

October 6, 2012

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Marie Gilmore, Mayor
City of Alameda
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John Russo, City Manager
City of Alameda
2263 Santa Clara Avenue
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Re: CEQA Compliance Considerations Regarding Proposed Amendment to City of Alameda-Department of the Navy Memorandum of Agreement (MOA) for Conveyance of Alameda Point Northwest Territories

Dear City Attorney Kern, Mayor Gilmore and City Manager Russo:

Since 2010, Golden Gate University School of Law's Center on Urban Environmental Law (CUEL) has conducted independent research and analysis of land use and open space issues pertaining to the former Alameda Naval Air Station (NAS) at Alameda Point. This letter addresses the question of how the environmental impact assessment requirements of the California Environmental Quality Act (CEQA) may pertain to certain actions and approvals the City of Alameda may undertake in connection with the proposed United States Department of the Navy (Navy) conveyance of former NAS lands to both the City

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of Alameda and federal Veterans Administration (VA). More specifically, this letter addresses CEQA compliance considerations related to a proposal for the City of Alameda to approve an amendment to an existing Memorandum of Agreement (MOA) with the Navy to reduce the amount of acreage in the Northwest Territories portion of Alameda Point that is to be transferred by the Navy to the City of Alameda for undeveloped open space purposes. The acreage in the Northwest Territories that would be withheld from the conveyance to the City of Alameda (pursuant to the proposed amendment to the existing MOA) would instead be transferred by the Navy to the VA to facilitate the construction of a new VA facility on these same lands.

Status of Municipal Land Use Conveyance MOAs/MOUs under CEQA

CEQA requires the preparation of an environmental impact assessment document – either an environmental impact report (EIR) or negative declaration – for all state and local (city/county) approvals that may have significant adverse environmental impacts. The California Supreme Court has held that CEQA's environmental impact assessment requirements apply when local municipal governments enter into memorandums of agreement (MOAs) or memorandums of understanding (MOUs) that commit the local agency to the conveyance and dispossession of real property. *Save Tara v. City of West Hollywood* (2008) 45 Cal.4th 116.

Save Tara v. City of West Hollywood involved an MOU between the City of West Hollywood and a private developer for the conveyance of city land to the developer for a housing project. The City of Hollywood claimed that that CEQA's environmental impact assessment requirements did not apply to the approval of the MOU because the MOU was not the final approval of the underlying housing project to be undertaken by the developer, and that CEQA review would occur later in connection with the City's review of the housing project. The California Supreme Court rejected the City of West Hollywood's argument, holding that the MOU had committed the City to a "definite course of action" in regard to conveyance of the lands and was therefore a "final agency action" in this respect. The California Supreme Court found that the City of West Hollywood's approval of the MOA without the benefit of CEQA review unlawfully foreclosed consideration of alternatives to the proposed conveyance of lands.

In the California Second District Court of Appeal decision in *Save Tara v. City of West Hollywood*, which was affirmed by the California Supreme Court, Justice Madeline Flier explained: "The trial court's error is two-fold. First, an EIR is not to be delayed until a final decision has been made. Second, the finding that the agreement was expressly conditioned on compliance with CEQA indicates a misunderstanding of the EIR review process. That process is intended to be part

of the decision-making process itself, and not an examination, after the decision has been made, of the possible environmental consequences of the decision."

CEQA's Prohibition on Piecemealing and Segmentation of Projects

In addition to the California Supreme Court's holding in *Save Tara v. City of West Hollywood* regarding the application of CEQA to municipal MOUs for the conveyance of real estate, there are separate provisions of CEQA that focus on the adequacy and completeness of the "project description" for purposes of CEQA compliance. More specifically, cases interpreting CEQA have consistently held that, for purposes of environmental impact assessment, a lead agency may not "piecemeal" or "segment" a larger integrated project into smaller discrete projects by providing artificially narrow project descriptions.

