

**Office of
The City Attorney
City of San Diego**

**MEMORANDUM
MS 59**

(619) 236-6220

DATE: June 15, 2020

TO: Honorable Members of the City Council

FROM: City Attorney Mara W. Elliott

SUBJECT: Overview of Purchase and Sale Agreement for the City's Sale of the SDCCU Stadium Site in Mission Valley to San Diego State University

INTRODUCTION

During a special meeting on June 17, 2020, the City Council (Council) will consider approval of the Purchase and Sale Agreement (PSA)¹ and various related actions for the proposed sale of the approximately 135-acre Mission Valley stadium site (Acquisition Site) by the City of San Diego (City) to San Diego State University (SDSU).² The City and SDSU (collectively, Parties) have negotiated the terms and conditions of the PSA in accordance with Measure G, the local citizens' initiative approved by the City's voters on November 6, 2018.³

From the City's standpoint, the main benefits of the PSA include: (a) effectuating the intent of local voters to cause SDSU's development of a mixed-use campus village on the Acquisition Site and SDSU's construction and operation of the River Park Improvements on the adjacent, approximately 34.6-acre City-owned River Park Property; and (b) allowing the City to sell the Acquisition Site for a purchase price of nearly \$90 million, affording substantial fiscal relief to the City and its constrained budget.

Some of the main risks to the City in this transaction include: (i) potential liability for environmental contamination that may exist on or under the River Park Property and related environmental remediation costs; (ii) an obligation to deliver certain storm drain outlets to SDSU in a condition free of debris and vegetation; and (iii) a potential delay in the Closing for up to

¹ Unless otherwise specified, all capitalized terms in this memorandum have the same meaning ascribed to them in the PSA.

² The full name of the acquiring entity is the Board of Trustees of the California State University, the State of California acting in its higher education capacity, on behalf of San Diego State University. This memorandum refers to the acquiring entity as SDSU, consistent with how the transaction is commonly referenced.

³ The City's negotiating and legal teams have worked diligently over the past 17 months to incorporate the Council's previous policy direction, engage in good faith negotiations, and timely review and respond to various revised documents provided by SDSU. The length of these negotiations is not unusual or unexpected given the complexity of this transaction, nor is it the result of any delay caused by the City.

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two years, during which time SDSU will undertake the general obligation to maintain the Acquisition Site, with some exceptions related to the property’s condition that could be detrimental to the City’s interests.⁴ This transaction also raises some policy concerns for the City. The main risks and policy concerns are discussed below.

DISCUSSION

On January 28, 2020, my Office transmitted a complete initial draft of the PSA to SDSU, reflecting policy direction provided by the Council during meetings on November 18, 2019, and January 27, 2020. Over the next several months, the Parties exchanged drafts of various PSA documents and engaged in negotiations in an effort to complete the PSA content. On April 28, 2020, SDSU transmitted to the City a proposed final draft of the PSA which favored SDSU and did not accurately reflect the City negotiating team’s understanding of verbal agreements reached with SDSU’s negotiating team leading up to April 28. As a result, my Office issued a memorandum identifying the 14 most critical issues in the transaction that remained outstanding based on SDSU’s April 28 draft PSA (14 Key Issues). City Att’y MS-2020-12 (May 5, 2020).

On May 5, 2020, SDSU transmitted to the City an updated version of the PSA, signed by SDSU’s representatives, that SDSU initially characterized as “final and non-negotiable.” That May 5 version reflected essentially the same content as SDSU’s April 28 draft PSA and did not satisfactorily resolve any of the 14 Key Issues. The Parties continued to engage in further negotiations regarding the PSA, resulting in a vastly improved resolution of the 14 Key Issues. The City’s negotiating team, however, generally limited the post-May 5 negotiations to the 14 Key Issues and otherwise accepted the SDSU-favorable PSA provisions. Therefore, the proposed final PSA remains a contract that tilts in SDSU’s favor in many respects, although it is much more protective of the City’s interests than the May 5 version.

