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June 27, 2017

VIA EMAIL

Nick Stone
FS Investors
1250 Prospect Street, Suite 200
La Jolla, CA 92037

Re: Actions By City Councilmembers To Take Steps To Sell Qualcomm Stadium Site Or Declare It Surplus

Dear Mr. Stone:

This letter is written at your request to provide additional information for those members of the public interested in the potential disposition of the Qualcomm Stadium Site ("Stadium Site") and how this might affect the San Diego River Park and Soccer City Initiative ("Initiative") that has qualified for the ballot in the City of San Diego. This letter also includes the disposition of the Stadium Site described in the Memorandum dated June 26, 2017 signed by four city councilmembers, (the "Memorandum"). The Memorandum seeks to have the City Council consider a resolution to declare the Stadium Site as "surplus land" that the City may dispose of by sale to a qualifying public agency or other entity.

This letter is an updated version of the letter we prepared and sent to you on Sunday June 25, 2017, before we had seen a copy of the Memorandum from the four councilmembers.

There are several severe legal problems with the Memorandum.

First, the Memorandum violates Council Policy 700-10 and the City Charter which grant the authority for the determination of properties that might be considered excess or eligible to be sold to the Mayor and the Real Estate Assets Department, not the City Council. Individual City Councilmembers do not have authority to take such an action, nor does the City Council have this authority as a collective body. The Memorandum refers to Council Policy 700-10 but fails to note that the Policy does not contain any provision that allows the City Council to unilaterally declare certain properties to be "surplus." Council Policy 700-10 refers to the preparation of a "Portfolio Management Plan" on an annual basis by the "Real Estate Assets Department," not the City Council. Additionally Council Policy 700-10 states that "the Mayor's staff will review" the City's property inventory to determine which properties are no longer needed . . ." No mention is made of a role for the City Council in unilaterally declaring property to be "surplus" or no longer needed by the City.

Second, the Memorandum contains content that reflects an improper and illegal use of City and public resources to campaign against the Initiative and attempt to block its effectiveness if adopted by the voters. The Memorandum is also an improper use of public resources to support competing proposals for use of the Stadium Site by San Diego State and/or developers interested in acquiring the Stadium Site who oppose the Initiative and seek its defeat. Because City Councilmembers individually or collectively do not have the legal authority to unilaterally dispose of City property, any actions by them using city resources to exhort the City to dispose of City property that is the subject of the Initiative would be campaigning against the Initiative, rather than a legitimate exercise of their existing legal authority.

As the March 21, 2017 Memorandum of the San Diego City Attorney stated on page 3: "It would be considered campaigning for City staff to provide input intended to make a voter initiative more or less appealing to voters or to use City resources to the advantage of the proponent." City Councilmembers are bound by the same limits as City staff. Likewise, it would be considered campaigning for City officials, such as City Councilmembers, to take actions to make a voter initiative, already qualified for the ballot, "less appealing to voters." *Id*. Additionally, it "would be considered campaigning to use City resources" "to the advantage" of Initiative ***opponents***. *Id*. Certainly individual City Councilmembers have the right as individuals to speak out and campaign against the Initiative, including making personal statements that the City should dispose of the Stadium Site outside of the Initiative process. However, they cannot use City staff or City resources to make these personal campaign statements, such as the campaign statements made in the Memorandum. Use of city resources for campaign-related activities is prohibited by San Diego Municipal Code Section 27.3564(b). The statements made in the Memorandum do not fall within the exemption set forth in San Diego Municipal Code Section 27.3564(f) for use of City resources to provide "a fair and impartial presentation of relevant facts to aid the electorate in reaching an informed judgment regarding the bond issue or ballot measure."

Among other things, the statements in the Memorandum that "Mayor Faulconer has not followed this process" and that "exclusive negotiations" have occurred and that a the Mayor and FS Investors "have reached, in part, a tentative agreement" are not only false, but are also blatant campaign statements against the Initiative. The statement that the "Mayor has repeatedly stated that the City has no use for the Existing Stadium Site and the Murphy Canyon Leased Property" is also a false statement and is another campaign statement made against the Initiative. The statements in the Memorandum refer to uniquely defined terms from the text of the Initiative, such as "Existing Stadium Site" and "Murphy Canyon Leased Property." (See Initiative Section 61.2802 which defines those terms.)

