

OFFICE OF
THE CITY ATTORNEY
CITY OF SAN DIEGO

Michael J. Aguirre
CITY ATTORNEY

1200 THIRD AVENUE, SUITE 1620
SAN DIEGO, CALIFORNIA 92101-4178
TELEPHONE (619) 236-6220
FAX (619) 236-7215

MEMORANDUM OF LAW

DATE: July 14, 2006

TO: Honorable Mayor and City Councilmembers

FROM: City Attorney

SUBJECT: Response to Request for Clarification Regarding the Mitigated Negative Declaration for the Third and University Project, Project No. 11896

INTRODUCTION

On or about the first week of April 2006, the Office of the City Attorney received for the first time a copy of the final Mitigated Negative Declaration [MND] for the Third and University project (Project No. 11896). With no significant opportunity to review this document, the City Attorney raised the concern for the need of legal review at the Planning Commission hearing of April 13, 2006. It is the opinion of the Office of the City Attorney that the environmental review is not adequate, does not meet the statutory requirements, and may subject the City, unnecessarily, to litigation. The substantive changes proposed in this memo may easily be achieved with language added to the text of the MND that incorporate additional analyses and study. In addition, providing the public the opportunity to reflect upon the additional analyses is fully within the spirit and intent of California Environmental Quality Act [CEQA] (Public Resources Code section 21000 *et seq.*). Given that the project was recently revised by the Applicant, the additional time for revision is de minimus and the benefit outweighs any anticipated or perceived harm. *See* section 128.0309 of the San Diego Municipal Code. This memo is a response to the Planning Commission's recommendations and the City Attorney's efforts to work through these deficiencies with the Development Services Department [DSD]. On or about July 7, 2006, DSD issued an updated revised version of the final MND. Despite repeated requests, the Office of City Attorney has yet to receive a signed copy of this document as circulated. The comments that follow rely upon an e-mailed version of this document sent by DSD to the Office of City Attorney on July 13, 2006.

The July 7, 2006 revised final MND reflects an admission by DSD that they had not provided the public the opportunity to review the complete MND in draft or final form prior to July 7th. The draft MND issued in March 2006 and the final document that was released shortly

thereafter did not contain the correct Initial Study Checklist and did not reflect in any way an April 2005 Environmental Assessment (Phase II). The Office of the City Attorney was provided a copy of the Phase II Environmental Assessment on July 13, 2006. The Phase II Environmental Assessment discusses soil and vapor tests evidencing releases of a known carcinogen into the environment at the project site; namely, the solvent perchloroethylene [PCE]. The presence of PCE was mentioned in the revised final MND. These releases may trigger necessary mitigation including proper handling, removal, containment, transport and disposal under applicable local, state and federal law. The Phase II Environmental Assessment also reveals that a gasoline station occupied the northeastern part of the property in the 1940s with an Underground Storage Tank or Tanks (UST). The limited testing in the Phase II Environmental Assessment did not indicate the continued presence of the USTs but soil sampling during project excavation for the parking garage was recommended in the Environmental Assessment to determine whether there is any soil contamination. The former presence of USTs at the site, and the recommendation that soil sampling take place, was not addressed in the text of the revised final MND. No one in the public has had an opportunity to comment on this revised final MND and this new information.

On April 13, 2006, the Planning Commission recommended approval of the Third and University project (Project No. 11896). However, with respect to the Mitigated Negative Declaration [MND], the Planning Commission adopted the following motion:

[R]equest that clarification be given to the City Council; that the Planning Commission take no action on either [to] certify or not certify the Mitigated Negative Declaration No. 11896 based on the following issues:

1. Concerns raised by the City Attorney during the hearing;
2. Adequate traffic analysis;
3. Infrastructure relating to the proposed density; and
4. Public parking amenity.

This memorandum is issued in response to the Planning Commission's request for clarification on the above-referenced matters.

QUESTION PRESENTED

Is the Mitigated Negative Declaration of March 28, 2006, and as revised July 7, 2006, legally adequate and fully in compliance with the spirit and intent of the law; specifically, the California Environmental Quality Act [CEQA] (Public Resources Code section 21000 *et seq.*) and the CEQA Guidelines (California Code of Regulations section 15000 *et seq.*)?

SHORT ANSWER

No. For the reasons provided below, the Mitigated Negative Declaration of March 28, 2006, as revised July 7, 2006, is not legally adequate and does not fully comply with the spirit and intent of the law. The Office of the City Attorney respectfully requests that the City Council, under authority granted it in San Diego Municipal Code sections 112.0509 and 128.0311, decline certification of the MND, deny the project, and provide the Applicant and Development Services

Department with appropriate direction necessary to address Council concerns. *See* sections 15073.5 and 15074.1 of the CEQA Guidelines.

LEGAL ANALYSIS

This memo addresses the following concerns: traffic impacts, consistency with the Community Plan (e.g., density, infrastructure), hazardous materials, adequacy of mitigation, notification requirements, response to public comment, cumulative impacts and structural consistency. *See* sections 21005(a); 21151.4; 21069; 21003.1; and 21080.3(a) of CEQA; *see also* sections 15063(a)(1); 15063(d); 15125(a); 15063(g); 15041(a); 15070(b); 15064.5; 15370; 15044; 15201; 15064.7; 15064; 15073.5 and 15074.1 of the CEQA Guidelines.

