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MEMORANDUM OF LAW

DATE: February 19, 2010

TO: Frank Alessi, Executive Vice President and Chief Financial Officer, Centre City Development Corporation
Brad Richter, Assistant Vice President – Current Planning, Centre City Development Corporation

FROM: City Attorney

SUBJECT: Reliance upon Environmental Secondary Study for Redevelopment Matters

INTRODUCTION

You have requested guidance from this Office concerning the frequent use of an environmental secondary study [Secondary Study] as the basis for environmental review of various redevelopment implementing activities that carry out the purpose of the redevelopment plan for a redevelopment project area [Project Area], where the redevelopment plan already has been evaluated in a Program Environmental Impact Report [Program EIR] earlier certified by the Redevelopment Agency of the City of San Diego [Agency]. Your request stems from a concern about whether members of the public have been unfairly denied an opportunity to participate in the environmental review process in situations where the Agency relies upon a Secondary Study.

QUESTIONS PRESENTED

1. Does the California Environmental Quality Act [CEQA] permit the use of a Secondary Study to evaluate whether a proposed redevelopment implementing activity in a Project Area and its potential environmental impacts are encompassed within the "program" analyzed in a prior Program EIR for the entire Project Area?

2. When a determination is made that no further CEQA review of a proposed redevelopment implementing activity is required based upon the completion of a Secondary Study, is that determination subject to an environmental administrative appeal to the Agency's Board of Directors [Agency Board] or the City Council [Council]?

SHORT ANSWERS

1. Yes. A Secondary Study is a modified initial study, the use of which is at least implicitly authorized under CEQA and has been upheld by one California appellate court as the basis for CEQA review of a proposed redevelopment implementing activity after a Program EIR has been certified for the applicable redevelopment plan.

2. No. Under CEQA, an environmental administrative appeal may be made to a public agency's elected decision-making body, if any, pertaining to certain CEQA determinations made at the staff level or by a non-elected decision-making body. There is no language in CEQA, the Agency's CEQA procedures or the City's CEQA procedures, however, that provides for an environmental appeal where a determination has been made that a proposed redevelopment implementing activity is within the scope of a prior Program EIR and that no further CEQA review is required. Moreover, the Agency does not have an elected decision-making body to which an environmental appeal could be made.

BACKGROUND

State and local guidelines provide assistance in implementing the requirements of CEQA, Cal. Pub. Res. Code §§ 21000-21178, and include the following: (i) the "State CEQA Guidelines," as published by the Office of Planning and Research, Cal. Code Regs. tit. 14, §§ 15000-15387 [State CEQA Guidelines]; (ii) the Agency's "Procedures for Implementation of the California Environmental Quality Act and the State CEQA Guidelines" dated June 1990 [Agency's CEQA Procedures], adopted by the Agency Board pursuant to Resolution No. 1875 on July 17, 1990, and filed with the Agency's Secretary as Document No. 1748; and (iii) the City's "Implementation Procedures for the California Environmental Quality Act and the State CEQA Guidelines," San Diego Municipal Code [SDMC] §§ 128.0101-128.0314, as well as the City's procedures for administrative appeals of environmental determinations, SDMC §§ 112.0310 and 112.0520 [collectively, City's CEQA Procedures].

ANALYSIS

I. The Use of a Secondary Study Is Permitted for Environmental Review of Implementing Activities in Furtherance of a Redevelopment Plan.

A. Initial Environmental Review of Proposed Activities

Under CEQA, the "lead agency" is required to prepare, or cause to be prepared, an environmental impact report [EIR] for a "project" that may have a significant, unmitigated effect on the environment. Cal. Pub. Res. Code §§ 21151(a), 21165(a). A "lead agency" is defined as "the public agency which has the principal responsibility for carrying out or approving a project." Cal. Code Regs. tit. 14, § 15367. A "responsible agency" means "all public agencies other than the lead agency which have discretionary approval power over the project." Cal. Code Regs. tit 14. § 15381. "Project" is defined

broadly to mean "an activity which may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment" and which is undertaken either directly by any public agency or by another entity in reliance upon the public agency's financial assistance or permitting authority. Cal. Pub. Res. Code § 21065; Cal. Code Regs. tit. 14, § 15378(a).

