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**MEMORANDUM OF LAW**

**DATE:** April 4, 2007

**TO:** Honorable Mayor and City Council

**FROM:** City Attorney

**SUBJECT:** Validity of the La Jolla Community Planning Association, Inc., Election Process, Election and Election Results for the March 1, 2007 Election

**INTRODUCTION**

Council Policy 600-24 provides the operating procedures of and assigns responsibilities to recognized community planning groups in the City of San Diego. Council Policy 600-24 was updated on October 17, 2005. At that time, the San Diego City Council directed that all planning group bylaws be revised to reflect the update of Council Policy 600-24 by April 2007.

The La Jolla Community Planning Association, Inc., [LJCPA] is the recognized community planning group for La Jolla. On January 18, 2007, the LJCPA held a Special Meeting for the purpose of adopting new bylaws. The LJCPA approved the bylaws at that meeting. However, due to questions about whether a quorum of both the LJCPA's trustees and members was present, the City Attorney recommended the LJCPA act to ratify the action of January 18, 2007. On February 1, 2007, the membership of the LJCPA ratified the new bylaws.

The City Attorney and City Planning and Community Investment Department [CPCI] have determined that certain provisions in the newly adopted bylaws do not conform to Council Policy 600-24 and therefore, require City Council approval.<sup>1</sup> The City Attorney has stated he has no objection to the proposed deviations from Council Policy 600-24 and believes it is within the City Council's authority to approve the bylaws with the deviations requested by the community.

The LJCPA expressed a desire to operate under the new bylaws as soon as possible after adoption. As a California corporation, the LJCPA asserted that it was within its rights to provide for immediate adoption of new bylaws, subject to future submission to the City.

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<sup>1</sup> Council Policy 600-24 provides for Council approval of certain deviations to community planning group structures. For example, in La Jolla, the group proposes to seat 22 members where CP 600-24 allows for only 12-20 members.

On February 2, 2007, the City Attorney requested Council President Scott Peters docket consideration of the newly adopted bylaws for the LJCPA as provided for under Council Policy 600-24. The City Attorney stated that, by approving the bylaws deviations before the March 1, 2007 LJCPA election, the Council would further the goal of allowing greater public participation in the election and further the democratic process.<sup>2</sup>

On February 13, 2007, Deputy Chief Operating Officer Jim Waring advised Council President Peters that, based on concerns regarding the potential negative consequences of a loss of uniformity and discipline in the community planning group governance process, the Mayor's office recommended against the City Attorney's request that the Council docket the LJCPA bylaws for discussion before March 1, 2007.<sup>3</sup> After Council President Peters determined that Council action on the LJCPA matter would be "ill timed," the City Attorney submitted a second request for docketing of the newly adopted bylaws.<sup>4</sup>

Of note, the City Attorney had determined and advised the LJCPA and CPCI both prior to the election and since the time of the election that the LJCPA may operate under those newly adopted bylaw provisions that conform with Council Policy 600-24.

The LJCPA held its annual election March 1, 2007. The CPCI and City Attorney are in receipt of two election appeals challenging aspects of the election, including whether the election was properly conducted under the LJCPA bylaws.<sup>5</sup> This memorandum addresses questions regarding the validity of the LJCPA election process, election and election results.

### **QUESTIONS PRESENTED**

1. Was the March 1, 2007 La Jolla Community Planning Association, Inc., election valid such that the election results should be upheld?
  - A. Does the fact that the LJCPA election was held under either the old bylaws or the new bylaws change the analysis regarding the validity of the election and election results?
  - B. Does the challenge alleging election process defects change the analysis?

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<sup>2</sup>See City Attorney's February 2, 2007 Request for Council Approval (Form 1472) and Executive Summary

<sup>3</sup>Memorandum from Jim Waring to Council President Scott Peters, February 13, 2007

<sup>4</sup>See City Attorney's Second Request, February 16, 2007

<sup>5</sup>Memorandum from Cecilia Williams, CPCI to Deputy City Attorney Alex W. Sachs, March 21, 2007

### SHORT ANSWERS

1. Yes. The La Jolla Community Planning Association, Inc., election was conducted in substantial compliance with all applicable laws and policies.
  - A. No. Whether conducted under the old bylaws or the new bylaws, the election and election results are valid.
  - B. No. Aspects of the election challenge are without merit. Those aspects of the election challenge with merit are of no consequence to the integrity of the election process, election and election results.

### BACKGROUND

#### **I. La Jolla Community Planning Association's Actions Prior to May 2006 Prompted Legal Action Against It For Alleged Violations of LJCPA Bylaws, Manipulation of its Election and Membership Procedures, and Other Related Allegations.**

The present controversy regarding the LJCPA's bylaws arose from an earlier controversy regarding La Jollans' participation in the LJCPA. On May 4, 2006, a group called La Jollans for Clean Government, Inc., served a lawsuit on the La Jolla Community Planning Association seeking declaratory relief for violations of LJCPA bylaws, manipulation of its election and membership procedures, and other related allegations.<sup>6</sup> The litigation was filed after citizens, including plaintiffs Sally Fuller and Donna Reichart, complained that the LJCPA membership requirements disenfranchised some community members, that individuals, including Ms. Fuller, were denied access to LJCPA records<sup>7</sup>, and that meetings were deliberately cancelled in order to prevent greater participation in the LJCPA. La Jollans for Clean Government, Inc., is a community-based nonprofit corporation formed by La Jolla residents to investigate and expose corruption and conflict of interest in local government-sponsored boards and committees.<sup>8</sup>

Additional allegations were that trustees of the LJCPA were improperly failing to assess economic conflicts of interest they may have and failing to recuse from voting where appropriate. The complaint alleged that "several" architects who serve as trustees of the LJCPA have proposed projects in La Jolla and would receive direct economic benefits if certain proposed changes to the La Jolla Planned District Ordinance were approved. On May 1, 2006,

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<sup>6</sup>LA JOLLANS FOR CLEAN GOVERNMENT, INC., a California non-profit corporation, SALLY FULLER, an individual, and DONNA REICHART, an individual, Plaintiffs, v. LA JOLLA COMMUNITY PLANNING ASSOCIATION, INC., a California non-profit corporation. San Diego Superior Court Case No. GIC 865370.

