

**Office of  
The City Attorney  
City of San Diego**

**MEMORANDUM  
MS 59**

**(619) 236-6220**

**DATE:** May 5, 2020

**TO:** Honorable Members of the City Council

**FROM:** City Attorney Mara W. Elliott

**SUBJECT:** Status Update Regarding Negotiations Related to the Purchase of the SDCCU Stadium Site in Mission Valley by San Diego State University

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This follows the memorandum issued on May 1, 2020, regarding the status of negotiations related to the sale of the SDCCU Stadium Site. The City's legal team, including my Office and the outside law firm of Kane, Ballmer & Berkman, prepared the attached "Key Issues" document outlining the 14 most critical policy issues that are not addressed in the City's favor in the Draft Purchase and Sale Agreement (PSA) delivered last week by SDSU. These issues remain to be decided by the City Council at its May 19 meeting. The Attachment is consistent with the City Council's direction on November 18, 2019, to prepare a Purchase and Sale Agreement that protects the City, taxpayers, and utility ratepayers and adheres the terms contained in voter-approved Measure G.

The key policy issues are summarized below, and the numbers correspond to those found in the Attachment.

1. Whether the commencement date for the New Lease should continue to be July 1, 2020 as originally agreed to by the Parties, or, as the California State University (CSU) now proposes, the commencement date should be pushed back to an uncertain future date incurring a cost to the City of approximately \$1 million a month after July 1, 2020, as well as other adverse consequences.
2. Whether the City should adhere to the Council-directed Outside Closing Date of December 31, 2020, with one narrow exception, or, as CSU now proposes, the Outside Closing Date should be left open-ended and subject to vague contingencies, potentially allowing CSU to delay final the execution of the PSA and leave the City in a holding pattern for many years.
3. Whether the PSA should preserve the City's ability to operate existing and future planned water and sewer facilities, including Pure Water facilities, as required by applicable water and sewer bond covenants and by Measure G.

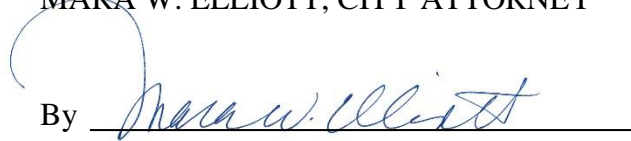
4. Whether the PSA should protect the existing City groundwater monitoring wells on the Property and the City's access to them, and require CSU to go through the City's standard processes if it seeks to relocate the wells.
5. Whether the sale should be conducted "as-is" with standard language in which CSU indemnifies the City against all environmental risk and liability for the Property and River Park Property in accordance with the language in Measure G, or, as CSU now proposes, the sale should be constructed so that the City as seller absorbs significant environmental risks and liability, likely of immense proportion, on CSU's behalf.
6. Whether the PSA should, as CSU proposes, include expanded warranties and representations by the City, including some that directly violate Measure G, and which expose the City to significant unanticipated liability after the Closing when the City no longer owns or controls the Property.
7. Whether language from Measure G on prevailing wage compliance should be accurately reflected in the PSA and its Attachments, making CSU (and not the City) responsible for any prevailing wage awards that could arise from the property's acquisition and development or, as CSU now proposes, all such language should be removed, subjecting the City to potentially enormous liability and costs.
8. Whether CSU should be responsible for the condition of Murphy Canyon Creek and indemnify the City against all deficiencies, as previously agreed to by the Parties, or, as CSU now proposes, the ongoing risk and liability of Murphy Canyon Creek should be shifted to the City, bringing with it potential extraordinary costs.
9. Whether the City should require CSU to collect from the CSU's development partners, and then remit to the City, the Regional Transportation Congestion Improvement Program (RTCIP) Fee paid by all developers, or as CSU now proposes, the City should agree to waive that fee and forgo an estimated \$10,000,000 in funds for major regional transportation and mobility projects.
10. Whether CSU and its development partners should be required to follow the City's standard procedure with respect to paying water and sewer connection fees, or, as CSU now proposes, the City should exempt CSU's development partners from those costs to the detriment of utility ratepayers.
11. Whether standard City park rules and regulations should initially apply to the River Park, protecting the public's right to access, or as CSU now proposes, the River Park should be governed by CSU's "grounds policy" for the SDSU campus, under which preferential treatment is afforded to university-related groups, exposing the City to potential litigation.

12. Whether the City should be included as a third-party beneficiary in all CSU contracts for River Park development, protecting the City against certain lawsuits, or, as CSU now proposes, that the City's inclusion as a beneficiary of CSU's contract provisions should be left to the sole discretion of CSU.
13. Whether CSU should comply with the negotiated terms and conditions of the previously negotiated River Park Development Agreement, or, as CSU now proposes, that it be allowed to alter those requirements at any time.
14. Whether CSU should comply with the City's Affordable Housing requirements as mandated by Measure G, or, as CSU now proposes, the City should allow CSU to follow its own rules, to oversee its compliance with those rules, and to allow the City and the Housing Commission no effective remedy to ensure that Affordable Housing units are built and occupied by income-eligible households.

We are looking forward to a robust discussion on May 19.

MARA W. ELLIOTT, CITY ATTORNEY

By

A handwritten signature in blue ink, appearing to read "Mara W. Elliott", is written over a horizontal line.

MWE:sne  
MS-2020-12  
Doc. No.: 2379161  
Attachment

cc: Honorable Mayor Kevin Faulconer  
Kris Michell, Chief Operating Officer  
Andrea Tevlin, Independent Budget Analyst

Attachment D to Staff Report for May 19, 2020 Council Meeting

**City/SDSU Transaction for the Sale of Mission Valley Stadium Site**

**Key Policy and Measure G Compliance Issues for the City Council's Consideration**

\*All capitalized terms in this document have the same meaning as in the draft Purchase and Sale Agreement (“**PSA**”), unless otherwise specified.

This document contains a list of significant policy and Measure G compliance issues that remain outstanding after CSU's submission, on April 28, 2020, of a substantially redrafted set of the PSA and its Attachments that include numerous provisions not negotiated with the City (“**CSU Draft**”). See Attachment C to the staff report for a copy of the main body of the CSU Draft, in red-lined format against the City's January 28 draft. The City requires the City Council's direction on several key issues in order for an acceptable version of the PSA and Attachments to be submitted for the Council's review and consideration. This list is not exhaustive because the Parties have not agreed on other policy and Measure G compliance issues nor the precise wording of specific provisions included in the PSA and Attachments. This circumstance exists mainly because, beginning in early April 2020, CSU declined the City's request to have the Parties' attorneys hold regular, frequent conference calls to negotiate the contractual language.

Prior extensive negotiations between the Parties involving two preliminary lists of policy issues resolved many issues (such that they are presently not included in this document) and partially resolved other issues (while deferring negotiation on the precise wording of the language). However, the City consistently reserved its right during the exchange of the two lists of policy issues to add new policy issues to a future master list once CSU finally provided the City with CSU's proposed revisions to the PSA, as well as all Attachments that CSU had promised by February 11 but did not provide to the City until April 28, 2020 – related to topics such as affordable housing, permitting, easements/access rights, and Fenton Parkway Bridge. Before CSU's transmittal of the CSU Draft, the City confirmed to SDSU in writing the City's standard requirements regarding permitting and easements/access rights, and the San Diego Housing Commission confirmed to CSU in writing the Housing Commission's standard requirements regarding the administration of affordable housing units.

Unfortunately, the CSU Draft disregards various key aspects of those standard requirements and conflicts in certain respects with Measure G and CSU's own revised offer, dated October 28, 2020, to purchase the Property (“**CSU Revised Offer**”). As a result, and in an effort to adequately protect the City's interests and maintain compliance with Measure G, the City's negotiating and legal teams have been left with no reasonable alternative but to bring forward additional issues in this document for the Council's input.

The most critical issues that remain, based on the City's review of the CSU Draft, can be categorized within four overarching concerns, as follows:

1. ***Lacks Compliance with Measure G;***
2. ***Conflicts with Prior City Council Direction (including the requirement for consistency with the CSU Revised and City-protective provisions);***
3. ***Exposes the City to Significant Risk and Potential Liability (such as eroding the requirement for an “as-is” sale of the Property at no cost to the City under Measure G and the CSU Revised Offer); and***
4. ***Conflicts with Commonly-Accepted Affordable Housing Requirements.***

The following summary includes: (i) each specific policy question for the Council's consideration; (ii) an executive summary of the major City concerns; and (iii) a description of the background of the issue, the City's rationale supporting its position, and the CSU Draft proposal. It is recommended that the Council vote "Yes" as to each question posed below in order to best accomplish the City's goal of a fair and equitable transaction that advances the interests of local taxpayers and utility ratepayers, consistent with Measure G, at SDMC Section 22.0908(a).

