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TO: Jean Cutler, Interested Parties
FROM: Chris Cieslak
CC: Mary Conturo
DATE: July 30, 2010
SUBJECT: PA History Code Process, Mellon Arena and Lower Hill Redevelopment Project

In December 2009, the SEA initiated consultation with the Pennsylvania Historical and Museum Commission (“PHMC”) in compliance with the Pennsylvania State History Code regarding the Lower Hill Redevelopment Project (“Project”). Since then, SEA has conducted eight Interested Parties meetings and has solicited comments on two DRAFT Development Options Comparison Reports (“Options Report”), dated May and July 2010, respectively, and one DRAFT Determination of Effect Report (“Effects Report”), dated June 2010. The SEA also has received materials submitted by Interested Parties, including an analysis submitted by 4Ward Planning LLC at Interested Party Meeting #8, held on July 13, 2010.

As you know, the draft Options Report identifies Option 5 – Arena Demolition and Site Development as the preferred alternative. In Interested Party Meeting #8, the SEA requested that any comments on these draft reports be submitted by July 23, 2010. To date, SEA has received comments from only one Interested Party. **The SEA has decided to extend the comment period and is now requesting that any further comments on the Options Report and/or Effects Report be submitted on or before August 6, 2010.**

After that date, the consultant will finalize the reports. The SEA will review the reports, correspondence, and other documentation and make a decision regarding the redevelopment of the site. The SEA and its consultants will then work with the PHMC and Interested Parties to determine future steps to mitigate adverse effects, if any of the project. The SEA intends to document any mitigation commitments future agreements.

The reason that we are extending the comment period is to give PHMC and all Interested Parties an opportunity to consider the SEA’s responses to several recent comments, including:

- (1) the comments submitted by the Pennsylvania History and Landmarks Foundation (“PHLF”) to the SEA, in a letter dated July 15, 2010 (enclosed);
- (2) a request made by an Interested Party and its consultant (4Ward Planning LLC) at an Interested Party meeting on July 13, 2010 (available on SEA website) and at an SEA Board Meeting on July 15, 2010, seeking a one-year extension of the decision-making process.

Responses to the above comments are attached. See Attachment A.

In addition, a response to the presentation given by 4Ward Planning LLC at Interested Party Meeting #8 is enclosed. See Attachment B. The 4Ward Planning presentation criticized the economic analysis that had been conducted by Oxford Real Estate Advisors (“OREA”) and by AECOM for the Lower Hill site. In the enclosed document, OREA provides its response to 4Ward’s critique. Additionally, we note that 4Ward’s presentation does not include any new economic analysis and does not identify any new redevelopment options that were not previously considered.

We appreciate your participation in this process and look forward to receiving any further comments.



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ATTACHMENT A

I. SEA Responses to PHLF Letter of July 15, 2010

1. Compliance with the NHPA

The PHLF letter contends that SEA is not in compliance with Section 106 of the National Historic Preservation Act and states that “failure to comply with Section 106 may result in foreclosure of the ACHP’s opportunity to comment and/or in anticipatory demolition as defined in Section 110(k) of the NHPA.” The letter also states that “While it is fine to reach out to federal agencies, requesting their participation without federal funds allocated, does not satisfy the requirements of Section 106.”

We disagree with PHLF’s interpretation of the NHPA’s requirements. The NHPA is a federal law. Section 106 of the NHPA requires federal agencies to consider the effects of their undertakings on historic properties. The Section 106 consultation process can be carried out only by a federal agency. The SEA is not a federal agency and therefore is not subject to Section 106, nor can it carry out a Section 106 consultation process. Moreover, the SEA has neither the obligation nor the ability to force a federal agency to carry out a Section 106 consultation process on the SEA’s behalf.

