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**MEMORANDUM OF LAW**

**DATE:** December 27, 2006

**TO:** Honorable Mayor and City Council

**FROM:** City Attorney

**SUBJECT:** In Relation to the Hearing of January 9, 2007 on the Appeals Challenging the Development Services Department's [DSD] California Environmental Quality Act [CEQA] 21166 findings for the Navy Broadway Complex Project [Project].

**INTRODUCTION**

On January 9, 2007, the San Diego City Council will hear two appeals challenging the Development Services Department's [DSD] California Environmental Quality Act [CEQA] 21166 findings relating to the Navy Broadway Complex Project [Project]. Previously, the Centre City Development Corporation [CCDC], under its delegated responsibilities, began the process of approving and adopting a Consistency Determination for the Navy Broadway Complex Project. Prior to CCDC's adoption of this Consistency Determination, the City was required to make and did make findings under CEQA Section 21166 concerning further environmental review. DSD made the CEQA 21166 determination that no substantial changed circumstances or new information existed that would warrant further CEQA environmental review for this Project. The last time a project-specific CEQA document was prepared for this Navy Broadway Complex Project was in 1990, although subsequent program-level reviews have occurred.

**QUESTION PRESENTED**

Would the City have to prepare a Subsequent or Supplemental Environmental Impact Report [EIR] if there exist substantial changed circumstances or new information warranting further environmental review?

### SHORT ANSWER

Yes, the City would have to prepare a Subsequent or Supplemental EIR if substantial changed circumstances or new information exist that were not previously analyzed in the 1990 EIR. If appropriate, the City could also adopt another agency's final CEQA or NEPA document as the City's subsequent CEQA document for the Navy Broadway Complex Project if the changed circumstances are adequately evaluated in the other agency's CEQA or NEPA document. However, specific findings would need to be made in order for the City Council to adopt the other agency document, and where deemed necessary, the document would need to be supplemented. *See* Sections 15153, 15096 and 15220 – 15225 of Title 14 of the California Code of Regulations [14 Cal. Code. Reg. 15096 and 15220 – 15225].

### ANALYSIS

Once an EIR has been certified, a Subsequent EIR or a Supplement to an EIR must be prepared if any of the following situations occur:

1. Substantial changes are proposed in the project which will require major revisions of the environmental impact report.
2. Substantial changes occur with respect to the circumstances under which the project is being undertaken which will require major revisions in the environmental impact report.
3. New information, which was not known and could not have been known at the time the environmental impact report was certified as complete, becomes available.

California Public Resources Code [Cal. Pub. Res. Code] Section 21166; 14 Cal. Code Reg. 15162. *See American Canyon Community United for Responsible Growth v. City of American Canyon* (2006) 2006 Cal. App. LEXIS 1952 (the issue before the court was whether, in light of the whole record, there was substantial evidence to support the City's determination that the proposed changes in the Project would not create significant new or substantially increased environmental effects requiring major revisions in the MND or preparation of an EIR. The court determined that the City's 21166 findings were incorrect and the City was ordered to go back and begin the 21166 review again consistent with the court's findings); *see also, Concerned Citizens of Costa Mesa, Inc. v. 32<sup>nd</sup> Dist. Agricultural Ass'n* (1986) 42 Cal. 3d 929, 937 (changes in project after completion of EIR that resulted in amphitheatre containing 7,000 seats rather than 5,000 and facing single-family homes rather than away from them required Subsequent EIR); *Eller Media Co. v. Community Redevelopment Agency* (2003) 108 Cal. App. 4<sup>th</sup> 25, 43-44 (applicant proposal to construct billboards 13 years after Final EIR was certified required Supplement to EIR); *but see, Fund for Environmental Defense v. County of Orange* (1988) 204 Cal. App. 3d 1538, 1549 (30-percent increase in project size, change in building location on site,

and change in source of water supply resulting in similar impact and requiring similar mitigation measures did not require preparation of Subsequent EIR or Supplement to EIR).

In evaluating changed circumstances and new information, some matters to consider may include, but are not limited to:

1. Whether there are any new substantial significant environmental effects the project might cause by bringing development and people into the area affected. *See* 14 Cal. Code Reg. Sections 15126.2(a) and 15162.
2. Whether there exists new substantial information relating to seismic impact that was not available before the EIR was certified and is available now. “For example, an EIR on a subdivision astride an active fault line should identify as a significant effect the seismic hazard to future occupants of the subdivision. The subdivision would have the effect of attracting people to the location and exposing them to the hazards found there.” 14 Cal. Code Reg. Sections 15126.2(a) and 15162.<sup>1</sup>
3. Whether there are newly identified unavoidable substantial environmental effects that may trigger the need for another EIR. With respect to significant unavoidable environmental effects, “[w]here there are impacts that cannot be alleviated without imposing an alternative design, their implications and the reasons why the project is being proposed, notwithstanding their effect, should be described.” 14 Cal. Code Reg. Sections 15126.2(b) and 15162.
4. Whether there are any substantial significant adverse growth-inducing effects that were not previously evaluated or that are different than what was previously studied, or whether there is new information regarding growth-inducing impacts that had not previously been considered? Are there characteristics of this project, as proposed today by the developer, that would encourage and facilitate other activities that could significantly affect the environment, either individually or cumulatively. *See* 14 Cal. Code Reg. Sections 15126.2(d) and 15162.

