

ITEM: 13

SUBJECT: **TIMING OF APPLICATION TO RESOURCES AGENCY FOR PROP 40 FUNDS TO SUPPORT CITY OF SAN DIEGO'S PROPOSED PROJECTS AND FOUNDATION'S EAGLE PEAK PARCEL**

The Board will discuss the following policy/timing question: Should the SDRC move forward now on requesting funding for the City's proposed projects and the Foundation's Eagle Peak parcel and concurrently initiate big picture planning/priority setting **OR** should the Conservancy conduct planning/priority setting first and then, in light of all available alternatives and priority ranking, make a decision regarding which projects to recommend for funding? (*Deborah Jayne*)

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**AGENDA ITEMS 11, 12, AND 13 HAVE BEEN COMBINED**  
(and are presented here.)

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PURPOSE: Discuss and answer the following questions:

1. **City of San Diego's Proposed NON-Acquisition Projects**  
Should the Board take an action of support today for one or both of the proposed non-acquisition projects presented by the City of San Diego on July 9, 2004? If so, what type of action(s)?
2. **City of San Diego's Potential Acquisition Projects**  
Should the Board take an action of support today for any or all the potential acquisition projects presented by the City of San Diego on July 9, 2004? If so, what type of action(s)? Who should hold title to the property? To whom should Resources award the Prop 40 grant?
3. **Foundation's Eagle Peak Acquisition Project**  
Following the presentation, should the Board take an action of support today for the San Diego River Park Foundation's (Foundation's) Eagle Peak acquisition project? If so, what type of action(s)? Who should hold title to the property? To whom should Resources award the Prop 40 grant?
4. **Public Sessions on Real Estate / Unintended Consequences**

How can the Board discuss and take actions on real estate projects in open public session without unintended negative consequences?

DISCUSSION:

***\$7.8 Million in Prop 40 Funds Available***

As you know in late 2002, former Governor Davis signed the fiscal year 2002-03 budget bill which appropriated \$12 million in Propositions 13 and 40 bond funds for the protection and restoration of the San Diego River. The funds are line-items in the Resources Agency budget and we must submit a grant application to access the funds. There is currently \$7.8 million remaining (total available local assistance and capital outlay).

The SDRC has recently been granted an extension of the deadline to encumber the remaining funds. Under the new deadline the funds must be encumbered by **June 30, 2007** and fully expended by June 30, 2009. During budget negotiations, adjustments were also made to our funding source such that today *all of the remaining \$7.8 million is in Proposition 40 funds*. This will streamline the grant application process for us and others.

***City of San Diego: Proposed Projects and Potential Acquisitions***

As a follow-up to the City of San Diego's July 9, 2004 overview presentation, Jeff Harkness (Project Manager, Park and Recreation) will provide a summary presentation to "recap" for the Board the City's two proposed non-acquisition projects (Ocean Beach Bike Path/Hotel Circle North Bikeway Project and Mission Valley Preserve Habitat Enhancement Program) and several potential acquisition projects.

***Eagle Peak Acquisition: San Diego River Park Foundation***

Rob Hutsel, Executive Director of the San Diego River Park Foundation (Foundation), will present an overview of its 100-acre Eagle Peak parcel located at the headwaters of the San Diego River near Julian. The Foundation has made a down payment and committed to purchase the Eagle Peak parcel. Approximately \$200,000 is needed to support the acquisition. The land will be purchased, preserved, and managed by the Foundation.

***Readiness of Projects for Prop 40 Funding:***

- Ocean Beach Bike Path/Hotel Circle North Bikeway Project: **Ready**
- Mission Valley Preserve Habitat Enhancement Program: **Ready**

- Potential acquisition projects: **Not Ready**
- Eagle Peak Parcel: **Ready**

### **Approximate Project Costs:**

- Ocean Beach Bike Path/Hotel Circle North Bikeway Project: **\$2 Million**
- Mission Valley Preserve Habitat Enhancement Program: **\$200,000**
- Potential acquisition projects: **Unknown**
- Eagle Peak Parcel: **\$200,000**

### **Issues to be Considered for NON-Acquisition Projects:**

- *Timing of Board Action*
- *Types of Board Action*

### **Issues to be Considered for Acquisition Projects:**

- *Timing of Board Action*
- *Who Should Hold Title to the Property?*
- *Types of Board Action*
- *Unintended Consequences*
- *To Whom Should Resources Award the Prop 40 Grant?*

### **Timing -- Pros of Taking Board Action Today:**

#### **1. Projects are worthwhile and generally consistent with:**

- SDRC Enabling Statute (objectives)
- Conceptual Plan for San Diego River Park (goals and objectives)
- City's draft San Diego River Park Master Plan (principles and recommendations)
- Prop 40 funding criteria (Resources' Proposition 40 Grant Guidelines dated March 2003)
- State's NCCP and City's MSCP<sup>1</sup> (objectives)
- California's statewide conservation policy and objectives
- Community vision for San Diego River Park. Projects are also supported by the San Diego River Park Foundation (and most likely by San Diego River Coalition). Each project will likely be funded at some point in the future.