I. GENERAL CONSIDERATIONS

As characterized below, the Initial Study of the MND [Initial Study] does not fully look at and analyze the potential environmental impacts from all phases of project planning, implementation, and operation. *See* section 15063(a)(1) of the CEQA Guidelines. Per section 15063(d) the Initial Study is required to contain in brief form:

- (1) A description of the project including the location of the project;
- (2) An identification of the environmental setting;
- (3) An identification of environmental effects by use of a **checklist**, matrix, or other method, provided that entries on a checklist . . . are briefly explained to indicate that **there is some evidence** to support the entries. The brief explanation may be either through a narrative or a reference to another information source such as an attached map, photographs, or an earlier EIR or negative declaration. A **reference** to another document should include, where appropriate, a **citation to the page or pages** where the information is found;
- (4) A discussion of the **ways to mitigate** the significant effects identified, if any;
- (5) An examination of whether the project would be consistent with existing zoning, plans, and other applicable land use controls; and
- (6) The name of the person or persons who prepared or participated in the Initial Study.

Emphasis Added. Consistent with the above requirements, DSD elected to use a checklist to identify environmental effects of the proposed project. The checklist is an integral part of the Initial Study and should not be undervalued in an evaluation of the legal adequacy of the document. Thus, the need for recirculation of the MND when it is clear that the wrong checklist was used for the document.

Other general deficiencies include the following: contrary to what is required, the Initial Study of the MND does not cite the page or pages in the referenced documents where the information relied upon can be found. In addition, the examination of whether the project is

consistent with existing zoning, plans, and other applicable land use controls is inadequate in that the Initial Study does not fully address the recommendations, objectives and goals of the Uptown Community Plan, as explained below.

One of the purposes of CEQA is to provide the public an opportunity to be informed of the potential environmental consequences of government actions and to provide the decision-making body an opportunity to make fully informed decisions taking into account these potential environmental consequences. section 21005(a) of CEQA states:

(a) [I]t is the policy of the state that noncompliance with the information disclosure provisions of this division which precludes relevant information from being presented to the public agency, or noncompliance with substantive requirements of this division, may constitute a prejudicial abuse of discretion within the meaning of section 21168 and 21168.5, regardless of whether a different outcome would have resulted if the public agency had complied with those provisions.

It is clear from a reading of the Initial Study that analyses supporting the conclusions reached are not fully disclosed or were not disclosed during the public comment period. In addition, analyses and findings that should otherwise be made are not found.

II. SPECIFIC CONSIDERATIONS

A. Traffic Impacts

The following concerns are specific to traffic related impacts. They are not intended to address all concerns but are highlights of primary issues.

1. Traffic Load and Capacity

The Initial Study Checklist suggests that the City has considered the impacts from "An Increase in Projected Traffic which is Substantial in Relation to the Existing Traffic Load and Capacity of the Street System." *See* Initial Checklist page 24. This issue is not adequately addressed in the text of the Initial Study nor in the Checklist findings. Specifically, the Initial Study fails to disclose area roadway classification, roadway capacity, and existing and future levels of service for segments and intersections. Absent this information, it is not possible to conclude that the increase in projected traffic is not substantial in relation to the existing traffic load and capacity of the street system.

The Initial Study states on pages 14 and 15 the following:

A traffic letter report for the proposed project was prepared by Urban Systems Associates, Inc. on January 20, 2006 which addressed project vehicular trip generation and intersection operations of University Avenue/Third Avenue and University Avenue/Fourth Avenue. The results and conclusions are summarized below.

Trips associated with the previous on-site commercial uses would have generated 686 ADT with 7 AM peak hour trips and 20 PM peak hour trips. Thus, the net new vehicular trips would total 424 ADT with 33 AM peak hour trips and 33 PM peak hour trips.

Pursuant to the City of San Diego's Traffic Impact Study Manual, projects that conform to the Community Plan Land Use and Transportation Elements and would not generate more than 1,000 total ADT or more than 100 trips during the peak hours, would not require preparation of a traffic study. The proposed project would conform with the Uptown Community Plan land Use and Transportation Elements, and as discussed above, would not generate more than 1,000 total ADT or more than 100 trips during the peak hour.

We have reviewed the January 20, 2006 traffic letter report and contrary to the above quote, this traffic letter report does not address intersection operations of University Avenue/Third Avenue and University Avenue/Fourth Avenue. In addition, according to the traffic letter report of January 20, 2006, the project would generate 1,110 ADT and a net of 424 ADT based on the existing uses. However, as noted in the Initial Study section entitled "Environmental Setting," the larger building is vacant; therefore, the assigned ADT of 460 should not be subtracted from the 1,110 ADT.

Furthermore, according to the City of San Diego draft CEQA Significance Determination Thresholds, dated November 2004, the following threshold has been established to determine significant traffic impacts:

If any intersection, roadway segment, or freeway segment affected by a project would operate at LOS E or F under either direct or cumulative conditions, the impact would be significant if the project exceeds the thresholds shown in the table below.

