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January 9, 2006

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Re: Legislative and Regulatory History of Public Resource Code § 21082.1 and CEQA Guidelines, § 15084; Applicant Participation in the Preparation of an Environmental Impact Report

This office represents Regis Homes with regard to the application for development of the Islands at Riverlake project. After a thorough review of statutory authority, the legislative history of the pertinent statutes, regulatory history, applicable case law, and accepted practice we conclude that there is no prohibition against an applicant's participation in the preparation of an EIR, as long as the FEIR certified by the City reflects the "independent judgment" of the City. Clearly, the record before the City reflects that the City, in fact, exercised its independent judgment.

In a July 11, 2005, email from Joseph Cerullo to Susan Brandt-Hawley, Cerullo claimed that as part of the City's practice, neither the applicant nor the applicant's attorney works on the city's responses with the caveat that comments specific to project details or purposes may require the City to solicit the applicant's assistance in drafting a response. The statement regarding the City's practice is not entirely true, however, and was corrected in a July 15, 2005, letter from Mr. Cerullo to Ms. Brandt-Hawley. In the July 15, 2005, letter Mr. Cerullo emphasized that what was important was not who writes the EIR or responses to comments, but that the final EIR reflects the City's independent judgment and analysis. Mr. Cerullo then went on to state that in light of anticipated litigation, he anticipated city staff would be working with Regis's attorneys on the city's responses to some or all of the comments received.

We fully expect that this project, if approved by the City Council, will once again be litigated by the Pocket Protectors. Moreover, given recent Public Records Act requests and inquiries from the Pocket Protector's attorney, we fully expect the Pocket Protectors to argue that the City failed to exercise its independent judgment in preparing the EIR and the FEIR. We ask that you carefully review the attached information with regard to these potential claims.

I. Analysis

A. Applicable Case Law

1. *Friends of La Vina v. County of Los Angeles*

Case law provides a comprehensive overview of the appropriate level of participation an applicant or an applicant's consultant is permitted to engage in with respect to the lead agency's preparation of an EIR for the applicant's proposed project. The lead case in this area is *Friends of La Vina v. County of Los Angeles* (1991) 232 Cal.App.3d 1446. In *Friends of La Vina*, a citizens' group sought a peremptory writ of mandate to set aside a county's approval of a general plan amendment, specific plan, and rezoning allowing development of 220 acres of "largely open" land in Altadena. The group claimed the county violated CEQA by allowing the developer to directly hire a consultant to prepare the initial version of the draft EIR. The superior court granted the writ, holding that the respondent county's practice of accepting such submissions created an inevitable conflict of interest for consultants, who would be tempted to reach conclusions favorable to the developers who hired them. The Court of Appeal reversed, however, upholding the county's approach, provided that the agency independently reviews such documents and adopts them as its own before releasing them to the public.

The litigation focused on Public Resources Code section 21082.1 prior to its 1991 amendment, which states in pertinent part that an EIR "shall be prepared directly by, or under contract to, a public agency." This language, which is still in effect today, guided the lower court to interpret it to mean that "an EIR must be written and composed by the agency, so that an EIR whose constituent documents are drafted for the agency by the applicant's consultant is necessarily invalid, without regard to how much agency input, direction, evaluation, and independent judgment went into it." This interpretation was rejected by the Court of Appeal as a misinterpretation of Section 21082.1.

Although section 21082.1 provides that an EIR must be prepared by the lead agency or under contract to it, the statute also allows agencies to accept submissions from “any person,” which can be submitted in “any format.” Such submissions “shall be considered by the public agency, and may be included, in whole or in part, in any report or declaration.” The court also cited CEQA Guidelines section 15084, subdivision (d), which expressly allows agencies to “[a]ccept[] a draft prepared by the applicant, a consultant retained by the applicant, or any other person.” The court emphasized, though, that the same provision requires the agency to subject such a draft to its “own review and analysis.” The court added that any document released to the public must “reflect the independent judgment” of the agency, and that the agency is “responsible for the adequacy and objectivity of the draft EIR.” The court held that this standard of “independent review,” which has been cited in previous published CEQA cases, is consistent with the statutory language. The 1991 amendments to section 21082.1 now require agencies to “[i]ndependently review and analyze any report or declaration” required by CEQA, to “[c]irculate documents which reflect [their] independent judgment,” and to find, in approving a negative declaration or certifying a final EIR, that the document in question “reflects the independent judgment of the lead agency.” The “independent review” standard championed by the Court of Appeal is consistent with the statutory language and CEQA case law. (*See Foundation for San Francisco’s Architectural Heritage v. City and County of San Francisco* (1980) 106 Cal.App.3d 893, 908 (holding an EIR is not fatally undermined by the direct participation of the developer and his or her experts in the underlying environmental and other studies, so long as the agency independently performs its reviewing, analytical, and judgment functions); *Concerned Citizens of Palm Desert, Inc. v. Riverside County Board of Supervisors* (1974) 38 Cal.App.3d 272, 287-288 (after independent evaluation and analysis, the findings of a draft EIR prepared by an applicant were adopted by the county in compliance with statutory requirements); *City of Poway v. City of San Diego* (1984) 155 Cal.App.3d 1037, 1042 (a petitioner must overcome a presumption that a respondent agency has “performed its duty independently to exercise its judgment on the draft EIR”).