B. Preparation of Program EIR for Redevelopment Plan

An EIR prepared for a proposed redevelopment plan may consist, at the lead agency's option, of one of three types of EIRs: (i) a Master EIR; (ii) a Program EIR; or (iii) a Project EIR (i.e., an EIR that treats the entire redevelopment plan as a single project). Cal. Code Regs. tit. 14, § 15180(a). The Agency typically prepares a Program EIR to achieve CEQA compliance with respect to the adoption of a redevelopment plan for an entire Project Area or the adoption of a major amendment to a redevelopment plan. The Agency then uses the Program EIR as a "baseline" to evaluate environmental effects of subsequent redevelopment implementing activities on a case-by case basis.

A Program EIR is a specialized type of EIR that may be prepared on a series of actions, which are interconnected and can be treated collectively as one large project. Cal. Code Regs. tit. 14, § 15168(a). To achieve efficiency and avoid unnecessary duplication and paperwork, a Program EIR is commonly used in lieu of the public agency's preparation of a Project EIR for each action within the series of actions. *See* Cal. Code Regs. tit. 14, § 15168(b). The Program EIR is considered a very flexible type of EIR, in that it is not required to list all of the subsequent redevelopment implementing activities that may be within the scope of the "program" covered by the Program EIR. Remy et al., *Guide to Cal. Environmental Quality Act* (Solano Press 2007), p. 636. One main function of a Program EIR is to provide a single environmental document used to effectuate the entire "program" of redevelopment implementing activities for a Project Area without necessarily requiring the subsequent preparation of site-specific or project-specific EIRs and negative declarations. *Id.* at 637-638. To serve this function, "a program EIR must be very detailed; in other words, it must include enough site-specific information to allow an agency to plausibly conclude that, in analyzing 'the big picture,' the document also addressed enough details to allow an agency to make informed site-specific decisions within the program." *Id.* at 638. The use of a Program EIR in connection with CEQA review of multiple redevelopment implementing activities can allow a public agency to reduce the costs of environmental review while still achieving high levels of environmental protection, so long as the environmental effects of the redevelopment implementing activities have been fully analyzed in the Program EIR. *Id.* at 642 (citing discussion portion of Cal. Code Regs. tit. 14, § 15168).

C. Environmental Review of Subsequent Activities

In general, where a lead agency already has certified an EIR for a project and the lead agency (or a responsible agency) later considers another approval related to the same project, the relevant issue is whether a subsequent EIR or a supplemental EIR must be prepared to evaluate any change in circumstances. A subsequent EIR is an updated EIR that revises the earlier EIR to make it adequate for the public agency's approval of a project where circumstances have changed since the time of the original EIR. *Mani Bros. Real Estate Group v. City of Los Angeles*, 153 Cal. App. 4th 1385, 1397 (2007). A supplemental EIR is a more streamlined form of EIR that "need contain only the information necessary to make the previous EIR adequate for the project as revised" and is used where "[o]nly minor additions or changes would be necessary to make the previous EIR adequately apply to the project in the changed situation." Cal. Code Regs. tit. 14, § 15163(a)(2), (b). A subsequent EIR or a supplemental EIR must be given the same public notice and opportunity for public comment as required for a draft EIR. Cal. Code Regs. tit. 14 §§ 15162(d), 15163(c).

CEQA prohibits a public agency from requiring the preparation of a subsequent EIR or a supplemental EIR unless (i) substantial changes to the project occur that require major revisions of the EIR, (ii) substantial changes occur with respect to the circumstances under which the project will be undertaken that require major revisions of the EIR, or (iii) new information becomes available about significant environmental impacts that was not known or could not have been known earlier. Cal. Pub. Res. Code § 21166. The public agency must make this determination "on the basis of substantial evidence in light of the whole record." Cal. Code Regs. tit. 14, § 15162(a). The State CEQA Guidelines recommend that a public agency provide a brief explanation of its decision not to prepare a subsequent EIR or a supplemental EIR and that such explanation be "supported by substantial evidence" and "included in an addendum to an EIR, the lead agency's required findings on the project, or elsewhere in the record." Cal. Code Regs. tit. 14, § 15164(e). The mere passage of a considerable period of time after certification of an initial EIR does not automatically trigger the need for preparation of a subsequent EIR or a supplemental EIR. *See, e.g., Long Beach Savings and Loan Assn. v. Long Beach Redevelopment Agency*, 188 Cal. App. 3d 249, 255-266 (1986) (court upheld public agency's decision not to prepare supplemental EIR for development agreement governing mixed-use development project within redevelopment area, even though EIR for redevelopment plan had been certified seven years earlier); *Snarled Traffic Obstructs Progress v. City and County of San Francisco*, 74 Cal. App. 4th 793, 795-801 (1999) (court upheld public agency's decision not to prepare EIR where such agency initially had prepared negative declaration for development project and then approved minor modifications to project after it remained dormant for nine years).

