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November 15, 2019

REPORT TO HONORABLE MAYOR AND MEMBERS OF THE CITY COUNCIL

FOLLOW-UP TO ANALYSIS OF SAN DIEGO STATE UNIVERSITY'S OFFER, DATED OCTOBER 28, 2019, TO PURCHASE THE SDCCU STADIUM SITE IN MISSION VALLEY

This report follows up on our report issued earlier this week. *See* City Att'y Report RC 2019-7 (Nov. 13, 2019). In our earlier report, we provided a detailed analysis of the revised offer submitted by San Diego State University (SDSU) on October 28, 2019 (Revised Offer), to purchase the City of San Diego's (City) real property located at 9449 Friars Road in Mission Valley, commonly referred to as the SDCCU stadium site (Property).

Given the complexity of the transaction and our analysis, we have prepared two attached worksheets to aid in the San Diego City Council's (Council) discussion of the Revised Offer on Monday, November 18, 2019. Worksheet A summarizes the recommendations earlier provided by the Office of the City Attorney (Office) and the Independent Budget Analyst (IBA) regarding additional terms and conditions related to particular deal points that need to be addressed in the purchase and sale agreement (PSA) to ensure consistency with Measure G and protect the City's best interests. Worksheet B contains questions related to specific deal points that require the Council's direction and input to assist this Office in drafting a PSA for the City's sale of the Property that the Council considers fair, equitable, and in the public interest.

In order to move forward with finalizing this transaction, we suggest that the Council: (1) provide input to the City's negotiating team on whether or not to follow the recommendations identified in Worksheet A; and (2) direct the negotiating team to complete negotiations on the open items in Worksheet B before the PSA is drafted. These steps could be implemented through a term sheet or other document, so long as there is sufficient specificity on each point to allow our Office to efficiently draft a PSA that reflects a meeting of the minds between the parties.

As noted in our earlier reports, the Mayor is the City's chief negotiator in this transaction, and the Council's role is to decide whether or not to approve the final transaction. This Office cannot proceed with drafting the PSA and other related transaction documents without direction from City staff and an agreement with SDSU regarding the policy and fiscal issues identified by this Office and the IBA.

Once we receive direction and the parties reach a meeting of the minds on the material deal points, we can provide a realistic timeline for completing the PSA (including its various attachments), although we cannot predict how many drafts of the PSA will need to be exchanged between the parties before they reach a consensus on all of the contractual language. As we

noted in Attachment 1 to our November 13 report, the detailed transaction documents for a complex real property transaction, such as this one, typically would take at least four months (often much longer) to draft and negotiate starting from the point at which the parties have agreed upon a comprehensive term sheet. Upon the Council's request, we can try to accelerate the timeline, to the extent possible without jeopardizing the City's interests.

MARA W. ELLIOTT, CITY ATTORNEY

By /s/ Kevin Reisch
Kevin Reisch
Senior Chief Deputy City Attorney

By /s/ Melissa D. Ables
Melissa D. Ables
Deputy City Attorney

KJR:MDA:nja
RC-2019-8
Doc. No. 2227379_3
Attachments

cc: Kris Michell, Chief Operating Officer
Cybele Thompson, Director, Real Estate Assets Department
Mike Hansen, Director, Planning Department
Andrea Tevlin, Independent Budget Analyst

WORKSHEET A

**RECOMMENDATIONS FROM REPORTS ISSUED BY
CITY ATTORNEY AND/OR INDEPENDENT BUDGET ANALYST**

| SDSU's Proposed Deal Point | City Attorney/IBA Recommendation |
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| 4. Murphy Canyon Creek | <p>(a) If SDSU does not acquire ownership of the entire channel, require that SDSU be required to maintain the entire channel, including its southernmost portion which will be part of the River Park.</p> <p>(b) Require strong indemnification and hold harmless protections for the City in the PSA related to the channel.</p> |
| 5. Stadium Demolition and Maintenance | <p>(a) Clarify in the PSA that, in addition to SDSU's commitment to maintain and then demolish/remove the existing stadium, SDSU is accepting the existing stadium in its "as-is" condition and will be responsible at its own cost for all rehabilitation/repair of the stadium and all new stadium capital improvements.</p> <p>(b) Include language in the PSA addressing each specific requirement of Municipal Code section 22.0908(n), such as SDSU's obligation to reimburse the City for its reasonable costs in providing public safety and traffic management-related activities for game or other events.</p> |
| 8. Transportation Improvements | Identify, and secure the performance of, SDSU's commitment to complete specific on-site and off-site traffic improvements, including specific trolley and other public transportation improvements. |
| 9. River Park | <p>(a) Identify, and secure the performance of, SDSU's commitment to complete specific elements within the River Park and to maintain the River Park in perpetuity.</p> <p>(b) Include language ensuring that SDSU's promise to maintain the park in perpetuity is enforceable and complies with State law, and that SDSU has the requisite authority to bind the State in this manner.</p> |
| 10. Additional 22 Acres of Parks | <p>(a) Identify the precise location of the park facilities;</p> <p>(b) Confirm that the park facilities will be publicly-accessible active recreation space in perpetuity; and</p> <p>(c) Provide an enforceable mechanism to ensure SDSU's successful long-term maintenance and management of the park facilities.</p> |

