(213) 617-5565
jcurtis@smrh.com

August 30, 1999

City Council
City of Pasadena
100 North Garfield Avenue, Room 247
Pasadena, California 91109

HAND DELIVERED

Re: Kidspace Museum - Proposed Mitigated Negative Declaration and Revised Initial Study/City Council Hearing on August 30, 1999, Concerning Proposed Mitigated Negative Declaration, Revised Initial Study and Other Actions Identified on Agenda Item 6.A.

Honorable Mayor Bogaard and Members of the City Council:

This Firm represents the Arroyo Seco Foundation and other concerned citizens of the City of Pasadena, including J. Al Latham, Jr., Maureen Carlson, James Tuck, John Waterson, J.J. Jenkins, Mark Frankel and Brian Terkelsen (collectively, "Concerned Citizens"). As you may know, the Arroyo Seco Foundation is a nonprofit public benefit corporation which is dedicated to preserving and enhancing the Arroyo Seco.

Our clients have requested our assistance in connection with the proposed Kidspace Museum project ("Project") to be located at the historic Fannie E. Morrison Horticultural Center Complex in Brookside Park in Pasadena. Although the information currently available concerning the Project and the proposed uses is vague and inadequate to fully evaluate the Project as currently proposed, our clients object to the proposed Project, as described below, and request that you require a full Environmental Impact Report ("EIR") under the California Environmental Quality Act ("CEQA").

In particular, our clients have the following concerns, comments and objections with respect to the Project, the proposed mitigated negative declaration ("MND") and the related revised initial study ("Initial Study"), all of which are discussed in more detail below:

SUMMARY OF COMMENTS AND OBJECTIONS

1. The Project violates the Charter of the City of Pasadena. In particular, park land can be neither "sold" nor "used for other purposes" except upon approval of the majority of the voters at an election held for such purpose. City Charter § 1601. Furthermore, when park land

is "sold or its use changed," land of comparable area or value in the same region is required to be acquired or dedicated for park purposes unless otherwise approved by the voters at such election. City Charter § 1603.

2. The Project is inconsistent with the City's Comprehensive General Plan ("General Plan") in that property in the "open space" designation must be owned by the City (a lease over 15 years is considered a sale) and the Project violates numerous objectives and goals contained therein.

3. The Project is inconsistent with the open space zoning in that impermissible uses are being proposed.

4. The Project violates Pasadena Municipal Code provisions concerning the disposition of the "surplus real property" because park land cannot be disposed of in this manner in violation of the City Charter and, even if it could, the required findings cannot be made.

5. The Project violates the Arroyo Seco Ordinance.

6. The Project as currently proposed violates the Lease Agreement dated April 1, 1998 ("Lease") with Kidspace Museum.

7. The City has not complied with the California Environmental Quality Act, the State CEQA Guidelines and the Environmental Guidelines for City of Pasadena based upon:

a. An EIR is required for a project with any potential significant adverse impact on a historic structure.

b. The Initial Study fails to provide evidence that the proposed Project will not have any significant environmental effects.

c. The proposed mitigation measures will not mitigate the Project's significant environmental impacts.

d. The adoption of the proposed MND would unlawfully defer environmental review.

e. Disagreement between experts underscores the need for an EIR.

f. The City has unlawfully "split" the project for purposes of environmental review.

g. The MND and Initial Study fail to have adequate cumulative analysis of the Project's environmental impacts.

I. VIOLATION OF CITY CHARTER.

The Charter of the City of Pasadena at Section 1601 provides that park land owned by the City shall only be used for park and recreational purposes, and it may neither be sold nor used for other purposes, "except upon the approval of the majority of the voters and an election held for such purpose." Pasadena Municipal Code § 4.02.010 defines "sale" as including any lease for a term in excess of 15 years, and there is no exception for voter approval for any type of "sale" that may be based upon some type of alleged park or recretional use. Given that the voters of the City of Pasadena have not approved the Lease, it is null and void. Furthermore, no amendment to the Lease, as currently proposed, can be undertaken without a vote of the voters.

The Charter also provides at Section 1603 that "[w]hen dedicated park land is sold or its use changed pursuant to the provisions of Section 1601, land of comparable area or value in the same region of the City shall be acquired or dedicated for park purposes, unless otherwise approved by the voters at said election." Currently, in addition to the fact that an election has not occurred, land of comparable area or value has not been acquired or dedicated for park purposes in violation of this section.

