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8 **SAN DIEGO COUNTY GRAND JURY**

9 **2013-2014 TERM**

10 IN THE MATTER OF BOB FILNER,
11 MAYOR OF SAN DIEGO

COMPLAINT REQUESTING A GRAND
JURY ACCUSATION BE ISSUED
REGARDING MALFEASANCE IN OFFICE
(GOVERNMENT CODE § 3060 AND
PENAL CODE § 922)

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14 Date Filed: August 1, 2013
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20 COMES NOW, [REDACTED] a San Diego Citizen, who files this Request for the
21 Issuance of an Accusation based on conduct of Mayor Bob Filner amounting to malfeasance in
22 office, as follows:

23 I.

24 **INTRODUCTION**

25 The purpose of this Complaint is to request the Grand Jury investigate certain financial
26 transactions in the City of San Diego and determine if there is enough evidence to file an Accusation
27 against Mayor Bob Filner ("Mayor") for malfeasance of office. (Government Code § 3060.) The
28 Grand Jury is the only legal authority that can seek to remove the Mayor from office in an

1 expeditious manner. This request is not made lightly and is meant to address legal/financial/ethical
2 issues that appear to be unaddressed by any other government agency.

3 On May 16, 2013, the Mayor vetoed a land use approval of the City Council involving
4 Sunroad Centrum. On June 7, 2013, the media reported that Sunroad Centrum had informed City
5 Council members that it had paid \$100,000.00 to the City of San Diego at the direction of the
6 Mayor's office. On June 11, 2013, the Mayor withdrew his objections to the Sunroad request and the
7 City Council overrode the Mayor's May 16 veto. On June 11th, the City Council approved the veto
8 override after the Mayor's Chief of Staff publically informed the City Council that the Mayor no
9 longer had an objection to the City Council's original action. The Mayor's change of heart came
10 after the payment of the \$100,000.00. The payment was not made through any normal city
11 procedures for the sale of property and amounted to a "gift" to the City by the developer. (See,
12 *Attachment "A"*, City Attorney Memo, dated June 10, 2013.)

13 Also in June 2013, the Mayor took a trip to Paris, allegedly paid for by a non-profit
14 corporation. However, at this point, there is no publically available evidence that a non-profit in
15 good standing paid for the trip. At least a portion of the travel for the Mayor's entourage was paid
16 for with City funds. As shown in the attached e-mails obtained from City Hall, the Mayor's office
17 obtained a credit limit increase on city-issued credit cards to pay for the trip. (See, *Attachment "B"*.)
18 In addition, despite repeated requests from public officials and the media, the Mayor has yet to
19 produce documentation that explains who paid for the trip. If the trip was paid for by the City, there
20 is a serious question as to whether the trip to Paris was a gift of public funds. (Cal. Const. Art. XVI
21 § 6.) If the trip was paid for by an entity that is not a non-profit (501(c)(3)), the payment would be
22 an illegal gift that exceeds the State gift limitation. No public official may accept a gift from a single
23 source totaling more than \$440.00 per year. (Government Code § 89503.) It is apparent that the
24 price of a trip to Paris exceeds the gift limitation. Furthermore, it appears that the Mayor travelled
25 first class in violation of City travel policies. The manner of raising the credit limits and the extent
26 of City expenses are an open question since Mayor Filner has failed to provide the documentation
27 requested by City Council members, the media and the public to explain his actions. These

1 documents are public records and subject to disclosure despite the Mayor's delaying tactics and
2 outright refusals.

3 While the Mayor faces alleged sexual harassment charges, both the Sunroad payments and
4 the Paris trip relate directly to fiscal and ethical integrity. Public officers have a special
5 responsibility to use public funds wisely. Furthermore, a public official should not use his office to
6 extract improper concessions as a cost of doing business with the City of San Diego. The Sunroad
7 Centrum Project is not the only one under scrutiny. The front page of the July 30th *San Diego*
8 *Union-Tribune* discusses the possibility of another project in the College Area being subject to the
9 same tactics as the Sunroad Centrum project. Attorneys for the Complainant are also aware of a
10 North Park *Jack-in-the-Box* that is currently sitting half constructed. Construction was halted after
11 neighborhood opposition. While the North Park project may be due to a legitimate code
12 enforcement effort, the pattern and practice that is beginning to emerge calls into question any
13 project that is halted after permit issuance. Complainant asks that the Grand Jury review the Sunroad
14 Centrum issue and similar situations you discover during the course of your investigation.

