MEMORANDUM OF LAW

DATE: January 31, 1991

TO: Councilmember Abbe Wolfsheimer
FROM: City Attorney
SUBJECT: Proposed Deletion of an Exclusion from the Resource Protection Ordinance Concerning Development in Sorrento Hills

BACKGROUND

You have asked whether there are any legal constraints to preclude an amendment to the Resource Protection Ordinance (RPO), San Diego Municipal Code Section 101.0462, to delete an exclusion for development of 178 acres in Sorrento Hills from RPO's application. You referenced certain memoranda of law dated May 24, 1990 and June 21, 1990 (attached as Enclosures (1) and (2) respectively), which concluded that the development agreement for Sorrento Hills does not exempt certain of the properties in the Sorrento Hills area from RPO's application. You expressed additional concerns that the language of Proposition D (attached as Enclosure (3)), approved in November 1986 by the voters, compels a legal requirement that the Sorrento Hills development be subject to RPO, and therefore should not be exempted.

In our discussion, we shall refer to two agreements that relate to Sorrento Hills, which bear upon our analysis. We shall refer hereafter to these documents and the properties they define as follows:

a. The Development Agreement is that agreement between the City of San Diego and Newlands, et al, for the development of property in Sorrento Hills, which was approved by Ordinance No. O-17300 effective June 14, 1989. The Development Agreement provides for development rights to the parcels of property therein designated as the "Owners Property." It also refers to certain other property which was to be traded by the City under a separate agreement to Genstar, and later assigned to Newlands, which is designated in that agreement as the "Park Trade Property."

The development rights in Sorrento Hills concerning the "Owners Property" were based upon land grading considerations at the junction of the "Owners Property" and the "Park Trade Property," which was in the nature of a "donut hole." The Development Agreement specifically references RPO by purporting to exempt the land grading on the "Owners Property" that was necessary to integrate it with the Park Trade Property from RPO. The effect of that provision was addressed in our memorandum of

law dated June 21, 1990. We shall return to this point later in our discussion.

b. The Land Swap Agreement is an agreement between the City and Genstar Development which was later assigned to Newlands. It was approved by City Council Resolution No. R-263850 on August 12, 1985. The Land Swap Agreement provides for the transfer of 166 acres of City land, which is part of the Park Trade Property referred to within the Development Agreement, for an approximate 291 acres of land then owned by Genstar (now Newlands) which abutted the Los Penasquitos Canyon Preserve. The Land Swap Agreement also depended upon voter approval of Proposition D at the 1986 election to permit the shift of the 166-acre City-owned Park Trade Property from a future urbanizing designation to a planned urbanizing designation. (An additional 12-acre parcel belonging to a Mr. McReynolds was also to be redesignated by Proposition D. That 12-acre parcel was included within the 178 acres of land that is presently exempted under subsection E.7 of RPO. The 12-acre McReynolds parcel is mentioned only for historical completeness.)

The 166-acre City parcel (the Park Trade Property) and the 12-acre McReynolds parcel comprise the 178-acre parcel in Sorrento Hills that was specifically excluded from RPO pursuant to Ordinance No. O-17253 (New Series) effective March 29, 1989. Previous to that amendment, there was a general exclusion for the development of property for park purposes pursuant to a park development plan. (See subsection E.7 of Ordinance No. O-16939 (New Series).)

CONCLUSION

Having identified the above agreements and provisions as they bear upon the property, we conclude as follows: There is nothing in the Development Agreement, the Land Swap Agreement nor Proposition D which either mandates or precludes an amendment to delete the exclusion of Sorrento Hills from the application of RPO. The determination of whether to do so is a policy decision which should consider the effects of such deletion on the Land Swap Agreement insofar as it may affect Newlands' discretion to go forward with that agreement. The analysis leading to this conclusion follows.

ANALYSIS

The Development and Land Swap Agreements

Our memorandum of law of June 21, 1990 concluded that the Development Agreement did not exempt the Park Trade Property from RPO. This memorandum also concluded that the Development Agreement did not exempt the Park Trade Property from any future amendments to RPO and would purportedly exempt the Owners

Property from future amendments to RPO once the conditions specified in the Development Agreement are satisfied. We reaffirm those conclusions.

It should be noted that when the Development Agreement was approved, the exemption for Sorrento Hills was part of RPO. However, since development permits have not been applied for on the Park Trade Property, and since the Development Agreement does not address development rights upon the Park Trade Property, no relevant vested rights issue arises should the RPO exclusion be deleted. Cf. Government Code sections 66474.2; 65866.

The significance of the omission of any provisions concerning these development rights in the Development Agreement itself must be understood within the scope of sections 5.2, 7.2 and 7.4 of the Land Swap Agreement, as that agreement might be affected by any later application of RPO to the Park Trade Property. Our attached memorandum of law of May 24, 1990, (Enclosure (1)) notes that Genstar had the discretion to terminate the Land Swap Agreement if they found a discretionary action of the City to be unsatisfactory. Further, that memorandum concludes that there were no provisions within the Land Swap Agreement which would insure that the land swap could or should go forward, absent the cooperation of Genstar (now Newlands).