Page 69, City of San Diego draft CEQA Significance Determination Thresholds. Neither the Initial Study nor the January 20th traffic letter report identify the LOS in the project vicinity. Statements in the adopted Uptown Community Plan, however, suggest traffic congestion in the area. Figure 13 (Street Recommendations) on page 66 of the Uptown Community Plan identifies "Streets with Congestion Expected." Among those streets identified are University Avenue and Fourth Avenue, which abut the project. The following statement is included in the Hillcrest Existing Conditions section of the Uptown Community Plan:

Automobile traffic is particularly heavy in an east-west direction along both Washington Street and University Avenue and in a north-south direction along Fourth and Fifth Avenues. (page 91)

Page 93, Uptown Community Plan. The following information (which is not discussed in the Initial Study) tends to substantiate "traffic congestion."

- The Uptown Community Plan classifies University Avenue and Fourth Avenue as 2-lane collectors. See Figure 11 (Future Street Classifications) on page 61 of Uptown Community Plan.
- The Traffic Impact Study Manual (July 1998), establishes Level of Service (LOS) E as 8,000 for a 2-lane collector (commercial-industrial fronting).
- According to SANDAG, the average weekday traffic volumes for streets in the vicinity of the project in 2004 were as follows:
 - University Avenue (between First Avenue and Fourth Avenue) – 13,700
 - University Avenue (between Fourth Avenue and Fifth Avenue) – 19,300
 - Fourth Avenue (between Washington and University) – 8,800
 - Fourth Avenue (between University and Robinson Avenue) – 11,800

As noted, all roadway segments are LOS E or worse.

Based on the above considerations, a revised traffic study (at least a focused non-computerized study with manual assignment) is warranted. Absent further information, it is not possible for the decision maker or the public to ascertain whether or not the project would result in a significant traffic impact.

2. Conflict with Alternative Transportation Models

The Initial Study Checklist suggests that the City has considered the impacts from "A Conflict with Adopted Policies, Plans or Programs Supporting Alternative Transportation Models (e.g., bus turnouts, bicycle racks)." See Initial Study Checklist page 25. On page 25 of the Initial Study Checklist the "No" box is checked with the following explanation: "The project area is served by the Metropolitan Transit System [MTS] with several bus stops in the vicinity. The project would not adversely affect these operations." There is no discussion in the Initial Study, however, of the Class II Bikeway that is proposed on Fourth Avenue adjacent to the project. See Figure 15 (Uptown Bikeways) on page 73 of the Uptown Community Plan. As defined on page 72, Class II facilities are "striped lanes with signage." The lanes are typically 4'6" and are located adjacent to the curb. Has the project been designed to accommodate the proposed Class II Bikeway? Would Fourth Avenue have to be widened to accommodate the bikeway while still maintaining adequate traffic capacity and maintaining existing curb parking? Absent such an improvement, the future implementation of a bikeway would likely be precluded because of the loss of curb parking (if located adjacent to the curb) or because of an impact on traffic (if located outside of the parking area).

B. Consistency with Community Plan

1. Density, Compatibility and Related Concerns

The Initial Study Checklist suggests that the City has considered the impacts from "A Conflict with the Goals, Objectives and Recommendations of the Community Plan in which it is Located." See Initial Study Checklist page 18. However, the Initial Study fails to identify

and analyze the following relevant Uptown Community Plan goals, urban design objectives and recommendations:

- Preserve the diverse and unique character of each neighborhood in the Uptown community.
- Develop design standards and guidelines with incentives which will maximize quality development that is compatible in both character and scale.

Page 77, Uptown Community Plan. These objectives are relevant in guiding the determination of how the proposed project preserves the unique character of Hillcrest.

The Initial Study also does not fully address the following Uptown Community Plan Urban Design Guidelines with respect to site planning and architecture:

Articulate the design of buildings so they relate to the form and scale of surrounding structures through the use of compatible setbacks, building coverage and floor area ratios.

Page 78, Uptown Community Plan. The issue to be considered here is how the proposed project will maximize quality development that is compatible in both character and scale. The text of the Initial Study suggests that scale compatibility is a real issue. The Initial Study states the following on page 6:

The proposed 12-story building would contrast with the surrounding neighborhood character with respect to scale. Existing surrounding development generally consists of one- to three-story commercial and residential buildings. Taller structures are located within the Hillcrest community; however, no buildings of similar size occur in the immediate site vicinity.

There are no projects in the "vicinity" of the project that have a comparable floor area ratio or are as tall as the proposed project. Scripps Clinic, located on Fifth Avenue south of Washington Street, is the tallest building (8 stories) in the Hillcrest Commercial Node. Four of the buildings that are referenced in the Initial Study are not even located in Hillcrest but in other neighborhoods in the Uptown community planning area. Scripps Mercy Hospital [UCSD] and Scripps are located in the Medical Complex neighborhood north of Hillcrest. 3060 6th Avenue and Park Laurel are located in the Park West neighborhood south of Hillcrest. The 1st Avenue Apartments and the 6th Avenue Apartments [Coral Tree Plaza] are located in Hillcrest, but are approximately 1/4 mile and 1/2 mile, respectively, from the proposed project.

Furthermore, the Environmental Setting section of the Initial Study, which is presented on page 3 of the Initial Study, addresses the project site and the immediately surrounding land uses; however, there is no discussion of the areas in which the structures cited above are located. CEQA Guidelines do not discuss the appropriate content to include in the "Environmental Setting" section of an Initial Study. CEQA Guidelines section 15125(a), however, does provide the following discussion of the Environmental Setting:

An EIR must include a description of the physical environmental conditions in the vicinity of the project This environmental setting will normally constitute the baseline physical conditions by which a lead agency determines whether an impact is significant.

