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Our File No. 46023.0004

February 22, 2022

VIA ELECTRONIC MAIL

Andreas C. Chialtas
Atkinson, Andelson, Loya, Ruud & Romo
12800 Center Court Drive, Suite 300
Cerritos CA 90703
achialtas@aalrr.com

Re: College of the Desert Meeting Issues

Dear Mr. Chialtas:

I write on behalf of the City of Palm Springs. It is our understanding that College of the Desert (COD) General Counsel Carlos Campos is not involved in closed session discussions concerning COD land use matters, and campus facilities issues. As this correspondence concerns such issues have been addressed in both closed and open session, and issues relating to the Brown Act, this correspondence is directed to you.

Upon review of COD Board of Trustees (Board) meeting agendas, minutes, and recordings, and comments made by Board members to the press, several of COD's practices relating to the Brown Act have emerged that appear to be inconsistent with open and transparent public meetings, and may in fact be violations of the Brown Act.

Discussion and Action on Items Without Public Comment

Under the Brown Act, members of the public have the right to speak on all items on a legislative body's agenda before the body may acts on them. Government Code Section 54954.3(a) requires:

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“Every agenda for regular meetings shall provide an opportunity for members of the public to directly address the legislative body on any item of interest to the public, **before or during the legislative body’s consideration of the item**, that is within the subject matter jurisdiction of the legislative body, provided that no action shall be taken on any item not appearing on the agenda unless the action is otherwise authorized by subdivision (b) of Section 54954.2.” (Emphasis added.)

The City is concerned the Board is taking action, and hearing reports about items relating to future action, without giving the public an opportunity to directly address the Board.

The public is regularly prevented from participating in the meeting due to the way the COD places public comment on the agenda, and how the COD appears to be discussing topics in closed session.

The Board agenda regularly places public comment as item 4.0, with all public comment being required to be submitted during that section. However, the Board also regularly takes action on items before such item is called on the agenda and does not allow public comment on those items.

At the January 21, 2022 Trustee Board meeting, the public’s opportunity to directly address the COD Board of Trustees occurred as item 4.01 of the agenda. This violates the Brown Act, as the Board acted on the following items without first allowing the public to comment:

3.01 Approval of Regular Meeting Minutes | December 17, 2021

3.02 Approval of Special Meeting Minutes | January 7, 2022

Under items 3.01 and 3.02, the Board approved minutes of two prior meetings, without allowing public comment. Under item 4.01, public comment, I and another speaker noted that the minutes of January 7 were inaccurate — after the Board had approved them. Accordingly, the Board could have corrected the erroneous minutes at that

meeting only by moving to reconsider them. The Board did not reconsider the item nor correct the minutes. Had the Board complied with the Brown Act, either by allowing the public to speak on each item, or by only taking action only after the public had been allowed to address the Board, the Board could have corrected the minutes easily.

The agenda for the February 17, 2022, Trustee Board Meeting again had the same order of business and public comment was only accepted *after* the Board acted on approval of the minutes under item number three.

This practice is in violation of the Brown Act and the Board must take public comment before acting on any item of business or allow comment item by item.

Closed Session Real Property Listings

The Board's closed sessions must comply with California Law and its own policies. You know this, for COD Board Policy 2315 requires that, "Closed sessions of the Board shall only be permitted by applicable legal provisions including but not limited to the Brown Act, and the California Education Code."

At the January 21, 2022, COD Trustee Board meeting, I also addressed the Board under item 4.01 to indicate that the closed session topics agendized as item 20.06 were improperly noticed. The closed session listing in item 20.06 did not indicate what was to be discussed in closed session. A staff member acting as clerk indicated that this was a "clerical error" and would be remedied. However, you did not provide at the meeting the information omitted from the January 21st agenda. We find no record of an oral correction at the January 21 meeting to correct the Board's "clerical error", or a change in the minutes to address the Board's "clerical error". In short, you never told the public what it was entitled to know, much less when it was entitled to know it.

The agenda improperly listed the property negotiations under item 20.06 as follows:

"20.06 CONFERENCE WITH REAL PROPERTY NEGOTIATORS Property:

Parcel Numbers:

669-330-047, 502-190-003, 502-190-004, 502-190-008, 502-190-015, 502-190-020,
502-190-019, 502-190-017, 502-190-018, 687-510-053, 687-510-055, 622-160-048,
611-212-007, 611-212-008, 611-212-009, 611-212-040, 611-212-012, 778-113-001,

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778-113-002, 778-080-009, 778-080-012, 778-080-013 Agency Negotiator or Designee: Dr. Martha Garcia”

This listing is contrary to the specific requirements of the Brown Act for several reasons.

An agency that describes its real property negotiations conducted under Section 54954.5(b) must include the following on its agenda:

“CONFERENCE WITH REAL PROPERTY NEGOTIATORS

Property: *(Specify street address, or if no street address, the parcel number or other unique reference, of the real property under negotiation)*

Agency negotiator: *(Specify names of negotiators attending the closed session) (If circumstances necessitate the absence of a specified negotiator, an agent or designee may participate in place of the absent negotiator so long as the name of the agent or designee is announced at an open session held prior to the closed session.)*

Negotiating parties: *(Specify name of party (not agent))*

Under negotiation: *(Specify whether instruction to negotiator will concern price, terms of payment, or both)”*

(Government Code Section 54954.5(b)).

First, the agenda omits *what* is being negotiated. An agency is only allowed to discuss price of a real property negotiation, terms of a real property negotiation, or price and terms.

