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August 31, 2007

Via facsimile (letter only) and for hand delivery on September 4, 2007 (letter and attachments)

Honorable Members of the City Council
City of San Diego
202 "C" Street, 2nd Floor
San Diego, CA 92101

Re: City Council Docket, September 4, 2007: Item-334: Two actions related to Consultant Agreement – Regents Road Bridge and Limited Roadway Changes Project

Dear Honorable Councilmembers:

As you know, this firm represents Friends of Rose Canyon ("FRC") on matters relating to the Regents Road Bridge project ("the Bridge"). We are writing in regard to Item 334 on the City Council's docket for September 4, 2007: Two actions related to Consultant Agreement – Regents Road Bridge and Limited Roadway Changes Project ("proposed Contract"). This letter supplements FRC's previous correspondence regarding a proposed contract for full engineering and design of the Bridge. That correspondence is attached for your reference as Exhibits A, B, C and D.

The proposed Contract would authorize Project Design Consultants ("PDC") to complete 100 percent of the engineering and design of the Bridge at a cost of more than \$4.8 Million before the City Council has certified a project-level Environmental Impact Report ("EIR") for the Bridge. We reiterate FRC's concerns, as detailed in our previous letters, that such an agreement for full engineering and design of the Bridge would:

- (a) commit the City to the Bridge project before completion of the project-level EIR for the Bridge; and
- (b) potentially result in damaging activities in Rose Canyon due to invasive borings, trenchings, and other activities authorized by the proposed Contract.

For both of these reasons, approval of the proposed Contract now – before the City has prepared the environmental review that the City Council recognized in March 2007 was a mandatory prerequisite “*before any implementation, if any,*” of the Bridge – would violate the California Environmental Quality Act (“CEQA”), Pub. Res. Code §§ 21000 *et seq.* (See City Resolution R-302497, attached as Exhibit E [emphasis added]). Moreover, such action would subject the City to significant financial risk; should the eventual project-level EIR lead to major changes in the project or the mitigation, or to the selection of a less harmful alternative, the City will have wasted significant time and millions of dollars on an unusable design, a serious waste of public funds.

I. Approval of the Proposed Contract for Full Engineering and Design of the Bridge Would Be a “Project” Under CEQA.

A. Commitment to the Bridge Project Through Approval of the Proposed Contract Is Prohibited.

As FRC explained in detail in its January 29, 2007 letter to the City Council (Exhibit A) and its March 12, 2007 letter to the City Attorney (Exhibit C), approval of a contract for full engineering and design of the Bridge would implement the very project that the City has committed to study in a future project-level EIR. Despite the City’s March 27, 2007 commitment to prepare and certify such an EIR before *any* implementation of the Bridge (see Exhibit E), the City has only just a few days ago started the competitive bid process to hire a consultant to prepare such a project-specific EIR.¹ The Request for Proposals seeking consultants to prepare environmental review for the Bridge is attached hereto as Exhibit F. The City’s proposed approach – to implement the Bridge project through the proposed Contract before completing environmental review of the project – would turn CEQA on its head.

There is no dispute that the City must prepare a project-level EIR before commencing implementation of the Bridge. Article 1 of the City Council’s March 27, 2007 Resolution R-302497 could not be plainer:

¹ Curiously, Section 1 of the proposed Ordinance authorizing execution of the proposed Contract states that the Mayor would be authorized to execute an agreement with PDC “for the purpose of *preparing supplemental environmental document*, obtaining permits, and providing design services” for the Bridge. (City Council docket p. 002289 [emphasis added]). Any authorization now for PDC to prepare environmental review of the Bridge would conflict with the RFP the City just released. (See Exhibit F). We assume this reference to preparation of supplemental environmental review is a typographical error, but we ask the City to confirm before it considers whether to approve the proposed Contract.

[T]he Mayor is authorized to proceed with the preparation of a full, separate, independent project-specific Environmental Impact Report under the provisions of CEQA and its Guidelines for the Bridge Alternative, which the Council must *certify before any implementation, if any, of that Bridge Alternative is approved and commenced.*

(Exhibit E [emphasis added]). Although the memoranda from the City Attorney and the City's outside counsel regarding the proposed Contract do not squarely address CEQA, both support this understanding. (See, e.g., City Attorney Memo [April 4, 2007], City Council docket p.002266, fn.2 and p.002265 [the Bridge project is "contingent upon completion and certification of a project-level EIR" and "further environmental work [is] needed to move forward with the Regents Road Bridge Alternative"]; Kevin Sullivan Memo [July 13, 2007], City Council docket p.002257 [Resolution R-302497 prohibits "implementation of the Regents Road Bridge Alternative [until] completion and certification of a project-level EIR for that alternative"]).

