BACK PAGE AND 1988 LCP DEVELOPMENT AGREEMENT AS AGREED CONDITION OF PUBLIC UNRESTRICTED USE OF ALL OF NEWPORT COAST RD. 16

May 4, 1994

Honorable Rodney O. Lilyquist
Senior Assistant Attorney General
110 West "A" Street
Suite 700
San Diego, California 92101

Re: Attorney General Opinion Request No. 93-1205
San Joaquin Hills Transportation Corridor;
Imposition of Tolls; Authority to Act; Notice

Dear Mr. Lilyquist:

This letter is written in response to the very recent statement of Deputy Attorney General Clayton Roche that did not intend to consider the more than 600 written communications from citizens and laypersons in drafting an opinion in response to certain questions posed to the Attorney General by Assemblymember Gilbert W. Ferguson. Because of the very small amount of time during which I have had to draft this letter, and the volume of written materials which are necessary to consider, of necessity this response is brief, and it would be my intention to supplement it, if necessary, before the review and opinion process is completed.

1. The Proper Questions to Consider.

Regrettably, the eight specific questions which were posed to the Attorney General by Assemblymember Ferguson, to which the San Joaquin Hills Transportation Corridor Association ("TCA") has narrowly responded, lent themselves to the avoidance by the TCA of the principal legal issues and the relevant facts which would lead to a conclusion that is substantially different than that advanced by the TCA. Consequently, in order for an accurate answer to be given to those citizens on whose behalf Mr. Ferguson brought their concerns to your attention, it is necessary to recast the issues somewhat more broadly.

Any opinion which the Attorney General would render on the specific questions actually raised, which does not at the same time deal with the overarching issues which were intended to be raised, will be substantially useless as guidance to those

citizens, the legislature, the affected public entities and those judges and justices who will ultimately rule on these precise questions.

I have had an opportunity to read the March 25, 1994, letter on behalf of the General Counsel to the TCA, the letters from Gary H. Hunt, Executive Vice President of the Irvine Company, and letters from John R. Griset, on behalf of the County Counsel of the County of Orange, which were sent to me 10 days ago. Collectively, they do not address and certainly do not resolve the legal and factual issues of the TCA's decision to attempt to impose tolls on a pre-existing public road.

The two questions which must be answered are: one, whether any portion of an existing free thoroughfare may be converted to a toll road and, if such conversion is legal, two, was the public given adequate legal notice of this conversion and of its environmental impact.

2. The Proper Terminology to Be Used.

In order to reach an accurate conclusion, it is necessary to understand not only the terminology which is used but the significance of the each of the words which is employed in discussing this issue. Any argument or opinion which confuses the San Joaquin Hills Transportation Corridor ("SJHTC"), a legal designation first employed in the late 1970's, with the wholly dissimilar concept of a toll road, as TCA has consistently done, will inevitably lead to a useless conclusion.

Similarly, while TCA cleverly seizes upon the use in Assemblymember Ferguson's letter of the term "abandonment" or "abandon", the effected citizens here to not contend nor do they believe that the process and procedures undertaken to date and contemplated in the future will constitute legal abandonment of any portion of Newport Coast Drive. Indeed, the TCA is quite correct when it states no public entity has caused the abandonment of any portion of Newport Coast Drive. The focus on that issue therefore confuses rather than enlightens.

3. Notice Of The Existence Of The Corridor Does Not Constitute Notice Of The Intention To Seek To Impose A Toll

The SJHTC was established conceptually and in general terms in November 1979 by a Corridor Route Location Study for a major freeway route in order to limit development in the area of the proposed route which would lead to high land acquisition costs later on. The SJHTC is part of the overall circulation plan of the Master Plan of Arterial Highways ("MPAH") for Orange County.

In 1983, the legislature amended the law which established Route 73 along the present Corona del Mar Freeway to the present alignment of MacArthur Boulevard to provide for an alignment

Transportation Corridor prior to 1987, because the concept of imposing a toll for the use of any portion of that road simply did not exist.