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| 13. Affordable Housing | <p>(a) Confirm details regarding the product type and targeted income levels applicable to the affordable restricted units in the PSA.</p> <p>(b) Identify a specific phasing plan for construction and occupancy of affordable units relative to market-rate units in.</p> <p>(c) Include one or more effective mechanisms to secure SDSU's completion of its affordable housing development obligations.</p> |
| 14. Groundwater Management | <p>(a) Include language in the PSA to ensure, to the extent possible, that the Project does not adversely impact the City's groundwater management activities and Pueblo water rights, and vice versa.</p> <p>(b) Determine a process for the City's future removal of two monitoring wells to be retained by the City upon the closing, if the City eventually opts to remove them.</p> |
| 15. Removal of Kinder Morgan Wells | <p>(a) Clarify in the PSA that the City will use reasonable efforts, but has limited ability, to "cause" well removal.</p> <p>(b) Clarify in the PSA that the current plan is to remove certain existing wells, vaults, and facilities from the Property and to abandon in place other existing facilities.</p> |
| Attachment 2, Nov. 13 Report Additional Deal Points for Council's Consideration | <p>Include in the PSA the additional deal points discussed in Attachment 2 to the City Attorney Report dated November 13, 2019, as follows: (a) project elements; (b) environmental design features; (c) security for performance of obligations; (d) development costs; (e) reduction of greenhouse gas emissions; (f) prevailing wage compliance; (g) as-is sale; (h) indemnity and release language; (i) no new taxes; (j) easements; (k) privatization of the sewer system; (l) wetland mitigation plan; and (m) evidence of financing.</p> |
| IBA Nov. 13 Report, Pg. 6 | <p>Include strongly-worded indemnification provisions that explicitly provide the City protection for any and all circumstances related to the property.</p> |
| IBA Nov. 13 Report, Pg. 7 | <p>Require SDSU to accept complete responsibility for the Property and fully indemnify the City for any liability related to the Property or operations thereon while it is under their control as Lessee.</p> |
| IBA Nov. 13 Report, Pg. 8 | <p>Establish a worst case outside close date of no later than December 31, 2020 to provide SDSU with a contractual incentive to effectuate an expeditious close.</p> |

WORKSHEET B

DEAL POINTS IN SDSU'S REVISED OFFER REQUIRING POLICY INPUT, AS IDENTIFIED BY CITY ATTORNEY AND/OR INDEPENDENT BUDGET ANALYST

| Deal Point | Further Policy Direction Needed to Assist the Negotiating Team in Bringing Back a Negotiated Term Sheet and/or PSA that the Council Considers Fair and Equitable and in the Public Interest: |
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| 2. Property | Should the City negotiate with SDSU to require that SDSU acquire the entire Murphy Canyon Creek Channel, including its southernmost portion south of Rancho Mission Road? |
| 3. Purchase Price | <p>(a) Is the base Purchase Price of \$86,200,000 acceptable?</p> <p>(b) Should the time value of money index factor be applied to the entire Purchase Price (including not only the Water Utility Fund's 37% portion, but also the General Fund's 63% portion) from September 30, 2017?</p> |
| 6. Fenton Parkway Bridge | <p>(a) Should the City pursue a non-binding agreement related to the construction and funding of the Fenton Parkway Bridge as described by SDSU in the Revised Offer? If so, what will be the time frame for completion of the non-binding agreement and for completion of the bridge construction?</p> <p>(b) Is the construction of the two-lane bridge, as opposed to the four-lane bridge contemplated in planning documents, acceptable?</p> <p>(c) Is SDSU's proposal acceptable with respect to SDSU's contribution of approximately 25% of the total bridge costs?</p> <p>(d) Is SDSU's proposal acceptable with respect to the City's funding contributions, including up to \$8.5 million in the General Fund's portion of the Purchase Price proceeds, \$1.3 million in existing capital improvement project funds, and an unspecified amount of DIF credits assuming SDSU meets DIF eligibility requirements?</p> <p>(e) Should the City negotiate to require SDSU to conduct the environmental review, design, permit and construct the bridge?</p> |
| 7. Additional Project Improvements | <p>(a) Is the City's General Fund contribution of \$1.5 million toward additional related Project improvements acceptable?</p> <p>(b) If yes, should the related Project improvements be identified in the PSA with a timeline for their construction, and be subject to appropriate controls to ensure that the City's money is being spent for a valid public purpose?</p> |
| 8. Transportation Improvements | Should the City negotiate to require SDSU's payment of 100% of the cost of all improvements listed in a recent memo provided by SDSU to the City and estimated by SDSU to total \$22 million (see Attachment H to the |

