ATTORNEY/CLIENT PRIVILEGED COMMUNICATION

DATE: 8/11/2005

TO: BETH POLLARD, CITY ADMINISTRATOR

FROM: ROBERT ZWEBEN, CITY ATTORNEY

RE: ALBANY WATERFRONT / REVISED FOR WEB SITE

I. WATERFRONT ZONING HISTORY

The Waterfront District is comprised of public lands owned by the City, sometimes referred to as the Albany Bulb, public lands owned by the State of California known as Eastshore State Park, and private lands owned today by Magna. The private lands were leased by the property owner to various racetrack operators since at least the early 1940's. Today Magna owns and operates the horse racetrack.

In June, 1978, the Albany City Council adopted a comprehensive zoning ordinance, Ordinance No. 78-07. Section 216 of that zoning ordinance contained the permitted uses regulations that have remained constant since that time. A copy of that section is attached to this memo.

When the Zoning Code was revamped in 1978, Section 216 was incorporated verbatim into the Albany Municipal Code as Section 20-2.16. In June of 1990, when Measure C was approved by the voters, the conditionally permitted uses were essentially frozen by the terms of Measure C and because of Measure C, Section 20-2.16d, related to modifications, was added to the waterfront regulatory scheme. When Albany passed its comprehensive revisions to its zoning ordinance in 2004, these sections were numbered as follows: (i) Section 20-2.16d can now be found in a table format in Section 20.12.040; and (ii) Section 20-2.16b entitled *Amendments* can now be found at Section 20.12.070B.2.

In 1979, pursuant to Ordinance No. 79-05, Chapter 19 entitled *Waterfront* was added to the Albany Municipal Code. This chapter was enacted as part of an implementation ordinance for a development plan and regulations for what was called the Albany Waterfront Plan for the public lands owned by Albany, which is commonly referred to as the Albany Bulb. By and large, this section is of no import because a waterfront plan for the Bulb, which had at different times included concessions and a marina, was never developed. More recently, these lands are earmarked for inclusion in the Eastshore State Park system.

A. Measure C

In 1990, the voters passed Measure C (Measure C full text attached). Measure C froze the allowable uses that can now be found in Section 20.12.040. Those conditionally permitted uses include the following:

1. Commercial Uses

a. Commercial Recreation. Includes live horse racing which exceeds one hundred twenty (120) days in any calendar year (irrespective of whether conducted by one or more operators at the facility), golf, tennis, swimming, and other commercial or spectator or participatory activities and uses which in the opinion of the Planning Commission are of a similar nature.

b. Waterfront and sports-related commercial sales and services.

c. Restaurants/Bars

d. Commercial parking lots.

2. Public and Quasi-Public Uses.

a. Marinas and boat launching ramps and related uses.

b. Parks, golf courses, open space areas and other recreational facilities.

c. Public utility and public service structures and installations.

Measure C, in addition to freezing the permitted uses on the private property owners on the waterfront, also included a section requiring voter approval for any amendments to the zoning ordinance, general plan, master plans, and certain other actions. These Measure C regulations are now codified in Section 20.12.070B.2. and it reads as follows:

"The following actions, if they authorize any use not authorized by the zoning ordinance for the Waterfront District as of the effective date of this ordinance, shall only be taken by passage of a ballot measure approved by a majority of voters voting.

1. Any amendment to the land use designations for the Waterfront Area in the City's General Plan;

2. The establishment of, or any material amendment to, the Waterfront Master Plan or other specific plan for the Waterfront Area. The meaning of the phrase "material amendment" shall be defined in the Waterfront Master Plan itself or other specific plan for the Waterfront area itself;

3. Any amendment to the zoning ordinance for the Waterfront area including changes to the text and changes to the map of the Waterfront area.

4. The entry into any development agreement and/or any material amendment to a development agreement for the Waterfront Area. The meaning of the phrase "material amendment to a development agreement" shall be defined in the development agreement itself. A development agreement or an amendment to a development agreement shall be deemed "entered into" on the date that the election results approving the agreement or amendment are certified in the manner provided by the Elections Code."