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<sup>1</sup> *See* Katheryn Rhodes and Conrad Hartsell’s Navy Broadway Complex CEQA Appeal to City Council relating to Seismic Safety Issues (November 3, 2006). *See also* the *Geotechnical and Geologic Fault Investigation for the Pacific Gateway Navy Administration Building Phase 1*, Project No. 07695-22-01, Prepared by Manchester Pacific Gateway, LLC (July 12, 2006). These documents were not available prior to DSD’s CEQA 21166 Findings and contain new information that may be substantial.

If findings show that substantial changed circumstances or new information warrant further environmental review, determining whether to do a Subsequent (new) EIR or Supplement to the existing EIR will be dependent upon the magnitude of changes that must be made to the previous EIR. If major revisions are required due to substantial change in the project, change in circumstance or new information, then a Subsequent EIR will be needed. If only minor additions or changes are necessary to make the prior EIR adequate to apply to the changed situation, then a Supplement to the EIR is appropriate.

Recognizing the need for additional environmental review, the United States Department of the Navy [Navy] did prepare an entirely new environmental document for the Navy Broadway Complex. The Navy prepared an Environmental Assessment [Navy EA] under the National Environmental Policy Act [NEPA]. After careful review, the Navy determined there would be no significant environmental impact for this Project, but it did so only after completing the requisite analysis. The City has not adopted the Navy's NEPA document as the City's CEQA document for this Project and did not have this NEPA document available to review when City Staff determined that no changed circumstances existed warranting further environmental review. Under CEQA, the City could potentially adopt the NEPA Environmental Assessment, with any needed supplements, as its own CEQA document if appropriate findings and circumstances warranted it. *See* 14 Ca. Code Reg. Sections 15220 – 15225. If the City had decided to use the Navy's NEPA document as the subsequent CEQA environmental review, the City would have been required to give notice of its intent to use the federal document and a statement of its belief that the federal document meets the CEQA standards. The CEQA Guidelines encourage a joint effort where both CEQA and NEPA are triggered. *See* 14 Cal. Code Reg. 15226.

In the Navy's NEPA Environmental Assessment, the Navy recognizes the need to complete this new NEPA document because of new information and changes in the law:

This EA is being prepared to allow the Navy to make an informed decision of whether to implement the [Record of Decision], which directs implementation of the Development Agreement, *given current conditions, recent federal policies, and updated local plans.*

*Emphasis Added.* Page EA-4, *Environmental Assessment for Navy Broadway Complex*, U.S. Department of the Navy (2006) [Navy EA]. The Navy's EA identifies various changed circumstances which warranted the preparation of an Environmental Assessment and which may warrant, after careful review, the preparation of a CEQA document.

The following excerpts are taken directly out of the Navy's NEPA document which identifies changed circumstances and new information:

- **Change in Responsibilities and Law:**

The City approved mitigation measures and Findings under Section 21081 of [CEQA] and developed a [Mitigation Monitoring Program (MMP)] designed to eliminate or substantially reduce the potential effects of the proposed action to a level below significance. In accordance with the MMP, the City of San Diego will be responsible for ensuring the implementation of mitigation measures. Due to regulatory changes that have occurred since the inception of the MMP, the City and the Navy's private development partner will be responsible for complying with all policies and regulations that have arisen under current laws, regulations, and standards.

*Emphasis Added.* Navy EA at Page 1-5.

- **Change in Market Conditions:**

The purpose for this action is to implement the Development Agreement now, because unlike in the early 1990s, market conditions are currently favorable for this type of development...

Navy EA at Page 1-6.

- **New Changes In Density and Use in Downtown San Diego:**

Since approval of the [Record of Decision (ROD)] for the Navy Broadway Complex in 1991, the downtown San Diego area surrounding the property has experienced growth, including the construction of numerous residential and commercial towers as well as the mooring of the USS Midway (San Diego Aircraft Carrier Museum) immediately west of the site. This EA evaluates existing conditions, applicable planning documents for the downtown waterfront area, and regulatory changes that may affect implementation of the Development Agreement....