It should be noted that the City Council cannot avoid an election with an approval of the voters by merely declaring park property as being "surplus" under the Pasadena Municipal Code. To interpret the provisions of the Charter otherwise would violate the clear language of the Charter and its intent, thereby allowing any park property to be disposed without a vote of the people.

II. THE PROJECT IS INCONSISTENT WITH THE CITY'S COMPREHENSIVE GENERAL PLAN.

The General Plan designation for the Project site is "open space." Open space is defined at page 34 of the General Plan as follows:

"This category is for a variety of active and passive public recreational facilities and for City-owned open space facilities. This includes natural open spaces and areas

> which have been designated as environmentally and ecologically significant. This category also applies to land which is publicly owned, though in some instances public access may be restricted. Most importantly, this designation only applies to lands owned by the City." (Emphasis added).

As stated above, this designation only applies to lands owned by the City. As a result, given that the Lease is a "sale" within the meaning of the Pasadena Municipal Code, as explained below, the Lease and the Project are inconsistent with and violate General Plan restrictions concerning land designated open space (land in this designation must be owned by the City). At a minimum, a General Plan amendment will be required for the Project prior to any action on the Lease.

The Project is also inconsistent with numerous objectives and goals and the City's General Plan[1/]. These objectives and policies include, but are not limited to, those requiring public park land to be protected from non-recreational uses, that development of any new park facility should be undertaken only after thorough study, that citizen participation shall play a major role in all phases of recreational space planning from site selection to program development and that open space land should be preserved.

III. THE PROJECT IS INCONSISTENT WITH THE OPEN SPACE ZONING DESIGNATION.

The Project as currently proposed is inconsistent with the zoning designation of "open space." A zoning designation of open space may permit "commercial recreation" uses pursuant to a conditional use permit, but this Project is a "museum." Furthermore, even if the Project were to be considered a commercial recreation use, the uses proposed by Kidspace Museum do not appear to be limited to commercial recreation activities.

Although not clear based upon the documentation presented, Kidspace Museum proposes to have a number of special events and private parties, including some in connection with Rose Bowl events. These private parties are anticipated to be exactly that, parties prior to a Rose

---

[1/] See General Plan Elements: (1) Vision Statement - Sections 2, 4 and 7; (2) Land Use - Objective 2 and Policies 2.1, 2.2 and 2.3; Objective 6; Objective 9; Objective 17 and Policies 17.3 and 17.4; Objective 25; Land Use Diagram - Open Space; Design Principles; Historic Preservation; (3) Conservation - Strategy 200 and related policies and programs; and (4) Open Space - Strategies, Goals and Objectives, including strategy 100 and Policies 101-104.

Bowl function, not recreational uses. Certainly, these types of uses are merely commercial activities, exactly like a restaurant or private meeting room.

Kidspace Museum's intent of having these types of commercial activities unrelated to recreation is apparent based upon Kidspace Museum's exclusive parking rights under the Lease during Rose Bowl events, taken together with concurrent statements that Kidspace Museum will not be opened to the general public at that time and, rather, that special programing and/or rental opportunities can be coordinated with the Rose Bowl activities. See Initial Study, Traffic Report. This must also be the reason for their desire to have a liquor license.

IV. VIOLATION OF PASADENA MUNICIPAL CODE CONCERNING DISPOSITION OF SURPLUS REAL PROPERTY.

Pasadena Municipal Code Section 4.02.010 defines "surplus real property" as "the real property of the city not needed for the purposes for which it was acquired or for any other public purpose." In addition, "sale" includes "a lease of an interest in city-owned land for a term in excess of 15 years." Section 4.02 sets forth detailed procedures to be followed for disposing of surplus real property. In the present case, prior findings for "surplus real property" are improper and the Lease is invalid for a number of reasons.

First, the City cannot avoid City Charter provisions (as described above), which require a vote of the citizens of the City of Pasadena, by declaring park property as "surplus."

Second, the competitive process set forth in Pasadena Municipal Code Section 4.02 should have been followed since there is no "extraordinary and overriding public benefit" for selling the property through a leased transaction to a private entity. Although a "museum" may sometimes qualify as an extraordinary or overriding public benefit to avoid the required competitive process, the current Lease for the Project, as anticipated to be amended, transfers public park property for private uses, some uses of which appear to be purely commercial in nature (dining facilities, alcohol use, Rose Bowl event use, etc.).

