

INTERIM REPORT NO. 14

**THE ONTARIO AVENUE CONNECTION
AND FOX CANYON PARK**

**REPORT OF THE
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Executive Summary

Beginning by at least the year 2000, City Staff began expending time and money on the potential extension of Ontario Avenue in San Diego's City Heights Neighborhood.

No Resolution of the San Diego City Council has even authorized the road extension or funded its construction, yet it has been actively pursued by City Staff for almost 5 years.

In 2002, Councilmember Jim Madaffer proposed construction of a neighborhood park on land owned by Larry Zajonc and Janice Smith. The Zajonc/Smith Property, not coincidentally, was the property that would have to be acquired to construct the extension of Ontario Avenue.

In May 2002 the City's Real Estate Assets Department [READ] sent Councilmember Madaffer a valuation for a vacant portion of the Zajonc/Smith property that would have to be acquired to extend the road and construct the park. This internal valuation provided a low estimate of \$340,000 and a high estimate of \$425,000.

On January 15, 2004 the City submitted an application to the State of California for a \$2.3 million grant to fund the park. Two days earlier, Councilmember Madaffer, joined by Councilmembers Lewis and Atkins, asked City Manager Michael Uberuaga to designate \$800,000 from the Mid City Park Development Fund to acquire a portion of the Zajonc/Smith property, almost twice the City's 2002 internal valuation. The State was also told \$800,000 would be expended on the acquisition of the property.

The City failed to tell the State of a planned extension of Ontario Avenue and also failed to include an adequate analysis of the road in environmental documents. These failures occurred although Councilman Madaffer has been adamant in stating, "The road came first, the park followed."

The City never offered the \$800,000 in appropriated park fees to Zajonc/Smith. The highest offer ever made to Zajonc/Smith was \$475,000.

After appropriating \$800,000 of park funds for the park, at least \$161,000 of the funds were utilized for the review and design of the Ontario Road extension. In addition, on multiple occasions Councilmember Madaffer or staff sought additional park funds for costs associated with the road extension, an extension never authorized by Council Action.

By ordinance, the Mid City Park Development Fund can be used only for park and recreation purposes. Also, the State Park Grant and matching funds must only be used for purposes shown in the grant application. These funds could not be used on the road extension, yet they were.

Zajonc and Smith never agreed to terms with the City to sell their property. Nevertheless, on June 8, 2005, READ, in a report to Council, falsely communicated that the City had in fact, entered into a voluntary transaction with the landowners and had opened an escrow that would close with Council approval.

Now, although the \$800,000 authorized for land acquisition has never been offered to the landowners, the City contends it must move the State grant to a new location because it cannot conclude a sale on the original site. City Staff acknowledge spending over \$400,000 over three years on a project planned on property the City never owned.

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I INTRODUCTION

Citizens in the early 1930's recognized the value a system of checks and balances would provide to San Diego when they voted to elect an independent City Attorney and to establish a City Charter that prohibited the City Council from directing City staff regarding administrative services. "The City Attorney is to be elected by the people. This is a guarantee that the legal head of the government will be able to fearlessly protect interests of all San Diego and not merely be an attorney appointed to carry out wishes of council or manager."¹ Charter section 22 provides:

(a) No member of the Council shall directly or indirectly by suggestion or otherwise attempt to influence or coerce the City Manager or other officer appointed or confirmed by the Council in the making of any appointment to, or removal from, any city office or employment, or the purchase of any supplies, or discuss directly or indirectly with any candidate for City Manager the matter of appointments to City Offices or employment, or attempt to exact any promises from such candidate relative to any such appointments.

(b) Except for the purpose of inquiry, the Council and its members shall deal with that part of the administrative service for which the City Manager is responsible solely through the City Manager or his designated representative and not through his subordinates.

(c) A violation of the provisions of this section by any member of the Council shall constitute a misdemeanor for which the offending member may be removed from office by the Council or for which the offending member may be tried by any court of competent jurisdiction and if found guilty the sentence imposed shall include removal from office.

Furthermore, they recognized the value of the public process when establishing advisory boards to the City Council whose job was to gather information and provide recommendations to Council.² The Park and Recreation Board was created pursuant to Municipal Code §26.30 and has powers and duties as delineated in Municipal Code §26.31:

(a) Advise the City Council through the City Manager on public policy matters relating to the acquisition, development, maintenance and operation of parks, beaches,

¹ 1931 election piece asking voters to elect an independent City Attorney. See Exhibit 1.

² Charter section 43. See Exhibit 2.

playgrounds and recreational activities in the City of San Diego.

(b) Periodically review the recreational program of the City in relation to the needs and desires of the citizens.

(c) Coordinate the work of such committees as may be established towards the end of developing integrated and balanced policy recommendations.

(d) Conduct such investigations, studies and hearings which, in the judgment of the Board, will aid in effectuating its general purposes.

The story of the Ontario Avenue connection and Fox Canyon Park enables us to collectively discover anew the need to respect and adhere to the great laws of our City. It also inspires us to encourage our leaders to strengthen the City's current system of checks and balances as we adopt new laws and regulations in the future.

In 2004 the City applied for a California State Grant for the acquisition and development of Fox Canyon Park, located in the Mid-City Community of City Heights. Subsequently, the public discovered that the park project was made as an additional component to a road project which had been envisioned years earlier. The project was brought to a halt when Park and Recreation Board members raised questions regarding funding for the road.

The Ontario Avenue connection and Fox Canyon Park project was ultimately unsuccessful because the transportation and park planning duties our Charter and Municipal Code give to the citizens of San Diego was instead conducted by an ad hoc committee of City staff led by one Councilmember. This resulted in the misappropriation of City funds and resources and in misrepresentations to the public and decision-making bodies.

In sum, the community was promised a park, developers thought they would get a road, and a property owner was led to believe he was in negotiations to sell his property for nine-times its appraised value³, and all are left with nothing but wasted resources.

II. THE ONTARIO AVENUE CONNECTION

Councilmember Jim Madaffer has been adamant that the idea to construct the Ontario Avenue connection preceded the idea to construct what came to be known as Fox Canyon Park. He explained,

...back in 2000 when I first looked at connecting Ontario Road to help with traffic and to reduce crime, I broached the idea to the community of building a neighborhood park

³ 21 September 2006 Park & Recreation Board Meeting, Transcript p. 15, See Exhibit 103.

adjacent to the new road...The road came first, the park followed.⁴

The first City document regarding the road appears in 2000, when Jim Madaffer was Chief of Staff to Councilmember Judy McCarty. Traffic Engineering provided a memo to Planning and Development Review “for the memo to Councilmember McCarty” which estimated the costs of a 600 foot Ontario Avenue connection at \$400,000.⁵ Traffic Engineering recommended that,

if constructed, Ontario Avenue be an additional connection to this neighborhood, and that Auburn Drive north of Ontario Avenue remain open to traffic, in order to maximize access for the residents of the neighborhood, and for emergency vehicles.⁶

The memorandum, however, stopped short of recommending construction of Ontario Avenue.

III. PUBLIC RESISTANCE TO ONTARIO AVENUE ROAD CONNECTION PROMPTS EMERGENCE OF A PARK PROJECT

In November 2002, in response to an e-mail from Councilmember Jim Madaffer⁷ that stated, “I support this road connection 100%,” Gary DeBusschere Program Manager for the City of San Diego’s Community & Economic Development Department and former staff member to Madaffer responded,

Got Ya. We understand the value of Ontario. I pick up negatives on the Ontario road are coming from J Varadore [sic] and M Sprague. Their rational [sic]... Don’t want to dump traffic on the Winona folks?? They are strong park building advocates.⁸

DeBusschere, who retired in 2004⁹, was also the project manager for the Crossroads Redevelopment Survey Area.¹⁰ The Redevelopment Plan for the Crossroads Redevelopment Project was adopted by the City Council on May 6, 2003. The project

⁴ 24 March 2006 Jim Madaffer Newsletter. See Exhibit 3.

⁵ City of San Diego Memorandum from Allen Holden, Jr., Deputy Director, Transportation Department, Traffic Engineering Division to Siavash Pazargardi, Senior Traffic Engineer, Transportation Planning, Planning and Development Review, 26 January 2000. See Exhibit 4.

⁶ *Ibid.*, emphasis added. See Exhibit 4.

⁷ Madaffer was elected in December 2000 and again in March 2004.

⁸ 16 November 2002 e-mail correspondence from Jim Madaffer to Gary DeBusschere. See Exhibit 5

⁹ 21 June 2004 Docket, San Diego City Council Meeting, proclaiming June 18, 2004 to be “Gary DeBusschere Day.” See *Also*, San Diego Resolution R-299372, (21 June 2004). See Exhibit 6.

¹⁰ 25 September 2001, Redevelopment Agency Meeting Minutes, p. 4. See Exhibit 7.

objectives included enhancing economic growth, provide “choice for a variety of new and rehabilitated housing opportunities”, and retain and expand existing neighborhood businesses.¹¹ The project area encompasses 1,031 acres and the redevelopment plan focuses on the revitalization of properties along El Cajon Boulevard, University Avenue, Streamview Drive, and College Avenue and the residential neighborhoods of Chollas Creek and Fox Canyon, and development of the Resource Based Parkland at Chollas Park.¹²

Just days after DeBusschere’s e-mail, Elyse Olson,¹³ also of Councilmember Madaffer’s Office, wrote to Tracy Reed in the Community and Economic Development Department to determine how to fund a park at Fox Canyon.¹⁴ She wrote:

I think we have some issues now that the property Jim originally identified has changed hands, and now, more than one group is eyeballing it for future affordable housing development.¹⁵

IV. REAL ESTATE ASSETS DEPARTMENT

In early 2002 the City of San Diego’s Real Estate Assets Department (READ) was already involved.¹⁶ READ staffer, Lane MacKenzie requested valuation information for four different properties, including what became known as the Fox Canyon Park property.¹⁷ Only one site, the Zajonc/Smith property, was also necessary for the extension of Ontario Avenue. This early memorandum estimated the cost of acquisition of the vacant, unimproved portion of the property to be between \$340,000 and \$420,000, and explained that the property owners had purchased the entire property (including the improved portions) the year before for \$510,000.¹⁸ This valuation appears to be the only

¹¹ Redevelopment Plan for the Crossroads Redevelopment Project, pp. 2-3. (Revised and adopted by City Council 22 April 2003 and 6 May 2003. See Exhibit 8.

¹² 23 May 2006 Press Release, Redevelopment Agency, “City to Hold Elections for Crossroads Redevelopment Committee.”

¹³ Elyse Olson would later be known as Elyse Lowe.

¹⁴ 21 November 2002 e-mail correspondence from Elyse Olson to Tracy Reed. See Exhibit 5.

¹⁵ *Ibid.* See Exhibit 5.

¹⁶ 16 May 2002 City of San Diego Memorandum from William T. Griffith, Real Estate Assets Director to Councilmember Jim Madaffer, Subject “Acquisition of Property for Park Space in Fox Canyon,” Reference “District Seven Memorandum No. M02-04-17, dated April 29, 2002. See Exhibit 9.

¹⁷ 29 January 2002 City of San Diego Memorandum from Valuation Division to Lane B. MacKenze, Supervisor, Acquisition and Relocation Services, Attachment 6 to 16 May 2002 City of San Diego Memorandum from William T. Griffith, Real Estate Assets Director to Councilmember Jim Madaffer, Subject “Acquisition of Property for Park Space in Fox Canyon,” Reference “District Seven Memorandum No. M02-04-17, dated April 29, 2000. See Exhibit 9.

¹⁸ 16 May 2002 City of San Diego Memorandum from William T. Griffith, Real Estate Assets Director to Councilmember Jim Madaffer, Subject “Acquisition of Property for Park Space in Fox Canyon,” Reference “District Seven Memorandum No. M02-04-17, dated April 29, 2002. See Exhibit 9.

formal valuation by the City until the summer of 2006. It was provided to Councilmember Madaffer in May 2002.¹⁹

In 2003, handwritten notes indicate MacKenzie had been asked to provide a real estate assessment/valuation for Fox Canyon and that the question was raised, “Are they willing sellers?”²⁰ The handwriting also notes,

Approximate lot value – 340-400,000 (does not inc. house or lot)...If vacate the street: ownership gets split to the two adj. owners thus we get half street [sic]. If keep as paper street then we can build park on full width of street.²¹

By July 2003, April Pendera of the Park & Recreation Department, who had been asked by Councilmember Madaffer’s office, asked MacKenzie:

lane,

did you get a chance, now that we have 1 mil in funding to purchase the land, to find out about sellers and stuff... cd7 is asking me.

a²²

Six months later, in January 2004, three council members requested allocation of \$900,000 from the Mid-City Park Development Fund: “\$800,000 for the acquisition and \$100,000 for preliminary design of the Fox Canyon Neighborhood Park.”²³ Councilmember Madaffer, who had received READ’s valuation of the property of \$340,000 to \$420,000, signed the memorandum.²⁴

V. SPECIAL PARK FEES

The Mid City Park Development Fund is a type of fund also known as a Special Park Fee. A Special Park Fee is a type of Development Impact Fee (DIF), charged to developers as a cost of development and allocated for a specific purpose and use.

In 1984, the San Diego City Council determined that the Mid-City Community Plan area had a particular need for the development of park and recreation facilities.²⁵ To address the issue, the City Council amended the municipal code to require all persons

¹⁹ Ibid.

²⁰ 2 July 2003, handwritten notes from JoEllen Jacoby’s file dated. See Exhibit 10.

²¹ Ibid. See Exhibit 10.

²² 25 July 2003 e-mail from April Pendera to Lane MacKenzie. See Exhibit 11.

²³ 13 January 2004 Memorandum from Deputy Mayor Toni Atkins, Councilmember Jim Madaffer, and Councilmember Charles Lewis to City Manager Michael Uberuaga. See Exhibit 24.

²⁴ Ibid.

²⁵ San Diego City Council Ordinance No. 0-16192 (23 April 1984); San Diego Municipal Code Section 102.0406.0671 (23 April 1984). See Exhibit 26.

obtaining a building permit in the Mid-City Community Planning Area to contribute fees to furnish adequate park and recreational facilities.²⁶ The section made clear:

All park fees collected shall be deposited in a special park fund for the Mid-City Community. These funds and their interest earnings may be expended **only for park and recreation projects** for this community.²⁷

In 1987, the Mitigation Fee Act²⁸ was enacted to regulate fees collected by public agencies in connection with development projects. The Act required public agencies to state the purpose and use of the fee,²⁹ deposit any fee collected in a separate fund to avoid any commingling with other revenues and funds of the agency, and “expend those fees solely for the purpose for which the fee was collected.”³⁰

The current municipal code section regarding the use of Special Park Fees was amended in 1988,³¹ and complied with the new state laws. The code then and now states:

Fees collected pursuant to the provisions of this Article, together with any earned interest thereon, shall be deposited in a special fund with a separate revenue and expense account established for park and recreational purposes. **Expenditures from said fund shall be made only for park and recreational facilities within areas from which they were collected.** Expenditures may be for: (1) the City purchase of land and the construction of facilities, (2) the purchase of already constructed facilities from public agencies or private parties, (3) the rehabilitation of existing park or recreational facilities only when such rehabilitation would serve expanded needs or demographic changes at existing parks or provide new additional equipment allowing expanding use of the park or (4) to reimburse those who may have donated land and constructed improvements to the extent of the value of such land and improvements in excess of their proportionate responsibility.