15 The Grand Jury has the statutory authority to protect the public from illegal and corrupt
16 conduct by public officials. We respectfully request that the Grand Jury investigate these matters
17 and any other ethical/financial irregularities in the Office of the Mayor of the City of San Diego.
18 Furthermore, if the Grand Jury finds sufficient evidence, it should issue an Accusation to remove
19 Mayor Bob Filner from office.

20 II.

21 ACCUSATION INVESTIGATION

22 A Grand Jury plays many roles. It gives the District Attorney an outlet to bring forward
23 criminal charges. It performs a civil "watchdog" function over the finances and operations of local
24 government. It also has the ability to bring charges in a quasi-criminal proceeding to remove local
25 public officials from office for corrupt or improper conduct. (Penal Code § 922; Government Code
26 §§ 3060-3075.)

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1 While a rarely used power, the authority to issue an Accusation against a public official lies
2 within the exclusive province of the Grand Jury. State officials may be removed by impeachment.
3 The Accusation process is the local government equivalent of impeachment. The regular or a
4 specially impaneled Grand Jury may bring an Accusation. (Government Code § 3060.¹) To issue an
5 Accusation, at least twelve members of the Grand Jury must concur. (*Id.*)

6 A local officer may be removed for “willful or corrupt misconduct” in office. (§ 3060.)
7 These terms include any willful malfeasance, misfeasance or nonfeasance of office. (*People v. Tice*
8 (1956) 144 Cal.App.2d 750.) “Willful misconduct” requires more than neglect of office, but must
9 concern serious misconduct. (*Steiner v. Superior Court* (1996) 50 Cal.App.4th 1771.) “Willful
10 misconduct” does not require criminal intent or corruption. (*People v. Hale* (1965) 232 Cal.App.2d
11 112.) It does not require evil intention or purpose to do wrong. (*People v. Elliot* (1953) 115
12 Cal.App.2d 410.) It simply requires the intent to do the prescribed act. (*People v. Hale* (1965) 232
13 Cal.App.2d 112.) The act does not have to be a crime. (*People v. Elliot* (1953) 115 Cal.App.2d
14 410.)

15 The California Supreme Court has described the process in the following terms:

16 “This special statutory proceeding is not a criminal prosecution; i.e., its object is
17 not to convict the defendant of a crime but merely to remove him or her from
18 office, no other punishment being authorized.” (2 Witkin & Epstein, Cal. Criminal
19 Law, *supra*, Crimes Against Governmental Authority, § 109, p. 1201.) A crime
20 committed in a defendant's official capacity necessarily suffices to establish
21 “willful or corrupt misconduct in office” under Government Code section 3060.
22 (See *People v. Hale* (1965) 232 Cal. App. 2d 112, 122 [42 Cal. Rptr. 533]; *People*
23 *v. Harby* (1942) 51 Cal. App. 2d 759, 767 [125 P.2d 874].) However, acts which
24 can be punished under Government Code section 3060 are broader than behavior
25 subject to criminal charges. In *Coffey v. Superior Court* (1905) 147 Cal. 525 [82 P.
26 75] (*Coffey*), we stated that “ ‘misconduct in office’ is broad enough to include
27 any willful malfeasance, misfeasance, or nonfeasance in office,” even without any
28 “ ‘criminal intention.’ ” (*Id.* at p. 529.) (*Stark v. Superior Court* (2011) 52 Cal.4th
368, 410-411.)

25 An Accusation focuses on the fiduciary duties of the officer. (*People v. Elliot* (1953) 115
26 Cal.App.2d 410.) A violation of the officer’s fiduciary duty, even if the action is not criminal, is the
27 key to any Accusation. As a quasi-criminal proceeding, the Accusation only removes the person

28 ¹ All statutory references will be to the California Government Code unless otherwise noted.

