CITY OF BREA

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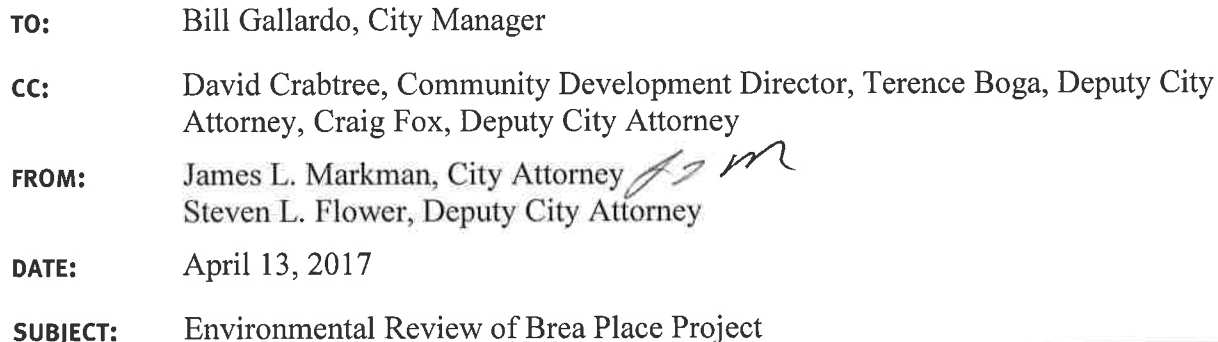
MEMORANDUM



TO: Bill Gallardo, City Manager

CC: David Crabtree, Community Development Director, Terence Boga, Deputy City Attorney, Craig Fox, Deputy City Attorney

FROM: James L. Markman, City Attorney
Steven L. Flower, Deputy City Attorney

DATE: April 13, 2017

SUBJECT: Environmental Review of Brea Place Project

Summary

For all of the reasons expressed in this memo, we have concluded that City Staff has processed and continues to process the Hines application legally, that no staff member engaged in any form of corruption, collusion or misconduct, and that any accusation of the occurrence of misconduct is baseless and reckless.

We prepared this memorandum in response to unsupported claims recently made on social media that the City Staff's decision to prepare an addendum to the 2003 General Plan Environmental Impact Report ("EIR") for the Brea Place mixed-use project ("Project") violates the California Environmental Quality Act ("CEQA"). It also was inferred that that decision was the result of "collusion and corruption" on the part of City officials without any indication of the motive for or method of the same. As stated above, in our opinion, the CEQA claim itself is without merit and the inference of misconduct by any City official is spurious and bordering on reckless.

The Project falls within the scope of the sort of mixed-use development that was previously analyzed in the 2003 General Plan EIR and the 2013 Housing Element Addendum. CEQA therefore prohibits the City from requiring a subsequent or supplemental EIR unless specific conditions are present. If none of these conditions are met, CEQA requires the City to prepare an addendum to the General Plan EIR that explains its decision not to prepare a subsequent or supplemental EIR. *See* 14 C.C.R. § 15164.

The City's decision to hire Kimley-Horn and Associates ("KHA") to prepare an addendum was entirely consistent with CEQA. Of the two proposals to provide environmental consulting services for the Project that the City received, only KHA's included a process to consider whether there was evidence to trigger any of the conditions that would allow preparation of a subsequent or supplemental EIR, while notably allowing for the possibility that a subsequent or supplemental EIR might still be required. In contrast, the other proposal presumed a subsequent EIR would be required. In light of CEQA's legal mandate that the City consider whether any of the threshold conditions for requiring a subsequent or supplemental EIR had been met, the City chose KHA.

Members of the public may rightly have strong opinions regarding the merits of the Project and are free to express those opinions through available means, including social media. Spurious claims of official misconduct are a different matter, however. There is no evidence to support claims of collusion or corruption by any City official and we can only conclude such claims are based on a fundamental misunderstanding of the law, bad faith, or both.

Discussion

1. The City's decision to hire KHA to prepare an addendum for the Project was consistent with the legal requirements of CEQA.

In the typical course of the CEQA process, a lead agency examines the potential environmental impact of a proposed project in an appropriate CEQA document such as an EIR or negative declaration, and if the agency approves the project, it is carried out as proposed. In some cases, however, a lead agency may be asked to consider approving a project that has already undergone CEQA review. This occurs, for example, where a developer wants to change the project after it has received approval from the lead agency. It also occurs where a project requires multiple discretionary approvals and its impacts were examined as part of an earlier approval.