In particular, the Parties have struck a careful balance of their respective rights and obligations regarding future development activities within the City’s utility easement areas and on the River Park Property – an asset that is now owned, and will continue to be owned, by the City’s Water Utility Fund. The PSA now provides stronger protections of the City’s rights for existing and planned future public utility infrastructure and addresses several related concerns recently highlighted in a memorandum issued by my Office. *See* City Att’y MS-2020-14 (May 22, 2020). The PSA includes dispute resolution provisions requiring the Parties’ good faith cooperation and review and/or approval rights with respect to CSU’s future development on the Acquisition Site and the River Park Property and the City’s construction, operation, and maintenance of existing and planned future utilities within utility easement areas and on the City-owned River Park Property.

⁴ This memorandum highlights certain significant risks to the City and is not intended as an exhaustive list of all potential risks.

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The PSA is a lengthy, complex contract including numerous attachments, some of which themselves are lengthy, complex contracts that will take effect upon the Closing of the transaction – i.e., when the City conveys to SDSU fee title ownership of the Acquisition Site by Grant Deed. The PSA attachments include contracts related to SDSU's development activities, which will be performed at no cost to the City and include: (a) construction, operation, and maintenance of the River Park; (b) demolition of the Existing Stadium; (c) construction of various development components envisioned by Measure G, including the New Stadium and parks, recreation, and open space; and (d) production of affordable housing units.

The main risks to the City in the transaction include:

- Liability for River Park Property: As between the Parties, the City will absorb the risk associated with environmental contamination that may exist on or under the River Park Property. As a result, the City could end up having to pay potentially significant environmental remediation costs, possibly in the millions or tens of millions of dollars, related to SDSU's development of River Park improvements and other improvements, such as storm water best management practices structures (primarily benefitting SDSU's Project), on the River Park Property after the Closing. Although the City will be able to tender a claim to Kinder Morgan seeking to recover future environmental remediation costs under the Kinder Morgan Settlement Agreement, the City's actual recovery of those costs is not guaranteed.
- Temporary Obligation for Storm Drain Outlets: The City will be required to deliver five existing storm drain outlets, located between the Fenton Parkway outfall and Murphy Canyon Creek, in a condition that is free of debris and vegetation and allows for those facilities to properly function, before SDSU is obligated to maintain those facilities. The City's removal of vegetation from the storm drain outlets may be costly and time-consuming, particularly if the City is required to obtain permits from any resource agencies (such as the California Department of Fish and Game) with respect to the disturbance of any sensitive habitat.
- Delayed Closing: The Closing will be scheduled to occur within ten business days after the PSA is signed. However, the Closing could be delayed for up to two years if a court injunction is issued preventing the Closing or if the COVID-19 pandemic results in the closure of banks or offices necessary to complete the Closing. These risks are likely minimal but could materialize and substantially delay the City's receipt of sale proceeds from the transaction. If there is a delay in the Closing for any reason other than the City's default, the Parties will enter into an interim lease generally providing that SDSU will be responsible for maintenance and liability at the Acquisition Site and surrounding property, subject to potential exceptions related to compliance accessibility requirements under the Americans with Disabilities Act and remediation of any asbestos contamination at the Existing Stadium.