Although declaring park property as "surplus real property" is certainly improper to avoid the mandates of the City Charter, even if it were a proper procedure, the City will now have to again go through the required procedures and make the required findings for disposing of the property as surplus (no competitive process required), given the proposed amendments to the Lease.

V. THE PROJECT VIOLATES THE ARROYO SECO ORDINANCE.

The Arroyo Seco Ordinance, Ordinance No. 6403, established "regulations for preservation, enhancement and enjoyment of the Arroyo Seco as a unique environmental, recreational and cultural resource of the City of Pasadena surrounded by residential neighborhoods." Pasadena Municipal Code § 3.32.020. Sections 3.32.160 and 3.32.170 of the Code set forth the permitted uses and special regulations that apply to the Brookside Park area. Active recreational uses, passive recreational activities and cultural events are permitted, but neither museums nor commercial uses are permitted. In fact, the ordinance expressly provides that "[c]ommercial uses other than those existing as of the effective date of this ordinance are prohibited unless ancillary to the basic recreational uses." As admitted in the Initial Study prepared by the City, the Project is, at the very least, a "commercial recreation" use under applicable zoning, and this use certainly did not exist at the time of the adoption of the Arroyo Seco Ordinance. Thus, the Lease and the underlying use are prohibited by this ordinance.

VI. THE PROJECT IS INCONSISTENT WITH THE CURRENT LEASE.

The City of Pasadena and Kidspace Museum entered into the Lease on April 1, 1998, concerning the proposed Project. The Project, as described in the MND and the related Initial Study, is inconsistent with the Lease on a number of grounds.

First, the size of the proposed "premises" will be much greater than that provided for under the Lease.

Second, it is now clear that the premises will not just be used for a children's museum, but rather, it will also be used for commercial uses with alcohol service.

Third, the proposed buildings and site improvements will not conform to the requirements under Section 6 of the Lease that exterior improvements be consistent with the original architectural design. In addition, these improvements will not be consistent with the Secretary of Interior Standards of Rehabilitation Historic Buildings, as required under the prior and current MND. This is apparent from the admitted change of the design of the structures to "contemporary," the proposed dramatic change to the buildings and the pergola and documents submitted into the record by others.

VII. THE MITIGATED NEGATIVE DECLARATION AND RELATED INITIAL STUDY ARE INADEQUATE AND NOT IN COMPLIANCE WITH THE CALIFORNIA ENVIRONMENTAL QUALITY ACT; AN ENVIRONMENTAL IMPACT REPORT MUST BE PREPARED.

A. The City Must Prepare and Certify an EIR for the Proposed Kidspace Museum Project.

1. Overview of CEQA. CEQA was enacted in response to the well-documented failure of state and local governmental agencies to consider fully the environmental implications of their actions. Selmi, The Judicial Development of the California Environmental Quality Act, 18 U.C.D.L. Rev. 197 (1984).[2/] The California Supreme Court has repeatedly affirmed that CEQA must be interpreted liberally "to afford the fullest possible protection to the environment within the reasonable scope of the statutory language." Laurel Heights Improvement Assn. v. The Regents of the University of California ("Laurel Heights I"), 47 Cal.3d 376, 390 (1988), quoting from Friends of Mammoth v. Board of Supervisors, 8 Cal.3d 247, 259 (1972).

Two of the central purposes of CEQA are to inform governmental decision makers and the public about the potential significant environmental effects of a proposed project and to identify ways that environmental damage can be avoided or significantly reduced. Guidelines §§ 15002(a) (1) and (2).

The EIR is the heart of CEQA. Guidelines § 15003(a). As noted by the California Supreme Court, the EIR:

> "is the primary means of achieving the Legislature's considered declaration that it is the policy of this state to 'take all action necessary to protect, rehabilitate, and enhance the environmental quality of the state.' (§ 21001, subd. (a).) ... Because the EIR must be certified or rejected by public officials, it is a document of accountability. If CEQA is scrupulously followed, the public will know the basis on which its responsible officials either approve or reject environmentally significant action, and the public, being duly informed, can respond accordingly to action with which it

---

[2/] The Office of Planning and Research has promulgated guidelines to implement CEQA. 14 Cal. Code of Regs. § 15000 et seq. (the "Guidelines"). Similarly, the City has also adopted its own "Environmental Guidelines for City of Pasadena" to implement CEQA (the "Pasadena Guidelines").