Friends of La Vina clearly laid out the appropriate level of involvement by an applicant in the process of drafting an EIR. The Court of Appeal determined, that provided the lead agency subjects the EIR to its independent review and judgment prior to certification, an applicant is allowed to draft the EIR.

Friends of La Vina also specifically addressed the issue of an applicant’s consultant drafting responses to comments. In *Friends of La Vina*, the applicant’s consultant submitted the Draft EIR to the City, drafted the responses to public agencies’ comments, drafted the

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responses to the public's comments, and drafted the proposed findings. The Final EIR submitted for certification "closely track[ed] the contractor's drafts." (*Friends of La Vina, supra*, 232 Cal.App.3d at 1451.) In support of the consultant's preparation of these documents, the court cited Public Resources Code section 21082.1 and CEQA Guidelines section 15084, both of which state that it is the agency's duty to prepare the EIR with input from the applicant, the applicant's consultant, or others, as long as the certified document represents the independent review and judgment of the lead agency, in this case, the County of Los Angeles.

The petitioners in *Friends of La Vina* "contend[ed] that contractor drafting of the responses to comments, which principally convert the draft EIR into the final EIR, cannot be tolerated if CEQA's promise and prescription of agency EIR preparation are to be followed." (*Friends of La Vina, supra*, 232 Cal.App.3d at 1455.) The court expressed sympathy with the petitioner's policy concerns, but stated

those concerns simply do not engender legal interdiction of an applicant's consultant's drafting the written responses. Plaintiffs' authorities do not dictate such a rule: the Guidelines' general terms prescribe no bar, and the *Kern II* case, . . . itself used the independent judgment rule discussed above as a mainstay of its analysis. In short, in accordance with consistent practice and judicial application, *the independent review, analysis and judgment test, not the proposed physical draftsmanship test, applies to the EIR as a whole, including responses to comments.*

(*Friends of La Vina, supra*, 232 Cal.App.3d at 1456 (internal citations omitted) (emphasis added).)

As in *Friends of La Vina*, the applicant's consultants' participation in the preparation of the EIR and the FEIR for the Riverlake project was within the scope of applicable case law, standard practice, regulatory history, and statutory authority. Here, the applicant's consultant prepared the draft EIR and the draft responses to comments, both components of the Final EIR. The final product, and indeed the previous drafts, however, were all subject to the independent review and judgment of the City of Sacramento. The City staff's own records of communications illustrate the back and forth exchange between the staff and consultants, including questions regarding the City regulations and policies and its process for environmental review. These communications demonstrate the integrity of the process adhered to by the parties in this case, and answer the question of whether the City exercised its independent review and judgment. It is clear from the record that it was the City of Sacramento, not the consultants, who had the final say over the contents of all

documents produced under the City's name, and as such, the City subjected the EIR to its own independent review and analysis.

2. *Sunset Drive Corp. v. City of Redlands* (1999) 73 Cal.App.4th 215.

Most recently, the case of *Sunset Drive Corp. v. City of Redlands* addressed the issue of an applicant and/or the applicant's consultants' participation in the EIR process. *Sunset Drive Corp. v. City of Redlands* looked to established precedent to make the case that an applicant or its consultants are permitted to take part in the various preparatory stages absent the final certification of the EIR. The court in *Sunset Drive Corp. v. City of Redlands* instructs that an applicant or the applicant's consultants are permitted to take part in the preparation of an EIR, "so long as the agency applies its "independent review and judgment to the work product before adopting and utilizing it." (*Sunset Drive Corp. v. City of Redlands* (1999) 73 Cal.App.4th 215, 220, citing *Friends of La Vina v. County of Los Angeles* (1991) 232 Cal.App.3d 1446, 1454; accord, CEQA Guidelines, § 15084, subd. (e)). Among the stages that the court cites as steps in the process in which an applicant or an applicant's consultant may take part are, "the preparation of a draft EIR; the circulation of that draft for comment; [and] the preparation of a final EIR which responds to those comments. . . ." (*Sunset Drive Corp. v. City of Redlands* (1999) 73 Cal.App.4th 215, 220, citing *Laurel Heights Improvement Assn. v. Regents of the University of California* (1993) 6 Cal.4th 1112, 1123-1124.) Thus, the Pocket Protector's challenge to Regis's consultants preparation of the draft EIR and draft responses to comments is not supported by case law. This case is evidence of the fact that the courts continue to express support for applicant-prepared EIRs.