The only reason that Section 106 procedures are being discussed, in the context of this non-federal project, is that the SEA has *voluntarily* chosen to follow a process modeled on Section 106 consultation as a method for satisfying the consultation requirements that apply to SEA under the State History Code. The SEA decided to adopt Section 106-like procedures because the State History Code itself does not define a consultation process. The SEA adopted these Section 106-like procedures because they provide a structure within which the stakeholders can participate in a thorough, thoughtful and methodical decision-making process. While Section 106 terminology has been used, the SEA and its consultants have stated consistently that their intent is to “mirror” Section 106 as a way of satisfying the State History Code. The SEA is in full compliance with its obligations under state law, and has gone above and beyond those requirements in an effort to provide a thorough, thoughtful and inclusive process.

The PHMC’s statements are fully consistent with the SEA’s application of the State History Code and with SEA’s determination that Section 106 does not apply to the SEA’s actions. Both the PHMC and the PHLF have acknowledged that the State History Code does not define a specific consultation process, and have acknowledged that SEA’s actions to date are sufficient to satisfy SEA’s obligation to consult with the PHMC under the State History Code. The PHMC also has recognized that, because the SEA is not a federal agency, the SEA does not have the obligation or the ability to engage in Section 106 consultation.

The *potential* for future federal funding to be used in the redevelopment of the Lower Hill site does not change this analysis. The SEA would like to receive federal funding for certain road improvements that will be needed on this site, when the site is redeveloped. However, federal funding is at this point a possibility at some indefinite point in the future. There is currently no federal funding designated for any aspect of the redevelopment of this site. The State and metropolitan transportation plans, which identify projects for which federal funding is anticipated over the next 20+ years, do not identify any federally funded projects at the Lower Hill site. Accordingly, in a letter to PHMC dated July 7, 2010, the Federal Highway Administration concluded that “the FHWA has no discretion or influence and cannot participate in Section 106 consultation on this activity.”



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In these circumstances, an assertion that demolition of the Mellon Arena could be considered “anticipatory demolition” in violation of Section 110(k) of the NHPA is inaccurate. Section 110(k) defines anticipatory demolition as destroying or irreparably harming an historic property “with the express purpose of circumventing or preordaining the outcome of Section 106 review.” The SEA’s actions throughout this process demonstrate great care for historic resources, and a desire to ensure that it thoroughly considers an array of options other than demolition before any final decisions are made. The reason that Section 106 consultation has not occurred is not because of any intent to avoid consultation. Rather, it has not occurred because there is no federal action.

Moreover, it is important to recognize that Section 110(k) does not directly regulate the actions of non-federal entities such as the SEA. Rather, Section 110(k) places a responsibility on *federal agencies* to develop procedures for discouraging “applicants and potential applicants” from carrying out “anticipatory demolition” as that term is defined in the statute. Recognizing that Section 110(k) places this responsibility on federal agencies, the PHMC specifically asked FHWA (in a letter dated June 14, 2010) to consider whether SEA’s actions would constitute anticipatory demolition. In its July 7, 2010 response to PHMC, FHWA stated that it has no basis for becoming involved in actions related to the potential demolition of the Mellon Arena. If FHWA considered the SEA a potential applicant and had concerns about anticipatory demolition, FHWA would have been legally obligated under Section 110(k) to provide an “early warning” to the SEA. FHWA’s letter raised no such concerns. FHWA’s response to the PHMC’s letter confirms that FHWA does not view SEA’s actions as creating the potential for “anticipatory demolition” under Section 110(k).

In sum, the SEA has complied with its obligations under the State History Code, and has substantially exceeded those obligations by carrying out a consultation process modeled on the procedures that federal agencies follow under Section 106 of the NHPA. The SEA has no obligations under the NHPA itself and can proceed with the redevelopment of the Lower Hill site, including the demolition of the Mellon Arena if that option is selected. Based on FHWA’s response to the PHMC letter, the demolition of the Mellon Arena would not be considered “anticipatory demolition” and therefore would not affect the SEA’s ability to use federal funding in the future for projects on that site.

