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MEMORANDUM OF LAW

DATE: July 5, 2011

TO: Mayor and City Councilmembers

FROM: City Attorney

SUBJECT: The Effect Under the California Environmental Quality Act (CEQA) of the Memorandum of Understanding (MOU) Between the City and the Plaza de Panama Committee

INTRODUCTION

At the Rules Committee meeting of June 8, 2011, the Committee reviewed a proposed Memorandum of Understanding (MOU) between the City of San Diego and the Plaza de Panama Committee. The Plaza de Panama Committee is a non-profit public benefit corporation formed for the purpose of fundraising and implementing improvements in Balboa Park, specifically to return the Plaza de Panama to pedestrian use by building a bypass bridge for cars, other improvements for cars and pedestrians, and a parking garage behind the Organ Pavilion (the Proposed Project).

The MOU describes the Proposed Project and states the City's desire to work with the Plaza de Panama Committee to "further explore, analyze, and develop" the Project. (Recitals, para. F; §§1.1, 1.2.) The MOU is conditioned on CEQA compliance and acknowledges the City's intent to "fully consider any proposed alternatives and mitigating measures" including not proceeding with the Proposed Project. (Recitals, para. G, and §1.2.) The MOU is a "preliminary expression of cooperation and intent" and is not an approval of the Proposed Project by the City or a commitment by the City to approve the Proposed Project in the future. (Recitals, paras. G, H; §§1.2, 6.1(1), 6.4.) The MOU states the parties' desire that the Proposed Project be completed prior to the 2015 Centennial celebration. (Recitals, para. F; §2.2.) The City agrees to provide staff support to the Proposed Project through the permitting and environmental review process, and to defer payment of fees until project funds are available. (§4.1.) If the Proposed Project is

approved, the City agrees to issue bonds for construction of the proposed parking structure, to be repaid through parking fees. (§5.2.) The City can cancel the MOU at any time. (§6.1(2)). The parties' stated intent is that the MOU is a preliminary non-binding agreement that is not enforceable against either party. (§6.4.)

The Committee moved to forward the MOU to the full City Council for its consideration. As part of that motion, the Committee asked the City Attorney for a written analysis of the legal issues raised during the discussion at the Committee's meeting, *i.e.*, whether entering into the MOU in advance of the Environmental Impact Report (EIR) violates the requirements of CEQA for environmental review to take place before approval of a project. The Committee emphasized the desire to avoid litigation and maintain the timeline of completing any improvements by January 1, 2015.

QUESTION PRESENTED

If the City Council authorizes execution of the MOU, then as a practical matter, has the City committed itself to the Proposed Project as a whole or to any particular features, so as to effectively preclude any alternatives or mitigation measures that CEQA would otherwise require to be considered, including the alternative of not going forward with the project?[1]

SHORT ANSWER

No. The MOU is a preliminary non-binding agreement that expresses the City's interest in and commitment to moving the project through the preliminary stages to bring it before the City Council for decision. Even so, the City cannot preclude a third party from challenging the Council's action authorizing the MOU prior to completion of the EIR. However, based on the analysis herein, we believe the City's position is defensible because the MOU does not commit the City to any decision, and reserves the City's right to fully consider the pending environmental analysis and any alternatives and mitigation measures contained in that analysis, including the alternative of not going forward with the project. It is the same type of preliminary or tentative agreement recognized by the court in *Save Tara* as needed so that a "proposal may be further explored, developed, or evaluated," for example, "to gather financial resources for environmental and technical studies," or "to seek needed grants or permits."

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[1] This is the question asked by the court in *Save Tara v. City of West Hollywood*, 45 Cal. 4th 116, 139 (2008) (*Save Tara)* and subsequent cases. *See RiverWatch v. Olivenhain Municipal Water District*, 170 Cal. App. 4th 1186, 1211 (2009) (*Riverwatch)*; *Sustainable Transportation Advocates v. Santa Barbara County Assn. of Governments*, 179 Cal. App. 4th 113, 123 (2009) (*Sustainable Transportation)*; *Cedar Fair, L.P. v. City of Santa Clara*, 194 Cal. App. 4th 1150, 1170 (2011) (*Cedar Fair).*