> disagrees. [Citations]. The EIR process protects not only the environment but also informed self-government." Laurel Heights I, 47 Cal.3d at 392.[3/]

CEQA provides for a three-tiered environmental analysis. First, the lead agency determines whether the project is exempt from CEQA review. Guidelines § 15061. If the lead agency concludes that the project is not exempt from CEQA, the lead agency then conducts an initial study to ascertain whether to prepare an EIR or a negative declaration in connection with the project. The lead agency may only adopt a "negative declaration" when the initial study concludes that "there is no substantial evidence ... that the project may have a significant effect on the environment" and further CEQA review is unnecessary. Cal. Pub. Res. Code § 21080(c)(1).[4/]

CEQA applies only to "discretionary projects." Cal. Pub. Res. Code §§ 21080(a) and (b)(1); Guidelines § 15268(a). A discretionary project is one which "requires the exercise of judgment or deliberation when the public agency or body decides to approve or disapprove a particular activity, as distinguished from situations where the public agency or body merely has to determine whether there has been conformity with applicable statutes, ordinances, or regulations. Guidelines § 15357.

2. Fair Argument Test Requires an EIR. If the administrative record contains substantial evidence that any aspect of a Project "may have a significant effect on the environment," the lead agency must prepared an EIR. Cal. Pub. Res. Code § 21100; Guidelines §§ 15002(f)(1), 15063(b)(1) and 15064(a)(1).[5/] Put another way,

---

[3/] An EIR serves "to demonstrate to an apprehensive citizenry that the agency has in fact analyzed and considered the ecological implications of its action." No Oil, Inc. v. City of Los Angeles, 13 Cal.3d 68, 86 (1974). An EIR also allows the public to "determine the environmental and economic values of their elected and appointed officials, thus allowing for appropriate action on election day should a majority of the voters disagree." People v. County of Kern, 39 Cal. App. 3d 830, 842 (1974). "The report ... may be viewed as an environmental 'alarm bell' whose purpose it is to alert the public and its responsible officials to environmental changes before they have reached ecological points of no return." County of Inyo v. Yorty, 32 Cal. App. 3d 795, 810 (1973).

[4/] For a discussion of "mitigated negative declarations", see below.

[5/] Professor Selmi pointed out that one of the reasons that courts are permitted to closely examine CEQA decisions is that public agencies "are subject to political pressure to avoid the full EIR process" which is certainly the case here. Selmi, supra, at 227.

> "... if a Lead Agency is presented with a fair argument that a project may have a significant effect on the environment, the Lead Agency shall prepare an EIR even though it may also be presented with other substantial evidence that the project will not have a significant effect. (No Oil, Inc. v. City of Los Angeles (1974), 13 Cal. 3d 68)." Guidelines § 15064(g)(1). (emphasis added). See also Friends of "B" Street v. City of Hayward, 106 Cal. App. 3d 988, 1002 (1980).

A trial court is entitled to independently review an agency's determination that there was no evidence upon which a fair argument could be made that an EIR was required. As the court stated in Friends of "B" Street, supra:

> "if there was substantial evidence that the proposed project might have a significant environmental impact, evidence to the contrary is not sufficient to support a decision to dispense with preparation of an EIR and adopt a Negative Declaration, because it could be 'fairly argued' that the project might have a significant environmental impact. Stated another way, if the trial court perceives substantial evidence that the project might have such an impact, but the Agency failed to secure preparation of the required EIR, the Agency's action is to be set aside because the agency abused its discretion by failing to proceed 'in a manner required by law'. (Pub. Res. Code § 21168.5.)" 106 Cal.3d at 1002. (Emphasis added).

Under the fair argument standard, deference to the lead agency's determination is not appropriate and its decision not to require an EIR can be upheld "only when there is no credible evidence to the contrary." Sierra Club v. Count y of Sonoma, 6 Cal. App. 4th 1307, 1317-18 (1992). The fair argument standard requires the reviewing court to employ "a certain degree of independent review of the record, rather than the typical substantial evidence standard which usually results in great deference being given to the factual determinations of the agency." Quail Botanical Gardens Foundation, Inc. v. City of Encinitas, 29 Cal. App. 4th 1597, 1602 (1994).

The Supreme Court has concluded that the interpretation of CEQA "which will afford the fullest possible protection to the environment is one which will impose a low thresholds requirement for preparation of an EIR." No Oil, Inc. v. City of Los Angeles, supra, 13 Cal. 3d at 84.

As explained below, the Concerned Citizens and others have presented a compelling argument, based on overwhelming evidence, that the Project will have a significant adverse impact on the environment. Therefore, the City should prepare an EIR.