2. Purpose and Needs Exercise

The PHLF letter also discusses the “purpose and needs” exercise, asserting that it “added confusion to the review process.” The PHLF letter cites an earlier letter from PHMC to the SEA, dated June 16, 2010, in which the PHMC commented on the purpose and needs exercise and the way it was used for evaluating alternatives.

We are aware that there is a reasoned difference of opinion between SEA and the PHMC regarding the way that the purpose and need statement was developed and the way it was used in evaluating alternatives. The SEA’s consultants developed the purpose and need statement through a collaborative process that included a survey in which Interested Parties articulated various goals. The SEA’s consultants then developed a method for assessing alternatives based on the various alternative’s ability to satisfy various aspects of the purpose and need. The PHMC expressed concerns about this approach early in the process, and the SEA’s consultants discussed these concerns with the PHMC and modified its methodology to address these concerns. While these changes did not fully resolve the difference of opinion, they demonstrate that SEA has carefully considered PHMC’s concerns.



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This difference of opinion does not call into question the adequacy of the SEA's decision-making process with regard to the Lower Hill site. As noted above, the SEA is required to follow the State History Code, and both PHMC and PHLF have agreed that the SEA's process complies with the State History Code. The SEA is not required to comply with Section 106. The SEA decided on its own to create a process where no formal process existed. The process created by the SEA included elements of Section 106 consultation and also included elements of the type of analysis that is performed under the National Environmental Policy Act ("NEPA"). NEPA is a federal law that requires federal agencies to engage in an environmental review process for major federal actions, and that process includes development of a "purpose and need" and an analysis of alternatives based on that purpose and need. In this case, the SEA's consultants chose to incorporate those elements from a NEPA study into its decision-making process. While some participants would have designed the process differently, the process was thoughtful, thorough, and inclusive, and went beyond SEA's obligations under the State History Code.

Therefore, while some differences of opinion remain, those differences relate solely to judgment calls made by the SEA and its consultants with regard to the design of an optional process. Such differences of opinion can be an expected part of a process such as this one, and they do not impair the SEA's compliance with the State History Code.

3. Decision-Making Responsibility

The PHLF letter states that "the SEA is the entity responsible for the process and the evaluation of alternatives, not the Interested Parties." It also states that "the SEA is ultimately responsible for making its own decisions regarding the redevelopment of the Mellon Arena site, and any preferred recommendations that stem from the Interested Party process should be labeled as those of SEA and its consultants."

The SEA agrees with these statements in the PHLF letter. The SEA is the public agency that owns the site and is responsible for making the decision about the future of Mellon Arena. The SEA's consultants have assisted the SEA by developing and overseeing the Interested Party process; by defining a range of options to be considered and evaluating those options; and by recommending an alternative (referred to as the 'preferred alternative') for adoption by the SEA. The SEA's consultants have facilitated a dialogue among the Interested Parties, and have carefully considered the views expressed by the Interested Parties. However, it is recognized that the Interested Parties do not have a decision-making role and may not necessarily agree with one another or with the SEA consultants' recommendations. Ultimately, the SEA will consider the recommendations of its consultants, along with the views expressed by all of the Interested Parties, in reaching a final decision regarding the redevelopment of its Lower Hill site.

For these reasons, the SEA concludes that the information in the PHLF letter does not provide a basis for requiring an extension of the existing process. Therefore, once any remaining comments have been submitted on the Options Report, the SEA will consider the comments and proceed forward in its decision-making process.

II. SEA Response to Request for Extension of Process

During the SEA Board Meeting and Interested Party Meeting in July, an Interested Party and its consultant called for a "unified planning process" for the Lower Hill site. As described by the Interested Party and consultant, this process would allow 12 months (through July 2011) for redevelopment requests for proposals to be developed, and no decision regarding the site would be made until after Fall 2011 or later. In effect, this consultant is asking for a substantial delay in the SEA's decision-making regarding the site.