DISCUSSION

I. CEQA REQUIRES AN EIR BEFORE "APPROVAL" OF A PROJECT THAT MAY HAVE SIGNIFICANT ENVIRONMENTAL IMPACTS, BUT ALSO PERMITS PRE-EIR PRELIMINARY AGREEMENTS

Under CEQA, a public agency must prepare an EIR on any project the agency proposes to "carry out or approve" if that project may have significant environmental effects. Cal. Pub. Res. Code §§ 21100(a) and 21151(a); *Save Tara v. City of West Hollywood*, 45 Cal. 4th 116, 121 (2008). The issue here is not whether the Proposed Project requires an EIR,[2] but whether entering into the MOU constitutes "approval" of the Proposed Project under CEQA such that the EIR must be completed and considered prior to a decision on the MOU.

For the purpose of applying CEQA requirements, "approval" of a project means "the decision by a public agency which commits the agency to a definite course of action in regard to a project intended to be carried out by any person." 14 Cal. Code of Regs § 15352(a). "[A]pproval occurs upon the earliest commitment to issue or the issuance by the public agency of a discretionary contract, grant, subsidy, loan, or other form of financial assistance, lease, permit, license, certificate, or other entitlement for use of the project." 14 Cal. Code of Regs § 15352(b).

Several recent cases have explored the question of whether actions taken by a public agency prior to formal approval of a project can, for all practical purposes, add up to "approval" of all or part of a project under CEQA because the agency is, at that point, committed to a definite course of action without having first considered the environmental impact of, alternatives to, and mitigation for the project. In the *Save Tara* case, the California Supreme Court declined to adopt a bright-line rule for when this approval occurs, and specifically rejected the plaintiff's assertion that any agreement is an "approval" under CEQA if, at the time the agreement was approved, the project was sufficiently well defined to provide meaningful information for environmental assessment. 45 Cal. 4th at 136-138. Instead, the court looked to all of the circumstances to determine whether, as a practical matter, the public agency had committed itself to all or part of the project in a way that precluded consideration of alternatives or mitigation measures that may be brought forward in the environmental review process. *Id.* at 139.

The court agreed that CEQA review must "be done early enough to serve, realistically, as a meaningful contribution to public decisions." *Id.* at 135. Even so, the court acknowledged the need for pre-CEQA preliminary and tentative agreements in the development of a project:

> [P]rivately conducted projects often need some form of government consent or assistance to get off the ground, sometimes long before they come up for formal approval. Approval, within the meaning of [Public Resources Code] sections 21100 and 21151 [of CEQA], cannot be equated with the agency's mere interest in,

[2] The City communicated its determination that an EIR is required for the Proposed Project in a letter dated May 25, 2011.

> or inclination to support, a project, no matter how well defined. "If having high esteem for a project before preparing an environmental impact statement (EIR) nullifies the process, few public projects would withstand judicial scrutiny, since it is inevitable that the agency proposing a project will be favorably disposed to it."

Save Tara, 45 Cal. 4th at 136-137, quoting *City of Vernon v. Board of Harbor Comrs.*, 63 Cal. App. 4th 677, 688 (1998). Those pre-CEQA agreements can be purchase option agreements, memoranda of understanding, exclusive negotiating agreements, or other arrangements with potential developers typically used to develop a public/private project. *Id.* at 137. In sum, "CEQA review was not intended to be only an afterthought to project approval, but neither was it intended to place unneeded obstacles in the path of project formulation and development." *Id.*

II. BASED ON RECENT CASE LAW, THE MOU IS A PRELIMINARY AND TENTATIVE AGREEMENT, AND NOT AN APPROVAL OF THE PROPOSED PROJECT

A comparison of the facts and circumstances in *Save Tara* and cases following it (*Riverwatch, Sustainable Transportation,* and *Cedar Fair*) to the MOU before the City Council demonstrates that the MOU is a preliminary and tentative agreement that does not rise to the level of "approval" under CEQA.