<sup>7</sup> Council Policy 600-24 provides that a report of attendance and a copy of approved minutes, which include the votes taken on each matter acted upon for each meeting, shall be retained by a planning group and shall be available for public inspection. CP 600-24, Article VI, Section 2

<sup>8</sup> www.LaJollaWatchdog.org

the City Attorney's Office had sent a letter to the LJCPA trustees reminding them of their responsibility to recuse from votes and discussion of items when they have a conflict of interest, including a direct economic interest in the matter before the board. The letter also included an explanation of the Council Policy 600-24 provision for indemnification of community planning groups and individual members and the limitation that, "A planning group found to be out of compliance with the provisions of Council Policy 600-24 or its adopted bylaws risks loss of indemnification [legal protection and representation] pursuant to Ordinance No. O-17086.

On May 8 and June 15, 2006, Tim Golba, President of the LJCPA, requested the City Attorney defend the LJCPA in that lawsuit. The City Attorney met with representatives of both organizations on June 1, 2006, in an attempt to resolve the issues at hand and bring an end to the litigation. On June 16, 2006, the City Attorney advised the LJCPA that he was not providing a defense or indemnification at that time. Further, the City Attorney told the LJCPA that he was conducting an investigation of the allegations against the LJCPA.

After a discussion at City Council, the City Attorney agreed to provide legal counsel to the LJCPA and to establish an ethical wall within the City Attorney's Office to enable his fact-finding investigation of the allegations against LJCPA to go forward.

La Jollans for Clean Government, Inc. ultimately agreed to dismiss the lawsuit with assurances by the City Council, CPCI, and the City Attorney's Office that new bylaws would receive expedited review and that they would serve to remove many of the barriers to participation that were subject of the complaint.

At the time the lawsuit was settled, the CPCI Department was working on uniform bylaws for all community planning groups and expected that such uniformity would address the concerns lodged in the lawsuit. The Department and the LJCPA agreed to revise the LJCPA bylaws by October 2006.

## **II. Relevant Provisions of the 1992 LJCPA Bylaws**

The LJCPA adopted bylaws on September 19, 1991. Those bylaws were found to be in conformance with Council Policy and were approved by the Planning Director and the City Attorney on January 2, 1992.

Under the 1992 bylaws, members of the corporation must have attended at least one-third or three (whichever is less) of the regular public meetings of the LJCPA in the immediate prior calendar year to qualify as a voting member. The Secretary is required to maintain attendance records of the corporation to establish membership qualifications.<sup>09</sup> A standing rule of the LJCPA, adopted on April 4, 1991, provides, "An attendance sign-in sheet shall be maintained at each regular meeting of the Board of Trustees. For the purpose of meeting the attendance requirements for membership pursuant to Article III, Section 2 of the Bylaws, attendees must sign the attendance list."

Among the Secretary's responsibilities under the 1992 bylaws are: to insure that a report

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<sup>09</sup> 1992 LJCPA Bylaws, Article III, Section 2.

of attendance and a copy of approved minutes for each meeting is made available for public distribution; check voter qualifications with official membership lists during voting; and publish at the first regular meeting in January each year a list of members who are qualified to vote in the annual election of trustees in March. This list will be reconciled with any protests or discrepancies prior to the first regular meeting in February when a certified and final voter list will be published.<sup>00</sup>

Article V of the 1992 bylaws governs elections of the LJCPA. Among the relevant provisions are prescribed roles of the Nominating Committee, including that the Committee “will recommend a **slate** of candidates.”<sup>01</sup> (Emphasis added.) In addition, this Article includes the provision allowing proxy voting, which was a subject of the 2006 lawsuit against the LCJCPA and which is prohibited under the 2005 amendment to Council Policy 600-24.<sup>02</sup>

The 1992 bylaws provide for the Board of Trustees to include eighteen (18) elected Trustees and the addition of the President of the La Jolla Town Council, Inc., as a Trustee Ex Officio with full voting rights.<sup>03</sup>

Article VII, Section 4 of the 1992 bylaws provides, “These bylaws may be repealed or amended, or new Bylaws may be adopted, by a majority vote at any annual meeting of the Members of this corporation or at any special meeting of the Members called for that purpose, subject to review and approval by the City Attorney and the City Planning Director.”

After Council Policy 600-24 was amended in October 2005, the LJCPA and other recognized community planning groups were provided up to eighteen (18) months to update bylaws and conform them with the changes to the Council Policy. The update also provided that, until the adoption of bylaws amendments, planning groups like LJCPA could continue to operate under previous bylaws that had been found in conformance with the earlier Council Policy.<sup>04</sup>

### **III. Relevant Provisions of the 2007 LJCPA Bylaws**

Under the 2007 bylaws, an individual may become a member of the LJCPA by meeting requirements including attending one (1) meeting in the prior year and submitting a membership application to the Secretary demonstrating qualifications to be a member. “Once eligibility to vote is established, an individual remains a member of LJCPA until a determination is made that the individual does not retain eligibility.”<sup>05</sup>

The new bylaws included a process for addressing alleged violations of the bylaws or of Council Policy 600-24 by a trustee and by the LJCPA as a whole.<sup>06</sup> Of interest is Article III, Section 6 (E), which requires that allegations be forwarded to the City for investigation; for a City “dialogue” with the group; that the LJCPA “work with the City” toward a solution; that the Community Planners Committee may be consulted; and that the City “may” recommend forfeiture of recognized status and the loss of indemnification and representation.<sup>07</sup>

Under the new bylaws, the Election Committee presents the planning group with a list of interested candidates (no mention of a “slate”).<sup>08</sup> To be a candidate, a LJCPA member must have

documented attendance at three (3) of the planning group's last 12 meetings.<sup>19</sup>

The 2007 bylaw voting policies include a goal of "assuring fair access to the election process and to avoid voting improprieties," proof of identity to vote, no proxy voting, and provide that "development and promotion of 'slates' of candidates is contrary to the intent of Council Policy 600-24."<sup>10</sup> Article V, Section 4 of the 2007 bylaws provides for an election to become final after the President announces the validated election results at the conclusion of the March meeting. Article VIII, Section 4 of the new bylaws provides that upon verification of the count, the Election Committee reports the results to the President and the President certifies and immediately announces the results.