1 from office and does not impose any other penal or civil sanctions. It is intended to provide an
2 intermediate level of remedy that removes the officer so that the public office is no longer used in an
3 unethical or improper manner.

4 **III.**

5 **ACCUSATION PROCESS**

6 The Grand Jury may investigate conduct of a city official to determine if their conduct
7 amounts to malfeasance. The Grand Jury can use its normal subpoena and investigatory powers to
8 determine if an Accusation should be issued. Once an Accusation is approved, the Grand Jury issues
9 the Accusation, which will be filed in Superior Court.

10 If the Grand Jury approves an Accusation, it is delivered to the District Attorney by the Grand
11 Jury Foreman. (§ 3062.) The District Attorney has a mandatory duty to file the Accusation and
12 serve it on the Defendant. (§ 3063.) The Defendant has at least ten days to respond to the
13 Accusation after being served by the District Attorney. The Defendant shall appear at the time set in
14 the notice and answer the Accusation. (§ 3064.) If the Defendant does not appear at the appointed
15 time, the Superior Court will proceed with the Accusation without the Defendant.

16 The Defendant may answer by either objecting to the sufficiency of the Accusation or
17 denying its factual allegations. (§ 3065.) The normal rules of criminal procedure do not apply and,
18 while objections to the sufficiency must be in writing, there is no specific format to follow. (§§ 3065
19 & 3066.) A denial of the truth of the Accusation may be oral and does not have to be made under
20 penalty of perjury (oath). (§ 3067.) If the Court overrules any objection to the sufficiency of the
21 Accusation, the Answer must be made forthwith. (§ 3068.)

22 The trial shall be by jury following the same procedure as a criminal indictment. (§ 3070.)
23 Upon conviction, the Defendant will be removed from office immediately, subject to appeal. (§§
24 3072 & 3075.) There are no other fines or penalties associated with a conviction. The only remedy
25 is removal from office.

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1 IV.

2 **GROUNDS FOR ACCUSATION FOR REQUIRING**
3 **SUNROAD PAYMENT AS A *QUID PRO QUO***
4 **FOR NOT OPPOSING VETO OVERRIDE**

5 The above-listed chronology alone raises serious concerns about the propriety of the payment
6 of \$100,000.00 by Sunroad. It was made to the City's General Fund for a pet project of the Mayor's
7 between the Mayor's veto and the veto override. The Mayor vetoed the City Council approval
8 reducing a setback by nine feet between an apartment building and a park constructed by the
9 Developer. The Mayor withdrew his objection to the setback waiver after the applicant, Sunroad
10 Centrum, made a payment of \$100,000.00 to fund a pet project of the Mayor.

11 The original City approval of the Sunroad project only required a six-foot setback between an
12 apartment building and a 2.0-acre park built by the developer. After construction, it was determined
13 that the City's Building Code required a fifteen-foot setback between the apartment building and the
14 park.

15 An item was originated by Councilmember Laurie Zapf to waive the policy requiring the
16 fifteen-foot setback. It was presented to a City Council Committee that voted to waive the policy
17 considering the factors unique to this Project. (*See: Attachment "C", Committee Action Report,*
18 *dated March 27, 2013.*) The matter was forwarded to the full City Council.

19 On April 30, 2013, the City Council approved the waiver to the setback requirement. (*See:*
20 *Attachment "D", Council Report and Resolution (R-2013-585).*) The minutes reflect a unanimous
21 vote. (*See: Attachment "E", Minutes of Item 332, City Council Meeting, April 30, 2013.*) On May
22 16, 2013, Mayor Filner vetoed the item because his Department was by-passed during the process.
23 (*See: Attachment "F", Mayor's Veto.*) There is no information in the minutes of the Council
24 Committee or during the City Council public hearing that the City Administration objected to this
25 item. No specific objection to the merits of the approval is listed in the veto message. (*Id.*) The
26 veto message only mentions that the matter should have gone through the City Administration first.

