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MEMORANDUM OF LAW

DATE: July 28, 2008

TO: Members of the City Council

FROM: City Attorney

SUBJECT: In Relation to the University Towne Center Revitalization Project,
No. 2214—Application for Community Plan Amendment, Re-Zone, Master
Planned Development Permit, Site Development Permit, Vesting Tentative
Map, and Sewer and Water Easement Vacations

INTRODUCTION

On April 7, 2008, the City finalized the Environmental Impact Report for the University Towne Center Revitalization Project [UTC Project]. The City also drafted the Master Planned Development Permit for the UTC Project. However, the Master PDP, although dated March 18, 2008, was not made available to the public until May 19, 2008. This was only three days prior to the initial Planning Commission hearing on the same project which was later continued to June 12. The scope of the Master PDP has changed since its first issuance and was not made a part of the EIR administrative record before the EIR was finalized on April 7. On June 12, 2008, the Planning Commission recommended approval of the University Towne Center Revitalization Project and the accompanying Final Environmental Impact Report [FEIR]. Thereafter, the project applicant substantively changed the scope of the project by reducing the height of the proposed buildings to 293 feet above grade. As a consequence of this substantial project change, the project description, impact analysis, conclusions, mitigation and over-riding considerations in the FEIR needed to be modified. The City Development Services Department elected to conduct these modifications using an Errata Sheet to the Final EIR dated July 3, 2008, rather than an amendment and without recirculation of the FEIR. The City Attorney's office received a copy of this fourteen (14) page Errata Sheet on or about July 18, 2008. This Errata Sheet modifies the project description, the scope of the alternatives and with respect to aesthetics and visual quality, modifies the findings for significant unmitigated impacts, the recommended mitigation, the findings of infeasibility and the cumulative impacts. See attached Errata Sheet.

On July 25, 2008, the Law Firm of Shute, Mihaly & Weinberger, LLP [Shute Mihaly], on behalf of the Friends of Rose Canyon, Endangered Habitats League and Center for Biological

Diversity, submitted 51 pages of comments on the scope of and changes to the UTC Project and the FEIR.

Shute Mihaly identified unresolved issues and incomplete analyses in the FEIR relating to traffic, water demand and supply, bulk, scale and height, and changes to both the scope of the project and the FEIR without opportunity for adequate public review and comment.

Because of the more recent project changes and the more recent public comments, the Office of the City Attorney has conducted additional review and provide the following comments and analysis.

ANALYSIS

Adequacy of FEIR Project Description and Need for Recirculation

“‘The ‘heart of CEQA’ is the EIR, whose purpose is to inform the public and government officials of the environmental consequences of decisions before they are made.’” *Communities for a Better Environment v. South Coast Air Quality Management District*, 158 Cal. App. 4th 1336, 1353 (2007) (quoting *San Franciscans Upholding the Downtown Plan v. City and County of San Francisco*, 102 Cal. App. 4th 656, 687-688 (2002)).

Without an accurate, stable, and finite project description, the purpose of the EIR in providing information to the public and City decision makers is thwarted. As the California Court of Appeals has explained:

[A]n accurate, stable and finite project description is the sine qua non of an informative and legally sufficient EIR.” (*County of Inyo v. City of Los Angeles* (1977) 71 Cal.App.3d 185, 199 [139 Cal. Rptr. 396].) However, “[a] curtailed, enigmatic or unstable project description draws a red herring across the path of public input.” (Id. at p. 198.) “[O]nly through an accurate view of the project may the public and interested parties and public agencies balance the proposed project's benefits against its environmental cost, consider appropriate mitigation measures, assess the advantages of terminating the proposal and properly weigh other alternatives” (*City of Santee v. County of San Diego* (1989) 214 Cal.App.3d 1438, 1454 [263 Cal. Rptr. 340].)

San Joaquin Raptor Rescue Center v. County of Merced, 149 Cal. App. 4th 645, 655 (Cal. App. 5th Dist. 2007).

The Master Planned Development Permit [Master PDP] is a major component of the UTC Project. As noted in the July 25th Shute Mihaly letter, “The Master Planned Development Permit that is the heart of this project was not made available until after the final environmental document was published and has been amended at least twice since that time.” The Master PDP

was originally proposed in March of 2008 and was subsequently revised in May and June of 2008; thus, the project description has not been stable as required by CEQA.

The Master PDP encompasses most if not all of the project's central design guidelines (e.g., angled building envelopes, articulated building facades, landscape screening, etc.) intended to mitigate for visual impacts to the surrounding neighborhood. Without access to this critical document during the public comment period on the EIR, the public is deprived of the opportunity to meaningfully comment on the project scope.

Moreover, because the draft EIR for the project did not include the finalized Master PDP, recirculation of the EIR with the new information is required. *See e.g., Laurel Heights Improvement Assn. v. Regents of University of California*, 6 Cal. 4th 1112, 1130 (1993) (holding that recirculation is required where "the draft EIR was so fundamentally and basically inadequate and conclusory in nature that public comment on the draft was in effect meaningless.")

Recirculation Due to New Substantial Impacts and Mitigation Measures

Recirculation and amendment of the FEIR is also warranted because of the substantial project changes proposed in the Errata Sheet. Section 21092.1 of CEQA requires that the EIR be re-noticed pursuant to the provisions of Section 21092 where significant new information is added to an EIR after notice has been given and after consultation has occurred, but before certification of the EIR.