Both the 2007 and 1992 bylaws provide for 18 elected Trustees.

Article VIII, Section 4 of the new bylaws provides for the bylaws to be repealed, amended, or new bylaws adopted, which then become immediately effective and are submitted to the City Attorney and City Planning Director for review and approval.

#### **IV. LJCPA Bylaws Update Process**

The LJCPA's bylaws update began in August 2006 with the appointment of Lance Peto as Bylaws Subcommittee chair and the announcement of a set of bylaws subcommittee meetings. At that time, the City Attorney's Office also assigned a deputy city attorney to attend both the LJCPA's bylaws subcommittee meetings and the general monthly meetings. After a bylaws update utilizing the CPCI "shell" as a basis was rejected by the LJCPA membership at a Special Meeting on October 19, 2006, a reconstituted LJCPA bylaws subcommittee, including LJCPA trustees and some of the trustees' more vocal critics, developed new bylaws for the LJCPA, which were submitted to the full board for consideration.

On January 18, 2007, the LJCPA held a Special Meeting for the purpose of adopting new bylaws. The LJCPA approved the bylaws at that meeting. However, to address questions about whether a quorum of both the LJCPA's trustees and members was present, the City Attorney recommended the LJCPA act to ratify the action of January 18, 2007. On February 1, 2007, the membership of the LJCPA ratified the new bylaws. Only nine of the more than 130 voting LJCPA members opposed the bylaws ratification.

The City Attorney and Planning Department have determined that certain provisions in the newly adopted bylaws do not conform with Council Policy 600-24 and, therefore, must be taken to the City Council for approval.<sup>11</sup> Among the provisions that would require Council approval are:

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<sup>19</sup>*Id.*

<sup>10</sup> 2007 LJCPA Bylaws, Article V, Section 3.

<sup>11</sup> Council Policy 600-24 provides that subsequent amendments to adopted bylaws may be approved by the Planning Director and Attorney if determined to conform with the policy.

1. A provision allowing for twenty-two (22) members on the board of the LJCPA. Council Policy limits membership to a maximum of twenty (20) members, but allows the Council to consider a larger number.<sup>12</sup> The new bylaws provide for eighteen (18) elected trustees and four (4) appointed trustees representing community organizations.<sup>13</sup>
2. A provision limiting LJCPA's trustees to serving two (2) three year terms for a total of six (6) consecutive years. Council Policy states trustees may serve three (3) three-year terms or two (2) four-year terms.<sup>14</sup>
3. A provision making the LJCPA's bylaws amendments "effective upon adoption by the members."<sup>15</sup>

The ratified LJCPA's bylaws also include a provision for the recall of trustees, a democratic process not foreseen in Council Policy 600-24.<sup>16</sup>

The City Attorney has no objection to the proposed deviations from Council Policy 600-24 and believes it is within the City Council's authority to approve the bylaws with the deviations requested by the community. In addition, the City Attorney determined and advised the LJCPA and CPCI both prior to the election and since the time of the election that the LJCPA may operate under the newly adopted bylaw provisions that are in conformance with Council Policy 600-24.

On February 2, 2007, the City Attorney alerted Council President Peters that approval of the LJCPA's newly-adopted bylaws prior to the March LJCPA annual board election would allow greater public participation in the election and further the democratic process. The City Attorney submitted a formal request to Council President Peters that he docket approval of the newly-adopted bylaws for the LJCPA as provided in Council Policy 600-24.

However, in a February 13, 2007 memorandum from Deputy Chief Jim Waring to Council President Peters, Jim Waring advised the City Council against approval of the newly-adopted bylaws. Council President Peters denied the City Attorney's docketing request and provided the following legal advice<sup>17</sup> as to how the LJCPA may proceed:

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<sup>12</sup> Council Policy 600-24, Article III, Section 2.

<sup>13</sup> 2007 LJCPA Bylaws, Article III, Section 1.

<sup>14</sup> 2007 LJCPA Bylaws, Article III, Section 2.

<sup>15</sup> 2007 LJCPA Bylaws, Article VII, Section 5.

<sup>16</sup> See 2007 LJCPA Bylaws, Article III, Section 4(B).

<sup>17</sup> San Diego Municipal Charter Section 40 provides that the City Attorney shall be the chief legal adviser of, and attorney for the City and all Departments . . . . Council President Peters is not the legal advisor to the City and is not authorized to practice law as a City Councilmember.

The LJCPA is not without recourse to address issues related to its upcoming elections . . . . In order to make these two aspects [the elimination of proxy voting and decreasing the number of meetings required for voting] of its proposed bylaws revisions effective for its March 1, 2007 election, the LJCPA would need to convene a special meeting, vote to approve these two revisions, and submit those revisions to the CPCI. Given the time-sensitive nature of the request, CPCI has committed to reviewing and approving these two amendments within 48 hours of submission. I respectfully request that the City Attorney review and approve these two amendments within the same expedited timeframe.<sup>18</sup>

As the issues raised regarding the LJCPA are legal questions, the City Attorney provided a legal analysis to the Mayor and City Council as part of his second docketing request on February 16, 2007. The City Attorney advised the LJCPA, CPCI, and the City Council that, contrary to the statements of Council President Peters, it was not necessary for the LJCPA to hold yet another meeting to adopt the same changes to the LJCPA bylaws approved by the LJCPA at a special meeting on January 18, 2007, and ratified by the LJCPA on February 1, 2007, nor to re-adopt any subset of those bylaws.