D. Use of Program EIR for CEQA Review of Subsequent Activities

A Program EIR is intended to streamline the environmental review of various redevelopment implementing activities to be carried out after the Program EIR has been certified. A Program EIR can "[p]rovide the basis in an initial study for determining whether the later activity may have any significant effects." Cal. Code Regs. tit. 14, § 15168(d)(1). "Subsequent activities in the program must be examined in the light of the program EIR to determine whether an additional environmental document must be prepared." Cal. Code Regs. tit. 14, § 15168(c). "If a later activity would have effects that were not examined in the program EIR, a new initial study would need to be prepared leading to either an EIR or a negative declaration." Cal. Code Regs. tit. 14, § 15168(c)(1). If the public agency finds that no new effects could occur or no new mitigation measures will be required, the agency can approve the activity as being within the scope of the project covered by the Program EIR, such that no new environmental document is required. Cal. Code Regs. tit. 14, § 15168(c)(2).

When a public agency approves a later activity within the scope of a Program EIR, the agency must incorporate into such approval feasible mitigation measures and alternatives developed in the Program EIR to the extent relevant to the later activity. Cal. Code Regs. tit. 14, § 15168(c)(3). If the later activity involves site-specific operations, the State CEQA Guidelines recommend that the public agency use "a written checklist or similar device to document the evaluation of the site and the activity to determine whether the environmental effects of the operation were covered in the program EIR." Cal. Code Regs. tit. 14, § 15168(c)(4). The State CEQA Guidelines provide that, where the Program EIR contains specific and comprehensive analysis of the environmental effects of the development program, many later activities could be found to be within the scope of the development program, such that no further environmental documents will be required for those activities. Cal. Code Regs. tit. 14, § 15168(c)(5).

Generally, where an EIR prepared for a redevelopment plan already has been certified, CEQA does not "require a redevelopment agency to afford public notice and comment for the agency's decision not to conduct further environmental review of an individual component of a redevelopment plan." *Cumming v. City of San Bernardino Redevelopment Agency*, 101 Cal. App. 4th 1229, 1233 (2002). The lack of need for in-depth subsequent CEQA review of specific redevelopment implementing activities is especially true "if the project remains within the density configurations evaluated in the redevelopment plan EIR." 2 Kostka & Zischke, *Practice Under the Cal. Environmental Quality Act* (Cont. Ed. Bar, 2nd ed. 2009) [Kostka CEQA Treatise], § 20.17, p. 955.

E. Reliance upon Secondary Study

When assessing the need for a subsequent EIR or a supplemental EIR, the lead agency may, but is not required to, prepare an initial study to evaluate the potential

environmental effects of the subsequent activity. *Friends of Davis v. City of Davis*, 83 Cal. App. 4th 1004, 1018 (2000). If the lead agency determines that the subsequent activity may cause a significant effect on the environment, the agency may use a prior EIR that adequately analyzed the project or may determine, pursuant to a Program EIR, which of the project's effects were adequately analyzed by a prior EIR or a prior negative declaration. Cal. Code Regs. tit. 14, § 15063(b)(1). Two of the goals of an initial study are to eliminate unnecessary EIRs and to determine whether a prior EIR provides adequate coverage of a project. Cal. Code Regs. tit. 14, § 15063(c). Public agencies are encouraged to reduce delay and paperwork by using a prior EIR when it adequately addresses a proposed project. Cal. Code Regs. tit. 14, § 15006(f).

