AGENDA
SAN DIEGUITO RIVER VALLEY REGIONAL OPEN SPACE PARK
CITIZENS ADVISORY COMMITTEE

10:30 a.m. to 12:15 p.m.
Friday, August 3, 2012

Hope United Methodist Church
16550 Bernardo Heights Parkway
(Corner of Bernardo Center Drive and Bernardo Heights Parkway, on top of hill) Rancho Bernardo

In order to conduct the meetings effectively, the Chair has asked the Citizens Advisory Committee appointees to please sit at the front of the room. Alternates (who are not sitting in for the regular appointee) and others present are invited to sit in the rows behind the committee. Discussion during the meeting will be conducted by the appointees. Alternates and others are welcome to address the committee during the public comment period or if recognized by the Chair during the meeting. Speaker slips are available. It is important that CAC members comply with the Chair's Meeting Procedures and maintain decorum and politeness at all times. A quorum is a simple majority of current members. **The Chair cannot start the meeting until a quorum is present. PLEASE ARRIVE BY 10:25 A.M!** The CAC may take action on any item listed on the Consent or Discussion/Action agenda, but only when a quorum is present. If a quorum is temporarily lost during the meeting, no further discussion will take place until the quorum is regained. If the quorum is not regained, the meeting will be adjourned. **Please advise the Chair at the beginning of the meeting if you must leave before 12:15 p.m.**

NOTICE: Agenda packets are distributed by e-mail only. If you do not have an e-mail address, please contact the office at 858 674-2270 to make alternative arrangements.

Roll Call and Introductions

Chair

Late arrivals should speak to staff to make sure their attendance is noted.

Approval of June 1, 2012 Minutes

Chair

Chair's Report

Staff

Executive Director’s Report

Public

Public Comment
DISCUSSION/ACTION

1. Committee Reports
   a. Project Review Committee (oral report)
   b. Trails Committee (oral report)

2. Regional Water Quality Control Board (RWQCB) Storm Water Requirements

INFORMATION

3. Lagoon Trailside Open Air Classroom

4. Status Update Rancho del Mar

5. Park Project Status
   a. Entry Monuments
   b. August 18 Event – Mile Markers, Trail App, Bilingual Materials
   c. Other

6. Communications An opportunity for any CAC member or the public to bring to
   the CAC's attention a project or activity not reviewed by the Project Review
   Committee in their reports.

Adjournment

If you have any questions, please call Dick Bobertz at (858) 674-2270.
TO: CAC

FROM: Staff

SUBJECT: Regional Water Quality Control Board (RWQCB) Storm Water Requirements

RECOMMENDATION:

Consider Issues and Recommend Action for JPA Board.

SITUATION:

The Building Industry Association (BIA) is seeking support to modify requirements of a draft Storm Water Discharge Permit which they consider ineffective in improving wetland water quality or impractical to achieve in San Diego County soil conditions. Industry representatives will detail their issues and outline alternative ideas they believe would be more effective in achieving improved water quality.

The Storm Water Discharge Permit of concern to the BIA was drafted in April 2012 and is currently undergoing review in a series of public meetings scheduled to continue through September 2012 with a finalized draft tentatively scheduled to be released for public comment in Fall 2012. The most recent meeting notes (7/11/12) available are attached. The full draft permit is available at www.swrcb.ca.gov/sandiego/water_issues/programs/stormwater. Regional Water Quality Control Board staff have been invited to provide their perspective.

ALTERNATE ACTIONS:

1. Recommend support of BIA position to the JPA Board.
2. Do not recommend support of BIA position to the JPA Board.
3. Request staff to follow the Draft Storm Water Discharge Permit Public Review Process and report back at the next CAC meeting.

Attachment: Minutes of RWQCB July 11, 2012 Meeting
San Diego Region - Storm Water

The San Diego Water Board is considering the development and adoption of a Regional Municipal Separate Storm Sewer System Storm Water NPDES Permit (Regional MS4 Permit) that will be issued to municipal Copermittees in San Diego County, Southern Orange County and Riverside County. Currently, each of these counties within the San Diego Region has its own Municipal Storm Water Permit. In order to better achieve regulatory consistency as well as maximum efficiency and economy of resources, the San Diego Water Board has initiated work to develop a single Regional MS4 Permit based on the boundaries of the San Diego Region instead of county political boundaries. Under this approach, the permit being developed will uniformly regulate all three counties within the San Diego Region.

- Administrative Draft Regional MS4 Permit (posted April 9, 2012)
- Public Workshop Notice of Administrative Draft Regional MS4 Permit (posted April 2, 2012)

- July 25, 2012 Focused Meeting
  - Agenda
  - Meeting Notes

- July 11, 2012 Focused Meeting
  - Agenda
  - Meeting Notes

- June 27, 2012 Focused Meeting
  - Agenda
  - Meeting Notes
  - Notice of Revised Administrative Draft MS4 Permit Focused Meeting Procedures and Schedule (posted June 21, 2012)

- April 25, 2012 Public Workshop
  - Workshop Agenda
  - Presentation on Permit Concepts and Approach
  - Presentation on Permit Elements
  - Handout on Stakeholder Comments and Recommendations

PHASE I MUNICIPAL STORM WATER PERMITS

- San Diego Municipal Storm Water Permit
- San Diego Municipal Storm Water Permit - Frequently Asked Questions
Meeting Notes

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I. Introductions

Table participants introduced themselves. Lewis Michaelson (Facilitator) ensured the appropriate representatives were at the table, per the June 20, 2012, San Diego Regional Water Quality Control Board (SD RWQCB) Notice.

San Diego County Copermittees (5): Drew Kleis (City of San Diego), Jon Van Rhyn (County of San Diego), Mikhail Ogawa (City of Del Mar), Todd Snyder (County of San Diego), Elaine Lukey (City of Carlsbad)

Orange County Copermittees (5): Ziad Mazboudi (City of San Juan Capistrano), Joe Ames (City of Mission Viejo), Grant Sharp (Orange County Flood Control District), Ryan Baron (County of Orange), Chris Crompton (County of Orange), Nancy Palmer* (City of Laguna Niguel) *Indicates representatives rotated during the meeting.

Environmental Community (3): Colin Kelly (Orange County Coastkeeper), Jill Witkowski (San Diego Coastkeeper), Roger Butow (Clean Water Now! Coalition), Thom Spanos* (San Diego Coastkeeper) *Indicates representatives rotated during the meeting.

Development/Business Community (3): Thom Fuller (San Diego Business Industry Association), Dennis Bowling (American Public Works Association), Bryn Evans (Industrial Environmental Association), Wayne Rosenbaum* (BIA), Mike McSweeney* (BIA) *Indicates representatives rotated during the meeting.

U.S. Environmental Protection Agency (US EPA) (1): Cindy Lin

San Diego Water Board Permit Team: David Barker, Wayne Chiu, Laurie Walsh, Eric Becker
It was noted that Riverside County MS4 Coperrmitees were invited to the focused meeting but were unable to attend.

II. Meeting Recap & Feedback

Lewis Michaelson (Facilitator) reflected on the effectiveness of the June 27 Focused Meeting. It seemed that much of the meeting consisted of stakeholders asking questions of the Regional Water Quality Control Board (RWQCB). Today’s meeting should consist more of the opposite; questions from the RWQCB and input from the stakeholders.

As requested at the June 27 meeting, a number of stakeholders provided suggestions on topics for today’s meeting. Those suggestions were incorporated into the agenda. Lewis reviewed the agenda for today’s meeting.

III. Focused Meeting Intent

David Barker (RWQCB) provided information on the intent of the focused meetings. He is the San Diego Water Board Chief of the Surface Water Basins Branch, which encompasses the NPDES wastewater and stormwater programs, including municipal, construction, and industrial stormwater programs. The team that developed the MS4 administrative draft permit is within his Branch. David is here to observe the meetings and assist staff in framing issues for discussion. He is also here as a representative of executive management, including Executive Officer David Gibson, and will do his best to respond to broad policy issues and the Board’s process of bringing the permit to adoption.

Although the specific causes of water quality impairments within the San Diego Region are not all known, it is known that most water quality impairments occur downstream of, or within, urbanized settings, and are therefore directly affected by dry weather flows and urban runoff. Thus, there is a continuing need for comprehensive, innovative, and effective stormwater regulation. Creative and non-traditional approaches are needed to address these challenges.

With these challenges in mind, the RWQCB has put considerable thought and effort into proposing the administrative draft permit, which provides an adaptive management pathway for Coperrmitees to address water quality issues in an iterative process. Under this process, water quality improvement objectives will be regularly prioritized and assessed.

Unlike current prescriptive permits, this administrative draft permit puts the Coperrmitees in the driver’s seat, allowing deployment of resources to achieve goals that will have the greatest water quality improvements.

The RWQCB would really like to hear thoughts from the stakeholders about what should be in the draft permit. The administrative draft permit was released April 9, 2012. By the time written comments are due in September, it will have been available for public review and comment for more than five months. To communicate detailed ideas on specific permit language, the RWQCB would appreciate that detailed language be submitted as written comments. The RWQCB values the stakeholders’ thoughts and insights on permit language and will closely consider all submissions.
During this extended review and comment period on the administrative draft permit, the RWQCB has allocated four days for focused meetings to meet with interested stakeholders and listen to ideas on how to improve the administrative draft permit. The schedule for the focused meetings was selected in order to maintain momentum for finalizing the final draft of the permit later this fall. The RWQCB does not anticipate scheduling additional focused meetings prior to release of the final draft permit, other than perhaps a special session on the hydromodification requirements as suggested at the June 27 focused meeting. With recognition that four focused meetings is not enough time for exhaustive, detailed review of the full administrative draft permit, the focused meetings are structured to discuss key issues at a conceptual level. Stakeholders can be most influential on shaping the next iteration of this permit by providing quality input and feedback on the key issues at the conceptual level. The focused meetings are a golden opportunity to have productive discussions in a fair and impartial setting.

David reminded the stakeholders that while these focused meetings may not allow for detailed discussions on all issues of concern, all stakeholders will have an opportunity to review and provide detailed comments on any aspect of the draft permit again later this fall.

Several stakeholders (Roger Butow, Clean Water Now! Coalition; Todd Snyder, San Diego Copermittees; Ziad Mazboudi, City of San Juan Capistrano) strongly support a stand alone hydromodification meeting prior to the written comment deadline. Ziad Mazboudi (City of San Juan Capistrano) is working with Tory Walker and others to hold a symposium with field experts and would want the hydromodification meeting to be held after the symposium. The RWQCB will have a game plan for a hydromodification meeting ready to roll out by the next focused meeting.

Roger Butow (Clean Water Now! Coalition) asked if the legal issues over the legitimacy of the consolidated permit have been addressed by RWQCB counsel. David Barker (RWQCB) stated the RWQCB’s official position is that they do have the legal authority to issue this regional general permit; RWQCB counsel is expected to confirm that authority. David mentioned there is a parallel legal track of meetings underway where RWQCB counsel is working with attorneys of the Copermittees. Any legal opinion issued will be open for public review and scrutiny.

IV. Water Quality Improvement Plan Priority Setting & Approval Process

Laurie Walsh (RWQCB) explained that in pre-drafts of the permit the Water Quality Improvement Plan was originally called a Water Quality Management Plan. The title of the plan was changed to “Improvement” instead of “Management” because the goal of the plan is water quality improvement.

The Water Quality Improvement Plan is in the beginning of the permit because of its high importance to the permit. The Water Quality Improvement Plan sets the road map through which the Copermittees will achieve improved water quality. It gives the Copermittees complete control to set priorities with rationale, set schedules, set targets, etc. From meeting with stakeholders, the RWQCB understands that there are not enough
resources to do everything all at once; the Water Quality Improvement Plans are the Copermitttees’ opportunity to set priorities.

The approval process for the Water Quality Improvement Plans is outlined in the administrative draft permit. The RWQCB is looking for input on any impediments to developing and implementing the Water Quality Improvement Plans, specifically within the timeframe identified in the administrative draft permit.

San Diego Coastkeeper would be open to a staggered submittal of Water Quality Improvement Plans for the nine watersheds so that public review is not all within the same 30-day period.

Jill Witkowski (San Diego Coastkeeper) suggested a phased review period for the Water Quality Improvement Plans where the first phase is review of the priorities and the second phase is review of the full Water Quality Improvement Plan. This may assist in keeping prioritization consistent across watershed management areas. Ziad Mazboudi (City of San Juan Capistrano) expressed concern that a separate review of the priorities is leaning toward micro-managing. Jon Van Rhyn (County of San Diego) said it is an interesting concept; however, the more the process is extended, the more the Copermitttees would have to confront the realities of the time needed to budget, which could affect how fast programs move forward. Jon admitted there may need to be a multi-year planning process upfront where the priorities are laid out at the highest level and made open to feedback before proceeding with details of the Water Quality Improvement Plan. Drew Kleis (City of San Diego) agreed with the concept of getting iterative feedback in the process of developing the Water Quality Improvement Plans to ensure development of the plan stays on track.

Jill Witkowski (San Diego Coastkeeper) pointed out there is good direction in the permit on how to assess receiving water conditions, but there is not good guidance on where the bar should be set; it is not clear if the Copermitttees will be aiming low or aiming high in their plans. Ziad Mazboudi (City of San Juan Capistrano) explained that the bar could be set high, but the reality of reaching that level may be driven by available resources. Drew Kleis (City of San Diego) acknowledged that Total Maximum Daily Loads (TMDLs) and other regulations will be major factors in determining priorities. There also may not be high priorities in every watershed; there may be tradeoffs that a certain watershed is not as high as another because of TMDLs or other regulations. By allowing that prioritization, the net benefit of a jurisdiction’s efforts can be maximized. The frank reality is that prioritization will be driven by regulations and there will be issues that are medium or low priorities. Eric Becker (RWQCB) explained that the permit was purposefully set up so there could be differences across watersheds. Todd Snyder (County of San Diego) concurred that the intent is there will be different prioritizations across different watersheds.

Jill Witkowski (SD Coastkeeper) raised the concern that in watersheds with TMDLs, the only priority might be the TMDL although there are other issues within the watershed. Eric Becker (RWQCB) clarified that the TMDL might be the top priority and efforts to satisfy the TMDL may not allow for other priorities at that time. Other priorities are still on the list, but resources may not be allocated to them until the TMDL is satisfied. Jill Witkowski (SD
Coastkeeper) is concerned that areas on the cusp of becoming TMDLs and ASBSs may not receive attention needed to prevent them from becoming TMDLs and ASBSs.

Mikhail Ogawa (City of Del Mar) explained that aiming high and capturing as many pollutants as possible is an iterative process within the plan development. For example, bacteria may be the highest priority pollutant because of a bacteria TMDL in the watershed; however, as the plan is developed it may be found that additional pollutants can be targeted at the same time using the same methods as those for bacteria. At that point, the priorities may be adjusted to reflect those findings. Therefore, having a phased approach to approving the priorities and then the Water Quality Improvement Plans may not be efficient. Jill Witkowski (SD Coastkeeper) conceded Mikhail’s point about priorities changing during plan development and reiterated that it is still important to the environmental community to have sufficient information about how and why priorities are set.

Elaine Lukey (City of Carlsbad) explained that the Copemittees are not starting from scratch in creating watershed priorities. The Copemittees have many years of experience looking at 303(d) listings, impairments, etc., and already have good programs in place to address watershed priorities. The San Diego Copemittees have had Watershed Urban Runoff Management Plans (WURMPs) for 10 years, and there are priorities in those existing WURMPs. The priorities may change based on a TMDL or other regulations; however, looking at the WURMPs is a good place to start to understand the current watershed priorities.

Wayne Chiu (RWQCB) asked stakeholders to provide suggestions as to how to put priority setting guidelines in the permit without limiting the Copemittees’ ability to have flexibility in setting priorities and prevent Copemittees from setting the bar too low. Jill Witkowski (SD Coastkeeper) suggested having a tiered approach to priority setting: the baseline tier would be TMDLs, the next tier might be mid-range priorities, and the next tier might be long-range priorities. Jon Van Rhyn (County of San Diego) responded that there are two program elements defined in the permit that are implemented concurrently: the Water Quality Improvement Plans and the Jurisdictional Urban Runoff Management Plans (JRMPs). The Water Quality Improvement Plans are about establishing priorities and following an adaptive management strategy. The JRMPs have baseline requirements and are about establishing an extensive set of activities. The Water Quality Improvement Plans are not entirely independent of the rest of the permit, including the JRMPs.

Drew Kleis (City of San Diego) referred the group to slide 2 of a handout the San Diego Copemittees prepared for this meeting. The San Diego Copemittees would like to have a reference to permit section A.4 in sections A.1, A.2, and A.3 so that compliance with discharge prohibitions, receiving water limitations, and effluent limitations is clearly defined as implementation of the iterative process. They believe explicit language is needed in light of the 9th Circuit Court’s finding of the separate enforceability of these provisions. Drew asked Cindy Lin (US EPA) if there is a possibility of revising Provision A to define compliance through the iterative process. Cindy replied that this is still an NPDES permit and there needs to be clarity regarding compliance points. There is, however, a lot of creative
language in other permits within California, so it is not out of the toolbox to have creative language in this permit.

Drew Kleis (City of San Diego) explained that the Copermittees are not looking to walk away from responsibility, but it is easier to budget for a plan if the plan is the compliance pathway. Jill Witkowski (SD Coastkeeper) asked how linking section A.4 to sections A.1-A.3 accomplishes that. Drew explained that at some point a City Manager or politician will question why certain actions or plans are being done. By linking the iterative process clearly to compliance, Copermittees’ staff will be able to defend those questions.