The analysis should focus on the surrounding area in the "vicinity" of the project site, which may suggest those buildings and structures located primarily in the Hillcrest neighborhood. The difference is in how one defines "vicinity." Should this definition include those buildings and structures within Hillcrest, any buildings/structures in the larger Uptown Community or building found in a different (larger or smaller) geographical area? Clarification is needed on this point.

2. Alleys

The project proposes to close down the alley situated between the two lots in order to connect the two buildings. However, the Initial Study does not discuss how this is consistent with the following objective delineated in the Uptown Community Plan for the Hillcrest neighborhood:

Preserve and promote the alleys in the Hillcrest area to be used as service pick-up locations in addition to their other uses.

Page 95, Uptown Community Plan.

3. Setback

The following recommendation, as found in the Uptown Community Plan, is specific to Hillcrest and is in addition to the recommendations for the Uptown community found on pages 77 through 86 of the Uptown Community Plan, Urban Design Element.

Projects over three stories should include a setback of the streetwall to reflect the historical scale of development.

Page 95, Uptown Community Plan. As shown in the Initial Study, the north, east and west elevations¹ do not indicate a setback at the fourth floor that would reflect the historical scale of development. In fact, two balconies extend out over the public right-of-way according to the Fourth Floor Plan².

Not only does the proposed project not comply with the Uptown Community Plan recommendation for setback, a deviation to the regulations is requested as an essential part of the proposed project. As stated on page 2 of the Initial Study, "proposed deviations to the City of San Diego's Land Development Code would include varying setbacks, from 0 to 12 feet instead of the required 15-feet, from the base of the street wall for portions of the building above a height of 36 feet" The Initial Study does not adequately explain why these deviations are allowed under the provisions of the San Diego Municipal Code and the Uptown Community

¹ Sheet A2.1 dated November 2005 and Sheet A2.2 dated January 16, 2006.

² Sheet A1.4 dated January 12, 2006.

Plan.

4. Neighborhood Character:

In determining that the impact on neighborhood character is not significant, the Initial Study relies upon the City of San Diego's draft CEQA Significance Determination Thresholds. The draft Thresholds state the following with respect to "projects that severely contrast with the surrounding neighborhood:"

To meet this significance threshold, one of more of the following conditions must apply:

- a. The project exceeds the allowable height or bulk regulations and height and bulk of the existing patterns of development in the *vicinity* of the project by a **substantial** margin . . .

Emphasis Added. Unfortunately, there are no guidelines that define "in the vicinity" or "substantial margin." Furthermore, there are no buildings in the surrounding blocks or in the Hillcrest Commercial Node that are as tall as the proposed project. The project is 9 stories higher than any structure in the surrounding blocks and 4 stories higher than the tallest building in the Hillcrest Commercial Node.

Absent adopted quantifications for the terms "in the vicinity" and "substantial margin," it is not evident from the Initial Study or elsewhere how it was justifiably determined that the proposed project will have no significant impacts associated with height and bulk.

5. Substantial Shading of Other Properties

The shadow analysis in the Initial Study, which is included on page 10 of the Initial Study, fails to consider the following site-specific neighborhood characteristics:

- On the block immediately north of the proposed project, the Initial Study identifies only three outdoor seating areas associated with dining. In fact, there are four: Hamburger Mary, Peet's Coffee & Tea, Bread & Pie Bakery/Cafe, and Chef's Wok. Of these four, only Hamburger Mary is partially covered by a trellis. All four would be impacted by shadow during the Spring Equinox, Fall Equinox, and Winter Solstice during the noon lunch period (approximately 11:00 a.m. to 1:00 p.m.). The two most easterly facilities would be impacted throughout the afternoon and into the dinner period (approximately 4:00 p.m. to 6:00 p.m.). The Initial Study erroneously concludes that "[g]iven the limited time of potential shading exposure at outdoor useable areas during the winter season and the fact that the restaurant patio is currently partially covered, impacts related to shading as a result of the proposed building during winter would be considered less than significant." The analysis fails to recognize the chill of winter which will be increased by the presence of the shadow. Furthermore, the analysis discounts the other three outdoor seating areas.
- 11:00 a.m. was chosen as the morning hour in the Initial Study. A more meaningful morning time would be sometime between the hours of 7:00 a.m. and 9:00 a.m. Such

an analysis would likely result in impacts to two outdoor dining areas [Chilpancingo Mexico City Grill and Brazil on the Hill] on the block west of Third Avenue during the Spring Equinox, Fall Equinox, and Winter Solstice.

- There are also outdoor dining areas on the block east of Fourth Avenue that would be impacted during the Spring Equinox, Fall Equinox, and Winter Solstice.

Furthermore, the Draft Significance Determination Thresholds do not address shading.

C. Hazardous Materials

1. The Environmental Assessment

The Initial Study indicates that there is the potential for significant impact to human, health and safety because of the likely presence of asbestos containing material and lead based paint. The revised final MND of July 7th also reveals that the 333 University Avenue site, including soil, is contaminated with the solvent, perchloroethylene [PCE]. PCE is a carcinogen and will require proper handling, removal, containment, storage, transport and disposal under applicable law.

A Phase I Environmental Assessment [EA] is referenced in the Initial Study on page 5. The EA was completed in June 2003 and only addressed concerns related to 301 University Avenue, and not 333 University Avenue (this property was nor originally part of the proposed project). A Phase II Environmental Assessment (EA) was performed in April 2005 and is referenced for the first time in the July 7th revised final MND. The Phase II EA covers that portion of the project site located at 333 University Avenue.