Any time a building permit was issued, an applicant was charged \$75 or \$100 per unit to be expended for park and recreation facilities as set forth in Section 96.0404.³²

²⁶ Ibid. See Exhibit 26.

²⁷ Ibid., emphasis added. See Exhibit 26.

²⁸ Cal.Gov.Code § 66000 et. seq. See Exhibit 28.

²⁹ Cal.Gov. Code § 66001 (a)(1). See Exhibit 28.

³⁰ Cal.Gov. Code § 66006 (a). See Exhibit 28.

³¹ San Diego Municipal Code § 96.0403 (Amended, 19 July 1999); San Diego Municipal Code § 96.0404 (Amended, 16 May 1988); San Diego Ordinance O-17093 (16 May 1988); San Diego Municipal Code § 99.0104 (Repealed by renumbering to Sec. 96.0404 3 September 1975); San Diego Ordinance O-11672 (12 September 1975); San Diego Ordinance O-11341 (27 June 1974). See Exhibit 29.

³² San Diego Municipal Code § 96.0403. See Exhibit 29.

A road is not a park and recreational facility.³³ Examples of park and recreational uses in case law and San Diego City Attorney Opinions include baseball parks, tennis courts, croquet grounds, children's playgrounds, art galleries, public libraries, and a log cabin.³⁴ Schools, storage buildings, and streets, all have been determined *not* to be park and recreational uses.³⁵ The question is whether the use furthers the recreation, pleasure and enjoyment of the public.³⁶ Parking areas and other non-park uses have been held to be an appropriate use of park land only if the non-park use directly contributes to and is necessary for proper use and enjoyment of the park.³⁷

The grant contract made clear that here, no aspect of the road was necessary to provide access to or parking for the park:

Adequate parking for the new park would be on existing street surrounding the site. No on-site [sic] parking provided...Access [sic] to the park is available from existing streets...³⁸

VI. COUNCIL OFFICE INVOLVMENT WITH CITY STAFF

In August of 2003, Madaffer requested the City Manager create a cost accumulation account that allowed various city departments to charge staff time to the account. He copied four city departments on the memorandum including Park and Recreation, Real Estate Assets, Transportation, and Auditor and Comptroller.³⁹ Although he had written the memorandum to the City Manager, Madaffer copied the involved departments.

Notes from park and recreation staffer JoEllen Jacoby's file indicate staff was informed Madaffer wanted them to create a road:

Madaffer committed to new road. Consider it funded! Go ahead need schedule.⁴⁰

³³ *Mulvey v. Wangenheim*, 23 Cal. App. 268 (1913).

³⁴ 28 October 1997 Office of the San Diego City Attorney Memorandum re: Use of Dedicated Park Lands; *Vale v. City of San Bernardino*, 109 Cal. App. 102 (1930); *Griffith v. City of Los Angeles*, 175 Cal. App. 2d 331 (1959); *Caulfield v. Edward Berwick*, 27 Cal. App. 493 (1915).

³⁵ *San Vicente Nursery School v. County of Los Angeles*, 147 Cal. App. 2d 79 (1956); *Mulvey v. Wangenheim*, 23 Cal. App. 268 (1913); *Roberts v. City of Palos Verdes Estates*, 93 Cal. App. 2d 545 (1949).

³⁶ *Spires v. Los Angeles*, 150 Cal. 64 (1906).

³⁷ *Roberts v. City of Palos Verdes Estates*, 93 Cal. App. 2d 545, 548 (1949); *Abbot Kinney Co. v. City of Los Angeles*, 223 Cal. App. 2d 668 (1963).

³⁸ Grant Application, Initial Study, p. 41, paras. (f) and (g). See Exhibit 12.

³⁹ 8 August 2003 Memorandum from Councilmember Jim Madaffer to City Manager Michael Uberuage. See Exhibit 13.

⁴⁰ Handwritten notes from JoEllen Jacoby's filed dated 4 September 2003. See Exhibit 9.

In September, April Penea responded directly to Madaffer's August Memorandum, indicating that she had complied with his request to create a cost accumulation account. She concludes,

Your interest and assistance with this project is appreciated. Please call me...or JoEllen Jacoby...if you have any questions.⁴¹

Penea also copied the four city departments.⁴²

In October 2003, handwritten notes indicate Madaffer was involved with naming the park, "Call Elyse confirm name of park."⁴³ Those same notes, which are titled "Mtg. w/Heidi," ask:

"Who is going to pay for road improvement for Ontario?"⁴⁴

VII. PROJECT CONTINUES AS A ROAD/PARK PROJECT BUT ENVIRONMENTAL CHECKLIST AND STATE GRANT APPLICATION FAIL TO MENTION THE ROAD

On December 8, 2003, the City Council authorized the City Manager to apply to the State of California Department of Parks and Recreation for an Urban Park Act of 2001 Program grant.⁴⁵ The Act required the State Department of Parks and Recreation to "establish a local assistance program under which the department would offer grants, on a competitive basis, to various local entities...for the acquisition or development, or both, of urban *parks and recreational areas and facilities*."⁴⁶ The Act does not provide funding for roads.

A timeline of this project reported that on November 19, 2003,

Decided to show road as vacated in graphic for grant.⁴⁷

⁴¹ 29 September 2003 Memorandum from April Penea, Deputy Director, Park and Recreation Department, Park Planning and Development Division to Councilmember Madaffer. See Exhibit 14.

⁴² *Ibid.* See Exhibit 14.

⁴³ Handwritten notes from JoEllen Jacoby's file dated 15 October 2003. See Exhibit 10.

⁴⁴ *Ibid.* See Exhibit 10.

⁴⁵ Resolution No. R-298701, Adopted 8 December 2003. See Exhibit 12.

⁴⁶ Urban Park Act of 2001, Assembly Bill 1481, Chapter 876, emphasis added. See Exhibit 15; *See also* 8 December 2003 Agenda for the Regular Council Meeting, Item 120 and San Diego Resolution R-298701 (8 December 2003). See Exhibit 12.

⁴⁷ Timeline, See Exhibit 27.

Just one month after the grant application was submitted, staff decided to “introduce” the road in public communications.⁴⁸

Although it had already been internally valued between \$340,000 - \$425,000, JoEllen Jacoby asked Lane MacKenzie about the status of an appraisal for the property, and also explained that it had been decided that the initial submittal to the Development Services Department would not show the Ontario Avenue connection developed as a road, but instead would show the area developed as a park:

I have completed a conceptual design for the site. This was necessary for my Public Project Assessment submittal to DSD. FYI April Pender wanted to show the park with Landis St. vacated and the full width of Ontario Ave. developed (I am not sure how we are going to accomplish that – keep the paper street and get an encroachment removal permit?) but it is necessary in order to reroute Auburn Creek which is required as part of the Chollas Creek Enhancement Plan.⁴⁹

According to Jacoby, McKenzie responded that he had set up a meeting with the property owner, was working out a price starting at \$800,000, and was determining whether he needed an appraisal.⁵⁰ In fact, the property had never been valued at \$800,000.⁵¹ The property owner was never offered \$800,000 for the property. The highest offer was \$475,000.

Later that month, handwritten notes from two different City employees who attended an organized ad hoc committee meeting called “Fox Canyon Park Meeting,” indicate that the plan was to show Ontario Avenue as a park to the state, and later to develop it as a road.⁵²

Specifically, the notes indicate that Madaffer’s office, through Elyse Olson,⁵³ envisioned two phases of the Fox Canyon Park project. Phase One appears to have been the development of the park and the enhancement of Chollas Creek. Phase Two appears to have been the construction of the Ontario Avenue connection.⁵⁴ The typewritten agenda for the committee meeting stated that the “Ontario Avenue configuration” was a “main issue” for the Fox Canyon park project.⁵⁵ The typewritten agenda delineated two separate categories under the heading “scope of work:” one for the entire project, and one for the Urban Park Grant Application.⁵⁶

⁴⁸ Ibid., See Exhibit 27.

⁴⁹ 2 December 2003 e-mail from JoEllen Jacoby to Lane MacKenzie. See Exhibit 16.

⁵⁰ 8 December 2003 e-mail from JoEllen Jacoby to Kelly Rodgers. See Exhibit 16.

⁵¹ See Exhibit 9.

⁵² 22 December 2003 Agenda, Fox Canyon Park Meeting Handwritten Notes. See Exhibit 17.

⁵³ Formerly known as Elyse Olson

⁵⁴ Ibid. See Exhibit 17.

⁵⁵ Ibid. See Exhibit 17.

⁵⁶ Ibid. See Exhibit 17.

Notes from the December committee meeting at which the phased park-then-road project was discussed, show that a representative from the Development Services Department was present for the two-stage discussions and suggest that Myra Hermann of that department had indicated the desire or ability to “Keep it simple” by generating a mitigated negative declaration as compliance with the California Environmental Quality Act.⁵⁷

Accordingly, on January 8, 2004, Hermann signed the environmental checklist for the Fox Canyon Park project. Although the committee meeting the month before indicated that the Ontario Avenue configuration was a “main issue” for the project, the description of the project in the environmental checklist made no mention of it whatsoever:

The proposed is the acquisition of land and development of the site into a community park with tot lot, passive play area, a hardcourt play area, barbecue, and picnic area. The project also includes a bridge with public art element.⁵⁸

Accordingly, the checklist stated that the project would have no impact to “induce substantial population growth in an area, either directly (for example, by proposing new homes and businesses) or indirectly (for example, through extension of roads or other infrastructure)” because the “park project would not induce substantial growth in surrounding community.”⁵⁹

The checklist also stated that the project would have no impact on circulation and traffic:

Park project would not cause an increase in traffic over existing... Existing traffic patterns would not be impacted to accommodate proposed project... Adequate parking for the new park would be on existing street surrounding the site... Avvess [sic] to the park is available from existing streets; however, paper streets within the project site that are included in the Community Plan as circulation elements must be vacated in order to create the park.⁶⁰

On January 14, 2004, at the next ad hoc Fox Canyon Neighborhood Park Meeting, the road was discussed and the “project” continued to be planned in phases.⁶¹

⁵⁷ Three different people’s handwritten 22 December 2003 Fox Canyon Park Meeting Notes. See Exhibit 17.

⁵⁸ Environmental Checklist Form, p. 13. See Exhibit 19.

⁵⁹ *Ibid.* See Exhibit 19.

⁶⁰ Environmental Checklist Form, p. 15. See Exhibit 19.

⁶¹ Handwritten notes on 14 January 2004 Fox Canyon Neighborhood Park Meeting Agenda. See Exhibit 20.

The next day, on January 15, 2004, the City submitted its Urban Park Grant Program application.⁶² Although the Procedural Guide for the application explained that the Department would not approve changes in Project Scope unless the scope meets the exact need cited in the original application,⁶³ there was no mention of the Ontario Avenue connection in the application City submitted. In fact, the grant shows Ontario Avenue as a “paper street with easement” with Auburn Creek running through it.⁶⁴

Although by this time he had advocated for of the Ontario Avenue connection for over four years, and although his office had already orchestrated the multi-phased park-then-road project, Councilmember Madaffer neglected to mention the Ontario Avenue connection when he wrote a letter of support for the park to Park & Recreation Department Director Ellen Oppenheim.⁶⁵

VIII. FUNDS TO BE USE SOLEY FOR THE PARK

Staff initially proposed funding the park and road project with Crossroads Redevelopment funds and Council District 7 Community Development Block Grant (CDBG) funds.⁶⁶ By the time the City applied for the Urban Parks grant, however, it had been decided funding was to come from CDBG and Special Park Fees. The grant application indicated \$900,000 of Mid City Special Park Fees and \$30,000 in CDBG funds would be a match for any grant funds.⁶⁷ Again, there was no mention of the road in the grant application. The City told the State that the funds referenced in the grant were only to be spent for park purposes:

Only on rare occasions can the city identify and allocate such a high amount of funds toward **park acquisition and development**. Fox Canyon Park is one of those extremely rare projects.⁶⁸

The matching funds to be expended by City were also to be used for only park purposes.

⁶² Fox Canyon Park Application to the Urban Park Act of 2001 2002 Resources Bond Act, Submitted by City of San Diego Park and Recreation Department January 2004. See Exhibit 12.

⁶³ Procedural Guide for the 2002 Resources Bond Act Urban Park Act of 2001, July 2003, State of California – The Resources Agency, Department of Parks and Recreation, p. 21. See Exhibit 21.

⁶⁴ Fox Canyon Park Application to the Urban Park Act of 2001 2002 Resources Bond Act, Submitted by City of San Diego Park and Recreation Department January 2004, p. 53. See Exhibit 12.

⁶⁵ 19 December 2003 letter from Jim Madaffer to Ellen Oppenheim, Director, Park and Recreation Department. See Exhibit 22.

⁶⁶ 21 November 2002 e-mail from Elyse Olson to Tracy Reed; 21 November 2002 e-mail from Tracy Reed to Elyse Olson and Gary DeBuschere. See Exhibit 5.

⁶⁷ Fox Canyon Park Application to the Urban Park Act of 2001 2002 Resources Bond Act, Submitted by City of San Diego Park and Recreation Department January 2004, p. 20. See Exhibit 12.

⁶⁸ *Ibid.*, emphasis added. See Exhibit 12.

In August 2003, Councilmember Madaffer wrote a memorandum to the City Manager requesting an account be created for Fox Canyon Park.⁶⁹

I would like to request that a cost accumulation account be created for CIP 295960, Fox Canyon Park. It is my intention that City departments (Real Estate Assets, Park and Recreation and Transportation-Streets Division) will be able to charge staff time into this account for the purpose of staff time necessary for acquiring land for a new neighborhood park in District 7.