3. CEQA's Application to Historic Resources. CEQA was intended to protect a broad spectrum of environmental resources and includes the protection of historic resources and the preservation of examples of California history. See Cal. Pub. Res. Code § 21001(b) and (c). Specifically, CEQA inclusively defines "environment" as, inter alia, the "physical conditions which exist within the area which will be affected by a proposed project including ... objects of history or aesthetic significance." Cal. Pub. Res. Code § 21060.5.

In 1992, the Legislature engaged Assembly Bill 2881, which establishes the California Register of Historical Resources (the "California Register"). The intent of AB 2881 was to clarify the circumstances under which EIR would be required for projects that adversely affect history resources and set forth bright-line rules for the process. The test established by AB 2881 is that a project that may cause a "substantial adverse change" in the significance of a historical resource is a project that may have a significant effect on the environment (which triggers the need for an EIR). Cal. Pub. Res. Code § 21084.1.

"Substantial adverse change" includes demolition, destruction, relocation or alteration which would impair the significance of a historical resource. Cal. Pub. Res. Code § 5020.1(q). Historic structures included in a local register of historic resources are presumed to be historically or culturally significant for purposes of Section 21084.1, unless the preponderance of the evidence demonstrates that the resource is not historically or culturally significant. Cal. Pub. Res. Code § 21084.1. The fact that a resource is not included in local register of historical resources shall not preclude a lead agency from determining whether the resource may be a historical resource for purposes of Section 21084.1. Id.

The Guidelines include two other thresholds for determining when an EIR is required for the proposed alteration of a historic building. First, a project will normally have a significant effect on the environment (and therefore require the preparation of EIR) if it will disrupt or adversely affect a property of historic or culture significance to a community or ethnic or social group. 14 Cal. Code Regs., Appendix G, Item (j). Second, an EIR must be prepared if a project will have the potential to eliminate important examples of major periods of California history. 14 Cal. Code Regs. § 15065(a).

Under the current circumstances, everyone is in agreement that the current structures are historic structures. Based upon the evidence submitted separately from this letter, the Project will have a substantial adverse change to the historic structures. The size and character

will change, including with the demolition of a substantial portion of the pergola. Proposed Mitigation Measure No. 13 does require that the renovation comply with the Secretary of the Interior Standards for the Rehabilitation of Historic Buildings, but there is neither evidence at this point that the Project does comply with these standards nor is there any reason to believe that compliance will fully mitigate the impact to a level of insignificance. In fact, it appears that the Project will likely not comply with the Secretary's Standards, given the change in the design of the Project to one of "contemporary." This is precisely the reason why an EIR must be prepared under CEQA. The public must have an opportunity to truly examine the potential significant adverse impacts of the Project with the Project clearly defined. Here, the impact of the Project on the historic buildings is not fully known and will not be known until an EIR is prepared.

B. The Initial Study Fails to Provide Evidence That the Proposed Project Will Not Have Any Significant Environmental Effects.

An initial study must disclose the data or evidence upon which the "person(s) conducting the study relied .... Mere conclusions simply provide no vehicle for judicial review." Citizens Assn. for Sensible Development of the Bishop Area v. County of Inyo, 172 Cal. App. 3d 151, 170 (1985). One of the primary purposes of an initial study is to "[p]rovide documentation of the factual basis for the finding in the Negative Declaration that a project will not have a significant effect on the environment." Guidelines § 15063(c)(5); See also Pasadena Guidelines § 6. An initial study must document reasons to support the finding that a project will not have any significant environmental effects. Guidelines § 15071(d); Pasadena Guidelines § 6.

The Initial Study includes an "Environmental Significance Checklist" (the "Checklist") which includes approximately 78 questions regarding the potential environmental impacts of the proposed Project. With respect to each questions, the Initial Study concludes either that (a) the questioned impact will not occur at all, (b) the impact will occur, but it will not be significant, or (c) the impact will be significant, but proposed conditions will mitigate the impact below a level of significance. However, the Initial Study includes little or no explanation for many of these negative responses, and it fails to take into account the numerous studies (traffic and others) that have been or are being prepared for the greater Arroyo Seco area.

In fact, where there is an explanation, the explanation often offers no baseline condition or reason to believe that a significant adverse impact will not occur. For example, the traffic study fails to define a baseline condition or take cumulative projects into account. Rather, the traffic study merely estimates the number of anticipated trips and concludes that the adjacent streets will handle the impact.

