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Tom McCarron
Senior Vice President
SDSU Mission Valley Development

MEMORANDUM

DATE: May 7, 2020

TO: Mayor Faulconer and Honorable Members of the City Council

FROM: Tom McCarron, Senior Vice President, SDSU Mission Valley Development

SUBJECT: CSU/SDSU Response to City Attorney Memorandum MS 59 Related to the Purchase of the SDCCU Stadium Site

Since the passage of Measure G, when voters directed the City to sell the stadium property to SDSU for a campus expansion and new stadium, San Diego State University representatives have worked diligently in good faith with the City. Over that time, SDSU circulated a draft Environmental Impact Report, secured approval of a Final EIR, secured funding approval for the project and designed a stadium and public River Park for the benefit of all of San Diego.

On Tuesday, May 5th, SDSU submitted a signed purchase agreement reflective of the many months of negotiations. For every issue that was brought up by the City, the City Attorney or its outside counsel, SDSU worked to find a solution collaboratively and in the spirit of compromise.

The executed agreement reflects all of the agreed upon financial terms including the \$86.2 million purchase price, the more than \$1.5 million time-value inflationary adjustment for the PUD portion of the property, the obligation to take on expenses related to the existing stadium (estimated to be \$1M per month) and the responsibility to construct, maintain and operate the River Park in perpetuity.

Below, you will find CSU/SDSU responses to the City Attorney's May 5th memo outlining her remaining concerns with the agreement. It is important to share that: 1) the City Attorney's memo repeatedly mischaracterizes the CSU/SDSU position; 2) the issue summaries are missing critical facts; and, 3) the risk to the City is grossly exaggerated.

In addition to the many compromises reflected in the agreement, CSU/SDSU is providing comprehensive releases of the City from future liability, 18 broad indemnities protecting the City from potential future claims, covenants that run with the land, and multiple layers of enforcement rights and remedies in favor of the City. The agreement is squarely in line with the requirements of Measure G and is consistent with our offer which was supported by this Council. The City is well-protected and the deal that is represented here is fair and balanced for both parties, as well as the public we both serve.

The executed agreement submitted by CSU/SDSU, is ready to be acted upon. It is fair and equitable to both parties and is worthy of your support and we are now formally requesting that you docket our signed agreement for approval by City Council. We look forward to briefing you further.

Sincerely,



Tom McCarron
Senior Vice President, SDSU Mission Valley Development

CSU/SDSU Responses to the City Attorney Issues

1. **City Attorney's Issue:** *Whether the commencement date for the New Lease should continue to be July 1, 2020 as originally agreed to by the Parties, or, as the California State University (CSU) now proposes, the commencement date should be pushed back to an uncertain future date incurring a cost to the City of approximately \$1 million a month after July 1, 2020, as well as other adverse consequences.*

CSU/SDSU Response

The bottom line: CSU/SDSU is ready to get this deal done and meet the City's deadline of a July close. There is no "new lease" without an approved PSA.

The details:

- CSU/SDSU never agreed that a New Lease would automatically commence on July 1 without a binding PSA.
 - The City negotiating team requested that the sale transaction close by July 1 in order to avoid the monthly stadium cost of \$1 million and to receive the sale proceeds in order to enhance the City's 20/21 budget.
 - The City Attorney is omitting important context: CSU/SDSU's offer is specific and contingent only on a delay in closing, through no fault (including unreasonable delays) of either party. Any delay at this point is not the fault of CSU/SDSU. If there are delays outside the control of the parties that prevent closing, CSU/SDSU has agreed to lease the stadium site. **(See Main Body PSA, Section 3.2)**
2. **City Attorney's Issue:** *Whether the City should adhere to the Council-directed Outside Closing Date of December 31, 2020, with one narrow exception, or, as CSU now proposes, the Outside Closing Date should be left open-ended and subject to vague contingencies, potentially allowing CSU to delay final the*

execution of the PSA and leave the City in a holding pattern for many years.