With respect to 301 University Avenue, Page 5 of the Initial Study states that "the only known regulated use was the last tenant, the University Avenue Orthopaedic Medical Group, which generated limited quantities of film-processing wastes." Since this is a known regulated waste at this site, until testing is performed ruling out the possibility of exposure to surface or subsurface conditions and structures, it is illogical to conclude no possibility of contamination.

With respect to 333 University Avenue, the 2003 EA (Phase I) did suggest the potential for presence of hazardous materials, substances or wastes. Specifically, the 2003 EA indicated, as emphasized on page 5 of the Initial Study, that "several regulated solvents are used at the dry cleaners. One such solvent, perchloroethylene [PCE], is used routinely in the dry cleaning process. One 55-gallon drum of PCE waste was observed in the alley behind the cleaners." Although the applicant was aware of the risk of PCE contamination at the 333 University Avenue site at least as early as 2003, the property was not tested for possible contamination until after the property had been chosen for development and not until after or while a draft MND had been released to the public in March 2005. At no time prior to July 7, 2006, had the public been informed that a Phase II Environmental Assessment revealed contamination at the 333 University Avenue site. An apartment structure is located near and/or adjacent to this property.

The revised final MND discusses the presence of PCE at the 333 University Avenue site, but fails to mention that the Phase II Environmental Assessment also revealed historic presence of

Underground Storage Tanks [USTs] at this site and recommended soil testing during excavation for the garage in order to rule out any possibility of soil contamination from the USTs. The Phase II Environmental Assessment also recommended additional soil testing for PCEs as well. Page 10, *Phase II Environmental Site Assessment*, GBI Project No. 04-1636A, Bryant GeoEnvironmental Inc. (April 26, 2005).

At a minimum, the San Diego Air Pollution Control District and the County Department of Environmental Health, Hazardous Materials Division should have been notified as soon as this contamination was discovered. This should also have alerted DSD to the possibility of a need to test for additional soil and groundwater contamination or the possibility of improper disposal into storm drains or the sewer system. Adequate mitigation necessary to address these environmental hazards has yet to be fully developed in the revised final MND. In fact, DSD has made no changes to the mitigation proposed even though this new information is provided. Furthermore, DSD has not yet added the San Diego Air Pollution Control District and the County Department of Environmental Health, Hazardous Materials Division to the distribution list for the MND.

This Initial Study also does not address the potential exposure to hazardous materials to adjacent schools (if any) as a result of the construction, demolition or transportation activities at these two project sites. *See* section 21151.4 of CEQA.

2. Other Agency Notification

Furthermore, page 11 of the MND states that the following agencies/entities (in addition to others) were notified as follows: "Draft copies or notice of this Mitigated Negative Declaration were distributed to":

- MTDB [Metropolitan Transit Development Board]
- SDGE [San Diego Gas & Electric]
- South Coastal Information Center
- San Diego Natural History Museum

However, nowhere in the MND, Initial Study or elsewhere is it clear that prior to determining the appropriate CEQA document, responsible agencies were notified. At a minimum, because of the presence of suspect hazardous materials, the following agencies should have been notified and/or sent a copy of the draft:

- The County of San Diego, Department of Environmental Health [DEH], Hazardous Materials Division [HMD], inspects businesses or facilities that handle or store hazardous materials, generate hazardous waste, generate medical waste, and own or operate underground storage tanks. The County DEH is the County CUPA [Certified Unified Program Agency], per the Unified Hazardous Waste and Hazardous Materials Management Regulatory Program, requiring the administrative consolidation of six hazardous materials and waste programs under one agency.

- California Department of Toxic Substance Control [DTSC]. DTSC is part of Cal/EPA and regulates hazardous waste, cleans existing contamination and looks for ways to reduce hazardous waste produced in California (e.g., asbestos, lead, PCE).
- Cal/OSHA [California Occupational Safety & Health Administration]. Cal/OSHA regulates worker exposure to hazardous materials.
- San Diego Air Pollution Control District [SDAPCD]. SDAPCD regulates air contaminants, including air quality impacts from demolition and construction activities, toxic air contaminants and hazardous air pollutants (e.g., PCE from dry cleaning facilities). SDAPCD regulates stationary sources (i.e., non-mobile sources).
- California Air Resources Board [CAB] regulates non-stationary sources of air pollution--transportation (e.g., trucks, vessels, etc.).
- San Diego Regional Water Quality Control Board--for water contamination.
- Caltrans for transport of hazardous materials.
- California Highway Patrol, for transport of hazardous materials.
- City of San Diego Fire Department.

In determining the appropriate environmental document to prepare, the City is responsible for consulting with any and all responsible agencies and trustee agencies. Section 21080.3(a) of CEQA states:

- (a) Prior to determining whether a negative declaration or environmental impact report is required for a project, the lead agency shall consult with all responsible agencies and trustee agencies. Prior to that required consultation, the lead agency may informally contact any of those agencies.

A responsible agency is a public agency, other than the lead agency, which has responsibility for carrying out or approving the project. *See* section 21069 of CEQA. *See also* section 15063(g) of the CEQA Guidelines.

