

OPINION NUMBER 2001-1

DATE: November 19, 2001

SUBJECT: Ballpark and Redevelopment Project

REQUESTED BY: Honorable Mayor and City Council

PREPARED BY: City Attorney

INTRODUCTION

Before the City Council for consideration on November 20, 2001, are a number of actions related to the Ballpark and Redevelopment Project [Project]. These include the approval of a disclosure document [Offering Document] for the limited placement of the City's bonds for the Project [Ballpark Bonds], approval of a modified purchase contract and continuing disclosure agreement for the Ballpark Bonds, approval of a Second Ballpark and Redevelopment Project Implementation Agreement [Second Implementation Agreement], and a variety of budgetary actions related to the Project.

We have been asked to opine whether any of the actions presented for consideration on November 20, 2001, or those that have previously been approved, require a vote of the electorate at this time as set forth in the Memorandum of Understanding [MOU] for the Project, or whether they have been, or are, subject to referendum or initiative.

QUESTIONS PRESENTED

1. Do any of the actions or agreements on the City Council agenda for consideration on November 20, 2001, or any of those heretofore authorized by the City Council, constitute modifications or amendments to the MOU requiring a vote of the electorate as set forth in the MOU?
2. Are any of the actions or agreements on the City Council agenda for consideration on November 20, 2001, or any of those heretofore authorized by the City Council, subject to referendum or initiative?

SHORT ANSWERS

1. No. None of the actions or agreements on the City Council agenda for consideration on November 20, 2001, nor any of those heretofore authorized by the City Council constitute modifications or amendments to the MOU requiring a vote of the electorate because, to the extent such actions or agreements modified the rights and obligations of the parties to the MOU, they did not materially: a) decrease the rights or increase the obligations of the City; b) increase the financial commitments of the City; or c) decrease revenue to the City. On the contrary, submitting the Project to the electorate for a vote at this time would constitute a breach of contract on the part of the City.

2. No. None of the actions or agreements on the City Council agenda for consideration on November 20, 2001, or any of those heretofore authorized by the City Council, are subject to referendum or initiative.

BACKGROUND

On November 3, 1998, the electorate of the City approved Ordinance No. O-18613 [Ordinance] which authorized and directed the City to enter into the MOU with the Redevelopment Agency of the City [Agency], Centre City Development Corporation [CCDC], and Padres L.P. [Padres] “Concerning a Ballpark District, Construction of a Baseball Park, and a Redevelopment Project” within the Centre City East (East Village) Redevelopment District of the Expansion Sub Area of the Centre City Redevelopment Project. The Ordinance provided that it was the intent of the electorate that the Ordinance and the MOU constitute the legislative acts establishing policy for the City on those matters, and provided for the ways and means for the implementation of that policy by such administrative and non-legislative acts as may be necessary and appropriate to carry out the purpose and intent of the Ordinance. A copy of the Ordinance is enclosed as Attachment 1. A copy of the MOU is enclosed as Attachment 2.

Following the vote on Proposition C, the MOU was executed by the City, the Agency, CCDC and Padres [collectively “Parties”]. The City and Agency, which are separate legal entities under California law, were specifically and distinctly defined in the MOU (Section II), and each agreed to separate and distinct rights and obligations. Pursuant to Section XV, the City was to provide not more than \$225 million towards the construction of the Project, based upon its financing of choice and from sources of revenue in the City’s general fund and other non-general fund sources as it may determine in its sole discretion. Pursuant to Section XVII, the Agency was to provide not more than \$50 million towards the Project, based upon a combination of equity and tax increment financing, for certain infrastructure and land acquisition. Pursuant to Section XVIII, Padres was to provide not more than \$115 million for construction of the Ballpark and land acquisition, although Padres is solely responsible for cost overruns in the construction of the Ballpark. The MOU at Section XIX, also provided that the Parties would work cooperatively to find an additional \$21 million to complete funding for the projected cost of the Project. Section XVIII provides that Padres was to provide the City with a first priority lien on its franchise, to be released “promptly” upon deposit of \$50 million by Padres into the Design and Construction Fund for the Ballpark.

