jose* (2003, 6<sup>th</sup> Dist.) 114 Cal. App. 4<sup>th</sup> 689. If a governmental entity authorizes major modifications to a project without first determining whether further review under CEQA is required (a determination under 21166), its decision to approve the changes to the project may be set aside. *See El Morro Community Assn. v. California Dept. of Parks & Recreation* (2004, 4<sup>th</sup> Dist.) 122 Cal. App. 4<sup>th</sup> 1341.

**2. As lead agency for the Navy Broadway Complex, the City is responsible for evaluating the current adequacy of the 1990 EIR under the provisions of Section 21166.**

Other than the delegation of responsibility for completing a consistency determination under the Development Agreement, the City retained permitting and CEQA responsibilities for the Navy Broadway Complex Project. It is analogous to a situation where the City has subcontracted out responsibilities for completion of a contractual obligation and the terms of the contract spell out the duties and responsibilities of the subcontractor. In this case, by analogy, the contract would be the Development Agreement and the responsibilities subcontracted to CCDC would be that of performing a consistency determination. The underlying obligations of performance under the contract (the Development Agreement), and any breach thereof, rest with the prime contractor; namely, the City.

The City, for purposes of the 1990 EIR, was the designated lead agency for the Navy Broadway Complex Project. When the City approved the Downtown Community Plan, PDO and Redevelopment Plan Amendment in 2006, it also adopted as its own the 2006 EIR. A "lead agency" under CEQA is the public agency which has the principal responsibility for carrying out or approving a project which may have a significant effect upon the environment. *See* Public Resources Code Section 21067. A "responsible agency" is a public agency, other than the lead agency, that has responsibility for carrying out or approving a project. *See* Public Resources Code Section 21069. For purposes of entering into and carrying out the Development Agreement, the City remains the lead agency. This responsibility has not been delegated away.

So significant is the role of the lead agency that CEQA proscribes delegation. This prohibition was articulated in *Kleist v. City of Glendale* (1976) 56 Cal. App. 3d 770,

779 [128 Cal. Rptr. 781]: “Neither the CEQA nor the state guidelines authorize the city council to delegate its review and consideration function to another body. Delegation is inconsistent with the purpose of the review and consideration function since it insulates the members of the council from public awareness and possible reaction to the individual members’ environmental and economic values. Delegation is inconsistent with the purposes of the EIR itself.”

*Planning and Conservation League et al, v. Department of Water Resources, Central Coast Water Authority* (2000) 83 Cal. App. 4<sup>th</sup> 892, 907, 100 Cal. Rptr. 2d 173. *See also Robert T. Sundstrom v. County of Mendocino* (1988) 202 Cal. App. 3d 296, 307, 248 Cal. Rptr. 352 where the court found that the County improperly delegated its legal responsibility to assess environmental impact by directing the applicant to conduct the hydrological studies subject to the approval of the planning commission staff; *see also Hayward Area Planning Association v. City of Hayward* (2005) 128 Cal. App. 4<sup>th</sup> 176, 184, 26 Cal. Rptr. 3d 783 where the court concluded “[a]lthough courts have allowed public agencies to collect the labor costs of outside assistance when they prepare the [administrative] record..., no court has condoned the unilateral delegation of the task to a party with an interest in the litigation.”

Therefore, the City should conduct the 21166 evaluation of the 1990 EIR before CCDC completes the consistency determination. Furthermore, it may be that the 2006 EIR sufficiently provides the additional environmental documentation needed for the Navy Broadway Complex, but this has yet to be determined. This 21166 review, and any subsequent CEQA document determined to be necessary, if any, should cover any future discretionary actions associated with this project, unless and until any future substantial changes occur.

**3. A CEQA determination associated with CCDC’s consistency determination is appealable to the San Diego City Council under the provisions of Section 21151(c) of the Public Resources Code.**

Pursuant to Section 21151(c) of the Public Resources Code:

If a nonelected decision-making body of a local lead agency certifies an environmental impact report, approves a negative declaration or mitigated negative declaration, or determines that a project is not subject to this division, that certification, approval, or determination may be appealed to the agency’s elected decision-making body, if any.

In this case, the local lead agency is the City of San Diego. Any environmental determination made by CCDC or by City staff relating to the Navy Broadway Complex Project would be appealable to the full City Council as provided for under Section 21151(c). *See Bakersfield Citizens for Local Control v. City of Bakersfield et al* (2004) 124 Cal. App. 4<sup>th</sup> 1184, 1201-1202, 22 Cal. Rptr. 3d 203, *citing Vedanta Society of So. California v. California Quartet, Ltd.* (2000) 84 Cal. App. 4<sup>th</sup> 517, 525-526, 100 Cal. Rptr. 2d 889.

Honorable Mayor and  
Members of the City Council

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## **CONCLUSION**

Based upon the analysis provided herein, it is the recommendation of the Office of the City Attorney that the City complete an evaluation under the provisions of Section 21166 of the Public Resources Code to determine whether any further environmental documentation under CEQA is necessary for the Navy Broadway Complex Project. It is also recommended that this review, and any subsequent environment documentation, if any, be completed before CCDC makes its consistency determination.

MICHAEL J. AGUIRRE, City Attorney

By

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SRE:DP:pev

cc: Elizabeth Maland, City Clerk  
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