Elaine Lukey (City of Carlsbad) referred the group to slide 3 of the San Diego Copermittees’ handout. This slide contains suggestions of what would work for the Copermittees regarding permit language for determining compliance:

1. Insert language clarifying identification of individual jurisdictional commitments in the Water Quality Improvement Plans, and insert language clarifying RWQCB approval of individual jurisdictional commitments.
2. Add language to include RWQCB approval timeline for JRMP updates in year 1.
3. Add language in II.F. stating there is a specific (e.g., 90-day) RWQCB approval timeline for annual updates in years 2, 3, 4, 5.
4. Add language to permit, not fact sheet, about non-enforceability of Numeric Targets.

Todd Snyder (County of San Diego) followed that this ties back into the issue of Section A and why it is important that the permit clearly outline the points of compliance for the Water Quality Improvement Plans that Wayne Chiu (RWQCB) lined out at the June 27 MS4 Focused Meeting (1. Submit Water Quality Improvement Plan; 2. Include all required elements in the plan; 3. Implement the plan; and, 4. Assess the plan). Implementation of the Board-approved Water Quality Improvement Plan should constitute compliance. The approval process is critical to that.

Wayne Chiu (RWQCB) responded that the permit writing team does understand the over-arching concern and tried as much as possible to incorporate that concept into the permit language. The RWQCB will consider any recommendation put forth for revised permit language.

Joe Ames (City of Mission Viejo) asked for clarification about whether a goal under a certain priority could be a research project. Laurie Walsh (RWQCB) clarified that the goals are the water quality standards; numeric targets are interim goals to reach the water quality standards; a research project can be a strategy to reach the numeric targets and water quality goals. Cindy Lin (US EPA) concurred that under the Water Quality Improvement Plans there are priorities, under those priorities there are goals (i.e., water quality standards, waste allocations, etc.), under those goals are monitoring plans or targets to use to achieve the water quality objectives or criteria, and then there are the actions or controls implemented to reach those targets. Mikhail Ogawa (City of Del Mar) followed up that as adaptive management is a learning process, there is inherently an expectation that some of
the actions or controls implemented may not work as effectively or efficiently as planned. However, a failed strategy, action, or control does not imply that the Copermittees are not attempting to reach their priorities; it is part of the adaptive management process.

Chris Crompton (County of Orange) is uncomfortable with the idea of this permit trying to replace TMDLs, as the RWQCB has stated before that CLRPs could be modified slightly and become the Water Quality Improvement Plans. This permit is a municipal stormwater permit. It does not incorporate all the stakeholders that a TMDL process does. In addition to bringing in parties besides municipalities, the TMDL process also allows for longer timeframes than under this permit. This MS4 permit aims to fix issues that can be controlled by the jurisdictions; there are significant issues and sources that the jurisdictions cannot control. Eric Becker (RWQCB) asked for suggestions on changing language in the permit to cover TMDLs. Todd Snyder (County of San Diego) referenced slide 4 of the San Diego Copermittees’ handout. The concept is that the WQBELs used to interpret TMDLs in the draft permit are expressed as either (a) achievement of receiving water limitations or (b) achievement of a receiving water limitation applied at the MS4 outfall and applied as a concentration instead of a load. The San Diego Copermittees would like to add other means of demonstrating compliance with WQBELs. For example, load-based compliance with Waste Load Allocations, implementation of EO-approved TMDL compliance plan, compliance with exceedance limitations expressed as “days” or “frequency,” and/or other means of compliance identified in future TMDL language. These other means of demonstrating compliance with WQBELs acknowledge that MS4s are part of the TMDL solution but not the entire picture.

Cindy Lin (US EPA) provided an example from a Los Angeles TMDL (Dominguez Channel Greater Los Angeles Long Beach Harbor TMDL) where they are trying to reduce the distance between TMDLs and permit language. The TMDL offers four different ways of demonstrating compliance, thereby providing clarity in the expectations. Sometimes it does not make sense to try to meet the water quality standard level.

Wayne Chiu (RWQCB) asked Cindy Lin (US EPA) if that meant that language can be placed within this permit that states the Copermittees would be in compliance with discharge limits and receiving water limits if they have a numeric set of criteria that are met as part of the iterative process. Cindy responded that the compliance point must always be defined. It is the details of how the water quality standard is met. Different numeric metrics can be provided as long as they show that the water quality standard is met.

Wayne Chiu (RWQCB) acknowledged that everyone is highly concerned about the 9th Circuit Court Decision and the RWQCB has been struggling with how to make the language provide some level of assurance that there would be no requirement of enforcement or threat of third party lawsuits if the first two requirements are not met as long as they are implementing a Water Quality Improvement Plan with the full intent of meeting those requirements in the future. The 9th Circuit Court Decision, however, says those provisions are separate and enforceable. Wayne asked for the EPA’s position on this. Is the EPA saying that there is some alternative language that could be placed in the permit that the EPA
would accept as being in compliance with discharge prohibitions and receiving water limitations but not necessarily through actual receiving water quality data?

Cindy Lin (US EPA) responded that the 9th Circuit Court Decision is a legal issue on which she has been directed not to comment. Regarding alternative language, Cindy explained that EPA Region IX has been strong and consistent that Copernmittees either meet compliance through WQBELs or through quantitative measures. “Quantitative measures” are purposely not defined to provide some interpretation in how to meet compliance.

Wayne Rosenbaum (SD BIA) recommended looking at other, recent permits regarding compliance language and, also, building into Provision A some enforcement structure.

The Environmental and Development Communities (Colin, Wayne R) believe the solution will not be a safe harbor solution, nor will it be something where Copernmittees should put up walls to protect themselves from potential litigation. They would prefer not to spend money on litigation unless critically important; they would prefer to help Copernmittees implement or assess effective programs and be more involved in the creation of those programs. The permit will not provide complete security from litigation; however, dealing responsibly with the Environmental and Development Communities will reduce liability.

Ryan Baron (County of Orange) acknowledged the RWQCB’s multiple requests for stakeholders to submit language, but questioned if there is a statewide effort going on to suggest model language to the State Water Resources Control Board (SWRCB) and asked how difficult it is to change language provided by the EPA for the permit. Wayne Chiu (RWQCB) explained that the EPA has the final say on the permit language. Cindy Lin (US EPA) concurred, explaining that when the permit is presented to the EPA, they can approve it, reject it with recommendations for re-submittal, or decide to issue their own NPDES permit.

Chris Crompton (County of Orange) suggested that the CASQA conversations with the SWRCB may be the solution to this effort as they are working on language for section A and alternate ways of dealing with the 9th Circuit Court Decision.

V. JRMP Relationship with Water Quality Improvement Plan

Laurie Walsh (RWQCB) explained that one objective of the RWQCB is to work closer with the Copernmittees, as they have tried to do with this permit process. The permit team met with various stakeholders to talk about things to improve in the stormwater program and to get feedback on key issues. The permit team then went back and wrote the administrative draft permit, trying to address all the key issues the stakeholders had identified, including flexibility to put resources where best suited. The RWQCB is now looking for action items similar to the handout provided by the San Diego Copernmittees. Laurie led off with topic discussion question #5 from the June 20, 2012, San Diego Regional Water Quality Control Board (SD RWQCB) Notice: “How can the proposed provisions of the administrative draft permit be modified to support a Copernmittee’s ability to plan and/or procure resources for its jurisdictional runoff management program?”
Jill Witkowski (SD Coastkeeper) said one of the things unclear with how Water Quality Improvement Plans work together with JRMPs is how the priority setting at the watershed level, with numeric targets and strategies, gets implemented at each jurisdiction to achieve the targets. It is unclear who is responsible for making sure goals in the Water Quality Improvement Plans actually happen and everyone participates in the improvement together.

Jon Van Rhyn (County of San Diego) responded that the big issue has been to maintain separation of group versus individual responsibilities. The general understanding is there may be some things committed to in a group setting, but in the end there will still be multiple Copermittees in a watershed that will have their own stand alone plans to follow through and implement.

Ziad Mazboudi (City of San Juan Capistrano) said that every Copermittee will make sure they are working under the umbrella of the Water Quality Improvement Plans; however, there may be a jurisdiction where a particular pollutant is not an issue. In that case, the jurisdiction would document it, present it, and move to the next prioritized pollutant in the plan. The ultimate enforcement will have to be from the RWQCB.

Elaine Lukey (City of Carlsbad) directed everyone to slide 7 of the San Diego Copermittees’ handout. For illustrative purposes, the graphic is provided below.

The colored areas are the watersheds; the black lines are the jurisdictional boundaries. The blue lines are receiving waters.

Elaine Lukey (City of Carlsbad) provided an example where Watershed 2 (pink) has bacteria as the top priority but the portion of Jurisdiction C that is in Watershed 2 doesn’t have any identified sources of bacteria at the watershed scale. In that case, Jurisdiction C
could address their priority in Watershed 3 (green), doing more intense work in Watershed 3 (green) than in Watershed 2 (pink).

Mikhail Ogawa (City of Del Mar) provided another example where Watershed 2 may have bacteria as a group priority, but Jurisdiction C may decide with rationale and justification that they will focus on nutrients because receiving water in Watershed 2 in Jurisdiction C is impaired for nutrients. The San Diego Copermittees are hoping the RWQCB will look at these not only as individual watersheds, but also look across watersheds and across jurisdictions to get the entire picture.

Wayne Chiu (RWQCB) acknowledged that a very important aspect of this permit is RWQCB oversight. The RWQCB is ultimately responsible for making sure Copermittees are implementing the plans, but they also have to take into consideration that priorities may force them to focus on one watershed over another one as each Copermittee has different circumstances and different priorities because of watershed areas. This permit requires a lot of involvement by RWQCB staff to understand those intricate details. The streamlined reporting in this permit means the RWQCB staff is looking at fewer plans but with more details.

Nancy Palmer (City of Laguna Niguel) shared that South Orange County has been using some of its Integrated Regional Water Management (IRWM) money to develop regional action projects. To do so, they had to find contracting entities under the IRWM that crossed the boundaries; e.g., the Municipal Water District of Orange County is administering a grant for smart landscaping improvements. All the cities in South Orange County have a piece of that pie, but it is administered through a different agency by a grant opportunity. This is an example of an inter-jurisdictional project that is being managed by an identified entity. There are, however, certain projects that become orphans because they are inter-jurisdictional, highly complex, difficult to move forward, or extremely expensive. In the current administrative draft of the permit, there are requirements that regional BMPs are acceptable so long as the BMP is built during the first phase of the project. That does not typically work. It is, however, common in the community development field that for community parks a certain amount of park in lieu fees are collected during the development process and when a certain percentage of buildout is reached, the park is then built using those fees. Nancy suggests those clauses in the administrative draft permit be re-thought.

Colin Kelly (OC Coastkeeper) countered Nancy’s argument stating that there have been severe deficiencies with programs that allow BMPs to be developed toward the end of large projects. Especially with the bad economy, some developments have ended up with no BMPs or orphaned BMPs. Colin acknowledged, however, that there are development differences across the jurisdictions and watersheds; some jurisdictions still have high demand for new development so those developments are completed, while other jurisdictions have several developments that have been halted due to low demand and the economy.

Laurie Walsh (RWQCB) informed the group that this topic will be discussed at a future focused meeting and again encouraged stakeholders to submit permit language suggestions.
Jill Witkowski (SD Coastkeeper) asked for more information on how to review the Water Quality Improvement Plans together with the JRMPs. The public needs adequate time to review the reports altogether to check for orphan priorities. Then there needs to be time and a process to resolve conflicts between jurisdictions. Laurie Walsh (RWQCB) said they are interested in hearing more ideas on timing for the public vetting process. Wayne Chiu (RWQCB) explained that orphaned priorities, conflicts between jurisdictions, and other issues would come to light with the audits of the jurisdictions’ programs.

Wayne Chiu (RWQCB) explained that they tried to incorporate into the permit a concept of individual jurisdictional accountability as much as possible. There is the Water Quality Improvement Plan that ties jurisdictions together; however, each jurisdiction will be reviewed based on its own merits and own implementation of its portion of achieving the objectives of the Water Quality Improvement Plan. This will require RWQCB staff to look at programs on an individual and watershed scale.

Drew Kleis (City of San Diego) said the Copermittees are very focused on having individual measurability and responsibility. The numeric targets may be set for each Copermittee and that becomes their piece of the pie in addressing implementation of the Water Quality Improvement Plans. Subchapters in and attachments to the Water Quality Improvement Plans will clearly state what each jurisdiction’s commitments are. It will be critical to look across watersheds to understand jurisdictional commitments.

Grant Sharp (County of Orange), as someone who helps put together a JRMP for a Copermittee subject to multiple MS4 permits, is highly interested in how the JRMP relates to the Water Quality Improvement Plan. Grant shared that the County of Orange is subject to two separate Phase I MS4 Permits, but the County does not prepare a separate JRMP for each permit. The County prepares one JRMP that covers both permits. The JRMP should document everything being done within the jurisdictional boundaries; it should be a clearinghouse for data; it should be a document that states who, what, and how things are going to be done from the priorities within the Water Quality Improvement Plans. The priorities of the Water Quality Improvement Plans do not need to be reiterated in the JRMPs, just referenced so that the JRMP does not have to be revised every time the WQIP is revised.

Wayne Chiu (RWQCB) explained that the JRMPs establish the programs and lay out who is responsible for doing what within the jurisdiction or each component within the permit. This administrative draft permit has removed some specifics of how often, what frequency of inspections are required to allow discretion by the Copermittee in terms of inspections and enforcement. All actions must still work towards meeting the three basic requirements/objectives of the permit. The RWQCB wants to see outcomes from the Copermittees’ actions, whether they are successes or failures. If they are failure, then Copermittees are expected to figure out why their actions failed and revise their plans.

Todd Snyder (County of San Diego) agreed that it is important to see the JRMP to understand how things are being prioritized for jurisdictions in multiple watersheds. This is especially significant to the discussion of phasing plan submittal. To understand commitments in Water Quality Improvement Plans, one needs to understand commitments...
at jurisdictional levels (JRMPs). It is unclear how a phased plan submittal process for public review would accommodate this issue.

Chris Crompton (County of Orange) questioned why Section B and Section F are separated in the administrative draft permit. The draft permit seems to have conflicting language about whether the plans are expected to be revised annually or only once every three years. He recommended aligning the JRMP and Water Quality Improvement Plan sections, keeping Sections B, F, and E (TMDLs) closer together either as sequential sections or a combined section.

Jon Van Rhyn (County of San Diego) believes that structurally one of the hardest issues to address in this permit is the annual reporting. Coperrmittees have to document watershed and jurisdictional commitments, then generate annual reports. Jon does not believe the administrative draft permit fully anticipates all the issues implied in getting through these multiple plans and reports. The San Diego Coperrmittees, Orange County Coperrmittees, and SD Coastkeeper volunteered to develop suggested language to address these issues.

Jon Van Rhyn (County of San Diego) appreciated that the RWQCB has taken steps toward streamlined reporting; however, when reporting is too streamlined, it makes it difficult to maintain transparency. In addition, in the administrative draft permit, it appears that JRMP annual reports continue until watershed reports start (Attachment D), but it is unclear as to what happens with JRMP reports after that.

Wayne Chiu (RWQCB) acknowledged Jon’s comments and said perhaps having reporting components in one section would be more helpful. With regard to streamlined reporting, the administrative draft permit does focus more on reports on the watershed level than the jurisdictional level. The RWQCB plans to review the jurisdictional level more through audits and working closer with Coperrmittees. The RWQCB understands that the transparency allowed through streamlined reporting is not fully fleshed out. Wayne continued that the concept behind the regional clearinghouse was to provide documentation and thus transparency to the public. The regional clearinghouse at this time is primarily focused on monitoring data, not inspection or activity data, but that is an area where the RWQCB is open to suggestions. Jon Van Rhyn (County of San Diego) suggested working with the environmental and development communities to develop ways to include things in the clearinghouse that show transparency and robust programs.

Jill Witkowski (SD Coastkeeper) admitted the two-page jurisdictional annual report is a bit terrifying because very little information is provide compared to previous reports. The two-page format does not reflect the work being done. Jill would prefer to see a dashboard-type setup that shows progress bars toward achieving goals; something that is a meaningful summary that still touts the work being done.

Chris Crompton (County of Orange) is also concerned with such a short report as Coperrmittees ultimately have to defend their programs through audits. Having a thicker report with more information greatly assists with collecting adequate data for such audits.

Wayne Chiu (RWQCB) and Eric Becker (RWQCB) acknowledged the stakeholders’ concerns. They explained the Coperrmittees would still need to maintain the data to support their reports. The RWQCB is open to making the jurisdictional reports a two-page minimum,
allowing the Copermittees to provide additional pages for sufficient information to annually describe their programs and efforts.

VI. Adaptive Management Areas of Permit

Laurie Walsh (RWQCB) stated the administrative draft permit includes some areas for adaptive management. The RWQCB would like to see if those sections are well-received by the stakeholders or if there are other areas to add adaptive management within the permit.

Thom Spanos (SD Coastkeeper) voiced Coastkeeper’s support for adaptive management. He specifically highlighted the adaptive management in the JRMP Section of the administrative draft permit where it states that Copermittees are to look at all available data. Thom asked of the Copermittees what SD Coastkeeper and other NGOs could do to make their data useful to the Copermittees.

Drew Kleis (City of San Diego) replied that the Water Quality Improvement Plans and JRMPs first need to be developed so that the Copermittees understand the questions or issues they are to address with the monitoring data. For the data to be useful, they will need to answer a question or issue identified in the Water Quality improvement Plans or JRMPs. Jon Van Rhyn (County of San Diego) noted that the San Diego Copermittees have used SD Coastkeeper’s and other NGO’s monitoring data in the past. Elaine Lukey (City of Carlsbad) noted that the data need to be strategic, fit into the Water Quality Improvement Plan, be collected in a manner that follows standard protocol, and analyzed in a certified laboratory. Elaine also noted that the Copermittees’ stormwater hotlines are always open to receiving notice from NGOs and the public of any observed pollutant generating activities (PGAs).