#### **2. Conservancy Needs Accomplishments / Successes ASAP to:**

- Protect San Diego River Area from further degradation
- Establish SDRC track record and reputation as a "doer"
- Increase chances of surviving CPR (can point to accomplishments)
- Reward / thank all those instrumental in creating SDRC

**Timing -- Cons of Taking Board Action Today:**

**1. Proposed Projects Must be Consistent with SDRC's Strategic Plan and Priorities**

The SDRC does not yet have a Strategic Plan and established project priorities. Resources Agency has an informal policy and has repeatedly stated that it will not award any more of the remaining \$7.8 Proposition 40 funds (to anyone) until the SDRC has done its strategic planning and priority setting exercise. The applicant must demonstrate how its potential project(s) are consistent with the SDRC's Strategic Plan and established priorities.

**2. Lack of Project Urgency**

None of these projects are "urgent" (i.e., the current opportunity to acquire will soon be lost if we don't act now). Therefore there is no compelling reason to deviate from Resources established general rule of doing strategic planning before applying for prop 40 funds.

**3. Lack of Strategic Plan is a CPR Criticism**

One general complaint raised by CPR RES12 against state conservancies is that they tend to make "opportunistic" purchases rather than purchases based on an overall statewide Strategic Plan (or Conservancy Strategic Plan).

**4. Best to Make "Informed" Decisions**

It is generally smarter to identify and evaluate all options before spending limited resources. This ensures that investment decisions are informed and that you truly are investing in your highest priorities.

**5. Actions of Support Today May Compromise Upcoming Priority Setting Exercise**

Taking actions of support for specific projects today may render SDRC's upcoming exercise of objectively establishing and applying priority ranking criteria to all potential projects meaningless (or less meaningful).

**6. Extension of Deadline to Encumber / Lack of Urgency**

Because we were recently granted an extension of the deadline to encumber the San Diego River Prop 40 funds from June 2005 to June 2007, the urgency to spend the money now or risk losing it has been eliminated. Ms. Carol Wood (Grants Administrator of the City of San Diego) recently sent Elaine Berghausen (Deputy Assistant Secretary Bonds and Grants) general project descriptions

and a request for informal confirmation that the proposed projects would meet the Prop 40 funding requirements. Ms. Berghausen indicated that the urgency to commit the funds has now been removed, that she would need more information before commenting on the projects, and suggested working directly with the SDRC on any projects the City wishes to pursue.

**7. Risk of Annoying the “Purse Keeper”**

Don Wallace (Assistant Secretary of Administration and Finance of the Resources Agency) and Elaine Berghausen have made clear that the SDRC needs to do its strategic planning / priority setting exercise before spending the remaining \$7.8 million Prop 40 funds ear-marked for the San Diego River (but appropriated to Resources Agency budget). It is important for the SDRC to build positive long-term relationships with Mr. Wallace and Ms. Berghausen and other Resources staff. Mr. Wallace sets the annual budget for all state conservancies and Ms. Berghausen evaluates all Prop 40 funding proposals and recommends funding approval or denial to Mike Chrisman (Secretary of Resources Agency).

**8. Must Establish Strong Basis for Prop 40 Funding Requests or Recommendations**

When the Conservancy recommends a project for Prop 40 funding, we need to establish a strong basis for our recommendation. San Diego River Prop 40 grants should be viewed as “competitive” grants. My general sense is that “average” or general non-specific proposals will not be successful. Applicants for the San Diego River Prop 40 funds must make a compelling and thorough case that its proposed project(s) are fully consistent with (1) Resources Prop 40 grant guidelines and criteria; and (2) SDRC’s Strategic Plan and established priorities. Based on my discussions to date, the applicant will also need to show how a proposed project is consistent with the SDRC’s view of the “best and highest” use of San Diego River Prop 40 funds as compared with other potential alternate projects.

**Who Should Hold Title to the Property**

This is an important question with numerous implications including:

- To whom will Resources award the Prop 40 Grant?
- Extent of State reviews required by Department of General Services and Public Works Board (more reviews when State will hold title);
- Can SDRC meet in closed session (see below)?
- Who is responsible for ongoing management of the property?

- Who is liable? etc., etc.