The Downtown Community Plan allows a substantial increase in the number of residential units, commercial, and office centers, and population in the Centre City planning area beyond what was allowed in the 1992 Centre City Community Plan (2006a). While the 1992 Plan had indicated a target residential population for the downtown region of 41,120 people by 2025 (CCDC 1992), the updated Downtown Community

Plan of 2005 projects approximately 90,000 people, a 54 percent increase from the 1992 plan.

*Emphasis Added.* Navy EA at Pages 1-7, 3.1-9, 4-9 and 4-10.<sup>2</sup>

- **Change in Building Design Requirements since 9/11, Which Are in Addition to the Original Development Agreement’s “Development Plan” and “Urban Design Guidelines”**:

In October 2003, the Department of Defense (DoD) issued Instruction [N]umber 2000.16, “DoD Antiterrorism Standards,” requiring all DoD Components to adopt and adhere to common criteria and minimum construction standards to mitigate antiterrorism vulnerabilities and terrorist threats. ...That philosophy affects the general practice of designing inhabited buildings....[Anti-Terrorist Force Protection (ATFP)] standards consist of restrictions for onsite planning, including standoff distances, building separation, unobstructed space, drive-up and drop-off areas, access roads, and parking; structural design; structural isolation; and electrical and mechanical design. ATFP standards will be incorporated into the design of the new Navy administrative space, where applicable.

Navy EA at Page 1-8, 2-5, 2-6 and 3.1-16.<sup>3</sup>

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<sup>2</sup> The Navy’s EA relies considerably on the Downtown Community Plan EIR for an analysis of Cumulative Impacts; however, the EA also acknowledges that for the purpose of analyzing impacts from the Navy Broadway Complex Project, the Community Plan EIR is not enough: “As the EIR is a program-level document, it does not specifically associate any of these significant impacts with the redevelopment of the Navy Broadway Complex. The following discussion in Section 4.2 provides an analysis of potential cumulative impacts for each resource area, specific to the proposed action.” Navy EA at Page 4-12. “The analysis of impacts presented in the CCDC EIR considers redevelopment of the Navy Broadway Complex; however, any significant impacts were related to overall redevelopment in the downtown area and were not specific to the proposed action.” Navy EA at Page 4-13. It is also important to note that the Downtown Community Plan EIR is the subject of on-going litigation. Although the City is not currently enjoined from relying upon this EIR in its decisionmaking, if the Petitioners are successful in their challenge then any approvals that are based upon this EIR may be the subject of additional challenge and review.

<sup>3</sup> An issue that has not been fully analyzed since the 9/11 incident is whether it is safe to locate a Navy facility that may be a potential terrorist target next to an urban residential area such as Downtown San Diego. Are resident’s exposed to a greater risk of harm by the presence of such a facility? “The surrounding neighborhoods have recently experienced extensive residential development, and there are numerous residential complexes near the Navy Broadway Complex.”

- **Needed Police Protection Services:**

[T]he proposed action would require the Navy to retrocede jurisdiction over the property to the State of California for police and fire protection services, and the State may likely accept this change of jurisdiction.

The San Diego Police Department has identified potential secondary impacts as a result of implementation of the proposed action including:

- An increased risk of traffic accidents, resulting in an additional need for police services, due to the increase in vehicular traffic on surrounding streets and arterials.
- The potential for increased car prowls on parked vehicles as a result of the higher density use proposed by the project (San Diego Police Department 2005c).

In response to the future growth and development projected for the region not associated with the proposed action, the San Diego Police Department has recommended an increase in staff of 38 officers downtown over the next 5 years, and a related increase in civilian staff (CCDC 2006b).

Navy EA at Page 3.1-15 and 3.4-3.

- **The Creation of the North Embarcadero Alliance Visionary Plan [NEAVP]:**

NEAVP is a comprehensive plan encompassing the area from Laurel Street on the north to North Harbor Drive on the south and from the western edge of the piers on the west to the Metropolitan Transit Development Board rail lines on the east (Port District 1998). The North Embarcadero Alliance was originally established by the CCDC, the Navy, the City of San Diego, the County of San Diego, and the Port District. The Navy has subsequently withdrawn from the alliance. The Navy Broadway Complex is located in the southernmost part of the NEAVP plan area....The NEAVP establishes land uses within the North Embarcadero area. In addition to identifying land use, the NEAVP includes specific land use-related development criteria, including building intensity, building heights and massing, public access, and parking....The

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Navy EA at Page 3.1-4. “Much of the recent development in the vicinity has been multi-family residential units, mostly in high-rise structures.” Navy EA at Page 3.1-7.

NEAVP also considers public rights-of-way to enhance the physical and visual access to the Bay.

Navy EA at Page 3.1-12.