Regarding the adaptive management areas of the permit, Mikhail Ogawa (City of Del Mar) referred to slide 5 of the San Diego Copermittees’ handout. For the San Diego Copermittees, it is unclear in the administrative draft permit what is or is not up for adaptive management. The San Diego Copermittees provided examples of adaptive management based on their understanding of the administrative draft permit, including geographic adjustments, level of effort adjustments within a permit component, method adjustments within a permit component, and level of effort adjustments across permit components. San Diego Copermittees suggested inserting language in Section II.B.5 to clarify what sections of the permit “shall be considered, as appropriate,” by each Copermittee for adaptation.

Wayne Chiu (RWQCB) clarified that everything within the Water Quality Improvement Plans is up for adaptation. How the jurisdictional programs are implemented can be adapted through what is discovered in implementing the Water Quality Improvement Plans. For example, the numeric action levels for non-stormwater are based on the water quality objectives. While there is a set of numeric action levels that must be included, that does not mean that all those numeric action levels must be used during implementation of the plan; resources, including monitoring data analysis, can be prioritized on specific pollutants with numeric action levels. Other examples include the LID and hydromodification requirements. The requirements must be in the permit even though meeting those requirements onsite may be a challenge. The performance standards should be used to drive the way the
programs are implemented; such that the programs achieve the goals of those standards through alternate methods (e.g., offsite projects, regional BMP projects, etc.).

Bryn Evans (Industrial Environmental Association) supports the described level of adaptation for the Copermittees. The required monitoring and inspections for industrial sites through other NPDES permits may come into play with adaptive management.

Mike McSweeney (BIA) expressed frustration with the time constraints of the focused meetings and written comment period. The BIA is feeling time-pressured to digest what has been proposed, talk it through with other stakeholders, and provide quality feedback.

David Barker (RWQCB) explained that the focused meetings are a vetting process for the administrative draft permit. There have been four day-long meetings scheduled and dedicated to discussing key issues, along with a five-month schedule for receiving written comments on the administrative draft. After the administrative draft process, there will be another review period for the draft permit, including public hearings and the opportunity for submitting more written comments.

Colin Kelly (OC Coastkeeper) feels there is ample time provided in this permit development process. Jill Witkowski (SD Coastkeeper) concurred with Colin. Elaine Lukey (City of Carlsbad) shared appreciation for the process and the time given in development of this permit.

Jill Witkowski (SD Coastkeeper) referenced Section B.5.a.1.(h) (page 20) of the administrative draft permit where it says public comment will be solicited for the Water Quality Improvement Plans and asked how that will look and at what point public participation will be invited. She also asked how that will dove-tail with the annual reports, as the permit language is vague on the issue. Jill encouraged early, informed public participation for the best results.

Jon Van Rhyn (County of San Diego) admitted it is unknown at this point how the public participation process will work; however, it will be set up during the planning process; therefore, it is critical that the public is part of the development of the plan. Jill Witkowski (SD Coastkeeper) agreed and would appreciate public involvement early in the process.

Elaine Lukey (City of Carlsbad) stated that some areas of the permit dictate that Copermittees must do X, Y, and Z. She suggested adding the language “for the priorities that fit with the watershed” to those required activities.

Chris Crompton (County of Orange) shared in his experience that changes and adaptation are inherently a slow-moving process. Wayne Chiu (RWQCB) explained that the RWQCB is not expecting adaptation every six months or every year. Some issues may not yield significant results even on the 5-year basis. Chris Crompton (County of Orange) agreed that there should be minor course corrections on an annual basis. Todd Snyder (County of San Diego) referred to the San Diego Copermittees' handout (see graphic below), explaining the mid-course corrections will be the smaller loop and will be minor changes; the overall or big-picture questions and adaptations will be the outer loop on a 5-year or longer term.
Jon Van Rhyn (County of San Diego) described the differences between program modification and adaptive management. Program modification happens every now and then and is unpredictable. Adaptive management is more defined; it is question-driven. Adaptive management uses questions to direct program modifications; therefore, the questions being asked need to be understood at the beginning of the adaptive management process.

Wayne Chiu (RWQCB) asked the stakeholders how they learn best, where they learn best, and how does the RWQCB put that into the permit. Jon Van Rhyn (County of San Diego) explained that looking back to learn works well only if the plan is well thought out in the beginning. Jon emphasized beginning with a truly robust and comprehensive planning process is important.

Todd Snyder (County of San Diego) referenced slide 10 of the San Diego Coppermitee’s handout, suggesting development of a Strategic Monitoring and Assessment Plan as part of the Water Quality Improvement Plan to inform adaptive management. This is expected to be discussed in more detail at the next focused meeting; however, Todd recommended the RWQCB provide an opportunity for the San Diego Coppermitee to walk through the Strategic Monitoring and Assessment Plan to provide an adequate description before opening up the discussion to questions and answers.

Ziad Mazboudi (City of San Juan Capistrano) provided an example of how the City learned to adjust its program with regard to over irrigation. The City worked with water districts, educated the public, and provided rebates for smart timers instead of attempting to write enforcement tickets for each violation of over irrigation. This was a change in tactic that resulted in the same goal being achieved.

VII. Other Topics

There were some topics raised during the focused meeting that were not within the scope of the meeting but should be discussed at more appropriate times. These included:
- CalGreen / Hydromodification Dedicated Meeting
- Legal Issues
- Aliso Creek / specific areas of geography
- Ninth Circuit Court Decision
- BET and Other Technologies
- Regional BMP Funding and Implementation
- Review time for permit
- Monitoring Presentation by San Diego County Copermittees

VIII. Audience Comments

Comment: Cid Tesoro (County of San Diego), in reference to the proposed meeting, workshop, or symposium focused on hydromodification, recommended also including the full Land Development portion of the permit.

Question: Khosro Aminpour (City of Chula Vista) asked how anti-backsliding works in the realm of adaptive management; will the anti-backsliding policy prevent Copermittees from eliminating inefficient program elements?

Response: David Barker (RWQCB) explained that the anti-backsliding provisions are addressed in the NPDES permit regulations and are usually used in the context of preventing backsliding (relaxation) of numeric effluent limitations. David indicated that RWQCB staff are not prepared to conclude during these focused meetings whether any specific permit requirement is, or is not, subject to the anti-backsliding policy. Therefore, all issues should be open for discussion and we should not let anti-backsliding considerations take issues off the table at this point. Legal determinations will be made at a later date. It is a complicated regulation, but it would not prevent programmatic changes. Cindy Lin (US EPA) concurred.

IX. Meeting Adjourned
TO: CAC

FROM: Staff

SUBJECT: Lagoon Trailside Open Air Classroom

RECOMMENDATION

This is an information item, no action is required.

Staff reported at your last meeting in June about two proposed projects to be located on the DS 32 site (just south of Via de la Valle): the proposed Lagoon Trailside Open Air Classroom and Ranger Maintenance Building. At today’s meeting, Shawna Anderson will provide information regarding the schedule for permitting and construction on these projects. It was reported at your last meeting that a Supplemental EIR was being prepared that included all the changes proposed as part of the Lagoon Center project. Since then it has been determined that it would be more appropriate at this time to focus on the Open Air Classroom project because of timing concerns, and it is the only part of the overall Lagoon Center project that is currently funded. The Open Air Classroom project has minimal impacts, if any, and may not require additional environmental review beyond what was already done for the Wetland Restoration Project in 2000. A Coastal Development Permit is required. The Ranger Maintenance Building was previously addressed in the 2000 EIR, but will also require a Coastal Development Permit. The San Dieguito River Valley Conservancy’s Lynne Baker will present a powerpoint at today’s meeting that illustrates the latest design for the Open Air Classroom, also known as The Birdwing.
Concept Plan

- ADA parking spaces/service access at turnaround
- Multi-purpose staging area
- Sloped walk to Amphitheater (5% max)
- Lower trail
- Stairs to Amphitheater
- Upper trail
- Amphitheater and shade structure
- Arroyo
Size and Orientation

Visitor Center Master Plan c. 2010 Amphitheater
View oriented to southwest

Preliminary concept plan for Amphitheater
View oriented to south
Concept Plan

Entry wall incorporates site boulders?

Shade structure above

Amphitheater stage

Amphitheater seating

Bridge over Arroyo
Study model
Study model

View from the west

View from the east
TO: CAC  
FROM: JPA Staff  
SUBJECT: Rancho Del Mar Project Update

INFORMATION UPDATE:

Status updates about the Rancho del Mar project proposed along Via de la Valle just north of the Polo Fields were provided to the CAC in April and June, 2012. The JPA Board sent a letter of concern to the City requesting clarification and a public workshop on “Prop A” lands and JPA staff attended a meeting with councilmember Lori Zapf, Chair of the Land Use & Housing Committee, and representatives from the Protect San Dieguito River Valley Coalition personally requesting a workshop (Attachment 1). No workshop was planned and instead a memo from the Deputy City Attorney to the City’s Development Services Director was issued (Attachment 2) in response to letters received from the Carmel Valley Community Planning Board, JPA, the Friends of the SDRV, and inquiries made by Councilmember and JPA Board member Sherri Lightner’s staff. A letter from the Coalition’s representing attorney was also sent to the City Attorney’s office just after the City’s memo was released (Attachment 3).

Although the Deputy City Attorney’s memo spoke to some of the concerns raised and left some room for DSD staff to not allow the project on grounds that it does not qualify as an Intermediate Care Facility (ICF) or would be a violation of the General Plan, it left many unanswered questions and did not directly state that approving the project without a vote of the people would be a violation of Proposition A. JPA’s counsel Wayne Brechtel has provided an analysis of the points discussed in the City Attorney’s memo (Attachment 4).

The Coalition’s letter and the JPA Counsel’s letter both provide convincing legal arguments why the proposed Rancho del Mar project cannot be processed as a Conditional Use Permit (CUP) without a vote of the people and must follow the requirements of Proposition A, which requires a majority vote of the people to approve the project. Primarily, these reasons are:

1. The proposed project does not meet the definition of an ICF under the legal definition of such by State Code and by its primary use. Only 50 of the proposed 224 units would meet the legal definition of an ICF and thus, an ICF cannot be considered its primary use, which is residential. The project greatly exceeds the residential density allowed on the property under the current zone.

2. City ordinances passed as a result of Proposition A to carry out its intended purpose for some uses that were “inconsistent with general plan policy objectives” included prohibiting institutional uses such as nursing homes, hospitals, and Intermediate Care Facilities in agricultural zones. To revert back to then allowing those uses, even with a CUP, would seem to violate Proposition A.
3. The project does not meet any of the three criteria/findings that would need to be made by the City Council to allow such a use in an agricultural zone with a CUP, those being: a) the project is resource dependent; 2) the project is non-urban in character and scale; or c) the project is of an interim nature which would not result in an irrevocable commitment of land precluding future uses.

The JPA staff will present this new information to the JPA Board at their next meeting (August 17) for their consideration and recommend that the JPA respond to the Deputy City Attorney’s memo in writing in support of the Coalition’s letter and position.

Attachments:
1. JPA letter to LU&H Committee dated April 23, 2012
2. Deputy City Attorney Memo dated June 7, 2012
3. Letter to City Attorney from Jan Chatten-Brown, legal representative of the Protect San Dieguito River Valley Coalition
April 23, 2012

Chair Lorie Zapf
City Council Committee on Land Use and Housing
City of San Diego
202 C Street, 3rd Floor
San Diego, CA 92101

Dear Councilmember Zapf and members of the LU&H Committee:

The San Dieguito River Park JPA Board would like to draw your attention to a disturbing situation regarding a recent action taken by the City Planning Commission and Development Services Department. The action concerns a 23-acre parcel at the southeast corner of Via de la Valle and El Camino Real within the North City Future Urbanizing Area (NCFUA) Prop A lands and the San Dieguito River Park’s Focused Planning Area (FPA). A December 15, 2011 “classification of use” determination was made by the Planning Commission regarding a proposed Continuing Care Retirement Community project (aka Rancho Del Mar) - a proposed 224-unit residential care facility on agriculturally-zoned Prop A land in the floodplain of the San Dieguito River. The action taken by the City is disconcerting because it calls into question the validity of Proposition “A” Managed Growth Initiative passed by San Diego voters in 1985 that governs land use decisions in the City’s NCFUA.

The JPA Board sent a letter to the City on February 17, 2012 requesting a closer examination of the Planning Commission’s action (passed with a 4-2 vote) that would allow a substantial increase in land use intensity not allowed in the zone on Prop A lands to be processed through DSD without a vote of the people as required by Proposition A; however our letter was not answered (see attached). Other organizations including the Carmel Valley Community Planning Board, C-3, Sierra Club, and Friends of the San Dieguito River Valley have also expressed alarm. The current land use designation and density restrictions on this parcel are not an oversight but a deliberate approach to protect the integrity of the river valley. Therefore, the JPA respectfully requests that the Land Use & Housing Committee docket this issue for an upcoming meeting to investigate the applicability of Prop A on the “Rancho Del Mar” property/project and consider a moratorium on processing this and any other development proposals in the NCFUA until a joint LU&H/Planning Commission public workshop is held to review the status and procedures on remaining undeveloped Prop A lands.

In summary, the proposed Rancho Del Mar project is an example of why Proposition A was passed by the electorate. Specific reasons for the JPA’s concerns and request are the following:
• The issues raised by the City’s recent decisions are complex and controversial and have legal implications for other Prop A lands in the FPA and, therefore, deserve a comprehensive evaluation by the City Council.
• The proposed 224-unit retirement facility is an urban use on an agriculturally-zoned property on Prop A land currently zoned for two units. This represents a 1,000-fold increase in density over the existing zone.
• The project is inconsistent with the San Dieguito River Park Concept Plan.
• The municipal code was modified in 1990 consistent with Prop A to prohibit residential care facilities, such as the subject use, on Prop A lands in floodplains. Prop A allowed zoning modifications to be more restrictive, not less.
• Because the site is on Prop A land, uses more intensive than what is allowed in the zone cannot be approved without a vote of the people as specified in Proposition A and in other city documents.
• The property has an open space designation under the City’s General Plan and is recognized as open space or low-density in the North City Future Urbanizing Area Framework Plan.
• The project would require 14 feet of fill across the property and in the floodplain to support the level of intensity proposed.

We urge you to investigate this matter and schedule a Prop A lands public workshop for an upcoming meeting, and request that permit processing for the subject project cease immediately pending an investigation. Thank you for your consideration.

Sincerely,

Olga Díaz, City of Escondido Councilmember
JPA Board Chair

Cc: Stephen Høverly and Mel Millstein, Councilmember Lightner’s office
    Frisco White, Chair, Carmel Valley Community Planning Board
DATE: June 7, 2012

TO: Kelly Broughton, Development Services Director

FROM: Nina M. Fain, Deputy City Attorney

SUBJECT: Use Category Determination and Proposed Municipal Code Amendments for the Rancho Del Mar Project under Proposition A

INTRODUCTION

At the November 5, 1985 General Municipal Election, voters approved Proposition A, the Managed Growth Initiative. Proposition A prohibited intensification of land uses in the Future Urbanizing Area of the City above that which was allowed by the Progress Guide and General Plan in effect on August 1, 1984. Pursuant to Proposition A, any proposed use within Proposition A Lands\(^1\) that would be more intensive than what was allowed on August 1, 1984 would require approval by a majority vote of the people.

In accordance with Proposition A, a number of policy and regulatory amendments were adopted by the City Council to govern development within Proposition A Lands. The Planning Reports accompanying the proposed amendments stated that the amendments were intended to more effectively implement the Progress Guide and General Plan policy objectives for Proposition A Lands. Planning Report No. 90-359, dated November 6, 1990; Planning Report No. 90-202, dated July 10, 1990. Amendments to the Conditional Use Permit (CUP) regulations were included, prohibiting certain uses that were previously allowed with a CUP. Planning Report No. 90-202, dated July 10, 1990. The intermediate care facility (ICF) use was one such conditional use that was prohibited when the amendments went into effect. \(Id.\)

\(^1\) Upon the adoption of the 2008 General Plan the term Proposition A Lands replaced the term Future Urbanizing Area. Similarly, the San Diego Municipal Code was amended to provide the definition of Proposition A Lands as “lands characterized by very low density, residential, open space, natural resource based park or agricultural uses, have the same meaning as the former future urbanizing land designation, and are subject to Proposition A, the Managed Growth Initiative of 1985.” SDMC § 113.0103.
Sherri Lightner, Councilmember Council District 1  
Kelly Broughton, Development Services Director  
June 7, 2012  
Page 2

The reason for prohibiting ICFs, and other uses that previously were allowed in Proposition A Lands with a CUP, was that they were deemed “inconsistent with the General Plan policy objectives” for Proposition A Lands. Id. The uses were considered inconsistent “generally because they are permanent uses that are urban in character or intensity, would create a significant demand for public services and facilities, or would primarily serve the adjoining urbanized communities instead of the rural areas.” Id.

Furthermore, the amendments to the CUP regulations were meant to eliminate uncertainty in the development approval process for projects within Proposition A Lands. As explained by the Planning Report:

The proposed amendments to the Conditional Use Permit ordinance address the ambiguity regarding which of the various types of land uses, which may generally be permitted in any zone throughout the city, would be consistent with the adopted policy objectives for the Future Urbanizing area. Because this issue is not explicitly addressed in these ordinances, property owners/developers are uncertain as to which uses may possibly gain approval. Also, staff is obligated to accept and process development applications for proposed uses even though the required finding that the use would not adversely effect the General Plan may not ultimately be made and, thus, the permit may not be granted.

Id.

On July 15, 2011, Development Services staff deemed complete an application for the Rancho Del Mar project, which is proposed to be located in the AR-1-1 agricultural zone within Proposition A Lands. The applicant describes the project as a licensed continuing care retirement community, which is not a defined use category under the City of San Diego’s land use regulations. Development Services staff determined that the project’s use category most closely resembled housing for the elderly or residential care homes for the aged under the San Diego Municipal Code.