3. Mitigation Below a Level of Significance

The mitigation provided in the MND for human, health and safety risks is inadequate. The following guidance may prove helpful:

In practice, drafting a good mitigation measure involves clearly explaining its objectives--specifically how it will be implemented, who is responsible for its implementation, where it will occur, and when it will occur.

Formulation of mitigation measures should not be deferred until some

future time. However, measures may specify performance standards which would mitigate the significant effect of the project and which may be accomplished in more than one specified way.

CEQA Deskbook, Bass, Herson and Bogdan, pages 113-114 (Solano Press, 2001 Supplement).

On its face, the mitigation language does not demonstrate how all risks will be mitigated to a level below significance. *See* page 11 of MND. Per section 15041(a) of the CEQA Guidelines:

A lead agency for a project has authority to require feasible changes in any or all activities involved in the project in order to substantially lessen or avoid significant effects on the environment, consistent with applicable constitutional requirements such as the "nexus" and "rough proportionality" standards established by case law

Section 15070(b) of the CEQA Guidelines state:

- (b) The initial study identifies potentially significant effects, but:
 - (1) Revisions in the project plans or proposals made by, or agreed to by the applicant before a proposed mitigated negative declaration and initial study are released for public review would avoid the effects or mitigate the effects to a point where clearly no significant effects would occur, and
 - (2) There is no substantial evidence, in light of the whole record before the agency, that the project as revised may have a significant effect on the environment.

Section 15064.5 of the CEQA Guidelines. Mitigation is, per CEQA Guideline section 15370:

- (a) Avoiding the impact altogether by not taking a certain action or parts of an action.
- (b) Minimizing impacts by limiting the degree or magnitude of the action and its implementation.
- (c) Rectifying the impact by repairing, rehabilitating, or restoring the impacted environment.
- (d) Reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action.
- (e) Compensating for the impact by replacing or providing substitute resources or environments.

The mitigation proposed for human, health, and public safety impacts is found on Page 11 of the MND. This proposed mitigation does not adequately address the hazards associated with soil disturbance, clean up, testing, worker safety, community safety and demolition activities. The only regulatory entity identified as relevant in this proposed mitigation is the County Department of Environmental Health. This mitigation language neglects to discuss the role of the San Diego Air Pollution Control District in its regulation of air pollution associated with demolition activities, dust, asbestos, lead, and PCEs. The California Department of Toxic Substance Control is also not mentioned nor is the San Diego Regional Water Quality Control Board. Furthermore, the former presence of USTs is also not addressed. Enclosed with this memo is sample language outlining various mitigation measures used by other agencies and cities in response to similar project health and safety risks. The proposed mitigation found on page 11 of the MND gives no assurance that the impacts will be avoided, minimized, reduced or eliminated as called for by the CEQA Guidelines.

D. Opportunity for Public Comment and Response to Public Comment

1. Comments Not Evaluated

This project has undergone significant change since first proposed in 2003 and with each environmental review, there has been some form of public comment on the proposed project. Prior to the more recent MND, a prior draft MND had been circulated for public comment in March of 2005. There were comments submitted, but none of these comments are attached or analyzed in the revised MND that was finalized in March 2006. Some of the public comments are enclosed with this memo. These comments, as well as all comments obtained during any of the public workshops, should be addressed in the MND. To fail to address and include these comments suggests either little public involvement and/or little public concern. This is misleading. If the revisions to the MND adequately address these concerns, then explain how this is so in the MND and attach copies of these letters and e-mails to the MND. Why are public comments so critical to the effectiveness of the CEQA process? Public review is important "in order to allow the lead agencies to identify, at the earliest possible time in the environmental review process, potential significant effects of a project, alternatives, and mitigation measures which would substantially reduce the effects." CEQA Section 21003.1. *See also* 15044 of the CEQA Guidelines. *See* section 15201 of the CEQA Guidelines which states "Public participation is an essential part of the CEQA process."

2. City's Response to Public Comment

The only public comment letter addressed in the MND was a letter from the law firm of Johnson & Hanson LLP dated March 21, 2006. The City's response to this letter was divided up into 20 responses.

a. City's Response No. 8

In response to Comment No. 8, staff responds that "(t)he impacts of the more intense development that the zoning allows were addressed in the environmental review that was done when the zoning was applied to the area in 1989." No discussion or quotes from the 1989 environmental document were identified to substantiate this response. It may very well be that

the only determination for the zoning was a categorical exemption; in which case, no comprehensive environmental analysis is likely to be found.

b. City's Response No. 9:

Comment No. 9, addresses height and bulk of the project in contrast to existing buildings in the immediate site vicinity. In response to this comment, staff states that "the applicable criterion considers the projects consistency with the "surrounding area," not with the immediate vicinity." Unfortunately, there are discrepancies between the language in the City of San Diego's Draft CEQA Significance Determinations Thresholds and the Initial Study in discussing "projects that severely contrast with the surrounding neighborhood." The Draft Thresholds state the following:

To meet this significance threshold, one or more of the following conditions must apply:

- a. The project exceeds the allowable height or bulk regulations and height and bulk of the existing patterns of development in the *vicinity* of the project by a *substantial* margin

Emphasis Added. The Initial Study, however, provides different language:

To meet this significance threshold, one of more of the following conditions must apply:

- a. The project exceeds the allowable height or bulk regulations and bulk of existing patterns of development in the *surrounding area* by a *significant* margin.

