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The City Attorney  
City of San Diego

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COUNCILMEMBER  
DONNA FRYE

MEMORANDUM

MS 59

(619) 533-5800

**DATE:** September 18, 2007

**TO:** Councilmember Donna Frye, Council District 6

**FROM:** City Attorney's Office

**SUBJECT:** Substantial Evidence to Support the Preparation of an Environmental Impact Report for the Pacific Coast Office Building Project

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**INTRODUCTION**

The Pacific Coast Office Building Project [Project] includes a Site Development Permit [SDP] for the construction of a two-story office building of approximately 9,845 square feet on a vacant parcel in the Mission Valley Planned District and Mission Valley Community Plan area. In addition, a Mitigated Negative Declaration [MND] including a Mitigation, Monitoring, and Reporting Program [MMRP] was prepared for the Project.

On July 31, 2007, the City Council heard an appeal of the Planning Commission's certification of the MND for the Project.<sup>1</sup> City Council voted 6-0 (Council Districts 5 and 7 absent) to set aside the MND and direct the Development Services Department [DSD] to prepare an Environmental Impact Report [EIR] for the Project; however, the item was continued to allow an opportunity to articulate specific findings to assist DSD's preparation of the EIR.

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<sup>1</sup> This was the second appeal to the City Council of the MND. The procedural history of this Project is as follows: On April 19, 2006, the Hearing Officer certified the Project MND and approved the MMRP and SDP. On May 2, 2006, an appeal was filed challenging the certification of the MND and the approval of the MMRP and SDP. On June 15, 2006, the Planning Commission heard the appeal, and upheld the Hearing Officer's April 19<sup>th</sup> decision. An appeal was then filed to City Council to challenge the certification of the MND and MMRP. On September 26, 2006, the City Council voted unanimously to grant the appeal, set aside the environmental determination, and remand the issues back to the Planning Commission with direction for Development Services to review alternatives to reduce the impacts. Development Services staff prepared a revised MND including a review of alternatives. On May 17, 2007, the Planning Commission voted to certify the revised MND and approve the Project with a "green roof" modification. The Planning Commission's decision was again appealed to City Council under CEQA section 21151(c).

## QUESTION PRESENTED

Is there substantial evidence in light of the whole record creating a fair argument to support City Council's determination that significant environmental impacts may be caused by the Pacific Coast Office Building Project requiring the preparation of an EIR?

## SHORT ANSWER

Yes. At the July 31, 2007 hearing, City Council directed Development Services to prepare an EIR because substantial evidence in the administrative record created a fair argument that significant environmental impacts may occur relating to negative aesthetics, incompatibility with the surrounding area, loss of steep slopes, inconsistency with the Mission Valley Community Plan, traffic and average daily trips, and brush management.

## ANALYSIS

### I. Fair Argument Standard

The California Environmental Quality Act [CEQA] has a fundamental requirement that an EIR must be prepared when the approval of the project may cause significant adverse effects or impacts to the environment. *See* CEQA §§ 21002.1, 21061, 21100, 21151; CEQA Guidelines §§ 15080-15096, 15120-15132, 15160-15170, 15358, 15362, 15382. "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." Michael H. Remy, et. al., *Guide to the California Environmental Quality Act*, p. 158 (1999) (citing CEQA § 21082.2(a); CEQA Guidelines § 15064; *Gentry v. City of Murrieta*, 36 Cal. App. 4<sup>th</sup> 1359, 1399-1400 (1995)).

"[I]f a lead agency is presented with a fair argument that a project may have a significant effect on the environment, the lead agency shall prepare an EIR even though it may also be presented with other substantial evidence that the project will not have a significant effect." *Eureka Citizens for Responsible Government v. City of Eureka*, 147 Cal. App. 4th 357 (2007) (citing *Banker's Hill, Hillcrest, Park West Community Preservation Group v. City of San Diego*, 139 Cal.App.4th 249, 263 (2006)).

### II. Substantial Evidence

Substantial evidence is defined in the CEQA Guidelines to mean "enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached...Substantial evidence shall include facts, reasonable assumptions predicated upon facts, and expert opinion supported by facts." *See* CEQA Guidelines §§ 15384, 15064(f)(5).

“[I]nput from non-experts can be substantial evidence where such input is credible and does not purport to embody analysis that would require special training. Thus, for example, any lay person could credibly relate his or her firsthand perceptions that gridlock routinely occurs on a particular roadway at particular times.” Michael H. Remy, et. al., *Guide to the California Environmental Quality Act*, p. 158 (1999) (citing *Citizens Association for sensible Development of Bishop Area v. County of Inyo*, 172 Cal. App. 3d 151 (1985), *Quail Botanical Gardens Foundation, Inc. v. City of Encinitas*, 29 Cal. App. 4<sup>th</sup> 1597, 1604-1605 (1994), and *Friends of the Old Trees v. Department of Forestry and Fire Protection*, 52 Cal. App. 4<sup>th</sup> 1383, 1399(1997).