In light of Proposition A, Development Services staff evaluated the use category for the Rancho Del Mar project to determine if it could be approved by City Council without a majority vote of the people. Neither housing for the elderly nor residential care homes for the aged were allowed

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2 According to the Report to the Planning Commission dated December 8, 2011, the “Rancho Del Mar CCRC would have three basic components: an Assisted Living building, a Courtyard Suites building, and attached and detached Care Casitas. Assisted Living building proposes a total of 50 skilled nursing and memory care units, providing nursing, rehabilitation, intermediate, and dementia care. The attached and detached Care Casitas would provide all levels of assisted care in a homelike setting. There would be 133 ‘care suites’ and 41 attached and detached ‘care casitas.’”
uses in agricultural zones within Proposition A Lands on August 1, 1984. Thus, the applicant was notified by letter that the project would be an intensification of use requiring voter approval. In response, the project applicant sought a recommendation from the Planning Commission that the Rancho Del Mar continuing care retirement community use was more directly related to an ICF rather than housing for the elderly or residential care homes for the aged. ICFs were allowed in agricultural zones of Proposition A Lands with a CUP as of August 1, 1984.

On December 15, 2012, the Planning Commission held a public hearing and provided its interpretation. The Planning Commission recommended that the appropriate zoning use category for the Rancho Del Mar project is an ICF. Concerns have been raised that categorizing the Rancho Del Mar project as an ICF, thereby allowing the CUP regulations to be amended and the project to be approved by City Council as a conditional use without a majority vote of the people, is contrary to Proposition A.

**QUESTIONS PRESENTED**

1. May Development Services staff determine the use category for the Rancho Del Mar project?

2. May the Council approve the Rancho Del Mar project as a conditional use in an agricultural zone of Proposition A Lands without a majority vote of the people?

3. To approve the Rancho Del Mar project, what will the City Council need to consider in making the required CUP findings to approve the Project in light of Proposition A?

**SHORT ANSWERS**

1. Yes. The determination of use category is a factual determination that is appropriately made by Development Services staff as provided in the San Diego Municipal Code. Thus, Development Services staff may determine that the project’s use category is an ICF based on the Planning Commission recommendation. Alternatively, Development Services staff may adhere to its earlier determination that the Rancho Del Mar project is housing for the elderly or residential care homes for the aged. A court will uphold staff’s determination, so long as there is substantial evidence to support it.

2. Yes. If the Rancho Del Mar project is categorized as an ICF use, the City Council may approve the project with an amendment to the CUP regulations in the San Diego Municipal Code so long as the Council determines that the project is natural resources dependent, non-urban in character and scale, or of an interim nature which would not result in an irrevocable commitment of land precluding future uses.

3. If an amendment to the San Diego Municipal Code is approved, the City Council would need to consider whether the Project will adversely affect the General Plan (including Proposition A) and whether the proposed ICF use is appropriate at the proposed location.
ANALYSIS

I. Development Services Staff Has the Authority to Determine the Use Category for the Project.

Development Services staff has the authority to determine the use category and subcategory for a particular project. SDMC § 131.0110(a). If the applicant or property owner disputes Development Services staff's determination, staff may request an interpretation of the appropriate use category or subcategory by the Planning Commission. SDMC § 131.0110(b). The Planning Commission must recommend “its interpretation of the appropriate use category or use subcategory for the particular use.” Id. Therefore, the Planning Commission’s interpretation is simply a recommendation, and the Development Services staff has the authority to determine the appropriate category or subcategory.

In this case, Development Services staff determined that the Rancho Del Mar project should be categorized as either housing for the elderly or residential care homes for the aged. The justification for staff’s determination was provided in a letter from Development Services staff to the Rancho Del Mar project applicant, Mr. Shapouri. See Letter dated June 2, 2011, attached as Exhibit A. The Planning Commission recommended that the Rancho Del Mar project is more directly related to an ICF use. The justification for the recommendation is contained in the Report to the Planning Commission No. PC-11-107 and other testimony and evidence presented at the hearing. Development Services staff may, but is not required to, change its determination based on the Planning Commission’s recommendation.

Upon legal challenge, a court would review Development Services staff’s use category determination under the substantial evidence test for traditional writ of mandamus actions. Taylor Bus Service, Inc. v. San Diego Bd. of Education, 195 Cal. App. 3d 1331, 1340-41 (1987). Substantial evidence is defined as “relevant evidence that a reasonable mind might accept as adequate support for a conclusion.” Id. Under this standard, the court would view the evidence in the light most favorable to the City’s actions. Id. The burden would be on any challenger to show there is not substantial evidence to support the City’s determination. Id. The determination of a use category is a factual determination that is delegated to Development Services staff. Thus, Development Services staff has the decision-making authority to make such a factual determination based on the evidence that has been presented.

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3 San Diego Municipal Code section 131.0110(a) states that “[t]he City Manager shall identify a particular use’s category and subcategory.” Under the strong mayor form of government, the executive authority, power, and responsibilities conferred upon the City Manager are transferred to the Mayor. San Diego Charter § 260. The Mayor has delegated authority to Development Services staff to make determinations regarding use categories of particular projects.
II. Proposition A Prohibits Intensification of Land Uses in Proposition A Lands Above That Which Was Allowed on August 1, 1984.

Proposition A amended the City of San Diego’s Progress Guide and General Plan to provide that:

No property shall be changed from the “future urbanizing” land use designation in the Progress Guide and General Plan to any other land use designation and the provisions restricting development in the future urbanizing area shall not be amended except by majority vote of the people voting on the change or amendment at a City wide election thereon.

Proposition A, Section 1.

Proposition A defines the Progress Guide and General Plan as the one in existence on August 1, 1984. Id. at Section 2.a. Amendment or amended is defined to “mean any proposal to amend the text or maps of the Progress Guide and General Plan affecting the future urbanizing designation as the same existed in the Progress Guide and General Plan on August 1, 1984.” Id. at Section 2.c. Proposition A excludes from the definition of amendment or amended any changes that are “neutral or make the designation more restrictive in terms of permitting development.” Id. Thus, Proposition A essentially froze land use designations to those allowed by the Progress Guide and General Plan effective in 1984. Any proposed use that would be more intensive than what was allowed by the Progress Guide and General Plan in effect as of August 1, 1984, must be put to a vote of the people.

It has been suggested that Proposition A prohibited the intensification of land uses above that which existed on the ground on August 1, 1984. Such an interpretation is not supported by the text of Proposition A or the ballot materials. See City of San Diego Proposition A Ballot, attached as Exhibit B. To interpret Proposition A, we look first to the words of the provisions, giving “the usual, ordinary, and commonsense meaning to them.” Howard Jarvis Taxpayers Ass’n v. County of Orange, 110 Cal. App. 4th 1375, 1381 (2003). If the language is clear and unambiguous, we presume the voters intended the meaning apparent on the face of the measure and end our inquiry. Woo v. Superior Court, 83 Cal. App. 4th 967, 975 (2000). As Proposition A is not ambiguous, we rely on the plain language.

provided that, “Development should be permitted consistent with the A-1 (Agricultural) Zone applied.” Id. It follows then, that Proposition A prohibits amendments to the current agricultural zoning regulations that would allow intensification beyond that allowed by the agricultural zoning regulations in the Municipal Code in effect on August 1, 1984.

Proposition A contains no reference to amendments affecting land uses in existence on the ground. Accordingly, Proposition A has long been interpreted by this Office as setting an August 1, 1984 baseline effective date such that any amendment to the General Plan must be compared to those 1984 baseline land use designations. See 1995 City Att’y MOL 779 (95-84; Dec. 4, 1995); 1996 City Att’y Report 879 (96-41; Oct. 17, 1996). Therefore, generally Proposition A prohibits the intensification of land uses above that which were allowed by the Progress Guide and General Plan effective August 1, 1984.5

III. Proposition A Directed the City to Adopt Regulations to Implement Its Purpose, and Such Regulations May be Further Amended If They Are Neutral or More Restrictive on Development Than What Was Allowed on August 1, 1984.

Proposition A directed the City to take actions necessary to implement the initiative measure, including adopting General Plan and zoning amendments. Specifically, Proposition A provides:

The City Council, City Planning Commission, and City staff are hereby directed to take any and all actions necessary under this initiative measure, including but not limited to adoption and implementation on any amendments to the General Plan and zoning ordinance or City Code, reasonably necessary to carry out the intent and purpose of this initiative measure.

Proposition A, Section 3.

It has been suggested that the regulations adopted by the City to implement Proposition A may never be amended without a majority vote of the people. However, Proposition A does not prohibit subsequent amendments of such implementing regulations. Instead, Proposition A states that “the provisions restricting development in the future urbanizing area shall not be amended except by majority vote of the people . . . except amendments which are neutral or

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4 The former A-1 Agricultural Zone designations were replaced with the current AR (Agricultural—Residential) Zones and AG (Agricultural—General) Zones. SDMC § 131.0315.

5 The City of San Diego as a Charter City is not required to maintain consistency between its land use zoning regulations and its General Plan under the state Planning and Zoning Law. Cal. Gov’t Code § 65803. However, adopting a zoning regulation that is inconsistent with Proposition A of the General Plan could be subject to challenge as not “reasonably necessary” and not “reasonably related to the health, safety, morals, or general welfare of the community.” Friends of Davis v. City of Davis, 83 Cal. App. 4th 1004 (2000). Adopting a zoning regulation that is inconsistent with Proposition A could also affect the ability of the City Council to make the finding that the project does not adversely affect the applicable land use plan, which is a required finding for CUPs and other permits. See e.g., SDMC § 126.0305. Therefore, this Office recommends that any land use regulations should be consistent with the provisions of Proposition A in the General Plan.
make the designation more restrictive in terms of permitting development.” *Id.* at Sections 1-2(c). Therefore, Proposition A expressly allows future amendments to the General Plan and zoning regulations so long as those amendments are neutral or more restrictive in terms of permitting development in relation to those regulations in effect on August 1, 1984. *See* 1996 City Att’y Report 879 (96-41; Oct. 17, 1996); 1992 City Att’y Report 1064 (92-29; April 16, 1992); 1990 City Att’y MOL 729 (90-69; June 7, 1990).

IV. The City Council May Approve the Rancho Del Mar Project as an ICF Use if the Project is Natural Resources Dependent, Non-Urban in Character and Scale, or of An Interim Nature Which Would Not Result In A Irrevocable Commitment of Land Precluding Future Uses.

On August 1, 1984, many uses, including hospitals, ICFs, and nursing homes, were allowed in agricultural zones by Conditional Use Permit (CUP) in Proposition A Lands. *See former* SDMC § 101.0506 A.8 (“Conditional Use Permit Granted by Planning Commission,” O-16205, amended 5/21/84), attached as Exhibit D. In 1984, residential care homes were allowed only in certain residential zones of Proposition A Lands with a CUP. *See former* SDMC § 101.0506 A.12, attached as Exhibit D. Residential care homes were not allowed in any agricultural zones. *Id.*

The Progress Guide and General Plan in effect on August 1, 1984 also limited the approval of CUPs within agricultural zones to those that met one of three criteria. The criteria limited approval of conditional uses to projects that “[were] natural resources dependent, non-urban in character and scale, or [were] of an interim nature which would not result in a irrevocable commitment of land precluding future uses.” *See* Exhibit C.6

In furtherance of Proposition A, the San Diego Municipal Code was amended, and a number of uses previously allowed by CUP (including nursing homes, ICFs, and residential care homes) were prohibited in all Proposition A Lands. *See former* SDMC §101.0510 C.3.h. (“The Planning Commission as Decisionmaker,” [sic] O-90-219, adopted 12/10/1990), attached as Exhibit E. However, as discussed above, nothing precludes the City Council from subsequently approving development that meets the requirements of Proposition A.

ICF uses were allowed in agricultural zones of Proposition A Lands with a CUP on August 1, 1984. Therefore, the City Council may approve an ICF use with the approval of an ordinance to again allow ICF uses in Proposition A Lands as a conditional use. Still, the City Council may only approve the ICF use if the project meets one of the three Progress Guide and General Plan criteria for conditional uses in agricultural zones of Proposition A Lands. Based on the facts known at this time, the Rancho Del Mar project is not natural resources dependent, nor is it of an interim nature. Thus, the City Council may only approve the Rancho Del Mar project as an ICF use if the Council determines that the project is non-urban in character and scale. If the project is urban in character or scale, then a court would likely find the use more intense than the uses that

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6 These criteria also apply under current Council Policy 600-29.
were allowed by the land use regulations in effect on August 1, 1984. In that case, under Proposition A, a majority vote of the people would be required to approve the Municipal Code amendments for the Project.

V. The City Council May Approve the Project if it Makes the Applicable CUP Findings.

The City Council may only approve or conditionally approve the CUP if it makes the following findings:

(a) The proposed development will not adversely affect the applicable land use plan;
(b) The proposed development will not be detrimental to the public health, safety, and welfare;
(c) The proposed development will comply with the regulations of the Land Development Code including any allowable deviations pursuant to the Land Development Code; and
(d) The proposed use is appropriate at the proposed location.

SDMC § 126.0305.

While the City Council would be required to make all the findings in order to approve a CUP for the Project, the findings that are most pertinent to this analysis are findings (a) and (d). Therefore, the City Council would need to consider whether the Project will adversely affect the General Plan, of which Proposition A is a part. See General Plan, Appendix B, LU-3, Proposition A – The Managed Growth Initiative (1985). The Council will also need to consider whether the proposed ICF use is appropriate at the proposed location within Proposition A Lands.

CONCLUSION

Development Services staff may determine that the Rancho Del Mar project’s use category is an ICF in accordance with the Planning Commission recommendation. Alternatively, Development Services may adhere to its earlier determination that the Rancho Del Mar project is housing for

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7 In 1996, the Superior Court upheld the City’s approval of a project in Proposition A Lands including a golf driving range, a putting green, and a developed park with roller hockey and soccer associated uses. Rancho Del Mar Homeowner’s Ass’n, Inc., et al. v. City of San Diego, No. 700970 (Super. Ct. filed Dec. 31, 1996). The court found that the City’s approval of the project with a CUP and an ordinance amending the San Diego Municipal Code to allow the uses on site was not proscribed by Proposition A because “[t]he [p]roject was a permissible use at the time the Initiative was passed,” and it was “low intensity and interim in nature.” Id. at 11.

8 The Council may also need to waive the provisions of Council Policy 600-29.

9 “Land use plans means the Progress Guide and General Plan and adopted community plans, specific plans, precise plans, and sub-area plans.” SDMC § 113.0103.
the elderly or residential care homes for the aged. A court will uphold Development Services staff’s determination, so long as there is substantial evidence to support it.

ICF uses were allowed as conditional uses in agricultural zones in Proposition A Lands on August 1, 1984. If Development Services staff determines that the Rancho Del Mar project is an ICF use, the City Council may approve the project with an amendment to the land use regulations so long as the Council determines that the project is non-urban in character and scale.

If an amendment to the San Diego Municipal Code is approved, the City Council would need to make the CUP findings and consider whether the Project will adversely affect the General Plan including Proposition A. The Council will also need to consider whether the proposed ICF use is appropriate at the proposed location within Proposition A Lands.

JAN I. GOLDSMITH, CITY ATTORNEY

By

Nina M. Fain
Deputy City Attorney

cc: Sherri Lightner, Councilmember District 1
EXHIBIT A

June 2, 2011

Mr. Ali Shapouri
Shapouri & Associates
P.O. box 676221
Rancho Santa Fe, CA 92067

Dear Mr. Shapouri:

Subject: Proposition “A” Use Classification for Ranch Del Mar No. 226777

The proposed Rancho Del Mar Continuing Care Retirement Community project (the project) as currently proposed is not permitted in the agricultural zone of the City’s Future Urbanizing Area (FUA). At your request staff has reviewed the project description, the information in the March 26, 2011 letter from Mr. James Dawe, and the use regulations in effect on August 1, 1984, the threshold date for the Managed Growth Initiative (Proposition “A”). If the project can be classified as a use permitted on August 1, 1984 the project will be subject to approval of an amendment to a Land Development Code Amendment in addition to any other permits and approvals. If the project cannot be classified as a use permitted on August 1, 1984 then the project will be subject to approval of a city-wide ballot measure in addition to any other permits and approvals.

Reviews

The project is described as a high quality continuing care retirement community that complies with state requirements for licensing for a residential care facility. It includes a variety of living accommodations, a wellness center for those who may need or choose to take advantage of it, a memory care facility, an onsite restaurant, lounges, bars, and many other attractive amenities that one would expect to find in a retirement facility. It is clear from reviewing this description that the facility is designed to meet the needs of retired people in all stages of their life. While the assisted living and memory care building is described as a facility for “all residents in need of assistance in the personal activities of daily living,” the entry level units to be within the Care Casitas and Courtyard buildings of the project would be for residents who may desire services, but who do not necessarily need them due to a disability.

The March 26, 20011 letter focused on a request for reasonable accommodations. However, it did include a discussion of uses that were permitted on August 1, 1984 (Municipal Codes Section...
101.0506.A); specifically subsection (8) which stated that “hospitals, intermediate care facilities and nursing homes” were allowed uses in all zones (including agricultural zones) with an approved conditional use permit. The suggestion being the project could be classified as one of these uses.

The project is clearly not a hospital, leaving for consideration the uses of intermediate care and nursing homes. Current definitions of intermediate care facilities generally addresses facilities that provide health related services to individuals who do not require the degree of care given in a hospital but who because of their physical condition require care and services which are greater than custodial care and can only be provided in an institutional setting. Nursing homes are generally defined as a residential facility/institution for persons with chronic illness or disability who are unable to take care of their daily needs.

In reviewing the regulations in Section 101.0506.A that were in effect on August 1, 1984 staff identified two other residential uses are that were permitted with a conditional use permit. Subsection (14) permitted “Housing for the elderly in any residential or commercial zones” and subsection (12) permitted “Residential care homes, for more than ten aged,... which are licensed or certified by the State of California, in the R-2, R-2A, R-3, R-3A and R-4 Zones”.