Page 6, Initial Study, *Emphasis Added.* The Initial Study deletes "height" from the reference to "height and bulk of existing patterns," substitutes "vicinity" with "surrounding area," and substitutes "substantial" with "significant." This discrepancy should be explained. This mischaracterization could easily lead to a different outcome and analysis.

E. Cumulative Impacts

The draft MND circulated for public comment in March 2005 discussed cumulative impacts on pages 10 and 17. Specifically, page 10 of the 2005 MND Initial Study states: "The provision of additional mixed uses in an already developed area would not result in cumulative effects on neighborhood character." Page 17 of the 2005 MND Initial Study states: "Cumulative impacts related to noise would not be considerable when viewed in conjunction with other past, present or reasonably foreseeable future projects in the area. The project site is located in a developed urban area with high-density uses and associated traffic. Thus, ambient noise levels are already elevated due to its urbanized nature. The project would incrementally add to ambient noise levels in the project area; however, this increase would not result in a substantial net increase when combined with other projects in the area." Furthermore, page 27 of the 2005 MND Initial Study Checklist states: "The proposed project could contribute to cumulative impacts related to air quality, noise and traffic. All of these potential impacts would not be

cumulatively considerable due to their incremental and/or short-term nature. *See* Initial Study discussion of cumulative impacts associated with these specific issues." Although there is brief discussion of cumulative impacts on page 10 and 17 of the 2005 MND Initial Study, the language is more conclusive than analytical. What is even more significant is that the final 2006 MND leaves out any discussion of cumulative impacts in the initial study, but leaves in the conclusive paragraph found on page 29 of the 2006 Initial Study Checklist, which is the same as found in the 2005 checklist. The need for cumulative impact discussion is evident not only from DSD's initial decision to include it in 2005, but also from the comments received on the 2005 MND that talk about cumulative impacts and the Planning Commission cumulative impact comments at the April 13, 2006 public hearing. Furthermore, a cumulative impacts analysis is fully appropriate in a negative declaration. *See* CEQA Guidelines, Appendix G, XVII.b. MANDATORY FINDINGS OF SIGNIFICANCE: "Does the project have impacts that are individually limited, but cumulatively considerable?" More than a mere conclusive statement is needed to answer this question.

F. References Used in the MND

1. Locating the References

Throughout the text of the MND (including Initial Study and Checklist), the following documents are identified as reference material used to complete the analyses and reach conclusions. These are:

1. City of San Diego Historical Resource Guidelines. *See* Initial Study page 4.
2. City of San Diego Paleontology Guidelines (2002). *See* Initial Study page 4.
3. Phase I Environmental Site Assessment (ESA) for 301 University Avenue, prepared by Bryant Geoenvironmental Inc., June 20, 2003. *See* Initial Study page 5.
4. Phase II Environmental Assessment for 333 University Avenue prepared by Bryant Geoenvironmental Inc., April 26, 2005. *See* Initial Study page 5.
5. The City of San Diego's California Environmental Quality Act (CEQA) Significance Determination Thresholds. *See* Initial Study page 6.
6. Uptown Community Plan. *See* Initial Study page 8.
7. Elevation Study by KMA Architecture and Engineering (2005). *See* Initial Study page 8.
8. The San Diego Progress Guide and General Plan. *See* Initial Study page 9.
9. Shadow Study for 301 University Avenue, prepared by KMA Architecture and Engineering (2005). *See* Initial Study page 10.
10. Lindbergh Field Comprehensive Land Use Plan. *See* Initial Study page 14.

11. Preliminary Historical Evaluation of the 301-321 East University Avenue Building, San Diego, California (September 2003) prepared by the Office of Maria Burke Lia, Attorney at law. *See* Initial Study page 14.
12. Water Quality Technical Report and Drainage Study 301 University Avenue City of San Diego, Project Number: 11896 (January 30, 2006) prepared by SB&O. *See* Initial Study page 16.
13. A Geotechnical Investigation, 301 University Avenue, Third Avenue and University Avenue, San Diego, California (June 5, 2003), prepared by Geocon. *See* Initial Study page 16.
14. City of San Diego's Seismic Safety Study. *See* Initial Study page 16.
15. The Regional Air Quality Strategy. *See* Initial Study Checklist page 5.
16. Multiple Species Conservation Program [MSCP]. *See* Initial Study Checklist page 9.
17. Sanborn Fire Insurance Maps. *See* Initial Study page 5.
18. City of San Diego Building Department records. *See* Initial Study page 5.
19. Aerial photographs. *See* Initial Study page 5.
20. Regulatory databases and agency lists to determine listed hazardous waste sites or other regulated facilities in the project vicinity. *See* Initial Study page 5.
21. San Diego Air Pollution Control District Rule 361.145 Standard for Demolition and Renovation. *See* Initial Study page 5.
22. Mid-City Communities Planned District Ordinance. *See* Initial Study page 8.
23. Request from the Hillcrest Business Association and Uptown Partners for public parking (no date). *See* Initial Study page 13.
24. Traffic Letter Report (January 20, 2006) prepared by Urban Systems Associates, Inc. *See* Initial Study page 14.
25. City of San Diego's Traffic Impact Study Manual. *See* Initial Study page 15.
26. Noise Assessment for 301 and 333 University Avenue (2005) prepared by Weiland Associates, Inc. *See* Initial Study page 15. A Preliminary Acoustical Analysis for 301 University is identified on Page 33 of the Checklist References section, but this is a different document.
27. City of San Diego Street Design Manual (Document No. 297376, filed November 25, 2002). *See* Initial Study Checklist Page 3.