The MOU also provided that Padres would be responsible for a significant program of private development in the vicinity of the Ballpark. In particular, Padres agreed to construct

Phase 1 of this private development by the time the Ballpark opens, and agreed that Phase 1 would include 850 hotel rooms [Padres' Hotels], office complexes totaling 600,000 square feet, and retail development totaling 150,000 square feet. In significant part, however, Section XXXI.A of the MOU gave Padres the right to "fine-tune" the mix of private development "any time prior to the completion of Phase 1 . . . in order for the development program to respond to market conditions," subject to the revised development program generating Transient Occupancy Tax [TOT] revenues and assessed values [AV] in accordance with projected levels agreed upon by the Parties in early 1999.

Section XXXIII of the MOU set forth a number of conditions subsequent to performance by the Parties, including the receipt of "sufficient assurances" regarding a number of matters by April 1, 1999. Section XL specifically contemplated that the "the planning, construction, operation, management, use and occupancy of the Ballpark, Ballpark Project, and Phase 1 shall be subject to the terms of more definitive agreements, which will encompass issues not addressed in" the MOU.

Finally, modifications to the MOU were specifically addressed in both the Ordinance and Section XXXVIII of the MOU. In particular, the MOU could be modified or amended by agreement of the City Council and without a vote of the electorate if such modifications or amendments did not "materially: 1) decrease the rights or increase the obligations of *the City*; 2) increase the financial commitments of *the City*; or 3) decrease revenue to *the City*." (Emphasis added.) Finally, the MOU was set to expire on March 31, 2000, unless all the conditions subsequent were satisfied, in which case the MOU would continue in effect for as long as any lease or other agreement for the use and operation of the Ballpark was effective.

On March 31, 1999, the City Council adopted Resolution No. R-291450, which found "sufficient assurances" with regard to the matters set forth in the MOU. In addition, the resolution accepted the security agreement and first priority lien in the Padres' franchise. The resolution also approved the projections of TOT and AV to be generated by Phase 1 of the private ancillary development by 2004.

On January 31 and February 1, 2000, the City Council approved a number of agreements related to the Project. These included the finance documents (a site lease, facility lease, assignment agreement, indenture and purchase contract); the Ballpark and Redevelopment Project Implementation Agreement [Implementation Agreement]; the Joint Use and Management Agreement [JUMA]; the Design-Build Procurement Consultant Agreement [Design-Build Agreement]; a Guaranty Agreement concerning the Procurement Consultant Agreement [Guaranty Agreement]; Conditions, Covenants and Restrictions [CC&Rs] regarding the Ballpark and Park at the Park; and a Purchase and Sale Agreement and Joint Escrow Instructions with the San Diego Unified Port District [District] for the purchase of Tailgate Park [Purchase Agreement].

The finance documents implement the lease-revenue structure for the Ballpark Bonds, as specifically contemplated in Section XV of the MOU. The Implementation Agreement modified certain of the rights and responsibilities of the Parties, but importantly not those of the City. In particular, the Agency agreed to increase its contribution to the Project by \$11 million (from \$50

to \$61 million) plus it agreed to pay for one-half of the land acquisition costs, if necessary, between \$110 and \$130 million. Padres agreed to construct two parking lots previously the responsibility of the City and Agency (the P-1 and R-7 lots). Padres also agreed to pay for land acquisition costs between \$100 and \$110 million, plus one-half of such costs between \$110 and \$130 million. The Implementation Agreement also addressed some minor matters between the parties involving infrastructure, budget management, and remediation of hazardous materials, and extended the MOU until September 30, 2000.

The JUMA implemented the use and management obligations of Padres regarding the Ballpark as set forth in Sections XXII – XXIX of the MOU. One of the provisions in the JUMA that benefits the City, however, is a credit/offset in favor of the City regarding certain TOT. In particular, the City will receive a credit against its annual operating and maintenance [O&M] expense (\$3.5 million plus escalation) if the Padres’ Hotels are not open and operating by the time the Ballpark is open. The credit will be the amount of TOT the Padres’ Hotels were projected to generate if they had been open.

The Design-Build Agreement implements Padres’ obligation to construct the Ballpark as set forth in the MOU. The agreement provides that a wholly owned affiliate of Padres shall procure the design-builder of the Ballpark, and shall be responsible for the construction of the Ballpark. The Guaranty Agreement is a guaranty by Padres of the performance of its wholly owned affiliate for the construction of the Ballpark.