Conclusion

It is staff’s determination that the use that most closely resembles the project as currently proposed is housing for the elderly. Staff could also determine that the continuing care facility is a hybrid of housing for the elderly and residential care homes for the aged. However, on August 1, 1984 these uses could be considered with a conditional use permit only in residential and/or commercial zones. Therefore, staff concludes that the project was not a permitted use in the agricultural zones on August 1, 1984 and that in order to proceed; the project will require approval of a city-wide ballot measure in addition to other permits and approvals that may be required.

Second Opinion

The Municipal Code provides a mechanism to request a “second opinion” on this determination of use. Municipal Code Section 131.0110(b) (Determination of Use Category and Subcategory) allows an applicant to request the Planning Commission make a recommendation to the City Manager as to the appropriate use category or subcategory.

If you decide to formally request a classification of use by the Planning Commission a letter requesting the action should be submitted to your project manager. It should be noted in the request that this particular classification of use request will be to make a recommendation on a current use based on past uses. A staff report will be prepared for the Planning Commission hearing laying out staff’s reasoning for the determination along with information and reasoning
provided by you supporting your determination. Staff recommends that at a minimum you provide the following information with your request:

- A concise description of the project components organized by use, square footage, and percentage of project,
- A synopsis of the business model,
- A list detailing the number and type of staff anticipated,
- Number and percentage of residents that will require care initially and in the future, and
- A detailed reasoning supporting the use classification that was in effect on August 1, 1984 that you believe most accurately represents the project.

Questions regarding processing the Determination of Use Category and Subcategory by the Planning Commission should be directed to your project manager.

Sincerely,

[Signature]

Dan Joyce,
Senior Planner, Development Services Department

cc: Kelly Broughton, Director, Development Services Department
    Cecilia Gallardo, Assistant Deputy Director
    Nina Fain, Deputy City Attorney
    John Fisher, Development Project Manager
    James R. Dawe, Seltzer Caplan McMahon Vitek
EXHIBIT B

City of San Diego Proposition A Ballot.
CITY OF SAN DIEGO

Proposition A

This proposition will appear on the ballot in the following form:

A CITY OF SAN DIEGO INITIATIVE MEASURE AMENDS THE CITY OF SAN DIEGO PROGRESS GUIDE AND GENERAL PLAN. Shall the City of San Diego Progress Guide and General Plan be amended by adding restrictions requiring that land areas which are designated as "future urbanizing" not be redesignated without voter approval?

This proposition requires a majority vote.

Add to the Progress Guide and General Plan for the City of San Diego, Document Number 764585, at page 35 immediately following the caption "Future Urbanizing Areas" the language of the proposed initiative measure which is underlined:

Future Urbanizing Areas

Land within the future Urbanizing designation which is zoned agricultural or low density residential-recreational use for extended periods of time should be given tax relief through preferential tax assessments. This can be accomplished through the use of the Williamson Act which requires the designation of land as an "agricultural preserve" or as open space pursuant to the General Plan or specific plans based on the overall program to guide growth. The designation of land in this category is not permanent; it is an interim or urban reserve designation. Its purpose is to preclude premature development and to guide urbanization.

Section 1. "No property shall be changed from the "future urbanizing" land use designation in the Progress Guide and General Plan to any other land use designation and the provisions restricting development in the future urbanizing area shall not be amended except by majority vote of the people voting on the change or amendment at a City wide election thereon."

Section 2. Definitions. "For purposes of this initiative measure, the following words and phrases shall have the following meanings:

(a) "Progress Guide and General Plan shall mean the Progress Guide and General Plan of the City of San Diego, including text and maps, as the same existed on August 1, 1984."

(b) "Change in Designation" or "changed from "Future Urbanizing" shall mean the removal of any area of land from the future urbanizing designation."

(c) "Amendment" or "amended" as used in Section 1 shall mean any proposal to amend the text or maps of the Progress Guide and General Plan affecting the future urbanizing designation as the same existed in the Progress Guide and General Plan on August 1, 1984 or the land subject to said designation on August 1, 1984, except amendments which are neutral or make the designation more restrictive in terms of permitting development."

A-1 8-N-12
Section 3. Implementation. "The City Council, City Planning Commission, and City staff are hereby directed to take any and all actions necessary under this initiative measure, including but not limited to adoption and implementation on any amendments to the General Plan and zoning ordinance or City Code, reasonably necessary to carry out the intent and purpose of this initiative measure. Said actions shall be carried forthwith."

Section 4. Guidelines. "The City Council may adopt reasonable guidelines to implement this initiative measure following notice and public hearing, provided that any such guidelines shall be consistent with the intent and purpose of this measure."

Section 5. Exemptions for Certain Projects. "This measure shall not prevent completion of any project as to which a building permit has been issued pursuant to Section 91.02.03(a) of the San Diego Municipal Code prior to the effective date of this measure; provided, however, that the project shall cease to be exempt from the provisions of Section 91.02.0303(d) of the San Diego Municipal Code or if the said permit is suspended or revoked pursuant to Section 91.02.0303(e) of the San Diego Municipal Code."

Section 6. Amendment or Repeal. This measure may be amended or repealed only by a majority of the voters voting at an election thereon.

Section 7. Severability. "If any section, subsection, sentence, phrase, clause, or portion of this initiative is for any reason held to be invalid or unconstitutional by any Court of competent jurisdiction, such decision shall not affect the validity of the remaining portions of this initiative and each section, subsection, sentence, clause, phrase, part of portion thereof would have been adopted or passed irrespective of the fact that any one or more sections, subsections, sentences, clauses, phrases, parts or portions be declared invalid or unconstitutional."

ARGUMENT IN FAVOR OF PROPOSITION A
SUPPORT THE CITIZEN'S RIGHT TO DECIDE

San Diego is at a crossroads: a shining city by the sea or a city with runaway growth, traffic jams, overcrowded schools and parks.

Influenced by narrow special interests a City Council majority has consistently violated our adopted Growth Management Plan. Unable to say "no" to powerful development interests, the Council has allowed the exception to become the rule.

Our current Growth Management Plan sets aside thousands of acres to provide job opportunities and housing as they are needed - both now and in the future. Yet, since 1979 the City Council has squandered more than half of this precious resource.
These irresponsible actions will result in:
- RUNAWAY GROWTH
- TRAFFIC JAMS
- POLLUTED AIR
- OVERCROWDED SCHOOLS
- HIGHER SERVICE COSTS

The citizens must regain control of San Diego's future!

PROPOSITION A provides needed checks on the influence of special interests and assures accountability of our elected representatives. Just as government was unwilling to curb spending prior to Proposition 13, government is now unwilling to prevent the "Los Angelization" of San Diego.

Don't be misled by the expensive media campaign waged by our opponents who seek to bulldoze precious canyons and increase traffic congestion. The fact is, San Diego's current community plans provide for a surplus of housing beyond the year 2000, and the Chamber of Commerce confirms that thousands of acres of land for job producing industry are currently available in our city.

PROPOSITION A does not change the existing public review process. The City Council could still say "no" to requests to violate our Growth Management Plan but if they say "yes", YOU WILL HAVE THE FINAL VOTE. The undersigned represent a bipartisan citizen's effort to save our neighborhoods and prevent urban sprawl.

To maintain our quality of life, support the citizen's right to decide:

IT'S YOUR CHOICE!

NO "L.A."! VOTE YES ON A!

MIKE GOTCH, Councilman, City of San Diego
JULIA ZALOKAR, President, San Diego League of Women Voters
DAVID KREITZER, Past Chairman, Rancho Bernardo Planning Board;
Chairman, San Diegans for Managed Growth
SHERLIE MILLER, President, Friends of Tecolote Canyon
MARK D. ZERBE, Coordinator, San Diego Common Cause

ARGUMENT AGAINST PROPOSITION A

-------- DANGER ------

Don't Let Them "Los Angelize" Our Neighborhoods

Vote No on 'A'. It's the wrong way!

Proposition 'A' Will Force Growth Into Our Neighborhoods

With 'A', new growth isn't stopped.
Instead, it's jammed into our existing neighborhoods.
It will force unwanted development of vacant lots, canyons and open spaces.
We'll Pay Higher Taxes

New houses mean higher taxes.

Overcrowded neighborhoods mean we must pay for more parks, streets, sewers, traffic lights, police and fire protection.

The Mayor's own Task Force Report on Growth Management says San Diego will get 100,000 new homes over the next 15 years. If 'A' passes, almost all new housing will be forced into existing neighborhoods.

That means overburdened streets, crowded schools and more people in our neighborhoods than anyone ever planned on.

'A' will create the very 'Los Angelization' it was supposed to stop.

There's a Better Way Than 'A'

Proposition A tries to offer solutions, but in the process it causes far bigger problems, problems its supporters never even thought about.

Says the TRIBUNE: "It goes too far. It is not reasonable and responsible. It may not be constitutional. It will certainly lead to a court battle and could be nullified."

The TIMES' San Diego edition, in opposing 'A', calls it "cumbersome" and suggests other solutions for managing growth.

In response to the Mayor's Growth Management Task Force Report, our City Council already is drafting tough, new controls on growth that take into account many of the concerns raised by 'A'.

More than 25 citizen-planning leaders -- ordinary citizens from throughout San Diego who help the city in the planning of their neighborhoods -- urge "No on 'A'."

Don't be confused.

Unfortunately, Proposition 'A' does exactly what it says it won't -- it puts San Diego on the road to 'Los Angelization'.

VOTE NO ON 'A'. It's the wrong way!

UALDO MARTINEZ, San Diego City Councilman

DOROTHY LEONARD, Former Chair, San Diego Planning Commission; Former Chair, Navajo Community Planners

LEE GRISSOM, Mayor's 1984 Growth Management Review Task Force Member

ERNEST W. HAHN, Steering Committee, Citizens for Community Planning

BILL LOWERY, United States Congressman, San Diego
EXHIBIT C

the land to the planned urbanizing designation and a land use plan for the area is adopted.

3. Rural, resource-based and open space uses should be retained on a permanent basis, where appropriate and feasible.

4. Development should be permitted consistent with the A-1 (Agricultural) Zone applied, and conditional uses should be allowed provided they are natural resources dependent, non-urban in character and scale, or are of an interim nature which would not result in an irrevocable commitment of the land precluding future uses.

5. Public facility improvements should be permitted only to meet regional needs or to serve primarily the urbanized and planned urbanizing communities, provided the impacts of those facilities upon identified resources can be avoided or fully mitigated.

6. Lands that should be categorized as environmentally sensitive or which are appropriate for permanent retention as rural, resource-based or open space uses should be identified and mapped.

7. Following the identification and mapping of these resources, transportation corridor and other needed public facility improvements should be identified and mapped, provided such facilities avoid or fully mitigate impacts to the area’s resources.

8. Expenditures or plans for future urbanization of these areas should not be made until the need for urbanization of these lands has been evaluated based on the extent of utilization and redevelopment of existing urbanized and planned urbanizing areas, and findings have been made that:

   a. The capacity of lands identified as appropriate for development within the urbanized and planned urbanizing areas is approaching full utilization in accordance with adopted community plans;

   b. A need exists for additional developable lands; and

   c. A process has been developed to identify where the next phase of urban development should occur.

XI. REGIONAL PLANNING

Continue a cooperative relationship with other agencies such as the Local Agency Foundation Commission, the metropolitan sewer system, the San Diego Association of Governments, the Metropolitan Transit Development Board, etc. Continue active participation in and support of the Regional Planning and Growth Management Review Board function of the San Diego Association of Governments. Parameters include work to reach consensus of the region’s cities and the county on:

GUIDELINES FOR FUTURE DEVELOPMENT 50

51
EXHIBIT D

Conditional Use Permit Granted by Planning Commission, O-16205, amended 5/21/84.
SEC. 101.0505.5 SAME—DECISION
(Added 10-3-61 by Ord. 8528 N.S.; formerly a portion of Sec. 101.0505.1; amended 3-17-66 by Ord. 9985 N.S.; repealed 2-4-71 by Ord. 10494 N.S. • now in Sec. 101.0506.D.)

SEC. 101.0506 CONDITIONAL USE PERMIT GRANTED BY PLANNING COMMISSION
A. USES WHICH MAY BE CONSIDERED

The Planning Commission shall have the authority under conditions herein provided to permit by Conditional Use Permit the following uses in any zone, including interzone, except as otherwise provided in paragraphs "A.1.," "A.2.," "A.3.," "A.4.," "A.5.," "A.6.," "A.7.," and "A.14." of this section.
1. Automobile service stations in any zone except the R-1 Zones.
2. Boarding kennels for dogs or cats in any agricultural, industrial or commercial zone.
3. Buildings, structures, and uses operated by a public utility or by a public body having the power of eminent domain.
4. Educational institutions, except nursery and elementary schools.
5. Establishments or enterprises involving large assemblages of people or automobiles, including, but not limited to:
   a. Open air theaters.
   b. Recreational facilities privately operated.
   c. Theaters, nightclubs or bars, with or without live entertainment, and/or any combination thereof which exceeds 5,000 square feet in gross floor area. A Conditional Use Permit will be considered only if the zone in which the property is located permits such types of uses, and provided that off-street parking is provided as follows: one parking space for each three fixed seats or parking space for each 21 square feet of floor area where there are no fixed seats.
6. Fraternity houses, sorority houses and student dormitories provided that such use is within an area designated for such use in the applicable community plan or, if no such area is designated, is within one mile of the exterior boundaries of the campus of a major institution of higher learning and is in the R-3, R-3A, R-4 or R-4C zones.
7. Golf courses, golf practice driving tees or ranges, pitch-and-putt golf courses, and miniature golf courses.
8. Hospitals, intermediate care facilities and nursing homes.
9. Natural resources development and utilization including, but not limited to, extracting, processing, storing, selling and distributing sand, gravel, rock, clay, decomposed granite, soil, and manufacturing, producing, processing, storing, selling and distributing asphaltic concrete, Portland cement concrete, concrete products, and clay products, provided those activities, defined in Section 2755 of the California Surface Mining and Reclamation Act of 1975 as surface mining operations, comply with the requirements of Section 101.0506.1, including a requirement for a reclamation plan for activities conducted subsequent to January 1, 1976.
10. Nonprofit institutions whose primary purpose is the promotion of public health and welfare.
11. Research, development and testing laboratories and facilities.
12. Residential care homes, for more than ten aged or mentally disordered or otherwise handicapped persons or dependent children, which are licensed or certified by the State of California, in the R-2, R-2A, R-3, R-3A and R-4 Zones.
13. Residential, commercial, industrial or institutional uses in and on historical sites.
14. Housing for the elderly in any residential or commercial zone.
15. Facilities for the wrecking and dismantling of automobiles and other similar vehicles, junk yards, and all establishments engaged in the salvaging or processing of scrap metal, in any agricultural or industrial zone.
16. Companion units in R-1 Zones subject to the requirements of Section 101.0506.3.

B. APPLICATION—FORM AND CONTENTS

Application to permit any conditional use referred to in this section may be made by the owner of the property affected, or it may be initiated by Planning Commission. Application shall be filed with the Planning Department upon forms provided by it and shall state fully the circumstances and conditions relied upon as grounds for the application and shall be accompanied by adequate plans, a legal description of the property involved, and a detailed description of the proposed use.

C. HEARING BEFORE PLANNING COMMISSION—PROCEDURE

1. The Planning Commission shall set a date for public hearing and give notice of time, place, and purpose of such hearing in accordance with the procedure set forth in paragraphs "C.1.a." or "C.1.b." of this section.
   a. By depositing in the United States mail, postage prepaid, at least ten days prior to the date of the hearing, a notice addressed to the owner of each parcel of land lying within the subject property and within 500 feet of the exterior boundaries of the subject property. The last known name and address of each owner as shown in the records of the County Assessor may be used for this notice.
   b. By at least one publication of a notice in the City official newspaper, not less than ten days prior to the date of the hearing, and by posting notices, not less than ten days prior to the date of the hearing, in at least four public places within the subject property or within 500 feet of the boundaries of the subject property.
2. In addition to the methods set forth in paragraphs "C.1.a." or "C.1.b." of this section, the Planning Director may use other methods which he finds to be desirable in giving proper notice of the hearing.
3. The mailed and posted notices referred to in paragraph "C.1." of this section shall be headed "NOTICE OF PUBLIC HEARING" in letter not less than one-quarter inch in height for mailed notices and in letters not less than one inch in height for posted notices and both notices shall be in legible characters the following:
   a. The boundaries of the subject property. A diagram or plat may be substituted for this description.
b. The date, time, place, and subject of the hearing.
c. A statement that any person may, but is not required to, appear and be heard.
d. A statement that the application, together with plans and other data submitted with
the application are available for public inspection in the office of the Planning Department.
4. Upon the date set for the hearing, the Planning Commission shall hear the application,
unless for cause the Planning Commission shall, on that date, continue the matter. If a date
and time certain for the continued hearing is announced in the open meeting, no further notice
need be given.

D. DECISION OF THE PLANNING COMMISSION

1. After the public hearing, the Planning Commission may, by resolution, grant a condi-
tional use permit, if, after considering the facts presented in the application and at the hearing,
it is concluded that:
   a. The proposed use will not adversely affect the neighborhood, the General Plan or the
      Community Plan, and will not be detrimental to the health, safety and general welfare of per-
      sons residing or working in the area; and
   b. The proposed use will comply with all the relevant regulations in the Municipal Code.
2. If the Commission, after considering the facts presented on the application and at the
   hearing, is unable to reach the two conclusions set forth in paragraph "D.1." of this section, it
   shall deny the permit by resolution.
3. The resolution granting or denying the conditional use permit shall include a finding of
   facts relied upon by the Commission in reaching its decision. The resolution shall be filed with
   the City Clerk, Director of Building Inspection, County Recorder of San Diego County, and a
   copy shall be mailed to the applicant. The resolution shall not be filed with said County Re-
   corder if the resolution is a denial of the conditional use permit.
4. In granting a conditional use permit, the Planning Commission may impose such condi-
tions as it deems necessary and desirable to protect the public health, safety and the general
welfare. Any regulations of the zone in which the property is situated, including but not limited to:
   signs, fences, walls, maximum building height, density, minimum yards, maximum building
coverage and off-street parking, may be increased or decreased.
5. The decision of the Planning Commission shall be final on the eleventh day following its
   filing in the office of the City Clerk, except when an appeal is taken to the City Council as pro-
   vided in paragraph "E." of this section.

