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MEMORANDUM OF LAW

DATE: August 5, 2008

TO: Honorable Mayor, City Council, and Planning Commission

FROM: City Attorney

SUBJECT: Quarry Falls, Project No. 49068

INTRODUCTION

The Quarry Falls Project [Project] would redevelop a 230.5-acre site in the Mission Valley and Serra Mesa Community Planning areas that now contains an ongoing gravel mining operation, which is nearing depletion. Upon completion in 2022, the Project would be comprised of 4,780 residential units, 620,000 square feet of office space, 603,000 square feet of retail space, and 31.8 acres for park, civic, open space, trail, and optional school use. The Project would use approximately 2,420,000 gallons of water per day. This would be a net increase over existing water use at the Quarry Falls Project site of 2,403,608 gallons per day.¹

The Project would require a (1) Community Plan amendment, (2) General Plan amendment, (3) Rezone, (4) Specific Plan, (5) Master Planned Development Permit, (6) Site Development Permit, (7) Vesting Tentative Map, (8) Conditional Use Permit/Reclamation Plan, and (9) Public Facilities Financing Plan amendment. The Project is subject to Process Five approval and requires a recommendation from the Planning Commission before going forward to City Council.

A Water Supply Assessment [WSA] was prepared for the Project in August 2007 and updated in October 2007 to correct a typographical error. The WSA was summarized and analyzed in the

¹ This may at first blush seem an insignificant increase over the existing water usage. However, the gravel mining operation is nearing depletion, and the rest of the PEIR uses the re-vegetated condition of the property after the reclamation plan as the baseline for comparison to determine environmental impacts. Because the baseline must remain constant, the re-vegetated and naturalized condition of the property after the reclamation plan is complete should be used for the basis of comparison because it gives a truer picture of the impacts to water. “[A]n accurate, stable and finite project description is the sine qua non of an informative and legally sufficient EIR.” However, “[a] curtailed, enigmatic or unstable project description draws a red herring across the path of public input.” *San Joaquin Raptor Rescue Center v. County of Merced*, 149 Cal. App. 4th 645, 655 (Cal. App. 5th Dist. 2007)(quoting *County of Inyo v. City of Los Angeles*, 71 Cal. App. 3d 185, 197-198 (1977)).

draft Program Environmental Impact Report [PEIR]. The WSA relies on the 2005 Regional Urban Water Management Plan [RUWMP], which is now almost three years old and in need of update in light of impacts to water supply due to climate change, drought, and recent court decisions.

The draft PEIR was made available for public comment through December 17, 2007. The final PEIR and the Statement of Overriding Considerations [SOC] was issued on July 25, 2008. The SOC was made available to the public and the Planning Commission 13 days rather than 14 days prior to the hearing on the Project as required by the SDMC section 128.0310(a). This issue is secondary to the water issues herein, but it is another basis for the Planning Commission to refrain from voting on this Project at the August 7, 2008 hearing.

The final PEIR contains an expanded discussion of recent events relating to water supplies. However, neither the WSA itself nor the City's Water Department verification of sufficient water were re-analyzed despite significant new information that Southern California's water supplies are increasingly unreliable.² Similarly, the verification was made long before the State of California or the City of San Diego declared a water shortage emergency.³

QUESTION PRESENTED

Does the WSA, water supply verification, and PEIR need to be revised and recirculated before the Planning Commission makes a recommendation to City Council on the Quarry Falls Project?

SHORT ANSWER

Yes, due to recent information relating to the unreliability of the Water Authority's water supply to the City of San Diego, a re-evaluation of the WSA, water verification, and analysis in the PEIR must be completed and the PEIR recirculated to the public prior to the Planning Commission recommendation on the Project.

ANALYSIS

SB 610 requires a WSA to be included in the California Environmental Quality Act [CEQA] documentation for projects involving the construction of 500 or more residential units. Cal Wat

² "The deteriorating ecosystem and the vulnerability of an aging levee system that is supposed to control flooding diminish the reliability and quality of the water supply from the Bay-Delta. As a result of these conditions, water supplies available for diversion from the Delta to urban and agricultural water-users in central and southern California are **unreliable**" San Diego County Water Authority Fact Sheet, "The Bay-Delta," January 2007.

³Of significance, the Governor of California, Arnold Schwarzenegger, declared a statewide drought as of June 4, 2008. On July 28, 2008, City Council voted unanimously to instate a Stage One Water Shortage Emergency pursuant to section 67.3806 of the SDMC. Mayor Jerry Sanders declared a water shortage emergency on July 29, 2008.

Code §§10910 et seq. In addition, “SB 221 requires affirmative written verification from the water purveyor of the public water system that sufficient water supplies are available for certain large residential subdivisions of property prior to approval of a tentative map.” *See* 2005 Updated Water Urban Management Plan, San Diego County Water Authority (*citing* Cal Gov Code §§ 65867.5, 66455.3, and 66473.7). A WSA and verification was required for the Quarry Falls Project under SB 610 and 221 and CEQA.