A. *Save Tara*: A Binding Contract To Sell Property And Lend Money

In *Save Tara v. City of West Hollywood*, 45 Cal. 4th 116 (2008), The California Supreme Court determined that "the City of West Hollywood's conditional agreement to sell land for private development, coupled with financial support, public statements, and other actions by its officials committing the city to the development, was, for CEQA purposes, an approval of the project that was required . . . to have been preceded by preparation of an EIR." *Id.* at 121-122. The court reached its conclusion based on the following facts:

- Option to Purchase Property. In June 2003, to facilitate the developer's application for HUD financing, the City Council granted the developer an option to purchase the city's property for the purpose of demonstrating to HUD that the developer controlled the project site. *Id.* at 122.

- Pledge of Financial Assistance. In conjunction with the HUD application, the City Manager wrote to HUD stating that the city approved the sale of the property to the developer at a negligible cost, that the city would be contributing $1.5 million in land value to the project, and that the city would contribute up to an additional $1 million in funding. *Id.* at 122-123.

- City's Statements Announcing Project. In an email and newsletter to residents in December 2003 and January 2004, the city announced the grant approved by HUD and the city's plan to build affordable senior housing on the site. In

responding to residents, city staff characterized the development of senior housing as an "obligation" the city "must" pursue. *Id.* at 123.

- Relocation of Existing Tenants. At the same time, relocation consultants began contacting existing tenants notifying them that they would soon receive a one-year eviction notice.

- Binding Development Agreement. In May 2004, the city council approved a "Conditional Agreement for Conveyance and Development of Property." The stated purpose of the development agreement was to cause the site to be redeveloped with affordable senior housing. *Id.* at 124.

    - The development agreement was a binding agreement that committed the city to conveying the property to the developer before consideration of an EIR, provided the developer met certain conditions.

    - The agreement obligated the city to provide significant financial assistance in the form of a $1 million loan to the developer and conveyance of property valued at $1.5 million. The first phase of actions to be taken under the agreement included completing the relocation of existing tenants.

- Waiver of CEQA Condition. Although the development agreement stated that it was conditioned on CEQA review, it also included a provision allowing the City Manager to waive that condition, meaning that the property could be conveyed without CEQA review. *Id.* at 124.

- Binding Obligations. The agreement created real contractually binding obligations for the city. This fact was stressed to the city council at the meeting at which the development agreement was approved. *Id.* at 125.

Based on all of these facts, the court concluded that the city had in fact committed itself to a definite course of action:

> In summary, City's public announcements that it was determined to proceed with the development of low-income senior housing at 1343 Laurel, its actions in accordance with that determination by preparing to relocate tenants from the property, its substantial financial contribution to the project, and its willingness to bind itself, by the May 3 draft agreement, to convey the property if the developer 'satisfied' CEQA's 'requirements, as reasonably determined by the City Manager,' all demonstrate that City committed itself to a definite course of action regarding the project before fully evaluating its environmental effects.

Id. at 142.

In considering these factors, the court noted that half of the loan would be used before CEQA compliance and lost if the project was not approved, and stated that this was not a trivial outlay for such a relatively small city. *Id.* at 140. The court emphasized the discretion given the city manager in determining whether CEQA requirements had been satisfied and the lack of clear language allowing the city to reject the project if it found that the benefits did not outweigh immitigable environmental effects. *Id.* 140-141. The court also emphasized that relocation of existing tenants was a significant and irreversible step. Taking that step before certifying an EIR and finally approving the project showed that the city's commitment to the project was not contingent on review of an EIR. *Id.* at 142.[3]

B. *Riverwatch*: A Binding Contract To Provide Water For 60 Years

Save Tara was followed in 2009 by the Court of Appeal's decision in *Riverwatch v. Olivenhain Municipal Water District*, 170 Cal. App. 4th 1186 (2009). The *Riverwatch* case also hinged on a binding agreement that created contractual obligations for the public agency. In that case, the water district entered into a binding agreement to provide water to a trucking company for delivery to a landfill for landfill operations. Although the agreement provided for the trucking company to meet its CEQA obligations, the agreement said nothing of the need to address the environmental impact on the water supply, and the EIR for the landfill (certified by a different agency) did not address the issue. *Id.* at 1212-13.

The court found that approval of the agreement committed the water district to a definite course of action and for CEQA purposes, was approval of a particular feature of the landfill project that required environmental review. *Id.* As in *Save Tara*, the *Riverwatch* court looked at all of the circumstances in reaching its conclusion:

- Binding Agreement. The agreement created a 60-year obligation for the water district to deliver water and contained specific details regarding that obligation and the construction that would be required for the water deliveries to take place. *Id.* at 1212.