The City Attorney has already approved bylaw changes in conformance with Council Policy 600-24. Only those changes not in conformance with Council Policy 600-24 must be approved by the City Council.

## **V. Election**

On Thursday, March 1, 2007, the LJCPA held its regularly scheduled annual election for members or “trustees.” The polling place at the La Jolla Recreation Center was open from 3:00 p.m. until 7:00 p.m. and was staffed by three members of the LJCPA: Lance Peto, a trustee and chair of the Election Committee as well as the Bylaws Committee; Michelle Fulks, a member of the Bird Rock Community Council and the Elections Committee; and Cindy Thorsen, another member of the Elections Committee who is involved in the No Third Story effort.

Deputy City Attorney Sachs, who has been monitoring LJCPA activities since June 2006, attended the election as an observer and also discussed election concerns with Election Committee members as well as voters.

Approximately 349 people voted, with fewer than ten of those requesting ballots denied a ballot due to their failure to have a membership application on file. There were six trustees elected, receiving from 191 to 148 votes. The seventh top vote-getter, who was not elected, received 68 votes, meaning there was a difference of eighty (80) votes between the trustees elected and those not elected.

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<sup>18</sup> Memorandum from Council President Scott Peters to Deputy Chief Jim Waring and City Attorney Michael Aguirre, February 15, 2007



Deputy City Attorney Sachs primarily encouraged the Elections Committee to deal with questions regarding eligibility in an even-handed and impartial manner. On two occasions, the deputy city attorney engaged in discussions with voters or their advocates regarding balloting. First, Attorney Steve Haskins intervened on behalf of one woman who was turned away. After discussing the manner in which the committee was determining eligibility, and after Mr. Haskins learned that the person asking for a ballot had not attended any LJCPA meetings over the past year, those issues were resolved.

In addition, Deborah Marengo, who is active with the Promote La Jolla business group, asked a number of questions about the requirement for voters to provide identification at the polling place. Ms. Marengo was assured that showing of identification is a standard practice at many community planning group elections.

After the polls closed, and the ballots were counted in a methodical manner, Elections Committee chair Lance Peto announced the results to the members shortly before the meeting ended at 9:00 p.m. The LJCPA retained the ballots and election materials in case there were challenges to the election or questions about its procedures.

On March 28, 2007, Deputy Chief Jim Waring sent a letter to Tim Golba, the President of the LJCPA, to apprise the group that the Mayor's office is docketing a request to decertify the LJCPA at the City Council's April 24, 2007 meeting. Waring cited the LJCPA's adoption and utilization of new bylaws and its conduct of an election under the new bylaws as the bases for his decertification recommendation. Waring stated that the March 1, 2007 election was conducted under unapproved bylaws, calling into question the validity of the election itself. Waring further advised Golba that the LJCPA can avoid decertification by operating under the 1992 bylaws at the LJCPA meeting scheduled for April 5, 2007 and may elect to adopt the bylaw changes regarding proxy voting and membership requirements. Waring states the election results of March 1, 2007, must be voided by the LJCPA at its April 5 meeting. The statements by Waring are contrary to the legal advice provided by the City Attorney to the LJCPA and CPCI.

## ANALYSIS

### **I. Elections, Election Process, and Election Results are Valid and Shall Be Upheld in an Election Contest Unless Plainly Illegal.**

The rules governing election challenges include the principle of law that an election must be held valid unless plainly illegal.<sup>29</sup> An election is not set aside where there has been substantial observance of the law.<sup>20</sup> In the City of San Diego, district or City-wide primary and general elections, special municipal elections, and elections of the San Diego Unified School District are valid if held in substantial compliance with election requirements.<sup>21</sup>

Substantial compliance refers to actual compliance with the objective of each substantive requirement.<sup>22</sup> Strict compliance is applied in circumstances where the purpose of a statutory requirement is to provide information to the public to assist them in deciding how to vote.<sup>23</sup>

Procedural defects are analyzed under the substantial compliance standard.<sup>24</sup> Emphasis is placed on the purpose of each requirement with the courts favoring preservation of the election as long as the defect could not have affected the integrity of the electoral process “as a realistic and practical matter.”<sup>25</sup>

Planning groups are responsible for including in their bylaws policies and procedures for effective operation under Council Policy 600-24, including the conduct of meetings and elections:

(4) Member and Planning Group Responsibilities, suggested but not limited to: filling vacant seats either during a term or following an election; how planning group positions will be represented to the City; discipline or removal of an individual member; bylaw amendment process, including the development of procedures companion to the bylaws.

(5) Elections, suggested but not limited to: promoting planning group elections; determining eligibility of candidates and voters; ballot preparation, handling, and counting procedures; poll location and operation criteria; election challenges.

Council Policy 600-24, Article V, governs elections of recognized community planning groups. Among its provisions are:

- 1) a requirement that elections of recognized community planning group members be held in March under procedures set forth in bylaws.
- 2) a provision that planning groups may establish voting procedures including opportunities for multiple voting times or locations as long as they, “demonstrate an ability to assure fair access and avoidance of voting improprieties.”<sup>26</sup>
- 3) that the planning group makes a good faith effort to utilize appropriate means to publicize the planning group’s eligibility requirements for candidacy and elections.
- 4) that community planning groups may establish means, including the mailing of ballots, to increase participation in the election process, but under no circumstances allowing for proxy voting.

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<sup>24</sup>*Costa v. Superior Court*, 37 Cal.4th 986, 1013 (2006).

<sup>25</sup>*Id.*

<sup>26</sup> Council Policy 600-24, Article V, Section 1

- 5) that elections become final after the election results have been announced at a noticed planning group meeting, unless otherwise explicitly provided for in the bylaws. New members shall also be seated in April.<sup>27</sup>

The LJCPA adhered to the above procedures in its March 1, 2007 election.