The Land Swap Agreement, section 7.4, provides: "If Genstar, in its sole discretion, determines that City's probable or actual decision on any discretionary action will be or is unsatisfactory to Genstar for any reason, including but not limited to imposition of conditions unsatisfactory to Genstar or limitations of developable land unsatisfactory to Genstar, Genstar may . . . terminate this agreement . . . ." (Emphasis added.) The "discretionary action" referred to in 7.4 is defined in section 7.2 to refer to any of eight specific discretionary actions by the City Council. Those actions are: A threshold determination pursuant to Council Policy 600-30; amendment to the General Plan;

amendment to the Sorrento Hills Community Plan; rezoning; amendment to the Sorrento Hills Financing Plan; issuance of a PID permit; conditional approval of a tentative map; and, the conditional approval of a revised tentative map (T.M. 84-0520). Within section 7.2, however, the City retained the discretion whether to approve, in whole or in part, or to deny any of those requested discretionary actions.

Genstar's discretion to disavow the contract is limited by the terms of the Land Swap Agreement to only those Council actions respecting any or all of the above enumerated acts. In our view, however, that does not mean that Genstar's successor, Newlands, could treat a City Council action to amend RPO and

apply its provisions to any permit application thereafter submitted as constituting a "discretionary action" triggering Newlands' right to terminate the Land Swap Agreement. Again, in our view, Newlands first would be required to apply for discretionary approval and, to the extent that RPO would impact upon the development potential of the corresponding development permit (including any provisions for "alternative compliance" required as a condition of development), evaluate the nature of RPO's impact upon the specified "discretionary action" delineated in section 7.2.

However, section 5.2 of the Land Swap Agreement constituted a warranty by the City that it would not "cause, permit or suffer any encumbrance to or on the City land the Park Trade Property except any PID permit, FBA, financing plan or other encumbrance resulting from any discretionary action described in paragraph 7.2 of this agreement." It is again certainly arguable that deletion of the RPO exclusion for Sorrento Hills could be deemed to be an encumbrance upon development of the Park Trade Property as a possible restriction. But, the clear and only remedy for any breach of this warranty would be the disavowal by Newlands of the Land Swap Agreement. The practical effect of section 5.2 could thus preclude the application of RPO to any of the permits under sections 7.2 and 7.4, unless one wishes to run the risk of terminating the agreement.

PROPOSITION D

We will now discuss the effects of Proposition D and the language accompanying the ballot to determine whether it compels a legal conclusion that the Sorrento Hills property should be subject to RPO. Proposition D posed the question to the electorate whether the Progress Guide and General Plan should be amended to shift the 178 acres of land (which includes the Park Trade Property) from the future urbanizing designation into the

planned urbanizing designation so that it could be traded to Genstar for an approximate 291 acres adjoining Los Penasquitos Canyon Preserve.

The arguments in favor of the proposition did not allude to any development restrictions or permit requirements, nor to any ordinances or regulatory actions that might then or later be necessary or upon which the approvals would be conditioned. The arguments in favor of the proposition pointed out the benefits to be gained relative to the scenic and recreational values associated with the 291 acres to be received by the City. There were no arguments in opposition to the ballot.

Our reading of the ballot arguments does not suggest that anything other than the scenic and recreational benefits

associated with the 291-acre property was intended to be discussed.

The only reference in the arguments to the 166 acres of City property (Park Trade Property) was that it would be exchanged "for development," and that "Proposition D assures the most appropriate uses for both pieces of property."

The City Attorney's impartial analysis, after addressing the procedural reasons for the ballot, stated in pertinent part:

> The trade with Genstar will go forward only if this measure is approved and the City grants rezoning, subdivision map approvals and other development approvals for the 166 acres. The normal City review process will pertain to all of these actions. (Emphasis added.)

A fair interpretation of this language is that the development approvals for the Park Trade Property will be subject to the normal City review process as it would pertain to normal development approvals. The City Attorney's analysis is merely a statement of existing facts. It is not a representation as to any future actions or limitations upon those actions. It states that the trade may (can) proceed if the City grants Genstar the necessary development approvals. It neither says nor infers that these approvals would be other than those associated with the "normal City review process." It should also be recalled that at the time of the election RPO did not exclude these 166 acres, (nor the 12-acre McReynolds parcel). Thus, the normal review process could include consideration of a RPO permit, when applicable.

As you know, the provisions of Government Code section 66474.2 (and recent amendments to our own Code) provide with respect to development approval for tentative maps that a local agency shall only apply those ordinances, policies and standards in effect at the date the local agency has determined that the application is complete pursuant to provisions of the Government Code. To the extent that a development application in this matter is not complete, any revisions to RPO which would affect that development approval could lawfully be applied. There are no restrictions in the Land Swap Agreement against alteration of the policies or regulations affecting development of the Park Trade Property, unless one construes section 5.2 as being an undertaking by the City not to impose additional restrictions beyond those provided for in sections 7.2 and 7.4.

We therefore cannot interpret the ballot language nor the accompanying arguments as reasonably constituting any implied undertaking by the City to impose particular development restrictions, such as might arise under RPO, to the development

approvals sought by Genstar. More particularly, we cannot conclude that there is any implication within that ballot language which should cause the application of RPO to development on the Park Trade Property. Conversely, there is nothing in those provisions which precludes such an action.

To summarize then, the Council may legally, as a matter of policy, elect to delete the exclusion from RPO for development of the Sorrento Hills property. Newlands, as the successor in interest to Genstar under the Land Swap Agreement, retains the absolute discretion to go forward with the agreement whether the City deletes the exclusion or not. Should the City delete the exclusion for Sorrento Hills, RPO could be applied to any application for a development permit or approval submitted subsequent to the effective date of the amendment of RPO and provisions for alternate compliance could be imposed as a condition of any permit approval required. However, any alternative compliance that may have the effect of increasing the burden upon the applicant could result in abandonment of the land swap on the part of Newlands.

If you should have any further questions on this subject, we shall be pleased to respond to them.

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By
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Deputy City Attorney

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Attachments 3
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