The term "Secondary Study" is not mentioned anywhere in CEQA or the State CEQA Guidelines and is apparently unique to the Agency. A Secondary Study is a modified initial study that is prepared under the Agency's direction and is relied upon by the Agency and, in some instances, by the City. A Secondary Study is often prepared, for example, with respect to redevelopment implementing activities within the jurisdiction of the Centre City Development Corporation [CCDC] that are deemed by Agency staff to be consistent with the environmental documents previously certified in conjunction with the Redevelopment Plans for the Centre City and Horton Plaza Redevelopment Projects. *See* Agency's CEQA Procedures §§ 502.1, 502.2. A typical Secondary Study includes the following contents: (i) a narrative explanation of the development program evaluated in the prior Program EIR and any related CEQA documents, as well as the significant environmental effects associated with that development program; (ii) a detailed description of the redevelopment implementing activity that is being proposed presently; (iii) a checklist and supporting information evaluating whether each category of environmental effect (e.g., traffic, noise, aesthetics) associated with the proposed activity will be significant and whether each significant effect has been adequately examined in the prior Program EIR and any related CEQA documents; (iv) a summary of the environmental findings made as a result of the analysis set forth in the Secondary Study; and (v) an identification of any site-specific mitigation measures that will be enforced with respect to the proposed activity, to the extent such measures have been derived from the Mitigation Monitoring and Reporting Program for the prior Program EIR. Those contents are consistent with the provisions of the State CEQA Guidelines that discuss a public agency's ability to rely upon a prior Program EIR for adequate CEQA coverage of subsequent implementing activities within the scope of the development program, as discussed in Part I.D above.

The Agency's CEQA Procedures provide that, after Agency staff has determined a proposed redevelopment implementing activity is not exempt from CEQA, Agency staff is required to conduct a Secondary Study to determine if the activity "will result in substantial changes in environmental impacts anticipated and covered in the previous EIR for the [redevelopment project]." Agency's CEQA Procedures § 502.1. The Agency Board or the Council, or both, must make certain environmental findings if the Agency

proposes to take certain actions and if the Agency relies upon a Secondary Study to determine that no subsequent EIR, supplemental EIR, negative declaration or addendum is required. The environmental findings apply in this context if the Agency proposes to amend a redevelopment plan, to approve a site improvement agreement, a disposition and development agreement [DDA], an owner participation agreement [OPA] or any other documents, or to undertake other activities in implementing the applicable redevelopment plan. The environmental findings are used to support a conclusion that the proposed redevelopment implementing activity will not result in any new or increased significant environmental impacts compared to the analysis completed in the prior EIR for the redevelopment plan. Agency's CEQA Procedures § 507. The pertinent environmental findings are summarized in the Secondary Study, as described in item (iv) of the preceding paragraph. In addition, the Agency Board or the Council, or both, must adopt any site-specific mitigation measures relevant to the proposed redevelopment implementing activity, as described in item (v) of the preceding paragraph. Cal. Code Regs. tit. 14, § 15168(c)(3); Agency's CEQA Procedures § 507.

Nothing in CEQA or the State CEQA Guidelines requires a public agency to make the environmental findings envisioned in the Agency's CEQA Procedures when the agency decides not to prepare an EIR, whether in the form of an initial EIR or a subsequent EIR. *See Citizens for a Megaplex-Free Alameda v. City of Alameda*, 149 Cal. App. 4th 91, 114-115 (2007) (adoption of mitigated negative declaration in connection with approval of DDA for redevelopment project); *Benton v. Board of Supervisors of Napa County*, 226 Cal. App. 3d 1467, 1483 (1991) (adoption of mitigated negative declaration related to proposed relocation of existing winery onto enlarged project site, after original certification of EIR for winery project). In the event of a legal challenge to a public agency's decision not to prepare a subsequent EIR, the legal test is whether substantial evidence in the administrative record supports the agency's decision, and the courts are normally deferential to the agency's decision given that in-depth analysis of environmental impacts already has occurred in the original EIR. *Citizens for Responsible Equitable Environmental Development [CREED] v. City of San Diego Redevelopment Agency*, 134 Cal. App. 4th 598, 610-611 (2005); Cal. Code Regs. tit. 14, §§ 15162(a), 15164(e); 2 *Kostka CEQA Treatise*, § 19.38, p. 911.