28. The Amendment to City Council Policy 200-18 approved by City Council on February 26, 2002 [Resolution R-296141]. *See* Initial Study Checklist page 3.
29. The State Implementation Plan [SIP]. *See* Initial Study Checklist page 5.
30. State Water Resources Board 303(d) impaired water body list. *See* Initial Study Checklist page 17.
31. City of San Diego's Noise Ordinance (section 59.5.0404 of the Municipal Code). *See* Initial Study Checklist page 19.

Of all these documents referred to and relied upon in making the environmental findings in the text of the MND (including Initial Study and Checklist), only documents 1 thru 16, as identified above, are actually listed on pages 30-34 of the Initial Study Checklist **References** section of the MND. Documents 17 thru 31, as identified above, are not found in the Initial Study Checklist References section of the MND. Although a member of the public could probably spend a considerable amount of time going through the text of the MND to identify all referenced documents and then compare these to what is actually identified on pages 30-34 of the Reference list, such an exercise is overly burdensome on the public. A reasonable person would not expect that he or she would have to do this in order to find out what was actually relied upon in making the CEQA findings and in determining whether to request review of these other documents. Clarification would be helpful here.

2. Using Draft Document (Draft Thresholds) as a Reference

CEQA Guidelines section 15064.7 states the following:

- (a) Each public agency is encouraged to develop and publish thresholds of significance that the agency uses in the determination of the significance of environmental effects. A threshold of significance is an identifiable quantitative, qualitative or performance level of a particular environmental effect, non-compliance with which means the effect will normally be determined to be significant by the agency and compliance with which means the effect normally will be determined to be less than significant.
- (b) Thresholds of significance to be adopted for general use as part of the lead agency's environmental review process must be adopted by ordinance, resolution, or regulation, and developed through a public review process and be supported by substantial evidence.

Throughout the Initial Study there are references to the City's CEQA Significance Determination Thresholds. The MND does not refer to this document as a "draft." This document (which was updated in November 2004), however, has never been adopted by the City Council. By not calling it a "draft," a false impression is left that the City Council has adopted these thresholds. To the extent that this document is relied upon, it should be identified as "draft." In addition, these Thresholds should not be relied upon as the sole basis for precluding

or discounting other determinations. *See* section CEQA 15064.7 as highlighted above.

Thresholds of significance are principally used to determine whether a project may have a significant environmental effect. They are not intended to be stand alone environmental policies, although they should certainly reflect the agency's policies. Thresholds are an analytical tool for judging significance.

[T]hresholds do not substitute for the agency's use of careful judgment in determining significance (CEQA Guidelines section 15064).

Thresholds can help determine the significance of environmental effects, but are not necessarily conclusive.

Furthermore, significance thresholds may not obviate the need to provide information to support the determinations made in the initial study. Simply filling out an initial study checklist without citing supporting information is insufficient to show the absence of significant effects (*Sundstrom v. County of Mendocino* (1988) 202 Cal. App. 3d 296).

State Office of Planning and Research [OPR], *Thresholds of Significance: Criteria for Defining Environmental Significance*, pages 393-396 (September 1994). *See also* CEQA Guidelines section 15064(c).

CONCLUSION

The Office of the City Attorney respectfully requests that the City Council, under authority granted it in San Diego Municipal Code sections 112.0509 and 128.0311, decline certification of the MND, deny the project, and provide the Applicant and Development Services Department with appropriate direction necessary to address City Council concerns. Specifically, the Office of the City Attorney recommends that the City Council refer the MND back to the Development Services Department for additional environmental review and for re-circulation to ensure an opportunity for public comment and participation. *See* section 128.0309 of the San Diego Municipal Code; *see also* sections 15073.5 and 15074.1 of the CEQA Guidelines. Section 15073.5 of the CEQA Guidelines state:

(a) A lead agency is required to recirculate a negative declaration when the document must be substantially revised after public notice of its availability has previously been given pursuant to Section 15072, but prior to its adoption. Notice of recirculation shall comply with Sections 15072 and 15073.

(b) A "substantial revision" of the negative declaration shall mean:

(1) A new, avoidable significant effect is identified and mitigation

measures or project revisions must be added in order to reduce the effect to insignificance, or

(2) The lead agency determines that the proposed mitigation measures or project revisions will not reduce potential effects to less than significance and new measures or revisions must be required.

It is clear from a reading of the revised final MND and referenced studies that there are new significant impacts associated with this project, including clean up of contaminated soil. It is also clear that the mitigation proposed is insufficient and new mitigation will need to be developed. Recirculation is also justified per San Diego Municipal Code section 128.0309 which states:

When significant new information is added to an environmental document after notice is given of the availability of the document for public review but before it is certified, the Planning and Development Review Director shall recirculate the draft environmental document consistent with the State CEQA Guidelines, section 15088.5.

MICHAEL J. AGUIRRE, City Attorney

By

Karen Heumann
Assistant City Attorney

SE:KH;jb

ML-2006-11

cc: Gary Halbert, Development Services Director
Jerry Sanders, Mayor
Elizabeth Maland, City Clerk
La Jolla Pacific Development Group, Inc., Applicant