B. Statutory Authority

The holdings of the case law discussed above stem from statutory authority regarding participation by an applicant or the applicant's consultant in an agency's preparation of an EIR. Section 21082.1 of the Public Resources Code and its legislative history inform us that applicants are granted considerable latitude to assist a City in preparing an EIR. We discovered in our extensive legislative history research that there is no prohibition on an applicant's participation in the process, so long as the City exercises its independent review of the EIR prior to certification of the FEIR.

1. Public Resources Code Section 21082.1

Public Resources Code section 21082.1 is one of the two key statutes pertaining to applicant participation in the preparation of an EIR. Public Resources Code section 21082.1

provides in pertinent part:

- (a) Any draft environmental impact report, environmental impact report, negative declaration, or mitigated negative declaration prepared pursuant to the requirements of this division shall be prepared by, or under contract to, a public agency.
- (b) This section is not intended to prohibit, and shall not be construed as prohibiting, any person from submitting information or other comments to the public agency responsible for preparing an environmental impact report, draft environmental impact report, negative declaration, or mitigated negative declaration. The information or other comments may be submitted in any format, shall be considered by the public agency, and may be included, in whole or in part, in any report or declaration.
- (c) The lead agency shall do all of the following:
 - (1) Independently review and analyze any report or declaration required by this division.
 - (2) Circulate draft documents that reflect its independent judgment.
 - (3) As part of the adoption of a negative declaration or a mitigated negative declaration, or certification of an environmental impact report, find that the report or declaration reflects the independent judgment of the lead agency.
 - (4) Submit a sufficient number of copies of the draft environmental impact report, proposed negative declaration, or proposed mitigated negative declaration, and a copy of the report or declaration in a [sic] electronic form as required by the guidelines adopted pursuant to Section 21083, to the State Clearinghouse for review and comment by state agencies, if any of the following apply:
 - (A) A state agency is any of the following:
 - (i) The lead agency.
 - (ii) A responsible agency.
 - (iii) A trustee agency.
 - (B) A state agency otherwise has jurisdiction by law with respect to the project.
 - (C) The proposed project is of sufficient statewide, regional, or areawide environmental significance as determined

pursuant to the guidelines certified and adopted
pursuant to Section 21083.

(Public Resources Code § 21082.1.)

As explicitly stated in Section 21082.1, the onus is on the lead agency to prepare the environmental impact report; however, the agency is not prohibited from accepting information from any party and incorporating it in whole, or in part into the EIR. As a practice, lead agencies regularly allow an applicant or the applicant's consultant to prepare the EIR for their proposed project. The City is permitted to do so provided it ensures that the final product is independently reviewed and analyzed as required under Section 21082.1 (c) (1).

In 1991, Senator Byron Sher proposed Assembly Bill 1642. As introduced, AB 1642 would have prohibited applicant-prepared EIRs. The provision prohibiting applicant prepared EIRs was ultimately and explicitly deleted by the legislature. Instead, the independent review and judgment requirement was implemented. The Concurrence in Senate Amendments drafted for AB 1642, as amended August 26, 1991, provided that existing law required a lead agency to prepare an EIR for projects that may significantly affect the environment, and that EIRs may be prepared by "the lead agency, by contract with the lead agency, or by the applicant." The amendments brought about by AB 1642 did not prevent applicant-prepared EIRs, but rather, required the agency to exercise independent review and judgment prior to adopting an EIR.

Further, in the enrolled bill report filed by the Water Resources Department, the agency states that AB 1642 is a declaration of existing law regarding applicant-prepared EIRs, following the court's holding in *Friends of La Vina*, discussed above. The bill allows the applicant to submit the EIR, but requires the document that goes out for public review to reflect the independent review and judgment of the agency.

Legislative efforts over the past thirty years to prevent applicants from participating in the preparation of EIRs have failed. As highlighted in *Friends of La Vina*, when the "preparation language alone was proposed, the Assembly deleted it, and then reinstated and approved it only with the addition of the further language authorizing outside input." (*Friends of La Vina, supra*, at 1453 citing Assem. Amend. To Assem. Bill No. 2679 (1975-1976 Reg. Sess.) § 9.6, Apr. 29, June 10, Aug. 6, and Aug. 16, 1976.) The majority of agencies responsible for the preparation of EIRs do not have the time, money, or resources necessary to be wholly responsible for drafting EIRs for all proposed projects with potentially significant environmental impacts. As such, both section 21082.1 and, as

discussed below, CEQA Guidelines section 15084, were drafted so as not to prohibit applicant participation in the preparation of EIRs. Rather, the legislature and Resources Agency explicitly encourage their input, allowing the City to incorporate such input to the extent feasible, so long as it is governed by the City's own independent review and judgment.