Third, the combination of (1) the exercise of the City Council's discretion to postpone the vote on the Initiative for seventeen months, until November of 2018, and (2) the almost simultaneous action by individual members of the Council in the Memorandum to attempt to dispose of the property which is the subject of the Initiative prior to the scheduled date for the voters consideration of the Initiative, is a coordinated campaign plan which is an illegal frustration of the people's power of initiative established by the California Constitution, the City Charter, and the City's Municipal Code. While the City Council has limited discretion as to setting the date of the election for any qualifying initiative, such discretion cannot be exercised in

a manner designed to be a de facto veto by a hostile city council of the citizens' initiative rights. See, e.g., *Jeffrey v. Superior Court*, 102 Cal. App. 4th 1 (2002) (Court considers whether City Council can postpone an charter amendment initiative election to frustrate purpose of initiative, but ultimately determines that in the facts of the case before it "there is no risk of a de facto veto by a hostile city council" by the postponement of the election date by the City Council).

Fourth, the Memorandum is a first step in a plan to authorize the sale of the Stadium Site that violates Section 221 of the City Charter. Any sale of City land of 80 acres or more must be "first" "authorized by ordinance of the Council and ratified by the electors of the City of San Diego." Authorization for any sale must be obtained first before the City could consider whether the land is surplus or otherwise eligible for disposition by sale by the City as no longer needed for City use. *See* City Charter § 221. Stated differently, Charter Section 221 vests in the electorate the sole authority to determine whether any portion of City land over 80 acres is surplus or no longer needed for City use.

Fifth, this Memorandum, or any other discretionary action taken by the Council as part of a plan to dispose of the Stadium Site, such as an attempt to declare the site to be "surplus," would trigger the requirements of the California Environmental Quality Act ("CEQA"). Before taking any step in a plan to dispose of the Stadium Site, the City is also required to comply with CEQA and prepare an environmental impact report ("EIR") on the reasonably foreseeable development plans of any purchaser or lessor of the Stadium Site. *See e.g.*, *The Flanders Foundation v. City of Carmel-By-The-Sea*, 202 Cal.App.4th 603 (2012) (City EIR for potential sale of City property required to consider development plans of potential purchasers who might acquire the property under the Surplus Land Act, including all reasonably foreseeable uses, before the City property can be sold). The only environmental analysis that the City has conducted in recent years for the Stadium Site was the environmental report for the potential reconstruction of Qualcomm Stadium, which was never certified and did not consider potential residential or other non-stadium uses for the remainder of the Stadium Site. Accordingly, a new environmental impact report must be prepared before proceeding with any attempted City Council sponsored plan to dispose of the Stadium Site.

Sixth, the Memorandum conflicts with the June 15, 2017 Opinion of the San Diego City Attorney, which stated:

> Because the Initiative requires that the City provide an option to sell up to 79.9 acres of property, some have stated that the Surplus Land Act requires the land to be offered to entities designated in Government Code sections 54220 through 54233 (e.g., for affordable housing) before it can be sold. This argument would likely fail because the City did not determine that the subject land was not necessary for the City's use. Also, Government Code section 54226 states that the Surplus Land Act shall not be interpreted to limit the power to sell property at fair market value, and no provision of the Surplus Land Act shall be applied if it conflicts with other statutory law (e.g., the citizens' initiative rights).

June 15, 2017 City Attorney Report, p. 12.

As the City Attorney stated above, neither the City Council nor any other entity have the authority to apply the Surplus Land Act in a manner that would conflict with "citizens' initiative rights." Additionally, the City Council could not rationally make the determination that the "subject land [is] not necessary for the City's use," a required finding before disposing of property, when there is a pending initiative already on the ballot that would in fact use the same "subject land." *See* June 15, 2017 City Attorney Report. p. 12.

Should you wish to provide to the interested parties any further information on these legal issues, please do not hesitate to contact me.

Best regards,

Christopher W. Garrett

Christopher W. Garrett
of LATHAM & WATKINS LLP