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March 19, 2008

Mr. Martin Mosier, Chair
La Jolla Community Parking District Advisory Board
1111 Prospect St.
La Jolla, CA 92037

Via E-mail

Re: Agenda for March 19, 2008 LJCPDAB Meeting

Dear Mr. Mosier:

As you know, we advised you in December that the La Jolla Community Parking District Advisory Board ("LJCPDAB" or "Board"), which you chair, is required, pursuant to section 87300 et seq of California's Political Reform Act ("PRA"), to make certain financial disclosures. We further advised that "one of the following actions must occur prior to any Board action: either a) the members must file full disclosure, using Form 700, with the office of the City Clerk; or b) the Board must adopt and receive City Council approval of a code that is specific to the Board, and disclose under that code."

We have, since rendering the above advice, been working with the LJCPDAB to implement the second option described above. As you know, these efforts resulted in a proposed code being placed on the City Council's agenda on February 26, 2008. However, the Council declined to approve that code. This was largely because of concern from some councilmembers that a financial disclosure requirement was inconsistent with their intent that CPDABs should be purely advisory in nature. Thus, the Council directed our office to present it with two options to cure the problem of the lack of a code. First, it requested draft revisions to Council Policy 100-18 that would strip away the provisions upon which we had based our conclusion that the law requires disclosure. Second, it asked for a proposal for the most limited code possible.

On March 5, 2008, our office advised the CPDABs generally, through the City's CPD Program Administrator, that they could meet but must restrict themselves to genuinely advisory actions. If any CPDAB exceeds this restriction by making or participating in any governmental decision, such an action would be invalid and subject to injunction under Cal. Gov't Code section 91003. Thus, CPDABs may currently make recommendations. However, a recommendation that leads to the making of any governmental decision by another body is

purely advisory *only* if it is subject to “significant intervening substantive review” before it is presented to the decisionmaker. Cal. Code Regs. tit. 2 §18702.2. In the case of the action currently listed as items 5(A)-(C) on the LJCPDAB’s March 19, 2008 agenda (“Consideration and Adoption of Various Parking ideas for La Jolla”), this action would constitute participation in the making of a governmental decision unless there was, thereafter, significant and meaningful City Staff review before placement of the plan on the City Council agenda.

Upon learning on Friday, to our surprise, that you intended to have the LJCPDAB act on a parking plan so quickly, this office set out to examine whether such action would be defensible as a purely advisory action. We have concluded that it would not.

Although the cited regulations make it theoretically possible that such an action may be valid, our inquiries have led to two grave concerns. First and most important, there is evidence that the planned intervening staff review will not be “substantive” in any meaningful way. The principal substantive review by City staff should, in theory, be conducted by the City’s Traffic Engineering Division. However, employees of that Division were quoted on November 8, 2007, in the La Jolla Village News, as saying that they had been ordered to direct all inquiries on parking issues in La Jolla to you personally.¹ Review by a City Staff unit that has expressly stated its intention to defer to you is not “significant intervening substantive review.” Without intervening review that meets the requirements of the cited regulation, the LJCPDAB will have “participate[d] in the making of a governmental decision” as defined at Cal. Code Regs. tit. 2 §18702.2. If this occurs with no code in place, the action will be invalid, as will any resulting governmental decision, including any subsequent City Council adoption of a parking plan. Whether the facts alleged are verifiable is, of course, an open question, but we would strongly advise against any substantive action until it is resolved. Where factual doubts remain, we must resolve those doubts in favor of greater protection of the public interest in clean, open government.

Second, we are also concerned that the relationship of the board generally, and yourself in particular, with Council President Peters would render any nominal City Council review of your decisions a mere formality. Our understanding is that you have met with Mr. Peters to develop strategy for ensuring approval of your mutually preferred parking plan. If true, this suggests application of another FPPC regulation. As you know, even if a board is nominally advisory in nature, it may be subject to disclosure requirements under Cal. Code Regs. tit. 2 §18701(a)(1)(A)(iii) if it makes “substantive recommendations that are, and over an extended period of time have been, regularly approved without significant amendment or modification by another public official or governmental agency.” If this rule applies, even the Council’s requested revision of CP 100-18 would merely attempt to place form over substance, and thus would be of little or no value in eliminating the state law disclosure requirement. Although the short time frame has not yet permitted us to conduct a thorough review of the history of Council

¹ “We’ve been asked by the La Jolla parking task force – if we get any calls about the La Jolla area, we need to refer them back to Martin Mosier in La Jolla,” said a division staff member.” *La Jolla Village News*, Nov. 8, 2007.

review of CPDAB recommendations, anecdotal evidence so far suggests that CPDAB recommendations are, in fact, routinely approved. Moreover, the LJCPDAB's ongoing collaboration with the Council President's office provides reason to believe that the history of routine approval will be continued in this case.

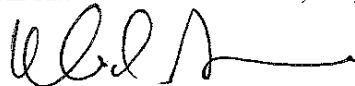
Mr. Kessler has suggested to this office that, even if the City Council itself rarely or never rejects or modifies CPDAB recommendations, there may be a history of review and modification of CPDAB draft recommendations by the City's Planning Staff (with CPDAB concurrence) prior to CPDABs' official recommendations. It was suggested that such review might be "amendment or modification by another public official" that would foreclose application of section 18701(a)(1)(A)(iii). However, we are unable to identify any legal justification for extending the regulation in this way. The literal language of the regulation states that, if decisions are consistently approved as adopted by the "advisory" board, that board is, *de facto*, a decisionmaking body. No exception applies where City staff gives input on the "advisory" board's advice before it is finalized. Thus, we cannot conclude that a history of such unofficial, non-legislative shaping of CPDAB recommendations, even if it can be documented, would eliminate the need for disclosure.

We stated on December 17, 2007 that "***In its current posture, the Board is incapable of taking any legally defensible action.***" We regret to conclude, based on the foregoing, that intervening events have not changed this situation. We are therefore advising you to remove items 5(A)-(C) from the March 19, 2008 agenda, and to schedule them for consideration only after the City Council has adopted a conflict of interest code for the LJCPDAB and members have made required disclosures under that code.

We should note that this conclusion is based upon facts that are specific and unique to the LJCPDAB and to its ongoing consideration of a parking plan for La Jolla. In addition, the LJCPDAB took significant steps toward recommending such a plan to the City prior to any consideration of the question of a conflict of interest code. The proposed action for tomorrow is an extension of that process. We do not believe that a modification of the Council Policy, while that same process is still in motion, can cure the disclosure problems that we identified in December of 2007. Thus, we are issuing this opinion based on these specific facts, but must make clear that this opinion does not extend to any other City advisory board or similar body.

Very truly yours,

MICHAEL J. AGUIRRE, City Attorney



MJA:mpc

Cc: Board Members
Scott Kessler, Deputy Director of City Planning and Community Investment
Deborah Van Wanseele, Deputy Director of Engineering and Capital Projects