In such situations, the lead agency's ability to require additional CEQA review is significantly limited. Under Section 21166 of the Public Resources Code, once an EIR has been approved for a project, the lead agency responsible for approving the project may not require preparation of a subsequent or supplemental EIR unless one of three triggering conditions are met:

1. Substantial changes are proposed that will require major revisions to the prior EIR;
2. Substantial changes have occurred to the circumstances under which the project will be undertaken that will require major revisions to the EIR; or
3. There is new information of substantial importance to the project that was not known and could not have been known at the time the prior EIR was certified.

Examples of a substantial change would include a proposed use of land on the site which differs from that specified in the subject General Plan, newly acquired knowledge of seismic activity which could affect structures placed on the site or the intervening approval or build out of projects which already have created physical impacts not considered in the original EIR.

This rule is also found in Section 15162 of the CEQA Guidelines, which further explains what constitutes substantial changes and information of substantial importance and expands the rule to prior negative declarations. Under Section 15162, a lead agency shall not require a subsequent or supplemental EIR when an EIR or negative declaration has previously been adopted for a project unless there is substantial evidence in light of the whole of the record of any of the following:

1. Substantial changes in the project that will require major revisions to the EIR or Negative Declaration due to new significant environmental effects or a substantial increase in the severity of previously identified significant effects;

2. Substantial changes occur in the circumstances under which the project is being undertaken that will require major revisions to the EIR or Negative Declaration due to new significant environmental effects or a substantial increase in the severity of previously identified significant effects; or

3. New information of substantial importance that was not known and could not have been known with the exercise of reasonable diligence at the time the previous EIR was certified or the Negative Declaration was adopted, shows the following:

   A. The project will have one or more significant effects not discussed in the previous EIR or Negative Declaration;

   B. Significant effects previously examined will be substantially more severe than shown in the previous EIR;

   C. Mitigation measures or alternatives previously found to be infeasible would be feasible and would substantially reduce one or more significant effects of the project, but the project proponent declines to adopt the mitigation measure or alternative; or

   D. Mitigation measures or alternatives that are considerably different from those analyzed in the previous EIR would substantially reduce one or more significant effects on the environment, but the project proponent declines to adopt the mitigation measure or alternative.

See 14 C.C.R. § 15162(a).

Agencies are prohibited from requiring further CEQA review unless these conditions are met. *See Melom v. City of Madera*, 183 Cal. App. 4th 41 (2010). This rule embodies the strong presumption in CEQA against requiring any further environmental review once an EIR has been certified or a negative declaration adopted for a project. The California Supreme Court has said, "[t]hese limitations are designed to balance CEQA's central purpose of promoting consideration of the environmental consequences of public decisions with the interests in finality and efficiency." *Friends of the College of San Mateo Gardens v. San Mateo Cmty. College Dist.*, 1 Cal.5th 937, 949 (2016).

Indeed, the presumption is so strong that once the statute of limitations for challenging the prior EIR or negative declaration has passed, neither the legal adequacy nor age of the prior CEQA document is deemed relevant if none of the triggers for further environmental review are met.

See Moss v. Co. of Humboldt, 162 Cal. App. 4th 1041, 1049 (2008); *Citizens for a Megaplex-Free Alameda v. Preservation Society of Alameda*, 149 Cal. App. 4th 91, 110 (2007); *Snarled Traffic Obstructs Progress v. City and Co. of San Francisco*, 74 Cal. App. 4th 79 (1999).

Under Section 15164 of the CEQA Guidelines, if a lead agency determines that none of the triggers for further environmental review have been met, but some minor changes or additions to the prior environmental document as still necessary, it must prepare an addendum to the prior document. *See* 14 C.C.R. § 15164(a). The addendum should contain a brief explanation of the decision not to prepare a subsequent or supplemental environmental document supported by substantial evidence in the administrative record. *See* 14 C.C.R. § 15164(c). An addendum therefore simultaneously: (1) embodies the process used to determine whether any of the conditions that would allow a subsequent or supplemental EIR have been met; and (2) is the result of that process.