#### **1. CSU NEW LEASE COMMENCEMENT DATE**

- Conflicts with Prior City Council Direction
- Exposes the City to Significant Risk and Potential Liability

**City Council Question:** Should the commencement date for the CSU New Lease be July 1, 2020?

**Executive Summary:** Yes.

- **The City needs the CSU New Lease to commence on July 1, 2020, even if the PSA is not yet in effect by that date.**
- **The CSU Revised Offer promised a July 1 commencement if no Closing had occurred by that date, and the City has made budgeting decisions on that basis.**
- **If the CSU New Lease is not in place by July 1, the City will continue to incur close to One Million Dollars (\$1,000,000) each month in costs to maintain and operate the Existing Stadium for CSU's benefit under the CSU Existing Occupancy Agreement and for little to no benefit to the City.**

- A. **Background:** (PSA § 3) The Existing Stadium is subject to the CSU Existing Occupancy Agreement, which is the existing lease from the City to CSU on CSU-favorable terms, scheduled to expire on December 31, 2020. The CSU Existing Occupancy Agreement allocates to the City the maintenance responsibility and related costs and liability for the Existing Stadium for CSU's use. The CSU Revised Offer states that the CSU New Lease will take effect as of July 1, 2020, if the Closing has not occurred by June 30, 2020.<sup>1</sup> The Parties contemplate that, once the PSA is approved and effective, the Closing will occur within ten (10) business days after the Effective Date of the PSA, although certain litigation-related conditions required by CSU to be included in the PSA could result in a delay of the Closing for up to two years (and potentially longer based on the CSU Draft). The exact Effective Date of the PSA will depend on when the Council adopts the ordinance approving the PSA. Given the ordinance's 30-day referendum period, the Effective Date of the PSA, and therefore the Closing, will each occur after July 1, 2020. The Parties have reached an impasse on the commencement date of the CSU New Lease if the Closing does not occur quickly. This issue requires Council direction.
- B. **City's Position:** The CSU New Lease should commence on July 1, 2020 and, if necessary to implement the July 1 commencement date, the initiation of the CSU New Lease should not be made contingent upon the effectiveness of the ordinance approving the PSA. This commencement date is consistent with the CSU Revised Offer, which states that the CSU New

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<sup>1</sup> While CSU may point out that the CSU Revised Offer contemplates the Parties reaching consensus on a final PSA by late March 2020, CSU's prolonged delay in submitting its revised draft of various PSA Attachments to the City and refusal to allow the Parties' attorneys to negotiate specific contractual negotiations in recent weeks significantly impeded progress in negotiations over the past several months.

Lease will commence July 1, 2020 if the Closing has not occurred by then. The City's ongoing maintenance and operation of the Existing Stadium is expensive and time-consuming, with little to no benefit to the City. The terms of the CSU Existing Occupancy Agreement are very favorable to CSU and cause the City to operate the Existing Stadium at a substantial loss and to absorb associated liability risk. Acting in reasonable reliance on the CSU Revised Offer, the City prepared its proposed FY 2021 budget assuming that CSU will take over management and operation of the Existing Stadium no later than July 1, 2020.

- C. **CSU Draft:** In contrast with CSU's promise in the CSU Revised Offer to enter into the CSU New Lease by July 1, 2020 in the absence of a Closing by then, the CSU Draft limits any agreement to enter into the CSU New Lease by such date to the sole situation of a court issuing an injunction against the Closing. Even the CSU Draft's provisions for negotiating and considering the CSU New Lease document are limited to that sole eventuality.

The CSU Draft also contains new language not previously seen or discussed with the City which:

- (i) Effectively amends the CSU Existing Occupancy Agreement so that the scheduled termination might be extended past its existing termination date of December 31, 2020, if there is a delay in the Closing past that date;
- (ii) Limits the Time-Adjusted Value for increases in the Purchase Price for the Property benefiting the City's General Fund to the injunction situation only, instead of requiring such adjustment for all delays past a June 30, 2020 Closing, as directed by the City Council in an approved motion on January 27, 2020, based on the CSU Revised Offer; and
- (iii) Deletes each Party's right to terminate the PSA if there is no CSU New Lease entered into by July 1, 2020.

## **2. NO OUTSIDE CLOSING DATE AND OPEN-ENDED TIME EXTENSIONS**

- Conflicts with Prior City Council Direction
- Exposes the City to Significant Risk and Potential Liability

**City Council Question:** Should the Council-directed Outside Closing Date of December 31, 2020 remain, but be subject to an extension of up to two (2) years based only on two narrowly drafted agreed-upon reasons: a litigation injunction preventing Closing and the pandemic?

### **Executive Summary: Yes.**

- **The CSU Draft includes a new open-ended extension of the Closing that could last well beyond the agreed-upon "up to two year" litigation and COVID-19 pandemic delays, based on an unspecified range of non-litigation or non-pandemic delays.**
- **CSU's new approach could delay the close of escrow for many years, and deletes the Council-directed Outside Closing Date of December 31, 2020.**
- **The new definition of unspecified delays could be used as a reason to postpone the Closing for an indefinite, lengthy period.**

City representatives had thought this issue was substantively resolved by agreement on the "Injunction Preventing Closing" definition added to the PSA, subject to final approval

of pertinent PSA language. During the negotiations, CSU required that a delay of the Closing be added to the PSA for a period of up to two (2) years should an injunction be issued. In order to address CSU's proposed extension of the Closing, the Parties exchanged versions of PSA language to address the mechanics for a delayed Closing for up to two (2) years in the scenario where an injunction prevents the Closing. Subsequently to this document exchange, CSU then added additional delays of the Closing for the COVID-19 pandemic matter that may prevent a Closing. The City then replied with PSA language that allowed such a further extension of the Closing as proposed by CSU, by including the additional delay if courts, banks, and escrow/title companies are closed for business due to the COVID-19 pandemic, provided the Closing occurs within the two-year period.

- A. Background: (PSA §§ 8.1, 9.7) On November 18, 2019, the Council provided direction that the Outside Closing Date must be no later than December 31, 2020. CSU objected to this absolute deadline. As a result, the City agreed to revise the PSA as requested by CSU to state that the Closing will occur within ten (10) business days after the Effective Date of the PSA, subject to certain delays in the Closing for a period of up to two years due to a court having issued an injunction that prohibits the Closing or prohibits the signature and delivery of Closing Documents and payment of the Final Adjusted Purchase Price, and for the COVID-19 pandemic due to the court or businesses being closed for business. The CSU Draft includes an additional extension to the Closing that could last well beyond 2022.
- B. City's Position: In the Closing context, the term "Injunction Preventing Closing" needs to be narrowly defined to a circumstance that truly prevents the Parties from taking the mechanical steps needed to consummate the Closing. The definition cannot include language that is subject to subjective interpretation, potentially leading to a future dispute as to whether the Closing must occur, or include language that could delay the Closing for an unspecified period of years while preserving CSU's right during that indefinite period to acquire the Property. The City's acceptance of CSU's PSA language could place the Closing in a holding pattern for many years.
- C. CSU Draft: The CSU Draft provides for delays in the Closing, and therefore a delay of the sale of the Property, that go well beyond the narrowly defined Injunction Preventing Closing or COVID-19 pandemic events (for which the Parties had presumably agreed to language on the assumption of that narrow definition), and also deletes the Outside Closing Date of December 31, 2020.

### **3. PROTECTION OF CITY'S EXISTING AND PLANNED FUTURE WATER AND SEWER PUBLIC FACILITIES AND GROUNDWATER MANAGEMENT**

- Lacks Compliance with Measure G
- Conflicts with Prior City Council Direction
- Exposes the City to Significant Risk and Potential Liability

**City Council Question:** Should the City include provisions in the PSA that adequately preserve the City's ability to operate existing and planned future water and sewer public facilities, as required by applicable water and sewer bond covenants?

**Executive Summary: Yes.**

- The CSU Draft does not adequately protect the City's interests with respect to the operation and maintenance of existing public utilities or the construction, operation, and maintenance of planned future public facilities, including the Pure Water infrastructure and the City's exercise of its groundwater management rights.
- The CSU Draft is problematic in many ways with regard to this topic – too many to identify in this document alone. Among other things, CSU will need to agree to grant broad pre-approval rights to the City with respect to CSU's proposed construction of improvements that may jeopardize the City's continued successful operation of its existing and planned future public utilities and its exercise of groundwater management rights. In addition, CSU will need to forgo its plan to create a wetland mitigation area on the City-owned River Park Property in a location that would prevent the City's completion of, or significantly increase the City's costs of, infrastructure necessary for Phase II of the Pure Water Program.
- The City's present and future utility needs must be met in the sale transaction for at least three important reasons. First, Measure G acknowledges the need to protect the City's public utilities and groundwater management rights. Second, the City must maintain ongoing compliance with water and sewer bond covenants, which prevent the City from agreeing to any contract rights that will disrupt operation of the City's water and sewer utilities or reduce related revenues. Third, the City's loss of a future opportunity to achieve successful completion of Phase II of the Pure Water Program could not only substantially reduce the City's water production capacity for the benefit of local water customers, but also could force the City to retrofit the substandard Point Loma Wastewater Treatment Plant at an estimated cost of billions of dollars.

- A. **Background:** (River Park Easement Agreement §§ 6,7; Property Development Decl. § 3.3) A portion of both the CSU Property (i.e., the acquisition site) and the River Park Property is currently an asset of the City's Water Utility Fund. Upon the Closing, CSU will acquire fee title ownership of the CSU Property and the City will retain fee title ownership of the River Park Property. The City currently has water and sewer utilities in portions of the CSU Property and the River Park Property that will need to remain in operation, either in their current alignment or in a relocated alignment acceptable to the City.