There is also no analysis as to aesthetics or the impact of light, glare and noise. Neighbors must merely trust that the Project will not be visible from their homes and that light and noise will not impact them, even though the Initial Study acknowledges that there will be new sources of light and that the ambient noise level will increase. These conclusions are especially suspect given the large number of trees that will be permanently removed.

It should also be noted that a Phase 1 environmental assessment is to be performed later (Is the City and Kidspace Museum willing to commit millions of dollars without knowing whether there may be hazardous materials on the site? Will this be another "Belmont High School" disaster?).

Certainly, further study is required with respect to potential impacts arising from traffic, parking, air quality (potential odors and fumes from busses, the kitchen, etc.), aesthetics, historic resources, light and glare, noise, hazardous materials, loss of the oak woodland plant community, loss of park land, the relocation of the Public Works and Transportation Department's facilities and cumulative impacts from other projects.

C. The Proposed Mitigation Measures Will Not Mitigate the Project's Significant Environmental Impacts.

A lead agency can approve a project with potentially significant environmental effects by adopting a mitigated negative declaration, only under the following circumstances:

> "An initial study identifies potentially significant effects on the environment, but (A) revisions in the project plans or proposals made by, or agreed to by, the applicant before the proposed negative declaration and initial study are released for public review would avoid the effects or mitigate the effect on the environment would occur, and (B) there is no substantial evidence in light of the whole record before the lead agency that the project, as revised, may have a significant effect on the environment." (Emphasis added) Cal. Pub. Res. Code § 21080(c)(2); see also Cal. Pub. Res. Code § 21064.5.

Since the City has prepared the proposed MND, it is expressly acknowledging under CEQA that, in the absence of clearly effective mitigation, the Project will have a significant, adverse environmental effect.

The mitigation measures attached to the proposed MND will not "clearly" mitigate the alteration of the historic buildings and other aspects of the Project. The City Council cannot

adopt the MND unless the mitigation measures reduce the impacts of the Project below the threshold of significance set forth in CEQA. In this case, the mitigation measures must eliminate the possibility of a substantial adverse change in the significance of the Project. The Initial Study not only fails to analyze whether the stated mitigation measures will prevent a "substantial adverse change," it does not even cite the appropriate threshold.

Furthermore, the MND and the Initial Study appear to be relying upon some of Kidspace Museums' stated operational plans concerning days of operation, time of operation and nature of operation, but this intent has not been translated into limits, whether they be conditions in the Lease or mitigation measures under the MND.

D. The Adoption of the Negative Declaration Would Unlawfully Defer Environmental Review.

CEQA requires that environmental review and the formulation of appropriate mitigation measures occur at the earliest feasible state in the planning process. Cal. Pub. Res. Code § 21003.1. CEQA provides further that a proposed negative declaration should only be prepared for a project when "revisions in the project plans or proposals made by or agreed to by the applicant before the proposed negative declaration is released for public review would avoid the effects or mitigate the effects to a point where clearly no significant effect on the environment would occur ...." Cal. Pub. Res. Code § 21080(c)(2).

The case of Sundstrom v. County of Mendocino, 202 Cal. App. 3d 296 (1988), illustrates these principles. In Sundstrom, the public agency approved a use permit for a motel and restaurant that included a private sewage treatment plant. The initial study did not analyze the environmental impacts of the treatment plant, but instead required that the developer prepare a hydrological study after the approval of the negative declaration. The study was to provide a basis for establishing additional mitigation measures for the project.

The court held that the public agency violated CEQA by including a condition that contemplated revisions to the project after the final adoption of the negative declaration. The court further held that the deferral of environmental review for the treatment plant ran counter to CEQA policy, which required environmental review at the earliest feasible change in the planning process. The court also noted that any mitigation measures added by the administrative staff as a result of this study would be exempt from public scrutiny since the public agency had already approved the negative declaration.

The very first proposed mitigation measure for the Project under the MND is an example of unlawful deferral of environmental review. This condition requires that the conditional

use permit "include conditions that insure that the museum will be compatible with adjacent residential uses." Neither the impacts nor the proposed conditions for mitigation are discussed, including those for light, glare, noise, aesthetics . Similarly, geotechnical reports, emergency plans associated with dam failure, circulation plans, parking study and conflicts with Rose Bowl operations are all deferred to another day.