CSU/SDSU Response

The bottom line: This is not an issue. **Both sides want this deal done ASAP.** CSU/SDSU and the City already agreed on closing date specifics, as reflected in the PSA submitted to the City on May 5th.

The details:

- The City Attorney mischaracterizes this issue. In the unlikely event that closing is prevented in July 2020, through no fault of either party, CSU/SDSU would lease the stadium alleviating any cost impacts to the city related to stadium operations.
- If in the highly unlikely event the sale is still not closed due to no fault of either party by the “Fourth Extended Closing Date,” which is two years after the effective date, the City has the right to terminate the agreement. **(Main Body PSA, Section 9.7)**

3. **City Attorney’s Issue:** *Whether the PSA should preserve the City’s ability to operate existing and future planned water and sewer facilities, including Pure Water facilities, as required by applicable water and sewer bond covenants and by Measure G.*

CSU/SDSU Response

The bottom line: CSU/SDSU is absolutely supportive of the City’s Pure Water efforts, which is detailed in the agreement (**Attachment 28**). Although CSU/SDSU considers it to be unreasonable and unfair for the City to remove parts of the park for the construction of the City’s future facilities and not be responsible to return it to its original condition after CSU/SDSU has spent tens of millions of dollars to build a world-class community River Park, CSU/SDSU acquiesced to the City’s demand that the damaged improvements only be restored to public utility department standards.

The details:

- As outlined in the agreement, the City will have access to any portion of the 34- acre River Park property (as opposed to a previously agreed upon area within the River Park), without limitations, recognizing the City’s right to install and operate Pure Water or other water and sewer facilities anywhere within the River Park Property that the City owns with very narrow exceptions (**Attachment 28, Section 6**).
- At the City’s request, CSU/SDSU has also agreed to reduce the size of the wetland in the southwest portion of the river park to no more than .75 acres, reduced from 1.5 acres.
- As perhaps one of the most important and highly scrutinized community benefits, the community is expecting a River Park that will be available in perpetuity.
- The City has repeatedly stated that the River Park and the groundwater/Pure Water uses should be able to coexist, which our proposed solution allows and to which CSU/SDSU agrees.

- Measure G requires that CSU/SDSU build a River Park consistent with existing community planning efforts, which includes trails, passive and active recreation areas. (**Main Body PSA, Section 6.6 and 6.7; Attachment 30; Attachment 32**)

4. **City Attorney's Issue:** *Whether the PSA should protect the existing City groundwater monitoring wells on the Property and the City's access to them, and require CSU to go through the City's standard processes if it seeks to relocate the wells.*

CSU/SDSU Response

The bottom line: This is not an issue. CSU/SDSU and the City's interests are aligned here.

The details:

- CSU/SDSU recognizes the City's needs and shares its desire to ensure adequate monitoring of hazardous substances potentially migrating from the Kinder Morgan site.
- CSU has also agreed to work cooperatively with the City to identify mutually acceptable locations for the replacement groundwater monitoring wells.
- CSU/SDSU has agreed to pay for the relocation of the existing monitoring wells that will be impacted due to the required construction grading. Until such grading occurs, CSU/SDSU has agreed to grant the Public Utilities Department with a Right of Entry allowing for unlimited access to the existing monitoring wells and to notify the City in advance of when the grading of that portion of the site will commence.
- A Right of Entry adequately protects the City's interest and is more efficient than creating a temporary easement because of the relatively short period of time between close of escrow and the necessary demolition and replacement. The easement vacation process is lengthy and would unnecessarily delay the project development (**Main Body PSA, Section 6.13**).

5. **City Attorney's Issue:** *Whether the sale should be conducted "as-is" with standard language in which CSU indemnifies the City against all environmental risk and liability for the Property and River Park Property in accordance with the language in Measure G, or, as CSU now proposes, the sale should be constructed so that the City as seller absorbs significant environmental risks and liability, likely of immense proportion, on CSU's behalf.*

CSU/SDSU Response

The bottom line: Consistent with the "as-is" language in its offer, CSU/SDSU has

agreed to take environmental liability for the land that CSU/SDSU is purchasing and to indemnify the City for all past and future environmental issues. However, CSU/SDSU is not purchasing the River Park and will not take liability for land CSU/SDSU will not own.