E. APPEAL TO THE CITY COUNCIL FROM DECISION OF THE PLANNING COM-
MISSION

1. An appeal from the decision of the Planning Commission granting or denying any
conditional use permit as provided in this section may be taken to the City Council by the
applicant, any governmental body or agency, by any owner of real property located within the
City, or by any resident of the City. Such appeal shall be filed within ten days after the
decision is filed with the City Clerk. Such appeal shall be in writing and shall be filed with
the City Clerk on forms provided by him. The appeal shall specify wherein there was error in the
decision of the Planning Commission.
2. If an appeal is filed within the time specified, it automatically stays proceedings
in the matter until determination is made by the City Council.
3. Upon the filing of the appeal, the Clerk shall set the matter for public hearing, giving
the same notice as provided herein for hearing before the Planning Commission. The City
Clerk shall send the Planning Commission a duplicate copy of the appeal and request the
Planning Commission to transmit to the City Council a copy of its decision and findings,
minutes of the hearing, and all other evidence, maps, papers, and exhibits upon which the
Planning Commission made its decision.
4. Upon the hearing of such appeal, the City Council may, by resolution, affirm, reverse,
or modify in whole or in part any determination of the Planning Commission subject to the
same limitations as are placed upon the Planning Commission by the Code.
5. The resolution shall contain a finding of facts showing wherein the proposed conditional
use permit meets or fails to meet the requirements set forth in paragraph "D." of this section.
6. The resolution shall be filed with the Planning Director, the Zoning Administrator,
Director of Building Inspection and the County Recorder of San Diego County and a copy
shall be mailed to the applicant. The resolution shall not be filed with the County Recorder
if the resolution is a denial of the conditional use permit.

F. AMENDMENT TO PERMIT

1. The Planning Commission may, by resolution, grant an amendment to a valid conditional
use permit which it has granted.
2. The procedure for making application, for hearing before the Commission, for the
decision of the Commission and for an appeal to the City Council from the decision of the
Commission shall be as set forth in this section.

G. EXTENSION OF TIME

1. The Planning Commission may, by resolution, grant an extension of time to a valid
conditional use permit which it has granted if it finds that there has been no material change.
EXHIBIT E

STRIKEOUT ORDINANCE

OLD LANGUAGE: STRUCK OUT
NEW LANGUAGE: UNDERLINED

AN ORDINANCE AMENDING CHAPTER X, ARTICLE 1, DIVISION 5, OF THE SAN DIEGO MUNICIPAL CODE BY AMENDING SECTION 101.0510 RELATING TO CONDITIONAL USE PERMITS.

SEC 101.0510 CONDITIONAL USE PERMIT

A. and B. [No change.]

C. USES WHICH MAY BE CONSIDERED

1. Zoning Administrator as Decisionmaker. The Zoning Administrator shall have the authority under conditions herein provided to permit by Conditional Use Permit the following uses in any zone, including interim zones, except as otherwise provided below:

   a. Churches, temples or buildings of a permanent nature, used primarily for religious purposes, except in A-1 zoned areas of the Coastal Zone subject to the FPF (Floodplain Fringe) Overlay Zone.

   b. Commercial uses associated with agriculture in areas designated "future urbanizing" the Future Urbanizing area including, but not limited to: nurseries, agricultural sales and services, animal sales and service (including hay, feed and tack), equestrian-related sales and services, and nursery sales and services.

   c. through g. [No change.]

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h. Lights for illuminating tennis courts and similar lighting, except in the Future Urbanizing area.

i. and j. [No change.]

k. Nursery and elementary schools, and day care facilities serving children, except in the A-1 zoned areas of the Coastal Zone subject to the FPF (Floodplain Fringe) overlay zone or in the Future Urbanizing area.

l. Outdoor storage and display of new, unregistered motor vehicles, except in the A-1 zoned areas of the Coastal Zone or in the Future Urbanizing area.

m. Parking facilities, except in the A-1 zoned areas of the Coastal Zone or in the Future Urbanizing area. (Note: See Subparagraph 3, Planning Commission as Decisionmaker.)

n. Private clubs, lodges and fraternal organizations except fraternities and sororities. Private clubs, lodges, and fraternal organizations shall not be permitted in A-1 zoned areas of the Coastal Zone subject to the FPF (Floodplain Fringe) overlay zone or in the Future Urbanizing area.

o. Residential care facilities, as defined in Section 101.0101.96 for not more than twelve persons in any zone which otherwise permits residential use, subject to the development standards and locational criteria of Section 101.0581, except in A-1 zoned areas.
of the Coastal Zone subject to the FFF (Floodplain Fringe) overlay zone or in the Future Urbanizing area.

p. Rotating and revolving signs pursuant to SEC Section 101.1117.1, except in the Future Urbanizing area (the permit may be granted by the Sign Code Administrator).

q. and r. [No change.]

s. Teaching of the fine arts including, but not limited to music, drawing, painting, sculpture, drama and dancing, except in the A-1 zoned areas of the Coastal Zone subject to the FFF (Floodplain Fringe) overlay zone or in the Future Urbanizing area.

t. Theater marquee signs pursuant to SEC Section 101.1118.1, except in the Future Urbanizing area (the permit may be granted by the Sign Code Administrator).

u. Veterinary clinics and veterinary hospitals in any commercial, industrial or agricultural zone, except in the A-1 zoned areas of the Coastal Zone subject to the FFF (Floodplain Fringe) overlay zone or in the Future Urbanizing area.

2. Planning Director as Decisionmaker. The Planning Director shall have the authority under conditions herein provided to authorize by Conditional Use Permit the following uses in any zone, including interim zones, except as otherwise provided below:

a. Automobile service stations in any zone except the R-1 zones, and the A-1 zoned areas of the
Coastal Zone, or in the Future Urbanizing area, subject to the locational criteria and developmental and operational standards contained within the document entitled "Guidelines for Automobile Service Stations," as adopted by resolution of the City Council and, if alcoholic beverages include beer, wine and distilled spirits are offered for sale or other consideration within the area portrayed on Map C-721, SEC. Section 101.0515 shall be considered by the Planning Director.

b. and c. [No change.]

3. Planning Commission as Decisionmaker. The Planning Commission shall have the authority under conditions herein provided to authorize by Conditional Use Permit the following uses in any zone, including interim zones, except as otherwise provided below:

a. through c. [No change.]

b. Educational institutions except other than nursery and elementary schools, except in the Future Urbanizing area. Permanent buildings and/or fill shall not be permitted in A-1 zoned areas of the Coastal Zone subject to the FPF (Floodplain Fringe) overlay zone.

c. Establishments or enterprises involving large assemblages of people or automobiles, including, but not limited to:

(1) through (3) [No change.]

The above uses shall not be permitted in A-1 zoned areas of the Coastal Zone subject to the FPF

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(Floodplain Fringe) overlay zone or in the Future Urbanizing area. This provision shall not apply to the reconstruction of an existing privately owned recreational facility destroyed by fire, flood or other natural disaster, provided such reconstruction does not require new (i.e., nonreplacement) permanent buildings and or fill.

f. [No change.]

g. Facilities for the wrecking and dismantling of automobiles and other similar vehicles, junk yards, and all establishments engaged in the salvaging or processing of scrap metal, in any agricultural or industrial zone except in the Coastal Zone or in the Future Urbanizing area.

h. Golf courses, golf practice driving tees or ranges, pitch and putt golf courses, and miniature golf courses.

i. h. Hospital, intermediate care facilities and nursing homes, except in A-1 zoned areas of the Coastal Zone subject to the FFP (Floodplain Fringe) Overlay Zone or in the Future Urbanizing area.

j. Natural resources development and utilization including, but not limited to:

   (1) Extracting, processing, storing, selling and distributing of sand, gravel, rock, clay, decomposed granite, and soil; and

   (2) Manufacturing, producing, processing,
storing, selling and distributing of asphaltic concrete, Portland cement concrete, concrete products, and clay products.

These activities, defined in Section 2735 of the California Surface Mining and Reclamation Act of 1975 as surface mining operations, shall comply with the requirements of SEC. 101.0511, including a requirement for a reclamation plan for activities conducted subsequent to January 1, 1976.

m-1. Nonprofit institutions whose primary purpose is the promotion of public health and welfare, except in A-1 zoned areas of the Coastal Zone subject to the FPF (Floodplain Fringe) Overlay Zone or in the Future Urbanizing area.

l-1. Research, development and testing laboratories and facilities, except in A-1 zoned areas of the Coastal Zone or in the Future Urbanizing area; however, a permit may be granted for the continued operation of existing uses and facilities in the Future Urbanizing area.

m- k. Residential care facilities, as defined in Section 101.0101.96 for more than twelve persons in any zone which otherwise permits residential use, subject to the development standards and locational criteria of Section 101.0581, except in the Future Urbanizing area.

n. Residential, commercial, industrial, or institutional uses in and on historical sites.
Parking facilities in the A-1 zoned areas of the Coastal Zone, except in the Future Urbanizing area.

4. City Council as Decisionmaker. The City Council shall have the authority, under conditions herein provided, to authorize by Conditional Use Permit the following uses in any zone including interim zones except as otherwise provided below:

a. Airports and permanent helicopter facilities, subject to the standards contained within the document entitled "Locational Criteria and Development Standards for Helicopter Facilities," as adopted by resolution of the City Council except in the A-1 zoned areas of the Coastal Zone subject to the FPF (Floodplain Fringe) Overlay Zone.

b. Amusement parks, except in the A-1 zoned area of the Coastal Zone subject to the FPF (Floodplain Fringe) Overlay Zone or in the Future Urbanizing area.

c. Cemeteries, mausoleums and crematories, except in the A-1 zoned areas of the Coastal Zone subject to the FPF (Floodplain Fringe) Overlay Zone or in the Future Urbanizing Area.

d. Fairgrounds, except in the Future Urbanizing area, provided that permanent buildings and/or fill shall not be permitted in A-1 zoned areas of the
Coastal Zone subject to the FPF (Floodplain Fringe) Overlay Zone.

e. Newspaper publishing plants, except in the A-1 zoned areas of the Coastal Zone or in the Future Urbanizing area.

f. Race tracks, except in the A-1 zoned areas of the Coastal Zone or in the Future Urbanizing area.

g. Major stationary facilities for the aerial transmission or relay of electromagnetic communications signals, including, but not limited to, radio or television transmission stations and broadcasting studios, microwave relay stations, paging broadcast facilities, and cellular mobile telephone transmitting facilities.

h. Camping parks, together with incidental facilities for limited to serving the needs and convenience of occupants only, in the following zones:

   (1) and (2) [No change.]

   (3) Any agricultural zone, provided that permanent buildings and/or fill shall not be permitted in areas of the Coastal Zone or the Future Urbanizing area subject to the FPF (Floodplain Fringe) Overlay Zone.

   (4) The FW (Floodway Zone), except in the Coastal Zone.

i. Any hazardous waste facility project, as defined in SEC. Section 101.0516, in any manufacturing
or agricultural zone; subject to the additional provisions in **SEC. Section 101.0516.**

**j.** Any facility, activity, or use of property in any agricultural or manufacturing zone which is required by federal law to obtain a Research, Development and Demonstration Permit for Hazardous Waste Treatment from the Environmental Protection Agency or any other agency of the United States Government pursuant to the Federal Resource Conservation and Recovery Act.

**k.** Golf courses, golf practice driving tees or ranges, pitch-and-putt golf courses, and miniature golf courses. Within the Future Urbanizing area lodging facilities shall not be permitted as accompanying or accessory uses; clubhouse, food service, and other customary incidental uses shall not constitute an irrevocable use of the land, and shall be limited in use, size, and capacity to serve the needs and convenience of the users of the golf facility only; and reclaimed water shall be required to be used for irrigation of all landscaped areas.

**l.** Natural resources development and utilization including, but not limited to:

1. Extracting, processing, storing, selling and distributing of sand, gravel, rock, clay, decomposed granite, and soil; and
2. Manufacturing, producing, processing.
storing, selling and distributing of asphaltic concrete, Portland cement concrete, concrete products, and clay products.

Those activities, defined in Section 2735 of the California Surface Mining and Reclamation Act of 1975 as surface mining operations, shall comply with the requirements of Section 101.0511, including a requirement for a reclamation plan for activities conducted subsequent to January 1, 1976 and the phased implementation of an approved restoration and reclamation plan.

m. Residential, commercial, industrial, or institutional uses on and on historical sites, except that only residential uses may be permitted in the Future Urbanizing area.

5. [No change.]

6. Conditional uses permitted in the FW Zone shall be limited to those uses identified in Section 101.0403.

D. through F. [No change.]

G. ACTION OF THE DECISIONMAKER

1. through 4. [No change.]

5. In granting a Conditional Use Permit, the Decisionmaker may impose such conditions as it deems necessary and desirable to protect the public health, safety and general welfare. Any regulations of the zone in which property is situated including, but not limited to, signs, fences, walls, maximum building heights, density, minimum

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yards, maximum building coverage, floor area ratio and
off-street parking may be increased or decreased, except
that density may not be increased within the Future
Urbanizing area. If deemed appropriate the Decisionmaker
may assign an expiration date to the permit.

H. through Q. [No change.]
June 11, 2012

Via Email and U.S. Mail

Jan Goldsmith
San Diego City Attorney
200 Third Ave., Suite 1620
San Diego, CA 92101

Re: Legal Analysis of the Current Legal Impediments to the Proposed Rancho Del Mar Project

Dear Mr. Goldsmith:

We write on behalf of the Protect San Dieguito River Valley Coalition ("Coalition"). The Coalition is composed of community members and groups supported by stakeholder organizations, including the Friends of the San Dieguito River Valley and the original sponsors of 1985 Proposition A, the Managed Growth Initiative. The purpose of Coalition is to ensure that maximum protections are afforded to the open space areas within the San Dieguito River Valley, and that proper planning and procedures are followed by all government agencies with respect to this area. Most immediately, the Coalition seeks to require that the development project described as “Rancho Del Mar, Continuing Care Residential Community,” located in Sub Area II of the North City Future Urbanizing Area (NCFUA) Framework Plan, comply with applicable laws, including Proposition A. Proposition A governs development of lands known as “Proposition A Lands” in the City of San Diego General Plan, as adopted by City Council in March 2008 and those areas identified in the Map of Proposition A Lands, as revised April 28, 2009.

The Coalition has been advised that your office is preparing a legal analysis regarding the applicability of Proposition A to the Rancho Del Mar project (the “Project”), and whether the proposed use was permitted as an Intermediate Care use under the 1984 zoning code. We are confident that counsel for the Project has spent considerable time attempting to persuade your office that the Project can proceed simply by treating the entire Project as an Intermediate Care use.

This firm has reviewed the applicable provisions of the City’s General Plan and Municipal Code as well as relevant sections of State law, and reviewed documents obtained from the City’s files and otherwise provided to us related to the Project. I also reviewed the videotape of the December 15, 2011 Planning Commission meeting where the majority of the Commission concluded that a Continuing Care Residential Community is sufficiently “similar” or “consistent with” an Intermediate Care facility. The Planning Commission did
not address in their action the fact that the applicant would have to obtain City Council approval to repeal the 1990 Municipal Code prohibition on such a use, which was adopted to implement Proposition A.

Our review discloses a number of reasons why the Project is not consistent with the use allowed as an Intermediate Care facility and even if it were, cannot proceed as proposed under current City law. First, the land is designated for Future Urbanizing and Proposition A land, and is designated Open Space. These designations were approved by the voters when Proposition A was passed and cannot be changed absent a majority vote for a Phase Shift. Before that could be done, under adopted City policies, a Subarea plan would need to be adopted for the area and numerous City procedures would have to be followed. Second, numerous changes in the City’s General Plan and laws would have to occur. A repeal of the 1990 ordinance prohibiting hospitals, Intermediate Care facilities and nursing homes on lands zoned for agricultural use would be required. Moreover, the land would have to be rezoned, or an amendment to the uses and density of development allowed on agricultural lands would have to be enacted. We believe that all of these actions would be in contravention of the letter and spirit of Proposition A unless the City has gone through the planning process and the voters have approved a Phase Shift so that the land is designated for urban uses.

I. Highlights of the Property and the Proposed Project.

The Project is a proposed high-density development designed to serve seniors on 21.86 acres of land in the floodplain of the San Dieguito River, adjacent to City-owned open space currently used for polo and soccer fields. The property is part of the San Dieguito River Valley that provides a greenbelt from the Del Mar Fairgrounds to development far to the east. The property is located within the Focused Planning Area of the San Dieguito River Valley Regional Park Joint Powers Authority.

In order to build the Project, it has been reported that the land would have to be filled to elevate the site by 14 feet in order to avoid flooding. The land is designated as Proposition A land. It is zoned as AR-1-1 for agricultural use. It appears it was zoned AR-1-10 in 1984, but likely had the same restriction, which is generally no more than 1 unit on ten acres. The land has been designated as Open Space on the City’s General Plan since the 1970’s. Indeed, the August 23, 2011 letter from City Project Manager John Fischer to the applicants states “Staff has reviewed the General Plan land Use map and determined this site is identified entirely in Open Space. The proposed project is not an allowed use in Open Space. A General Plan Amendment is required.” Pursuant to the General Plan, the Open Space designation is:

for the preservation of land that has distinctive scenic, natural or cultural features that contribute to community character and form, or that contains environmentally sensitive resources. This applies to land or water areas
that are undeveloped, generally free from development, or developed with very low-intensity uses that respect natural environmental characteristics and are compatible with the open space use.