In addition, the City has future planned uses for the River Park Property (and potentially part of the CSU Property toward its southern boundary). Those future planned uses include, but are not limited to, constructing and operating groundwater monitoring wells, production wells, and support infrastructure (including utility pipelines) in support of Phase II of the Pure Water Program (collectively, "**Pure Water Infrastructure**"). When completed, Phase II of the Pure Water Program will be a major daily source of potable water for the San Diego region. Phase II of the Pure Water Program is not ready to proceed yet and has not undergone any detailed engineering, such that PUD is presently unable to determine the exact footprint where the Pure Water Infrastructure will need to be installed on the River Park Property and the CSU Property.

In August 2019, the City identified to CSU certain designated areas where the City would need to retain permanent access rights for both the Pure Water Infrastructure and the City's exercise of groundwater management rights. CSU has preliminarily designed the River Park Improvements, the Storm Water Best Management Practice structures, and a wetland mitigation area on the River Park Property in a manner that will likely conflict with the City's future planned uses or increase



the City's costs of installing the Pure Water Infrastructure, to the detriment of the Pure Water Program and the Water Utility Fund. CSU's proposed installation of the wetland mitigation area on the River Park Property is completely incompatible with the Pure Water Infrastructure and the City's exercise of its groundwater management rights. As confirmed in the Final EIR, CSU can pursue suitable alternatives to creating a wetland area on the City-owned River Park Property, which include purchasing wetland mitigation credits from the City (at the wetland mitigation site adjacent to the CSU Property) or another landowner's wetland mitigation bank. CSU's effort to create a wetland mitigation area on the River Park Property is a cost-savings measure for CSU that seriously jeopardizes the future success of Phase II of the Pure Water Program.

**B. City's Position:**

As to the City's existing (or relocated) public utilities, the City needs sufficient easement and access rights to operate and maintain those utilities in accordance with all applicable City standards. The CSU Draft improperly interferes with the City's successful operation of those public utilities by, among other things: (i) refusing to accept the City's requirement that the City provide advance written approval, in its sole discretion, of CSU's proposed future improvements within any City easement/access areas for public utilities; and (ii) conferring upon CSU the automatic right to construct improvements within City easement/access areas if those improvements are planned as part of CSU's Project as described in the Campus Master Plan or the Final EIR. The City's public utilities need to have a paramount right over CSU's proposed improvements within City easement/access areas – a requirement that is not reflected, and in fact is contradicted, in the CSU Draft.

As to the City's future planned facilities, the City needs to reserve broad rights in designated areas on portions of the CSU Property and the River Park Property to ensure that the City can adequately manage the City's groundwater resources and meet any water and sewer utility needs, including construction and operation of the Pure Water Infrastructure. If the City needs to construct Pure Water Infrastructure or any facilities related to its exercise of groundwater management rights within the River Park, the City must be able to complete such activities without interference from CSU. The City will agree to restore limited surface improvements (landscaping, paving, etc.) in River Park areas that are temporarily impacted. However, the City cannot commit to replace River Park improvements in kind, as those improvements may not be compatible with the City's public utilities – e.g., the dimensions of a recreational field may need to be modified to accommodate a manway or vault, and a removed tree will not be allowed to be replanted on top of the City's public utilities. CSU may be relieved from its obligation to maintain any areas in which the City installs or constructs the Pure Water Infrastructure in the future. The City will cooperate with CSU to try to minimize any future impact on recreational uses within the River Park Property. The City's requirements, as discussed above, are not adequately reflected in the CSU Draft. In addition, the CSU Draft does not provide the City with adequate pre-approval rights with respect to CSU's proposed development activities on either the CSU Property or the River Park Property to ensure that the City is able to protect and preserve its right to construct Pure Water Infrastructure or any facilities related to its exercise of groundwater management rights.

In sum, the CSU Draft does not adequately protect the City's interests with respect to the operation and maintenance of existing public utilities or the construction, operation, and maintenance of planned future public facilities, including the Pure Water Infrastructure and the City's exercise of its groundwater management rights. This situation must be remedied for at least three important reasons. First, Measure G acknowledges the need to protect the City's public utilities and groundwater management rights (SDMC § 22.0908(u)). Second, the City must

maintain ongoing compliance with water and sewer bond covenants, which prevent the City from agreeing to any contract rights that will disrupt operation of the City's water and sewer utilities or reduce related revenues. Third, the City's loss of a future opportunity to achieve successful completion of Phase II of the Pure Water Program could not only substantially reduce the City's water production capacity for the benefit of local water customers, but also could force the City to retrofit the substandard Point Loma Wastewater Treatment Plant at an estimated cost of billions of dollars. The applicable regulatory authorities have permitted the City keep this treatment plant open without a retrofit that would bring the plant into compliance with current regulatory standards, based largely on the City's ongoing commitment to complete the Pure Water Program.

CSU Draft: The CSU Draft does not provide the City with the City's required pre-approval rights with respect to CSU's proposed construction of improvements that may jeopardize the City's continued successful operation of its existing public utilities and the City's ability to successfully complete the Pure Water Infrastructure and exercise groundwater management rights. In addition, CSU insists on placing a wetland mitigation area on the City-owned River Park Property in a location that would prevent the City's completion of, or significantly increase the City's costs of, the Pure Water Infrastructure. The CSU Draft is problematic in several other ways with regard to the City's existing and planned future public utilities and related infrastructure.

#### **4. RELOCATION OF CITY'S EXISTING GROUNDWATER MONITORING WELLS**

- Lacks Compliance with Measure G
- Conflicts with Prior City Council Direction
- Exposes the City to Significant Risk and Potential Liability

City Council Question: Should the PSA include the reservation or grant of an easement to the City for the existing monitoring wells, and require that CSU submit an application to the City for formal well relocation approval with relocation plans, drawings, and specifications in accordance with the City's standard process?

Executive Summary: Yes.

- **The CSU Draft does not provide adequate protections with respect to the City's existing groundwater monitoring wells toward the northern boundary of the CSU Property that are essential to the City's groundwater management activities. Measure G acknowledges the need to protect the City's groundwater management rights through the sale transaction.**
  - **The CSU Draft proposes to grant a mere right of entry permit to the City for the monitoring wells that could be revoked at CSU's option, whereas the City requires a recordable easement that meets City standards. Also, the CSU Draft seeks to have the City pre-commit to approval of CSU's relocation of the wells, whereas CSU will actually need to follow City's normal utility relocation process that ensures the relocated wells will meet the City's needs and provide reliable data regarding the detection of environmental contaminants in the groundwater.**
- A. Background: The City has existing monitoring wells toward the northern boundary of the CSU Property that are essential to the City's groundwater management activities and allow the City to continuously monitor the contamination levels in groundwater at the Property. In August 2019 or earlier, the City advised CSU regarding the location of these wells and informed CSU that the City would need to reserve an easement allowing the City's continued use of these wells after the Closing. CSU has planned its development in such a way that CSU believes the monitoring wells

must be relocated. CSU has proposed to limit the City's right at the time of Closing to a right of entry permit (which is a license that could be terminated at CSU's option at any time) rather than granting an easement in accordance with City standards. CSU also has proposed that the City pre-commit to approval of CSU's relocation of the wells.

- B. City's Position: Measure G acknowledges the need to protect the City's groundwater management rights through the sale transaction (SDMC § 22.0908(u)). The City is willing to cooperate with CSU to allow relocation of the existing wells, at CSU's own expense; however, this relocation must be accomplished through the City's normal utility relocation process that ensures the relocated wells will meet the City's needs. The City should not be required to pre-commit to removal of its monitoring wells, which provide valuable data relative to groundwater management, before CSU has identified the exact locations of proposed wells that could meet the City's requirements (access, easement requirements, utility offsets, etc.). New groundwater wells must meet all City, County of San Diego and State of California requirements, including the requirement that areas larger than the wellhead be protected in an easement. Before the City can approve CSU's removal of the City's existing monitoring wells, CSU must demonstrate that installing new wells in a different location will provide adequate data to meet the needs of the City's groundwater management program and to ensure that environmental contaminants are likely to be detected if they are entering the underground aquifer from adjacent properties.
- C. CSU Draft: CSU proposes to only grant the City a right of entry permit, not an easement, for the City's existing monitoring wells upon the Closing. CSU also proposes to have the City pre-commit to approve the removal of the monitoring wells, before CSU has identified exact well locations that will meet all applicable requirements and without submitting relocation plans, drawings and specifications.

## 5. "AS-IS" TRANSACTION AND ENVIRONMENTAL CONTAMINATION LIABILITY

- Lacks Compliance with Measure G
- Conflicts with Prior City Council Direction
- Exposes the City to Significant Risk and Potential Liability

City Council Question: Should the PSA include provisions requiring CSU to:

- (a) assume the risk and be responsible for all environmental remediation and contamination obligations and liability with respect to the Property and the River Park Property;
- (b) defend, indemnify, and hold harmless the City from and against all claims related to environmental remediation and contamination, as required by Measure G and as promised in the CSU Revised Offer; and
- (c) confirm CSU has relied on its own due diligence investigation in deciding whether to both purchase the Property and accept an easement interest in the River Park Property?

Executive Summary: Yes.

- The most significant immediate issue regarding environmental remediation with respect to the CSU Draft is CSU's deletion of clear, industry-standard provisions that expressly place all environmental remediation obligations and liability on CSU.
- The deleted provisions are consistent with the "as-is" nature of the sale under Measure G, the CSU Revised Offer, and prior Council direction, and must be restored to adequately protect the City's interests. CSU's proposed deletions cause the City to absorb environmental risks and liability, likely of immense proportion.