The UTC Project FEIR and Errata Sheet indicate that the original project substantially exceeded the *bulk and scale* regulations. (emphasis added) While the revised project includes design guidelines for the Master PDP that will limit building heights to 293 feet, the Errata explains that "[t]he building footprints would be broadened and the profile of the towers would be wider to accommodate the same amount of development permitted under the Master PDP." Thus, while the revised project may reduce visual impacts due to incompatibility of height, there is admittedly a fair argument that the revised project will increase other impacts to bulk and scale from broader building footprints and wider towers. *County Sanitation Dist. No. 2 v. County of Kern*, 127 Cal. App. 4th 1544, 1580 (Cal. App. 5th Dist. 2005) (holding, when there is substantial evidence in the record to support a fair argument that a project may have a significant effect on the environment, the lead agency is required to recognize the impacts as potentially significant despite "the existence of contrary evidence in the administrative record.")

Because the Errata Sheet for the revised project added new information disclosing new substantial environmental impacts to bulk and scale and incorporated new mitigation measures for impacts due to height, recirculation is required. *Laurel Heights Improvement Assn. v. Regents of University of California*, 6 Cal. 4th 1112, 1130 (Cal. 1993) (holding that recirculation is required when new information is added to an EIR disclosing a new substantial environmental impact resulting from the project or from a new mitigation measure proposed to be implemented (cf. Guidelines, § 15162, subd. (a)(1), (3)(B)(1)); or (2) a substantial increase in the severity of an environmental impact unless mitigation measures are adopted that reduce the impact to a level of insignificance (cf. Guidelines, § 15162, subd. (a)(3)(B)(2))).

FEIR Traffic Baseline Analysis

Whether the traffic impacts have been adequately analyzed in the FEIR will depend on whether the City has used an appropriate point of reference; namely, an appropriate baseline. As explained in the July 25th Shute Mihaly letter, the FEIR identifies existing traffic conditions (e.g., FEIR Table 5.304), but traffic impacts from the project are not adequately compared or contrasted with these existing traffic conditions to determine the true scope of the impact from the project. See page 9 of Shute Mihaly letter. Instead, the FEIR uses development levels in the University City Community Plan as the baseline for determining impacts. Unfortunately, case law disfavors such an approach.¹

For instance, in *Communities for a Better Environment v. South Coast Air Quality Management District*, 158 Cal. App. 4th 1336, 1353 (2007), the court struck down the approval of a project where the negative declaration failed to analyze impacts using an appropriate baseline. The finding of no significant environmental impact and thus the decision to prepare a negative declaration was based on analysis that used “the level of emissions that [the applicant] is allowed to emit under existing permits as the baseline, even though [the applicant] may not have released that level of emissions in the past.” The court explained that using the “permits maximum figure as the baseline for [the project], ...improperly calculated the baseline environmental setting on the basis of ‘merely hypothetical conditions’ as opposed to ‘realized physical conditions on the ground.’” *Id.* (citing *San Joaquin Raptor Rescue Center v. County of Merced*, 149 Cal. App. 4th 645, 658 (2007)). “[W]e conclude that a project’s baseline is normally comprised of the existing environmental setting-not what is hypothetically allowed pursuant to existing zoning or permitted plans.” *Id.* at 1361. Accordingly, the court held that the lead agency had “abused its discretion by reaching its conclusion of no significant impact from NOx [Nitrogen Oxide] emissions in a manner contrary to law.” *Id.*

Similarly, in *Woodward Park Homeowners Assn., Inc. v. City of Fresno*, 150 Cal. App. 4th 683, 708 (Cal. App. 5th Dist. 2007), the court held that the baseline was improper where the lead agency used the maximum build out under existing zoning as the baseline rather than using the vacant lot that was actually on the ground. The court explained that without the proper baseline, “the EIR never presented a clear or a complete description of the project’s impacts compared with the effects of leaving the land in its existing state.” *Id.*²

FEIR Analysis of Adequate Water Supply to Meet Demand

¹ Similarly, the FEIR and Errata Sheet conclude there will be no impacts to visual character, but the analysis improperly uses the proposed zoning change (CR-1-1) as the baseline. This baseline does not reflect the existing physical conditions on the ground. Because the proposed zoning change would increase structure height limits, using the correct baseline would likely reveal visual impacts not currently accounted for in the FEIR and Errata Sheet.

² See *Save Our Peninsula Committee v. Monterey County Bd. Of Supervisors*, (2001) 87 Cal. App. 4th 99, 118-128 where the EIR for the proposed residential development was held inadequate where the baseline water use figures were based on assumptions about water use that were unsupported by either existing conditions or evidence of historical use.

CEQA requires analysis of a project's water supply whenever the need for such information is relevant, regardless of the size of a proposed development. (*Santa Clarita Organization for Planning the Environment v. County of Los Angeles* (2d Dist. 2003) 106 Cal. App. 4th 715, 717 [131 Cal. Rptr. 2d 186] (holding that "[a]n environmental impact report for a housing development must contain a thorough analysis that reasonably informs the reader of the amount of water available").) If environmental review reveals that a proposed project would cause a significant adverse environmental impact, the lead agency must adopt any feasible means of substantially lessening or avoiding such an impact, and, if the impact still remains significant must adopt a statement of overriding considerations as to the impacts. (*Mountain Lion Foundation v. Fish and Game Commission* (1997) 16 Cal. 4th 105, 134 [65 Cal. Rptr. 2d 580]; Pub. Resources Code, § 21002.). In light of the City's current water supply uncertainty, a closer look at the water impacts from this project, both direct and cumulative, should be considered.

CONCLUSION

For the reasons explained above, a recirculation and amendment of the EIR appears appropriate. We welcome any additional information that may form the basis for further analysis and consideration.

Respectfully submitted,

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MJA

Attachment

cc: Mayor Jerry Sanders

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