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September 24, 2007

VIA HAND DELIVERY

Council President Scott Peters
and Members of the City Council
City of San Diego
202 C Street, 10th Floor
San Diego, CA 92101

Re: Pacific Coast Office Building
Hearing Date: September 25, 2007. Agenda No. 334

Dear Council President Peters and Members of the City Council:

I am writing on behalf of my client, Dr. Robert Pollack, the applicant for the proposed Pacific Coast Office Building (the "Project"), which is before your Council for the third time in one year. The purpose of this letter is to refresh your Council of the status of this Project, to respond to and rebut a memorandum prepared by the City Attorney's office at the request of Councilmember Donna Frye, and to strongly urge you to reject the appeal and certify the Mitigated Negative Declaration ("MND") which is before you. As you know, project entitlements have already been approved by the Planning Commission, and are not subject to your Council's review. If your Council decides that you will not certify any project which includes development above the 150 foot contour line on the property, we would ask you to state that clearly in the record so that the applicant may then pursue his legal rights without further delay.

Relevant History

The Project proposes the construction of an owner-occupied 9,845 square foot two-story office building on approximately five acres located on the south slope of Mission Valley at the terminus of Scheidler Way. The Project site is substantially constrained both by topography, and by prior City Council action. In 1977, the City Council approved a Planned Commercial Development ("PCD") for a similar building, and re-zoned it from "low density residential" to "commercial office." As conditions to the PCD, the developer was required by the City to dedicate approximately 78% of the total parcel area as permanent open space, and to grant a portion of the property for a street. In 1982, the City accepted the dedication of these properties,

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leaving only the lower 1.08 acre portion for commercial development. The original project was never built because the developer was killed in an airplane accident, and that entitlement expired. Despite that, the City benefited by obtaining the open space and street easements, and continues to enjoy them today.

In 2004, the applicant purchased the property, then submitted the Project for discretionary review. It has been in process for almost three years. The remaining commercially zoned portion of the property is on a hillside, and is a challenging site to develop. The site submitted as the Project was chosen from a number of alternatives and is environmentally superior to any other considered. The site would be denied all development potential if this Project was denied.

Environmental Analysis and Hearing History

After preparing an Initial Study, City environmental staff determined that a MND was the appropriate environmental document for this project. It directed that that document address all identified potentially significant, but mitigable impacts. These were identified as land use/MSCP, biological resources, paleontological resources, geologic conditions, human health/public safety, historical resources, and water quality. The document was prepared on that basis.

The Project has an intensive hearing history. It was determined to be a Process 3 matter, to be determined by a hearing officer with appeal rights to the Planning Commission. The MND, but not the entitlements, could also be appealed to the City Council.

The matter was twice heard by the hearing officer. On April 19, 2006, the hearing officer approved the Site Development Permit and certified the MND.

The Project was appealed to the Planning Commission by opponents, and on June 15, 2006, the Planning Commission denied the appeal and upheld the hearing officer's decision to approve.

On September 26, 2006, an environmental appeal to the Project was heard by the City Council. With the applicant's agreement, the Council remanded the Project back to the Planning Commission, with instructions to modify the MND to include project alternatives that had been previously discussed, but not included within the MND, for public input. The revised MND, including the requested alternatives analysis, was then re-circulated for public comment.

On May 15, 2007, the Planning Commission unanimously approved the Project, and again certified the MND. Project opponents once again appealed the certification of the MND to your Council.

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It was clear from the comments of the Planning Commissioners that they had no questions about the appropriateness of approving this Project and certifying the MND. Commission Chairman Barry Schultz stated, "I am not persuaded by any testimony that would suggest that there can be no development on this piece of property because of the open space designation." Further, he said, "What persuades me in this case is there is no basis for denying development on the property." Commissioner Naslund stated, "Like Chairman Schultz, I am not persuaded that a no development option is viable here or even warranted." Commissioner Ontai stated, "It is clear to me that this is a scrap piece of land left over from a previous decision by the Council in 1992, that is permissible under the PDO and is permissible by the Community Plan. The language is there and the planning group approved it. I think this is a rare and unique case."

In City Council testimony on July 31, 2007, Councilmember Frye expressed dissatisfaction with the alternatives study incorporated into the current MND.