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Delaying the decision-making process would result in significant additional holding costs to the SEA and would result in the area not being 'development ready' until **1st Quarter 2014**. The holding costs are expected to range from \$76,000 to \$122,000 per month depending on the future use of the Mellon Arena.

In addition to the financial impacts on the SEA, this delay would be problematic because it would impede efforts to plan for the redevelopment of the site by prolonging uncertainty about what development will be possible.

It is the goal of the SEA to provide for a desirable development-ready site in a timely manner, both in order to minimize holding costs of Mellon Arena and to avoid a situation where the future development of the property is in limbo for an extended period of time. It is the SEA's desire to build on the momentum that comes with the completion of the Consol Energy Center and Cambria Suites Hotel and the recent announcements of new development efforts underway in the Hill District, including the new YMCA, the new grocery store and the renovated Connelley Technical Institute.

To achieve that goal, the SEA has developed a preliminary schedule (if Option 5 is selected) for site preparation that would permit the first phase of development to commence by **Spring 2012**. Making a timely decision will enable the design for the site's infrastructure to proceed.



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July 15, 2010

Ms. Mary Conturo
Sports & Exhibition Authority of
Pittsburgh and Allegheny County
425 Sixth Avenue
Pittsburgh, PA 15219



Dear Mary:

We appreciate the Sports & Exhibition Authority of Pittsburgh and Allegheny County's (SEA) efforts to comply with the Pennsylvania State History Code in reviewing and analyzing alternatives for the redevelopment of the Mellon Arena site. While the SEA is attempting to mirror the State History Code review process with the procedures set forth in Section 106 of the National Historic Preservation Act (NHPA), this does not put the SEA in compliance with Section 106 as the Pennsylvania Historical and Museum Commission (PHMC) and Landmarks have advised numerous times.

Section 106 is invoked when federal funds are designated for a project that may have an adverse impact on historic properties. It is a federal agency's "statutory obligation" to comply with Section 106. The process is clearly laid out in the Section 106 regulations—36 C.F.R. Part 800—and includes, among other things, that a federal agency be designated, the alternatives analysis be reviewed by the public, and that the Advisory Council of Historic Preservation (ACHP) be given an opportunity to participate and comment.

Failing to comply with Section 106 may result in foreclosure on the ACHP's opportunity to comment and/or in anticipatory demolition as defined in Section 110(k) of the NHPA. This is applicable to the entire redevelopment of the site. Section 110(k) prohibits "anticipatory demolitions" by placing a penalty on recipients of federal funds that intentionally destroy or harm historic properties prior to the completion of the Section 106 review process.

While it is fine to reach out to federal agencies, requesting their participation without federal funds allocated, does not satisfy the requirements of Section 106.

Furthermore, we concur with PHMC's comments in their letter dated June 16, 2010, and as were reiterated by Mr. Bill Callahan at the July 13th Interested Parties meeting. As we expressed to you verbally, the "purpose and needs" exercise and statement added confusion to the review process. If mirroring Section 106, then the purpose is clearly defined in 36 C.F.R. § 800.1(b)—"to identify historic properties potentially affected by the undertaking, assess its effects and seek ways to avoid, minimize or mitigate any adverse effects on historic properties."

In continuing the State History Code review process, please note that the SEA is the entity responsible for the process and the evaluation of alternatives, not the Interested Parties. The SEA is ultimately responsible for making its own decisions regarding the redevelopment of the Mellon Arena site, and any preferred recommendations that stem from the Interested Parties process should be labeled as those of the SEA and its consultants.

We agree with PHMC that the SEA has complied with the State History Code, but that it has not complied with, and it is premature to conduct, the Section 106 review process, or to enter into a memorandum of agreement to that effect. The formal Section 106 review process should be initiated when federal funding for an adverse impact is identified.