27 After the veto, news reports indicate that the Mayor's Office and the Developer engaged in
28 discussions about the item. On May 23, 2013, press reports indicate that an agreement was reached

1 between the Mayor's Office and Sunroad Spectrum to make either a donation or to outright pay
2 \$100,000.00, in exchange for the Mayor supporting an override of his veto. The extent to which the
3 Mayor was involved in this exchange is unclear. The Mayor's former Deputy Chief of Staff, Allen
4 Jones, participated in the interactions with Sunroad Centrum representative, Tom Story. Chief of
5 Staff Vince Hall claims the donation was monetary consideration for recording the easement. (See,
6 Attachment "G", KPBS: "Mayor Filner Says He Was Unaware Of Sunroad's Expectations. Returns
7 Checks To Developer," aired June 28, 2013, [http://www.kpbs.org/news/2013/jun/28/mayor-filner-](http://www.kpbs.org/news/2013/jun/28/mayor-filner-says-he-was-unaware-sunroads-expectat/)
8 [says-he-was-unaware-sunroads-expectat/](http://www.kpbs.org/news/2013/jun/28/mayor-filner-says-he-was-unaware-sunroads-expectat/).) However, Mayor Filner is quoted in the story as follows:

9 "I did not have any notion that that was what they were doing. I was
10 told they were interested in making it easier and I said, 'If you make
11 the donations, that'd be for a great cause,' because I couldn't stop it
at the council anyway." (Id.) (emphasis added)

12 While Mayor Filner's Chief of Staff stated that the payment was for the cost of the easement, the
13 Staff Report for the veto override makes no mention of an easement payment. There are no available
14 public records showing that the transaction was part of any City-recognized property
15 acquisition/disposal procedure. In fact, the Mayor's own quote in the KPBS story calls it a
16 "donation". On June 7, 2013, Tom Story, on behalf of Sunroad Centrum, left a message for
17 Councilmember Kevin Faulconer that stated that the payment was made as requested by the Mayor.
18 (Id.)

19 On June 11, 2013, the matter returned to the City Council to override the veto. On that day,
20 the Mayor withdrew his opposition to the veto override. His Chief of Staff informed the City
21 Council that the Mayor no longer opposed the approval. (See, Attachment "H", San Diego Reader, Dorian
22 Hargrove, "Then along came the \$100,000", June 12, 2012, <http://www.sandiegoreader.com/>.) No reason for
23 the Mayor's change of heart is mentioned in the Staff Report or the minutes of the June 11th veto
24 override. The Mayor has since returned the money, after the matter became public.

25 **a. Potential Crimes (Federal and State)**

26 Under the Hobbs Act, federal law prohibits a public official from "extorting" money from
27 any person through misuse of their public office. (18 U.S.C. § 1951.) Because of the power of the
28 public office, the crime does not require that the officer use violence, force or fear to require a

1 payment. The United States Supreme Court stated that: “the coercive element is provided by the
2 public office itself.” (*Evans v. United States* (1992) 504 U.S. 255.)

3 Most courts have held that the public official does not have to be the direct recipient of the
4 benefit of the extortion. As long as the payment inures to the benefit of the public official, the crime
5 has been committed. (*See, generally, Attachment “I”, United States Justice Department, Criminal*
6 *Procedure Handbook: “No. 2404: Hobbs Act – Under Color of Official Right”*.) Here, the Mayor’s
7 Office deposited the money in the general fund of the City for use by the Mayor on another park
8 project.

9 Under California law, the crime of “extortion” is the most likely criminal act that may be
10 present. This crime is defined as follows:

11 Extortion is the **obtaining of property from another**, with his
12 consent, or the obtaining of an official act of a public officer, induced
13 by a wrongful use of force or fear, or **under color of official right**.
(Pen. Code § 518.) (*emphasis added*)

14 The same elements and conduct are regulated under the Hobbs Act. Whether a crime exists
15 or not, there is evidence of undue influence used by the Mayor to obtain a “donation” that was for a
16 “good cause”. The Developer had received approval of the easement over the park, which was
17 consistent with the original approval of a six-foot setback, and there was no requirement that any
18 payment be made for the “easement”. This “easement” serves only one purpose, to allow a building
19 to be nine feet closer to the Park that the Developer built as part of its project. While the Mayor says
20 it is a donation, his Chief of Staff states that it is a payment for the easement.