The CC&Rs are the “reciprocal easement agreements, and operating and maintenance covenants” regarding the Ballpark and Park at the Park contemplated by Section XVIII of the MOU. The Purchase Agreement was entered into for the purpose of providing for the \$21 million additional funding requirement set forth in Section XIX. The MOU has been extended a number of times, most recently in the Fourth Supplement to the Implementation Agreement to November 30, 2001.

As mentioned, there are a number of actions regarding the Project for the City Council’s consideration on November 20, 2001. These include adoption of resolutions:

1. Authorizing and approving the Offering Document and a revised Contract of Purchase for the Ballpark Bonds;
2. Authorizing and approving a Continuing Disclosure Agreement between the City and the trustee for the Project with respect to the issuance of the Ballpark Bonds;
3. Authorizing and directing, on behalf of the City and Agency, the execution of the Second Ballpark and Redevelopment Project Implementation Agreement [Second Implementation Agreement];
4. Authorizing the revision of CIP No. 39-228.0, Ballpark and Redevelopment Project;
5. Declaring the City’s intent to reimburse itself for certain contributions to the

Project in the event refunding bonds are issued in connection with the Project;

6. Accepting on behalf of the City the repayment from the Agency of loans totaling \$40.2 million, and on behalf of the Agency authorizing repayment of the loans from the Agency, and authorizing the appropriation of \$40.2 million in the Capital Outlay Fund for CIP No. 39-228.0 for the purpose of funding expenses associated with the City's contribution to the Project, and within the City's overall \$225 million cap;
7. Authorizing the City Manager, and the City Auditor and Comptroller to take certain actions, if necessary, to meet the City's obligations with respect to Project costs if the City is unable to meet certain conditions relating to a surety bond for the Ballpark Bonds; and
8. Authorizing the City Manager, and the City Auditor and Comptroller to take certain actions, if necessary, to purchase and develop Tailgate Park if the District does not purchase the lots under the Purchase Agreement.

The Second Implementation Agreement increases the Agency's contribution to the Project by \$15.4 million (to \$76.4 million) plus authorizes an additional \$8.5 million in contingent expenses. The agreement also releases the first priority lien and security interest in the Padres' franchise until a guaranty received from Major League Baseball is released, at which time the first priority lien will be reinstated. The resolution authorizing the execution of the Second Implementation Agreement also accepts from Padres and John Moores [Moores] an additional guaranty agreement regarding TOT. That guaranty requires Padres and Moores to pay the City the difference, if any, between projected TOT for the Padres' Hotels and the maximum available credit/offset set forth in the JUMA. This guaranty will be in place until the earlier of the opening of the largest of the Padres' Hotels or June of 2008. The Second Implementation Agreement also extends the MOU into December so that the City may obtain the proceeds from the Ballpark Bonds.

The loan repayment authorization is the repayment of currently outstanding loans, previously made by the City to the Agency, which will allow the City to pay additional cash towards the Project. The authorization regarding the surety bond allows the City to fully fund required reserves for the Ballpark Bonds in the event the City is unable to purchase a surety bond for that purpose. The authorization regarding Tailgate Park will enable the City (subject to the \$225 million cap on its investment) and Agency to purchase and improve Tailgate Park in the event that the District is unable to implement the Purchase Agreement.

The Project has been the subject of a number of lawsuits, including allegations that a number of the agreements related to the Project were in violation of the MOU, or that a further vote of the electorate was required pursuant to the MOU. In particular, these allegations were rejected by the courts in the cases *Currie v. City of San Diego*, Court of Appeal Case No. D035891; *Zoebisch v. Abdelnour*, Court of Appeal Case No. D035872; and *City v. Dunkl*, 86 Cal. App. 4th 384 (2001). In *Currie*, the validity of the agreements adopted by the City Council in January and February of 2000 was found as to all matters other than conflict of interest

allegations currently being addressed in *Skane v. City*, Superior Court Case No. GIC752505 and *City v. All Persons Interested*, Superior Court Case No. GIC763487. In the latter two cases, the trial court has ruled in favor of the City that either no conflict of interest exists which would invalidate the agreements, or that the City Council properly ratified those agreements, although the cases are on appeal. In addition, the *Currie* decision determined that the \$225 million cap on the City's contribution to the Project did not include finance charges or debt service resulting from the City's financing, but rather was only applicable to the City's direct contribution to the construction of the Ballpark.

