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November 18, 2007

BY HAND DELIVERY

La Jolla Community Parking District Advisory Board
1111 Prospect St.
La Jolla, CA 92037

RE: Leslie Devaney/ Letter of November 16, 2007/ La Jollans for Clean Government, Inc.

Dear Members of the La Jolla Community Parking Advisory Board:

This letter addresses apparent conflict of interest violations associated with the La Jolla Community Parking District ("Parking District") and requests that the City Attorney's office assume responsibility for providing legal advice to the Board. I am particularly concerned by a letter to each member of the District's board which provided incorrect legal advice and was prepared by a private attorney representing a select group of business interests, including those of Mr. Peter Wagener.

I THE PARKING BOARD SHOULD BE ADVISED BY THE CITY ATTORNEY, NOT AN ATTORNEY REPRESENTING BUSINESS INTERESTS

The San Diego City Council created the Parking District to serve the public. As such, its board members should be advised through the City Attorney's office, not through attorneys bound to represent private business interests. Sadly the latter is occurring, and the advice that was given is incorrect. The City Attorney's office should provide the Board with impartial and correct legal advice.

II BY IGNORING SECTION 87302.6, MS. DEVANEY GAVE INCORRECT LEGAL ADVICE TO THE PARKING BOARD

On November 16, 2007, a letter was sent by Ms. Leslie Devaney to each member of the Parking Board. She wrote the letter on behalf of Peter Wagener, in his private capacity, and Promote La Jolla, Inc. Ms. Devaney incorrectly opined that "the filing of a statement of economic interest is not required" if a person is "not one of the enumerated individuals in section 87200" and is not listed in "a local agency's conflict of interest code" adopted pursuant to Section 87302.

Inexplicably, Ms. Devaney ignored the controlling statute – Section 87302.6 of the California Government Code. Under Section 87302.6, “a member of a board or commission,” following its formation, must file a statement of interest “in the same manner as those individuals required to file pursuant to Section 87200.” Once a conflict of interest code is adopted for the local governmental agency, the board member “shall file his or her statement of economic interest pursuant to Section 87302.” Either way, the board member is statutorily required to file.

III THE SIEGEL TEST REQUIRES APPLICATION OF THE POLITICAL REFORM ACT TO THE PARKING BOARD

The Fair Political Practices Commission applies the long-standing Siegel test to determine whether a board is governmental in nature and subject to the filing requirements of the Political Reform Act (“PRA”). *See, In re Siegel (1977) 3 FPPC Ops. 62.* In this instance, the Parking Board satisfies each the four elements of test.

1. *Was the Parking District created at the impetus of the City?* Yes. In fact, the City Council formed the District by a resolution adopted in accordance with City Council Policy 100-18.
2. *Will the City provide the Parking District with a substantial part of its funding?* Yes. Forty-five percent of all parking meter revenue would be provided to the Parking District. Further, Policy 100-18 provides that additional revenues may be provided to the Parking District, including: (1) parking in lieu fees imposed on new development by the City; and (2) fees imposed by the City for residential or shopping parking permits.
3. *Is the Parking District formed to provide services or undertake functions traditionally performed by a City?* Yes. Cities routinely develop parking programs, manage on-street parking, and perform functions assigned to the Parking District.
4. *Is the Parking District treated as a public entity by other statutory provisions?* Yes. It is a “local agency” for purposes of the Public Records Act, and its board qualifies as a “legislative body” under the Brown Act. *See, Government Code sections 6252 and 54952.*

IV THE NARROW EXCEPTION IN REGULATION 18701 IS INAPPLICABLE TO THE BOARD AND FAILS TO EXCUSE ITS MEMBERS’ STATUTORY DISCLOSURE REQUIREMENTS

Although the Political Reform Act generally requires all board members to file statements of economic interest (Government Code section 82730.6), a narrow exception is created by FPPC

in 2 CCR section 18701 for boards entirely lacking in “decision making authority.” That exception is inapplicable, however, because the Parking Board exercises both decision making functions and advisory responsibilities.

A Including the Word “Advisory” in a Board Name Does Not Excuse its Members from Disclosure Requirements Set by State Law

While the word “advisory” is appended to the Parking Board’s name, this does not excuse its members from disclosure requirements set by State law. Indeed, the Fair Political Practices Commission has concluded that the members of the Central Parking District Advisory Board, for the City of Stockton, were obligated to file statements of economic interest. FPPC Opinion, A-89-591, WL 572601. The FPPC has repeatedly reached this conclusion. *See*, FPPC Opinion A-96-127 (members of “Transportation Advisory Committee” must file); FPPC Opinion A-88-304 (members of the “Advisory Board on Air Quality and Fuels” must file).