**In addition:**

- **CSU has been the primary tenant of the Property for over three years and has had the opportunity since early 2019 to perform due diligence on the Property in order to satisfy itself of the condition of the Property and the River Park Property.**
- **CSU (not the City) is responsible for developing the Project, including all costs of the development of the Property and construction of the River Park Improvements.**
- **The CSU Revised Offer confirmed that CSU would waive all environmental claims against the City. Fundamental to CSU waiving such claims against the City is CSU accepting responsibility for such claims, including the environmental remediation and associated liability.**
- **The CSU Draft also adds new representations and warranties regarding environmental contamination issues which directly conflict with Measure G and the CSU Revised Offer, and enables CSU to claim a breach of such representations as an excuse to not indemnify the City for related costs – costs that the City is prohibited to absorb under Measure G.**

The Council is urged to further consider:

(a) Under Measure G (at Section 2.B.2), the establishment of Fair Market Value already takes into account “costs of existing contamination”;

(b) Measure G requires that the construction and development of the Project and the River Park be done at no cost to the City’s General Fund and prohibits the City from paying any of such construction and development costs (SDMC Section 22.0908(i) and (n));

(c) The CSU Draft deleted PSA Section 6.3 titled “Potential Future Remediation of Environmental Contamination” in its entirety, which included provisions consistent with the CSU Revised Offer that (i) the City would not incur any expense or liability whatsoever with respect to any environmental remediation costs or expenses associated with CSU’s Project or any environmental contamination on the Property or the River Park Property, and (ii) CSU would defend, indemnify, and hold harmless the City from and against all claims related to environmental remediation and contamination; and

(d) Additionally, the CSU Draft deleted PSA Section 10.4(c) titled “CSU’s Assumption of Obligations Relating to Hazardous Substances” in its entirety, which included CSU’s agreement that the City would not have any obligation to remediate or remove hazardous substances discovered on the Property and that CSU assumes all such obligations and any related liabilities.

- A. Background: (PSA § 6.3, 10.3, 10.4, 12.5; River Park Development Agreement § 11.1; Property Declaration § 16.1) As is standard and typical in commercial real property transactions, the City has agreed to sell the Property to CSU and grant an easement to CSU on the River Park Property on an “as-is, where is” basis, subject to all faults and defects. These are express requirements of Measure G, which mandates that the sale of the Property and the development of the River Park Improvements shall be made at no cost to the City’s General Fund (SDMC Section 22.0908(i) and (n)). Such requirements also are consistent with prior Council direction and the CSU Revised Offer, which confirmed that CSU will acquire the Property in its “as-is” condition

and waive all environmental claims against the City.

- B. City's Position: Environmental contamination obligations and related liability with regard to development of the Property and the River Park Property are the responsibility of CSU. Compliance with Measure G requires that the PSA and its Attachments provide that CSU is responsible for all costs of the Project, including the River Park Project, which includes potential remediation and associated liability. CSU's effort to impose environmental risk upon the City in the CSU Draft is also inconsistent with the plain language of the CSU Revised Offer.
- C. CSU Draft: The CSU Draft eliminates the provisions in the PSA and its Attachments that adhered to the CSU Revised Offer in expressly placing the responsibility for environmental remediation and associated liability on CSU with regard to the Property and the Project. The CSU Draft also adds new representations and warranties regarding environmental contamination issues, which effectively undercut the "as-is" nature of this transaction, as explained above.

## 6. CITY'S POST-CLOSING LIABILITY FOR EXPANDED REPRESENTATIONS AND WARRANTIES

- Lacks Compliance with Measure G
- Conflicts with Prior City Council Direction
- Exposes the City to Significant Risk and Potential Liability

**City Council Question**: Should the City be protected from expanded representations and warranties and post-Closing liabilities in the CSU Draft?

**Executive Summary**: Yes.

- **The CSU Draft introduces brand-new provisions that expand the City's representations and warranties in the PSA and expose the City to what could be enormous unanticipated liability after the Closing when the City no longer owns or controls the Property. These brand-new provisions may lead to the PSA not being carried out as promised or substantially delayed.**
- **If the City accepts the CSU Draft, CSU could excuse itself from performing PSA obligations for invalid reasons, or the City could incur substantial liability as the result of: (i) a breach of the ADA Settlement Agreement arising from CSU's Existing Stadium operations after the Closing; (ii) a change in circumstance unknown to the City when not in ownership or control of the Property; or (iii) a lawsuit which succeeds in invalidating the Closing for some reason.**

Such newly revised provisions of the CSU Draft do not comply with Measure G, prior City Council direction, or the CSU Revised Offer in that such provisions are contrary to the "as-is" nature of the sale at no cost to the City, and conflict with many promised indemnities and obligations of CSU under Measure G and the CSU Revised Offer. They include:

- (i) Requiring that the City make ongoing representations and warranties regarding the ADA Settlement Agreement (i.e., an agreement that resolved a prior lawsuit alleging accessibility problems at the stadium), even though the City will no longer own or control the Existing Stadium after the Closing and even though the ADA Settlement Agreement itself provides for successors-in-interest to the Property to be bound by its terms (PSA § 10.2(d));

(ii) Introducing a continuing disclosure requirement that would subject the City to claimed liability if CSU believes there are material changes in circumstances on any subject covered by any of the City's representations, again even though the City will no longer own or control the Property or be in control of the River Park Property (PSA § 10.2(d));

(iii) Adding a new representation and warranty of the City broadly guaranteeing CSU that the Closing and the consummation of the transactions contemplated by the PSA are valid (PSA § 10.2(a)). This new City representation and warranty would undercut CSU's obligation to indemnify the City for any New LawsUIT promised in the CSU Revised Offer, under which CSU, not the City, takes responsibility for the validity of the approval and implementation of the PSA and the Closing. In fact, the CSU Draft removed language intended to confirm that CSU's indemnity obligation for any New LawsUIT would remain intact despite the City's representations and warranties. During negotiations leading up to CSU's transmittal of the CSU Draft, CSU made no mention of its intent to undercut its own indemnification obligation in this manner; and

(iv) Allowing CSU to refuse to perform its indemnification obligation to the City if changes in circumstances the City cannot control concerning the Property occur during a time period in which the City neither owns the Property nor controls the River Park Property.

- A. Background: (PSA §§ 4.2, 10.2, 10.4, 12.5) As is standard and typical in commercial real property transactions, the City has agreed to sell the Property to CSU and grant an easement to CSU on the River Park Property on an "as-is, where-is" basis, subject to all faults and defects, without extensive City representations and warranties that would undercut the nature of the transaction. These are express requirements of Measure G, which requires that the City not incur any costs as a result of this transaction (SDMC Section 22.0908(i) and (n)). Also, such requirements are consistent with prior Council direction and the CSU Revised Offer. The Parties have discussed these requirements during numerous meetings. In addition, CSU has been the primary tenant of the Property over the past three years and has had the opportunity to perform due diligence on the Property since early 2019 in order to satisfy itself of the condition of the Property and the River Park Property. Further, the CSU Revised Offer committed to indemnify the City for a New LawsUIT, which commitment cannot be undercut by exclusions and contingencies arising from City representations and warranties.
- B. City's Position: CSU needs to rely upon its own investigation and its own sophistication in real property transactions, as well as its own familiarity with the Property and the River Park Property, as the main stadium lessee, in deciding whether to sign the PSA to move forward with the sale transaction. The City has reasonably agreed to provide in the PSA and its Attachments limited factual representations and warranties regarding receipt of certain written notices and delivery of specified documents, not broad, vaguely-worded statements that could be exploited to the City's detriment.
- C. CSU's Draft: CSU seeks to require the City to provide broad representations and warranties on a variety of topics related to: (i) the physical and regulatory condition of the Property, including compliance with the ADA Settlement Agreement; and (ii) the validity of the consummation of the transactions contemplated by the PSA, which representations and warranties commence upon the Effective Date of the PSA or the Closing and last for one (1) year after the Closing, and which

also provides a right to CSU to terminate the Agreement if the City learns of a material inaccuracy of any such representation and warranty prior to the Closing.

## **7. CITY LIABILITY FOR PREVAILING WAGE AWARDS FROM CSU CONSTRUCTION AND DEVELOPMENT**

- Lacks Compliance with Measure G
- Conflicts with Prior City Council Direction
- Exposes the City to Significant Risk and Potential Liability

**City Council Question:** Should the language from Measure G on prevailing wage compliance be accurately reflected in the PSA and its Attachments, and should CSU (not the City) be responsible for any prevailing wage awards that could arise under State laws or regulations from CSU's acquisition of the Property and other property interests and from CSU's own construction and development?