The City cannot seriously contend that approval of the proposed Contract for full engineering and design of the Bridge, at a cost of more than \$4.8 Million, would not constitute a commitment to the Bridge, or commencement of "implementation" of the Bridge. As the minutes of the City Council's August 1, 2006 approval hearing plainly state:

Implementation of the Regents Road Bridge Alternative would require design and refinement of the preliminary estimates. The first stage of implementation [of the Bridge] would be design and would require future council action for a consultant agreement.

(See Exhibit G [excerpt of minutes of August 1, 2006 City Council meeting, p.50] [emphasis added]). A consultant agreement for design of the Bridge is precisely what is before the City Council here.

A long line of Supreme Court case law supports FRC's position that approval of an agreement for full engineering and design of the Bridge would constitute an improper commitment to the project. (See, e.g., *Muzzy Ranch Co. v. Solano County Airport Land Use Com'n* (2007) 41 Cal.4th 372, 382-83; *Laurel Heights Improvement Ass'n v. Regents of Univ. of Calif.* (1988) 47 Cal.3d 376; *Fullerton Joint Union High School Dist. v. State Bd. of Education* (1982) 32 Cal.3d 779, *disapproved on other grounds*, *Board of Supervisors v. Local Agency Formation Com'n* (1992) 3 Cal.4th 903, 918; *Bozung v. Local Agency Formation Comm'n* (1975) 13 Cal.3d 263; *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68; *Citizens for a Megaplex-Free Alameda v. City of Alameda* (2007) 149 Cal.App.4th 91, *petition for review denied*, June 27, 2007).

In particular, governmental action that is an “essential step [in a chain of actions] leading to potential environmental impacts” is a project subject to CEQA. (*Fullerton*, 32 Cal.3d at 797; *see also Muzzy Ranch*, 41 Cal.4th at 382-83). Here, there can be no doubt that engineering and design of the Bridge are an “essential step” leading to construction of the Bridge.

An agency cannot avoid timely compliance with CEQA merely by conditioning construction of a proposed project on completion of environmental review. As the Supreme Court explained in *Fullerton* and recently confirmed in *Muzzy Ranch*, an agency cannot escape CEQA “merely because further decisions must be made before [projects] are actually constructed.” (*Fullerton*, 32 Cal.3d at 795; *Muzzy Ranch*, 41 Cal.4th at 383; *see also Citizens for a Megaplex-Free Alameda*, 149 Cal.App.4th at 106-07; *Save Tara v. City of West Hollywood* (2007) 54 Cal.Rptr.3d 856, 868, *review granted* (May 16, 2007) 59 Cal.Rptr.3d 439). Thus, City staff’s explanation here that “this action does not include any approval for construction,” and “[t]he project will be brought back to [the] City Council in the future for construction authorization” (Expanded City Council agenda [September 4, 2007], p.82) does not permit the City to avoid compliance with CEQA before approving a contract for full engineering and design of the Bridge.

Nor would boilerplate language in the proposed Contract allowing the City to terminate the proposed Contract for its “convenience” allow the City to dodge its obligations under CEQA. Although it theoretically may be possible for the City to terminate the proposed Contract at some point in the future, CEQA concerns itself with the action that City proposes here and now, which is approval of a contract for 100 percent of the engineering and design of the Bridge, an action which squarely falls within the meaning of a “project” under Public Resources Code section 21065. Moreover, many public agency contracts provide standard language regarding termination for the agency’s convenience. As one treatise opines, “good practice is for the public entity to include a termination for convenience clause in the design agreement, so that a ‘no fault’ termination may be made by the public owner.” (Ernst C. Brown, *California Public Works: Managing Risk & Resolving Disputes* [3rd ed., 2003], at p.27). It simply is inconceivable that public agencies could avoid any CEQA review whatsoever merely by pointing to this standard clause intended to protect the government and taxpayers from the vagaries of public funding and administration. In any event, even if the City were to terminate the proposed Contract, the City would be committed to compensating PDC for work completed through the time of termination. (*See City Council docket p.002304*). Thus, even through this provision the City would not avoid its commitment to the Bridge project.

The City cannot point to its belated effort to prepare a project-specific EIR in order to absolve its decision to proceed full speed ahead *now*, in the absence of environmental review, with full engineering and design of the Bridge. As described in the RFP seeking consultants to prepare that document, the EIR for the Bridge, including alternatives to the Bridge, would not be

certified until October 2009 at the earliest. (*See* Exhibit F). Under the time schedule in the proposed Contract, final design of the Bridge would be nearly complete at the time environmental review of the Bridge is concluded. (*See* City Council docket p.002373). Thus, by the time the agency decision maker receives the final EIR for the Bridge, the \$4.8 Million investment in full design would make approval of the project a fait accompli, a result that CEQA absolutely prohibits.