In sum, the Agency's CEQA Procedures, if interpreted literally, are more rigorous than CEQA or the State CEQA Guidelines in two key respects pertaining to CEQA review of proposed redevelopment implementing activities. The first distinction relates to when an initial study must be prepared to evaluate the environmental effects of a redevelopment implementing activity being proposed after a Program EIR has been certified for the applicable redevelopment plan. Under the State CEQA Guidelines, an initial study is required only where the proposed redevelopment implementing activity will have environmental effects that were not examined in the prior Program EIR. Cal. Code Regs. tit. 14, § 15168(c)(1). Under the Agency's CEQA Procedures, however, a Secondary Study is required whenever Agency staff has determined a proposed

redevelopment implementing activity is not exempt from CEQA, regardless of whether new environmental effects are involved. Agency's CEQA Procedures § 502.1.

The second distinction relates to the making of environmental findings. On the one hand, CEQA and the State CEQA Guidelines do not require a public agency to make environmental findings when it decides not to prepare a subsequent EIR or a supplemental EIR, although the State CEQA Guidelines recommend that the public agency include substantial evidence in support of its decision somewhere in the administrative record. Cal. Code Regs. tit. 14, § 15164(e). On the other hand, where a Secondary Study has been prepared, the Agency's CEQA Procedures require the Agency Board or the Council, or both, to make environmental findings in certain (but not all) situations. The types of redevelopment implementing activities that are specifically listed in the Agency's CEQA Procedures as being subject to the requirement of environmental findings (i.e., redevelopment plan amendments, site improvement agreements, DDAs or OPAs) constitute the more high-profile and major redevelopment implementing activities undertaken by the Agency, which tend to generate a greater likelihood of environmental controversy. The Agency's CEQA Procedures are not entirely clear as to how expansively the requirement of environmental findings should be applied to other redevelopment implementing activities, such as an implementation agreement (i.e., amendment) to a DDA or an OPA.

The Agency and the City are legally permitted to rely upon a Secondary Study for adequate CEQA coverage of a proposed redevelopment implementing activity on a case-by-case basis, so long as the prior Program EIR and any related prior environmental documents adequately examined the environmental effects associated with that proposed activity. Although a Secondary Study is not formally recognized by CEQA, the use of a Secondary Study is at least implicitly authorized by the State CEQA Guidelines, which provide sample forms of an initial study, with the explanation that "public agencies are free to devise their own format for an initial study. A previously prepared EIR may also be used as the initial study for a later project." Cal. Code Regs. tit. 14, § 15063(f). More importantly, a California appellate court upheld the Agency's use of a Secondary Study in a relatively recent decision. *CREED*, 134 Cal. App. 4th at 616-617. In that case, the court concluded that the Agency and the City acted in accordance with CEQA by relying upon a Secondary Study to determine that the environmental effects of a proposed hotel project in downtown San Diego had been adequately examined in a prior Program EIR and that the project was within the scope of the Program EIR, and thus that no subsequent EIR or supplemental EIR was needed. *Id.* at 617. The court rejected the notion that a project-specific EIR needed to be prepared for all redevelopment implementing activities after certification of a Program EIR and remarked that such an approach "would be directly contrary to one of the essential purposes of [a Program EIR], i.e., to streamline environmental review of projects within the scope of a previously completed program EIR." *Id.* at 615. Moreover, the court emphasized that the Program EIR could be used for adequate CEQA coverage of the hotel project even though the hotel project had not

been specifically proposed until after certification of the Program EIR. The court reasoned that the Program EIR had adequately examined the environmental impacts associated with any potential commercial use on the site (including the construction of a hotel project) and that the hotel project adhered to the land use and intensity designations set forth in the downtown community plan that had been adequately evaluated in the Program EIR. *Id.* at 616-617.

Given that the Agency Board or the Council, or both, are required under the Agency's CEQA Procedures to make specific environmental findings in a resolution when a Secondary Study is used for adequate CEQA coverage of certain redevelopment implementing activities, the public has an opportunity to comment on CEQA-related issues either before or during the public meeting in which the findings are being considered. Nothing in CEQA or the Agency's CEQA Procedures, however, requires the Agency Board or the Council to respond to any comments made by the public regarding the contents of a Secondary Study or regarding the environmental findings made in reliance upon a Secondary Study.