Charges up to \$30,000 to this Code 50 account will be paid by District 7 CDBG Special Project Funds. I would like to request that each department that will be billing to this account submit a summary of their proposed activities associated with this action (i.e. general information – surveys, maps, permits, etc.) in order to keep my staff informed about the actions associated with this type of project. I would also like to request that if there is need to spend more than the allocated \$30,000, that it be submitted to my office in writing as a proposal by the requesting department.⁷⁰

Although the transportation director was copied on the memorandum, there was no mention of the road. The memorandum requested an account for a park only. The transfer occurred in December 2003.⁷¹

In January 2004, then Deputy Mayor Toni Atkins, along with Councilmembers Jim Madaffer and Charles Lewis jointly submitted a memorandum to City Manager Michael Uberuaga designating \$900,000 of Mid-City Park Development Fund for the acquisition and preliminary design of the Fox Canyon Park.⁷² The memorandum indicated that the entire \$900,000 was to be matching funds for the State of California Urban Parks Grant.⁷³ Council authorized the appropriation and expenditure of \$900,000 of Special Park Fees in June 2004.⁷⁴

⁶⁹ 8 August 2003 Memorandum from Councilmember Jim Madaffer to City Manager Michael Uberuaga, copied to Ellen Oppenheim, Park and Recreation Director, Will Griffith, Real Estate Assets Director, Cruz Gonzalez, Transportation Director, Ed Ryan, City Auditor and Comptroller. See Exhibit 13.

⁷⁰ *Ibid.* See Exhibit 13.

⁷¹ Agenda for the Regular Council Meeting 1 December 2003, Item 102. See Exhibit 23.

⁷² 13 January 2004 Memorandum from Deputy Mayor Toni Atkins and Councilmember Jim Madaffer, and Councilmember Charles Lewis to City Manager Michael Uberuaga. See Exhibit 24.

⁷³ *Ibid.* See Exhibit 24.

⁷⁴ 7 June 2004 Agenda for the Regular Council Meeting, Item 106. See Exhibit 25.

**IX.
PLANS CONTINUE FOR ROAD EXTENSION
BUT PUBLIC INFORMATION REFLECTS
ONLY THE PARK**

An April 2004 meeting agenda of what was now no longer a meeting called “Fox Canyon Park” but instead the “Fox Canyon Neighborhood Improvements Coordination Meeting” identified that the project was a “CD 7 priority”⁷⁵ and that a goal was to:

Discuss roles, responsibilities and feasibility of the four options for development of the Fox Canyon Neighborhood Park and Ontario Road.⁷⁶

A summary of the meeting prepared by JoEllen Jacoby explains,

The council office has asked us to look at extending the redevelopment plan to include the extension of Ontario Avenue, development of Auburn Creek per the Chollas Creek Enhancement Plan and possible redevelopment of adjacent properties.⁷⁷

Three of four options presented at the meeting included construction of Ontario Avenue.⁷⁸ Tracy Reed voiced concern that construction would cause a significant increase in traffic:

T. Reed feels that the ADT would be greatly increased and put traffic through a single family neighborhood to the south. He suggested a one way street or a sidewalk that would accommodate police cars.⁷⁹

The June agenda explained that staff would present to Madaffer’s office:

DELIVERABLE: Recommendation of preferred alternative/alternatives for presentation to CD 7⁸⁰

The minutes of the meeting indicated that Ellie Oppenheim, Hank Cunningham, Lane McKenzie, Lara Evans, and Karen Henry were to meet with Council District 7.⁸¹

⁷⁵ 26 April 2004 Agenda, Fox Canyon Neighborhood Improvement Coordination Meeting. See Exhibit 30.

⁷⁶ 26 April 2004 Fox Canyon Neighborhood Improvements Coordination Meeting Agenda, emphasis added. See Exhibit 30.

⁷⁷ Minutes of 26 April 2004 Fox Canyon Neighborhood Improvements Coordination Meetings, p. 1. See Exhibit 30.

⁷⁸ *Ibid.* See Exhibit 30.

⁷⁹ *Id.*, p. 2. See Exhibit 30.

⁸⁰ 1 June 2004 Agenda, Fox Canyon Coordination Meeting. See Exhibit 31.

In June 2004, then Deputy Mayor Toni Atkins, Councilmember Jim Madaffer, and then Councilmember Charles Lewis requested then City Manager Lamont Ewell to allocate Mid-City Park Development funds by percentage of population served in each council district by the fund, and that Council District Seven:

be given special consideration and priority in funding in order to bring that district up to their allocation percentage of 30 percent of the total funds allocated.⁸²

Ellen Oppenheim, Director of Park and Recreation was copied, and handwritten notes appear to indicate Elyse Olson provided a copy to April Pendera.⁸³

Shortly thereafter, Resolution No. R-299371 was adopted by the City Council, appropriating \$900,000 of Mid-City Park Fees to the Fox Canyon Park Project pursuant to the January 13, 2004 memorandum. The resolution recites that the funds will be used only for a park:

That the appropriation and expenditure of an amount not to exceed \$900,000 from Fund No. 39094, Mid-City Special Park Fees, CIP No. 295960, Fox Canyon Park – Acquisition and Initial Studies, is **authorized solely and exclusively for the purpose of providing funds for the purposes of acquisition, design contracts, and environmental studies of Fox Canyon Park**, provided that the City Auditor and Comptroller first furnishes one or more certificates certifying that the funds necessary for expenditures are, or will be, on deposit with the City Treasurer.⁸⁴

Contrary to what was being told to the state and the public, Madaffer continued to expend resources planning the road with City Staff. An agenda for a Council District Seven “update meeting” stated:

GOAL OF MEETING: Present each alternative.

⁸¹ 1 June 2004 Minutes, Fox Canyon Coordination Meeting, p. 2. See Exhibit 31.

⁸² 17 June 2004 City of San Diego Memorandum from Deputy Mayor Toni Atkins and Councilmember Jim Madaffer and Councilmember Charles Lewis to City Manager Lamont Ewell re Use of future Mid-City Park Development Funds. See Exhibit 32.

⁸³ *Ibid.* See Exhibit 32.

⁸⁴ San Diego Resolution R-299371 (21 June 2004), entitled A Resolution of the Council of the City of San Diego Authorizing Funding for Two New City Parks; Namely, Fox Canyon Park and Home Avenue Park, p. 2, para. 6, emphasis added. See Exhibit 33.

DELIVERABLE: Input from CD 7 on preferred alternative.⁸⁵

Kelly Rodgers summarized a “Fox Canyon Brown Bag Lunch Meeting w/Councilmember Jim Madaffer” as follows:

Mr. Madaffer provided the following comments.

-He prefers the options that include the road

-He would like to see a study that would analyze the flow in the culvert at Auburn Drive.

-PP&D should eliminate alternatives that include major creek realignment. – PP&D should look at options to address property flooding issues at Auburn and Ontario.⁸⁶

Councilmember Madaffer’s Office, through Elyse Lowe, thanked Kelly Rodgers for the recap.⁸⁷

Again in September, Madaffer met with staff. The September agenda set forth the following:

GOAL OF MEETING: Provide update on land acquisition. Present new alternative.

DELIVERABLE: Input from CD 7 on preferred alternative.⁸⁸

A matrix attached to the September Agenda indicated that for preferred alternative E, a possible funding source was the State Grant (Urban Park), Prop 40 Per Capita RZH (CD 7), Redevelopment, PSD (future), and CDBG.⁸⁹ An unknown author also indicates that additional Park Development Fees will be available in 2005.⁹⁰

An e-mail summary from Kelly Rodgers indicated, “We will proceed with Alternative E, as shown in the matrix,” and that “Lane forwarded DSD’s comments on the owner’s development plans to the owner. Lane will continue with negotiations to secure parcel.”⁹¹

⁸⁵ 26 July 2004 Agenda Fox Canyon CD 7 Update Meeting. See Exhibit 34.

⁸⁶ 2 August 2004 e-mail from Kelly Rodgers. See Exhibit 35.

⁸⁷ 3 August 2004 e-mail from Elyse Lowe to Kelly Rodgers. See Exhibit 35.

⁸⁸ 14 September 2004 Agenda Fox Canyon Council District 7 Update Meeting. See Exhibit 36.

⁸⁹ 14 September 2004 Fox Canyon Cost Analysis, p. 2. See Exhibit 37.

⁹⁰ 8 December 2004 Typewritten Memo entitled “Information from Tracy Reed regarding funding sources for Fox Canyon: 12/8/04.” See Exhibit 38.

⁹¹ 14 September 2004 e-mail from Kelly Rodgers to Aimee Faucett, April Pender, Bill Deloatch, Brian Schoenfisch, Chris Zirkle, Ellen Oppenheim, Elyse Lowe, Hank Cunningham, JoEllen Jacoby, Karen Henry, Lane MacKenzie, Lara Evens, Myra Hermann, Sally Pearson, Tracy Reed, Will Griffith, subject

X.
PLANNING FOR ROAD CONTINUES:
GRANT CONTRACT AWARDED

On November 1, 2004, the State notified Ellen Oppenheim that \$2,363,000 had been awarded to the City for acquisition and development of a park.⁹²

Heidi Lang, Park & Recreation's Assistant Grants Administrator, e-mailed Bonnie Morse-West, Project Officer for the State Department of Parks & Recreation, regarding whether eminent domain could be used to acquire the property:

We've been in negotiations with the seller for a year. The seller is asking for much higher amounts than a year ago when we applied. The question of imminent [sic] domain has arisen. I have reviewed the procedural guidelines to see if this would be an option. On page 24, the guidelines state, "All property shall be acquired from a willing seller..." Carol Wood, my supervisor, and I interpret this to mean that we cannot use imminent [sic] domain on this project. What is your assessment?⁹³

Morse-West agreed.⁹⁴ Lang then asked whether the cost estimate on the project could be adjusted, with less money going to development, if the City paid more money than what was listed in the estimate for the acquisition of the property, to which Morse-West replied that the City could adjust the project's cost estimate,

However, what is important is that everything listed in the project scope be completed as a part of this project, as that was part of the criteria used in awarding this competitive grant to the City in the first place. Therefore, you might need to scale down the development in one area or another.

Your project scope reads:

This project will acquire and develop Fox Canyon Park which will include a playground, hard courts, grassy area, picnic area, shade structure, interpretive kiosks, drinking fountains, sidewalks and landscaping. The City of San Diego, Urban Corps of San Diego, Fox Canyon

"Re: Fox Canyon Follow-up Brown Bag Lunch Meeting with Councilmember Jim Madaffer (Confirmation)." See Exhibit 39.

⁹² Letter received 1 November 2004 from Sedrick V. Mitchell, Deputy Director, State of California Department of Parks and Recreation to Ellen Oppenheim. See Exhibit 40.

⁹³ 13 December 2004 e-mail to Bonnie Morse-West from Heidi Lang, Assistant Grants Administrator, Park Planning & Development, Park and Recreation, City of San Diego. See Exhibit 41.

⁹⁴ 14 December 2004 e-mail from Bonnie Morse-West to Heidi Lang. See Exhibit 41.

Neighborhood Association, and San Diego City Schools are partners in this proposal. The development of this park will greatly enhance the quality of life, and provide a beautiful public space for this multicultural, park-deficient neighborhood.⁹⁵

Meanwhile, the Fox Canyon Coordination team was continuing to meet regarding funding and phasing of Preferred Alternative E, which included the road.⁹⁶ An additional meeting with Council District 7 was planned for mid-January 2005.⁹⁷

One person's handwritten notes on the Fox Canyon Coordination Meeting Agenda for December 15, 2004 show "bought total for \$500 k" under the subject "Update on Property Acquisition – Will/Lane" and the notes "could get park fees too" under "Description of Proposed Financing and Phasing Plan – Kelly/Joey."⁹⁸

The grant contract was executed on December 1, 2004.⁹⁹ On December 24, 2004, Bonnie Morse West wrote to Ellen Oppenheim to remind the City that all requirements under the California Environmental Quality Act were to be completed by October 26, 2005.¹⁰⁰ The contract also indicated that the State's remedy if City were to breach the contract was that City would be required to perform the contract:

Because of the benefit to be derived by the State, from the full compliance by the Grantee with the terms of this Contract, is the Preservation, protection and net increase in the quantity and quality of parks, public recreation facilities and/or historical resources available to the people of the State of California and because such benefit exceeds to an immeasurable and unascertainable extent, the amount of money furnished by the State by way of grant monies under the provisions of this Contract, the Grantee agrees that payment by the Grantee to the State of an amount equal to the amount of the grant monies disbursed under this Contract by the State would be inadequate compensation to the State for any breach by the Grantee of this Contract. The Grantee further agrees therefore, that the appropriate remedy in the event of a breach by the Grantee of this

⁹⁵ 14 December 2004 e-mail from Bonnie-Morse West, Project Officer, Office of Grants & Local Services, California State Parks, to Heidi Land. See Exhibit 41.

⁹⁶ 15 December 2004 Agenda Fox Canyon Coordination Meeting. See Exhibit 42.

⁹⁷ 15 December 2004 Handwritten notes, Agenda Fox Canyon Coordination Meeting. See Exhibit 42.

⁹⁸ *Ibid* .See Exhibit 42.

⁹⁹ Grant Contract, 2002 Resources Bond Act Urban Park Act of 2001. See Exhibit 43.

¹⁰⁰ 24 December 2004 letter from Bonnie Morse West, Project Officer, State of California Department of Parks and Recreation, to Ellen Oppenheim, Director, Park and Recreation Department, City of San Diego. See Exhibit 43.

Contract shall be the specific performance of this Contract, unless otherwise agreed to by the State.¹⁰¹

**XI.
CITY STAFF RAISES CONCERNS ABOUT TIMING
BUT COUNCIL OFFICE INSISTS PARK AND
ROAD TO PROCEED TOGETHER**

The “deliverable” on the January 2005 agenda of the Fox Canyon Neighborhood Park meeting states,

Input from CD 7 on phasing and direction on hiring consultants. Commitment from Team on schedule to meet grant deadline for environmental.¹⁰²

Handwritten notes indicated a list of thirteen individuals who were presumably at the meeting: Gary Halbert, Lane MacKenzie, April, Will Griffith, Heidi L, Kelly, JoEllen, Jim Madaffer, Tracy, Michelle St. Bernard, Myra Herrmann, Elyse, Ellie.¹⁰³ Those handwritten notes also state:

April: If we can get MND w/road we should do it but can we make the date

Jim: Should be all done together
Speed bump – slow road
One way

Gary: If a 2 lane road – he says no traffic issues? 28’

Another person’s handwritten notes on the January agenda also note, with an asterisk

Jim wants road + park done together

Those notes also indicate:

Local roads do not need to be addressed in the community plan.

Auburn made one way¹⁰⁴

¹⁰¹ Procedural Guide for the 2002 Resources Bond Act Urban Park Act of 2001, July 2003, State of California – The Resources Agency, Department of Parks and Recreation, p. 44. See Exhibit 21.

¹⁰² 25 January 2005 Agenda Fox Canyon Neighborhood Park. See Exhibit 44.

¹⁰³ Handwritten notes on 25 January 2005 Agenda Fox Canyon Neighborhood Park. See Exhibit 44.

¹⁰⁴ Id. See Exhibit 44.