- No CEQA Compliance or CEQA Condition re Water Source and Supply. Conditioning the agreement on CEQA compliance regarding the use and transportation of the water by the trucking company was not enough because it did not address the water district's obligation to comply with CEQA, and it did

[3] Notably, in *Save Tara*, the Supreme Court discussed but did not overrule the earlier case of *Concerned McCloud Citizens v. McCloud Community Services District*, 147 Cal.App.4th 181 (2007) (*McCloud*). In *McCloud*, the district entered into a long-term agreement with Nestle for exclusive rights to bottle and sell water from the district's water sources, conditioned upon several items including a feasibility analysis, permits and approvals, and CEQA compliance. *Id.* at 186-87. While the agreement gave Nestle an exclusive option on the delivery and purchase of spring water, the agreement specifically stated that neither party was bound by the agreement unless and until CEQA compliance was completed. *Id.* at 188. The court held that the district's approval of the agreement was not an "approval" under CEQA. *Id.* at 192-93. Instead, "[w]e view the agreement as temporarily holding in place a set of preagreed financial terms between the parties, while conceptually outlining a proposal for a project to be subjected to and conditioned upon full environmental review." *Id.* at 193-94. The Supreme Court in *Save Tara* declined to find and apply a general rule from *McCloud* that EIR preparation can be postponed in all circumstances, instead looking to the particular facts of the situation to determine whether the public agency committed itself to a definite course of action. *Save Tara* at 133.

not condition the water district's performance on its approval or disapproval of the lead agency's final EIR. The lead agency's EIR did not address water sources and supply. *Id.* at 1212-14.

- No Recognition of Need for CEQA Compliance. Moreover, the water district's board did not, in the course of approving the agreement, recognize or acknowledge its obligation to comply with CEQA in connection with its approval of the agreement, and did not indicate any intent to do so in the future. *Id.* at 1214-15.

By executing and approving the binding agreement without any provision for CEQA compliance, the water district effectively precluded any alternatives or mitigation measures that CEQA might require, including the alternative of not going forward with the project. *Id.* at 1215.

C. *Sustainable Transportation*: No CEQA Violation For Voter-Approved Transportation Plan

Also in 2009, the Court of Appeal reviewed whether a voter-approved retail sales and use tax to fund transportation improvements violated CEQA because it was approved without environmental review. *Sustainable Transportation Advocates v. Santa Barbara County Assn. of Governments*, 179 Cal. App. 4th 113 (2009). The court found that it did not, because implementation of the individual projects described within the transportation plan was contingent on several factors including CEQA analysis and funding. Specifically, the court noted:

- Flexibility to Change or Not Go Forward with Project. In the related ordinance, the public agency retained the power to amend the plan, including the power to delete a project. This flexibility, including the lack of details and specifications in the plan, would allow the agency to address mitigation measures and alternatives set forth in a subsequent EIR. *Id.* at 120.

- Commitment to CEQA Compliance. The related ordinance also stated that any necessary environmental review would be completed before beginning a specific project. *Id.* at 119.

- Financial Conditions. Although the tax measure was expected to generate more than $1 billion over 30 years, implementation of the projects required receipt of substantial matching funds from other sources. Accordingly, passage of the measure and collection of the tax did not assure implementation of the projects. *Id.* at 116, 121.

- Political Campaign. The public agency's year-long campaign in favor of the tax measure and recommendation of the measure to voters did not outweigh the agency's stated intention to comply with CEQA before implementing a specific project. *Id.* at 121-22.