## **II. Challenges to March 1, 2007 LJCPA Election: Found to Be of No Consequence to the Integrity of the Election Process, Election and Election Results**

On March 8, 2007, LJCPA trustee Phil Merten filed an official challenge to the election with LJCPA President Tim Golba. In addition, trustee Alice Perricone filed an undated challenge to the election. Both election challenges were forwarded to CPCI and later provided to the City Attorney. The challenges allege, among other things, that the election was not held in accordance with City-approved bylaws; that LJCPA voters were disenfranchised by the Election Committee's membership list process; that a "slate" was promoted in violation of Council Policy 600-24 and the Brown Act; and, that illegal electioneering occurred.

Below is an analysis of each of the challenges. All but one of the challenges are found to be without merit, while the sole claim with merit did not impact the election result. The election was held in substantial compliance with City and LJCPA policies and should not be overturned.

### **A. Challenge 1: Election not conducted in accordance with bylaws approved by the City.**

First, it is not clear whether the March 1, 2007 election was conducted under the 2007 or 1992 bylaws. The LJCPA takes the position that, as a corporation, the adoption of the new bylaws is effective immediately, as stated explicitly in the new bylaws. The City has been aware of the corporate status of the organization, and elected to allow corporate status when the 1992 bylaws were adopted. At this time, no action by the City has been taken to deny the LJCPA its corporate status.

On the other hand, one of the reasons the CPCI considers the newly adopted bylaws of the LJCPA to not be in conformance with Council Policy 600-24 is that the bylaws become effective immediately upon adoption. Of course, however, every community planning group must adopt new bylaws to bring the group into compliance with Council Policy 600-24 revisions. Action by a community planning group to adopt new bylaws is not contrary to bylaws or policy, but rather, is required of each group. At issue now is the status for that interim period between community planning group adoption of revised bylaws and consideration by the City Council of any deviations from Council Policy.

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<sup>27</sup> Council Policy 600-24, Article V, Sections 1-4

Whether the City chooses to continue to recognize the corporate status of the LJCPA or not, there has been no action taken by the LJCPA that relates to the election provisions of either the 1992 or new bylaws that is in conflict with either bylaws or Council Policy. Both the 1992 and 2007 bylaws provide for 18 elected members. The March 1, 2007 election resulted in an elected body of 18 members.

If the election was conducted under the 1992 bylaws, the election was conducted in accordance with those bylaws except that proxy voting and the onerous membership requirements provided for in the 1992 bylaws were not followed, as instructed by the City Attorney's office.

If the election was conducted under the 2007 bylaws, the election was conducted in accordance with those bylaws except that the deviation allowing for the four appointed seats has not yet been considered by the City Council, and those appointees either should not be seated until City Council approval is granted or, alternatively, they should be seated with a process in place to distinguish their votes during this interim period so that should the City Council reject that bylaw deviation, such rejection will not negate any prior vote of the LJCPA.

The new bylaws were adopted by the LJCPA in advance of the elections with sufficient time for the City Council to consider them prior to the election. Council President Peters declined to docket the newly adopted bylaws prior to the March 1, 2007 election. A community planning group that finds that changes to its bylaws will better serve the community must adopt those new bylaws before they can be approved by the City Council. The community is not necessarily better served by delaying adoption of new bylaws simply for administrative ease. The City Council, City Attorney, and City staff recognize the importance of the role of the community planning groups and want to demonstrate continued support for those volunteers. Immediate approval of the newly adopted bylaws of the LJCPA would have served to address the unique circumstances facing the LJCPA, particularly in light of the prior litigation and the promise to those litigants that new bylaws would be expedited in exchange for dismissal of the litigation.

The CPCI and the complainants are correct in that CPCI and the City Council had not yet approved the newly adopted bylaws at the time of the March 1, 2007 election. However, as all parties are aware, the City Attorney made a legal determination that the bylaws as ratified on February 1, 2007 were substantially in compliance with Council Policy 600-24 and basic democratic processes.

In addition, the CPCI identified the provision for ratification of bylaws by the entire eligible membership of the community, rather than the trustees, as outside the scope of Council Policy 600-24. While the City Attorney understands CPCI's position that "members" under Council Policy 600-24 are only the 12 to 20 elected members referenced in Council Policy 600-24, Article III, Section 1, it is not clear how a provision broadening the voting on bylaws amendments to all eligible community members runs contrary to the Council Policy 600-24 policy statement that, "Individual planning groups' bylaws may expand on provisions in this Policy to better meet the needs of diverse communities."<sup>28</sup>

Finally, CPCI has indicated that the LJCPA's bylaws provisions for recall of trustees are outside of the scope of Council Policy 600-24. While the 2005 amendment to Council Policy 600-24 adds policies regarding alleged violations of Council Policy 600-24 (*See* Article III, Sections 6-7), the City Attorney can find no policy statement in Council Policy 600-24 that indicates a recall provision, allowing for due process, would run contrary to Council Policy 600-24.

Regardless of the concerns of complainants and CPCI that the newly adopted bylaws had yet to be approved by CPCI and the City Council, the March 1, 2007 election was conducted including new bylaws provisions for (1) a polling station open at the La Jolla Recreation Center from 3:00 p.m. to 7:00 p.m.; (2) implementation of new eligibility requirements that eligible members show attendance at one (1) LJCPA monthly or special meeting within the 12-month period and submission of a membership application to the Secretary; and (3) the provision prohibiting proxy voting.