Heidi Lang summarized the meeting:

Meeting included Councilmember Madaffer, Elyse Olson, Tracy, Will, Lane, Myrra, Gary, Ellie, April, Kelly, Joey, Heidi. Lane reported he made another offer to the land owner and there on [sic] negotiations underway. Heidi reported on grant schedule and CEQA requirements. The grant requires that the EIR or mitigated neg. dec. be completed by October 2005. The project will in all likelihood by a mitigated neg. dec. The group discussed scope of environmental studies and decided to include the park *and the road*. Heidi brought up issue of schedule several times, and read the part of the State's memo about the schedule & requirements. Heidi said that if the env. can be completed by October 2005 it will meet the grant. If the traffic studies and street section make the schedule slip past October, we could lose the grant. Madaffer said the env. should be completed by end of July. Myrra said that is possible if she gets the various studies (traffic, bio, etc.) quickly from Park and Recreation. At this time, the env. Studies will regard Ontario as a one-way street. If that changes in the future, then the env. doc could be amended. (As opposed to doing two completely different env. documents.)

Once the owner agrees on the price, there will be Council action to purchase the property. Also, Council will certify the mitigated neg. dec. when it is done. There will be further research on a change to the Community Plan regarding the streets. If it isn't needed, then no action from Planning Commission needed.¹⁰⁵

The minutes of the meeting prepared by JoEllen Jacoby corroborate the attendees mentioned above, and summarized the discussion and action items as follows:

Real Estate Assets is close to an agreement for purchase of land

Property acquisition should go to Council as soon as possible (do not hold for environmental) Action: Lane to proceed with 1472 for property acquisition

The park and road must be evaluated as one project for Environmental review

¹⁰⁵ 25 January 2005 e-mail from Heidi Lang to Chris Sichel, Carol Wood, emphasis in original. See Exhibit 44.

We must have a certified MND by October 26, 2005 to meet State requirements for our State Grant Money.

...

Proceed with a road design that fits within the footprint that we currently have

Action: Joey to hire a consultant to provide conceptual road design.

Regarding the road, the following items were discussed: a one way road, speed bumps to slow traffic, parking along one side.

The Community Plan Amendment is not needed for a Local Road per Gary Halbert. Community Plan Amendment is not needed for a park less than 2 acres per A.R. 1.6.¹⁰⁶

...

While READ communicated in the park meetings on negotiations with the landowners that an agreement was “close,” in fact there was no deal.

XII. MORE MONEY AND PROPERTY NEEDED FOR ROAD

On February 7, 2005, Elyse Lowe e-mails Councilmember Madaffer:

Jim-P&R asked that you provide funding for the road consultant. The \$30,000 you initially authorized for this project has been expended and they are now charging the \$900k that came from the Mid City park Fund – all allocated for the park design/allocation.

They asked that we fund up to \$100,000 for the consultant to design the road. I am checking on funding sources and we can use CDBG and D7 Public Infrastructure.

According to P&R we can't use money from the \$900k intended for the park to fund the road, because its matching funds to the \$2.3 million grant.¹⁰⁷

Accordingly, when requesting an estimate of funds needed for the “Fox Canyon park/Road Project” from April Penera, JoEllen Jacoby, and Kelly Rodgers, Elyse Lowe told them,

¹⁰⁶ 21 November 2006 Minutes, City of San Diego, Fox Canyon Neighborhood Improvement Coordination Meeting, held 25 January 2005. See Exhibit 44.

¹⁰⁷ 8 February 2005 e-mail from Elyse Lowe to Jim Madaffer. See Exhibit 45.

I have told Jim that charges associated with the road can't be charged to the park.¹⁰⁸

In March, a sublet project of the Fox Canyon Park Acquisition & Development was requested,

to distinguish Ontario Ave. design & construction expenses and park expenses.¹⁰⁹

Also in March, Heidi Lang drafted a memorandum to her supervisor, asking her to consider:

1. Remove or modify the Site Development Permit. The process is internal; the State Parks and Recreation Department and CEQA do not require it.
2. Allocate funding for the roads' environmental review. The State grant cannot be used to cover any part of the roads. It can only be used for the park.
3. Remove the roads from the environmental review process. Work on this after the park's CEQA is complete.
4. Bring all parties to the table to discuss other ways that the park's environmental review can be completed on time so we keep \$2,363,000 – and Fox Canyon Park.
5. Consider funding the park and roadways with local funds if we cannot retain the grant.¹¹⁰

Heidi Lang concluded her memo,

Please raise this up through the chain of command. We all make better decisions with more complete information. Working together, I hope we can find a way to retain the Fox Canyon Park grant.¹¹¹

On February 8, 2005 the Park and Recreation Department Development Office sent a memorandum to the Auditor and Comptroller's Office requesting a grant payment

¹⁰⁸ 8 February 2005 e-mail from Elyse Lowe to April Pender, JoEllen Jacoby, Kelly Rodgers, emphasis added. See Exhibit 45.

¹⁰⁹ 1 March 2005 Job Order Request No. 295961. See Exhibit 46.

¹¹⁰ 4 March 2005 City of San Diego Memorandum from Heidi Lang, Assistant Grant Administrator, Park Planning and Development to Carol Wood, Grants Administrator, Park Planning and Development, p. 1. See Exhibit 47.

¹¹¹ *Id.*, p. 2. See Exhibit 47.

invoice.¹¹² The invoice was issued March 8, 2005 and requested \$236,000¹¹³ which the State ultimately paid. Later, however, Heidi would tell the State in an e-mail that was a mistake:

As we discussed briefly this morning, the progress reports sent June 2005 and February 2006 need to be clarified. The reports inadvertently show total project costs spent to date, not grant funds spent to date.

To date, the expenses for preliminary design and CEQA for the park have been charged to City funds, not the grant fund. As of today, only \$1,275 has been charged directly to the park grant.¹¹⁴

In mid-March, Elyse Lowe e-mailed Councilmember Madaffer,

Lane is writing the 1472 for the Fox Canyon Land acquisition – the seller finally agreed on a price. Lane does not have in writing yet from the seller, but should have it soon...¹¹⁵

Madaffer responded,

Now it looks like we may need to buy that other house – please get an estimate from READ on that one as well. We may need to do a “temporary” 108 loan to fund portions of the park including things for the road – all with a Crossroads TI reimbursement agreement. Feel free to throw that into the mix as an option to keep things moving quickly. Thanks.¹¹⁶

The “other house” was outside the footprint of the park, and was only necessary for construction of the two-lane road. Elyse then e-mailed April Penera,

Jim wants to investigate buying the house at the corner of Auburn/Ontario to build a two lane road. He suggests using a “temporary” 108 loan to fund portions of the park including things for the road – all with a Crossroads TI

¹¹² 8 February 2005 City of San Diego Memorandum from Development Office, Park and Recreation Department to Joan Talbert, Accountant III, Auditor and Comptroller’s Office, “Request for Grant Payment Invoice.” See Exhibit 48.

¹¹³ 8 March 2005, City of San Diego, California Government Agency Invoice to State of California Acct. No. 035932. See Exhibit 49.

¹¹⁴ 3 April 2006 e-mail from Heidi Lang to Bonnie Morse West. See Exhibit 50.

¹¹⁵ 15 March 2005 e-mail from Elyse Lowe to Jim Madaffer. See Exhibit 51.

¹¹⁶ 16 March 2005 e-mail from Jim Madaffer to Elyse Lowe, emphasis in original. See Exhibit 51.

reimbursement agreement. Should that be included in Lane's 1472?¹¹⁷

April responded,

I believe there is money left in the Mid City Special Park funds... wouldn't we just use that? A¹¹⁸

Elyse responded to April,

Can you pretty please confirm the amount that is left? Kelly thinks its only \$180,000 in Mid City Special Park Funds. Thanks!¹¹⁹

April wrote,

I want to make sure we are all saying the same thing.

We have \$930,000 in the project. It is my understanding that \$30,000 was CDBG and \$900,000 was Mid City Special Park Fee. Then, on top of that, we will get the \$2.5 mil of grant money. In addition to that, there is \$180,000 in the Mid City SPF... Agreed?¹²⁰

And Elyse replied,

\$900,000 from Mid City Special Park Fee

\$30,000 from CDBG has been allocated and spent on staff costs (according to Joey)

It is my understanding that we have burned through the \$30,000 CDBG and have now started spending the \$900,000 for staff costs.

Parkland acquisition cost: \$480,000 per Lane M. as of today.

\$900,000

-\$480,000

=420,000 remaining-\$ amount used up to date in staff costs. Do you have an accurate figure on what has been spent to date?

The estimated cost for the house is \$450,00, per my conversation with Lane today.

¹¹⁷ 16 March 2005 e-mail from Elyse Lowe to April Penner. See Exhibit 51.

¹¹⁸ 16 March 2005 e-mail from April Penner to Elyse Lowe, emphasis added. See Exhibit 51.

¹¹⁹ 30 March 2005 e-mail from Elyse Lowe to April Penner, See Exhibit 51

¹²⁰ 5 April 2005 e-mail from April Penner to Elyse Lowe

Our office needs to get the other Council members in agreement that we can use the \$180,000 Special park fee remaining – I know Tony Yong is eyeing it, even though we have a memo signed by all three that D7 has first take on it.

I do not know what part of the \$2.3 million could be used to build the road (and/or buy the house needed for the road). Heidi would know this. I believe its no, but we need confirmation.¹²¹

Elyse had already e-mailed Councilmember Madaffer,

We will need to purchase part of the property on the corner in order to make the road work. Don't know yet if we need the whole house or part of the parcel. **Do we have your permission to have Lane Makenzie start discssions with the owner of the house?** The ballpark estimate on the house is \$400-\$500,000.

The only \$\$ we have to buy the house would be \$180,000 out of the Mid City Special Park funds (which D4 thinks they have a hold on but according to the memo – wee [sic] have first rights to it) and a loan as you suggested (in your e-mail below) from HUD 108 to be repaid by Crossroads TI.¹²²

Madaffer replied,

2 weeks ago I personally chatted with Will G and asked him to begin pursuing the house. Please confirm this with him directly. Buy the house now – any and all ways possible using any and all funds possible. Thanks.¹²³

A week later April Penera asked Carol Wood, Heidi Lang's supervisor, whether she agreed that grant monies could be used for the road:

carol, can you weigh in on the grant and being able to buy the house with the money... it isn't only for the road, it is the entrance to the park... can we make that nexus?¹²⁴

¹²¹ 5 April 2005 e-mail from Elyse Lowe to April Penera

¹²² 30 March 2005 e-mail to Jim Madaffer from Elyse Lowe, emphasis in original. See Exhibit 51.

¹²³ 30 March 2005 e-mail to Elyse Lowe from Jim Madaffer, emphasis in original. See Exhibit 51.

¹²⁴ 6 April 2005 e-mail to Carol Wood, Elyse Lowe, Kelly Rodgers, Margaret May from April Penera. See Exhibit 51.

The next Fox Canyon Neighborhood Improvements Meeting was focused exclusively on the road.¹²⁵

In April, Madaffer requested \$150,000 in Mid-City Special Park Fees from Lamont Ewell for the Fox Canyon park project and corresponding Ontario road connection for “an additional private property parcel acquisition.”¹²⁶ Again, Madaffer had been advised that additional private property was only for the road.¹²⁷ Madaffer had also been briefed less than two months earlier that charges associated with the road could not be charged to the park.¹²⁸

Minutes of the May 2005 meeting of the “Fox Canyon Neighborhood Improvements DSD Coordination Meeting” indicate the property would not be purchased outright and only a narrow portion of the property needed to accommodate Ontario Ave. would be purchased.¹²⁹ The property owner signed an Ownership Disclosure Statement in September 2005.¹³⁰

April Penera responded to Madaffer’s request for an additional \$150,000

I am in receipt of your AIM #05-0137 dated April 27, 2005, which requests that the Park and Recreation Department allocate \$150,000 from the Mid-City Special Park Fees for the purpose of developing the Fox Canyon project and the corresponding Ontario Road connection. This E-mail is to inform you that we will oblige this request and do so as part of the June Revision memo.¹³¹

Though the request was for funding for the road, Madaffer responded,

Thanks for all your help in building this new park.¹³²

Not having been told that Madaffer’s request for the additional \$150,000 of Special Park Fees was for the purchase of a house needed to make the two-lane road possible, when Heidi Lang reviewed the revision letter she wrote the following e-mail to JoEllen Jacoby:

¹²⁵ 7 April 2005 Minutes, City of San Diego Fox Canyon Neighborhood Improvements DSD Coordination Meeting. See Exhibit 52.

¹²⁶ 11 April 2005 City of San Diego Councilmember Jim Madaffer District Seven Memorandum from Councilmember Jim Madaffer to City Manager Lamont Ewell. See Exhibit 53.

¹²⁷ 30 March 2005 e-mail from Elyse Lowe to Jim Madaffer, See Exhibit 51

¹²⁸ 8 February 2005 e-mail from Elyse Lowe to April Penera, JoEllen Jacoby, Kelly Rodgers, emphasis added. See Exhibit 45.

¹²⁹ 2 May 2005 Minutes of City of San Diego Fox Canyon Neighborhood Improvements DSD Coordination Meeting. See Exhibit 54.

¹³⁰ 29 September 2005 Ownership Disclosure Statement of Kahnkong Souryamath. See Exhibit 64.

¹³¹ 5 May 2005 e-mail from April Penera to Jim Madaffer. See Exhibit 55.

¹³² 6 May 2005 e-mail from Jim Madaffer to April Penera. See Exhibit 55.

Is that to cover the funds that were used earlier from the park grant to cover the studies on the road? Just checking!¹³³

Heidi Lang made explicit in a follow up e-mail to JoEllen Jacoby and Kelly Rodgers,

You probably know this already, but just a reminder: the Mid City Park Fees used for the Fox Canyon property acquisition can only be used for parks, not for roads.¹³⁴

To the contrary, however, in November 2005, Madaffer requested yet another \$100,000 of Mid-City DIF for the park:

This funding will be used to supplement the matching funds used by the City for the Urban Park Act of 2001 grant awarded to the Fox Canyon Park Project.¹³⁵

Elyse Lowe would later explain that this request was actually intended for the road, not the park.¹³⁶

Deputy Mayor Toni Atkins, Councilmember Tony Young, Charlene Gabriel from the Planning Department, Kelly Rodgers from the Park and Recreation Department, and Heidi Lang from the Park and Recreation Department were copied on Councilmember Madaffer's memo. Charlene Gabriel, Facilities Financing Manager, responded that staff has set aside the requested funds pursuant to Madaffer's request.¹³⁷

In November, Heidi Lang requested an additional \$150,000 of special park fees to be allocated to the park project:

Please appropriate \$150,000 of Park Development Impact Fees per the attached CIP Fiscal Year 2006 change letter by close of business today. This matter is extremely important.¹³⁸

In an e-mail describing Heidi Lang's request, Jaime Jacinto of the Water Department writes,

¹³³ 29 June 2005 e-mail from Heidi Lang to JoEllen Jacoby, copy to Margaret May, April Penera, Carol Wood. See Exhibit 56.