The court determined that as a practical matter, even with voter approval, the public agency had not committed itself to implementation of the specific projects within the transportation plan. As such, approval of the tax and transportation plan was not approval of a project under CEQA.[4]

D. *Cedar Fair*: No CEQA Violation For Detailed NFL Stadium Term Sheet Agreement

The most recent case on this topic, and the one most on point, is *Cedar Fair, L.P. v. City of Santa Clara*, 194 Cal. App. 4th 1150 (decided April 6, 2011). In that case, the Court of Appeal ruled that a very detailed 39-page Stadium Term Sheet approved by the City of Santa Clara, its redevelopment agency, and a private developer for construction of a football stadium for the 49ers did not trigger CEQA review. Even though the agreement included a very detailed description of the project and the terms for the project, it was a preliminary document intended to set forth a framework for future negotiations, leaving the city with full discretion to make decisions under CEQA, including a decision not to proceed with the project. In reaching its decision, the court considered the following facts:

- Non-Binding Agreement. Although the terms contained in the agreement are numerous and detailed, they are not binding. The stated purpose of the agreement is to memorialize the preliminary terms negotiated by the parties and inform the public of the goals and principles that will guide the proposal through public review process. 194 Cal. App. 4th at 1167-69. The court noted that a commitment to continue to negotiate does not commit a public agency to a particular course of action.[5] *Id.* at 1170-71. The agreement states that it "creates 'no legal obligations'" and states "the parties' intent to not 'create any binding contractual obligations.'" *Id.*

- Series of Agreements. Prior to approval of the term sheet, the city council and redevelopment agency authorized a negotiating agreement with the developer for negotiation of a disposition and development agreement. The negotiating agreement also contained a CEQA compliance condition. *Id.* at 1157-58.

- Advocacy is Not "Approval." The plaintiffs claimed that statements made by council members, the city manager, and city staff about the approved term sheet indicated it was viewed as a binding agreement. *Id.* at 1171-72. Those statements were not enough to override the non-binding effect of the agreement. "[A] local agency may be a vocal and vigorous advocate of a proposed project as well as an

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[4] *See also, City of Santee v. County of San Diego*, 186 Cal. App. 4th 55 (2010), where the court held that an agreement between the county and the State Department of Corrections identifying potential locations for a state prison reentry facility in exchange for preferential access to $100 million in financial assistance for jail construction if one of the identified sites were chosen, did not constitute commitment to a definite course of action. It was a preliminary agreement of the type "needed to explore and formulate projects and for which CEQA review would be entirely premature." *Id.* at 67.

[5] *See also, Parchester Village Neighborhood Council v. City of Richmond*, 182 Cal. App. 4th 305 (2010), where the court held that an agreement between the city and a neighboring Indian tribe for city services for a proposed casino "merely sets the stage for future negotiations" and was not an approval of a project under CEQA. *Id.* at 320.

approving agency. But 'an agency does not commit itself to a project "simply by being a proponent or advocate of the project . . ."'" *Id.* at 1173 (citations omitted).

- CEQA Condition. The agreement was conditioned on CEQA review and other required approvals including voter approval. The city and the redevelopment agency retained discretion to modify the project to comply with CEQA, select other feasible alternatives, or to choose not to proceed with the stadium project. *Id.* at 1170-71.

- Very Detailed Agreement. The extensively detailed 39-page term sheet included a detailed description of the proposed project, including the number of seats, number of years for the lease, ownership structure, financing structure, financial rights and responsibilities including re future revenues, etc. *Id.* at 1167-70.[6] Nonetheless, the court found that the term sheet "merely 'memorializes the preliminary terms' and only mandates that the parties use the term sheet as the 'general framework' for 'good faith negotiations'." *Id.* at 1170-71.

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[6] The following paragraphs from pages 1169-70 of the decision convey the level of detail contained in the agreement:

> Extensive details are set forth in the 39–page term sheet. "Article 2" specifies the city's responsibilities, which include the obligations to (1) jointly with the redevelopment agency, create the stadium authority to build, own, and operate the stadium, (2) enter into a ground lease with the stadium authority, and (3) engage in reasonable good faith efforts to form a Mello–Roos Community Facilities District for special taxation purposes. "Article 3" of the term sheet concerns the DDA. It states that the City and the stadium authority "will enter into a Disposition and Development Agreement ('DDA') with [the] 49ers Stadium Company," which "will set forth the predevelopment activities to be performed, the preconditions to commencement of construction of the Stadium," and will specify the "funding of construction costs." "Article 5" concerns the stadium lease and the 49ers NFL franchise sublease. The term sheet specifies the term of the leases (40 years with five options for additional four year terms) and the formula for calculating the rent to be paid by the 49ers Stadium Company to the stadium authority. "Article 6" concerns the design and construction of the stadium. It states that "[t]he Stadium Authority will enter into a project management agreement ... with 49ers Stadium Company pursuant to which 49ers Stadium Company will direct and manage all design and construction for the Stadium, subject to oversight of the Stadium Authority...." It also specifies the development fees to be paid by the 49ers Stadium Company and the redevelopment agency. "Article 7" addresses stadium construction financing.
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> The remainder of the term sheet is chiefly concerned with financial and other rights and responsibilities involved in the operation of the proposed stadium. "Article 8" sets forth responsibility for management and operation of the Stadium and parking. "Article 10" addresses entitlement to stadium operating revenue, which excludes team revenue. "Article 11" concerns team revenue. "Article 12" defines "reimbursable expenses." "Article 13" pertains to non-NFL events, including the income, revenue and expenses of such events. "Article 14" specifies the funding and maintenance of a capital reserve by the stadium authority. "Article 15" concerns use of excess revenues. "Article 16" describes the right of the 49ers Stadium Company to sublease to a second NFL team. "Article 17" concerns adjacent property, including the obligations of the Redevelopment Agency with respect to the Great America Theme Park.

- Financial Commitment. The redevelopment agency spent over $1 million for consultant support, and expected to spend another $1 million during the next phase of negotiations. *Id.* at 1172-73. The court noted that the expenditure of significant funds is to be expected on a large, complex project. *Id.* The expenditures themselves "do not establish any legal commitment to any feature of the project that effectively foreclosed meaningful environmental review." *Id.* Neither the city nor the redevelopment agency made any contractual promises to loan money, as in *Save Tara. Id.*

While the plaintiff emphasized the high level of detail, the large amount of money being invested by the public agencies before final approval, and the fact that the term sheet was put to a public vote, the court concluded that, looking at all of the facts, adoption of the term sheet did not preclude any alternative or mitigation measure that would be part of CEQA review. *Id* at 1172-73.

E. The Plaza De Panama MOU: A Tentative Non-Binding Agreement

In stark contrast to the development agreement in *Save Tara* and the water supply agreement in *Riverwatch*, the Plaza de Panama MOU is not a binding agreement, commits the City only to further exploring and developing the project so that it can be considered for approval, clearly states the City's intent to fully consider the environmental effects of the project including analysis of the impact on historical resources, and retains the City's full discretion to consider and adopt feasible mitigation alternatives up to and including a decision to not move forward with the Proposed Project.

Unlike the agreements in *Save Tara* and *Riverwatch*, the MOU does not set the City down a path from which it cannot stray. Instead, like the circumstances in *Sustainable Transportation* and *Cedar Fair,* the City has clearly identified off-ramps from the Proposed Project: the City can, under the terms of the MOU, withdraw its support at any time *and* the City can decline to approve the Proposed Project or adopt mitigation measures or alternatives to the Proposed Project. The Plaza de Panama Committee has the same options: the Committee can withdraw its support at any time *and* if the City approves the Proposed Project with changes not acceptable to the Committee, the Committee can withdraw its support at that time. (*See* MOU §6.1.)

In *Cedar Fair*, the redevelopment agency made a substantial investment both in money spent and in the commitment for additional expenditures (totaling $2 million through the negotiation stage), for *consultants*. The court found such expenditures appropriate and not indicative of "approval" of the project for CEQA purposes. *Cedar Fair*, 194 Cal. App. 4th at 1172-73. Presumably, considerable time was spent by city and redevelopment agency staff over the more than one year since the agencies started working on the stadium project at issue in that case. The court noted:

> While such expenditures suggest that respondents were politically dedicated to the goal of developing a NFL stadium, those expenditures do not establish any legal commitment to any feature

> of the project that effectively foreclosed meaningful environmental review.

Id. at 1173.

Here, the Plaza de Panama Committee, not the City, has retained several consultants for design and environmental studies. The City has not and does not intend to contribute to those costs. The MOU provides for the City to defer collection of fees for staff time that would typically be charged to the project applicant. (MOU §4.1.3.) Again, as the MOU is not binding and can be cancelled at any time, the project applicant remains responsible for those amounts. (MOU §§6.1, 6.4.)