Likewise, numerous “advisory” boards in San Diego file statements of economic interest, even when they are involved in less significant decisions than those assigned to the Parking Board. Thus, members of the following boards comply with the Political Reform Act and file statements of economic interest: Crest Canyon Park Reserve Advisory Board, Grading Advisory Board, La Jolla Shores Planned District Advisory Board, La Jolla Underwater Park Advisory Committee, and the Tecolote Canyon Citizens Advisory Board. While an agency may believe itself exempt from open-government laws, this conclusion receives no judicial deference whatsoever.¹ Both state law and governmental transparency require that members of the Parking Board disclose their financial interests before participating in further decisions affecting the value properties and business ventures in La Jolla.

B The Exception is Inapplicable Because the Parking District Combines Advisory and Decision Making Functions

The FPPC has repeatedly held that boards are subject to reporting requirements when they combine advisory and decision making functions, as is true for the Parking Board. While one function of the Parking Board may include making recommendations, it is also authorized (pursuant to City Council Policy No. 100-18) to use its allocated revenue to engage consultants, perform studies, provide maintenance services, and acquire property. These are functions that render the exception in Section 18701 inapplicable.

The FPPC has addressed this issue on several occasions. In *Ewing*, *Advice Letter* No. I-89-490, WL 572428 the FPPC concluded that a “Study Group” was subject to the disclosure obligations of the Political Reform Act because it could approve select contracts, in addition to providing advice:

¹ *Epstein v. Hollywood Entertainment District II*, (2001) 87 Cal.App.4th 862, 876

“The High-Speed Rail Corridor Study Group will..establish an implementation and funding plan and report its findings and recommendations to the Legislature. Any decision to act on the recommendation must be initiated by the Legislature. The Legislature may follow or reject the recommendations....However, the board also has the authority to hire outside consultants to conduct certain studies. In this capacity, the board is empowered to make governmental decisions....Accordingly, the Group...should adopt a conflict of interest code.” (Citations omitted.)

The FPPC reached the same conclusion with respect to an Advisory Board in *Amen, Advice Letter* No. A-88-304, WL 560869 explaining:

“The board...will be reporting its findings and recommendations to the Legislature. Any decision to act on the recommendations must be initiated by the Legislature....However, the board also has authority to hire contractors to conduct certain studies. In this capacity, the board is empowered to make governmental decisions. Accordingly, the Advisory Board on Air Quality and Fuels should be covered by a conflict of interest code and its members would file statements of economic interest.” (Citations omitted.)

See also, *Hogeboom, Advice Letter* A-96-127, WL 779624.

C Although the Parking Board Exercises Some Advisory Functions, It Possesses Significant Decision making Authority Compelling its Members to Satisfy Statutory Disclosure Requirements

The FPPC finds that a board lacks decision making authority when the board can only make recommendations and lacks an ability to control or implement actions. Yet, the Parking Board does not fall into this exceptional category.

Pursuant to City Council Policy No. 100-18, each Community Parking District undertakes functions that are beyond advisory. In fact, under City policy, “a percentage of the total parking meter revenues generated within each Community Parking District shall be allocated to that Community Parking District on an annual basis. The percentage shall be forty five (45%) each fiscal year.” Section B.1. Pursuant to Resolution R-2005-1307, the Parking District was created. Based on estimates, the Parking District might receive close to \$1 million annually in revenues.

The City Council has vested the Parking District with significant responsibility, providing that “annually, each Community Parking District Advisory Board shall develop...and recommend to the City Council an annual improvement/implementation plan.” Since only the Parking Board can initiate a proposal to budget, expend and implement its revenue share under City Council Policy No. 100-18, the Parking Board falls outside the exception set forth in Regulation 18701. See,

subsection (a)(2)(A)(ii) (decision making authority exists “by reason of an exclusive power to initiate the decision”).

Likewise, the Parking Board can contract on behalf of the Parking District. City Council Policy No. 100-18 explains that improvement/implementation plans can be formalized through “written Agreement between the City and each Community Parking District Advisory Board.” City Council Policy No. 100-18, Section D.1. The City Manager also acknowledged the Board’s authority to contract, stating “the relationship between the City and the CPD Advisory Board is defined by contract on an annual basis.” *See*, City Manager’s Report, re “Request for the Formation of a La Jolla Community Parking District” April 15, 2005

From the date the Parking District was formed, its importance was fully recognized. In fact, the City staff provided written advice to the City Council stated that “the community-based advisory group would function as the guiding mechanism for the CPD.” Manager’s Report No. 05-103 (April 15, 2005). Just this year, the importance of the Parking Board was restated when the City Council approved the Parking Board’s submitted improvement/implementation plan. The accompanying report, dated June, 2007, declared that “each CPD has a designated Advisory Board responsible for developing plans” for the expenditure of revenues.