¹³⁴ 29 July 2005 e-mail from Heidi Lang to JoEllen Jacoby, Kelly Rodgers. See Exhibit 56.

¹³⁵ 18 November 2005 City of San Diego Councilmember Jim Madaffer District Seven Memorandum. See Exhibit 57.

¹³⁶ 8 March 2006 e-mail from Elyse Lowe to April Penera re Revision to past memo. See Exhibit 58.

¹³⁷ 14 December 2005 City of San Diego Memorandum from Charlene Garbriel to Councilmember Jim Madaffer. See Exhibit 59.

¹³⁸ 29 November 2005 Park and Recreation Department Fax Message from Heidi Lang to Joan Talbert. See Exhibit 60.

As explained by Heidi, the \$150,000 from the Park DIF Fund (39094) should be appropriated to CIP 29-596.0. This amount represents the City's match to State grant funds already received. The funding source was programmed not to download automatically because it is a type of DIF...¹³⁹

In January, 2006, JoEllen Jacoby reports:

After Project Design Consultants sends [sic] me corrected billings, I anticipate no extra money in this account....¹⁴⁰

Elyse responds:

Jim is sending a memo to allocate more CDBG to the road. I will copy you on it.¹⁴¹

At the March 2006 Fox Canyon Neighborhood Improvements Coordination meeting, the minutes indicate:

Additional funds in the amount of \$275,000 is needed to cover the Road design. \$100,000 will be Special Park Fees – see above

April to look into transferring CDBG money into Central Ave. project and releasing Mid City Fees for the road

...

ACTION ITEMS:

Elyse will e-mail Joey a Statement that the \$100,000 Special Park Fees can be used for the road CIP# 29596.1.¹⁴²

April Penera, Tracy Reed, Melissa Garcia, Samir Mahmalji, Joey Jacoby, and Elyse Lowe were present at this meeting.¹⁴³ Less than a year before, Heidi Lang had made it clear to Penera and Jacoby that Special Park Fees could not, in fact, be used for roads.

Two days later Elyse Lowe e-mailed April Penera contending that Madaffer's November 2005 memorandum requesting special park fees for the park should have been for the road:

¹³⁹ 29 November 2005 e-mail from Jaime Jacinto to Yeshe Bezuneh, copy to Heidi Lang. See Exhibit 61.

¹⁴⁰ 20 January 2006 e-mail from JoEllen Jacoby to Elyse Lowe. See Exhibit 62.

¹⁴¹ 20 January 2006 e-mail from Elyse Lowe to JoEllen Jacoby, April Penera. See Exhibit 62.

¹⁴² 7 March 2006 Minutes, City of San Diego Fox Canyon Neighborhood Improvements Coordination Meeting. See Exhibit 63.

¹⁴³ Ibid. See Exhibit 63.

The memo sent by Councilmember Madaffer back in Nov. 2005 should have been allocated to the sub-CIP. Please revise the memo to read: Please allocate \$100,000 of Mid City DIF (Fund 39094) to the Fox Canyon Park Project CIP 29-596.1¹⁴⁴

In May, 2006, Elvi Ricafort, Associate Management Analyst, Park and Recreation Department, Park Planning and Development Division, requested that \$50,000 from the Fox Canyon Park Fund be transferred to the sublet fund, for “Fox Canyon Park – Ontario Avenue Design and Construction, Fund 39094, Mid-City Park Development.”¹⁴⁵

Teresa Hovland e-mails Yeschi Bezuneh,

Please process the attached JV that will back out labor charges from Fox Canyon Park project (JO #295960) and transferred to Fox Canyon Park – Road (295961). Per the project manager, charges from #295960 from 01/01/04 to 12/31/04 were labor hours spent on the road (#295961), however, there was no funding at that time for the road so the hours were charged to Fox Canyon Park JO# 295960. The total amount to be transferred from job order no. 295960 to job order no. 295961 is \$30,565,78.¹⁴⁶

XIII.

PARK & RECREATION BOARD ASKS QUESTIONS; CITY ATTORNEY’S OFFICE INVOLVED

At the March 16, 2006 Park and Recreation Board meeting, Item 102 was noticed as an action allowing the Board to recommend Fox Canyon Park with the extension of Ontario Avenue, recommend the park without the extension of Ontario Avenue, or recommend the park with modifications. Hilda Mendoza, Deputy City Attorney, drafted a memorandum to the Park and Recreation Board members, advising them to return Item 102 to Park and Recreation staff. Mendoza explained:

As stated in San Diego Municipal Code section 26.31, the Board’s powers and duties are, among others, to advise the City Council, through the Mayor, on public policy matters relating to “acquisition, development, maintenance and operation of parks, beach, playgrounds and recreational activities in the City of San Diego.” The construction of Ontario Avenue is not the development of a park, beach,

¹⁴⁴ 8 March 2006 e-mail from Elyse Lowe to April Penner re Revision to past memo. See Exhibit 58.

¹⁴⁵ 24 May 2006 City of San Diego Memorandum from Elvi Ricafort, Associate Management Analyst, Park & Recreation Department, Park Planning & Development Division, See Exhibit 65.

¹⁴⁶ 26 June 2006 e-mail from Teresa Hovland to Yeschi Bezuneh, JoEllen Jacoby copied. See Exhibit 66.

playground or recreational activity, and therefore outside the purview of this Board.¹⁴⁷

At the hearing, Ms. Mendoza, represented to the Park and Recreation Board Members that no park funds would be spent on the road.¹⁴⁸ Later in the meeting, April Penea indicated that some special park fees had been spent on a portion of the road.¹⁴⁹ Park and Recreation Board Member Bob Otilie requested that Hilda Mendoza provide an opinion regarding whether the use of any special park fees for road purposes were appropriate.¹⁵⁰

Mendoza responded:

At the Park and Recreation Board Meeting of March 16, 2006, you requested the information as to the source of monies for the construction of Ontario Road. I confirmed with City staff that the monies are development impact fees. Pursuant to California Government Code section 66001, the fees may finance a public facility. California Government Code section 66002(c) defines a “facility” to include “streets and supporting improvements, [and] roads.” I will refer to the Park and Recreation Department your question as to the amount of the fees that will finance the construction of Ontario Avenue.¹⁵¹

Hilda Mendoza has not been employed at the City Attorney’s Office since Spring 2006. It is unclear to what extent she discussed this issue with staff before coming to the above conclusion. Nevertheless, whether she was misled by staff or somehow came to her own conclusion, Mendoza failed to complete the proper legal analysis. While it is true that special park fees are a kind of development impact fee, all development impact fees are not special park fees. Not all development impact fees may be used for streets, supporting improvements, and roads. To the contrary, the Government Code requires that when the use of fees are specifically set forth, they be used for no other purpose.¹⁵²

At the March 16, 2007 Park and Recreation Board Meeting, the Board voted unanimously to oppose construction of the Ontario Avenue connection.

¹⁴⁷ 16 March 2006 letter from Hilda Ramirez Mendoza, Deputy City Attorney to Park and Recreation Board Members, Subject: Item 102 – Fox Canyon Neighborhood Park Project on the City of San Diego Park and Recreation Board agenda for March 16, 2006. See Exhibit 67.

¹⁴⁸ 16 March 2006, Minutes, Park and Recreation Board Meeting. See Exhibit 68.

¹⁴⁹ Id. See Exhibit 68.

¹⁵⁰ Id. See Exhibit 68.

¹⁵¹ 21 April 2006 Letter from Hilda Ramirez Mendoza, Deputy City Attorney, to Robert P. Otilie. See Exhibit 69.

¹⁵² See Section V, *supra*.

**XIV.
AN OFFER ON THE PROPERTY**

Although in January 2004 the grant application indicated that the City was “currently negotiating the acquisition of the site from a willing seller”¹⁵³ and Larry Zajonc and Janice Smith-Zajonc confirmed on January 20, 2004 that they were “willing sellers” but only “if a mutual agreement can be reached,”¹⁵⁴ an official offer on the property was not made until almost a year and a half later.

On April 5, 2005, although prior authorizations had been \$800,000¹⁵⁵, Lane MacKenzie offered Larry Zajonc \$475,000 for the property.¹⁵⁶ \$800,000 was never offered. On May 17, 2005, Heidi Lang asked JoEllen Jacoby whether the land acquisition was in escrow yet.¹⁵⁷ It was not.

**XV.
NO ACCEPTANCE BY OWNER
BUT READ TELLS COUNCIL THERE’S A DEAL**

Notwithstanding the fact that there was nothing in writing from the property owner, in June 2005 READ told the City Council:

The Real Estate Assets Department has negotiated a voluntary sale by seller and acquisition by the City of the park site. An escrow has been opened and will be able to close upon approval of the funding for the acquisition. Immediate funding would be from Fox Canyon Park Fund # 39094 with reimbursement after October by the State grant.¹⁵⁸

The City Council approved the funding.¹⁵⁹ In fact, however, the property owners had not entered into escrow and had not agreed to sell the property,¹⁶⁰ and therefore the escrow did not close upon approval of the funding for the acquisition.

Minutes from the October meeting of the Fox Canyon Neighborhood Improvements Coordination Meeting explained,

¹⁵³ Fox Canyon Park Application to the Urban Park Act of 2001 2002 Resources Bond Act, Submitted by City of San Diego Park and Recreation Department January 2004, p. 49. See Exhibit 12.

¹⁵⁴ 20 January 2004 Letter from Larry W. Zajonc and Janice Smith-Zajonc to “Mr. or Mrs. KcKenzie.” See Exhibit 70.

¹⁵⁵ 4 August 1998 Mid-City Communities Plan, See Exhibit 71.

¹⁵⁶ 4 April 2005 letter from Lane MacKenzie to Larry Zajonc. See Exhibit 72.

¹⁵⁷ 17 May 2005 e-mail from Heidi Lang to JoEllen Jacoby. See Exhibit 73.

¹⁵⁸ 8 June 2005 City of San Diego Manager’s Report, p. 2. See Exhibit 74.

¹⁵⁹ San Diego Resolution No. R-300516, (13 June 2005). See Exhibit 75.

¹⁶⁰ 29 September 2005 letter from Sandra Brower, Wertz McDade & Wallace, to JoEllen Jacoby. See Exhibit 76.

The main parcel is still not purchased. The owner is dealing with a developer, Duane Betty, for the upper parcel. The owner wants to make sure that the developer is agreeable to purchasing the upper portion before the owner splits the lot. Duane Betty wants certain clearances from Development Services before he commits to the upper portion. Action: Lane to request that Duane Betty proceed with a Preliminary Review Submittal to Development Services, so that issues can be quickly identified and resolved.¹⁶¹

By February 2006, the parcel was still not purchased. Ted Medina told the state that purchase of the property had been delayed, but that “The City is in escrow with the seller.”¹⁶² Although the Real Estate Assets Department had opened an escrow, the sellers had not agreed to sell the property and had not entered into escrow. They were, however, continuing to negotiate the sale of the property, including the upper portion of the property to a third party, Duane Betty.¹⁶³

In April 2006, Patricia Grabski asked,

On 4/5/06 Mr. Zajonc was contacted to sign the Fox Canyon permit. He said that he wasn’t going to sign anything until he got paid by the City. When will he be getting paid? Please let me know when it occurs.¹⁶⁴

XVI. STATE OFFICIALS AND PUBLIC FINALLY TOLD ABOUT ROAD BUT NOT INFORMED THAT PLANS FOR ROAD PRECEDED PARK

Heidi Lang requested that the State grant the City an extension of time to comply with California Environmental Quality Act [CEQA].¹⁶⁵ Although the project scope was not amended, Lang attached a timeline.¹⁶⁶ The timeline mentioned the road as if it was first discussed in April 2004.¹⁶⁷ The State approved the request for an extension.¹⁶⁸

¹⁶¹ 7 October 2005 Minutes, Fox Canyon Neighborhood Improvements Coordination Meeting. See Exhibit 77.

¹⁶² 10 February 2006 Grant Progress Status Report, submitted to State of California Department of Parks and Recreation. See Exhibit 78.

¹⁶³ 22 March 2006 e-mail from Mitchell Berner, consultant for Duane Betty, to April Pendera. See Exhibit 79.

¹⁶⁴ 14 April 2006 e-mail from Patricia Grabski to JoEllen Jacoby, Lane MacKenzie, April Pendera. See Exhibit 79.

¹⁶⁵ 31 May 2005 letter from Heidi Lang to Bonnie Morse West. See Exhibit 80.

¹⁶⁶ Attachment, Tasks Completed: Fox Canyon Neighborhood Park, 31 May 2005 letter from Heidi Lang to Bonnie Morse West. See Exhibit 80.

¹⁶⁷ Ibid.

¹⁶⁸ 6 July 2005 letter from Bonnie Morse West to Heidi Lang. See Exhibit 80.

In August 2005, Heidi Lang notified the state that “the City of San Diego has decided to develop a road over the “paper street” just west of the park.¹⁶⁹ In a subsequent site visit, Josh Brady, State Parks staff, inquired about the road:

Josh also asked why we didn’t include the road in the original application and initial study. I said that application was written before the decision to build the road. Josh said that we should submit a request for a scope change if the size of the park changes or the scope of work changes (any of the main elements in the contract paragraph). The rescope should include text (what’s changing and why), a new site plan, and a new cost estimate. The rescope must meet the intent of the competitive grant program.¹⁷⁰

In a press release and a January 2006 report to the Park and Recreation Board, the public was told that the decision to include the road in the project was not made until January 2005.¹⁷¹ The purported rationale was to further the purposes of the Euclid Avenue Revitalization Action Program.¹⁷² The State was informed the same in a letter drafted by April Penner.¹⁷³ However, the State did not receive a formal change request to include a road.¹⁷⁴

XVII. THE EUCLID RAP

In April of 2000, the Euclid Avenue Revitalization Action Program (“Euclid RAP”) was adopted.¹⁷⁵ The Euclid RAP prioritized recommendations, the penultimate being to “reduce the volume of ‘cut-through’ traffic on Auburn Dr.” by “clos[ing] Auburn Dr. to through-traffic south of Wightman St.” and by

examin[ing] alternatives, such as one-way traffic flow on Wightman St. and upper Auburn Dr., for those in favor and opposed to closure of Auburn Drive.¹⁷⁶

¹⁶⁹ 31 August 2005 Letter from Heidi Lang to Bonnie Morse West of State of California Department of Parks and Recreation. See Exhibit 80.

¹⁷⁰ 31 January 2006 e-mail from Heidi Lang to Carol Wood. See Exhibit 81.

¹⁷¹ 14 October 2005, Handwritten notes on e-mail from Heidi Lang to JoEllen Jacoby, April Penner, Kelly Rodgers, Carol Wood; 10 November 2005 e-mail from JoEllen Jacoby to Elyse Lowe; 10 January 2006 Report to the City of San Diego Park and Recreation Board. See Exhibit 82.