In *Zoebisch* and *Dunkl*, the courts found that the Ordinance and MOU constituted the only legislative acts involving the Project, and that all other actions of the City Council were administrative in nature, and were thus not subject to referendum or initiative.

Significantly, while the Project has been the subject of a number of implementing agreements, as specifically contemplated by the MOU, and the contribution of the Agency has increased, there has been no increase in the contribution of the City, nor have the obligations of Padres to construct certain private ancillary development been altered.

ANALYSIS

I

NO VOTE OF THE ELECTORATE IS OR HAS BEEN REQUIRED

Both the Ordinance and Section XXXVIII of the MOU provide that the MOU may be modified or amended by agreement of the City Council and without a vote of the electorate if such modifications or amendments do not “materially: 1) decrease the rights or increase the obligations of *the City*; 2) increase the financial commitments of *the City*; or 3) decrease revenue to *the City*.” (Emphasis added.) The first step in analyzing whether a vote of the electorate is or has been required, therefore, is to determine if a modification to or amendment of the rights and obligations of the Parties is proposed. If such a modification or amendment is proposed, the second step in the analysis is to determine if such modification or amendment purports to affect the rights, obligations, financial commitments or revenue of the City, as set forth in the MOU. If such modification or amendment does affect the City, the last step in the analysis is to determine whether the affect is such that a vote is required.

In conducting the analysis, it is important to remember that the MOU specifically defines the City separate and apart from the other Parties, including the Agency and CCDC. Thus, where the actions and agreements of the City following the execution of the MOU affect only the

rights and obligations of the Agency, CCDC or Padres, the modification restrictions in the MOU are not implicated.

In reviewing the past actions of the City Council, and the proposed actions on the agenda for November 20, 2001, we conclude that none of those actions, nor the agreements approved by them, require a vote of the electorate because, to the extent they constitute modifications or amendments to the rights or obligations of the Parties pursuant to the MOU, they did not, and do not, modify or amend the MOU to affect the rights or obligations of the City in a way that requires a vote of the electorate.

The approval of the “sufficient assurances” resolution implemented several matters specifically contemplated in the MOU, and did not affect the rights of the City. The approval of the finance documents, JUMA, Design Build Agreement, Guaranty Agreement, CC&Rs, and Purchase Agreement similarly implemented in more specific terms the provisions of the MOU; none constituted modifications or amendments to the MOU requiring the approval of the electorate. The Implementation Agreement modified a number of the rights and obligations of the Parties, but none of the City’s requiring a vote of the electorate. In the Implementation Agreement, Padres agreed to assume the responsibility for constructing two parking structures previously the responsibility of the City and Agency. The Agency and Padres agreed to contribute more funds for land acquisition, and the agreements involving infrastructure, budget management, and remediation of hazardous materials did not affect the rights or obligations of the City.

Similarly, none of the actions on the agenda for November 20, 2001, affect at all the rights or obligations of the City in a manner that requires a vote of the electorate. The approval of the Offering Document, amended Purchase Agreement and Continuing Disclosure Agreement implement the City’s “financing of choice” as contemplated by the MOU, and, as found by the courts in the *Currie* case, the City’s financing costs are not within the City’s maximum \$225 million contribution. The budgetary actions on the agenda also implement the City’s financing and do not increase the City’s contribution to the Project above the maximum \$225 million. The approval of the Second Implementation Agreement only increases the Agency contribution to the Project and such action does not affect the rights or responsibilities of the City. The release of the first priority lien is consistent with the MOU as Padres has already paid in excess of \$50 million toward the Project and, under the MOU, the lien would have been released by now. The lien will be reinstated following the release of the guaranty from Major League Baseball, for the protection of the City against cost overruns in the construction of the Ballpark, as provided in the Design-Build Agreement. Finally, the acceptance of the new TOT guaranty from Padres and Moores only adds to the protections for the City.