The details:

- CSU/SDSU is fully releasing the City from any liability related to the property being purchased. (**Main body PSA, Section 10.4** [fully releasing the City with respect to any hazardous materials claims and accepting the Property as-is] **and Section 12.5(c)(i)** [From and after the Closing, CSU agrees to defend, indemnify, and hold harmless the City Indemnified Parties from and against all claims to the extent arising out of or directly or indirectly related to: (i) any Environmental Claim and any condition, circumstance, dangerous instrumentalities, and soils conditions, including soils subsidence or presence of Hazardous Substances, now or hereafter existing on, under, or affecting the CSU Property”])
 - The City is retaining ownership of the River Park Property and is retaining significant control over how the land is used in the future (i.e. groundwater management, Pure Water, operational rules and regulations).
 - Accordingly, CSU/SDSU should not be expected to assume environmental liability for the land that the City has owned for many years and will continue to own in the future.
 - CSU/SDSU is not requesting that the City indemnify CSU/SDSU as it relates to third-party environmental claims on the River Park Property and CSU/SDSU has further agreed to indemnify the City for any environmental issues cause directly by CSU/SDSU on the River Park Property. (**Attachment 28, Section 10.2** [CSU not proposing any environmental indemnity from City]; see **Section 10.1(f)** [CSU to indemnify City for environmental conditions it causes])
 - CSU/SDSU’s approach is reasonable and consistent with market standards. As a mere easement holder, CSU/SDSU should not be required to provide the type of release and indemnity that the City is requesting with respect to the River Park.
6. **City Attorney’s Issue:** *Whether the PSA should, as CSU proposes, include expanded warranties and representations by the City, including some that directly violate Measure G, and which expose the City to significant unanticipated liability after the Closing when the City no longer owns or controls the Property.*

CSU/SDSU Response

The bottom line: The City’s very limited and standard representations and warranties should pose no risk at all to the City, if the representations being made are accurate.

The details:

- None of the representations and warranties require the City to update or recertify representations in the future if it becomes aware of something it had no knowledge of at the time of closing.
- In the real estate market, this very narrow and limited scope approach to representations and warranties is extremely seller favorable and minimizes the City's risk. Such representations and warranties do not violate Measure G. **(Main Body PSA, Section 10.2)**

7. **City Attorney's Issue:** *Whether language from Measure G on prevailing wage compliance should be accurately reflected in the PSA and its Attachments, making CSU (and not the City) responsible for any prevailing wage awards that could arise from the property's acquisition and development or, as CSU now proposes, all such language should be removed, subjecting the City to potentially enormous liability and costs.*

CSU/SDSU Response

The bottom line: We have already reached an agreement on this. CSU/SDSU PSA language makes clear it will be responsible for any prevailing wage claims that may arise from the property's acquisition and development, and also indemnifies the City for any related claims. **(Main Body PSA, Section 5.21)**

The details:

- The PSA accurately reflects the requirement of Measure G regarding prevailing wage compliance, including payment of prevailing wage on construction of the stadium, River Park, and public improvements.
 - Further, at the request of the City, CSU agreed to specifically state that the City is not the awarding body for any contracts on the property and that the City has no prevailing wage responsibility for the CSU project. **(Attachment 21, Section 2.12)**
 - To further protect the City and respond to its concerns, CSU/SDSU also indemnifies the City for any prevailing wage claims. **(Attachment 21, Section 16.1(e))**
8. **City Attorney's Issue:** *Whether CSU should be responsible for the condition of Murphy Canyon Creek and indemnify the City against all deficiencies, as previously agreed to by the Parties, or, as CSU now proposes, the ongoing risk and liability of Murphy Canyon Creek should be shifted to the City, bringing with it potential extraordinary costs.*

CSU/SDSU RESPONSE

The bottom line: CSU/SDSU has agreed to maintain and repair the portions of Murphy Canyon Creek located within the property CSU/SDSU will own, and within the River Park Property on a go-forward basis **(Attachment 21, Section 2.8 and 5.5)**.