There is also no discussion as to the type or amount of mitigation for the removal of over 50 trees (only that new trees will be planted), and the City's own Forestry Supervisor of the Public Works and Transportation Department was uncomfortable and expressed concern regarding the removal of large parts of the Wisteria arbor and "the large area which is now heavily shaded becoming mostly open which would increase the heat loads on the buildings and change the wooded nature of the site." See Initial Study, Exhibit C.

This "Alice in Wonderland" type of mitigation is not permitted under CEQA, the Guidelines or the Pasadena Guidelines.

E. Disagreement Between Experts Underscores the Need for an EIR. Guidelines Section 15064(h)(2) provides as follows:

> "(h) In marginal cases where it is not clear whether there is substantial evidence that a project may have a significant effect on the environment, the Lead Agency should be guided by the following factors:
>
> (2) If there is a disagreement between experts over the significance of an effect on the environment, the Lead Agency shall treat the effect as significant and shall prepare an EIR."

The City has received or will receive voluminous testimony from a variety of noted citizens, City groups, and other experts that the Project will likely have a significant, adverse effect on the environment, and that the proposed mitigation measures will in no way mitigate the impacts of the Project. In fact, even the City's Recreation and Park Commission (a commission comprised of Pasadena citizens who were appointed by the City Council) voted overwhelmingly as to their concern about the Project, especially regarding the loss of open space. In contrast, the only potential "expert" testimony which supports the adoption of the MND are the inadequate traffic and tree studies.

Of course, this is not a "marginal" case at all. The City's position is entirely unsupported. However, even if the reports upon which the MND is based could be considered unbiased, expert testimony, the disagreement among experts requires the preparation of an EIR:

> "In such cases, an EIR - an impartial, detailed and factual analysis of the Project's effect - can perform an invaluable service in aiding the agency's resolution of a dispute .... 'The very uncertainty created by the conflicting assertions made by the parties ... underscores the necessity of the EIR to substitute some degree of factual certainty for tentative opinion and speculation.'" See No Oil, Inc. v. City of Los Angeles, 13 Cal. 3d 68, 85 (1974); City of Carmel-By-The-Sea v. Board of Supervisors, 183 Cal. App. 3d 229, 249 (1986); see also Sundstrom v. County of Mendocino, 202 Cal. App. 3d 296, 313 (1988).

F. The Agency Has Unlawfully "Split" The Project for Purposes of Environmental Review.

The term "project" has been broadly defined under CEQA. "Project" means "the whole of an action, which has the potential for resulting in a physical change in the environment, directly or indirectly ...." Guidelines § 15378(a). All phases of project planning, implementation and operation must be considered in the initial study for a project. Guidelines § 15063(a)(1). The term "project" refers to the activity which is being approved and which may be subject to several discretional approvals by governmental agencies. The term "project" does not mean each separate governmental approval. Guidelines § 15378(c).

Under CEQA, a project must be fully analyzed in a single environmental document. An agency may not split a project into two or more segments with mutually exclusive environmental documents. Citizens Assn. for Sensible Development of Bishop Area v. County of Inyo, 172 Cal. App. 3d 151, 165 (1985). Similarly, an agency cannot overlook a project's cumulative impacts by separately focusing on isolated parts of the whole. McQueen v. Board of Directors, 202 Cal. App. 3d 1136, 1144 (1988).

In Citizens Assn. for Sensible Development of Bishop Area v. County of Inyo, supra, a county split a shopping center project into two segments, the first part consisting of general plan amendments and zoning classifications, and the second part involving a tentative map approval and road abandonment. The public agency prepared a separate negative declaration for each project segment. Because the project applicant had requested related discretionary approvals at different times, the county had failed to understand that it was dealing with a single project. The court overtured the negative declarations and the project approvals, holding that an agency cannot prepare mutually exclusive environmental documents for a single project. 172 Cal. App. 3d at 165-67.

The project description in a CEQA document must include:

> "an analysis of the environmental effects of future expansion or other action if: (1) it is a reasonable foreseeable consequence of the initial project; and (2) the future expansion or action will be significant in that it will likely change the scope or nature of the initial project or its environmental effects." Laurel Heights I, supra, 47 Cal. App. 3d 376, 396 (1988).