II. CEQA Does Not Afford the Right to an Environmental Administrative Appeal to Challenge the Agency's Determination That No Further Environmental Review Is Needed Based upon a Secondary Study.

A. Right to Environmental Administrative Appeal under CEQA Generally

CEQA establishes the right to an environmental administrative appeal [CEQA Administrative Appeal] to a public agency's elected decision-making body pursuant to a specific statutory provision [CEQA Appeal Provision], as follows:

> If a nonelected decisionmaking body of a local lead agency certifies an [EIR], 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 decisionmaking body, if any.

Cal. Pub. Res. Code § 21151(c) (emphasis added). The State CEQA Guidelines authorize each local agency to establish procedures for CEQA Administrative Appeals consistent with the CEQA Appeal Provision, and further provide that CEQA Administrative Appeals must be handled according to the local agency's procedures. Cal. Code Regs. tit. 14, § 15185(a).

Evaluating the scope of the right to a CEQA Administrative Appeal requires an understanding of the meaning of several defined terms used in the CEQA Appeal Provision. A "decision-making body" includes "any person or group of people within a public agency permitted by law to approve or disapprove the project at issue." Cal. Code

Regs. tit. 14, § 15356. The decision-making body essentially includes any person or entity who has been delegated the authority to make the environmental determination at issue. A "local agency" includes a city and a redevelopment agency, among other entities. Cal. Pub. Res. Code § 21062; Cal. Code Regs. tit. 14, § 15368. The definition of a "project" is set forth in Part I.A above.

Before 2003, the right to a CEQA Administrative Appeal extended only to a non-elected decision-making body's certification of an EIR. As of January 1, 2003, the State Legislature broadened the CEQA Appeal Provision to allow a CEQA Administrative Appeal in certain other circumstances, as shown in the above-quoted language. Perhaps due to this relatively recent statutory change, there is no case law that provides useful guidance regarding the precise scope of determinations that are presently subject to a CEQA Administrative Appeal. Where the CEQA Appeal Provision refers to the right to a CEQA Administrative Appeal extending to a non-elected decision-making body's determination that a project is not subject to CEQA, the CEQA Appeal Provision presupposes that the particular activity already has been determined to be a "project" as defined under CEQA and that the project has been determined to be exempt from CEQA. Thus, the CEQA Appeal Provision does not afford the right to a CEQA Administrative Appeal where a non-elected decision-making body has determined, at the outset, that a particular activity is not a "project" as defined in CEQA. In the redevelopment context, the Agency often determines, on the basis of a Secondary Study or otherwise, that a particular activity is not a "project" under CEQA or that a particular activity is not a separate "project" in the sense that it already has been included within the comprehensive development program addressed in a certified Program EIR. For the reasons described above, such determinations are not subject to a CEQA Administrative Appeal.

B. No Right to Environmental Administrative Appeal to Agency Board

The Agency's CEQA Procedures do not provide for a CEQA Administrative Appeal to the Agency Board or to the Council under any circumstances with respect to CEQA determinations on redevelopment matters.

Under CEQA, assuming that a particular determination is within the categories of determinations subject to a CEQA Administrative Appeal, the right to a CEQA Administrative Appeal applies only if the lead agency has an elected decision-making body. Cal. Pub. Res. Code § 21151(c); Cal. Code Regs. tit. 14, § 15090(b); *El Morro Community Assn. v. California Dept. of Parks and Recreation*, 122 Cal. App. 4th 1341, 1349-1350 (2004). The Agency is an independent and separate legal entity that was formed under the California Community Redevelopment Law, Cal. Health & Safety Code §§ 33000-34160 [CRL] to carry out certain state policies, namely to redevelop blighted areas and to preserve and increase the supply of affordable housing. *See* Cal. Health & Safety Code §§ 33037, 33071. The Agency's territorial jurisdiction is the same as the territory within the City's limits. Cal. Health & Safety Code § 33120. The CRL