Sincerely,



Arthur P. Ziegler, Jr.
President

cc: Bill Callahan
Chris Cieslak
Jean Cutler
Barbara Franco
Scott Lieb
Anne Nelson
Rob Pfaffman
Timothy Zinn
Yarone Zober



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ATTACHMENT B



OXFORD REAL ESTATE ADVISORS, INC.

Institutional Real Estate Investment Managers

Advisors to The Oxford Fund, L.P. / Oxford Fund Select, L.P.

July 29, 2010

The following is a summary of our comments with regard to the report prepared by 4Ward Planning entitled Mellon Arena Reuse Analysis, and dated July 13, 2010, for Preservation Pittsburgh (“Option 3”). We have divided our commentary into two components, 1) an Executive Summary and 2) Specific Slide Commentary.

EXECUTIVE SUMMARY

The referenced ‘analysis’ refers to the AECOM report which was done independently (and prior to all other reports) and provided the broad-spectrum basis for the Option 5 data. It also refers to Oxford’s Comparative Economic Benefit Analysis which is an evaluation of Option 3 data (provided by affiliates of Preservation Pittsburgh) and Option 5 data, utilizing a number of new assumptions which were ‘equalized’ and which had been agreed to by the various parties in an effort to avoid providing either Option with an advantage.

A substantial number of the slides in the 4Ward Planning, LLC presentation contain misleading information, omissions, and incorrect source citations and quotes.

The presentation takes statements and data out of context and includes conflicting, misleading and incorrect data to cast doubt on the validity of various market conclusions. The presentation also ignores the agreement to equalize assumptions for Option 3 and Option 5.

Overall, the 4Ward Planning analysis uses a generic approach to evaluation which in many cases is not specific or applicable to the Pittsburgh market.

In conclusion, the amount of misleading information, incorrect data, and inconsistencies throughout 4Ward Planning’s presentation is a concern and needs to be accounted for by those relying on the representations made and the conclusions drawn.

SPECIFIC SLIDE COMMENTARY

Slides 9 & 21

The first sentence is taken from AECOM’s draft February 19, 2010 report, but fails to include the follow up sentence which qualifies it by stating: “*However, given the lack of developable land within the golden triangle and the desire of many office tenants to be near the CBD, the project site will offer desired proximity to downtown resources (although there is also competition from the North Shore).* Utilizing a quote of one sentence and ignoring a succeeding sentence that qualifies it, is misleading.

The second quote on this slide is also misleading. In the AECOM report, the quote is actually referring to the effect that the “movement among several firms” had on the CBD at a specific point in time and does not accurately address the overall CBD office market. A more thorough evaluation of the Pittsburgh office market would

conclude that the market is performing very well. For example, the Pittsburgh office of Cushman and Wakefield stated in its 2010 1Q Pittsburgh Office Report 'MarketBeat ': "Leasing activity increased significantly over first quarter 2009 and is expected to climb throughout 2010." "Direct absorption should increase in 2010 in response to new energy companies entering the market." The report states that overall absorption in the CBD for the quarter finished at 318,227 sf.

Slides 11-14

The Slide 13 map illustrates 18 movie theaters however the data box indicates 14 "movie houses." The map also appears to show two 'movie houses' in the CBD, and one on the Northshore. None of these three 'movie houses' show mainstream movies that would compete with a movie house on the subject site. In addition, nine (9) of the theatres are outside, or close to, the '15 minute' contour and it is unlikely that they would be considered competitive theatres.

Slide 14 quotes Cinemark as searching for theatre locations in Monroeville and the North Hills communities of McCandless and Cranberry; three locations not likely to compete with a theatre complex on the subject site.

Slides 15-18

These slides provide information related to restaurants and the retail market in general. The information is credited to DirectoriesUSA.com and ScanUS, internet research sources, as well as the author of the report.

The Pittsburgh office of CB Richard Ellis paints a different picture with regard to retail viability in this market.