CEQA does not require a lead agency to provide public notice or opportunity for public comment when solely considering an addendum. *See* 14 C.C.R. § 15164; *Fund for Environmental Defense v. Co. of Orange*, 204 Cal. App. 3d 1538 (1988); *Bowman v. City of Petaluma*, 185 Cal. App. 3d 1065 (1986). However, CEQA does mandate that if a public hearing is otherwise required before approving a project, the hearing should include a hearing on the City's environmental review. *See* 14 C.C.R. § 15202(b). Best practices therefore dictate that an addendum be considered at any such hearing and that legal mandate and practice were followed in this matter.

The subject Project is the proposed development of properties located on either side of State College Boulevard, north of Birch Street, including 747 apartments and 16,900 square feet of commercial space distributed between two mixed use buildings, expansion of an existing parking structure from two levels to four levels, and a 150-room hotel. Although consistent with the General Plan land use designation and zoning, the project still requires approval of a precise development plan, related conditional use permits, and a tentative parcel map.

The 2003 General Plan EIR did not expressly consider the Project, but it did consider the impacts associated with changing the land use designation of the property to mixed-use development. Additionally, the 2013 Housing Element Addendum considered the possible development of the Project site with mixed uses, including the development of multifamily housing.

In recognition of these facts, the City's Community Development Director, David Crabtree, and City Planner, Jennifer Lilley, with advice from our office, conducted a preliminary review to consider whether any of the conditions that would allow requiring a subsequent or supplemental EIR for the Project were met. Their preliminary determination was that there was a sufficient basis to consider the use of an addendum and that the City should retain the services of an environmental consultant to analyze whether any of the conditions were met that would allow or require a subsequent or supplemental EIR.

In selecting a consultant for such purposes, the City is not required to either engage in a formal bidding process or necessarily award a contract based on the lowest bid. It may instead hire a consultant through an informal process and pay the consultant such compensation as it deems appropriate for the services rendered. *See* Gov. Code §§ 37103, 53060; *see also* Brea Municipal Code § 3.24.040 (contracts for professional services exempt from centralized purchasing). In Brea, City Staff directly supervises the consultant. Some cities allow developers to employ such consultants with the City only peer reviewing the work instead of supervising it directly.

In all cases, the cost of hiring an environmental consultant is born by the applicant. City Staff therefore discussed with the Project applicant the option of either issuing a formal request for proposals ("RFP") or informally soliciting proposals from two environmental consultants with whom the City had prior experience. The Project applicant agreed to the latter.

City Staff therefore simultaneously solicited proposals for CEQA review of the Project from two environmental consultants, KHA and ICF International ("ICF"), both of whom were advised that the City Staff had preliminarily determined that the Project might be covered by the prior EIR and that an addendum might therefore be appropriate.

Of the two proposals the City received, only KHA's included consideration of whether there was evidence to trigger any of the conditions that would allow preparation of a subsequent or supplemental EIR. KHA also proposed that the City's review include technical studies of specific resource area impacts such as air quality and traffic to make sure that the decision to use an addendum would be adequately supported by substantial evidence. *See* Professional Services Agreement with KHA, exhibit A (Scope of Work), page 2. Even then, however, KHA's proposal recognized that the City's decision to prepare an addendum was merely preliminary and that:

> "...should the facts including the technical documentation find that the project will have one or more significant effects not discussed in the previous EIR or significant effects previously examined will be substantially more severe than shown in the previous EIR, then an Addendum would not be appropriate and either an Initial Study leading to a Mitigated Negative Declaration (IS/MND) or an EIR would be required."

Professional Services Agreement with KHA, exhibit A (Scope of Work), page 1.

In contrast, ICF's proposal presumed that a subsequent EIR would be required, notwithstanding the requirements of CEQA that the City must consider the prior EIR, and that an addendum would be inappropriate.

City Staff reviewed the proposals and consulted with our office to evaluate the differing approaches presented by KHA and ICF. That consultation led to the conclusion that the legally and fiscally prudent option would be to evaluate whether a subsequent or supplemental EIR

could be required through the preparation of an addendum supported by a thorough update of necessary technical studies, while recognizing that a subsequent or supplemental EIR might ultimately be required if the technical studies resulted in substantial evidence of new or substantially more severe significant impacts than were found in the prior EIR or new information of substantial importance. City Staff shared that conclusion with the Project applicant, and the applicant agreed with the approach.

Accordingly, City Staff prepared a professional services agreement with KHA consistent with its proposed scope of work. The agreement was presented to and approved by the City Council on March 1, 2016.