Potential Title scenarios include:

- State will hold sole title;
- State will hold partial title (e.g., easement, joint title); or
- State will hold no title;

At this time, I recommend that the *City of San Diego hold title to its proposed projects. The Foundation will do same.*

### **To Whom Should Resources Award Prop 40 Grant?**

The answer depends on who will hold title to the property:

- State will hold sole title:
  - Resources grants directly to State
- State will hold partial title:
  - For easements, Resources grants directly to State
- State will hold no title:
  - Resources grants *directly* to Local or Nonprofit;
  - Resources grants to SDRC and SDRC *re-grants* to Local;
  - Resources grants to eligible non-SDRC entity who re-grants to Nonprofit (*Resources cannot grant directly to Nonprofit*).

### **Types of Board Action:**

The answer depends on the “readiness” of the project and who will hold title to the property. Types of potential supportive actions that the SDRC Board may take include:

- If State will hold title: Board may “*Formally Endorse project and direct Executive Officer to submit grant application to Resources Agency for Prop 40 funding*”;
- If Local or Nonprofit will hold title and project is “mature”: Board may “*Formally Endorse*” *project and recommend project to Resources for Prop 40 Funding*”;
- If Local or Nonprofit will hold title and project is in “early” stages: Board may “*Informally Support*” *project; and*

- Various combinations of these.

In light of the “timing” discussion above, I recommend that for each currently proposed project, the Board consider a vote to ***“Informally Support the project at this time (with the likelihood of Formal Endorsement and Recommendation for Prop 40 Funding (upon completion of SDRC strategic planning and priority setting exercise)”***.

### **Unintended Consequences of Public Sessions on Real Estate Transactions**

Potential negative unintended consequences of the SDRC discussing and taking an action of support on potential real estate acquisitions in an open public session include:

- Influences on the market price
- “bad will” amongst land owner community

### **Closed Sessions for Real Estate Transactions**

**Under what conditions can the Board adjourn into closed session to discuss potential acquisitions?**

In limited circumstances, closed sessions are authorized under the Bagley-Keen Open Meeting Act to discuss real property. The Conservancy may meet in closed session with *its* negotiator prior to the purchase, sale, exchange or lease of real property *by or for the state body* to give its negotiator instructions regarding the price and terms of payment for the purchase, sale, exchange or lease. Prior to the closed session, the Conservancy must hold an open public session, which has been properly noticed, in which it identifies the real property and the person or persons with whom its negotiator may negotiate. (Gov. Code, § 11126(c)(7); Guide, at p. 13.)

***If the State itself is not purchasing (or obtaining an interest in) the property, closed sessions are not authorized.***

In other words, the real property exception to Bagley-Keene does not extend to grants to assist another entity in purchasing property.

## **Open Sessions for Real Estate Transactions**

**How can the SDRC Board discuss and take actions on real estate projects in public session without unintended consequences?**

If a closed session is not authorized either because (a) the state will not hold title or (b) the state is in the early stages of negotiations, how can the Board discuss or take an action of support for a particular acquisition project(s) without potentially influencing the market price, generating “bad will” amongst the land owner community, or other unintended negative consequences?

Good question. I am seeking your guidance on this topic. Although I will also seek further counsel from my fellow Executive Officers (of the other seven state conservancies) my only current recommendations are to:

- Don't discuss or take an action of support on a *single* acquisition. Instead discuss and take actions on a “*set of potential acquisitions*”. For example, for projects in the early stages, the Board action could be “*Informal Support*” for any one or all of a set of potential acquisitions. “***The Informal Support***” Board action provides the “green light” and allows the Executive Officer, City, or Nonprofit to move forward on further investigations and negotiations with property owners. “*Informal Support*” facilitates progress.

For a set of more “mature” projects, the Board's action could be the “*Formal Endorsement and Recommendation (to Resources) for Prop 40 Funding*”. ***The “Formal Endorsement and Recommendation” Board action would “authorize” the Executive Officer to initiate formal actions towards the acquisition and funding of any one or all of the potential acquisitions in the set “as the opportunity arises”.***

Similarly, ***Formal Endorsement and Recommendation by the Board would “facilitate and support” the City's or Nonprofit's formal efforts to secure funding and acquisition for any one or all of the potential acquisitions in the set “as the opportunity***

*arises”.*

- Don't assign a specific priority ranking to a single acquisition project. Instead, assign a priority ranking to a “*set of potential acquisition projects*”.
- Carefully consider and address the possible implications of releasing plans for a “specific” trail between the headwaters and Julian.