Here, COD has failed to indicate whether it intended to discuss price, terms of payment, or both. Additionally, COD has failed to indicate who the negotiating parties are as to each parcel. Naming your chief executive “or designee” amounts to no meaningful disclosure at all. The public is entitled to know who your negotiators are, and they must attend the meeting. Otherwise, you may be tempted to use closed sessions to discuss issues related to real estate acquisition from which you may not exclude the public.

Second, the item lists 22 parcels of property as one transaction. The 22 parcels listed together gives the impression that there is one real property transaction taking place involving all 22 parcels. That is not the case. As these are presented by APN only, one must use the Riverside County Assessor's website to discover these are in fact six separate groupings of parcels in different cities.

This could have been remedied if the Brown Act was followed.

The Brown Act requires that the street address of the property be specified, "or if no street address, the parcel number *or other unique reference*". (Gov. Code section 54954.5(b)) (Emphasis added). Here, COD has chosen to only use the APN numbers, though most of the properties do in fact have a street address (e.g., 45524-45474 Towne Street, Indio; McCallum Theater for the Performing Arts, 73000 Fred Waring Drive, Palm Desert; College of the Desert – Palm Springs campus, 2365 East Tahquitz Canyon Way Palm Springs). As listed, this is contrary to what is required under Government Code section 54954.5(b).

Moreover, the listing also includes APNs that according to the Assessor's property search portal indicate "no situs" for the property address (e.g., 611-212-040, 778-080-009, 778-080-012). These properties appear to be adjacent to other addresses (e.g., 45524 Towne Street, Indio; in the vicinity of 1293 6th St., Coachella). The "other unique reference" identifier under the Brown Act should have been used to allow the public to understand what parcels are being considered for purchase or sale by the COD.

The manner in which COD has identified properties for discussion in closed session denies the public not only the right to be informed, but also the ability of the public to comment before the Board makes decisions or provides direction. This pattern of obfuscation of what properties are being discussed, along with what issues are being discussed certainly does not promote the openness and transparency that the Board has recently championed.

Improper Use of Closed Session Real Property Exception

Most concerning is what appears to be the complete improper use of the real estate negotiation exception to the open meeting law to receive improper briefings and provide direction on topics not allowed under the Brown Act in a closed session.

Closed session discussion of topics *relating* to a real estate transaction-- not negotiation of the transaction itself—is forbidden. These forbidden topics include briefing on land acquisition efforts, design work of architects and engineers, and infrastructure and parking. (*Shapiro v. San Diego City Council* (2002) 96 Cal. App. 4th 904, 923). *Shapiro* also found improper closed session discussion of such topics as capping interim expenses, environmental impact report (EIR) considerations, alternative sites, traffic impacts, issues of alternative sites, and retaining experts and staff. *Id.* *Shapiro* noted that allowing such discussions would be “turning the Brown Act on its head, by narrowly construing the open meeting requirement and broadly construing the statutory exceptions to it.” *Id.* The court also noted, “in this case, the City Council is attempting to use the Brown Act as a shield against public disclosure of its consideration of important public policy issues, of the type that are inevitably raised whenever such a large public redevelopment real estate-based transaction is contemplated. The important policy considerations of the Brown Act, however, must be enforced, even where particular transactions do not fit neatly within its statutory categories.” *Id.*

Jeff Baker’s statements in open session on January 21, 2022, in reference to the June 24, 2021 closed session presentations as to designs of the Palm Springs campuses, as part of what he termed “a discussion of projects”, demonstrates the improper listing of real property negotiations and improper discussion of matters in closed session. That statement effectively proves that seven months ago your District violated the Brown Act just as San Diego did.

Equally concerning are Trustee Gonzalez’s comments at the February 17, 2022 Board meeting when, as reported in the Desert Sun, that she recognized a slide in the recent presentation by a community group as information from a closed session. She stated, “The information was a portion of the discussion that took place in closed session.” If price and terms of a real estate transaction properly discussed in a COD Trustee Board of Directors closed session meeting has been released, then indeed there should be concern. It is presumed that the Trustee’s comment was in reference to the Promises Made group’s presentation on February 1, 2022. However, the Promises Made group’s presentation did not touch “price and terms” of a real estate transaction. More proof the District is violating the law.

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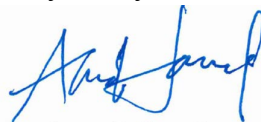
These Brown Act violations have not allowed the public to comment on decisions the Board is making in closed session. These improper actions must stop. The District's Board must discuss development of its various campuses in open sessions only and allow the public to hear what the Board is hearing, and be able to provide comment prior to decisions being made by the Board.

Conclusion

It appears that the Board is addressing some Brown Act improprieties. We hope that extends to closed session discussion relating to facilities design, costs of construction, and other items that are prohibited from being discussed outside of a noticed public meeting. Indeed, it appears your obligations under the Brown Act are no impediment to your managing the District's campuses, as both Trustee Wilson and Trustee Gonzales have asked for a "deep dive" into the history of COD's owning and developing property and those discussions, of course, must occur in open session.

Trustee Gonzalez noted on February 17, the Board will "bring light into [its] decision making and fiduciary responsibility and light to the deals that may have been made in the dark." The City of Palm Springs and those it serves certainly hope so.

Very Truly Yours,



Andrew L. Jared

Cc: Dr. Martha Garcia, Ed.D.
Rubén AríAztlán Pérez, Trustee
Aurora Wilson, Trustee
Bonnie Stefan, Trustee
Fred Jandt, Trustee
Bea Gonzalez, Trustee
Ireland Olson, Student Trustee
City Council of the City of Palm Springs
Michael A. Hestrin, District Attorney