Nothing in any of the actions previously taken, or agreements previously approved, modifies the rights or obligations of Padres to construct the required Phase 1 private development. The obligation embodied in the MOU remains, subject to Padres’ right to fine-tune its mix of development to respond to market conditions. If Padres fail to perform on that obligation, the City has all its remedies at law and equity, which was the City’s position at the time the Ordinance was approved by the electorate in 1998. Nothing that has transpired since that time has reduced Padres’ obligations or reduced the City’s remedies. On the contrary, the

City has negotiated significant protections in the event Padres' does not perform. The JUMA contains the credit/offset against the City's O&M expense in the event that the Padres' Hotels are not built, and the recent TOT guaranty from Padres and Moores adds to that protection.

Padres' mix of development may look different today than it did in 1998, but the MOU reserves to Padres the right to make that adjustment provided that the Phase 1 development generates the required level of TOT and AV. The annual TOT projected to be produced beginning in 2004 begins at about \$800,000, escalates quickly to \$3 million, and further escalates over time to about \$6 million in 2014. The agreed upon level of AV in 2004 is \$311 million. Padres have the right to substitute residential for commercial or retail to satisfy this obligation, provided that the generated AV is the same. The final program for the Phase 1 development is yet to be determined, but the currently planned program includes a substantial amount of residential rather than commercial because of market conditions.

Contrary to the claim that the Project must be put to a vote of the electorate at this time, such an action would raise significant issues regarding the breach of the MOU by the City. The MOU is nothing more than a contract. The Ordinance, voted upon by the electorate, authorized and directed the City Manager to execute the MOU on behalf of the City. As the courts have determined, the approval of the Ordinance by the electorate constituted the sole legislative act regarding the Project; all other acts implementing the MOU are administrative in nature, to be carried out by the City Council. In that regard, if the provisions of Section XXXVIII, concerning modifications or amendments of the MOU, are not implicated, the City Council is charged with the responsibility to carry out the City's obligations pursuant to the MOU. As we have set forth in this Opinion, the provisions of Section XXXVIII have not been implicated, and thus the City Council must make the decision whether or not to proceed with the Project at this time. In particular, the City Council must make the determination under Section XXXIII.A of the MOU whether the terms of the proposed financing are reasonably acceptable. To defer that decision to the electorate on a voluntary basis would be a breach of the MOU by the City, giving rise to potential liability on the part of the City to Padres.

In sum, none of the actions or agreements previously approved or on the agenda for consideration modifies or amends the rights or obligations of the City set forth in the MOU such as to require a vote of the electorate. The City Council is charged solely with the responsibility to determine whether to proceed with the Project at this time. In addition, the obligation of Padres to build the Phase 1 private development has not been reduced, and the City has all the remedies available to it in the event of non-performance by Padres, as well as several additional remedies not contained in the MOU.

II

THE ACTIONS OF THE CITY ARE NOT NOR HAVE BEEN SUBJECT TO REFERENDUM OR INITIATIVE

A referendum and initiative have been attempted against the Project previously. The *Zoebisch* and *Dunkl* litigation conclusively determined that the actions of the City Council in implementing the provisions of the MOU were administrative in nature and thus not subject to

the power of referendum or initiative. Similarly, the actions for consideration on November 20, 2001, administratively implement the provisions of the MOU and are not subject to referendum or initiative.

The approval of the Offering Document, amended Purchase Contract, and Continuing Disclosure Agreement, and the other budgetary actions on the agenda implement the City's "financing of choice" as set forth in Section XV of the MOU, and are thus administrative actions not subject to referendum or initiative. The approval of the Second Implementation Agreement further implements the MOU by making an adjustment to the contribution of the Agency only, as well as further extending the MOU so that the City may receive the proceeds of its bonds. The approval of the Second Implementation Agreement is thus not subject to referendum or initiative.

CONCLUSION

None of the actions previously taken by the City Council, nor any of the agreements previously approved, nor any of those on the City Council agenda for November 20, 2001, materially: 1) decrease the rights or increase the obligations of the City; 2) increase the financial commitments of the City; or 3) decrease revenue to the City. As such, a vote of the electorate was not, and is not, required. In addition, none of those actions or agreements are subject to referendum or initiative. In the opinion of the City Attorney, submitting this matter to a vote of the electorate at this time would constitute a breach of contract on the part of the City. Pursuant to the MOU, it is the duty of the City Council to determine whether the terms and conditions of the proposed financing are reasonably acceptable.

Respectfully

submitted,

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CASEY GWINN
City Attorney

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Attachments 1&2
LO-2001-1