- **The Design of the San Diego Downtown Historic Harborfront Redevelopment:**

The Port District held a design competition to select a concept for the redevelopment area, and a design team was selected in June 2004. Ultimate buildout of the Downtown Historic Harborfront Redevelopment concept is expected to be completed by 2018.

Navy EA at Page 3.1-12, 3.1-14.

- **New Proposed Development of the Old Police Headquarters [OPH], Located Within the Downtown Historic Harborfront Redevelopment Area:**

[T]he Port District is conducting a study to reuse/rehabilitate the OPH and develop additional parkland to the west of the OPH. The OPH and park project site consists of 8.6 hectares (21.3 acres); proposed plans include a mix of specialty retail, entertainment, and restaurant uses and include a new public park and play areas....

The second amendment to the Development Agreement signed in 2003 included a requirement that the agreement be in effect for a period of time deemed adequate to bring the Development Agreement into consistency with the NEAVP.

Navy EA at Page 3.1-14, 3.1-17.

- **Traffic Improvements Not Originally A Part of the Development Agreement and Not Considered in the Original EIR:**

[T]he following traffic measures are directly adjacent to the project site and provide more specific descriptions of the needed improvements than did the original measures included in the Development Agreement.

- Provision of a traffic signal at Pacific Highway and E Street.
- Provision of a traffic signal at Pacific Highway and G Street.
- Align the G Street segment through the project site to connect with the current G Street alignment east and west of the project site, and provide a continuous center turn lane in this segment.

- Provision of a four-way stop-controlled intersection at North Harbor Drive and G Street.
- Provide enhanced sidewalk on Broadway.
- Provide Class II bike facilities along Pacific Highway.
- Provide shared path bike facilities along North Harbor Drive.

Navy EA at Page 3.2-16.

- **Applicability of New Archeological Requirements Per The San Diego Metropolitan Area Programmatic Agreement (Metro Area PA) (February 2003):**

For the Navy Broadway Complex project, compliance with Section 106 of the National Historic Preservation Act (NHPA) and 36 CFR 800 is being conducted under the San Diego Metropolitan Area Programmatic Agreement (Metro Area PA), executed in February 2003 between the [Commander, Navy Region Southwest (CNRSW)] and the Advisory Council on Historic Preservation, and the State Historic Preservation Officer (SHPO).....CNRSW identified an Area of Potential Effect (APE) as the geographic area within which the proposed project could directly or indirectly affect historic properties (e.g., demolition activities or visual impacts)....

The Navy will conduct archaeological monitoring in accordance with Stipulation 9 of the Metro Area PA and a construction monitoring and discovery plan will be prepared and approved by the Navy prior to the start of ground-disturbing activities.

Navy EA at Pages 3.10-1 and 3.10-7.

Another consideration that was not previously evaluated in the Navy Broadway Complex 1990 EIR, and not subsequently evaluated in the Downtown Community Plan EIR and Navy EA, is CCDC's proposed Quiet Zone for Downtown San Diego. According to the December 6, 2005 CCDC Staff Report, the Quiet Zone, as proposed, would require the conversion of G Street from a two-way into a one-way street from Pacific Highway to Front Street. The 2005 CCDC Traffic Study referenced in the Staff Report concludes there will be unavoidable adverse traffic impacts in 2030 with or without the conversion of G Street to one-way. The cumulative impacts of the proposed Quiet Zone have yet to be evaluated in relation to the Navy Broadway Complex Project. This proposed G Street one-way conversion may be inconsistent with the Navy Broadway Complex Development Agreement:

When the Development Agreement was signed between the Navy and the City, it was determined that redevelopment of the site would result in increased [Average Daily Trips (ADT)] and that implementation of four specific transportation

improvements would be required. As described in Section 3.2.2, this includes the extension of E, F, and G streets for vehicular and pedestrian access; the creation of G Street as a major pedestrian promenade; widening and improvements to the segment of Pacific Highway adjacent to the site; and implementation of a TDM. The extension of E, F, and G streets is also considered in the downtown Community Plan and analyzed in the CCDC EIR. The Navy's development partner will work in coordination with CCDC to assure that these improvements are carried through in compliance with current regulations. These specific improvements were adopted as a condition of project approval and were determined to mitigate both project-specific and cumulative effects and would sufficiently reduce traffic impacts to all road intersections and road segments to a level below significance (U.S. Navy 1990a).

Navy EA at Page 4-14.

### CONCLUSION

For the reasons discussed above, further consideration should be given to these changed circumstances and a determination made as to whether they are substantial and, if so, whether to develop a Subsequent or Supplemental EIR or to adopt the Navy's EA as the City's CEQA document, with supplemental information and analysis where needed.

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By

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