In Laurel Heights I, the Regents proposed the relocation of a biomedical research facility to a portion of a building located in the residential neighborhood. The EIR for the project failed to analyze the cumulative impacts of the anticipated full use of the building as a biomedical facility within a few years. The California Supreme Court rejected the Regent's argument that, because the proposed expansion had not been formally approved, the EIR's analysis could be limited to the project in its initial form. Evidence in the record indicated that, despite the lack of a formal approval, the Regent's ultimate plans were clear. Therefore, because the expansion was reasonably foreseeable, and was likely to change the scope or nature of the initial project or its environmental effects, the EIR should have discussed at least the general effects of the reasonably foreseeable future uses and the anticipated measures for mitigating those effects. Id. at 396-398. "The fact that precision may not be possible ... does not mean that no analysis is required." Id. at 399.

Another case that illustrates this principle is Whitman v. Board of Supervisors, 88 Cal. App. 3d 397. In Whitman, an EIR was prepared in connection with an application to drill an exploratory oil and gas well, which omitted discussion of a contemplated pipeline if the well proved productive. The court found the EIR inadequate and explained that "[t]he record before us reflects that the construction of the pipeline was, from the very beginning within the contemplation of [the] overall plan for the project and could have been discussed in the EIR in at least general terms." Id. at 414-15. (emphasis added)

Under the current circumstances, the Project suffers from the same problems that occurred in Laurel Heights I and Whitman. First, there is absolutely no discussion whatsoever as to the impacts associated with relocating within the Arroyo Seco the Public Works and Transportation Department facilities (potential loss of even more park land). Second, the actions and mitigation measures associated with the conditional use permit are deferred to another day. Third, activities coordinated with actual and proposed Arroyo Park, Brookside Park and Rose Bowl events are anticipated but are never defined or discussed. Rather, these activities are left to be defined in the future in discussion with representatives of the Rose Bowl. In conclusion, the City needs to examine all of these foreseeable consequences.

G. The MND and Initial Study Fail to Have Any Cumulative Analysis of the Project's Environmental Impacts.

An environmental document must discuss "cumulative impacts" when they are significant. Guidelines § 15130(a). However, even if a cumulative impact is not deemed significant, the document must explain the basis for the conclusion. Citizens to Preserve the Ojai v. County of Ventura, 176 Cal. App. 3d 421, 429 (1985). "Cumulative impacts" are defined under CEQA as two or more individual effects which, when considered together, are considerable or which compound or increase other environmental impacts. Cal. Pub. Res. Code § 21083(b).

The proposed MND and the Initial Study fail to have any analysis of any potential "cumulative impacts." Rather, potential related projects for cumulative analysis are listed, and then a conclusion is drawn that cumulative environmental impacts may occur and that "the City recognizes that a comprehensive approach to impact assessment should be undertaken once all projects can be defined." Initial Study, pg. 49 (emphasis added.)

This comprehensive approach must be done before approval of the Project and must include the proposed Arroyo Seco Master Plan. The proposed Arroyo Seco Master Plan is comprised of three sub-master plans: (a) the Lower Arroyo Seco Master Plan, (b) the Central Arroyo Master Plan (which includes Brookside Park), and (c) the Upper Arroyo or Hahamongna Watershed Area Master Plan. To ignore the Project's interrelationship, consistency or inconsistency and impact on these plans improperly segments the Project from these plans and ignores a proper cumulative analysis under CEQA, all to the detriment of the citizens of Pasadena and proper long-term planning efforts for the Arroyo Seco.

Given these related projects, the related environmental analyses that the City is undertaking and the City's own conclusion, the MND should not be approved because further studies are in process and have been admitted to be necessary. This is especially true given the substantial public funds which would be committed to the Project and the fifty year term of the Lease. Furthermore, as discussed above, this type of analysis cannot be deferred to a later day.

CONCLUSION

Given the foregoing, on behalf of all of our clients, we request that the City Council reject both the MND and the Initial Study, and that a full EIR be required. In addition, the City

Council should note for the record that the City Charter of the City of Pasadena will require that this Project be approved by a majority of the voters at an election and that the General Plan and Arroyo Seco Ordinance will have to be amended.

Respectfully submitted,

Jonathan C. Curtis

for SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

LA:LCR\LET\100\70059008.1

cc: Mr. Segun Abegunrin - Public Works and Transportation Department
Michele Beal Bagneris, Esquire, City Attorney
Ms. Jane Rodriguez, City Clerk
Arroyo Seco Foundation
Mr. J. Al Latham, Jr.
Ms. Maureen Carlson
Mr. James Tuck
Mr. John Waterson
Mr. J.J. Jenkins
Mr. Mark Frankel
Mr. Brian Terkelsen