Unlike most boards, “solely advisory” boards formed to operate for a short time or formed to advise on a single ad hoc issue, the Parking Board has perpetual existence and authority over the implementation and expenditure of funds. Thus, each board member has a term of one year and may “serve a maximum of six years.” Council-Approved District Formation Plan, p. 5. Under the approved formation plan, the Parking Board is authorized to undertake a range of actions, including negotiating and making contracts, making purchases, expending revenues and engaging in other decision making functions. Specifically, the Council-Approved Formation Plan, states that:

- 1 “The District could purchase state-of-the art, multi-space parking pay stations.” Page 9.
2. “Parking in a community parking facility,” when constructed, could “be operated by the LJCPD.” Page 8.
- 3 The “Parking Board” would continue to sell “subsidized monthly MTDB bus passes for employees.....” Page 9.
- 4 The “CPD would use new, state of the art technology to improve [parking] enforcement.” Page 9.

- 5 The "LJCPD would work with local garages to negotiate extended hours of operation on week nights and weekends" and "provide an enhanced signage program to promote use of existing off-street parking facilities. Pages 9, 10.

Other functions include the possible "implementation of a parking pass program," "negotiations with the San Diego City parking enforcement to provide additional parking enforcement," and the possible retention of "in lieu fees" imposed on development. Council-Approved Formation Plan pp. 8, 9.

D. The District's Announced Plan is to Construct and Achieve Operational Control Over a Public Parking Garage

Importantly, the approved Formation Proposal declares that a "goal of the La Jolla Community Parking District will be the retention of a majority of the parking district revenues for local improvements, **including the construction of a public parking garage.**" Council-Approved Formation Plan, p. 8. The Parking District, in the Council-Approved Formation Plan, sets its sights on operational control and the resulting revenue from a future facility: "Future revenues [to the District] might include fees for parking in a community parking facility **operated by the LJCPD.**" Page 8. Thus, the District's "expenditures could include the evaluation of several sites and a schematic design of a parking facility at one designated site...." Council-Approved Formation Plan, p. 10. Undoubtedly, these functions require the expenditure of funds, the execution of contracts, administrative choice, managerial decisions, and other functions that are not properly classified as being "solely advisory."

E. The Parking Board's Decision Making Functions are Occurring Already

Without disclosing their financial interest, the Parking Board's decision making functions are underway. As the "guiding mechanism for the CPD," the Parking Board obtained Council approval of its budget and implementation plan. With this approval, the "Advisory Board" is "responsible for...expending the allocated revenue." Report of June 29, 2007. This expenditure oversight and control will eventually extend to revenues that could approach \$1 million annually. The Council-approved plan includes functions that require the Parking District to contract, expend funds, oversee contracts, and make purchases. These functions would only grow as the Parking District's revenues and responsibilities grow. Yet, for now, the approved implementation plan provides that: (1) the "Community Parking District will install state of the art system of paid on street parking in the Core Village Commercial Area" at a cost: \$786,000; the District will contract for "a public parking feasibility study and site evaluation" at a cost of \$60,000; and (3) the "the La Jolla CPD will continue to buy parking passes from parking garages that are underutilized and re-sell them to the public below market-rate." Of course, the Council-approved plan provides that "**all elements...are subject to Community Parking District Board implementation.**"

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Given the revenue stream and functions assigned to the Parking District, its Board cannot circumvent the statutory disclosure obligation by a fictional claim that the Board is devoid of all “decision making authority.” Rather, it is a board which offers some recommendations, but also exercises other functions. It fits squarely into the opinions of the FPPC which require members of boards with advisory and decision making authority to file statements of economic interest. See, *Hogeboom, Advice Letter A-96-127*, WL 779624; *Ewing, Advice Letter No. I-89-490*, WL 572428; and *Amen, Advice Letter No. A-88-304*, WL 560869. Further, this result is entirely consistent with the practice within the City of San Diego recognizing the disclosure obligations of a wide range of less important advisory boards that are obligated to file statements of economic interest in accordance with the Political Reform Act., such as the La Jolla Underwater Park Advisory Committee.

Public service entails honor and trust. The Parking Board should welcome, not resist, disclosure requirements showing that they serve the public interest, not their own. If the Board members continue to oppose disclosure of their financial interests relating to the Board’s activities, the public will have no other impression but that the Board members have something to hide.

Thank you for this opportunity to set the record straight in this matter. If the required disclosure forms are not filed within **5 (five) days of the date of this letter**, appropriate legal action will be taken to achieve compliance.

Yours very truly,

HASKINS & ASSOCIATES APC

Steven W. Haskins, Esq.

cc: Client
Hon. Michael Aguirre, City Attorney