(City of San Diego General Plan, p. LU-16.)

According to a four page “Rancho Del Mar CCRC Project Description” contained in the City files and dated July 15, 2010 (but dated June 1, 2010 on the header to each page), the Project would involve development of 31% of the site, with 713,677 square feet of development and 224 dwelling units.

In addition to the dwelling units, the complex would include many amenities for active life styles, including a health spa and pool, exercise rooms, dining rooms, theater, lounges, bars, and 577 parking spaces. The June 2, 2011 letter from the City to Mr. Ali Shapouri states the facility also would include an on-site restaurant. There is no question in our minds that this is primarily a residential development designed for seniors, with 50 care units. The intent of the applicant is to have residents move to the Project and reside there for the remainder of their lives.

II. City Processing of the Application and the Planning Commission’s Advisory Opinion.

Jim Dawe, the attorney for the applicant, stated at the Planning Commission hearing that this Project has “been in the mill for several years.” Rather than attempt to participate in a planning process for Subarea II in the NCFUA, as contemplated by the Framework Plan, the applicant is attempting to circumvent the intent of the Framework Plan and Proposition A by arguing it can proceed without a Phase Shift if it can shoe-horn the Project into the definition of an Intermediate Care facility. His theory is that if the Continuing Care Residential Community is treated as a use allowed on agricultural lands in 1984 with a conditional use permit (CUP), the applicant can proceed with the Project if it can persuade the City Council to repeal the 1990 ordinances implementing Proposition A. Three types of health facilities were allowed on agricultural land with a CUP in 1984: hospitals, nursing homes, and Intermediate Care facilities. All of these are considered institutional uses. The applicant determined to attempt to persuade the City that the Project should be found to qualify as an Intermediate Care facility.

For months before the question of whether the Project could qualify as an Intermediate Care facility was presented to the Planning Commission, City planning staff advised the applicant they did not believe the proposed Project was consistent with such a use. Rather than requiring the applicant to follow the City’s policies for allowing more intensive development of this Proposition A property, the Development Services Department decided to submit the issue to the Planning Commission for an “advisory opinion.” As stated in the December 8, 2011 Report to the Planning Commission, the sole issue was whether
“the 1984 Municipal Code include[d] a use that could be determined to be a continuing care retirement community, and if so, could that use be permitted in the agricultural zones?” The Report also incorrectly stated “Within Prop “A” lands land use is restricted by zone to those allowed by the San Diego Municipal Code as of August 1, 1984.” (December 8, 2011 Report, p. 1.) Actually, Proposition A froze the General Plan land use designations unless there was a vote of the people, reserving for themselves the decision about the appropriate intensity of development of Proposition A lands. The land use designation was and continues to be for Open Space and Future Urbanizing. The zoning was and is Agricultural. The Project is much more intensive than the uses allowed under either the General Plan or the Zoning Code.

From a review of the videotape of the Planning Commission hearing, it is very clear that the Planning Commission members were searching for some guidance on the definition of an Intermediate Care facility. They were told there is not a definition in the Municipal Code, and given a definition out of the National Library of Medicine. Although the Report discussed and provided copies of the portions of the Health and Safety Code related to Continuing Care facilities, it entirely ignores the definition of Intermediate Care facility included in the Health and Safety Code. That definition provides, in pertinent part, an Intermediate Care facility is “a health facility that provides inpatient care to ambulatory or nonambulatory patients who have recurring need for skilled nursing supervision and need supportive care. . .” Furthermore, there was no discussion about whether the Project is an institutional use. Had the Planning Commission been provided with the State law definition of an Intermediate Care facility, and focused on the fact that the Project is not proposed for institutional uses, but rather a residential use with some medical support, they likely would have reached a very different decision.

When one considers all the relevant facts related to the Project description, the State definition of an Intermediate Care facility, and the limitation of the Zoning Code in 1984 to three institutional uses, is it is quite clear the project is not the same as or even similar to a hospital, nursing home, or a Intermediate Care facility, all of which provide medical services, normally for a limited duration.

Additional reasons why the Project should not properly be considered an Intermediate Care facility are discussed in detail in Section III. Essentially, this Project would create a residential retirement community with medical assistance on a regular basis for only a small number of the residents.

The size of the Project also belies the argument that it is an institutional Intermediate Care facility. Although there would be 50 assisted living units of 504-604 square feet where extensive medical assistance would be provided (half for dementia patients), the courtyard suites would be 1,278-2,079 square feet, and the “Casitas” would be 1,645-1,566 square feet, plus a 737 square foot balcony and a 258 square foot garage. (Report to Planning Commission, Dec. 8, 2011, p. 4.) These sizable properties are more typical of single-family
residences than an Intermediate Care facility, and almost certainly will often be occupied by couples rather than single individuals. The contrast between an Intermediate Care facility and fairly large residential units was not discussed at the hearing. And there was no discussion of the definition of Intermediate Care facilities under State Law.

Importantly, there is no evidence in the record that the Project would meet the definition of an Intermediate Care facility under State law: a “health facility that provides inpatient care to ambulatory or nonambulatory patients who have recurring need for skilled nursing supervision and need supportive care . . .” The applicant says it does not intend to have any independent living facilities. However, as pointed out by staff member Fisher at the Planning Commission hearing, the assisted living units may provide a continuum of assistance, but it wouldn’t necessarily be medical. Rather, as another staff member at the hearing stated, the assistance could range from changing a light bulb to assisting in dealing with financial issues, and individuals might buy in early looking for care when they need it. Only fifty units (half for dementia patients and the remainder for general nursing care) would provide skilled nursing care to ambulatory and nonambulatory residents. Whether all such residents would be considered “patients” is another question.

At the end of the Planning Commission hearing, the Commissioners began to address the intensity of development that would be allowed for an Intermediate Care facility, but they did not fully explore the intensity of development that would result from this Project. Page four of the Report to the Planning Commission states that the “revised project would provide 251 parking spaces.” While this is far less parking than the 577 that the applicant’s June 2011 letter asserted, the relevant issue noted on page four of the report is that an Intermediate Care unit would require only 148 parking spaces, assuming 224 units each with two beds. Clearly, the Project is a more intensive use than an Intermediate Care facility in terms of traffic. None of these issues were discussed in detail at the Planning Commission hearing.

After the Planning Commission decision, Cory Hao of the Coalition attempted to appeal the decision of the Commission to the City Council, filing the necessary form and providing a check for $2,000. The City rejected the appeal and returned the check, asserting it is not an appealable decision. That was unfortunate because such a hearing would have provided an opportunity to bring to the City Council’s attention the relevant State definition of an Intermediate Care facility, why the Project does not constitute such an institutional use, and explain why a development such as the Project is an urban use that cannot be considered without complying with the Council Policies for considering a Phase Shift of Proposition A lands.

III. The Project is Not Consistent with an Intermediate Care Facility and Would Not Have Been Allowed in 1984.

The applicant mistakenly attempts to utilize the zoning as it existed on August 1, 1984, to argue that its “Continuing Care Retirement” facility has the same intensity, and
therefore could be considered an “Intermediate Care facility” allowed with a CUP in 1984, assuming the facility met other zoning provisions. First, as discussed infra, the Project would not have met the density restrictions that existed in 1984. Regardless, the applicant misconstrues the relevance of the August 1984 date. As one of the Proposition’s sponsors stated in a letter to Deputy City Attorney Nina Fain, the significance of the August 1, 1984 date in Proposition A was to ensure that the action taken by the City Council in September 1984 to shift over 5,000 acres of what was referred to as the “La Jolla Valley” project into the planned urbanizing land use designation was subject to the requirement for voter approval of a phase shift to a planned urbanizing use. The August 1, 1984 effective date in no way was intended to imply or convey any development rights to any project or specific land use as of that date. In fact, the Proposition is explicit that the only exemptions to Proposition A’s provisions were to projects that had already obtained a building permit before the effective date of the Proposition.

In any case, the Project could not have been approved in 1984 as an Intermediate Care facility because it is not exclusively or even primarily an Intermediate Care facility, even if 50 of the units constitute such a use. The City Code at that time allowed hospitals, nursing homes, and Intermediate Care facilities—all institutional uses—on agricultural lands with a CUP, if the use was otherwise allowed. The Municipal Code does not recognize a use called a “Continuing Care Facility” and has no definition of an Intermediate Care facility. It does have provisions for Housing for Senior Citizens (§ 141.0310) and Residential Care Facilities (§ 141.0312). Thus, it is helpful to look at the State regulatory system.

The State regulates Continuing Care facilities from a consumer protection standpoint under Health and Safety Code section 1770, et seq. Those laws do not aid in determining whether the proposed Project is “consistent with” Intermediate Care facility. However, the State law describing skilled nursing facilities (often also called nursing homes) and Intermediate Care facilities is extremely relevant, but was not considered by the Planning Commission:

c) "Skilled nursing facility" means a health facility that provides skilled nursing care and supportive care to patients whose primary need is for availability of skilled nursing care on an extended basis.

d) "Intermediate Care facility" means a health facility that provides inpatient care to ambulatory or nonambulatory patients who have recurring need for skilled nursing supervision and need supportive care, but who do not require availability of continuous skilled nursing care.

(Health and Safety Code Section 1569.2 (emphasis added).)

The Project is a blend of different uses and cannot be defined as an Intermediate Care facility. Even though 50 of the units might be considered an Intermediate Care facility, the
vast majority would not. Normally, when there is more than one use, one looks to the “primary use.” The City Municipal Code defines primary use as the use allowed on the premises that occupies the majority of the area of the premises. (§113.0103.) Because only fifty of the units seem to contemplate significant medical care, the primary use is not Intermediate Care.

Mr. Shapouri’s July 7, 2011 letter claims the Project will provide skilled nursing, assisted living, intermediate care, and medical care to all occupants. He emphasizes that the contract all residents must execute will provide for care required for all entering the facility. However, the simple fact that a person agreeing to reside at the complex will execute a contract for care, if it becomes necessary, does not convert the whole facility to an Intermediate Care facility.

Both Mr. Shapouri and Mr. Dawe in a separate letter assert the residents will be part of a “protected class” under State and federal Fair Housing Act, but they provide no support for this contention. With our burgeoning population of 65 and over, it would be unreasonable to consider seniors a “protected class.” In any case, even if they were a “protected class,” neither Mr. Shapouri nor Mr. Dawe explain why that would justify allowing the City to ignore City ordinances and to violate Proposition A.

Finally, even if one were to assume that the type and density of use was permitted, in 1984, a CUP would have been required for the Project at that time. The development would not have been by right. In light of the subsequently enacted Proposition A and Municipal Code provisions, the Planning Commission would no longer have the discretion to grant of a CUP.

IV. The Project is Contrary to Proposition A, the City's General Plan, and Proposition A's Implementing Ordinances and Policies.

A. The Requirements of Proposition A.

Proposition A, the Managed Growth Initiative, was passed by San Diego voters in November 1985. Supported by the Sierra Club, Common Cause, League of Conservation Voters, and Citizens Coordinate for Century 3 (C3), the Proposition was a “bipartisan citizen’s effort to save our neighborhoods and prevent urban sprawl” by halting what was seen as a City Council pattern of violating the Growth Management Plan. (Ballot Argument accompanying Proposition A, November 1985.) The Growth Management Plan set aside thousands of acres of land in the City, protecting them from development unless it became necessary to develop them. In so doing, the Plan also prevented new urban sprawl and accompanying traffic and air pollution, termed as the “Los Angelization of San Diego.” (Ibid.) As recognized by the California Supreme Court, the voters were thus using a “legislative battering ram.” (Amador Valley Joint Union High Sch Dist. v. State Bd of Equalization (1978) 22 Cal.3d 208, 228.) The initiative power “was designed for use in
situations where the ordinary machinery of legislation had utterly failed . . .” \( (Id. \)\) The ballot arguments make it clear that the sponsors of Proposition A felt the City Council was being unduly influenced by developers. To prevent this, the voters reserved to themselves the right to make the fundamental decision about whether certain broad swaths of land would be protected from intense development. Specifically, Proposition A provides:

No property shall be changed from ‘future urbanizing’ land use designation in the Progress Guide and General Plan to any other land use designation, and the provisions restricting development in the Future Urbanizing Area shall not be amended except by majority vote of the people . . . at a citywide election thereon.

(Proposition A, Section 1.) The entire Proposition is found in the Appendix to the City of San Diego General Plan, page AP-27.

The Proposition applies to lands designated as “future urbanizing” in the General Plan on August 1, 1984. (Proposition A, Section 2.) Thus, lands set aside as “future urbanizing” or “Proposition A lands” cannot be opened to urban development without a majority vote of the people. The only exception provided in Proposition A is for projects for which “a building permit has been issued . . . prior to the effective date of this measure.” (Proposition A, Section 5.)

Proposition A authorized the City to “take any and all actions necessary” to “carry out the intent and purpose of this initiative measure,” (Proposition A, Section 3), including the adoption of reasonable guidelines for implementation (Proposition A, Section 4). Proposition A may be amended or repealed only by a majority of voters. (Proposition A, Section 6.)

Proposition A also specifies,

‘Amendment’ or ‘amended’ as used in Section 1 shall mean any proposal to amend the text or maps of the Progress Guide and General Plan affecting the future urbanizing designation as the same existed in the Progress Guide and General Plan on August 1, 1984, or the land subject to said designation on August 1, 1984, except amendments which are neutral or make the designation more restrictive in terms of permitting development.

(Proposition A, Section 2(c.) Thus, not only does Proposition A preclude changing the use from future urbanizing to urban without a Proposition A vote, but it also prevents changing the land use designation from open space without a vote, because it would make the designation more permissive in terms of permitting development.
B. Proposition A Is Part of the General Plan.

Proposition A has been incorporated directly in the General Plan, most notably in the Land Use and Community Planning Element, which contains a map of Proposition A lands. (General Plan, Figure LU-4). The General Plan designates the land where the Project is proposed, and Proposition A requires that any change in the designation be done with a majority vote of the public. Proposition A has been further incorporated into the General Plan’s Public Facilities Element, where it affects how the City finances public facilities. (General Plan, Figure PF-1.)

According to the current General Plan, the City’s land is now divided into two types of land, Proposition A lands (which were long designated as “future urbanizing,” and urbanized lands. Proposition A lands are characterized by very low-density residential, open space, natural resource-based park, and agricultural uses. (General Plan, p. LU-41.) By contrast, urbanized lands are characterized by communities at urban and suburban levels of density and intensity. (Ibid.) The Project is clearly appropriate on urbanized, but not future urbanized or Proposition A lands.

C. The Project May Not Be Approved Because It Is Inconsistent with the General Plan and the Land Designations Cannot be Amended Without Approval of the Voters.

The City’s website which introduces the General Plan states, “The General Plan is the City's constitution for development . . .” This acknowledgment is consistent with repeated pronouncements of the courts. Because a general plan is the constitution for development, any decision of the city affecting land use and development must be consistent with the general plan. (Citizens of Goleta Valley v. Board of Supervisors (1990) 52 Cal.3d 553, 570.) Although most charter cities are exempt from the direct zoning consistency mandate of Government Code section 65803, this exemption applies only to zoning and not to consistency requirements for other land use or development approvals. (See Curtin’s California Land Use and Planning Law, 26th Ed, p. 26.) Thus, the Project cannot be approved without an amendment to the General Plan changing the land use designation from Future Urbanizing and Proposition A and from Open Space. This cannot be done without a majority vote of registered voters.

D. The North City Future Urbanizing Area Framework Plan Precludes the Project.

The North City Future Urbanizing Area Framework Plan (Framework Plan) was adopted by the City in 1992 and approved by the Coastal Commission in 1993. This Framework Plan provides a “blueprint” for development of the area, divides the FUA into subareas, and sets forth requirements and procedures for future development. (Framework
Plan, 2006, p. 5.) For example, the Plan provides, “A single, unified subarea plan is to be prepared and adopted for each of the subareas delineated on the Framework Plan diagram prior to development approval of density greater than one dwelling unit per ten acres.” (Framework Plan, p. 17.) The only exception to the requirement for a unified subarea plan is for development consistent with the underlying zoning, provided the applicant meets a number of specifications. (Framework Plan, p. 20.) Another exception to the requirement arose in 1994, when the Framework Plan was amended to include the Project site. This exception reads:

[T]he owners of the approximately 26-acre parcel at the southeast quadrant of Via de la Valle and El Camino Real may also prepare and submit a separate Subarea Plan-level document for their property instead of preparing a single, unified Subarea Plan for Subarea II.

(Framework Plan, p. 17.) Any separate plan prepared for this parcel must meet the requirements for subarea plans. And, as discussed above, a subarea plan is required prior to placing a phase shift on the ballot. Although the City granted this parcel authority to prepare its own subarea plan 18 years ago, no such plan has been submitted. Lacking in the necessary subarea plan, the Project site is ineligible for a Proposition A vote. Accordingly, development onsite is limited to the uses permitted in the existing Municipal Code. An institutional use such as the Project would have to conform to the conditional use permit regulations for future urbanizing areas, which only permit “uses that are natural resource dependent, non-urban in character and scale, or are of an interim nature which would not result in an irrevocable commitment of the land precluding future uses.” (Policy 600-29, p. 3.) The Project, as proposed, is urban and permanent, and wholly fails to meet that test.

E. There Are Specific Policies That Must Be Followed For the City to Consider More Intensive Uses on Proposition A Lands.