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- Liability for Murphy Canyon Creek: Upon the Closing, SDSU will be responsible for maintaining Murphy Canyon Creek (located adjacent to the Interstate 15 freeway) on the Acquisition Site and the River Park Property. However, the City will retain potential liability in the event that certain factual representations and warranties made by the City related to the physical and regulatory condition of Murphy Canyon Creek are discovered to be untrue. SDSU insisted on the inclusion of these representations and warranties in the PSA rather than take ownership of Murphy Canyon Creek in as-is condition. Also, the City will retain liability for deficiencies or other conditions related to any portions of Murphy Canyon Creek located outside of the Acquisition Site and the River Park Property.
- Defense and Indemnification: The PSA includes relatively strong defense and indemnification provisions in the City's favor, but the effectiveness of those provisions is limited to some extent by "carve-out" language for certain scenarios. The PSA also includes defense and indemnification provisions in SDSU's favor as to certain types of claims, including claims that involve the City's breach of any factual representation or warranty or arise from the City's active negligence, sole negligence, or willful misconduct. To the extent an indemnified claim is triggered in SDSU's favor under the PSA, the City will be responsible not only for its own costs, but also for SDSU's costs, in defending against the claim and paying any court judgments or settlements.
- Future Recreation Center Site: The PSA provides the City with an option during a 20-year period to acquire a 99-year leasehold interest in approximately one acre of land toward the southern boundary of the Acquisition Site for the City's future construction and operation of a future recreation center. The PSA does not include a legal description of the pertinent site, which could create complications if the City seeks to exercise its option. Also, the City may be unable to secure sufficient financing within 20 years to cover the construction and operation costs for the recreation center. Finally, the structure of the City's option as a lease, rather than fee title ownership, could complicate the City's future effort to develop the site and obtain third-party financing for the recreation center.

The Council also may wish to consider the following policy concerns in the transaction:

- Limited Remedies: The City has very limited remedies and enforcement rights to ensure that SDSU ultimately delivers the Project in a way that meets voter expectations under Measure G. For example, the PSA allows SDSU to make unilateral future amendments to its Campus Master Plan, in its sole discretion, without giving the City any approval rights over any proposed plan amendments to ensure accountability under Measure G and without requiring SDSU to respond to or incorporate any input provided by the City. SDSU could approve future plan amendments that allow for increased density or additional types of uses on the Acquisition Site or erode the "campus village" aspect of SDSU's Project. The PSA also allows SDSU to remove recorded development covenants, such as covenants requiring SDSU's construction of the River Park Improvements, from

significant portions of the Acquisition Site after SDSU subdivides the Acquisition Site, potentially weakening the City's ability to enforce the covenants for the public's benefit.

- Construction Delays: Measure G requires that construction of both the River Park and the New Stadium be completed no later than seven years after the Parties sign the PSA. SDMC § 22.0908(i), (j). The PSA gives SDSU up to an additional three years of excusable delay to complete the River Park and the New Stadium under certain circumstances, such as a force majeure event or a court injunction. It also gives SDSU additional time to complete the River Park if environmental remediation is necessary. As a result, SDSU's delivery of prominent public benefits in the Project could be delayed.
- Regional Transportation Fee: Pursuant to Measure G, the sale and ultimate development of the Acquisition Site must require compliance with the City's development impact fee requirements. SDMC § 22.0908(l). The Regional Transportation Congestion Improvement Program fee (RTCIP Fee) is a development impact fee that the City typically collects in connection with residential development projects to provide a funding source for public investment in the San Diego region's transportation system to offset the negative impact of new development on congestion and mobility. The PSA states SDSU's questionable position that SDSU, as a state agency, is exempt from payment of the RTCIP Fee even for private residential development within the Project. City staff has estimated that, in the normal course, the City would collect an RTCIP Fee of approximately \$10 million for the Project, benefitting the local community. The PSA does require SDSU to defend and indemnify the City in the event that a third party, such as SANDAG, claims that the RTCIP Fee is owed with respect to the Project.

CONCLUSION

Through painstaking negotiations, the City's negotiating and legal teams have succeeded in causing the PSA to be much more balanced and protective of the City's interests than SDSU's May 5 version of the PSA. Most of the 14 Key Issues have been resolved to the City's satisfaction. However, the PSA tilts in SDSU's favor in many respects and entails some significant risks for the City, as described herein. The Council is encouraged to review the entire PSA carefully and to ask questions to the City's negotiating or legal team before or during the public meeting.

MARA W. ELLIOTT, CITY ATTORNEY

By _____ /s/ Mara W. Elliott
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