authorizes any city or county in California to establish a redevelopment agency. Cal. Health & Safety Code §§ 33101, 34115; *Evans v. City of San Jose*, 128 Cal. App. 4th 1123, 1131 (2005). When a redevelopment agency is formed under the CRL, the legislative body (i.e., city council or board of supervisors) can appoint either its own members, or a group of five to seven residents in the community, to act as the redevelopment agency's board of directors. Cal. Health & Safety Code §§ 33110, 33121, 33200(a). In either situation, the redevelopment agency's board of directors consists of appointed, not elected, members; in other words, the CRL does not provide for a public election of a redevelopment agency's board of directors under any circumstances. In San Diego, the Council has appointed its own members to serve collectively as the Agency Board. While the City Councilmembers comprise the elected decision-making body on behalf of the City, they comprise the non-elected, self-appointed decision-making body on behalf of the Agency.

Thus, although there is no case law directly on point, the most reasonable interpretation is that the Agency Board is not an elected decision-making body. To conclude otherwise would be to disregard the fact that the City and Agency are separate and distinct legal entities and that the Agency Board is responsible for implementing state, not local, laws and policies under the CRL. *See Evans v. City of San Jose*, 128 Cal. App. 4th at 1131. Assuming that the Agency Board is not an elected decision-making body, the CEQA Appeal Provision dictates that the right to a CEQA Administrative Appeal does not apply to any environmental determination on a redevelopment matter made solely by Agency staff or by the Agency's delegated decision-making body (e.g., CCDC's Board of Directors).

C. Limited Right to Environmental Administrative Appeal to Council

There may be situations in which City staff makes a determination on a redevelopment matter, such as where the City's Development Services Department issues a permit for a redevelopment activity in accordance with Processes One, Two or Three (i.e., not automatically involving a decision by the Planning Commission or the Council), or where City staff decides to provide a relatively small amount of funding for a redevelopment activity undertaken by the Agency. In such situations, the right to a CEQA Administrative Appeal exists only if permitted under the CEQA Appeal Provision and the City's CEQA Procedures. Under the City's CEQA Procedures, any person may initiate a CEQA Administrative Appeal concerning an "environmental determination" made by the City Manager, as well as any decision made by the Planning Commission to approve a negative declaration, mitigated negative declaration or EIR, provided that the decision is associated with a Process Two or Three decision and all available administrative appeals have been exhausted. SDMC § 112.0520(a). A Process Four decision made by the Planning Commission may be appealed to the Council, in which case the appeal is not limited solely to the adequacy of the environmental determination. SDMC § 112.0508.

An "environmental determination" is defined to include:

> a decision by any non-elected City decision maker, to certify an [EIR], adopt a negative declaration or mitigated negative declaration, or to determine that a project is not subject to [CEQA], under State CEQA Guidelines section 15061(b)(2) [relating to categorical exemptions] or (3) [relating to the "common sense" exemption based on an activity having no potential for causing a significant effect on the environment].

SDMC § 113.0103. The City's CEQA Procedures require City staff to post a notice of the right to a CEQA Administrative Appeal when any environmental determination has been made. SDMC § 112.0310(a).

Accordingly, although the City's CEQA Procedures provide for a CEQA Administrative Appeal as to determinations that a project is categorically exempt from CEQA, they do not provide for an environmental administrative appeal as to other types of determinations, including a determination that an activity is not a "project" and thus not subject to CEQA. For example, the City's CEQA Procedures (consistent with the CEQA Appeal Provision, Cal. Pub. Res. Code § 21151(c)) would not permit an environmental administrative appeal of a staff-level decision not to prepare a subsequent EIR or a supplemental EIR. To the extent that City staff relies upon a Secondary Study to determine that a proposed redevelopment implementing activity already has been addressed adequately in a prior Program EIR and thus is not a new "project" and is not subject to CEQA, this staff-level determination is not within any of the categories of decisions that comprise an appealable "environmental determination" under the City's CEQA Procedures.