21 **b. Negotiating a Payoff to Not Oppose a Veto Override Constitutes Malfeasance.**

22 Here, the timing and statements of the Mayor indicate that there is enough information to
23 investigate the matter as a possible crime or for purposes of filing an Accusation. First, there was an
24 approval of a waiver of a setback condition when the City issued a land use entitlement that was in
25 conflict with another City policy. After a unanimous approval by the City Council at a public
26 hearing, with no objection from the Mayor’s administration, the Mayor vetoes the item on May 16th.
27 The veto message only discusses the fact that his staff had not participated in the process. On May
28 23rd, the Mayor’s Office had reached agreement with the Developer to pay \$100,000.00 to the City’s

1 General Fund, apparently to fund a pet project of the Mayor. Regardless of who made the first offer,
2 the Mayor's office accepted the money and agreed not to oppose the veto override (*quid pro quo*).
3 On June 7th, the Developer informed City Council members that the payment was made and that the
4 veto override could proceed. On June 11th, the Mayor's Chief of Staff told the City Council that the
5 Mayor did not oppose the veto override. The veto was overridden by a unanimous vote.

6 After the payment came to light, the Mayor made a statement to the press, referenced above,
7 that indicated he was aware of the payment and "got" something from the Developer. (*See*,
8 *Attachment "F"*, KPBS Article.) Later, as the controversy got bigger and other issues surfaced, the
9 Mayor returned the "donation". The public record shows the following actions:

- 10 1. City approves a land use entitlement with a setback that conflicts with the City's Building
11 Code.
- 12 2. The Developer seeks a waiver of the conflicting setback rule from the City.
- 13 3. A City Council committee unanimously recommends granting the waiver.
- 14 4. The City Council approves the waiver unanimously with no objection raised by the City
15 Administration at the public hearing.
- 16 5. Mayor Filner vetoes the approval.
- 17 6. Within one week, an agreement is reached between the Developer and the Mayor's Office
18 for the Developer to pay \$100,000.00 to the City's General Fund.
- 19 7. The payment is not made under any City legal authority to purchase an easement; no City
20 land acquisition/disposal procedures are followed; and no appraisal is done to determine
21 the value of the easement.
- 22 8. Council members are informed by the Developer that the payment was made and that the
23 veto override may take place.
- 24 9. The Council overrides the veto with the Mayor's Chief of Staff informing the City
25 Council that the Mayor no longer has objections.
- 26 10. The Mayor states to the media that he was aware of the \$100,000.00 negotiated by his
27 Office, but, since "he could not stop it (veto override) anyway", he accepted the money.
- 28 11. After public scrutiny over the issue, the Mayor returns the \$100,000.00.

1 While an Accusation does not have to be based on a crime, the elements of a crime appear
2 to be present. Mayor Filner used his office to gain money for use by the City General Fund. The
3 payoff was not a condition of the City Council approval. The amount was not based on the value of
4 the alleged easement.

5 From the Developer's perspective, they agreed to pay the money seven days after the veto
6 (May 16th to 23rd). Whether the veto could have been overridden over the Mayor's objection is not
7 important. The Federal Hobbs Act and "extortion" under California law consider the use of the
8 public office itself to gain something of value as "coercion". The Developer negotiated with the
9 Mayor's office and the veto was not opposed after the payoff. Repaying the money after the matter
10 becomes public is not a defense. Regardless of whether these actions amount to a crime, they must
11 be considered a misuse of the Office of Mayor amounting to malfeasance.

12 From recent press reports, the Sunroad Centrum matter may be part of a pattern and practice
13 of conduct. Projects receive approval and begin construction. If there is a glitch in the approval or
14 neighborhood opposition, the Mayor's Office intervenes and halts the project. After payment of
15 funds to the City, the projects are allowed to continue. This scenario is chilling. It raises serious
16 ethical and legal questions that the Grand Jury is uniquely qualified to address in an expeditious
17 manner.

18 **V.**

19 **POTENTIAL ILLEGAL EXPENDITURES**

20 **IN PARIS**

21 Mayor Filner was invited to speak at the Organization of Iranian-American Committees 2013
22 Annual Conference for Democracy. The Mayor has stated that a non-profit group paid for his
23 portion of the trip. However, to date, he has not shared with either the media, city council or the
24 public any documentation showing who paid for his trip.