The Planning Commission had a different view: Chairman Schultz stated, "I think the job we were asked to do and staff was asked to do by Council has been accomplished. The alternatives were made public. The public has had an opportunity to analyze, then comment on them. I think the analysis that the staff put forward on the issues is sufficient and addresses the issues that had been raised by both the public as well as the Council." Commissioner Griswold added, "I think we have fully vetted this issue and feel we have looked at the alternatives. Staff has done an excellent job looking at all the alternatives and based on what has been presented I will gladly support the motion to approve the project and the MND."

The Commissioners' comments were consistent with the law in this area which provides, "An EIR need not consider every conceivable alternative to a project. Rather, it must consider a reasonable range of potentially feasible alternatives that will foster informed decision making and public participation. An EIR is not required to consider alternatives which are infeasible. The lead agency is responsible for selecting a range of project alternatives for examination and must publicly disclose its reasoning for selecting those alternatives. There was no iron clad rule governing the nature or scope of the alternatives to be discussed other than the rule of reason." CEQA Guidelines, Section 1526.6(a); Public Resources Code 21100(b)(4).

On July 31, 2007, your Council heard the matter once again. Councilmember Frye made a motion to grant the appeal and deny certification of the MND, arguing that the Project required an Environmental Impact Report ("EIR"). She was unable to articulate findings of fact as required by law to support this motion. At that time, the Council voted to continue the item until September 25, to allow her to develop findings.

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Rebuttal of City Attorney Memorandum

During the three years of environmental study of this Project, at least four separate Deputy City Attorneys have evaluated the appropriateness of an MND instead of an EIR on this Project, and in all prior hearings have endorsed an MND as the appropriate level of environmental review, and have opined that this MND is legally sustainable. Illustrative of that analysis by the City Attorney's office is the following quote from Deputy City Attorney David Miller at the City Council hearing on September 26, 2006:

"I think the fundamental issue here is the assumption that open space is not developable based on the open space designation in the Community Plan whereas the opposite is actually true. If you read through the open space section in the Community Plan they do anticipate development in open space in several areas. The purpose is to try and protect the open space, but in sections in the open space section there is specific language talking about it. It is apparent if they develop it must be in a manner comparable with hillside ecology and in the language that says development oriented toward the valley and accessed by roads from the valley should not extend above the 150' contour line. It does not say *shall not extend* [emphasis added]. It is permissive in the sense it allows it, and subsequent to that they had developed regulations that talk about developing the hillside which basically allow, as staff has said smaller scale development above the 150' contour line. So if you look at all of those items collectively you recognize the open space designation and development are not mutually exclusive in the Mission Valley Community Plan."

In the City Attorney memorandum dated September 18, 2007, without any explanation or rationale, the City Attorney's office has reversed its position 180°, and is now an advocate for the appellants. This reversal is disturbing, and seriously calls into question the validity of the current memorandum. In it, the City Attorney purports to set forth substantial evidence to support the preparation of an EIR for the Pacific Coast Office Building Project.

The memorandum is incomplete, misleading, and fails totally to achieve its purpose. The initial error in the City Attorney's memorandum is a misunderstanding of the actions of your Council on July 31, 2007. The City Attorney represents that action to be a direction from the City Council to Development Services to prepare an EIR in this project. In truth and in fact, that action was not taken. The Council was advised they had nothing in the record to sustain findings necessary to support that action. Instead, the action of the Council was to continue the matter to allow the proponent of the motion to attempt to develop sustainable findings.

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The memorandum correctly states that "An agency must determine whether the project may have significant effect based on substantial evidence 'in light of the whole record'... Under this standard, the agency must determine whether substantial evidence in the record before it supports the 'fair argument' that the project may have a significant effect on the environment." However, it incorrectly argues that there is "substantial evidence" in the record that would mandate an EIR. To the contrary, the entire three year environmental review of this Project has developed significant substantial evidence, after study of all identified potentially significant impacts, showing that all impacts are totally mitigated by conditions imposed on this Project. There is no significant evidence presented either in the record of the Project or in the City Attorney's memorandum that would call into question this determination.