In *Save Tara,* the court found the size of the city's investment ($2.1 million) compared to the relatively small size of the city to be a factor, in combination with the development agreement, in determining whether the city had as a practical matter committed itself to the project in a way that prevented it from considering alternatives or mitigation measures brought forward in the environmental review process. 45 Cal. 4th at 140. Here, the City is substantially larger, the investment is substantially smaller, and the agreement at issue is non-binding. Moreover, unlike the project in *Save Tara* or *Riverwatch*, the Proposed Project will result in improvements to the City's property, owned and operated by the City or for its benefit, making the City's investment even more appropriate.

The statements made by City of San Diego officials to date are also much different than those made by city officials and staff in *Save Tara.* Whereas in *Save Tara*, the city characterized the project as an obligation that it must pursue because of the grant funding received from HUD, here the statements made have been on both sides of the project and not dispositive of its outcome. (*See, e.g.,* Mayor's 2011 State of the City Address (*available at* www.sandiego.gov/mayor/pdf/sotc2011.pdf) and June 8, 2011 Media Statement (*available at* www.sandiego.gov/mayor/pdf/plazadepanama110608.pdf); "Jacobs Suspends Work on Balboa Park Plan," June 8, 2011, www.signonsandiego.com/news/2011/jun/08; and "Balboa Park Groups Regrouping on Plaza Issue," June 9, 2011, www.signonsandiego.com/news/2011/jun/09.) In addition, the City is currently reviewing alternatives to be studied as part of the environmental analysis. (*See* www.balboapark.org/plaza-de-panama/updates.) These facts do not weigh in favor of a conclusion that the City is not intending to consider alternatives brought to light as part of the environmental analysis.[7]

III. THE STRENGTH OF THE CITY'S POSITION WILL NOT NECESSARILY PREVENT A LAWSUIT

As discussed above, recent cases decided by both the California Supreme Court and the California Court of Appeal support the position that the City can approve and enter into the MOU without first completing the EIR for the Proposed Project. That does not mean, of course, that a party intent on challenging the decision to enter into the MOU could not file a lawsuit claiming a CEQA violation. The Save Our Heritage Organisation (SOHO) has signaled its intent to do so.

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[7] This analysis could change if additional facts are brought to light that merit consideration.

In each of the cases discussed in this memorandum, the court's decision followed a review and analysis of the facts in the case. Only after that review could the court determine whether the public agency had committed itself to a definite course of action regarding the project before fully evaluating its environmental effects. The end result, if against the public agency, typically sets aside the public agency's approval and/or requires the agency to take the necessary steps to fix the CEQA compliance problem.

For example, in *Save Tara*, the City of West Hollywood lost on the issue of failing to complete its EIR before entering into the development agreement, and the court set aside the approval of the development agreement. The EIR that had been completed and certified in the meantime, however, remained. 45 Cal. 4th at 125-26. The court returned the matter to the city to determine whether a subsequent or supplemental EIR for the project was required. *Id.* at 143. Likewise, in *Riverwatch*, where the public agency had not conducted any environmental review related to water supply, the water supply agreement was set aside. 170 Cal. App. 4th at 1215.

At Rules Committee, more than one Councilmember expressed concern that litigation over the MOU could affect the timeline for and cost of the proposed project. Those are valid concerns. Even though it appears the City would have a strong legal and factual defense, the City cannot preclude the filing of such an action.

CONCLUSION

The MOU before the City Council for its consideration is the type of preliminary agreement identified in the CEQA Guidelines necessary for development of a project, but not an "approval" of the project for CEQA purposes. The MOU commits the City to work with the Plaza de Panama Committee to further explore, analyze, and develop the Proposed Project, but does not create binding obligations for the City and can be cancelled by the City at any time. The MOU clearly states the City's intention to give full consideration to the environmental studies currently underway, including alternatives and mitigation measures presented by those studies, and the alternative of not proceeding with the Proposed Project. Accordingly, the City Council can approve and authorize the execution of the MOU without first completing environmental review.

JAN I. GOLDSMITH, CITY ATTORNEY

By _____
Carrie L. Gleeson
Deputy City Attorney

CLG:als
cc: Gerry Braun, Director of Special Projects
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