The result of KHA's work was a draft addendum over 1,000 pages in length, inclusive of the technical studies. The document does not rely solely on the 2003 General Plan EIR, but includes current technical studies covering air quality, geotechnical issues, phase I environmental review, drainage, water quality management, traffic impacts, and wastewater. It concludes there is no substantial evidence that any of the conditions that would allow the City to legally require a subsequent or supplemental EIR have been met and that an addendum is therefore appropriate under the requirements of CEQA.

As the City's review of the adequacy of the addendum is ongoing, this memorandum does not address the ultimate merits of the conclusions made in the Project addendum. The subject of this memorandum is rather the City's decision to prepare the addendum in the first place, which based on the reasons discussed above, was entirely appropriate and, in fact, the best approach according to legal principles. That said, we are as yet unaware of any substantial evidence that has been presented to contradict the addendum's conclusions that the conditions that would allow for a subsequent or supplemental EIR have not been met.

2. There is no evidence of collusion or corruption in the City's decision to hire KHA to prepare an addendum for the Project.

As discussed in the preceding section of this memorandum, the City's decision to hire KHA to prepare an addendum for the project is fully consistent with CEQA. The more serious inference is that this decision was the result of an identified form of official misconduct. We believe that this accusation is patently false and could without basis tarnish well earned impeccable professional reputations.

The claim of misconduct is belied by both the sound legal basis for the decision discussed above and the extent to which the City has far exceeded the procedural requirements for public review of the Project addendum.

As explained above, CEQA does not require a formal public notice or comment period on an addendum. Nevertheless, City Staff in this case made the draft addendum available for public review and comment on February 25, 2017 prior to the Planning Commission's first public

hearing on February 28, 2017. At that hearing, the City Planner expressly stated that the staff was asking for the Commission to continue the hearing to allow the public further opportunity to review the addendum and provide further comment about it and the Project. The public received a further opportunity to comment on the addendum and the Project at the continued hearing held on March 28, 2017. That night, the Commission concluded the hearing but continued its deliberations on the Project until April 25, 2017. Although no further public hearing will be held at that time, members of the public can still submit written comments to the Commission any time prior to its deliberations.

This timeline shows that the addendum will have been publicly available for review and comment for a period of at least 61 days, which exceeds the length of public review periods that CEQA mandates for EIRs. *Cf.* 14 C.C.R. § 15105 ("Review periods for draft EIRs should not be less than 30 days nor longer than 60 days from the date of the notice except in unusual situations"). This backdrop shows that the charge that the City has not been transparent is specious.

We are also aware that social media statements falsely accuse City Staff of improperly discarding ICF's proposal to provide environmental consulting services for the Project in order to avoid a disclosure that that ICF believed that a new EIR is required. In reality, City Staff regularly discards rejected proposals to provide professional services to the City. In other words, rejected proposals are not considered permanent City records customarily retained in the ordinary course of City business. This is because rejected proposals for professional services do not serve any ongoing use for the City and often contain consulting fee structures and other information that could be used by competitors to gain a competitive business advantage if collected pursuant to the Public Records Act.

The City's retention policy does require the retention of "bid" documents for two years after opening, but this has always been interpreted by City Staff to apply only to projects subject to the formal public bidding process such as construction projects. Retaining rejected bids in those cases ensures that bidders and the public can evaluate whether the City properly awarded the construction contract to the lowest responsible bidder. As explained above, professional service contracts are not subject to this same requirement. Retaining rejected proposals would therefore not serve the same purpose as retaining rejected bids.

It also should be noted that the fact that ICF's proposal suggests that a full EIR should be prepared did not compel the City's Staff or the City's attorneys to concur in that conclusion, and as explained above, they had good reasons for not doing so in this case. ICF is not a law firm equipped to offer legal opinions on CEQA. It is therefore ludicrous to suggest that the City discarded ICF's proposal to hide ICF's nonbinding conclusion that a new EIR was required.

For all of the reasons stated above, this office finds the use of terms such as "collusion" and "corruption" on social media to characterize the conduct to date of City Staff on the Project to be spurious and bordering on reckless.

Conclusions

In sum, the facts and circumstances pertinent to the Project compel the conclusion that the City's decision to hire KHA to prepare an addendum for the Project was consistent with CEQA, and was not the result of official misconduct.

Please contact me at your convenience if you have any questions or concerns regarding the contents of this memorandum.