¹⁷² 14 October 2005, *Handwritten* notes on e-mail from Heidi Lang to JoEllen Jacoby; 10 January 2006 Report to the City of San Diego Department of Parks and Recreation. See Exhibit 82.

¹⁷³ 18 November 2005 letter to Bonnie Morse West from April Penner. See Exhibit 83.

¹⁷⁴ 20 April 2006 e-mail from Patti Keating to Michael Shanahan. See Exhibit 84.

¹⁷⁵ Euclid Avenue Revitalization Action Program, April 2000. See Exhibit 85.

¹⁷⁶ *Ibid.*, Traffic Improvements: Prioritized Recommendations Chart. See Exhibit 85.

The final recommendation was to provide a “connection between Winona Ave. and Ontario Ave.” by

open[ing] a connection between Winona and Ontario Ave.s
as part of the closing of Auburn Dr.¹⁷⁷

The Euclid RAP then explained,

A more detailed study of the proposed opening of a connection between Ontario and Winona Avenues should be conducted to evaluate the project’s potential impacts and effectiveness in resolving neighborhood traffic concerns.

Implementation of this program’s recommendation that the resolution of traffic and streetscape issues identified along Euclid Avenue be achieved through improvements to the existing right-of-way will require amendment of the Mid-City Communities Plan...¹⁷⁸

The Euclid RAP also suggested development of “a neighborhood park on Auburn Dr., perhaps in conjunction with any future roadway construction linking Winona Avenue and Ontario Avenue.”¹⁷⁹

The Euclid RAP did not, however, recommend opening a connection between Winona and Ontario independent of the closing of Auburn Drive. The Ontario Avenue connection and Fox Canyon Park project did not include closing Auburn Drive.

XVIII. TRAFFIC STUDY, ENVIRONMENTAL REVIEW WHOLLY INADEQUATE

Meanwhile, the project made its way through the permitting process. On September 26, 2005, the final report for the environmental document, the Mitigated Negative Declaration [MND], was completed. The MND was based on an initial study, which incorporated by reference the environmental checklist which did not include the road at all.¹⁸⁰

¹⁷⁷ *Ibid.*, emphasis added.

¹⁷⁸ *Ibid.*, Traffic Improvements: Implementation [referencing Mid-Cities Communities Plan, 4 August 1998, which contains no reference to an Ontario Avenue connection. See Exhibit 85.

¹⁷⁹ *Ibid.*, Streetscape Improvements. See Exhibit 85.

¹⁸⁰ 8 January 2004 Initial Study, p. 3, and attached checklist; *See Also*, 21 March 2006 City Council Meeting, Appeal of the Adequacy of Environmental Documents for the Fox Canyon Park, Statements made by Myra Hermann. See Exhibit 19.

No analysis of the cumulative impacts of the road was ever completed. There was no discussion of any growth inducing effects. An environmental document must study all reasonably foreseeable consequences of a project.¹⁸¹ It must discuss:

the ways in which the proposed project could foster economic or population growth, or the construction of additional housing, either directly or indirectly, in the surrounding environment. Included in this are projects which would remove obstacles to population growth (a major expansion of a waste water treatment plant might, for example, allow for more construction in service areas)....[and]

the characteristic of some projects which may encourage and facilitate other activities that could significantly affect the environment, either individually or cumulatively. It must not be assumed that growth in any area is necessarily beneficial, detrimental, or of little significance to the environment.¹⁸²

Although CEQA requires a comparison to applicable land use plans and a discussion of not only the environmental impact of the project on the current conditions, but also possible future conditions anticipated in the plan,¹⁸³ there was no mention of the Crossroads Redevelopment plan or the future conditions it contemplates in the MND.

The traffic report, too, failed to analyze reasonably foreseeable projects in the area and the possible future conditions anticipated in the Crossroads Redevelopment plan. It explained,

The purpose of this technical report is to document trip generation and associated parking demand for the proposed Auburn Creek-Fox Canyon Park and to estimate average daily traffic volumes for the extension of Ontario which will occur with development of the park...¹⁸⁴

The traffic study concluded that the park would generate 20 daily trips,¹⁸⁵ although an early draft of the traffic study indicated the park would generate only 4 daily trips.¹⁸⁶ The traffic study failed to analyze the daily trips that would be generated by the

¹⁸¹ *Laurel Heights Improvement Ass'n v Regents of University of California*, 47 Cal. 3d 376 (1988).

¹⁸² 14 Cal Code Regs § 15126.2(d)

¹⁸³ 14 Cal. Code Regs §15125(e)

¹⁸⁴ 18 August 2005 Final Report-Traffic Information, Auburn Creek-Fox Canyon Neighborhood Park, p. 1. See Exhibit 86.

¹⁸⁵ *Ibid.* See Exhibit 86.

¹⁸⁶ 12 May 2005 Final Report – Auburn Creek – Fox Canyon Neighborhood Park Traffic Study. See Exhibit 87.

road. Instead, when purporting to analyze “estimated traffic volumes,” the traffic study took an area-wide approach, purporting to analyze only “trip redistribution.”¹⁸⁷ There was no analysis of reasonably foreseeable trips that would be generated by construction of the road.

Nevertheless, the Hearing Officer approved the Site Development Permit for the park/road project on October 12, 2005.

The Hearing Officer expressed his strong concern that staff had received two different recommendations from the community; the Fox Canyon group which wanted the park and the road to go through, and the City Heights Area Planning Committee which also wants the park, but does not want the road. He noted that while the Ontario Avenue connection could possibly be used for park purposes or even emergency access, given the configuration of the lot, the right-of-way usability for park purposes would be limited given the width of it. He asked staff if the right-of-way for the Ontario Avenue connection had been set aside as part of a subdivision. If it was, he stated that it would confirm the fact that the connection was envisioned. At the time of the hearing, staff was unable to answer the question.¹⁸⁸

On December 1, 2005, the Planning Commission heard an appeal of the Hearing Officer’s decision. At the Planning Commission hearing, Elyse Lowe read into the record a letter from Councilmember Madaffer. The letter explained:

I feel very strongly that the Fox Canyon Park and the Ontario Road connection should be approved under the same Site Development Permit. It would be unfair and dishonest to move forward with the development of the park without planning for the long-promised and planned road connection of Ontario Ave.

...

Following my announcement of the Fox Canyon Park shortly after taking office, City staff immediately went to work and successfully secured a state park grant based on the promise I made to the people in the area: a new park and improved public safety by adding a long-promised and missing road link for their neighborhood. This project has further enjoyed the support of the late Charles Lewis and

¹⁸⁷ 18 August 2005 Final Report-Traffic Information, Auburn Creek–Fox Canyon Neighborhood Park, Appendix C. See Exhibit 86.

¹⁸⁸ 21 March 2006 City Council Meeting Agenda, See Exhibit 66.

his successor, Councilmember Tony Yong and by Deputy Mayor Toni Atkins – critical allies for a desperately needed park and road connection at the junction of our three City Council districts.

It is imperative that we plan for the future connection of Ontario Ave as part of this park project. With this new road adjacent to the park, criminals will no longer be able to escape into the darkness when running from Police. Graffiti vandals will disappear as the eyes of the community will now be upon them watching their every move in the well lit area. The road is needed for the access, safety and positive changes it will bring to this area that has been so underserved over the last forty years. The park will also be served by the on-street parking the road will provide.

As Councilmember, I refuse to allow the misinformation and ill wills of a few conquer the desires and dreams of many. Improving this neighborhood has been discussed by neighbors and with my office for many years. I have asked my staff and the City Manager and staff to help implement the dream that has come from community consensus: build the park, and connect the road.

The creation of Crossroads Redevelopment area is a key source to the funding that will be needed to complete the road connection. There was no mistake when we included Fox Canyon neighborhood and this park and needed road in the Crossroads redevelopment area. I worked hard for my constituents to make sure this was a key element in the Crossroads Redevelopment plan, and not just a pipe dream. We are now able to see the dreams of the community, the residents come to fruition.¹⁸⁹

During Commission discussion, Commissioner Garcia asked,

I don't feel like I have concrete data as to make a decision as to whether we will really need the street or not need the street and maybe you can expand on that.¹⁹⁰

Ann responded,

Unfortunately I can't answer for sure if its in the CIP currently – as I said earlier it is a dedicated paper street for a number of years and so people did plan it would be eventually be used as a street – Mr. Khaligh said correctly

¹⁸⁹ 30 November 2005 letter to Planning Commissioners from Jim Madaffer. See Exhibit 88.

¹⁹⁰ 1 December 2005 Planning Commission Transcript, See Exhibit 89

that **it is not needed as a circulation element street**. But those are collectors and above so that is not to say that it might not be --- needed as access. Obviously, I can't speak for Emergency Services but any time you have access or you have none I think they would see that as an overall positive.¹⁹¹

Later during Commission discussion, Penera offered the publicly given reason for including the road in the project:

We didn't look into making it only the emergency access because when we started to go out and approach the land use groups, it became apparent that the RAP in our interpretation of reading it concluded that a road was what the community wanted. So, we put the road in because we felt that that's what the community supported. We were just trying to follow what we thought was the direction of the community.¹⁹²

When asked about the Fire Department and Police Department's opinion on the road, Penera responded,

The Fire Department, Sam Oats, who I'm sure has been here before, said he does not use this as primary access for response times, but it would definitely work as an alternative route. The Police Department weighed in on the grant from the safety perspective as a safe place for kids to play, but did not weigh in on response times.¹⁹³

Almost five hours after the planning commission hearing began, many members of the Planning Commission seemed to have decided that the best course of action was no action. A motion to continue the matter had been made and seconded when the Chairman allowed Mr. Madaffer to speak:

Commissioners, you will be happy to know I have been watching downstairs intently....

In listening to the debate, I understand the issue. It gets down to the road.

The road was not part- And I have to give a lot of credit to these incredible city staff members who have done a wonderful job in putting together this project.

¹⁹¹ Ibid., emphasis added.

¹⁹² Ibid.

¹⁹³ Ibid.

The park and the road were always one in the same for me. They were not included in the grant because a park grant does not include a road. You just don't pay for roads out of park grants.

When I created the Crossroads Redevelopment area, I specifically included the Fox Canyon area and this area in particular as part of the Crossroads Redevelopment area because my intent is to use tax increment funding to build the road. This is a needed link within the community.

My feeling is this, and if ah – if you would be so inclined. Continuance, that is certainly within your discretion. Ah - in watching the prior motion fail I would agree it goes back to the original decision of the hearing officer.

My feeling would be this, I would be happy to convene a task force that would dialogue on the road, subject to your approval of the project today with the condition of the task force.

And I would be happy to have the dialogue necessary in the community.

Frankly, the road idea was one to provide access, to provide parking, and a number of things that I think are beneficial and frankly to provide access to the creek area as an amenity to the Chollas Creek park.

So with those things being said though those are obviously my perspective I would love - nothing more than see a dialogue with the community. My worry is holding this project up any further because they are on a tight timeline.

So my request would be that you folks consider moving forward with the project today with the original - I think Mr. Steele you were kinda hinting in that direction - although Mr. Griswold I appreciate your motion just to ah – to ah deny the appeal. I would think that would be good and I'll certainly do from my perspective and in my ability to facilitate the needed task force and the needed dialogue on the road.

If it is determined by the community if in fact they don't want a road, if in fact they want just an access road, if they want just an emergency vehicle trail, given the fact that there are those easements already in place as been well noted I'd be open to that.

But what's important is that this park project continue and I would just ask your indulgence in giving that every consideration.

I have long said I wanted the two to go together. I can't see one without the other, but that's a philosophical perspective.

The park grant was written at my request because the road and the park were to be the same.

With redevelopment coming down there's a lot of positive change soon to happen in this neighborhood. This is a down payment to that positive change. And this is about moving San Diego forward.¹⁹⁴

Ultimately, the Planning Commission took Madaffer's advice. They denied the appeal and required a task force be created prior to implementing the road:

Motion by Griswold for Councilmember Madaffer's Office taking the lead in coordinating a taskforce; along with the deletion of condition #19 and adopt the language listed:

Prior to implementation of the road, the permittee/applicant shall create a taskforce to evaluate the issues related to the road and alternatives, such as impact, benefits, needs, environment, and cost.

The applicant/permittee shall work in good faith with the taskforce to evaluate their recommendations and then process any amendment to the permit that may be required to implement any changes to the project, which the applicant/permittee determines to make.¹⁹⁵

On December 15, 2005, an environmental group, Friends of Fox Canyon Park, appealed the environmental determination to the City Council.

The task force met three times in February.¹⁹⁶ Madaffer's office continued its involvement with the project in March. His office held meetings with staff on the project.¹⁹⁷ And, Park and Recreation member Bob Otilie reported that Madaffer called him the day before the City Council hearing and said that the road had to come first and

¹⁹⁴ 1 December 2005 Planning Commission Hearing, emphasis added, See Exhibit 89

¹⁹⁵ 1 December 2005 Planning Commission Minutes. See Exhibit 89.

¹⁹⁶ 24 January 2006 letter to John Stump from Jim Madaffer. See Exhibit 91.

¹⁹⁷ 7 March 2006 appointment from April Penera to April Penera, Elyse Lowe, JoEllen Jacoby, Samir Mahmalji, location "jim's office, cab 10"; 8 March 2006 appointment from JoEllen Jacoby to DSD-Training; Ann Gonsalves, JoEllen Jacoby, Kamran Khaligh, Elyse Lowe, Samir Mahmalji, April Penera, subject "Ontario Ave Task Force Report. See Exhibit 92.

that the opponents of the project were “screwing the pooch on the park.”¹⁹⁸ Otilie reported,

His next comments were as follows: “The whole thing is terminated at this point.” Councilmember Madaffer then told me that “we’ll build the road and put in the new housing and there will be no park.” *He reiterated that the road would be built.* Reiterating that the park had come second, Councilman Madaffer stated that “I (meaning he) screwed things up by suggesting that they put the park in.”¹⁹⁹

On March 20, 2006, the City Attorney’s Office recommended that Councilmember Madaffer recuse himself from participation in the appeal to the City Council.²⁰⁰

Our recommendation is that Councilmember Madaffer recuse from participation in this environmental appeal because public comments he has made regarding the project following the filing of the environmental appeal may be interpreted as bias against the appellant and the validity of the environmental appeal.

If Councilmember Madaffer elects to participate in this matter, we advise Councilmember Madaffer to state for the record that he has carefully considered the allegations that he cannot be fair and impartial and that he believes he can be fair and impartial in his consideration of the environmental appeal.

...

After the appeal of the environmental determination was filed, Councilmember Madaffer formed the Task Force as recommended by the Planning Commission. Councilmember Madaffer invited individuals to participate in the Task Force by letter. Attachment 3. The letter includes the statement, “At the Planning Commission meeting held on December 1, 2005, I committed to assemble a Task Force to evaluate the issues related to the Ontario Ave. road connection and alternatives, such as impacts, benefits, needs, environment and costs.”

