

**Chevron Complaint Regarding Modification and Extension of the Exclusive Right
to Negotiate (ERN) with Upstream Investments LLC
A review by Tom Butt, Richmond City Council Member**

Chevron has mounted a letter writing offensive against the proposed sale of Point Molate to Upstream, citing improprieties in the extension of the ERN and the failure of the City to offer the property to other public agencies pursuant to Government Code 54220, *et seq.* This analysis deals only with the ERN. In a letter dated August 20, 2004, Dean O'Hair complained that the City amended and modified the Exclusive Right to Negotiate (ERN) with Upstream without a public hearing or notice to Chevron and that the City Manager exceeded his authority by modifying the terms of the ENR in extending it.

I have finally received copies of both the original ERN and the extension, and I can provide the following history and analysis.

History and Facts:

The December 16, 2003, Minutes of the Special Joint Meeting of the Local Reuse Authority and City Council record the following:

A proposed joint resolution of the City Council and the Local Reuse Authority authorizing and directing the City Manager to negotiate and execute an Exclusive Right to Negotiate Agreement with Upstream Investments and Lowe Enterprises to become the master developer and eventual purchaser of the Point Molate site, also known as the Point Molate Fuel Depot, as defined under the provisions of Base realignment and Closure Act and other pertinent legislation was presented. Steve Duran, Community and Economic Development Director gave an overview of the matter. The following individuals spoke on the matter: Tarnel Abbott, Debbi Landshoff and Peter Clark. Following discussion, on motion of Member/Councilmember Bates, seconded by Member/Councilmember Rogers adopted Joint resolution No. 173-03 of the City Council and the Local reuse Authority by the unanimous vote of the City Council and Local reuse Authority.

Pursuant to the direction given by Resolution 173-03, an Exclusive Right to Negotiate (ERN) Agreement dated January 27, 2004, was executed by Jay Corey as Interim City Manager. The agreement included the following:

City agrees that, with the exception of ongoing discussions and negotiations with Chevron, the Navy and various state agencies, during the Exclusive Period and any extension of the such exclusive period, it will not offer, or negotiate with any other person or entity to the use, leasing, acquisition or development of the Property without the prior written consent of Developer, which consent shall not be unreasonably withheld.

The agreement also included the following:

Such Exclusive Period may be extended by up to two (2) successive ninety (90) day periods, at the sole discretion of the City Manager of CITY and if the parties

continue to negotiate in good faith and have not yet, despite all reasonable efforts, had sufficient time to complete the Investigation described below.

On July 20, 2004, there was a discussion by the Richmond City Council in properly noticed executive session about the pending end of the original ERN period and the possibility of an extension. City Attorney Everett Jenkins reported in public session of the City Council that a report on the Point Molate negotiations was presented and that the City Council provided guidance to the negotiator.

On July 27, 2004, the City agreed to extend the Exclusive Right to Negotiate to September 27, 2004, for the additional consideration of \$250,000. The ERN was modified as follows:

During the Extension period, the City shall not negotiate, receive or otherwise entertain, in any manner, any offer, or proposal from or on behalf of Chevron or any of its subsidiaries, affiliates, agents or representative relating directly or indirectly to the use, leasing, acquisition, development or preservation of the property.

The amendment was written under the letterhead of Upstream Investments LLC, addressed to Rich McCoy, and executed "on behalf of the City Council" by Vice Mayor Richard Griffin.

Analysis:

Do the terms of an exclusive right to negotiate have to be discussed in open session? No. According to the Brown Act, Government Code 54956.8, anything regarding negotiations can be discussed in closed session.

Notwithstanding any other provision of this chapter, a legislative body of a local agency may hold a closed session with its negotiator prior to the purchase, sale, exchange, or lease of real property by or for the local agency to grant authority to its negotiator regarding the price and terms of payment for the purchase, sale, exchange, or lease. However, prior to the closed session, the legislative body of the local agency shall hold an open and public session in which it identifies its negotiators, the real property or real properties which the negotiations may concern, and the person or persons with whom its negotiators may negotiate. For purposes of this section, negotiators may be members of the legislative body of the local agency. For purposes of this section, "lease" includes renewal or renegotiation of a lease.

The open session on December 16, 2003, satisfied the requirement to identify the negotiators, the real property and the prospective purchaser. The discussion by the City Council in closed session on July 20, 2004, was properly noticed and reported.

Did the City have an obligation to disclose in public session or otherwise the details of the modifications to the ERN? No. According to the Brown Act, Government Code 54956.8, only final price and payment terms must be disclosed when the actual lease or contract is discussed for approval. (§ 54957.1(a))

54957.1. (a) The legislative body of any local agency shall publicly report any action taken in closed session and the vote or abstention of every member present thereon, as follows: (1) Approval of an agreement concluding real estate negotiations pursuant to Section 54956.8 shall be reported after the agreement is final, as specified below: (A) If its own approval renders the agreement final, the body shall report that approval and the substance of the agreement in open session at the public meeting during which the closed session is held. (B) If final approval rests with the other party to the negotiations, the local agency shall disclose the fact of that approval and the substance of the agreement upon inquiry by any person, as soon as the other party or its agent has informed the local agency of its approval.

Did the city have an obligation to notify Chevron before amending the ERN? Probably not, inasmuch as Chevron was not a party to the ERN.

Was the amendment beyond the authority of the City Manager? Did the original ENR restrict the City Managers authority to simply an extension of time and not substance? Since the original Resolution 173-03 gave the City Manager full authority to draft the ENR without subsequent City Council review, it would seem to follow that he would have full authority to modify it.

Conclusion

It appears that the extension and modification of the ENR was proper and in conformance with the Brown Act.