In *San Joaquin Raptor v. County of Stanislaus* (1994) 27 Cal.App.4th 713, the California Court of Appeal held that the separation of a sewer expansion project from the development project for which the sewer expansion was being undertaken improperly curtailed the projected description, in that the truncated project concept "resulted in a fallacy of division" which caused the CEQA environmental impact analysis to overlook the project's larger environmental effects.

In *Plan for Arcadia v. City of Arcadia* (1974) 42 Cal.App.3d 712, the California Court of Appeal held: "It is clear to us that the shopping center and parking lot project together with the widening of the southern portion of Baldwin Avenue are related to each other and that in assessing the environmental impacts they should be regarded as a single project under CEQA."

Provisions in CEQA and NEPA for Preparation of a Joint EIR/EIS

Closely related to CEQA prohibition on piecemealed/segmented project descriptions is the CEQA provision for the preparation of integrated environmental impact assessment documents that can satisfy the requirements of both CEQA and the federal National Environmental Policy Act (NEPA). Just as CEQA requires that state and local agencies prepare an environmental impact report (EIR) for approvals that may have significant adverse environmental impacts, so NEPA requires that all federal agencies prepare an environmental impact statement (EIS) for approvals that may have significant adverse environmental impacts.

Anticipating that there will be situations where an integrated project will involve approvals of both federal agencies (subject to NEPA) and state/local agencies (subject to CEQA), CEQA Guideline 15170 provides "A lead agency under CEQA may work with a federal agency to prepare a joint document which will meet the requirements of both CEQA and NEPA." The express provision for the

preparation of a *Joint EIR-EIS* in CEQA Guideline 15170 makes clear that a local agency is not permitted to piecemeal/segment its CEQA environmental impact analysis of a larger integrated project merely because some of the project approvals for the larger integrated project will be made by federal agencies.

Similar to CEQA Guideline 15170, Council on Environmental Quality (CEQ) Regulation 1506.2(a) authorizes federal agencies to cooperate with state and local agencies on the preparation of joint documents to satisfy the requirements of NEPA and state environmental impact assessment laws. CEQ Regulation 1506.2(a) provides: "[federal] Agencies shall cooperate with State and local agencies to the fullest extent possible to reduce duplication between NEPA and State and local requirements...such cooperation shall to the fullest extent possible include...Joint environmental assessment."

Under both CEQA and NEPA, there is explicit authorization and encouragement for a local California agency (such as the City of Alameda) and federal agencies (such as the Navy and the VA) to undertake joint environmental impact assessment of a larger integrated project that involves federal and local government approvals.

City of Alameda's Proposed Amendment of the MOA for the Navy's Conveyance of the Northwest Territories at Alameda Point

In 2011, the City of Alameda the Navy entered into a Memorandum of Agreement for the conveyance of a portion of undeveloped land at Alameda Point known as the Northwest Territories. The Northwest Territories is a triangle-shaped area consisting of 225 acres, bordered by San Francisco Bay on the west, the Oakland-Alameda Estuary on the North and a strip of paved airplane tarmac on the south. Per the terms of the 2011 City of Alameda-Navy MOA, the Northwest Territories was to be conveyed by the Navy to the City of Alameda for the purposes of preserving this existing undeveloped open space.

In early 2012, as a result of negotiations between the City of Alameda, Navy and VA, a new proposal for Alameda Point emerged. Under this new proposal, the VA would construct a new outpatient facility on approximately 20 acres of the Northwest Territories. To facilitate the implementation of this new proposal for the Northwest Territories, the Navy would need to transfer this 20-acre portion of the Northwest Territories to the VA instead of to the City of Alameda. To permit the Navy's conveyance of this 20-acre portion of the Northwest Territories to the VA, the Navy and the City of Alameda would need to first amend the 2011 MOA to reduce the amount of Northwest Territories land being conveyed to the City of Alameda.