B. Synopsis of Zoning Regulations

Under today's zoning ordinance provisions, consistent with Measure C, a person would need to obtain a conditional use permit for those uses that are permitted under the waterfront regulations (Section 20.12.040). Any use not permitted, for example a retail or commercial use that is not consistent with the allowable uses today, would require voter approval. Any amendment to the land use designations in the waterfront area in the General Plan or any material amendment to the Waterfront Master Plan or other specific plan that may be enacted, would require voter approval. The voters would have to approve a development agreement or any material amendment to a development agreement that related to the waterfront. Any amendment to the zoning ordinance for the waterfront, including changes to the text and changes to the map of the waterfront area, would have to be approved by the voters.

C. The CEQA Process

If an applicant files for development entitlements or if the City embarked on a waterfront master plan process, CEQA requires an environmental study. An EIR will probably have to be prepared. The cost of this process will exceed, in all likelihood $500,000.00 to $750,000.00. If a developer files an application, the applicant is obligated to reimburse the City for the CEQA related costs in addition to any other processing related costs. The City will require payment of all processing costs under the terms of a reimbursement agreement. The CEQA review is the City's responsibility. The City hires the consultants, conducts the hearings, and controls the process. The applicant pays for it, but cannot direct the City or the CEQA consultants hired by the City.

If there is no application and the City commenced its own waterfront planning process, it would use its funds to pay for its planning process.

II. BRIEF HISTORY OF APPLICATIONS RELATED TO DEVELOPMENT PROPOSALS ON THE GOLDEN GATE FIELDS' PRIVATE PROPERTY AT THE WATERFRONT

A. The Catellus EIR

In the 1980's, when this property was owned by the Santa Fe Realty Company, the City was asked by the landowner to undertake a program Environmental Impact Report process to study possible development scenarios. This EIR process commenced around 1985 and continued for approximately five years. This program EIR evaluated hypothetical project alternatives ranging from a no project alternative to the development of approximately 4.2 million square feet of a combination of retail, commercial, and residential development. A park alternative was one of the options studied. The EIR also evaluated potential environmental impacts of projects based on the assumption that there would be development without a racetrack. Although Santa Fe, later to be known as Catellus, paid probably over $500,000.00 to the City for the preparation of the program EIR, they did not proceed to file a request to have processed a specific development application. Toward the end of this process, some citizens who were concerned about the potential for development at the racetrack, circulated the initiative petition that is known as Measure C. Measure C was approved by the voters in June of 1990.

B. The Card Room Proposal

The only development proposal on the privately owned lands on the waterfront that was submitted to the City since 1990 was the Ladbroke Cardroom proposal. Voter approval was required to adopt a gaming ordinance, a development agreement, and zoning amendments permitting the

establishment of a card room gaming facility within the racetrack facility. Measure F was presented to the voters in November of 1994. The measure passed. Thereafter, Citizens for Responsible Government challenged the process by which this measure was presented to the voters. Due to this litigation, Measure F was not implemented.

Measure F included Ordinance No. 94-011, a gaming ordinance, proposed zoning ordinance amendments to Section 20-2.16 (Waterfront District) and a development agreement between Ladbroke and the City. A development agreement was entered into for a variety of reasons. Significantly, from the City of Albany perspective, the development agreement was the legal vehicle by which the City could validly acquire dedications and other benefits that the City otherwise would not have been able to acquire in a normal land use approval process. For instance, the City was thereby able by agreement to receive the following from Ladbroke:

- An irrevocable perpetual easement for a bay trail with specified dimensions;
- A leasehold easement for a buffer area separating the bay trail and beach area from the Golden Gate Fields facility;
- A leasehold conservation easement covering two acres of Ladbroke lands adjacent to the marsh;
- A payment of $500,000.00 by Ladbroke to the City for costs of designing, constructing, and developing the bay trail;
- A requirement the Ladbroke, at its sole cost and expense, would landscape the bay trail/beach area buffer; release of Ladbroke's interest in the area known as the plateau that lies north of Buchanan Street;
- Public access to and use of certain other Ladbroke lands known as the Horseman's Lot;
- Payment of a $600,000 fee for the initial issuance of a City license; and
- Payment of an annual business license tax on percentages of total revenue in the first year and commencing in the second year a minimum tax of $1.2 million per year with additional tax being paid depending upon the gross revenues.