### **Executive Summary: Yes.**

- **If the PSA and its Attachments do not clearly obligate CSU to be responsible for any and all applicable prevailing wage requirements and determinations for its own design, maintenance, construction and development (especially if triggered under State law for the entire Project), the City will be at risk of enormous liability and costs, potentially amounting to hundreds of millions of dollars in light of onerous penalties under State prevailing wage laws.**
- **The CSU Draft deletes two entire provisions meant to assure that the City does not incur any prevailing wage liability due to CSU's Project. Those provisions are required to comply with the Measure G requirement that CSU pay all costs for construction and development of the Project (PSA §§ 12.5(iv), 12.6). The City routinely includes protective language of this type in construction or maintenance contracts that may even arguably trigger prevailing wage requirements.**
- **As a matter of basic equity and fairness, the City should not incur any risk of prevailing wage noncompliance for CSU's acquisition of the Property, acceptance of the easement interest in the River Park Property, and CSU's Project. Nor can the City pay for any of these potential costs under the requirements of Measure G.**

The Parties had appeared to be close to resolving this issue. Both verbally and in written comments on April 20, 2020, CSU agreed in concept to the City's position on this subject, and has accepted that the City is not the "awarding body" for any CSU construction or development. The CSU Draft omissions of language on this subject expressly required by Measure G and reasonable protections for the City leave a real potential that the City could become liable for CSU's own construction and development costs if the State imposes the requirement for payment of prevailing wages on all or any portion of the Project. With this blatant omission, the City would be at risk of a potential State enforcement action and determination with associated liability for the payment of prevailing wages, which in turn could also impede and impair the City's right to receive any State funding on local construction projects for a two-year period (likely a loss of hundreds of millions of dollars for the City).

- A. **Background:** (PSA §§ 5.21, 12.5(iv), 12.6; Property Declaration; River Park Development Agreement; River Park Maintenance Agreement) The City will provide a direct financial subsidy

of \$1.5 million toward certain site preparation work in the Project. Other elements of the sale transaction, such as the City permitting CSU to construct the Storm Water Best Management Practice structures on the City-owned River Park Property, could be viewed as an indirect financial subsidy toward the Project. These factors raise the possibility that prevailing wage compliance is triggered for the entirety of CSU's Project, not only the public improvement components. In addition, CSU will be performing design and maintenance activities, in addition to construction work, which may also trigger the requirement to pay prevailing wages.

- B. City's Position: CSU is responsible for designing, constructing, and maintaining the Project and CSU, and not the City, should be responsible for complying with all applicable prevailing wage requirements. Otherwise, the City could incur significant financial penalties, including wage underpayment penalties on the Project and other statutory penalties (including the forfeiture of any State funding toward local construction projects for a two-year period), if it is later determined that prevailing wage requirements apply to any aspect of the Project and that the City did not cause the PSA and its Attachments to affirmatively impose those requirements on CSU. Similarly, the City could incur significant liability for CSU's noncompliance with prevailing wage requirements if CSU does not provide adequate defense and indemnification in that regard and with respect to the sale of the Property and any other conveyance of a property interest to CSU.
- C. CSU Draft: The CSU Draft includes provisions in the PSA and its Attachments that do not conform to prevailing wage language in Measure G. The CSU Draft also narrows CSU's obligations with respect to prevailing wage matters and narrows (and deletes, in some cases) specific obligations of CSU to defend and indemnify the City as to any third party's claims regarding lack of compliance with all prevailing wage requirements determinations.

## 8. MURPHY CANYON CREEK LIABILITIES

- Lacks Compliance with Measure G
- Conflicts with Prior City Council Direction
- Exposes the City to Significant Risk and Potential Liability

**City Council Question**: Should CSU be responsible for the physical and regulatory condition of Murphy Canyon Creek, including making improvements to the southern portion of Murphy Canyon Creek if, in the future, another regulatory agency determines that such repairs or improvements are required, and should CSU be responsible for indemnifying the City as to deficiencies in any portion of Murphy Canyon Creek?

### **Executive Summary**: Yes.

- **The CSU Draft eliminates CSU's prior commitments regarding Murphy Canyon Creek and significantly limits CSU's obligations with respect to the portion of the Property to be acquired by CSU on which Murphy Canyon Creek traverses, shifting the burden of ongoing risk, liability, and potential extraordinary costs to the City.**

The Parties had appeared to be close to resolving this issue. Consistent with Measure G, prior City Council direction, and the CSU Revised Offer, CSU verbally agreed during negotiations that CSU would maintain all of Murphy Canyon Creek, including the southern portion, and if a regulatory agency requires improvements to the creek, then CSU agreed to complete the



improvements, but is otherwise under no affirmative obligation to make creek improvements. Specifically, the CSU Draft contains language which absolves CSU of any responsibility for any future legally-required curative improvements or conditions on the Murphy Canyon Creek Parcel. Additionally, the CSU Draft expressly excludes from CSU's indemnification obligations, for the benefit of the City, claims for deficiencies relating to conditions of Murphy Canyon Creek.

- A. Background: (Property Declaration; River Park Agreements) CSU will take ownership of the majority of the Murphy Canyon Creek east of the Existing Stadium as part of its purchase of the 135.12-acre Property. A small southern portion of Murphy Canyon Creek will continue to be owned by the City, but will be maintained by CSU as part of the River Park. The City is not requiring as a condition of the sale transaction that CSU make any improvements to Murphy Canyon Creek at this time. However, in the future, another regulatory agency could determine that repairs or improvements must be made to Murphy Canyon Creek.
- B. City's Position: CSU should be responsible for any maintenance, repairs, or improvements that are required to be made to Murphy Canyon Creek in the future. CSU should also be obligated to indemnify the City for its operation and maintenance of Murphy Canyon Creek, without any carve-outs for claims related to conditions that exist on or before the Closing Date. The sale transaction is an "as-is" transaction in all aspects, consistent with CSU's Revised Offer. CSU should be responsible for 100 percent of the costs of its perpetual maintenance and operation of both the Property and the River Park Property, including the southern portion of Murphy Canyon Creek (except to the limited extent that the City is operating any public facilities in that area).
- C. CSU Draft: As evidenced by the CSU Draft, CSU seeks to not be responsible for certain claims involving Murphy Canyon Creek, even for the portions of the Property to be acquired by CSU, and seeks to not be obligated to perform any physical improvements to the southern portion of Murphy Canyon Creek or for indemnifying the City for claims arising from or relating to (1) deficiencies or other conditions occurring or existing within the portions of Murphy Canyon Creek located on the Property or the River Park Property prior to the Effective Date or (2) deficiencies or other conditions occurring or existing before or after the Effective Date on portions of Murphy Canyon Creek that are not the Murphy Canyon Creek Parcel or Southern Murphy Canyon Creek.

## 9. OBLIGATION TO PAY REGIONAL TRANSPORTATION FEE

- Lacks Compliance with Measure G
- Exposes the City to Significant Risk and Potential Liability

**City Council Question**: Should the CSU Developer Entities (i.e., CSU's development partners for construction of the Project) be subject to the standard Regional Transportation Congestion Improvement Program fee ("**RTCIP Fee**") if the pertinent development component of the Project does not qualify for an exemption under the local TransNet Ordinance?

**Executive Summary**: Yes.

- As a requirement of the voter-approved TransNet Extension Ordinance, the City collects the RTCIP Fee for use in funding major regional transportation and mobility projects. If the City does not require CSU to collect, and then remit to the City, the RTCIP Fee from the CSU Developer Entities (whenever the RTCIP Fee

**applies and is not subject to an exemption), then the City could be waiving a total estimated payment of up to \$10 million, depending on the actual number of the units that are built.**

- **If the City waives payment of the RTCIP Fee, then not only will much less funding potentially be available for major regional transportation and mobility projects, but the City may become entangled in a dispute with SANDAG for which the City will need to assert an indemnification claim against CSU.**
- A. Background: (Property Development Decl. § 4.5) The City agreed that CSU (rather than the City) would collect, and remit to the City, certain “Additional Development Fees,” which have consistently included the RTCIP Fee under the City’s draft PSA. The City further agreed that CSU would be responsible for making the determination of whether a specific project is exempt from a particular fee. CSU agreed to indemnify the City for any claims related to non-payment of development fees, such as the RTCIP Fee, which is a fee that the City routinely collects as a participating jurisdiction in the TransNet Extension Ordinance. For the first time in the CSU Draft submitted on April 28, CSU has proposed to delete the RTCIP Fee from the definition of Additional Development Fees. This deletion means CSU would not be required to collect the RTCIP Fee from any CSU Developer Entity even if the CSU Developer Entity is developing residential units that otherwise would be subject to the fee.
- B. City’s Position: Measure G requires development on the CSU Property to comply with the City’s development impact fee requirements (SDMC § 22.0908(1)). The TransNet Extension Ordinance sets forth specific exemptions for certain types of projects. The RTCIP Fee must be collected for any project that is not exempt. CSU’s proposed “universal exemption” of the entire CSU Project from the RTCIP Fee is improper, and in direct violation of Measure G, because many development components in the CSU Project will be plainly subject to the RTCIP Fee. If the City accepts CSU’s proposal for a universal exemption, the City will be effectively waiving, without SANDAG’s knowledge or consent, an estimated amount of up to \$10 million in fees that should be collected and used for major regional transportation and mobility projects.<sup>2</sup> As a result, the City’s General Fund may become directly liable for payment of the uncollected RTCIP Fee. Even though CSU has offered to indemnify the City for any liability related to the City’s waiver of the RTCIP Fee, the City may become embroiled in a protracted dispute with SANDAG and CSU regarding the unauthorized waiver, and the region will lose up to \$10 million in funding that was required to be collected under the TransNet Extension Ordinance.
- C. CSU Draft: CSU has deleted the RTCIP Fee from the definition of Additional Development Fees that it would be required to collect. CSU has agreed to indemnify the City against claims related to nonpayment of the RTCIP Fee.