According to the CB Richard Ellis Real Estate Symposium Report of May 18, 2010 "Pittsburgh has benefitted from slow, consistent growth and stable housing and job growth. Retailers are looking for markets with limited exposure to housing busts and job creation." In their "Predictions-Pittsburgh" CBRE states the following: "2010 will surprise many as the market is as hot as it has ever been;" "Downtown will continue to prosper and grow;" "Meds, Eds and High Tech will continue to lead us to new heights;" "Retailers will continue to enter our market given our notoriety and new found success/stability;" "Development will continue bucking National Trends."

Slides 19 and 20

Slide 19 states that the Class A office component of Option 5 is not such a good idea. However, the Pittsburgh office of CB Richard Ellis sees opportunity for Class A office in Pittsburgh and its CBD.

In its May 18, 2010 Real Estate Symposium, Pittsburgh, 2010, CBRE stated that Pittsburgh is a "Diamond in the Rough" with stability, job creation (second best City for graduating seniors), led by lower recession industries; medical, education, hi-tech, and engineering. Pittsburgh's downtown area is "booming with development, new residences, new Class A office, new exclusive retail, new restaurants, new green spaces, new parking, new entertainment/sports, new hotels."

Slide 20 uses data that includes Class B and Class C space, as well as suburban office data, which is data not pertinent to a discussion regarding new Class A office development in the CBD.

According to CBRE's May 18, 2010 report, the Class A office market in the CBD is comprised of 13,645,792 square feet and has one of the lowest vacancy rates nationwide at 9.6%, or 1,313,215 square feet. If the total office space currently planned for either Option 3 or Option 5, +- 600,000 square feet, were added to the market today, the vacancy rate would be 14%. Moreover, if fringe downtown Class A space is added to the mix, the vacancy rate would be only 8.56%, and even with the Option 3 or Option 5 space included, the rate would only increase to 11.9%.

CBRE concludes that 1st quarter statistics indicate five consecutive quarters of positive absorption and population influx in Pittsburgh for the first time in 20 years.

Slide 21

The first sentence beginning with, "According to the Penguins' updated market study" is reworded resulting in a misinterpretation of this statement. The sentence in the AECOM report actually states that "a capture of between 20 and 30 percent of new office space demand would generate the need for approximately 400,000 to 600,000 square feet of office space over the next ten years within the downtown/fringe submarket." The AECOM report does not use the words 'only' or 'likely' and states affirmatively a capture rate that would substantiate the office space programmed by Options 3 and 5.

The second sentence repeats the same misquote as Slide 9, deleting a second sentence which modifies the first sentence. The complete statement supports the subject sites close proximity to the Pittsburgh CBD as a positive attribute for Class A Office development.

Slide 22

The 'source' citation identifies the April 21, 2010 Oxford Infrastructure Analysis, however only a portion of the information is from that source. The remaining information comes from an unidentified source. The results are misleading because the annual carrying costs for Option 5 are not greater than Option 3.

Slides 5,6,
23 and 25

Each of these slides ignores the agreement reached by all concerned parties to equalize assumptions for economic benefit analysis purposes. In meetings with Option 3 and Option 5 proponents, assumptions (including but not limited to) commercial lease rates, square footage for office workers, and construction costs per square foot, were different and it was agreed to use the same set of assumptions for each option so that neither Option would gain an advantage. This agreement to equalize the assumptions was confirmed in a meeting held May 18, 2010 and was attended by Scott Pollock, Larry Castonguay, Chris Cieslak, Rob Pfaffmann, Steve George, Rebecca Moller, Todd Poole, and Adam Nelson.

The transposition error was a mistake and was discovered by Oxford, however not corrected. The revision will be included in the next published report. Total payroll and associated taxes for Option 3 and Option 5 will increase.

Slide 24

Slide 24 affirms the fact that, once corrected, the transposition error increases the difference between the two options' economic benefits to the City of Pittsburgh and Allegheny County by an estimated \$10 million in favor of Option 5.