2. Title 14, California Code of Regulations, Section 15084 (c)-(e) ("CEQA Guidelines")

According to the Supreme Court "[a]t a minimum . . . courts should afford great weight to the Guidelines except when a provision is clearly unauthorized or erroneous under CEQA." (*Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 391, fn. 2.) Therefore, the section should be construed as appropriately instructive in its relation to the scope of applicant participation in the preparation of EIRs.

CEQA Guidelines section 15084 (c)-(e) provides:

- (c) Any person, including the applicant, may submit information or comments to the lead agency to assist in the preparation of the draft EIR. The submittal may be presented in any format, including the form of a draft EIR. The lead agency must consider all information and comments received. The information or comments may be included in the draft EIR in whole or in part.
- (d) The lead agency may choose one of the following arrangements or a combination of them for preparing a draft EIR.
 - (1) Preparing the draft EIR directly with its own staff.
 - (2) Contracting with another entity, public or private, to prepare the draft EIR.
 - (3) Accepting a draft prepared by the applicant, a consultant retained by the applicant, or any other person.
 - (4) Executing a third party contract or memorandum of understanding with the applicant to govern the preparation of a draft EIR by an independent contractor.
 - (5) Using a previously prepared EIR.

- (e) Before using a draft prepared by another person, the lead agency shall subject the draft to the agency's own review and analysis. The draft EIR which is sent out for public review must reflect the independent judgment of the lead agency. The lead agency is responsible for the adequacy and objectivity of the draft EIR.

(CEQA Guidelines § 15084 (c)-(e).)

“The preparation method prescribed in the foregoing Guidelines allows for an agency to enlist the initial drafting and analytical skills of an applicants' consultant, subject to the requirement that the agency apply independent review and judgment to the work product before adopting and utilizing it.” (*Friends of La Vina, supra*, 232 Cal.App.3d at 1454; *see also Foundation for San Francisco's Architectural Heritage v. City and County of San Francisco* (1980) 106 Cal.App.3d 893 (“CEQA does not prohibit the applicant from providing data, information and reports required for preparation of the EIR. CEQA merely requires that the agency independently perform its reviewing, analytical and judgment functions. . . .”), *City of Poway v. City of San Diego, supra*, 155 Cal.App.3d 1037 (approving an EIR prepared by the applicant's consultant and certified by the agency after changing only one word).)

As with Public Resources Code section 21082.1, efforts to strike the language in section 15084, subdivision (d)(3), which allows for the City to accept an applicant-prepared EIR have not met with success. The Guidelines, as they currently appear, including the language contained in Section 15084 (d) (3) were the result of revisions drafted in 1982. The revisions received both positive and negative feedback targeted at the applicant-prepared EIR language. The Resources Agency refused to strike the language pertaining to applicant-prepared EIRs, stating that, “CEQA expressly allows a lead agency to receive and use information from any person at all in preparing a draft EIR.” (Summary of and Response to Comments, State CEQA Guidelines, Public Utilities Commission (July 1982).) The Resources Agency went on to state that the required agency independent review and analysis would be sufficient to protect against abuse of this provision. (*Id.*)

Section 15084 and its legislative history are particularly instructive for questions regarding the appropriate level of applicant participation in the EIR process. Here, the applicant prepared the draft EIR and draft responses to comments, and the City independently reviewed and applied its judgment to the work product before adopting and publishing it as the Final EIR. This method is precisely what is defined and endorsed in Guidelines section 15084 (c)-(e). The parties followed the letter of the law, and the City was not only within its rights, but is explicitly permitted to allow the applicant's consultant

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to submit work product, which City staff reviewed and adopted as the Final EIR.

III. Conclusion

Based upon our research, it is clear that the City is not prohibited, but rather, is explicitly permitted to accept information or documents in any form from the applicant and/or the applicant's consultant to assist in preparation of both EIRs and the FEIR. This allows the applicant's consultant to prepare proposed draft EIRs and other components of the FEIR, subject to the City's independent judgment and review, including but not limited to, the drafting of the EIR and the responses to comments. To find otherwise would, in the words of the Court of Appeal, be "erroneous as a legal matter, because [such an interpretation] conflicts with CEQA, the Guidelines, and all relevant case law." (*Friends of La Vina, supra*, 232 Cal.App.3d at 1452.)

Thank you for your time and assistance in this matter. I hope that we have provided you with the necessary information regarding the state of the law as it regards applicant-prepared EIRS for the Islands at Riverlake project. Please contact me if we can be of any further assistance.

Sincerely yours,



Tina A. Thomas

cc: Mayor Heather Fargo
Sacramento City Council Members
Sacramento City Clerk
Sabina Gilbert
Susan Brandt Hawley (via email)