Ladbroke also had agreed to make charitable donations of revenues of the gaming facility on an annual basis to Gamblers Anonymous and Alcoholics Anonymous, and was committed to contribute up to $50,000.00 annually to the cost of childcare required by employees at the gaming facility, and Ladbroke had agreed to make available its facilities twice a year for use by the City without cost or expense to the City. The gaming regulations required Ladbroke to pay a $600,000.00 fee for the initial issuance of a license. It additionally required that each year Ladbroke pay a business license tax based on percentages of total revenue in the first year and commencing in the second year, a minimum tax of $1.2 million dollars per year with additional tax being paid depending upon the gross revenues. Without a development agreement, the City would not have been able to receive all these benefits, because it would not have had the legal authority to impose requirements resulting in many of the dedications and economic commitments.

The court of appeals decision and a subsequent trail court judgment prevented the card room proposal from taking effect. Ladbroke operated the racetrack for several more years and then sold its interest to Magna. Magna purchased both the land and the business, through an asset purchase of stock in the company that owned the land and business.

III. FUTURE PLANNING AT THE WATERFRONT

There are at least several development scenarios that could occur on the Magna property. Each possibility will be briefly described. With each possibility, other than one that might request approval for a CUP for a proposed allowable use under Section 20.12.040, there may be several options as to how the City configures a review process.

A. Hypothetical One

Magna or Caruso submits a request for a use permitted under Section 20.12.040. For example, the application could request approval for a permit to construct a bar and restaurant or conceivably something like a horse ring. This request would be processed like any other use permit. It would require CEQA review. It would be a discretionary permit subject to the Permit Streamlining Act. The City's ability to require dedications of property to the public would be circumscribed in relationship to the impacts of the project.

B. Hypothetical Two

Magna or Caruso submits a development application that seeks permits for construction of some combination of retail, commercial, and/or residential uses that require voter approval pursuant to Measure C (i.e. amendments to the general plan or zoning ordinances). Although Measure C requires a zoning change or general plan change to be approved by the voters and not the City Council, the City would process this request under the applicable zoning provisions pertaining to general plan or zoning amendments as outlined in Chapter 20 of the Albany Municipal Code. This type of application would require legislative decisions, as distinguished from an application for a use permit which is the administrative processing of a discretionary use permit request. Legislative acts are not mandatory and do not obligate any approvals, even after a full review and processing. Final approval could only occur if the voters cast a majority of votes in favor of the proposed project.

When the City received such an application, staff would review it and recommend how it would be processed. At least a preliminary environmental assessment would be undertaken. The staff would provide an informational report to the City Council to determine how then to proceed. The Council would have to instruct the staff how and whether to discuss specifics with the applicant.

C. Hypothetical Three

The City wishes to initiate a waterfront and/or specific plan for the privately held lands. The threshold question would be how to pay for a City initiated process. This process could easily cost $750,000.00 to $1,000,000.00. The largest cost would be the CEQA law and the EIR report would provide essential information necessary for the preparation of any plan. If the Council committed the funds, then environmental, planning, and economic studies would be done. Public hearings would be held. The voters would have to adopt the plan.

D. Hypothetical Four

Consider no land use changes until the racetrack ceases to operate. Even if the City Council did not wish to approve any project proposal until or unless the racetrack ceased operation, it would have to process an application requesting modifications to the allowable uses now. In that case, an application should probably be processed to a level that allows staff to provide Council with an informational report with enough detail to allow the Council to make an 'informed' decision about the application and the changes it would propose for the property. Based on the review and information, the City would presumably have discretion to refuse to proceed with the proposed project. The land would then remain as is, privately owned property with no rights of public use unless the landowner so permitted.

E. Hypothetical Five

The City wishes to establish a park on these lands. The City would have to acquire through purchase or condemnation the land it wanted to establish as publicly owned park. The estimated cost of the whole property, given what is known about the approximately $80 million dollar purchase price that Magna paid some years ago, may be $100 million or more dollars. Funding sources could include a combination of local taxes, regional bond measures, or state bond monies. The likelihood of raising sufficient funds from these sources in the near term is probably remote.