The details:

- The City Attorney's suggestion that the CSU/SDSU project would somehow shift new liability onto the City is not true.
- The City will continue to own and maintain responsibility for other upstream/downstream portions of Murphy Canyon Creek that are not within the CSU Property or the River Park.
- These liabilities exist now and there is no shifting of responsibility or liability other than to CSU as described above. **(Attachment 21, Section 16.1(h); Attachment 27, Section 15.1(g); Attachment 28, Section 10.1(g))**

9. **City Attorney's Issue:** *Whether the City should require CSU to collect from the CSU's development partners, and then remit to the City, the Regional Transportation Congestion Improvement Program (RTCIP) Fee paid by all developers, or as CSU now proposes, the City should agree to waive that fee and forgo an estimated \$10,000,000 in funds for major regional transportation and mobility projects.*

CSU/SDSU Response

The bottom line: CSU has agreed to indemnify the City should any third-party entity make a claim to the City regarding the RTCIP fees related to the CSU property. **(Attachment 21, Section 15.1(f))**

The details:

- As a California state entity, CSU/SDSU is not subject to SANDAG's RTCIP fee.

10. **City Attorney's Issue:** *Whether CSU and its development partners should be required to follow the City's standard procedure with respect to paying water and sewer connection fees, or, as CSU now proposes, the City should exempt CSU's development partners from those costs to the detriment of utility ratepayers.*

CSU/SDSU Response

The bottom line: As negotiated, CSU/SDSU agrees to be held to the City's standard procedures related to water and sewer capacity and connection fees.

The details:

- As is consistent with standard City practice, existing water and sewer capacity within a subject property is recognized in the calculation of these fees.
- CSU/SDSU is not requesting a credit for connection fees. These provisions were previously negotiated with the City. **(Attachment 21, Section 4.7)**

11. **City Attorney's Issue:** *Whether standard City park rules and regulations should*

initially apply to the River Park, protecting the public's right to access, or as CSU now proposes, the River Park should be governed by CSU's "grounds policy" for the SDSU campus, under which preferential treatment is afforded to university-related groups, exposing the City to potential litigation.

CSU/SDSU Response

The bottom line: CSU/SDSU does not intend to limit the community's access to the River Park and agrees that City ordinances regarding public parks should apply until River Park-specific regulations are developed in the future and approved by the City Council.

The details:

- CSU/SDSU's final agreement (**Attachment 27, Section 2.10**) submitted on May 5, 2020 addressed this concern.
- CSU/SDSU would like to collaborate with the River Park Advisory Group to help prepare the operating rules and regulations, and as such SDSU would prefer to defer creation of the rules. The future rules will be subject to City Council approval at a later date.

12. **City Attorney's Issue:** *Whether the City should be included as a third-party beneficiary in all CSU contracts for River Park development, protecting the City against certain lawsuits, or, as CSU now proposes, that the City's inclusion as a beneficiary of CSU's contract provisions should be left to the sole discretion of CSU.*

CSU/SDSU Response

The bottom line: CSU/SDSU agrees the City should be a third-party beneficiary for River Park development contracts and has never proposed a "sole discretion" standard.

The details:

- The agreement states the City is an intended third-party beneficiary of all CSU/SDSU's contracts and purchase orders for design, supply or construction of the River Park and that CSU/SDSU shall use commercially reasonable efforts to incorporate express third-party beneficiary language in such contracts (**Attachment 26, Section 23.20**)
- CSU has agreed to name the City as an additional insured in the insurance policy obtained by the contractor that constructs the River Park (**Attachment 26, Section 12.1**)
- In addition, CSU/SDSU is providing broad indemnities in favor of the City for construction, design and operation of the River Park (**Attachment 26, Section 11.1; Attachment 27, Section 15.1; Attachment 28, Section 10.1**)

13. **City Attorney's Issue:** *Whether CSU should comply with the negotiated terms and conditions of the previously negotiated River Park Development Agreement, or, as CSU now proposes, that it be allowed to alter those requirements at any time.*

CSU/SDSU Response

The bottom line: CSU/SDSU is responsible for following certain state-mandated contracting policies and procedures, set out in the CSU General Contract Conditions prepared by the Office of the Chancellor. These General Contract Conditions track the requirements of the Public Contract Code.