## **10. OBLIGATION TO PAY STANDARD WATER AND SEWER CAPACITY FEES**

### **➤ Lacks Compliance with Measure G**

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<sup>2</sup> The City’s waiver of the RTCIP Fee, where such fee applies, would amount to an indirect subsidy of substantial public funds toward the pertinent development components of CSU’s Project. As a result of this subsidy, prevailing wage requirements would likely apply to the entirety of the Project. A separate policy issue in this list identifies the massive financial risk that the City will incur if it does not receive the benefit of an adequate indemnification from CSU against future prevailing wage claims.

- Exposes the City to Significant Risk and Potential Liability

**Council Question:** Should CSU and the CSU Developer Entities be required to follow the City's standard procedure with respect to utility connection fees, which requires the payment of all Water and Sewer Capacity Fees before any construction activity commences and applies the fees to any new, additional, or increased connection to the City's water or sewer system?

**Executive Summary:** Yes.

- **CSU proposes to limit the payment of Water and Sewer Capacity Fees to a situation in which CSU needs to make a larger connection to the City's system. CSU proposes not to pay these fees with respect to any "new, additional, or increased connection," based on the City's customary fee collection process.**
  - **CSU and its development partners must follow the City's standard procedures for up-front payment of the Water and Sewer Capacity Fees. The City's consistent application of its procedures is required to treat all developers equitably and protect the financial interests of utility ratepayers. The City's acceptance of CSU's attempt to carve out a special exemption from payment of fees for certain utility connections could result in an illegal gift of public funds, to the detriment of utility ratepayers.**
- A. **Background:** (Property Development Decl. § 4.6) The City routinely collects Water and Sewer Capacity Fees from all developers who propose to make a new, additional, or increased connection to the City's water or sewer system. The City plans to follow its standard procedure for the Project. Instead, CSU seeks to carve out a special exemption from the City's standard procedure, for the benefit of CSU and its development partners and to the detriment of local water and sewer utility ratepayers.
- B. **City's Position:** Measure G requires development on the CSU Property to comply with the City's development impact fee requirements (SDMC § 22.0908(1)). There is no justification for giving special treatment to CSU and its development partners relative to the normal situation, in which the developer must make an up-front, complete payment of the Water and Sewer Capacity Fees before connecting to the City's utility system. In terms of CSU's request for a credit against these fees, CSU and its development partners are not entitled to a credit against payment of the City's standard Water and Sewer Capacity Fees for any new, additional, or increased connection to the City's water or sewer system. The City is prohibited from providing such a credit because that approach would lead to an illegal gift of public funds, to the financial detriment of ratepayers.<sup>3</sup> While CSU may contend that it is not seeking a special exemption in this instance, the CSU Draft can be reasonably interpreted as granting a special exemption, and therefore, the City's standard language regarding collection of Water and Sewer Capacity Fees needs to be restored in the PSA.
- C. **CSU Draft:** CSU proposes to limit the circumstances under which Water and Sewer Capacity Fees are paid to the City to construction activity that will result in a larger connection to the City's water or sewer system than existed as of the Closing of the sale transaction. CSU's

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<sup>3</sup> Even if (for the sake of argument) the City could waive application of the standard Water and Sewer Capacity Fees in certain scenarios, the City's waiver would amount to an indirect subsidy of substantial public funds toward the pertinent development components of CSU's Project. As a result of this subsidy, prevailing wage requirements would likely apply to the entirety of the Project. A separate policy issue in this list identifies the massive financial risk that the City will incur if it does not receive the benefit of an adequate indemnification from CSU against future prevailing wage claims.

proposal is at odds with the City's standard process, under which the City collects the fees with respect to any "new, additional, or increased connection to the City's water or sewer system."

## 11. PRESERVATION OF PUBLIC ACCESS TO RIVER PARK PROPERTY

- Lacks Compliance with Measure G
- Exposes the City to Significant Risk and Potential Liability

**Council Question:** Should the City's rules and regulations applicable to public parks apply to the River Park, until such time as CSU develops rules and regulations for the River Park, including the penalties for violations thereof, and the Council adopts an ordinance to approve those rules and regulations, all as required by San Diego Charter section 55?

**Executive Summary:** Yes.

- Under Charter section 55, the City's standard rules and regulations must apply to the River Park until CSU develops rules and regulations for the River Park, in a manner consistent with the River Park being a public park available for use by all members of the public, and subject to the Council's future approval. CSU proposes to develop rules and regulations at some time in the future for approval by Council, but in the interim, proposes that CSU's existing "grounds policy" for the SDSU campus apply to programming and permitting of the River Park. However, that grounds policy does not address the River Park specifically, or parks generally.
  - One very concerning aspect of the grounds policy is that it confers preferential treatment upon university-related groups and individuals over the general public, such as giving priority to the university community in reserving space and limiting the public's right to reserve space to no more than four days per month. This type of preferential treatment is directly contrary to the requirement in Measure G that the River Park be made available for use by the public generally. The City's acceptance of CSU's position could result in a lawsuit being raised by interested members of the public alleging that the City has improperly allowed CSU to apply policies for operation of the River Park that directly conflict with Measure G.
- A. **Background:** (River Park Maintenance Agmt. § 2.4) Measure G requires that the River Park Property be designated under San Diego Charter (Charter) section 55. The City will retain fee ownership of the River Park Property, and CSU will own, maintain, and operate the River Park Improvements located on the River Park Property. CSU will be responsible for issuing any permits associated with use of the River Park.
- B. **City's Position:** Measure G requires the City to designate the River Park Property for park and recreation purposes in accordance with Charter section 55, and further requires that the improved River Park be made available "for use by all members of the public" (SDMC § 22.0908(c)(2), (i)). The Charter is the City's local constitution, and compliance with the Charter's provisions at all times is mandatory, not optional. Under Charter section 55, the City Manager (now the Mayor) is required to have control and management of parks, recreation centers, recreation camps, and recreation activities held on any City playgrounds and parks owned, controlled, or operated by the City. Charter section 55 also requires that the Council adopt regulations by ordinance for the use and protection of City-owned park property, and provide penalties for violations of those regulations. If the City wishes to allow CSU to operate the River Park subject only to rules and regulations that CSU develops, the Council will need to adopt an ordinance: (i) waiving the

applicability of the Municipal Code sections containing park regulations generally applicable to public parks within the City limits and special event permit requirements to the River Park Property; and (ii) accepting CSU's regulations for the River Park, which must include penalties for any violations of those regulations.

CSU has proposed that its programming and permitting of River Park uses be subject to the Buildings and Grounds Policy for SDSU's existing campus ("**CSU Grounds Policy**"), as may be updated and approved by the SDSU campus president from time to time. CSU's proposal does not comply with the Charter section 55 requirements for park property and would allow CSU to make changes to park rules and regulations, including penalties for violations, without any advance notice or opportunity for public input on such changes. Additionally, the CSU Grounds Policy does not address the River Park specifically, or parks generally. The most applicable provisions of the CSU Grounds Policy appear to be related to use of "campus outdoor space."

Most significantly, the CSU Grounds Policy confers preferential treatment upon university-related groups and individuals over the general public, such as giving priority to the university community in reserving space and limiting the public's right to reserve space to no more than four days per month. This type of preferential treatment is directly contrary to the requirement in Measure G that the River Park be made available "for use by all members of the public" (SDMC § 22.0908(c)(2)). The City's acceptance of CSU's position not only could result in inequitable public access to the River Park, to the disadvantage of the local community, but also could result in a lawsuit being raised by interested members of the public alleging that the City has improperly allowed CSU to apply policies for operation of the River Park in direct conflict with Measure G.

- C. CSU Draft: CSU proposes that its programming and permitting for River Park use should be subject to the CSU Grounds Policy, regardless of whether CSU has otherwise developed rules and regulations applicable to the River Park that have been approved by the Council by ordinance in compliance with Charter section 55.

## 12. THIRD-PARTY BENEFICIARY PROVISIONS FOR PROTECTION OF THE CITY

- Conflicts with Prior City Council Direction
- Exposes the City to Significant Risk and Potential Liability

**Council Question:** Should CSU be required to include the City as a third-party beneficiary in all of its contracts for the design, construction, maintenance, and operation of the River Park, consistent with the City's standard approach in similar situations and for the City's protection?

**Executive Summary:** Yes.

- **The City will continue to own the real property on which CSU will construct and operate the River Park. In similar situations, the City's standard approach is to require the City to be named as a third-party beneficiary on all contracts between the master developer and its contractors. Being named as a third-party beneficiary on each of CSU's River Park contracts will afford the City the option to enforce terms and conditions of the contract, such as the requirement to design the River Park in compliance with ADA accessibility standards, the requirement to name the City as an additional insured, and the indemnity and hold harmless provisions.**
- **If the City is not named as a third-party beneficiary, including on CSU's consultant and design contracts, the City will not be named as an additional insured on the insurance policies of those consultants, who accordingly will have no obligation to**

**indemnify the City. Consequently, the City (as the fee title owner of the River Park Property) may have limited, if any, protection against future lawsuits alleging, for example, an injury from a defective design. In that scenario, the City may be unable to pursue a claim against a responsible design professional because a court may determine the design professional did not owe a duty of care to the City, given that the City is not a party to the pertinent design contract.**

- A. Background: General contract law provides that only the parties to a contract are entitled to enforce that contract, unless the contract specifically identifies third-party beneficiaries to the contract. The City's standard development agreement requires that the developer include the City as an express third-party beneficiary of any contracts that the developer enters into for the design and construction of public improvements, to ensure that the City is able to enforce those contracts, if necessary to protect its own interests. The standard agreement also requires that the City be named as an additional insured and that the City be an indemnified party under design and construction contracts for work occurring on City-owned property or resulting in City-owned improvements. In recent negotiations, the Parties verbally agreed that CSU would attach a Rider to its contracts naming the City as an express third-party beneficiary, even for contracts that CSU had previously executed for design professional services for the River Park. However, the CSU Draft does not reflect that prior verbal agreement.
- B. City's Position: Requiring a third-party beneficiary provision to be included in CSU's design and construction contracts will allow the City to enforce the contracts, if deemed necessary by the City to protect its interests, regardless of whether CSU chooses to take action. If the City is not named as an express third-party beneficiary, the City will have limited to no rights to pursue any remedies directly against developers, contractors, or consultants whose work results in damage to the City-owned River Park Property or who fail to perform their obligations under those contracts, which could prevent or delay completion of the River Park Improvements. As described above, the City's acceptance of CSU's position could result in additional liability exposure to the City with respect to future lawsuits, in amounts that are difficult to predict.
- C. CSU Draft: CSU proposes that it should only be required to use commercially reasonable efforts to include third-party beneficiary provisions in River Park contracts that it signs in the future, and that it should have no such requirement at all with respect to contracts already signed.