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| | Staff Report), as necessary to mitigate direct environmental impacts of SDSU's project? |
| 9. River Park | <p>(a) Is the Council willing to waive Council Policy 600-33 (including the City's General Development Plan process) for SDSU's design and construction of the River Park?</p> <p>(b) Should the City negotiate with SDSU to require the three storm water treatment facilities, or basins, to be relocated to SDSU's own development parcel?</p> <p>(c) If no, should the City negotiate to require that SDSU indemnify the City and maintain (at its own expense) the basins?</p> |
| 11. Future City Recreation Center Site | <p>(a) Should SDSU reserve a one-acre site for the City's future construction of a recreation center, consistent with the Mission Valley Community Plan?</p> <p>(b) If yes, should the City negotiate for SDSU to raise the footprint for the recreation center site to an elevation outside of the 100-year flood level?</p> <p>(c) Also, if yes, should the PSA include appropriate long-term management, maintenance, and protection of the recreation center site?</p> |
| 12. Development Impact Fees | <p>(a) Should certain public improvements on the Property be exempt from DIF, and if so, how broadly or narrowly should the exempt improvements be defined?</p> <p>(b) Should the City reduce or waive the park component of DIF in an amount equal to the cost of the park projects, if certain requirements are met such as compliance with the City's development standards?</p> <p>(c) Should a Park Development Agreement be included as an attachment to the PSA, or alternatively, should the PSA state that future completion of a PDA is a condition to SDSU's receipt of any reduction or waiver in the park component of DIF?</p> |
| 16. Environmental Contamination | Should the City agree to tender a written claim to Kinder Morgan for reimbursement of environmental remediation costs, if the PSA is carefully drafted to ensure that, by doing so, the City is not incurring any expense or liability whatsoever? |
| 17. Compliance with CEQA | Should a negotiated non-binding term sheet, based on the Council's input, be brought back to the Council, prior to the parties drafting and negotiating a PSA? |
| 18. Possessory Interest and Other Taxes | <p>(a) Should certain governmental use portions of the Property be deemed exempt from paying taxes?</p> <p>(b) If yes, should the PSA include provisions confirming that (1) sales tax will apply to specified elements of the Project; (2) possessory interest tax will apply to SDSU's lease of any portion of the Property to a third party for specified private uses; and (3) the City's transient occupancy tax and</p> |

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| | <p>tourism marketing district assessment will apply to specified elements of the Project, such as hotel uses and short-term rentals?</p> <p>(c) Also, if yes, should the City negotiate SDSU's payment in lieu of taxes to fully or partially compensate the City for the anticipated loss of future tax revenue?</p> |
| 20. Sovereignty | <p>(a) Should SDSU have unilateral permitting authority with respect to all aspects of the Project, including the River Park which will remain in the City's fee ownership?</p> <p>(b) If yes, should SDSU be allowed to collect DIF from Project developers on the City's behalf?</p> <p>(c) Also, if yes, does the Council agree with the recommendation that the PSA include a reliable mechanism for collection and payment to the City of all applicable fees that the City typically charges to commercial development and new residential development?</p> <p>(d) Should the PSA require that land use covenants, enforceable by the City, be recorded on the Property to hold SDSU accountable to deliver the Project in a manner consistent with Measure G and related campaign promises?</p> |
| 25. Potential Delay in Closing | <p>(a) Should any conditions precedent to the closing be allowed, such as the final resolution of any litigation filed in opposition to the Project or the PSA, recognizing that a litigation resolution could take many years?</p> <p>(b) Should the PSA establish an outside Closing Date?</p> <p>(c) If yes, what is the outside Closing Date that the Council believes is fair and equitable and in the public interest? (Note: The IBA has recommended an outside Closing Date of December 31, 2020, and this Office has suggested that the outside Closing Date could potentially extend to December 31, 2023, without violating the terms of Measure G.)</p> <p>(d) Should the City lease the Property to SDSU at a rent of \$1.00 per month if the closing extends beyond June 30, 2020, understanding that the City's General Fund will be required to compensate the Water Utility Fund for the interim use of its portion of the Property? If no, should the rent be increased to an amount that is either based on market rent or based on an amount that will fairly compensate the Water Utility Fund without any fiscal impact to the General Fund?</p> <p>(e) Should a pre-negotiated lease be included as an attachment to the PSA with provisions confirming that: (i) SDSU would be responsible to complete and pay for any rehabilitation costs and capital improvements related to the safe operation of the existing stadium; and (ii) SDSU would defend and indemnify the City against any claims related to the condition of the Property, including the stadium and the creek channel?</p> |