Two of the three new bylaws provisions implemented by the LJCPA election committee for the March 1, 2007 election were new provisions agreed to by all parties, the City Attorney, CPCI and the LJCPA. The polling station served to enhance LJCPA's compliance with Council Policy 600-24's flexibility regarding voting procedures that include opportunities for multiple voting times, so long as groups "demonstrate an ability to assure fair access and avoidance of voting improprieties."<sup>39</sup>

Accordingly, the City Attorney finds that this aspect of the election challenge does not raise material concerns sufficient to set aside the LJCPA's election, particularly where it is equally arguable that the election was conducted in accordance with both the 1992 and 2007 bylaws and Council Policy.

## **B. Challenge 2: Membership list disenfranchised voters.**

Regarding who is an eligible member to vote, the Council Policy 600-24 Administrative Guidelines section 5.1 states, "The Policy remains vague on this point to allow for community discretion."

The LJCPA bylaws enacted in 1992 state that the submission of a written application for membership is a prerequisite to membership of the LJCPA.<sup>30</sup> At the LJCPA's November 2, 2006 meeting, the LJCPA trustees approved CPA President Tim Golba's suggestion that this bylaws provision be waived for calendar year 2006.<sup>31</sup> Other LJCPA members, including Rob Whittemore, objected that under the California Corporations Code a bylaws provision could not be "waived" in this manner. Subsequently, the Membership Committee, chaired by trustee Lance Peto, determined to continue gathering written application forms from LJCPA members.

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<sup>39</sup> Council Policy 600-24, Article V, Section 1, page 7 of 12

<sup>30</sup> 1992 LJCPA Bylaws, Article III, Section 2

<sup>31</sup> LJCPA Minutes for November 2, 2006, Motion by Cleveland, second by LaCava, 15-0-1 vote

Although the LJCPA bylaws assign the Secretary of the association to maintain membership lists, eligibility lists and membership applications, Cindy Thorsen, a member of the Membership Committee and later the election committee, had begun taking membership application forms and providing them to the Secretary in May 2006. Membership Committee member Michelle Fulks states that when the committee first began its work after the November meeting, it determined that the present LJCPA secretary had not been keeping membership application forms.<sup>32</sup> Another committee member, Joe LaCava, who was unable to participate on the Elections Committee as he was a candidate for reelection to the board, created and maintained an extensive spreadsheet detailing attendance at LJCPA meetings. This list, including a category indicating whether a membership application is on file, has been available on the LJCPA's website since the summer of 2006.

Deputy City Attorney Sachs, in consultation with LJCPA chair Tim Golba, elections chair Lance Peto and members of the Election Committee, discussed the eligibility requirement via e-mail in February 2007. On February 9, 2007, Peto wrote the Deputy City Attorney:

We have almost 300 members who have submitted applications & we only had 1, yes 1, woman at last month's meeting who was not on our membership lists & seemed a little miffed that she was omitted. We added her & also accepted her application. We have made it very clear at the last several CPA meetings that we wanted applications from all members before the elections in March. The only questionable members are those who have submitted applications which seem to have been misplaced (23 or so). We are going to allow them to vote if they show up & have them sign another duplicate application . . . .<sup>33</sup>

The deputy city attorney, in correspondence with Golba and Peto, urged "transparency and consensus about procedure."<sup>34</sup> The most active members of the committee during this period, trustee Lance Peto, Bird Rock Community Council member Michelle Fulks and No Third Story activist Cindy Thorsen, were united in their approach to the membership application requirement, and consulted with Tim Golba on their strategy.<sup>35</sup> The membership application requirement was announced at the January regular and special meetings, and the elections committee in February held discussions regarding the number of eligible community members who had not filed an application.<sup>36</sup> According to Lance Peto, and as verified by Deputy City Attorney Sachs, the January meetings, including the special meeting to ratify bylaws, were much better attended than the November 2006 meeting at which the trustees attempted to waive the membership application requirement.<sup>37</sup>

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<sup>32</sup> Interview with Michelle Fulks, March 30, 2007

<sup>33</sup> E-mail between Lance Peto, Tim Golba and Alex W. Sachs, February 9, 2007

<sup>34</sup> Alex W. Sachs response to Peto E-mail, February 9, 2007

<sup>35</sup> Interview with Michelle Fulks, March 30, 2007

<sup>36</sup> *Id.*

<sup>37</sup> E-mail between Lance Peto, Tim Golba and Alex W. Sachs, February 9, 2007

According to Michelle Fulks, and consistent with the deputy city attorney's observations as an election observer on March 1, 2007, fewer than ten individuals were properly denied the opportunity to vote due to their failure to have a membership application on file.<sup>38</sup> Ms. Fulks reported that two of the individuals who were denied ballots had been recruited by an e-mail from No Third Story and acknowledged, when asked, that they had never attended a LJCPA meeting. In addition, trustee Hal White was denied a ballot because he declined to show identification.<sup>49</sup>

On March 1, 2007, more than 349 voters participated in the election. The six elected trustees received from 191 to 148 votes.<sup>40</sup> The seventh ranking candidate received 68 votes. Therefore, there was an 80-vote difference between the lowest-ranking winner and the highest-ranking losing candidate. Had the ten individuals denied a ballot been allowed to vote, their votes could not have effected the election results.

The complainants argue that LJCPA members who were otherwise eligible to vote were disenfranchised because they had not filed a membership application. However, both complainants voted in the March 1, 2007 election. In the months preceding the election, the Election Committee analyzed individual voter eligibility and alerted those LJCPA meeting attendees who did not have an application on file. In addition, the committee made regular announcements of the membership application requirement at meetings.

Contrary to the complainant's statements and the CPCI's conclusion that the Election Committee's decision to follow the 1992 LJCPA bylaws by requiring a membership application "served to disenfranchise a number of voters in the community,"<sup>41</sup> the City Attorney concludes from the evidence presented and from Deputy City Attorney Sachs' personal observations that, at most, ten individuals seeking to vote were denied ballots by the actions of the Elections Committee. Further, it appears that those individuals were properly denied the opportunity to vote. Given that the number of potentially disenfranchised voters was so small, and given the vote gap between the elected candidates and the unsuccessful candidates, the City Attorney finds that this denial was not material to the election results and is insufficient to warrant overturning the March 1, 2007 LJCPA election.