25 According to press reports, the last minute trip to Paris related to Iranian politics. (*See, i.e.:*
26 *Attachment "J" Channel 10 News: "Mayor Bob Filner's office releases the cost of his trip to Paris,*
27 *France", <http://www.10news.com/news/mayor-bob-filners-office-released-the-cost-of-his-trip-to-paris-france>.) Prior to
28 the trip, the Mayor or his staff had a credit card limit raised to \$30,000.00 to pay for the City-paid*

1 portion of the trip. It is not clear whether City procedures were followed in taking these steps. (See,
2 Attachment "K", City E-mails regarding the raising of the credit limit.) Two police bodyguards
3 accompanied the Mayor for most of the trip. A side trip was taken to Lille to study energy issues that
4 may be of benefit to the City of San Diego. However, the main portion of the trip to Paris was for
5 non-city business. According to the press reports, two-thirds of the trip was paid by the City of San
6 Diego.

7 Who paid for the trip is important. If the trip was paid for by a 501(c)(3) non-profit in good
8 corporate standing, the payments would not be a "gift" to the Mayor under state conflict of interest
9 law. According to one report, the trip was paid for by "Organization of Iranian-American
10 Communities" (See: Attachment "L", "San Diego Mayor Bob Filner's June Trip to Paris
11 questioned", latimes.com/local/lanow/la-me-ln-filner-paris-20130726,0,3950601.story.) The question of who
12 paid for the trip and whether any taxpayers' money was improperly used is still an open question. If
13 the trip was paid for a by someone other than a 501(c)(3) in good standing, the Mayor has exceeded
14 the \$440.00 annual gift limit. (Government Code § 89503.)

15 At least one City Council member has asked for documentation of the trip and none has been
16 forthcoming to date. At a minimum, the Mayor should be able to provide the Grand Jury with
17 documentation that his expenses for the Paris trip were paid for by a source that qualifies for an
18 exception under the gift rules of the State of California.

19 VI.

20 CONCLUSION

21 There are very few remedies for the public in dealing with malfeasance in public office. The
22 normal method of recall is illusory in San Diego. Under state law, a recall requires that ten percent
23 of the registered voters sign a petition within one hundred and sixty days. (Elec. Code § 11220.) In
24 San Diego, a Charter City, voters must gather fifteen percent of the registered voters within sixty-nine
25 days. (San Diego Municipal Code §§ 27.2701 *et seq.*) No City in the State of California has a
26 higher barrier.

27 On its face, the payment requested of Sunroad Centrum appears to be a *quid pro quo* for the
28 Mayor's forbearance on the veto override. These facts warrant a serious investigation of the Office

1 of the Mayor. Is the office being used for improper purposes? An investigation is necessary and the
2 Grand Jury is the only body that can do so in a prompt and efficient manner.

3 With recent revelations, there is a serious question whether the Sunroad scenario is part of a
4 pattern and practice utilized by the Mayor. Are land developments subject to improper government
5 action, which requires cash payments to allow them to proceed? Is the land development process in
6 San Diego fair and impartial? Are cash payments now a normal cost of land development in San
7 Diego?

8 The remedy requested by this Complaint is one within the jurisdiction of the Grand Jury.
9 While the Grand Jury could investigate this matter through its normal watchdog function, this
10 method is untimely and does not directly address the problems faced by the City. If the allegations of
11 wrongdoing contained herein are true, the chances of reoccurrence are real. If the veto in the Sunroad
12 Centrum matter was issued in order to gain a *quid pro quo*, the system is essentially a "pay for play"
13 and threatens the integrity of all local governments.

14 It is respectfully requested that the Grand Jury investigate these issues and any other issues of
15 fiscal or ethical integrity in the Mayor's Office including the documentation for the Mayor's trip to
16 Paris. While the sexual harrasment allegations have an outlet through the civil judicial process, there
17 is no similar process that would result in the immediate removal of the Mayor if he has committed
18 malfeasance of office.

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20 LOUNSBERY FERGUSON ALTONA & PEAK, LLP
21

22 DATED: July 31, 2013

By:

Kenneth H. Lounsbery,
James P. Lough

[REDACTED]