The memorandum correctly quotes that "Substantial evidence shall include facts, reasonable assumptions predicated upon facts, and expert opinion supported by facts," as required by CEQA Guidelines Sections 15384, 15064(f)(5). However, the memorandum ignores the rest of the language that the legislature added to CEQA in 1993 to define substantial evidence for the purposes of supporting a "fair argument" triggering the need for an EIR. That missing language clearly specifies "argument, speculation, unsubstantiated opinion or narrative, evidence which is clearly inaccurate or erroneous, or evidence of social or economic impacts which do not contribute to or are not caused by, physical impacts from the environment, is not substantial evidence. Substantial evidence shall include facts, reasonable assumptions predicated upon facts, and expert opinion supported by the facts." Public Resources Code Section 21082.2(c); CEQA Guidelines, Section 15384.

The relevant statutes and regulations provide further, "The existence of public controversy over environmental effects of a project shall not require preparation of an Environmental Impact Report if there is no substantial evidence in light of the whole record before the lead agency that the project may have a significant effect on the environment." Public Resources Code Section 21082.2(b); CEQA Guidelines, Section 15064(f)(4).

In Paragraph III of the memorandum, the City Attorney weakly attempts to identify significant unmitigated impacts in the areas of aesthetics, building incompatibility and loss of steep slopes. Once again, no facts are presented to support this pure opinion. Additionally, the City Attorney quotes liberally from the Mission Valley Community Plan and the Mission Valley Planned District Ordinance suggesting that the PDO prohibits development over the 150 foot contour line, but conveniently, and one would hope unintentionally, omits the provisions of the PDO that specifically incorporated and established a public process by which to review and analyze development proposals on properties with special circumstances, and allows exceptions under unusual or hardship conditions. As staff has set out repeatedly in all of its analysis over three years, this Project is exactly the type of special circumstances that the exception was developed to deal with. Because of prior actions of the City Council, the commercially zoned

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portion of this property cannot be developed without intruding above the 150 foot contour line. If that intrusion is not made, a strong argument can be made that no development is possible and therefore a governmental taking has occurred.

Likewise, in the same section, the City Attorney claims the Project is located in a highly visible area and would strongly contrast with surrounding development or natural topography through excessive height and bulk. This is an unsubstantiated opinion and is totally rebutted by numerous exhibits in the record which show that the surrounding area is primarily developed by large commercial buildings which for the most part screen this parcel from public view.

The memorandum, once again with opinion, not facts, attempts to maintain that the ADT allowance for this Project is not supported by proper calculation by virtue of the fact that the majority of the Project is located on steep hillsides. This ignores the following facts in the record. First of all, the City maintains significant determination thresholds, and in evaluating this Project found that the Project does not exceed those thresholds, therefore obviating the necessity for further study. Secondly, if the appellants' argument with regard to the calculation of ADTs were strictly applied, that alone would prohibit development on the property and would amount to a taking.

In a similar vein, it is speciously argued that the Project is improperly relying on fireproof building materials and a sprinkler system in order to address fire safety, rather than carving out two brush management zones around the perimeter of the property. This is not persuasive for several reasons. First, the Fire Chief, after study, has deemed the alternative fire management requirements to be adequate. Second, insisting on the brush management zones in this area would take away any possible developable pad and would result in a taking. Even if that were not true, it would require encroaching into dedicated open space and doing extensive clearing, which is completely opposite from what the appellants have said that they desire.

Conclusion.

In conclusion, the memorandum of the City Attorney is legally insufficient, and will place the City in extreme jeopardy with regard to this Project should it be relied on in any way as establishing substantial evidence for requiring an EIR on this Project.

Further, it is crystal clear from a review of the record of this Project, that it is supported by full and complete environmental analysis, and that no significant impacts have been identified that are not mitigated by project conditions. It is time for your Council to deny the appeal that has kept this Project a prisoner for over a year. CEQA is designed to inform the public and decision-makers of all potential impacts which might result from approval of a project. It was never designed to be a maze with no exit.

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Thank you for your consideration.

Very truly yours,


J. Michael McDade

cc: Nina M. Fain, City Attorney's Office
Elizabeth Maland, City Clerk
Robert J. Manis, Assistant Deputy Director, Development Services
Dr. Robert Pollack