The details:

- If they are modified in the future, the modification would apply systemwide and not to just the River Park Property, and CSU/SDSU would be required to follow them.
- It is baseless for the City Attorney to suggest that the General Contract Conditions would be modified in a manner that would result in the new risk or liabilities that the City claims to be concerned about.

14. **City Attorney's Issue:** *Whether CSU should comply with the City's Affordable Housing requirements as mandated by Measure G, or, as CSU now proposes, the City should allow CSU to follow its own rules, to oversee its compliance with those rules, and to allow the City and the Housing Commission no effective remedy to ensure that Affordable Housing units are built and occupied by income-eligible households.*

CSU/SDSU Response

The bottom line: CSU/SDSU is wholly committed to providing the affordable housing on site and is in **no way** backing away from its extraordinary commitments. CSU/SDSU looks forward to creating a successful affordable housing program in partnership with the Housing Commission as a model for other universities.

The details:

- As outlined in the agreement (**Attachment 22**), CSU/SDSU is going above and beyond the existing affordable housing requirements by agreeing to build the units onsite in compliance with City requirements: 10 percent of all residential units to households earning, on average, no more than 60 percent of average median income.
- CSU/SDSU is fully committed to complying with the substantive requirements of the City's affordable housing requirements, as described above and in Attachment 22, but not all of the City's typical procedures.
- CSU/SDSU has agreed to strict phasing thresholds that ensure affordable units are provided at a pace commensurate with the development of market rate housing. (**Attachment 22, Section 2.2**)
- CSU/SDSU recognizes and respects the Housing Commission's expertise in the area of affordable housing and intends to work collaboratively with the Housing Commission to implement its affordable housing program in a manner that achieves the substantive requirements of the Inclusionary Regulations, while establishing its own procedures.
- The assumption that CSU/SDSU will fail to develop enforceable agreements

and ensure that affordability restrictions are enforced is offensive and unwarranted.

- CSU/SDSU has also agreed to provide regular reporting to the Housing Commission and has provided an effective remedy for the City/Commission to pursue a specific performance remedy against CSU or collect in-lieu fees from CSU in the unlikely event that CSU/SDSU does not cause the construction of the affordable rental units as committed.
- CSU/SDSU has further agreed that student housing units not be eligible as affordable housing units.
- The current Municipal Code only requires the payment of in-lieu fees for rental developments and does not contain provisions dealing with onsite affordable rental units at all.
- The City desires to treat CSU/SDSU as an ordinary private developer and require it to utilize the Housing Commission's template agreements and be subject to the Housing Commission's Inclusionary Housing Manual. As the City has recognized with other aspects of this transaction (for example in allowing CSU/SDSU to have permitting authority for the River Park improvements), CSU/SDSU should not be treated as an ordinary developer because it is the State of California operating in its higher education capacity.
- Moreover, the provisions of the Inclusionary Regulations cited by the City Attorney that require use of template Housing Commission agreements, deeds of trust and compliance with the Housing Commission's Inclusionary Housing Manual are not applicable to affordable rental developments. Those requirements are only applicable to for-sale developments and CSU/SDSU has agreed not to provide for the establishment of for-sale affordable housing at this time (SDMC 142.1305(b) states "the development of for-sale affordable housing units is subject to the following requirements and the provisions of the inclusionary affordable housing implementation and monitoring procedures manual;" see also SDMC 142.1305(c)(6) and 142.1310 [use of Housing Commission forms only apply to for-sale developments.]
- Accordingly, CSU/SDSU respectfully disagrees with the assertion that CSU/SDSU's proposal violates Measure G and the Inclusionary Regulations.

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