### **13. CSU GENERAL CONTRACT PROVISIONS PREVAILING OVER RIVER PARK DEVELOPMENT AGREEMENT OBLIGATIONS**

- Conflicts with Prior Council Direction
- Exposes the City to Significant Risk and Potential Liability

**Council Question**: Should CSU be obligated to comply with the requirements of the River Park Development Agreement if those requirements conflict with CSU's General Contract Conditions?

**Executive Summary**: Yes.

- **CSU has proposed that, if there is a conflict between its general contracting provisions and the River Park Development Agreement, then the CSU's general contracting provisions will prevail, and CSU will not be required to comply with the affected terms and conditions of the negotiated River Park Development Agreement. The City's acceptance of CSU's position would mean that CSU could**

**unilaterally change its general contracting conditions at any time and thereby avoid complying with any contrary provisions in the River Park Development Agreement, to the likely detriment of the City. In other words, the City's acceptance of CSU's position could render any provision of the River Park Development Agreement as an illusory promise, at CSU's sole option at any future time.**

- A. Background: (River Park Development Agmt.) CSU uses certain "general terms and conditions" ("**CSU General Contract Conditions**") in its construction and development contracts, any may change the CSU General Contract Conditions from time to time. The CSU General Contract Conditions may differ from the City's requirements for development on City-owned property. CSU has proposed that, if there is a conflict between the CSU General Contract Conditions and the River Park Development Agreement, then the CSU General Contract Conditions will supersede the River Park Development Agreement, and CSU will not be required to comply with the affected terms and conditions of the negotiated River Park Development Agreement.
- B. City's Position: Under the negotiated River Park Development Agreement, CSU has agreed to comply with certain City requirements and has further agreed to include certain City requirements in CSU's third-party contracts for development, construction, and maintenance of the River Park (including, for example, the City's requirements related to payment and performance bonds to secure completion of the River Park Improvements). CSU should be required to comply with its obligations under the River Park Development Agreement, regardless of whether those obligations are consistent with the CSU General Contract Conditions. If CSU anticipates that there is a specific conflict with the CSU General Contract Conditions, and is unwilling to comply with one or more contractual requirements under the River Park Development Agreement, CSU should identify the objectionable requirements and negotiate a resolution with the City now so that the Parties can clarify exactly what CSU is required to do.

The City's acceptance of CSU's position would mean that CSU could unilaterally change the CSU General Contract Conditions at any time and thereby avoid complying with any contrary provisions in the River Park Development Agreement, to the likely detriment of the City. In other words, the City's acceptance of CSU's position could render any provision of the River Park Development Agreement as an illusory promise, at CSU's sole option at any future time. For example, CSU could unilaterally amend the "force majeure/unavoidable delay" provisions in its General Contract Conditions, allowing CSU to nullify the City's construction requirements for the River Park Improvements, or CSU could amend the General Contract Conditions to state that there are no third-party beneficiaries to CSU's contracts, allowing CSU to nullify the requirement to name the City as a third-party beneficiary under third-party River Park contracts.

CSU Draft: CSU has proposed to handle conflicts by including a provision in the River Park Development Agreement that states: "CSU Contract General Conditions. Notwithstanding anything to the contrary herein, CSU shall require compliance with the surety and bonding requirements set forth in the CSU General Contract Conditions prepared by the Office of the Chancellor, Capital Planning, Design and Construction, June 2019, as the same may be amended, modified or supplemented in the future. Any conflicts between the terms of this Agreement and the General Contract Conditions shall be resolved in favor of the General Contract Conditions."

#### **14. COMPLIANCE WITH AFFORDABLE HOUSING REQUIREMENTS**

- Lacks Compliance with Measure G
- Conflicts with Prior City Council Direction
- Conflicts with Commonly-Accepted Affordable Housing Requirements

**City Council Question:** Should the PSA include provisions requiring CSU (or its selected affordable housing developers, as applicable) to:

(a) comply with the San Diego Housing Commission's commonly-accepted standard template of long-term affordability covenants and regulatory deed of trust for affordable housing units, including monitoring, administration, and enforcement by the Housing Commission (rather than allowing CSU to loosely self-certify compliance on a "spot-check" basis);

(b) comply with the income averaging rules established by the California Tax Credit Allocation Committee (as opposed to CSU's vague income averaging approach), unless the Housing Commission agrees to a different arrangement in its sole discretion, with respect to CSU's proposal to produce affordable housing rental units at an "average" of 60 percent of area median income; and

(c) agree to a reasonable outside date for the initiation of each affordable housing phase and the completion of each phase once construction of market-rate units has commenced, subject to the Housing Commission's reasonable approval of requested time extensions based on delays caused by market conditions?

**Executive Summary:** Yes.

- **The CSU Draft includes massive revisions to the Housing Commission's standard template of Master Affordable Housing Declaration ("Master Declaration"), by which CSU seeks to (i) exert control over virtually all aspects of the affordable housing component of CSU's Project; (ii) prepare its own form of long-term affordability covenants and regulatory deed of trust (collectively, "Developer-Specific Regulatory Documents"), to be recorded only in favor of CSU (not the City or the Housing Commission); and (iii) advance its own customized affordable housing program, containing several vague and likely unenforceable provisions.**
- **If the City accepts CSU Draft, then CSU's Project will fail to meet the express mandate in Measure G for compliance with the City's affordable housing requirements (SDMC § 22.0908(1)), to the detriment of the local community.**
- **Under the CSU Draft, the City and the Housing Commission also will not have any adequate remedy to ensure that affordable housing units are timely constructed and continuously occupied by income-eligible households. The CSU Draft broadly allows excusable delays for initiating and completing construction of affordable housing units, which could cause the units required to be built in each of four development phases to be delayed indefinitely, and potentially never built at all.**

- A. **Background:** (Affordable Housing Declaration) The City's initial draft of the PSA, transmitted to CSU on January 28, included the Master Declaration based on the standard template used consistently by the Housing Commission for local affordable housing projects. Consistent with established practice, the City's draft of the Master Declaration described the anticipated affordable housing component of CSU's Project, contemplated that the Master Declaration would be recorded in senior lien priority against the Property upon the Closing of the sale transaction, and further contemplated that the standard template Developer-Specific Regulatory Documents would be recorded in senior lien priority against the affected affordable housing developer's project site upon CSU's signature of a ground lease with such developer.



The City's initial draft of Master Declaration, based on the Housing Commission's standard template, stated that the Housing Commission will monitor, administer, and enforce compliance with the Developer-Specific Regulatory Documents for specific affordable housing projects within CSU's Project and that each affected affordable housing developer will pay the Housing Commission's standard administration fee for that purpose. By contrast, the CSU Draft proposes that CSU would administer compliance with its own affordable housing program (a program not in compliance with the City's affordable housing requirements), subject to CSU's ability to delegate the administrator role to the Housing Commission in CSU's sole discretion. CSU also proposed that, as part of its self-certification of compliance with its own affordable housing program, CSU would "periodically monitor and spot verify" the accuracy of statements made by affordable housing applicants – for example, verification that the applicant actually meets the income requirements to be eligible for occupancy in the restricted affordable housing unit. CSU has not proposed any specific language that would require ongoing monitoring for each occupant's compliance with income requirements at regular intervals – for example, after the date of initial occupancy, the occupant's income could increase (sometimes substantially), causing the occupant to no longer meet the income requirements for the applicable affordable housing unit.