Pursuant to Section 3 of Proposition A, the City Council adopted Proposition A implementation policies. Two notable policies are Policies 600-29 and 600-30, each of which were the subject of thorough review by City Council over several months and hearings. The current version of these policies became effective on October 26, 1993. Policy 600-29 declares the Future Urbanizing areas “urban reserves” that will help the City avoid premature urbanization, conserve open space and the natural environment, and protect fiscal resources. (Council Policy 600-29, October 26, 1993, p. 1.) The policy concludes that permitting development in these urban reserves would “strain City fiscal resources,” inefficiently divert development from urbanized areas, increase drive times and air pollution “without any realistic prospect for mass transit service,” and “infringe upon the few remaining viable agricultural areas within the City limits.” (Ibid.) To that end, Policy 600-29 declares, “It shall be the policy of the City Council that lands within the Future Urbanizing area be maintained as an ‘urban reserve’ in part through the application or continuation of agricultural zoning which prohibits development at urban intensities.”
For lands zoned A-1, such as the Project site, Policy 600-29 permits residential development in three ways:

1) According to the density and minimum lot size permitted by A-1 zoning regulations;

2) Pursuant to cluster development regulations that allow the same amount of total development as A-1 zoning regulations, but clustered in one location to allow future development of other lands when the property is shifted into an urbanizing area; and

3) Pursuant to the Planned Residential Development regulations that allow development at an increased density in exchange for permanent easements on undeveloped land.

Each of these development options incentivizes the preservation of agricultural and open space land. Policy 600-29 further incentivizes the retention of undeveloped land by promoting the consideration of preserved lands for tax benefits under the Williamson Act. Policy 600-29 provides that lands only be considered for shifting outside of a Proposition A designation in accordance with specific procedures and monitoring mechanisms. Before urban density can be permitted in Proposition A lands, a General Plan Amendment and supporting community, specific, or precise plan is required. However, before the City even may expend funds on such a plan, it must make supportable findings that “(1) available lands are approaching full utilization; (2) a need exists for additional developable lands; and (3) a process has been developed to identify where the next phase of urban development should occur.” Finally, the policy requires the completion of a survey to identify lands that should be retained as permanent open space for agricultural, environmental, or other purposes. None of these findings have been made. Instead, the applicant seeks to circumvent the Proposition A procedures for careful planning of an area and rely upon inapplicable language in the pre-1985 zoning code.

The proposed Project’s 224 residential units vastly exceed those that would be permitted by any of Policy 600-29’s allowable development types, and is therefore not permissible absent a vote supporting a phase shift. Additionally, a phase shift into an urbanizing area cannot yet occur because a general plan amendment, specific plan, or precise plan has not been approved for this portion of the North County Future Urbanizing area, as required.

Policy 600-30 sets out the City’s policies for handling the “exceptional situations,” wherein the Council may consider land shifts outside of the General Plan update process, such as when a property owner petitions for a land shift. (City Council Policy 600-30,
October 26, 1993, p. 1.) The Policy restates Proposition A, making it clear that “[n]o land shall be shifted from the Future Urbanizing area...except by a General Plan Amendment approved by the City Council and approved by a majority vote of the people.” (Ibid.) Applications for land shifts can only be reviewed by the Planning Commission if they are consistent with an adopted land use plan, such as the North City Future Urbanizing Area Framework Plan, or if the application provides a “reasonable basis” for the General Plan amendment it would require. (City Council Policy 600-30, p. 2.) Pursuant to the policy, an application for an amendment provides a reasonable basis if it is needed to provide land development, as determined by City monitoring; if the amendment is “responsive to population and growth rates which demand land availability;” if the amendment will not contribute to “urban sprawl, leapfrog development, or premature development;” or if the amendment will “provide the City with substantial and unique public benefits.” (Ibid.) Without one of these showings, the application cannot be forwarded to the Planning Commission, and ultimately the City Council, for review and the scheduling of a public vote.

Council Policy 600-30 also prohibits approval of the Project, which fails to meet any of the thresholds for a substantive review – the Project is neither unique nor required by great demand – and it is inconsistent with the NCFUA.

F. Prior City Attorney Opinions Do Not Support Approval of the Project Without a Phase Shift Vote.

Prior City Attorney opinions (Memorandums of Law) provided to Mr. Jay Powell by Nina Fain are not inconsistent with our analysis. The January 1, 1995 City Attorney report to the Planning Commission states that the Commission can adopt a specific plan in part of the future urbanizing area without a City vote as long as it doesn’t exceed authorized uses and density authorized in 1984. Here, no specific plan is proposed and the densities (and we believe uses) were not authorized in 1984.

A December 4, 1995 Memorandum of Law discusses the concept of adoption of a Sub-Area Plan and whether consolidation of density would violate Proposition A. Again, no Sub-Area Plan is at issue here. The Framework Plan is part of General Plan and part of Proposition A implementation and is the guiding document for considering development on Proposition A lands. In fact, the plan for Sub Area II in which the proposed Project is situated has not been completed and adopted by the City Council. So any urbanizing project proposal is premature. However, the Memorandum is applicable in part, as it properly states “Prop. A did not freeze the existing regulatory scheme in place upon its passage. By its express terms, Proposition A allows amended or alternative development regulations or processes within the FUA, so long as those regulations ‘are neutral or make the designation more restrictive in terms of permitting development.’” (Memorandum, p. 2.)

The May 15, 1986 Memorandum from the City Attorney to the City Council says that a community plan map can be corrected when there is an error, but it must be minor and not
done in a way to frustrate Proposition A. The October 17, 1996 report by John Witt to the City Council concluded that a transfer of development rights from certain property owned by the City to a developer, in settlement of litigation, would not violate Proposition A because it would be “neutral.” (Letter, page 1, emphasis added.) This appears to be because the same number of units on the property would be allowed. What is proposed for this Project is a tremendous increase in the density of the development over what was allowed in 1984 and what is allowed on Proposition A lands.

In any case, the City Council had the benefit of these opinions when it adopted Council Policies 600-29 and 600-30. Those subsequently adopted City policies and procedures changed the legal landscape after all of these opinions, making it particularly important that a comprehensive review be undertaken now.

Finally, as your office has noted on numerous prior occasions, a landowner does not have a vested right to develop land in a certain way. “While the removal of the opportunity to seek a PRD or conditional use permit may frustrate the plans of a property owner, a property owner does not have a present right to a future use of property. Op. San Diego City Att'y 729 (1990). See generally, Avco Community Developers, Inc. v. South Coast Regional Commission, 17 Cal. 3d 785, 793 (1976).” (Memorandum of Law, December 4, 1995, p. 4.) Also, a taking will not occur unless there is no feasible economic use remaining (Lucas v. South Carolina Coastal Council (1992) 505 U.S. 1003, 1019), which would not be the case here. The current owner of the property purchased it relatively recently, with full knowledge that it is on Proposition A lands, in a flood plain, and with a General Plan open space designation. Consistent with the Zoning Code, the land can be used for agricultural purposes, with no more than five dwelling units. This constitutes an economically feasible use of the property.

IV. The Agricultural Zoning Designation on Proposition A Lands Also Precludes the Project.

Under the current zoning code, no more than one dwelling unit is allowed for every four acres, or no more than five units for the entire property, because it is on Proposition A lands zoned AG-1-1. The purpose of the agricultural designation is to retain agricultural uses in a rural environment allowing for development only at a very low density. Portions of the existing zoning code are provided with emphasis:

§131.0301 Purpose of Agricultural Zones

The purpose of the agricultural zones is to provide for areas that are rural in character or areas where agricultural uses are currently desirable.
§131.0302 Purpose of the AG (Agricultural--General) Zones

(a) The purpose of the AG zones is to accommodate all types of agricultural uses and some minor agricultural sales on a long-term basis. Nonagricultural uses are limited in the AG zones in order to strengthen the presence and retention of traditional agricultural uses.

(b) The AG zones are differentiated based on the minimum lot size as follows:

- AG-1-1 requires minimum 10-acre lots
- AG-1-2 requires minimum 5-acre lots

§131.0303 Purpose of the AR (Agricultural--Residential) Zones

(a) The purpose of the AR zones is to accommodate a wide range of agricultural uses while also permitting the development of single dwelling unit homes at a very low density. The agricultural uses are limited to those of low intensity to minimize the potential conflicts with residential uses. This zone is applied to lands that are in agricultural use or that are undeveloped and not appropriate for more intense zoning. Residential development opportunities are permitted with a Planned Development Permit at various densities that will preserve land for open space or future development at urban intensities when and where appropriate.

Because the voters included the land in Proposition A, they determined that urban densities are not appropriate on this land unless they vote a Phase Shift to allow it to be so developed.

The zoning code also limits the number of units that are allowed and requires the remaining land to be retained in open space.

§131.0340 Maximum Permitted Residential Density in Agricultural Zones

... (4) Within Proposition A Lands except within the Del Mar Mesa Specific Plan area, an increase in density of up to one dwelling unit per 4 acres of lot area may be requested through a Planned Development Permit in accordance with Process Five subject to the regulations in Section 143.0402. The remainder of the premises shall be left undeveloped in perpetuity. ...

Since the applicant seeks to have the standards applied that were in existence in 1984, it is worth noting that then only two dwelling units would have been allowed on the property then, while five dwelling units would be permissible under the current zoning code.
V. The Project Would Violate the 1990 Zoning Code Provisions that Repeal the Allowance of Intermediate Care Facilities in Order to Implement A.

The Project should not even be processed because it violates the 1990 zoning code amendment (now codified as Municipal Code § 141.0413(a)) prohibiting hospitals, Intermediate Care facilities, and nursing homes on agricultural land. In 1990, the City Council adopted several ordinances to comply with the mandate of Proposition A to “take any and all measures reasonably necessary to carry out the intent and purpose of the initiative.” This ordinance was adopted pursuant to the Proposition A mandate for the Council to adopt guidelines “provided such guidelines shall be consistent with the intent and purpose of this measure.” In implementing Proposition A, the City Council determined that hospitals, Intermediate Care facilities and nursing facilities, which are institutional uses, would no longer be permitted on agricultural zones in Proposition A lands. (§141.0413). In addition, residential care facilities and transitional housing, which are both residential uses, are not allowed on Proposition A lands. (§§141.0312 and 141.0313.)

In Planning Report 90-202, issued on July 10, 1990, the Planning Department recommended several other measures to implement Proposition A’s goals: retaining the rural character of subject lands in order to preserve public space, reducing impacts to existing infrastructure, and reducing City investment in areas where it was not yet needed. One recommendation was to remove allowances for developing at greater residential densities than otherwise allowed in agricultural zoning—an option that the Planning Department concluded actually promoted urbanization in future urbanizing areas. The Planning Department also proposed excluding residential care facilities, schools, and churches in agricultural zones and future urbanizing areas that were more akin to urbanized uses than agricultural uses. These issues were revisited in Planning Report 90-359, issued on November 6, 1990, which further proposed a prohibition on hospitals, Intermediate Care facilities, and nursing homes in future urbanizing areas. (Planning Report 90-359, Attachment 4, p. 5.)

On December 10, 1990, the City Council accepted this final recommendation amending section 101.0510 of the Municipal Code to prohibit the siting of hospitals, Intermediate Care facilities, and nursing facilities on Proposition A lands. This prohibition has since been re-codified and is now contained in section 141.0413 of the Municipal Code. Currently, residential care facilities and transitional housing, which are both residential uses, in addition to hospitals, Intermediate Care facilities, and nursing facilities are all prohibited in Proposition A lands. (§§141.0312, 141.0313, and 141.0413.)

VII. Conclusion.

The City did not follow the correct procedures in determining to allow the Project application to be processed because the Planning Commission determined the Project could be considered an Intermediate Care facility. The Planning Commission did not have all of
the facts or law before it when it made its decision, which according to the City staff, was only advisory in any case.

It is not in anyone’s interest to have this Project be subject to costly and lengthy environmental review without first addressing the fundamental planning question: is this land appropriate for an intensive residential use, albeit of seniors, and would such a use be approved by the legislative body of the City, and ultimately by the voters? We strongly recommend that the City Attorney advise the Development Services Department, the Mayor, and the City Council that the procedures set forth in Policy 600-29 and 600-30 be followed in evaluating any possible change in land use, and that the Project cannot be approved without changing the land use designation of this property, which ultimately requires a majority approval of registered voters.

The City has held eight elections pursuant to Proposition A that have ultimately resulted in conversion of seven future urbanizing areas to urbanized uses. The one vote that failed concerned the NCFUA, which includes the site of the proposed Project. The voters thus have expressed its continuing support for maintaining the designated open space in the San Dieguito River Valley. Unless a majority of the voters have changed their mind, processing of this Project should not go forward.

I would welcome any opportunity to discuss this matter further with you and/or the Deputy City Attorney who is assigned this matter. Please feel free to call me at (858) 999-0070.

Sincerely,

Jan Chatten-Brown

cc: Sherri Lightner, City Council District 1
    Lori Zapf, City Council District 6
    David Graham, Office of the Mayor
    Nina Fain, Deputy City Attorney
    Leslie Fitzgerald, Deputy City Attorney
MEMORANDUM

TO: Shawna Anderson

FROM: D. Wayne Brechtel

DATE: June 21, 2012

RE: City Attorney Opinion dated June 7, 2012 regarding the Rancho Del Mar Project

I reviewed the Opinion provided by Deputy City Attorney Nina M. Fain regarding the Use Category Determination and Proposed Municipal Code Amendments for the Rancho Del Mar Project under Proposition A. Generally, the Opinion appears to be carefully written to provide the City with the option of going either way on the issue. However, in my opinion, it does not focus in on the key questions that I continue to believe prohibit approval of the Rancho Del Mar Project without a Proposition A vote. Set forth below is a quick overview of my response to the answers provided by the Deputy City Attorney.

1. Development Services May Determine the Use Category for the Rancho Del Mar Project, and its Determination Will Be Upheld So Long as it Is Supported by Substantial Evidence.

This answer is correct to a point. The answer is premised upon the belief that the determination is primarily factual in nature. In this instance, however, the facts are undisputed. Only 50 of 224 units arguably satisfy the definition of an intensive care facility (“ICF”). As such, under the San Diego Municipal Code, that use is an accessory use to the primary use which is residential housing. A good analysis of this issue was provided by Attorney Jan Chatten-Brown in her June 11, 2012 letter to City Attorney Jan Goldsmith. (See pp. 4-7.) The bottom line is that I believe the Deputy City Attorney failed to provide appropriate guidance to Development Services regarding the nature of its position regarding the appropriate use designation for the Rancho Del Mar Project and whether such a position would withstand legal scrutiny. The deference provided by the substantial evidence standard is not unlimited. Determinations that are arbitrary or capricious or entirely lacking in evidentiary support will not be upheld. In this instance, a good case could be made...
that a decision by the Development Services Department that the primary use associated with the Rancho Del Mar Project is as an ICF would be arbitrary and capricious and lacking any evidentiary support. The undisputed facts in this instance show that the ICF aspect of the Project is a small fraction of the total units, which are primarily residential in nature.

2. The Council May Approve the Rancho Del Mar Project as a Conditional Use Without a Majority Vote of the People.

I disagree with this conclusion for a number of reasons. First, I believe the Opinion incorrectly presumes that ICFs were allowed by the General Plan regulations that were locked into place by Proposition A. After its approval, the City was required to adopt regulations to carry out the intended purposes of Proposition A. One aspect of the regulations adopted was to eliminate uses that were “inconsistent with general plan policy objectives” for Proposition A lands. (See Fain Opinion, p. 2.) The old Municipal Code provisions that purported to allow ICF uses were eliminated by the City which found that they were not consistent with Proposition A General Plan policies. Specifically, as set forth in Ms. Fain’s Opinion, “The uses were considered inconsistent ‘generally because they are permanent uses that are urban in character or intensity, would create a significant demand for public services and facilities, or would primarily serve the adjoining urbanized communities instead of the rural areas.” (Id. p.2.) The uses were removed from the Code to eliminate staff’s obligation to process applications for uses that would ultimately be found to adversely affect the General Plan. Put another way, the new regulations eliminated code provisions that would arguably allow developers to circumvent the provisions of Proposition A by relying upon zoning regulations that were inconsistent with General Plan provisions. It is difficult to envision a circumstance in which the Council could now make an amendment that would put back into place the provisions that were eliminated as a result of the Proposition in the first instance.

In addition, the Opinion provided by Ms. Fain failed to acknowledge that not only would amendments to the San Diego City Code be required to consider approval of a conditional use permit for an ICF, but the applicable Community Plan for the property would also have to be amended. The current Community Plan for the property is the North City Future Urbanizing Area Framework Plan, which expressly provides that a vote of the people is required to amend its provisions, including the existing zoning provisions for the property which limit development. (Framework Plan, p. 16.) Thus, there is a clear legal question as to whether Council has the power to amend the zoning provision without a vote.

Presuming for the sake of argument that a conditional use permit for the Rancho Del Mar Project was permissible, in my opinion, the Council could not make the required findings for approval. Approval of a conditional use permit would require that the project meet one of the following three criteria:

1. The project is natural resource dependent;
2. The project is non-urban in character and scale; or
3. The project is of an interim nature which would not result in an irrevocable commitment of land precluding future uses.

The Rancho Del Mar Project is not natural resource dependent and is not of an interim nature. The only arguable finding that could be considered is whether it is non-urban in character and scale. This finding cannot be made because when the Council approved regulations eliminating ICFs as an allowed use within Proposition A lands, it did so based upon the express finding that such uses were “urban in character or intensity.” There is no question that the Rancho Del Mar Project, a high density residential facility involving 224 units, is urban in character and intensity. Accordingly, for this reason alone I do not believe the Council could make the required findings to approve a conditional use permit.

Please keep in mind that my opinion is based upon a review of the City Attorney Opinion and not all of the referenced documents. If this matter continues to proceed forward towards a potential approval, those documents should be reviewed and analyzed along with all other applicable rules and regulations. Also, I have had an opportunity to review the Opinion provided by Attorney Jan Chatten-Brown dated June 11, 2012. She provided a well reasoned letter that documented a number of other reasons I believe would disqualify the Rancho Del Mar Project from consideration as an allowed use.

Please feel free to give me a call if you would like to discuss this Opinion in more detail.