### **C. Challenge 3: Promotion of a Candidate Slate**

The City Attorney was provided copies of the subject e-mails regarding the ad hoc No Third Story "slate" prior to the March 1, 2007 elections. The e-mail, sent from an e-mail address identified solely as "NoThirdStory.org" <info@Nothirdstory.org> encouraged attendance of La Jollans at the March 1, 2007 election. It stated, in part:

**This is the 4-hour window of time in which you can submit**

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<sup>38</sup> Interview with Michelle Fulks, March 30, 2007

<sup>49</sup> *Id.*

<sup>40</sup> Tally e-mailed by Tim Golba, March 30, 2007

<sup>41</sup> Memorandum of Cecilia Williams to Alex W. Sachs, March 21, 2007

**your ballot in La Jolla CPA's 2007 Election. Six of the 18 Trustee Positions are open – so you can vote for six!** To best serve the La Jolla community at this critical time in the CPA's history, NoThird Story is requesting that you support this SLATE of SIX Nominees:

Darcy Ashley  
Orrin Gabsch  
Todd Lesser  
Sherri Lightner  
Ray Weiss  
Rob Whittemore

We need a STRONG VOTE for these six individuals, as that will give us the best chance to elect to all six open seats . . . <sup>42</sup>

While it is clear that the subject e-mail constitutes the promotion of a "slate" – as the document utilizes that word explicitly, there is no evidence that the promotion of this slate by the NoThirdStory group violated Council Policy 600-24, nor was it sufficient to invalidate the LJCPA's March 1, 2007 election.

While the Council Policy is silent on the issue of slate voting, the Administrative Guidelines, under a discussion of Impartiality and Objectivity, state that, "It is important to maintain as much objectivity surrounding the recognized community planning group elections as possible."<sup>43</sup> As a continuation of this discussion, the Guidelines state that "planning groups should not use the word "slate" for the elections because it implies a predetermination or preference for certain candidates by the Elections Committee."<sup>44</sup>

In developing the proposed "shell" bylaws, the CPCI Department was more explicit in its guidance, with a draft bylaws section, including a statement: "Development and promotion of 'slates' of candidates is contrary to the intent of Council Policy 600-24 and is not allowed."<sup>45</sup> The La Jolla CPA's newly enacted bylaws repeat this statement, with the exception of the phrase "and is not allowed."<sup>46</sup>

The challenge based on the "slate" issue is predicated upon a conclusion that the senders of the NoThirdStory.org e-mail were governed by the Administrative Guidelines and the bylaws' assertion that promotion of slates is "contrary" to the Council Policy. From the City Attorney's perspective, this does not appear to be the case. NoThirdStory.org is not a recognized part of the LJCPA, the group is unincorporated and solicits donations made to another entity, the La Jolla ~~Village Residents Association~~, accordingly the group is not subject to the requirements of

<sup>42</sup> Undated e-mail provided to City Attorney and CPCI as attachment to formal election challenges

<sup>43</sup> Council Policy 600-24 Administrative Guidelines, Section 5.1 Election Procedures, pg. 54

<sup>44</sup> *Ibid.*

<sup>45</sup> Community Planning Bylaws "Shell", August 21, 2006 revision, Article V, Section 2.

<sup>46</sup> 2007 LJCPA Bylaws



Council Policy 600-24. Additionally, the Administrative Guidelines are only intended to apply to recognized community planning groups consisting of the 12-20 elected members.<sup>47</sup>

While the LJCPA newly adopted bylaws state that, “The Members of LJCPA and the Board of Trustees of the LJCPA shall constitute the officially recognized community planning group . . . .”<sup>48</sup>, the role of the elected trustees as the governing entity of the LJCPA is also clearly stated. The Board of Trustees is defined as, “The group of elected and/or appointed Trustees who administer the affairs of the LJCPA.”<sup>59</sup> Additionally, the bylaws set a quorum as constituting a majority of the elected Board of Trustees.

As Council Policy 600-24 clearly states, the recognition provided by the City is for the 12-20 elected community planning group members, and not the membership at large. The slate discussion in the Administrative Guidelines and the bylaws cannot legally be construed to prohibit any outside group or individual from advocating for the election of certain persons or a slate of persons as part of a democratic process.

Community planning groups are subject to the requirements of the Brown Act, including conducting business in public:

Any attempt to develop a collective concurrence of the elected or appointed members of a recognized community planning group as to action to be taken on an item by members of the [planning group], other than at a properly noticed public meeting, either by direct communication, personal intermediaries, serial meetings, or technological devices, is prohibited.<sup>50</sup>

However, similar to the above analysis, the NoThirdStory.org e-mail cannot be construed to constitute an improper violation of the Brown Act’s prohibitions on the development of a “collective concurrence.” First, the LJCPA trustees and members do not have any control over e-mail messages they receive. A violation of the Brown Act occurs only when members or trustees initiate or respond to e-mails in an attempt to create a collective concurrence. Second, the Brown Act prohibitions are meant to govern attempts to develop such concurrence of or by the elected/appointed recognized community planning group. As discussed above, these prohibitions govern the LJCPA trustees and not the membership at large. There is no evidence, nor is there an allegation, that any of the sitting LJCPA trustees participated in the distribution of the NoThirdStory.org slate.

If a trustee was a participant in sending the objectionable e-mail, it may be appropriate to ~~address that conduct with the trustee~~, however; there is no evidence that any member would have

<sup>47</sup> The goal of the Administrative Guidelines is to, “assist recognized community planning groups and City staff in creating, implementing, and amending bylaws” Council Policy 600-24 Administrative Guidelines, Introduction, pg. 7

<sup>48</sup> 2007 LJCPA Bylaws, Article III, Section 1, pg. 3

<sup>59</sup> 2007 LJCPA Bylaws, Article I, Section 4, pg. 1

<sup>50</sup> Council Policy 600-24, Article VI, Section 10, invoking the “spirit” of the Brown Act directive.

been misled into believing the e-mail was a product of the LJCPA.