In sum, City staff's contention that execution of the proposed Contract would not be a "project" under CEQA and thus is exempt from CEQA (*see* City Council docket p.002281), is contradicted by a long line of Supreme Court case law and the City Council's own previous decision as to the appropriate timing of CEQA review. Because the proposed Contract is an essential step toward construction of the Bridge and may result in significant environmental impacts in Rose Canyon, it is clearly subject to CEQA review.

B. Activities Under the Proposed Contract May Result in Significant Environmental Impacts in the Canyon.

The proposed Contract also is a "project" under CEQA because its execution may result in significant impacts to biological and hydrological resources in Rose Canyon, in addition to the other significant environmental impacts identified in the Final EIR for the Study (*see* Exhibit H), and the comment letters on that document (*see* Exhibit I). In particular, the proposed Contract would authorize PDC to engage in invasive borings, trenchings, and other destructive activities in Rose Canyon. For example, the proposed Contract would authorize geotechnical tests (Task 1.7.3 and 1.7.4, City Council docket p.002326), geotechnical borings and test pits (Task 3.1.1.2, City Council docket p.002331; Tasks 3.1.4, 3.1.5 and 3.1.6, City Council docket p.002340), and excavation of trenches with backhoes (Task 3.1.2.1, City Council docket p.002331).

The City previously has recognized that geotechnical work may result in significant environmental impacts, and has required project applicants to prepare environmental review under CEQA and obtain approval from the City before engaging in such work. For example, in February, 2005, the City required preparation of environmental review prior to approving geotechnical investigations in Salk Canyon in University City that would involve two trenches and three borings. (*See* Report to Hearing Office No. HO-05-022 [February 16, 2005], attached hereto as Exhibit J). By comparison, under the proposed Contract at issue here the City would authorize PDC to excavate ten borings and five trenches. (*See* City Council docket Tasks 3.1.1.2 and 3.1.2.1, City Council docket p.002331; Tasks 3.1.4 and 3.1.5, City Council docket p.002340).

Importantly, City staff themselves have conceded that environmental review is needed before any borings are taken in Rose Canyon. For example, internal City correspondence

demonstrates that City intended to rely on the EIR for the Study in order to move forward with invasive borings in the Canyon without further review. *See* Email correspondence attached as Exhibit K (City staff describing that a “goal” of the EIR for the Study is that the document “would be sufficient to allow geotechnical borings in final design without the delay of obtaining a development permit”). Of course, because that review was seriously flawed, it would be foolhardy for the City to rely on the EIR for the Study in order to move forward with geotechnical work in the Canyon.

II. Full Engineering and Design of the Bridge Are Not Required to Prepare Project-Level Environmental Review of the Bridge and Alternatives.

As FRC explained in its January 29, 2007 letter to the Mayor and City Council (*see* Exhibit A), FRC does not object to those tasks in the proposed Contract that will enable the City to conduct the project-level EIR for the Bridge. Thus, FRC explained that it would *not* object to those components of the proposed Contract that provide for public outreach, data collection, mapping, studies, preliminary (or 15 percent) engineering and design, and other similar activities that would not cause any environmental damage to the Canyon and which would contribute to preparation of a project-specific EIR.

Full engineering and design of the Bridge, however, are *not* required in order to comply with CEQA. Thus, FRC strenuously objects to those tasks in the proposed Contract that would result in full engineering and design of the Bridge, would secure permits or other approvals for the project, or may damage environmental resources in Rose Canyon. According to the case law cited above, such activities should not proceed until after the City has prepared and certified an adequate EIR for the project. As the City Attorney’s April 4, 2007 Memorandum recognizes, “final detailed design is commonly deferred to a later segment, since it cannot proceed until final environmental clearance has been received.” (City Council docket p.002265 [citing the Caltrans Local Assistance Procedures Manual, p.10-6]).

Significantly, the State’s highway building agency expressly *prohibits* final design of a project before environmental review is complete:

Compliance with the environmental requirements may occur simultaneously with preliminary engineering, however, *local agencies may not commence with final design* prior to obtaining environmental document approval

(*See* Caltrans Local Assistance Procedures Manual, p.6-14, attached as Exhibit L [emphasis added]).

The federal government also *prohibits* final design of transportation projects before all environmental review is complete. (*See* Exhibit L [23 C.F.R. § 771.113 (Federal Highway Administration and Federal Transit Administration regulations providing that “final

design activities . . . shall not proceed until the following have been completed: (1)(i) The action has been classified as a categorical exclusion (CE), or (ii) A FONSI has been approved, or (iii) A final EIS has been approved and available for the prescribed period of time and a record of decision has been signed.”)). Thus, it is Caltrans’s and the federal government’s standard practice to defer final engineering and design of transportation projects until environmental review is complete. Likewise here, there is no reason that the City would need to complete 100 percent of engineering and design of the Bridge in order to comply with CEQA.