¹⁹⁸ 21 September 2006 Memo from Bob Otilie to Park and Rec Board, p. 5. See Exhibit 93.

¹⁹⁹ 21 September 2006 Memo from Bob Otilie to Park and Rec Board, p. 6. See Exhibit 93.

²⁰⁰ 20 March 2006 Memorandum from Michael J. Aguirre to Honorable Mayor and Members of the City Council, “Participation in Vote on March 21, 2006 City Council Agenda, Item 331, Fox Canyon Neighborhood Park. See Exhibit 94.

Additionally, the letter references the City Council hearing on the environmental appeal. The concern is that discussions regarding the “impacts” and “environment” are inappropriate communications prior to the City Council hearing on the environmental appeal.

Further, Councilmember Madaffer’s newsletter mailed March 15, 2006, includes a lengthy discussion of the park and road. Attachment 4. The newsletter states in part:

“Sadly, there are a few people who don’t like the idea of the road but they do want an isolated park without adequate fire and police access and without any parking. In order to create community consensus, I committed to creating a task force that met to discuss the merits of the road connection and try to work things out. The task force includes neighborhood residents and community leaders. It seems just about every project these days has people who are against something no matter what. The Fox Canyon Park project is no exception. While I respect the opponent’s opinion, I support the greater community in what they envision for their own neighborhood and their efforts to create it.”²⁰¹

XIX. THE THREE-MOTION CITY COUNCIL HEARING ON THE MITIGATED NEGATIVE DECLARATION

Councilmember Madaffer refused to recuse himself at the City Council hearing, and announced that he could be fair and impartial in making a decision.²⁰² On March 21, 2006, the City Council heard the appeal of the Planning Commission’s approval of the MND. After first voting to grant the appeal and not approve the MND because of insufficient analysis, the Council entered into lengthy discussion, voted to reconsider their first vote, and ultimately voted to deny the appeal and approve the MND. The reason for the reconsideration and vote change appeared to be concern that if the MND was not approved that day, grant funding for the park would be lost.

During Council discussion Councilmember Frye honed in on the discrepancy between the project description in the initial study checklist and the project description in the Mitigated Negative Declaration.

Myra Hermann, who had been at the December committee meeting at which the road was discussed as a “main issue” of the project, responded,

²⁰¹ *Id.* at p. 3. See Exhibit 94.

²⁰² 21 March 2006 City Council Meeting transcript. See Exhibit 95.

It's true that when we did the initial study checklist that was submitted for the grant, it did not include the road, and that is because **at the time that was prepared which was back in January 2004, we did not know about the road** in terms of the way it is today. We anticipated that the road would be acated [sic]and then it was subsequent to being actually awarded the grant and having subsequent staff meeting with other departments and other divisions within our department, that the road needed to be constructed. So what happened is that when we actually started to prepare the environmental documents, we did include the road in the project description...²⁰³

Later, Hermann further explained,

Basically, as I explained earlier, when we first, when staff first looked at the initial grant application, **we did not know that there was going to be a road as part of the project.** So this initial study checklist was submitted with the grant application with the assumption that the road would be vacated. It is, as I said earlier, a snapshot in time. Oftentimes, when we start a project, we're looking at it at that time. That's our baseline information. We start from there. During the process of reviewing the project, once this was the project, okay we're not talking about the project we see today, when we first looked at the initial study checklist, and prepared it for the grant, it was January 2004. After the grant was awarded, in October of 2004 and then before – I think the contract was signed by park and recwith [sic] the state, and then they resubmitted for the project, the actual project in March 2005, there were changes in the project that had to do with meetings with other City staff, new information from the community, the realization that the Euclid Avenue RAP existed, and that the road was to be built, so the project progressed over time and unfortunately, we're not necessarily always required to update the checklist, sometimes we do when the project changes. We can usually cover that off in our discussion, and in the actual project description, which is what is on our notice, it is what is on the MND, and what in the initial study. So all the initial analysis was done for a project which included the park, it included the enhancements to the creek, and it included the development and realignment of the road, so while some members of the community feel

²⁰³ Id. See Exhibit 95.

that the document is flawed because the initial study checklist doesn't include a road, it doesn't mean that the analysis is inadequate because we did analyze the whole project as described.²⁰⁴

Contrary to her statements, staff did know that there was going to be a road as part of the project before she signed the initial study checklist that was executed.²⁰⁵ Staff did know when they first reviewed the project it included a road.²⁰⁶

Councilmember Hueso made the first motion on the matter. After explaining he believed the environmental document was adequate, he proceeded to make an argument that the environmental document was in fact inadequate:

I think because of redevelopment, we have this conversation today. And redevelopment is going to make this park a reality...²⁰⁷

Redevelopment was required to be and was not discussed at all in the environmental document.²⁰⁸ Hueso moved to deny the appeal.

After the motion was made and during discussion, Frye requested traffic and growth inducement be studied and suggested:

...an adequate environmental analysis for the people because this is going to add a minimum of 2,000 cars going where there are no cars now. And for me, and if I were living there, I mean, I would think that was a significant impact to my community. I would say, I want to know how are we going to be addressing these cars, 2,000 cars, that's minimum. It could be much more depending on what type of new development. The other thing that has not been analyzed in the environmental document is the growth inducing impacts caused from that road. When you put a road and attach one area of a community to another area of a community, you have the potential to grow more housing or development which could further have impacts. So the direct impacts and then in addition, the cumulative impacts, we'd like to know what's going to happen.

The motion failed four to three with districts three, four, and six voting no and district five absent.

²⁰⁴ Id. See Exhibit 95.

²⁰⁵ See Page 10, Exhibit 17.

²⁰⁶ *Ibid.* See Exhibit 17.

²⁰⁷ 21 March 2006 City Council Meeting transcript. See Exhibit 95.

²⁰⁸ See Section XVIII, *supra*.

After a break, Madaffer asked to be recognized, and proceeded to speak about the project, even though the Council had been reminded by the City Attorney's Office that they were only to discuss the environmental document:

Thank you Mr. Peters. And I know Ms. Frye wants to make some comments to try to perhaps, with respect to the environmental document, since the appeal is no longer over, I don't have to sit here in a quasi-judicial matter with respect to the appeal that was before us. I do want to offer a couple of comments relative to this project for my colleagues and for members of the public. The project that is before, that we've been talking about today, has to do with this park. We have a 2.3 million dollar Murray-Haden grant that is hanging in the balance right now. I understand that it was originally the deadline was October of '05. We have an extension to May. The only way I think at this point that anything could be saved on this project is if the environmental somehow or another came back before the May '05 date. I don't think you can do an environmental document that quickly. Just for the benefit of my colleagues, thank you, Mr. Peters for the privilege to speak. I personally think that the action perhaps has, today that took place in not denying the appeal, it could have the potential of getting keeping us from getting the funding for the park. I don't know if we can do things in time. I can tell you this. This area is within the Crossroads Redevelopment Area. The community has clamored for a long time to have improvements made to the area. That's why we included it in the Crossroads Redevelopment Area. **The fact of the matter is the road itself will undoubtedly be built. It will be paid for through tax increment funds. And it will connect these two areas.** The issue with respect to the park, I'm not sure where the funding would come from for that. And having heard this discussion today, if there would ever be the two compatible. You know, this is one of those things where no good deed goes unpunished. I started off as a City Councilmember. I go into this area; I want to do everything I can to help the people we heard today before us. So we talked about having this, finishing this road it actually provide access to Euclid Avenue Revitalization Action Plan called for this road. It relieves the traffic that's on Euclid Avenue, which is bumper to bumper right now. Many of you have been in the area right now you would see it, it's bad. Talk about kids crossing the street. They can't

on Euclid. We want to do what we can to ameliorate the traffic there. I thought, lets do this: let's kind of put this road in. You know, this is an idea that was born right here. So we come forward with this and we thought, yeah, we'll use Crossroads to pay for it. About that same time, there was a guy that bought some property, I think its one of the co applicants and they owned a house up above and they owned vacant land below. And I thought, you know, wouldn't this be great, I thought, we could actually put in a park for these residents. We have such a park deficiency for this area. We could put in a park and so we come up with the idea, let's apply for a grant. **We didn't connect the two together on purpose. I didn't want to have the grant include a road just for the same reason that you wouldn't have park monies pay for a road. It kind of came along like that.** And now that I see where we are today is, unfortunately because of the vote of the council, I think we're going to have a tough time seeing this happen unless somebody can figure out a way to pull a rabbit out of a hat and get a new or changed or amended environmental document between now and May of '05. So I just thought I'd offer a little perspective, May of '06. I'd thought I'd offer a perspective at least from my standpoint, that this is one of those things where all I ever tried to do from the beginning was provide the community access to the neighborhood, clean up the area, put in a park, and now it looks as though those are in jeopardy.²⁰⁹

However, Madaffer had connected the road and the park on purpose.²¹⁰ He had, on multiple occasions, requested park monies pay for a road.²¹¹ And he confirmed that the environmental document which made no mention of growth inducing effects or cumulative impacts, was inadequate when he discussed the Crossroads Redevelopment Area.

Taking Madaffer's lead, April Penera warned the City Council,

For the grant, I have to have a certified NOD by May 1st. I don't know what I can accomplish in a month. That's what I've got: I've got all of April. So I don't know, I'm kind of struggling and if you could give me more direction, that

²⁰⁹ 21 March 2006 Transcript, City Council Meeting, emphasis added. See Exhibit 95.

²¹⁰ 25 January 2005 Agenda Fox Canyon Neighborhood Park, handwritten notes, See Exhibit 44; 1 December 2005 Planning Commission Transcript, See Exhibit 89.

²¹¹ 11 April 2005 City of San Diego Memorandum, See Exhibit 53; 18 November 2005 City of San Diego Memorandum, See Exhibit 57; 8 March 2006 e-mail from Elyse Lowe to April Penera re Revision to past memo, See Exhibit 58; 30 March 2005 e-mail from Jim Madaffer to Elyse Lowe, See Exhibit 51.

would be great – how, what exactly someone would want me to be able to accomplish because I’ve often heard, you don’t want to rush it to the point where it is not quality, and I don’t know exactly what this direction is leading me to.²¹²

Longtime Fox Canyon committee member Myra Herman, added,

We would, we would still need to, if necessary, do an addendum to the Environmental Documents which would not actually require a public review, but actually, no we would – well, I take it back. If we’re changing the scope of the project, we could do a revised final which would then require public review. We’d have to go back out and it may – it’s either twenty days or thirty day public review. I’d have to go back and look at CEQA, what CEQA requires and that would still, could still possibly put us beyond our timeline for needing an NOD, a certified document.²¹³

Madaffer continued commenting on various development and redevelopment projects that had not been discussed or analyzed in the Mitigated Negative Declaration:

Then the other, the other question that I had beyond Ms. Frye’s motion, one of the other folks that are really not – that are here today but have not spoken up, is the redevelopment agency. **The Crossroads Redevelopment Area has interest in supporting the community.** Mr. Lopez and the residents of Fox Canyon – making improvements in and around alot of the housing area. **There is incredible new affordable housing opportunities right at the juncture of Auburn and Ontario.** The City of San Diego, for the last 30 years, pays out flood damages on a regular basis to the apartments that are along Chollas Creek. And so when Chollas Creek floods, these apartments flood, and then we, the City, taxpayers, pay and so one of the things that we want to do with Crossroads is provide an economic incentive to people that own these apartments in that area to perhaps build new housing that will be outside or above the flood plain. **Now, if for some reason this park mitigation through the environmental documents would preclude a road, I would venture to say then a good question would be is**

²¹² 21 March 2006 City Council Meeting transcript, See Exhibit 95.

²¹³ 21 March 2006 City Council Meeting transcript. See Exhibit 95.

would that preclude good access to new and more dense housing in this area at Ontario and Auburn. One of the things we are trying to do with the Crossroads Redevelopment Area is build more market rate and affordable housing. One of the things we're trying to do is provide housing for a lot of these folks so they don't have to move out of the neighborhood – they want to stay in that area – and so Crossroads contemplated building new housing to replace some of the old deficient housing that gets flooded and that we, as taxpayers, have to pay money on every year, or every other year for flood damage. So I guess a question to be added into this analysis is if in fact this road were to become, say, just an access road as has been contemplated, would that preclude then the ability to add density in the Crossroads Redevelopment Area because these other roads are already so impacted. We already have a one-way road in the area now because traffic is so bad. We actually approved here at City Council a couple of years ago a one-way road on Auburn, where it kind of does the pork chop there, it really turns kind of sharp because traffic is so bad – I mean that didn't come up today. **This idea of keeping this road from happening, all that's going to do is also keep more housing from happening in the Crossroads Redevelopment Area.** That's why I was trying to do a park and a road that I thought was so complementary to one another. But I think we would include that in the analysis as well – does this preclude future economic development opportunities in this area?²¹⁴

If Madaffer's comments are true, if the road not happening could keep more housing from happening, then the road happening could allow more housing to happen. This is the very definition of growth inducement.²¹⁵

Understanding this, Frye responds,

...I'm happy to include any type of analysis for the road, but the thing is the document that I read – the mitigated negative declaration – did not have any discussion about the growth inducement that would be caused as a result of building that road...I don't believe in the traffic analysis there was anything in there that talked about average daily trips for a whole lot more housing that is going to be built as a result of the building of the road. That analysis was

²¹⁴ 21 March 2006 City Council Meeting transcript. See Exhibit 95.

²¹⁵ See Section XVIII.

not done and if that was the intention then that needs to be so stated, and that is a cumulative impact and that does need to be addressed in a much different way.²¹⁶

She then moved to uphold the appeal, deny the certification of the mitigated negative declaration, and to suggest that staff go back and provide an environmental impact report that includes alternatives, one alternative being a park project without a road, or a no project alternative, and a park with a road project alternative.

Dissatisfied, April Penera suggested a different motion,

if the project, if the environmental document were to be proved with the exception that the road not be built, but that the access road be built for the purposes of moving the park project through. And then come back to do a follow up at a later date because²¹⁷

Peters interrupted, "...that is an excellent idea..." and Penera continued, "And the project does come back before you for approval of the construction drawings because it is over a million dollars in the current muni code..."²¹⁸

After Assistant City Attorney Karen Heumann again explained only the environmental document was before the Council, Frye expressed frustration and Peters suggested,

Alright. Let me suggest this. We can't do anything without approving the environmental document. What Mr. Halbert is telling us is that no one can build a road without our vote on funding. So why don't we, one way to skin this cat is if you agreed that the document was sufficient for the purposes of an emergency access road, and we wanted to restrict that, we can do that through our funding decision that comes down the road. Is that?"²¹⁹

Halbert responded,

No, I wouldn't say that. I would say that if you are going to certify the documents, you actually have to certify it for the project that is before you... Having said that, the reality is if the project were, at a later date, changed to being either

²¹⁶ 21 March 2006 City Council Meeting transcript. See Exhibit 95.