When a project requires CEQA evaluation, the urban water management plan analysis may be incorporated in the water supply and demand assessment required by both the Water Code and CEQA “[i]f the projected water demand associated with the proposed project was accounted for in the most recently adopted urban water management plan.” Cal Wat Code § 10910(c)(2).

The final PEIR attempts to rely on section 10910(c)(2) of the Water Code when it states:

[B]ecause the Water Department UWMP took the Quarry Falls Project into account when it was prepared, the Water Supply Assessment can rely on the information contained therein.

WSA at 5.12-8.

The WSA was prepared in August 2007 and updated in October 2007. It relies on the 2005 RUWMP prepared by Metropolitan Water District of Southern California [MWD]. The MWD provides wholesale water to the City’s Water Department through the San Diego County Water Authority [Water Authority]. The Water Authority is one of twenty-six member agencies sharing water provided by MWD.

The MWD relies on imported water from the Colorado River and the Sacramento-San Joaquin Delta [State Water Project or SWP] to supply approximately sixty percent of its water. *See* PEIR, p. 5.12-3. Moreover, “[u]p to 90 percent of the City’s existing water supply is imported from the Colorado River and the California State Water Project.” *Water Reuse Study*, City of San Diego Water Department, March 2006, p. 1-1. These imported water supplies have become unreliable since the RUMWP was prepared in 2005.

As the Water Authority has warned:

[T]he region’s water supplies remain impacted by extremely dry conditions around California over the last year that significantly reduced storage in key reservoirs, as well as by an eight-year drought in the Colorado River basin. In addition, court-ordered pumping restrictions on the State Water Project, designed to protect threatened fish species, went into effect in December 2007, cutting water supplies from the Bay-Delta to 25 million

Californians who live from the Bay Area to San Diego. Already this year, pumping restrictions have resulted in the loss of nearly 1 million acre-feet of water statewide. Of that figure, the Metropolitan Water District of Southern California, from which the Water Authority purchases the majority of its imported water supplies, has lost approximately 300,000 acre-feet due to Delta smelt pumping restrictions.⁴

“Restrictions on pumping from the State Water Project have resulted in the loss of 500,000 acre-feet of water deliveries so far this year, including about 60,000 acre-feet that would have been delivered to San Diego County.”⁵

Due to these significant, changed circumstances, the City needs to re-evaluate the water supply availability in the WSA relied on in the PEIR. Due to the significant nature of the additional water analysis and information, the City “must issue new notice and must ‘recirculate’ the revised EIR, or portions thereof, for additional commentary and consultation.” *Cadiz Land Co., Inc. v. Rail Cycle L.P.*, 83 Cal. App. 4th 74, 95 (2000) (citing Pub. Resources Code, § 21092.1; CEQA Guidelines, § 15088.5; *Laurel Heights Improvement Association of San Francisco, Inc. v. Regents of the University of California*, 6 Cal. 4th 1112 (1993) [Laurel Heights II]; Remy et al., *Guide to the California Environmental Quality Act*, (1999 10th ed.) p. 301.)

The additional analysis should include information as to whether particular supplies “bear a likelihood of actually proving available; speculative sources and unrealistic allocations (‘paper water’) are insufficient bases for decision-making under CEQA.” *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova*, 40 Cal. 4th 412, 432 (2007). See also *Santa Clarita Org For Planning the Environment v. County of Los Angeles*, 106 Cal. App. 4th 715 (2003)(when “there is a huge gap between what is promised and what can be delivered,” [it] render[s] State Water Project entitlements nothing more than ‘hopes, expectations, water futures or, as the parties refer to them, ‘paper water.’”).

The PEIR explains that climate change may impact SWP water supplies in at least six different ways and recognizes that the full extent of impacts of climate change to the SWP are uncertain. See PEIR pg. 5.12-15. The PEIR concludes that there will be enough water to meet current and expected demand. *Id.* However, in light of the uncertainty, it is not sufficient to merely conclude

⁴Water Authority News Release, “Governor’s Drought Declaration Underscores Urgent Call for Water Conservation Water Authority actions over past several years designed to increase conservation and prepare for potential shortages,” available at http://www.sdcwa.org/news/2008_0604_droughtdeclaration.phtml (June 4, 2008).

⁵ See Water Authority News Release, “Statement from San Diego County Water Authority Board Chair Fern Steiner calling for state leaders to place water bond on November ballot, available at http://www.sdcwa.org/news/2008_0717_waterbond_steiner.phtml.

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that potential future measures will result in adequate water supplies. Where supplies are uncertain, EIR needs to acknowledge the degree of uncertainty and discuss reasonably foreseeable alternatives, potential environmental impacts associated with those alternatives and feasible mitigation for each adverse impact. *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova*, 40 Cal. 4th 412, 432-434 (2007).

The EIR also needs to formulate mitigation measures that prevent the physical development of the project from occurring before water supplies are physically available for delivery. *Id.* While the development of the Project would proceed in phases, the PEIR does not require the halt of construction at any phase in which it may be determined that sufficient water is not available.

CONCLUSION

For the forgoing reasons, the City Attorney recommends that the Planning Commission refrain from voting to make a recommendation to City Council until such time as the WSA and water supply verification are re-analyzed and the PEIR recirculated for public comment and review.

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