To the extent things proceed as indicated above, and there is a proposal for the City of Alameda to approve an Amended MOA to reduce the amount of

Northwest Territories acreage to be conveyed by the Navy to the City of Alameda for undeveloped open space purposes, CEQA is likely to apply to such an action. Per the California Supreme Court's holding in *Save Tara v. City of West Hollywood*, when a municipal government enters into an agreement (whether called an MOU or MOA) that commits the municipality to a particular conveyance of real property, CEQA's environmental impact assessment requirements must be complied with before such an agreement can be approved. Moreover, per *Save Tara v. City of West Hollywood*, CEQA will not be satisfied by provisions in the MOU/MOA providing that a CEQA environmental impact assessment will take place at some later point in time.

Additionally, for CEQA compliance purposes, it would be improper for the City of Alameda to limit its CEQA environmental impact assessment to just the reduced conveyance of Northwest Territories' acreage by the Navy (and to disregard the larger VA development plans). The reduced conveyance of Northwest Territories' acreage by the Navy is being proposed for the sole reason of facilitating the development of these withheld lands by the VA for an outpatient facility and columbarium. As such, the proposed Amendment to the City of Alameda-Navy MOA is an element/component of the larger proposal for the VA's development on the Northwest Territory. To avoid the piecemealing/segmentation prohibited under CEQA (see authorities discussed above), a CEQA environmental impact assessment performed by the City of Alameda in connection with the proposed Amendment to the MOA would need to cover the VA development project as well. Since both CEQA and NEPA provide for the preparation of a *Joint EIR/EIS*, the fact that the VA's proposed development project on the Northwest Territories also involves federal agency approvals would not provide justification under CEQA for the City of Alameda to adopt a narrow project description or narrow scope of environmental review in the context of its consideration of amending the 2011 City of Alameda-Navy MOA.

Conclusion

At present, the current baseline condition of the Northwest Territories at Alameda Point is undeveloped open space, and the terms of the 2011 City of Alameda-Navy MOA provide for the Navy's conveyance of the Northwest Territories to the City of Alameda so that the area would remain undeveloped open space. An amendment to the 2011 MOA to remove 20 acres from the Navy's conveyance of Northwest Territories lands to the City of Alameda, to facilitate the conversion of portions of the Northwest Territories for the proposed new VA outpatient facility, would constitute a significant change in the use of such lands. The environmental impact assessment provisions of CEQA provide a mechanism to ensure that, prior to any final action to approve this development plan, the City of Alameda thoroughly evaluates whether there are alternative configurations and locations for the VA project at Alameda Point that can reduce the open space, habitat,

scenic/visual, wetlands, wildlife/waterfowl, recreational, traffic and noise impacts of the VA project as it is currently proposed.

Yours,



Paul Stanton Kibel
Associate Professor and CUEL Co-Director

Cc: Alameda Vice-Mayor and City Council Member Rob Bonta
Alameda City Council Member Dough deHaan
Alameda City Council Member Lena Tam
Alameda City Council Member Beverly Johnson
Michael Sherwood, Earthjustice
Ben Eichenberg, Law Offices of Steve Volker
Sierra Club, North Alameda County (Arthur Feinstein, William Smith and Irene Dieter)
Sierra Club, East Bay Public Lands Committee, SF Bay Chapter (Norman La Force, Chair)
Golden Gate Audubon Society, Friends of the Alameda Wildlife Refuge (Leora Feeney, Michael Lynes)
Alameda Point Restoration Advisory Board (Dale Smith, Richard Bangert and Susan Galleymore)
SF Bay Conservation and Development Commission (Jamie Michaels, Tim Eichenberg)
United States Fish and Wildlife Service (Ben Solvesky)
San Francisco Regional Water Quality Control Board (John West)
City of Alameda City Manager (John Russo)
City of Alameda Planning Department (Andrew Thomas, Jennifer Ott)
Veterans Administration (Larry Janes)
United States Department of the Navy (Derek Robinson, Jacques Lord)