²¹⁷ Id. See Exhibit 95.

²¹⁸ Id. See Exhibit 95.

²¹⁹ Id. See Exhibit 95.

an access road or no road at all, this MND would still be sufficient.”²²⁰

Peters nodded,

I understand that. Okay. So I’d suggest that what we should do if we are trying to head for that is vote against this motion and to vote to accept the, to deny the appeal, and approve the document, so lets vote please. Okay call the roll. That motion fails five to two with districts three and six voting yes.²²¹

Peters then suggested a continuance. However, Hermann interjected,

I don’t believe that staff would have enough time, if we need to do additional analysis, or do another document, or revise our environmental document if that is the case with whatever motion is before you today.²²²

After a motion to reconsider passed, Madaffer made a motion to deny the appeal and uphold the environmental document. Eric Bowlby of the Sierra Club inquired whether there will be a full EIR on the road,

...what has convinced the members to reconsider here was the fact that they would get to vote at a later time a road, an access road, or no road. That would be an alternative that they could – if we wind up with a two lane road, as Councilmember Madaffer pointed out, it’s tremendously growth inducing. That would need a full EIR. Do you agree, Mr. Madaffer?²²³

Madaffer responded,

I’ll follow along with whatever the environmental staff and attorneys advise the City needs to do on whatever that project becomes, whether it’s a mitigated negative dec, whether it’s a full EIR, I think that’s to be determined because we don’t have that before us today, sir.

²²⁰ Id. See Exhibit 95.

²²¹ Id. See Exhibit 95.

²²² Id. See Exhibit 95.

²²³ Id. See Exhibit 95.

Hermann again interjected, this time asking for clarification,

Well, Staff is kind of confused over here as well. I'm sorry. Because my understanding of the new motion is to deny the appeal which would then certify the environmental document as it stands. No further analysis, we could move forward with the park project, however its...

Peters, frustrated, interrupted, stating,

That does not preclude more analysis, the fact that we say today,²²⁴

And Myra continued,

Yes it does, because technically the road project and the park project are consumed in that one environmental document, in actuality you could...

Peters again interrupted, demanding,

Wait a minute. Step out of your CEQA hat for a second. **Step away from the law. Step back from the law.** The point is you can bring to us information in the form of a staff report that explains to us what the traffic impacts are of a one lane road, that can be in a three page letter, or it can be in a set of tables. It doesn't have to be as part of a new environmental document, and I think everyone on this board, I can promise you will get that analysis. That does not mean that that has to be named mitigated negative declaration or environmental impact report. But we can meet Mr. Bowlby's concern that we have that information before we make a decision about funding.²²⁵

Councilmember Frye tried to explain why the law is in fact important:

My concern is there is no requirement to do any further environmental analysis. If this motion is approved, the road will be approved, the park will be approved, and you will not have another opportunity under the law, to deal with this issue. That will be it, it will be over. And that is

²²⁴ Id. See Exhibit 95.

²²⁵ 21 March 2006 Transcript, City Council Meeting, emphasis added. See Exhibit 95.

why I made the motion I did, which was to uphold the appeal, to allow for some further analysis so that we could bring back a project that would include no road, or an access road, or the full analysis.²²⁶

But the majority of the Council stepped away from the law. Madaffer's motion passed five to two with districts four and six voting no. Madaffer concluded with a statement to the appellant's attorney, Mr. John Stump,

I will communicate to the Crossroads Redevelopment committee that they in fact make sure that if there is going to be any kind of road, that there will be an environmental analysis done.²²⁷

XX. THE STORIES CHANGE AFTER CITY IS SUED

Friends of Fox Canyon Park filed a lawsuit on April 19, 2006, *Friends of Fox Canyon Park v. City of San Diego, et al.* The lawsuit alleged the Mitigated Negative Declaration was inadequate and also alleged procedural improprieties in the decision making process due to Councilmember Madaffer's bias.

After the lawsuit was filed, Elyse Lowe suggested that the property owner was suddenly asking for more money:

Unfortunately, another issue has arisen which would more likely kill the park than the lawsuit. The owner is now demanding an exorbitant amount of money for the land – five times more than we thought he had agree to in recent months. Now we will battle with appraisals and see if we can get anywhere.²²⁸

Lane MacKenzie then sends a letter to the landowner's attorney, requesting a response to the April 2005 offer.²²⁹ Attorneys for the landowner replied by rejecting the \$475,000 offer but indicating that they were still interested in selling.²³⁰

²²⁶ 21 March 2006 City Council Meeting transcript. See Exhibit 95.

²²⁷ Id. See Exhibit 95.

²²⁸ 28 April 2006 e-mail from Elyse Lowe to Myra Herman, JoEllen Jacoby, Bob Manis, and April Pender were copied. See Exhibit 96.

²²⁹ 8 May 2006 letter from Lane MacKenzie to Sandra Brower, Sullivan Wertz McDade & Wallace. See Exhibit 97.

²³⁰ 18 May 2006 letter from Rebecca Michael, Sullivan Wertz McDade & Wallace to Jim Waring. See Exhibit 98.

Shortly afterward, handwritten notes indicate discussions had already commenced regarding moving the park to a different location.²³¹

By June, April Penea tells Lane MacKenzie to hold off on getting an appraisal.²³²

XXI. PARK & RECREATION BOARD ASKS MORE QUESTIONS

By September, however, Mackenzie had obtained an appraisal.²³³ In response to questioning by Park & Recreation Board member, Bob Otilie at the September Park & Recreation Board Meeting, Mackenzie disclosed that the appraised value was \$52,000.²³⁴ When the Park & Recreation Board continued to question the use of special park fees, April Penea indicated that she had received her advice from David Miller of the City Attorney's Office. Deputy City Attorney Miller had not in fact advised April Penea that it was appropriate to use special park fees for the Ontario Avenue connection. Instead, the minutes of the Department of Parks and Recreation Board Meeting show he gave the following advice when presented with a general, hypothetical scenario:

...assuming there is no relationship between the road and the park, and the road does not border the park or assist in providing entrance to the park, it is simply a road in the community, it would not be appropriate to use Special Park Fees to build a road.²³⁵

Notably, the decision to use special park fees had been made over a year earlier.²³⁶

At the September 21, 2006 Park and Recreation Board Meeting, April Penea provided a summary sheet of the funds that had been used.²³⁷ The sheet explained that at least \$430,000 in special park fees had been spent on the park and road.

When asked by Park and Recreation Board Member Bob Otilie to explain the special park fees, April Penea attempted to defer to David Miller.²³⁸ When pressed, Penea explained,

The way – the way that I understand them is exactly the way David explained it which says that, ...explained the city, mid-city Special Park Fee was created in the '80s and was charged to single family residents in the North Park and mid-city communities to help fund park and rec parks

²³¹ Handwritten notes dated 31 May 2006. See Exhibit 99.

²³² 29 June 2006 e-mail from April to JoEllen Jacoby, Samir Mahmalji, Teresa Hovland. See Exhibit 100.

²³³ 29 September 2006 Park & Recreation Board Meeting Transcript p.15, See Exhibit 103.

²³⁴ Ibid, See Exhibit 103.

²³⁵ 20 July 2006 minutes Park and Recreation Board. See Exhibit 101.

²³⁶ 16 March 2005 e-mail from April Penea to Elyse Lowe. See Exhibit 51.

²³⁷ 21 September 2006 Park and Recreation Board Summary Sheet Fox Canyon Neighborhood Park. See Exhibit 102.

²³⁸ 21 September 2006 Park and Recreation Board Meeting Transcript, p. 9. See Exhibit 103.

and facilities that were identified by those communities as a priority. These fees were collected in lieu of the park component of the developer impact fee...A Special Park Fees is a component of a developer impact fee, instead of paying for parks.²³⁹

When Otilie then requested Deputy City Attorney Alex Sachs respond as to the legality of using Special Park Fees, Penera interjected,

The \$165,000 of special – mid-city Special Park Fees was spent on a road and David Miller of your office was here explaining that that is a, that you, that you could use Special Park Fees, that are developer impact fees, for a road in connection with a park, so if you, just giving you that as, as when you come back to Mr. Otilie’s question, want to seek David Miller as your resource on that.²⁴⁰

Again, however, Penera had proposed using park fund monies on the road in a March 2005 e-mail to Elyse Lowe.²⁴¹ The City Attorney’s Office never advised Penera that Special Park Fees could be used to fund the Ontario connection.

XXII. CITY COUNCIL SETTLES LAWSUIT

On October 10, 2006 the City Council voted 7-1 to settle the lawsuit by rescinding the Mitigated Negative Declaration, the Site Development Permit, and the resolutions approving both of them, and by paying the petitioners \$5,000 in consideration of a waiver of any and all claims for costs and/or attorneys fees.²⁴²

When the closed session item was adopted in open session, Madaffer explained:

It is with regret that I make the motion in support of this item but I think it is important that we move on with the most feasible action...

Some say it was the road that killed this park; actually I think this road has been on the books since 1923, long before anybody ever talked about a park alongside that road at Fox Canyon. It ultimately was community politics, a struggle for power and greed that ultimately killed this park in the end.”²⁴³

²³⁹ Id. at p. 11. See Exhibit 103.

²⁴⁰ Id. at p. 12. See Exhibit 103.

²⁴¹ 16 March 2005 e-mail from April Penera to Elyse Lowe. See Exhibit 51.

²⁴² 10 October 2006 Closed Session Meeting Report. See Exhibit 104.

²⁴³ 14 November 2006 City Council Meeting, Councilmember Madaffer’s comments, 47:30.

XXIII.
**SPECIAL PARK FEES FROM THE FOX CANYON PARK
ACCOUNT ARE TRANSFERRED TO A TRANSNET ACCOUNT.**

Resolution No. R-301959 moved \$250,000 out of the Fox Canyon Park account and into a transportation account in October 2006.²⁴⁴ It was resolved:

That the City Auditor and Comptroller is authorized to transfer \$250,000 from CIP 29-596.0, Fox Canyon Park, to CIP 52-763.0, Skyline Median and Parkway Improvements within Fund 30306, TransNet.

This was to correct the improper allocation of \$250,000 that had been allocated from Fund 30306, the TransNet Commercial Paper Fund, which had been approved in May 2006 through the 2007 CIP budget process.²⁴⁵ The use of TransNet funds to fund the road had been discussed at an October 2005 Fox Canyon Coordination Meeting.²⁴⁶

XXIV.
COUNCILMEMBER STILL ACTIVELY ADVOCATES FOR THE ROAD

Months after the litigation concluded and the Site Development Permit and the Mitigated Negative Declaration had been rescinded, Councilmember Madaffer appeared before the Park and Recreation board to give his take on the Fox Canyon fiasco and to make clear his will that the road be built:

This community has been discussing the Ontario Avenue connection for years, long before the Fox Canyon Park ever came into discussion. In fact, the Euclid RAP, known as the Euclid Revitalization Action Plan, which was a community-produced document, publicly noticed meetings put on by the Planning Department actually calls for the connection of Ontario to Winona. There are no surprises here. There was never any doubt in my mind that this road would have been built; it was simply a question of when. This has been supported by our constituents since I took office. Now, in hindsight, the City staff probably shouldn't have depicted the park covering the road. It was always an easement. But, you know what, the Park & Rec Department corrected that mistake, with the State applying for the grant with the proper schematic in place... That one photo though sure seems to get out there a lot. My

²⁴⁴ San Diego Resolution R-301959, (17 October 2006). See Exhibit 105.

²⁴⁵ City of San Diego Fiscal Year 2007 Annual Budget, Capital Improvements Program, p. 133, adopted by City Council 31 July 2006 by Ordinance Number 19522. See Exhibit 106.

²⁴⁶ 6 October 2005 Fox Canyon Coordination Meeting Notes and Minutes, See Exhibit 77.

commitment was always the road first, which is why I'm getting the road funded. But, as you, and the rest of the community came to learn, the road and the park project became a battle. It just became stalemate...at City Council, the environmental documents for both the Fox Canyon Park and the Ontario Connection, and they settled the litigation. I still support the road going through, and I still, and I'll continue to support the park system for the community. I fully do not support eliminating the road at all.²⁴⁷

XXV.

KUSI AIRS THE TURKO FILES: "PARKS IN PERIL"

In January 2007, Madaffer publicly praised staff for their work on the Fox Canyon Park and road:

I cannot commend more the City of San Diego staff. For what I think they've done, they did an outstanding job.²⁴⁸

In February 2007, KUSI aired "Parks in Peril," a Michael Turko investigative report. After refusing to do so initially, Madaffer agreed to be interviewed on camera. He blamed everything on staff, and acted as though he had no idea about what they had been doing:

If Real Estates Assets had bought the property back when they had the chance, back when Zajonc was gonna sell it for four hundred seventy five thousand we'd be under construction today. Had the park staff not screwed up and actually included the road on that first grant application, not having to go and amend it the second time, you'd have the park under construction today. Am I angry about this stuff? You better believe I am.

He also blamed the environmental group who sued the City and the City Attorney's Office:

The city attorney should have never settled the lawsuit. In fact, their win/loss record in the City right now is abysmal.

Ironically, the City Council settled the lawsuit, and it was **Councilmember Madaffer who made the motion to do so.**²⁴⁹

²⁴⁷ 18 January 2007 Park and Recreation Board Meeting. See Exhibit 107.

²⁴⁸ Ibid.

²⁴⁹ 10 October 2006 Minutes of Closed Session Meeting. See Exhibit 108.

Turko asked Madaffer why he really wanted to put the road through the park, and Madaffer replied,

You've got potential development right here, and you've got to figure out a way to get traffic in and out – you don't want to cause more of a traffic impact – so you just simply make this connection - it's been on the books forever - and there you have it.

I'm here fighting for people for affordable housing, for people to have workforce housing.

Turko prompted,

So you're not doing this for the developers that are going to build the housing?

And Madaffer exclaimed,

I don't even know who the developers are. I'm hoping if I put in a park, maybe some developer will come along and say, "wow the city is doing something --- I think I can put in some housing here."

The last question Turko aired follows:

You've told a lot of people that we're not getting the road so we're not gonna do the park. How do you get the authority to tell them that?

Madaffer responded,

Look, I'm the councilmember – this park, this road - it starts right here.

XXVI. CONCLUSION

In conclusion, to gain public support and funds for a road which he believed would promote growth and development in his district, Councilmember Madaffer used his influence to pressure City staff to circumvent the public process. As a result, City (1) expended over \$400,000 and almost four years on a project intended for property that City never owned, (2) failed to mention the road when applying for a State of California grant and adequately study it in environmental documents, (3) appropriated \$800,000 for the purchase of a property valued at \$340,000 to \$425,000 and which was ultimately appraised at \$52,000, and (4) used a significant portion of allocated park funds on the design of a road.

By _____
Michael J. Aguirre
City Attorney