Indeed, the City previously has recognized that full engineering and design would *not* be required in order to comply with CEQA. For example, the City’s Request For Qualifications seeking consultants for the University City North/South Transportation Corridor Study (“Study”) recognized that “preliminary design of the proposed [project]” would be all that was necessary “to support the proposed environmental document,” and that final design should be deferred until *after* such environmental review is complete. (*See* Exhibit M). The City’s 2003 contract with PDC to prepare environmental review for the Study confirms the City’s understanding that only preliminary design would be required to comply with CEQA. (*See* Exhibit N).

Conclusion

In short, approving the proposed Contract for full engineering and design of the Bridge -- and committing the City to spend nearly \$5 Million -- before the City has prepared and certified an EIR for the project completely inverts the process required by CEQA. Because such sequencing would relegate any future project-specific environmental review to merely “an after-the-fact rationalization of a completed plan,” this approach has been uniformly rejected by the courts. (*See e.g., Save Tara*, 54 Cal.Rptr.3d at 864).

In addition, it is our understanding that the City has yet to resolve the need for state legislation in order to design and build the Bridge in the state-funded habitat grant restoration areas of Rose Canyon. City documents describing the City’s obligation to maintain these lands “in perpetuity,” and relating to the need for such legislation prior to are attached hereto as Exhibit O.

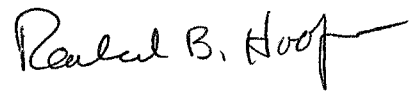
Finally, it is our understanding that the City has not yet addressed the conflict of interest concerns that approval of this proposed Contract would raise under Government Code section 1090. The City Attorney’s July 24, 2007 and April 4, 2007 memoranda on this issue, which are reproduced in the City Council docket for this item at pages 002249 through 002253, and 002263 through 002272, are incorporated herein by reference.

For all of the foregoing reasons, FRC respectfully requests that the City Council decline to approve the proposed Contract as presented, and direct the City to revise the Contract

to strictly limit the Scope of Services to only those preliminary design activities that will enable the City to comply with CEQA and that will not result in environmental damage to the sensitive resources in Rose Canyon. Consistent with its commitment in Resolution R-302497, the City should prepare a "full, separate, independent project-specific [EIR]" and certify that EIR "*before any implementation, if any, of that Bridge Alternative is approve and commenced.*" (Exhibit E [emphasis added]).

Very truly yours,

SHUTE, MIHALY & WEINBERGER LLP



Rachel B. Hooper

Attachments

- Exhibit A: January 29, 2007 letter from Shute, Mihaly & Weinberger LLP to the Mayor and City Council
- Exhibit B: February 9, 2007 memo from Shute, Mihaly & Weinberger LLP regarding the City's Environmentally Sensitive Lands regulations as applied to the proposed Bridge
- Exhibit C: March 12, 2007 letter from Shute, Mihaly & Weinberger LLP to Carmen Brock and Michael Calabrese, City Attorney's Office (w/o attachments)
- Exhibit D: July 20, 2007 letter from Marco Gonzalez, Coast Law Group, on behalf of FRC, to the City Council (w/o attachments)
- Exhibit E: City Resolution R-302497 (adopted March 27, 2007; final passage April 2, 2007)
- Exhibit F: August 24, 2007 Request for Proposals for Environmental Impact Report for Regents Road Bridge and Limited Roadway Changes (H084105)
- Exhibit G: Excerpt of minutes of August 1, 2006 City Council meeting
- Exhibit H: Final EIR for the University City North/South Transportation Corridor Study, submitted electronically via two CDs
- Exhibit I: Comment letters of City Attorney's Office, US Fish & Wildlife Service, California Department of Fish & Game, and Friends of Rose Canyon on Final EIR for Study
- Exhibit J: Report to Hearing Offer No. HO-05-022 (February 25, 2005)
- Exhibit K: Email correspondence between Sara Katz and Gordon Lutes, et al. (November 5-6, 2003)
- Exhibit L: Excerpt of Caltrans Local Assistance Procedures Manual, Chapter 6: Environmental Procedures (January 26, 2004); 23 C.F.R. § 771.113

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(Federal Highway Administration and Federal Transit Administration regulations)

Exhibit M: Request for Qualifications, University City North/South Transportation Corridor Study (June 21, 2002)

Exhibit N: Excerpt of City agreement with Project Design Consultants for University City North/South Transportation Corridor Study (April 21, 2003)

Exhibit O: City documents regarding Habitat Restoration Grant

cc: Mayor Sanders (letter only via facsimile)

Michael Calabrese (letter only via email) (letter and attachments via hand delivery on September 4, 2007)

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