**D. Challenge 4: Electioneering occurred at the meeting and voter sign-in table**

The governing rules of law regarding an election contest, including allegations of misconduct, are that the election is held valid where the irregularities do not impact the result.<sup>51</sup> Second, it is not proper to defeat “the fair expression of the popular will unless the law permits no alternative.”<sup>52</sup> Third, the emphasis of the analysis rests with the public interest and will of the people.<sup>53</sup>

Deputy City Attorney Sachs monitored the election at the La Jolla Recreation Center beginning at approximately 4:00 p.m. through the closing of the polls at 7:00 p.m. During that period, he did witness “electioneering” outside the polls in close proximity, approximately 20 to 30 feet from where people were voting. Individual candidates were present and talking with voters, as well as individuals with No Third Story signs.

The Council Policy 600-24 Administrative Guidelines, section 5.1 provide:

The spirit of fair elections should be maintained even though planning groups are not subject to the formality of the Fair Political Practices Act. For example, there should be no campaigning for the planning group candidates at polling places or within a **reasonable distance** of the polls. Individual planning groups can set limits appropriate for their polling places...

(Emphasis added.) “Reasonable distance” is not defined.

Several voters complained about the electioneering, and the Election Committee uniformly felt that the presence of electioneering activities outside the room was inappropriate and should be rectified next year. The LJCPA has not established guidelines as to “reasonable distance” and may elect to incorporate some standards into their bylaws for next year’s election pursuant to the Administrative Guidelines.

Regarding the allegation that a “stack” of No Third Story slate flyers was present at the sign-in table for LJCPA voters, that allegation is incorrect, based upon the observations of Deputy City Attorney Sachs as well as a statement from Election Committee member Michelle Fulks. Sachs never saw such a stack, and Fulks states that on occasion voters brought the “slate” flyer into the polling place and left it upon casting their ballot, but that the Election Committee promptly discarded any flyers left in the polling place.<sup>54</sup>

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<sup>51</sup> *Salazar v. City of Montebello*, 190 Cal. App. 3d 953, 958-9 (1987, 2nd Dist.)

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> Interview with Michelle Fulks, March 30, 2007

As in state, federal and municipal elections, there does not appear to be any prohibition on voters bringing election materials, including the flyer produced for the “slate,” into a polling place.

While the City Attorney has determined that this allegation by the complainants does have some merit, at least as to the allegations of electioneering close to the polling place in violation of the Administrative Guidelines, the complainants’ challenge to the election may not be granted merely upon these grounds. In this instance, as in any election challenge, the principle is that an election must be held valid unless plainly illegal.<sup>55</sup> Particularly, irregularity or improper election conduct will not void an election where that conduct had no impact on the election results.<sup>56</sup>

While electioneering violations are misdemeanors under California Election Code section 18370 (prohibiting electioneering “within 100 feet of a polling place”), there is no basis for applying such a standard in a community planning group election where the sole prohibition is an undefined “reasonable distance” called out in Administrative Guidelines, and not the San Diego Municipal Code nor Council Policy. Further, the remedy for such violations is not decertification of the election.

The electioneering by some candidates did not impact the election results. Some voters were mildly annoyed but otherwise unfazed. The expression of public will, as evidenced by the election results, requires protection unless “the plain mandate of the law permitted of no alternative.”<sup>57</sup> Further, as the California Supreme Court has reiterated on numerous occasions, as summarized below:

Of course, neither the voters nor those voted for have any control over election officers, and to set aside the vote of a precinct, when there was clearly no fraud or any mistake affecting the result, for mere irregularities occasioned by the ignorance or carelessness of election boards would, in many cases, be a patent injustice. Moreover, a construction requiring an exceedingly strict compliance with all statutory provisions might tempt to irregularities contrived for the very purpose of vitiating the vote at a certain polling place, and as was said in *Whipley v. McKune*, 12 Cal. 361, ‘might lead to more fraud than it would prevent.’<sup>58</sup>

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<sup>55</sup>*Friends of Sierra Madre v. City of Sierra Madre*, 25 Cal.4th 165, 192 (2001), as modified May 2, 2001

<sup>56</sup>*Abbott v. Harley*, 143 Cal. 484, 486 (1904).

<sup>57</sup>*Willburn v. Wixson*, 37 Cal App. 3d 730, 737-8 (1974)

<sup>58</sup>*Atkinson v. Lorbeer*, 111 Ca. 419, 421 (1896).

The LJCPA election was conducted in substantial compliance with all applicable laws and policies.

### **CONCLUSION**

The March 1, 2007 La Jolla Community Planning Association, Inc., [LJCPA] election is valid and the election results should be upheld. The law favors preservation of elections as long as any defects could not have affected the integrity of the electoral process “as a realistic and practical matter.” There are no procedural or otherwise substantive defects that had any impact of consequence on the integrity of the LJCPA election. Therefore, the election is valid and the results should be upheld, consistent with the legal principle that an election is not set aside where there has been substantial compliance with election requirements.

The LJCPA election was conducted in accordance with all applicable laws and policies. The fact that the LJCPA election was held under either the old bylaws or the new bylaws does not change the analysis regarding the validity of the election and election results. The election challenges alleging election process defects do not change the analysis. Aspects of the election challenge were found to be without merit. Those aspects of the election challenge with merit were found to be of no consequence to the integrity of the election process, election, and election results.

MICHAEL J. AGUIRRE, City Attorney

By

Michael J. Aguirre  
City Attorney

KH:AS:jb  
ML-2007-5

cc: Jim Waring, Deputy Chief Operating Officer for Land Use and Economic Development.  
Betsy McCullough, Deputy Planning Director, Planning Department  
Tim Golba, President, La Jolla Community Planning Association, Inc.