B. City's & Housing Commission's Position:

*Enforceability of Affordable Housing Requirements*

Measure G, at Municipal Code section 22.0908(l), plainly states that the sale transaction "shall require development [on the Property] to comply with the City's . . . affordable housing requirements."<sup>4</sup> The City's affordable housing requirements are primarily contained in the City's Inclusionary Affordable Housing Regulations ("**Inclusionary Regulations**"), codified in Chapter 14, Article 2, Division 13 of the Municipal Code. The Inclusionary Regulations, at Municipal Code section 142.1310, require all development of affordable housing units to comply with the Housing Commission's Inclusionary Affordable Housing Implementation and Monitoring Procedures Manual and further require that affordable housing covenants, approved by the Housing Commission and in favor of the Housing Commission, be recorded against the pertinent site in first lien position, secured by a regulatory deed of trust in the Housing Commission's favor (i.e., this is a collective reference to the Developer-Specific Regulatory Documents). The Housing Commission's standard template of Developer-Specific Regulatory Documents exists for a simple and obvious reason: to ensure that the affordable housing units promised by the developer at the outset are actually constructed, operated, and maintained over the long term in accordance with applicable affordable housing requirements, for the benefit of the local community.<sup>5</sup>

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<sup>4</sup> CSU has taken the position that CSU (as a State agency) is generally immune from local laws and regulations, and therefore, should not be required to comply with the City's affordable housing requirements. That position is directly contrary to the language and intent of Measure G and, if accepted by the City, would frustrate the will of local voters who approved Measure G in November 2018 and eviscerate a key component of Measure G. Although CSU is generally immune from local laws and regulations, Measure G requires CSU to contractually agree to comply with the City's affordable housing requirements as a condition of the sale transaction. Without such agreement on CSU's part, no sale transaction in compliance with Measure G can occur.

<sup>5</sup> Local affordable housing developers are very familiar with the Housing Commission's standard template of Developer-Specific Regulatory Documents and routinely sign the Housing Commission's documents based on that standard template without any need for extensive negotiations. Local affordable housing developers typically have no expectation or need to depart from the Housing Commission's standard template, which has become an accepted standard in the local affordable housing industry. In certain instances, the Housing Commission will approve one or more requested deviations from its standard template if an affordable housing developer provides a compelling factual justification. The Housing Commission is willing to follow the same approach in this instance, but any

In all local affordable housing projects developed in accordance with the Inclusionary Regulations, the Housing Commission is the regulatory administrator and routinely monitors and certifies compliance with the applicable affordable housing requirements, including each resident's income eligibility, both in connection with the resident's initial application and at regular intervals throughout the resident's occupancy period. The income verification typically involves the collection of several months of current and consecutive pay stubs to determine income eligibility before the resident's move-in date and again through subsequent, regular re-certifications.<sup>6</sup> Without proper monitoring and certification (including re-certifications) of this nature, the City would have no reasonable assurance that affordable housing requirements are being met continuously at the affordable housing units within CSU's Project.

The CSU Draft seeks to create a customized, loosely-enforced affordable housing program for CSU's Project and eliminates any effective enforcement rights of the City and the Housing Commission against CSU under the Master Declaration and against individual affordable housing developers under the Developer-Specific Regulatory Documents. If CSU "enforces" compliance in the lax manner suggested by the CSU Draft and based on CSU's inadequate expertise, it is very likely that many occupants of the affordable housing units in CSU's Project will be income-ineligible at the outset or will become income-ineligible during their occupancy period without any detection by CSU. That circumstance would undermine the intent of local voters, who approved Measure G with the reasonable expectation that affordable housing units in CSU's Project would comply with the City's affordable housing requirements at all times.

### ***Income Averaging Approach***

CSU's proposal is to produce affordable housing rental units on the Property that are affordable to occupants who have an average income equal to or less than 60 percent of area median income. Under that proposal, individual affordable units could be occupied by households earning up to 100 percent of area median income, as long as the cumulative total of all affordable units is occupied by households an average of no greater than 60 percent of area median income. CSU's proposed language to achieve this income averaging approach is vague and confusing and, as a result, likely unenforceable. In response, the Housing Commission has proposed that the affordable housing component of CSU's Project should meet the income averaging rules already established under a statewide funding program administered by the California Tax Credit Allocation Committee ("CTCAC") for affordable housing projects subsidized by an award of tax credits, unless the Housing Commission agrees to a different arrangement. The statewide program allows for individual affordable units to be occupied by households earning up to 80 percent of area median income, as long as the cumulative total of all affordable units is occupied by households an average of no greater than 60 percent of area median income.

The Housing Commission has a track record of monitoring compliance with CTCAC's established rule in connection with various local affordable housing projects and could easily do

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deviations from the standard template must be approved by the Housing Commission in its sole discretion. In addition, any proposed waiver, variance, reduction, or adjustment from the City's affordable housing requirements for a specific affordable housing project requires the City Council's approval in accordance with the Inclusionary Regulations, at Municipal Code section 142.1307.

<sup>6</sup> Unlike CSU, the Housing Commission has vast experience and expertise in administering, monitoring, and enforcing compliance with the detailed, continually evolving mix of federal, state, and local laws and regulations applicable to local affordable housing projects. Local affordable housing developers routinely pay the Housing Commission's standard administration fee, which equals a scheduled amount per unit.

the same with respect to the affordable housing components within CSU's Project. In addition, it is reasonable to expect that CTCAC's established rule will apply to the affordable housing components within CSU's Project anyhow, because most affordable housing projects nowadays require an infusion of significant tax credit funding to be financially sustainable. Conversely, CSU's proposed income averaging approach is vague and confusing and, as a result, likely unenforceable. Moreover, by allowing individual units to be occupied by households earning up to 100 percent (as opposed to 80 percent) of area median income, CSU's proposal does not achieve compliance with CTCAC's established rule.

### ***Reasonable Timelines for Initiating and Completing Affordable Housing Units***

CSU has proposed to cause the affordable housing units in CSU's Project to be constructed in four phases, with CSU meeting the inclusionary requirement of ten percent in each phase. In other words, out of the total residential dwelling units – both market rate and affordable – constructed in each phase, ten percent of the units will be restricted for occupancy by income-eligible residents. CSU presently contemplates building a total of approximately 4,600 residential units in the Project, which equates to 460 affordable units, although based on the Council's prior policy direction on January 27, CSU will not be required to build a minimum number of affordable units if the total number of constructed units is less than 4,600.<sup>7</sup>

The City's initial draft of the Master Declaration described an affordable housing phasing plan, consistent with CSU's earlier written proposal. The City's initial draft contemplated that CSU would commence the first phase of residential development within ten years after the Closing of the sale transaction and would commence each successive phase within five years after the issuance of a building permit for the required number of affordable housing units in the preceding phase. The City's initial draft further contemplated that CSU would complete the affordable housing units in each phase within three years after the date of issuance of the building permit for those units, although the Housing Commission would prefer a shorter period of 18 months for completion.<sup>8</sup> CSU's revised draft of the Master Declaration does not require CSU to commence residential development by any specified date and states that, if CSU builds the market rate units in each phase, CSU must build the corresponding affordable housing units in such phase within three years, subject to a broad exception for excusable delay in the event of "recession, economic slowdown or other conditions affecting the housing economy."

To ensure that CSU proceeds with reasonable diligence in causing the construction of affordable housing units in the overall project, the Master Declaration should set forth reasonable deadlines for CSU to initiate and complete each affordable housing phase. The current proposal by the City and the Housing Commission is that CSU: (i) commence the first phase of residential development within ten years after the Closing of the sale transaction; (ii) commence each successive phase within five years after the issuance of a building permit for the required number of affordable housing units in the preceding phase; and (iii) complete the affordable housing units

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<sup>7</sup> Hypothetically, if CSU decides to build only 1,000 residential units in the project, CSU would be required to produce only 100 affordable units on the Property. CSU could not reasonably opt to build no market rate or affordable units on the Property because Measure G specifically requires the inclusion of those two components in CSU's project, as confirmed in the PSA.

<sup>8</sup> Due to the pressing deadline for the City's preparation of the initial draft of the Master Declaration distributed to CSU in late January, the Housing Commission did not have a sufficient opportunity to review in detail all provisions of the Master Declaration at that time. Accordingly, the City reserved the Housing Commission's right to review and provide comments at a later date. In recent weeks, the Housing Commission has conferred with CSU regarding CSU's affordable housing proposal and has provided detailed comments on that proposal, including the comments that have given rise to the policy issues addressed in this document.

in each phase within 18 months after the date of issuance of the building permit for those units. This approach is very lenient – in fact, more lenient in terms of timing milestones for construction and completion of affordable housing units than the Housing Commission recalls having offered to a developer at any time since the inception of the Inclusionary Ordinance in 2003.

Further, consistent with its standard approach, the Housing Commission would agree to reasonably consider any future requests for time extensions on any construction deadlines, based on substantiated delays caused by market conditions. The Housing Commission would process such requests at an administrative level, without the need for approval by its governing board. CSU's force majeure provision with respect to compliance with construction deadlines is overly broad, allowing CSU or its affordable housing development partners to claim excusable delays for an indefinite time period based on their unilateral assertion of "recession, economic slowdown or other conditions affecting the housing economy." The future claim of excusable delays in this broad manner could cause the affordable housing units required to be built in each phase to be delayed indefinitely, and potentially never built at all, without any reasonable recourse available to the Housing Commission to enforce compliance. As a result, CSU could gain the benefit of its market rate units and the associated revenue generation without delivering on its promise to produce the minimum number of affordable units per the ten percent inclusionary requirement.

- C. CSU Draft: CSU desires to prepare its own form of Developer-Specific Regulatory Documents and to have those documents recorded only in favor of CSU, with a very limited (and likely ineffective) remedy available to the Housing Commission in to address any future noncompliance with applicable requirements. CSU desires to serve as the regulatory administrator of affordable housing units within the Project and to self-certify compliance with its own affordable housing program, including spot verification of the accuracy of statements (such as stated income) made by affordable housing applicants, and periodic monitoring of compliance at unspecified intervals. CSU also proposes to use income eligibility standards and construction milestones that are vague, and thus likely unenforceable.