### **Special Issues for Eagle Peak:**

#### **Resources Can't Grant to Nonprofit Directly**

Our Proposition 40 funds are “River Parkways funds”. Pursuant to Water Code section 78682.2, the funds for River Parkways shall be made available for “the acquisition and restoration of riparian habitat, riverine aquatic habitat, and other lands in close proximity to rivers and streams and for river and stream trail projects”. Water Code section 78682.2(e) specifies that eligible projects include River Parkway projects undertaken by a state agency, city, county, city and county, or pursuant to a joint powers agreement between two or more of these entities.

Note that nonprofit organizations are not included in Water Code section 78682.2(e). In San Diego, where a “true river park” is defined, section (e) applies. ***Where section (e) applies, Resources Agency can not award grants directly to nonprofits.*** That is why the \$4.2 million grant for the CalMat Property was awarded to the State Coastal Conservancy, rather than to the San Diego River Park - Lakeside Conservancy directly. The State Coastal Conservancy subsequently re-granted the funds to the nonprofit.

In summary, due to the fact that California Water Code section 78682.2(e) omits nonprofits, ***the Resources Agency can not directly issue grants to nonprofits.*** For this reason, the grant would need to be issued to the SDRC or an eligible non-SDRC entity such as the State Coastal Conservancy or a local jurisdiction who would in turn re-grant to the Foundation. I will explore the alternatives further with Deputy Attorney General Peterson and Ms. Berghausen and will make a future recommendation as to the optimal granting mechanism.

#### **Eagle Peak is Outside SDRC Jurisdiction**

The Eagle Peak parcel lies approximately 400 feet outside of the jurisdiction of the SDRC (defined as .5 miles on either side of the

center-line of the River). Strictly speaking, the *SDRC can not purchase or fund properties outside our legal jurisdiction*. Nevertheless, Ms. Peterson has indicated that it *may be possible* for the Board to consider *making a finding* that the Foundation's Eagle Peak parcel should be considered for priority funding because (1) the project is in the immediate vicinity of the Board's jurisdiction; (2) the parcel is important to the continuity of the River Park; and (3) the project is fully consistent with the SDRC Enabling Statute and Resource's Prop 40 Funding Guidelines.

Absent such a Board finding, we will need to use a conduit and re-granting process in order to fund the Eagle Peak acquisition.

LEGAL CONCERNS: None.

FISCAL IMPACT: None.

SUPPORTING DOCUMENTS: See Supporting Document for Item 6, *Bagley-Keene Open Meeting Act Quick Reference Guide*

RECOMMENDATION: 1. *City of San Diego's Proposed NON-Acquisition Projects*

Should the Board take an action of support today for one or both of the proposed non-acquisition projects presented by the City of San Diego on July 9, 2004? **YES, BOTH PROJECTS**

If so, what type of action(s)? **"INFORMAL SUPPORT" (for today) WITH LIKELY FORMAL ENDORSEMENT AND RECOMMENDATION FOR PROP 40 FUNDING (upon completion of SDRC strategic planning and priority setting exercise).**

2. *City of San Diego's Potential Acquisition Projects*

Should the Board take an action of support today for any or all the potential acquisition projects presented by the City of San Diego on July 9, 2004? **YES, ALL PROJECTS**

If so, what type of action(s)? **"INFORMAL SUPPORT" (for today) WITH LIKELY FORMAL ENDORSEMENT AND RECOMMENDATION FOR PROP 40 FUNDING (upon completion of SDRC strategic planning and priority setting exercise).**

Who should hold title to the property? **CITY OF SAN DIEGO**

To whom should Resources award the Prop 40 grant?  
**DIRECTLY TO THE CITY OF SAN DIEGO**

3. **Foundation's Eagle Peak Acquisition Project**

Following the presentation, should the Board take an action of support today for the San Diego River Park Foundation's (Foundation's) Eagle Peak acquisition project? **YES**

If so, what type of action? **"INFORMAL SUPPORT" (for today) WITH LIKELY FORMAL ENDORSEMENT AND RECOMMENDATION FOR PROP 40 FUNDING (upon completion of SDRC strategic planning and priority setting exercise).**

Who should hold title to the property? **SAN DIEGO RIVER PARK FOUNDATION.**

To whom should Resources award the Prop 40 grant? **TO THE SDRC OR ELGIBLE NON-SDRC ENTITY (TO BE DETERMINED).**

4. **Public Sessions on Real Estate / Unintended Consequences**

How can the Board discuss and take actions on real estate projects in open public session without unintended negative consequences? **DISCUSS AND PROVIDE GUIDANCE TO EXECUTIVE OFFICER.**

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<sup>1</sup> State of California Natural Communities Conservation Plan (NCCP). The San Diego NCCP (Multiple Species Conservation Program, MSCP) was the pilot program upon which the innovative, now Statewide, NCCP is based.