In connection with the Navy Broadway Complex project, the prior administration of this Office issued several legal memoranda in late 2006 relating to the applicability of Public Resources Code Section 21151(c) -- which establishes the right to a CEQA Administrative Appeal, to the highest elected decision-making body, of certain CEQA determinations made by a non-elected decision-making body -- and Public Resources Code Section 21166 -- which describes the factors to be applied by a lead agency in determining whether it needs to prepare a subsequent EIR or a supplemental EIR. City Att'y ML-2006-21 (Sept. 15, 2006); ML-2006-36 (Sept. 29, 2006); MS-2006-5 (Oct. 4, 2006); MS-2006-1 (Nov. 22, 2006); ML-2006-33 (Dec. 27, 2006) [collectively, Prior Memoranda]. The Prior Memoranda stated that the Council did not have the right of review over CCDC's factual determination that the modified development plans for the Navy Broadway Complex achieved consistency with the original development agreement. More significantly, the Prior Memoranda concluded that: (i) CEQA required CCDC and City staff to evaluate the factors in Public Resources Code Section 21166 to

determine if a subsequent EIR or a supplemental EIR needed to be prepared for the modified project; and (ii) the staff-level determination in that regard was subject to a CEQA Administrative Appeal to the Council. The Prior Memoranda cited only to Public Resources Code Section 21151(c) as support for the right to a CEQA Administrative Appeal and neglected to mention or discuss the scope of an "environmental determination" and thus the limited availability of an environmental administrative appeal under the City's CEQA Procedures. This memorandum supersedes the Prior Memoranda to the extent they intended to convey that the Council is required to process and hear a CEQA Administrative Appeal regarding any staff-level CEQA determination, including a determination not to prepare a subsequent EIR or a supplemental EIR; they are inconsistent with the CEQA Appeal Provision under state law and the City's CEQA Procedures. There is no case law under CEQA that has addressed, much less questioned or invalidated, the manner in which the City has established the limited right to an environmental administrative appeal under the City's CEQA Procedures.

It is also important to note that, whenever both the Agency Board and the Council, or the Council on its own, make an environmental determination with respect to a redevelopment matter, such as when they make findings in reliance upon a Secondary Study, a CEQA Administrative Appeal will be rendered moot. The Council is the highest elected decision-making body of the City, and its members also serve collectively as the Agency Board. To allow a CEQA Administrative Appeal of a determination already made by the Agency Board or the Council would amount to giving the appellant a "second bite at the apple" in front of the same decision-makers who made the initial environmental determination -- a needlessly repetitive exercise. Moreover, such an interpretation would contravene a primary objective of the California Secretary of Resources, which is to reduce delay and paperwork when implementing CEQA. Cal. Code Regs. tit. 14, § 15006. In such situations, members of the public already will have been afforded the opportunity to comment on any topics addressed in the Secondary Study either before or during the meeting in which the Agency Board or the Council, or both, consider making the environmental findings.

The inapplicability of a CEQA Administrative Appeal in certain situations does not preclude any judicial remedies related to compliance with CEQA. Even without a CEQA Administrative Appeal, any aggrieved member of the public could initiate a writ proceeding to challenge the reliance upon a Secondary Study, in which case the court would need to determine whether substantial evidence in the administrative record supports the decision not to prepare a subsequent EIR or a supplemental EIR. *See* Cal. Civ. Proc. Code §§ 1085, 1094.5; *CREED*, 134 Cal. App. 4th at 610-611.

CONCLUSION

A Secondary Study is an appropriate vehicle for determining whether a proposed redevelopment implementing activity in a Project Area and its potential environmental impacts

are encompassed within the "program" analyzed in a prior Program EIR for the entire Project Area. The Agency and the City are legally permitted to rely upon a Secondary Study for adequate CEQA coverage of such an activity on a case-by-case basis, so long as the prior Program EIR and any related prior environmental documents adequately examined the environmental effects associated with the activity. Given that the Agency Board or the Council, or both, are required under the Agency's CEQA Procedures to make specific environmental findings in a resolution when they rely upon a Secondary Study for adequate CEQA coverage of certain redevelopment implementing activities, members of the public are afforded the opportunity to comment on the topics addressed in the Secondary Study.

There is no language in the CEQA Appeal Provision, the Agency's CEQA Procedures or the City's CEQA Procedures that establishes the right to a CEQA Administrative Appeal of a determination that a proposed redevelopment implementing activity is within the scope of a prior Program EIR and that no further environmental review is required. The availability of a CEQA Administrative Appeal is usually rendered moot given the requirement that the Agency Board or the Council, or both, make environmental findings when they rely upon a Secondary Study for adequate CEQA coverage of certain redevelopment implementing activities.

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