### III. Evidence in the Record Relating to Significant Impacts Identified by City Council

#### a. Aesthetics / Building Incompatibility / Loss of Steep Slopes

- The project exceeds the allowable height and bulk regulations and bulk of the existing patterns of development in the vicinity of the project by a substantial margin. **By exceeding the 150 foot contour line, the building is incompatible with the surrounding area.**
- The project would result in the physical loss, isolation or degradation of a community identification symbol or landmark, which are identified in the General Plan, applicable Community Plan, or local coastal program. **The Mission Valley Community Plan identifies the “linear greenbelt and natural form of the southern hillsides” as a community landmark and calls it out for preservation. This greenbelt is located above the 150 foot contour line and is located within the steep slopes of the southern hillside where this Project will encroach. The Mission Valley Planned District Ordinance also prohibits development over the 150 foot contour line to protect steep slopes. By allowing development above the 150 foot contour line, the Project results in the physical loss of steep slopes in the linear greenbelt, which are identified in the Mission Valley Community Plan.**
- The project is located in a highly visible area, **on the steep slopes of Mission Valley**, and would strongly contrast with surrounding development or natural topography through excessive height and bulk.
- The project significantly conflicts with height, bulk or coverage regulations of the zone **particularly in the manner that it encroaches into designated open space and the open space easement, allows for development over the 150 foot contour line, and does not provide architectural interest.**

#### b. Inconsistency with Mission Valley Community Plan

According to the Mission Valley Plan, “Development oriented toward the valley and accessed by roads from the Valley floor should not extend above the 150-foot elevation contour.” The Mission Valley Community Plan states that one of its objectives is to “Preserve as open space

those hillsides characterized by steep slopes or geological instability in order to control urban form, insure public safety, provide aesthetic enjoyment, and protect biological resources.” The inconsistency with the goals, objectives, and guidelines of the Mission Valley Community Plan would also fall under the “Land Use” category of the environmental document. The following are considered significant land use impacts:

- Inconsistency/conflict with the environmental goals, objectives, or guidelines of a community or general plan. The project is inconsistent with the Mission Valley Planned District Ordinance in that the Ordinance prohibits development above the 150 foot contour line. Furthermore, the project conflicts with the environmental goals of both the community and the general plan because it encroaches on designated open space.
- Development or conversion of a general plan or community plan designated open space to a more intensive land use. **The project provides for development in designated open space to a more intensive land use; a large percentage of the building footprint encroaches into the open space.**

#### c. Traffic and Average Daily Trips

Generally, if any intersection or roadway segment affected by a project would operate at a Level of Service [LOS] of E or F under either direct or cumulative conditions, the project exceeds certain allowable increases in delay or intersection capacity utilization for affected intersections or volume-to-capacity ratio or speed for affected roadway segments, the impacts would be considered significant. *See City's Significance Determination Thresholds.*

Traffic impacts are evaluated by the number of average daily trips [ADTs] created by a project. “Land acreage within a steep hillside shall not be used to calculate the ADT allocation.” (SDMC 1514.0301(d)(1)(A) and (C); and Table 1514-03A “excluding acreage within steep hillsides”). **The majority of the Project is located in steep hillsides, and that acreage was improperly included in the calculation of the allowable ADTs. If the steep hillsides are excluded from the calculation, the ADT allowance is exceeded by this Project and reveals significant traffic impacts.** Exceeding the allowance would also require an exception to the Planned District Ordinance regulations or an amendment to the Mission Valley Community Plan. SDMC § 1514.0303.

#### d. Brush Management

Brush management is required for all development adjacent to open space. SDMC § 142.0142. The Municipal Code mandates two zones established around these structures. Zone One extends 35 feet beyond the structure and must be free of habitable structures and must be irrigated among other requirements. Zone Two extends 65 feet beyond Zone One and provides for thinning of natural habitat. These requirements may be modified upon written opinion of the Fire Chief, based on a fuel load model report conducted by a certified fire behavior analyst, among other requirements.

The Project has no brush management requirement and instead relies solely on fire proof building materials and a sprinkler system in order to address fire safety. No report was conducted by a fire behavior analyst and no written opinion was obtained from the Fire Chief as to the adequacy of the alternative measures.

**As the steep slopes where this Project will be located contain sensitive biological resources including rare, threatened, and/or endangered plant and animal species and their habitat and because fire may have a substantial adverse affect on human beings, the lack of brush management is by definition a significant environmental impact under CEQA Guidelines section 15065 subsections (a) and (d). See *Mira Monte Homeowners Association v. Ventura County*, 165 Cal. App. 357, 363-364 (1985) (holding that impacts under CEQA Guidelines section 15065 are "by definition" significant).**

### CONCLUSION

There is a deferential standard for the preparation of an EIR where substantial evidence supports a fair argument that a project may cause significant adverse environmental impacts. An EIR is to be prepared even where other substantial evidence has been presented that the project will not have a significant environmental effect. Based on the forgoing, in light of the entire record, there is substantial evidence to support the City Council determination that an EIR is required.

MICHAEL J. AGUIRRE, City Attorney

By



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