If the City wished to try to acquire portions of the Magna property as publicly owned open space or parks, and it could not pay for it, it could explore an agreement with the developer to acquire open space in exchange for granting development rights. The development agreement would allow the City to maximize its ability to negotiation for the acquisition of publicly owned open space/park land in exchange for development rights.

It is unlikely that the proposed Sierra Club plan could be implemented without significant funding to purchase open space/park land.

F. Other Hypothetical Alternatives

The prior hypotheticals are presented only to show some of the variations that could occur. One could imagine, without much ingenuity, any number of other possible application configurations.

IV. RELATED LEGAL MATTERS

A. Measure C

At least a brief discussion of Measure C seems appropriate to explain how it affects the land use planning process. The typical land use planning process places a governing body of a public agency as the final decision maker. In a city that would be the City Council. In a county that would be the Board of Supervisors. It is rare to find the 'voters', as is the case under Measure C, in the role of the final decision maker. When a city council or a board of supervisors is the final decision maker, the people can weigh in through the referendum process and thereby overrule a decision to approve a project by the governing body. While many land use planners or attorneys may question the wisdom of the process created by Measure C, Albany's staff and City Council are in the unique position of implementing Measure C in a way that works for the community. The City has responsibility to the voters. The City has the responsibility to determine how best to provide the voters with information so the voters can cast informed votes.

In the usual land use process, an applicant has a right to receive a decision on its application, even if it is a request for a change in the General Plan or zoning ordinance. Only the voters can

approve matters that fall under Measure C, but the City would still have to process application requests that provide decisions in accordance with the law in a situation where a denial may occur.

B. In What Ways Can Public Agencies Obtain Publicly Owned Open Space / Parkland or Dedications of Open Space, Parklands or Land for Other Uses.

The question is asked because for more than the last 25 years the community has debated how to approach development at the waterfront on these privately held lands.

1. Parkland Dedication or Fees: Residential Developments.

Subject to appropriate authorizing ordinance and general plan provisions, the City may require the dedication of land for parks. State law proscribes the allowable amount. The size of dedication cannot exceed the proportioned amount necessary to provide three acres of park area per 1,000 subdivision residents. In other words, if residential uses are proposed at the waterfront, then the City could require lawfully proscribed amounts of dedicated land.

2. Other Exactions or Fees

To impose other exactions or fees, a City must show through individualized findings that there is a nexus between the condition imposed and the condition imposed is roughly proportional to the impacts of the subdivision. If an application on the Magna lands proposed commercial and retail uses, the City may be hard pressed to require the dedication of much, if any, parkland under public ownership.

3. Development Agreement

Without a question a development agreement is the best vehicle to use to obtain publicly owned open space/parkland. A development agreement is a contract consensually agreed to between the developer and the City. The City can negotiate for a package of dedications and fees that it could not otherwise obtain through the imposition of conditions or executions that are subject to legal limitations. For example, if Magna proposed to develop retail and commercial uses at the waterfront, the City may be hard pressed to justify a dedication of property at the beach, marsh or other significant amounts of land. But through the use of a development agreement, the developer could agree to 'give' the land in exchange for favorable consideration of various development requests.

4. Purchase

If the funds were available, the City could purchase, at fair market value or by agreement, lands that are held in private ownership. The amount of land the City could purchase would depend on the amount of funds available. If an agreement to purchase lands could not be reached, then the City could exercise, in accordance with the applicable laws, it power to condemn for public purposes, at fair market value.

V. CONCLUSIONARY REMARKS

Measure C has given the voters the final authority to approve various matters at the waterfront. It is in the City's interest to make sure the review process fully informs the voters of all aspects of the project.

The amount of dedicated parkland and open space and the future of the racetrack are two significant issues related to the determinations related to any application that is submitted. With these two issues in mind, negotiating a development agreement is the best way by which to explore and to discuss with the applicant how the City can attain open space and parkland dedications and it is also a way by which a proposal that would be submitted to the voters could address the relationship between proposed development and the future of racing operations at this site.