Similarly, the Attorney General must also disregard each and every assumption or argument made by TCA that giving notice of the alignment of the Corridor ever constituted notice to the public or anyone else that a toll would be imposed on any arterial route or portion thereof which fell into the proposed Corridor. Notice of the alignment of the corridor does not give notice of the imposition of the toll during any period of time that the SJHTC was conceived as a freeway and, indeed, in light of the clear language of Sts. & Hwy. Code § 373 continues to state that Corridor is a freeway, a point which becomes extremely significantly in a discussion of the failure that TCA or anyone else to give adequate notice of the TCA's desire to impose a toll for the use of a portion of Newport Coast Drive, discussed in Section --- hereinafter.

4. The Concept of "Abandonment" Plays No Part In This Discussion.

It is unfortunate that Assemblymember Ferguson's letter of January 7, 1994, expanding his earlier question into eight separate questions used the terms "abandon" and "abandonment" in questions 1, 2, 3, 4, 5 and 8. The concept of "abandonment" has a very specific legal meaning which is irrelevant to the disposition of the issues generally raised by the citizens through Mr. Ferguson, and while it serves the purposes of the TCA gleefully to latch onto that concept in its March 25, 1994, letter, any consideration of this issue by the Attorney General will be a waste of time and not responsive to the real issues.

As TCA correctly states, the Streets & Highways Code addresses abandonment in its streets in Part Three of Division Nine, Sts. & Hwy. Code § 8300 et seq. Not only does the vacation of an existing public street require specific legislative enactments by the local jurisdiction, none of which have taken place here, vacation or abandonment of a street, road or highway leads to the termination of the public right to use such street, road or highway, and that concept is irrelevant here. What the TCA wishes to have the Attorney General approve, and what is not permitted under existing law, is the conveyance or relinquishment to the TCA for use as a portion of the toll road which TCA wishes to construct over the route of the SJHTC, either passively or directly, of an existing highway constructed and dedicated, and in use for 2 1/2 years, as a non-tolled public by-pass route between MacArthur Boulevard and Pacific Coast Highway, around heavily congested commercial streets in Corona del Mar.

For that reason, virtually all of the legal argument presented by the TCA in its March 25, 1994, letter is completely irrelevant.

5. Authorization Of The Inclusion Of Public Roads In The Freeway And Expressway System Does Not Constitute Authorization For Their Inclusion In A Toll Road.

The courts have explicitly held that the conversion of a street or highway into a freeway or expressway does not constitute its abandonment. People ex rel. Department of Public Works v. Vallejos (1967) 251 Cal.App.2d 414, 418. Instead, the law explicitly authorizes the incorporation of an existing street or highway into a freeway or an expressway. Streets & Highway Code §§ 941.1 and 1800. Moreover, no existing intersecting street or highway may be closed by the construction of a freeway except pursuant to an express agreement with the city council or Board of Supervisors having jurisdiction over that street or highway. Sts. & Hwy. Code § 100.2. Pursuant to such agreements, the state agrees to pay for all new construction and the jurisdiction agrees to accept control and maintenance of the changes at its expense. City of Fresno v. California Highway Commission (1981) 118 Cal.App.3d 687, 694.

A freeway may only be constructed without the necessary freeway agreements where there is a gap in an existing freeway, a freeway agreement is not possible, there is least one feasible alternative route to the proposed freeway and an environmental impact report or statement has examined the impact of the alternative route alignment on the communities involved, among other conditions. Sts. & Hwy. Code § 100.4.

Manifestly, therefore, if the SJHTC were being constructed by the TCA as a freeway or expressway, it would be entirely proper to incorporate Newport Coast Drive into the Corridor, but the construction of this or any other portion of the Corridor without approval of the affected communities would be forbidden. The essence of the TCA's argument is therefore that its powers are greater and more sweeping than the statutory powers granted to the State of California for the construction of a freeway and that the protection afforded to the residents of the area affected by the TCA's attempt at conversion of a portion of Newport Coast Drive to a toll road, and the cities and county in which they reside, nonexistent. And this unprecedented grab for power is based on absolutely nothing more than reference to Section 66484.3 and the implicit, unstated, and wholly unsupportable assumption by the TCA that a toll road is the same as a freeway or expressway.

6. The Power To Convert An Arterial Street To A Freeway Or Expressway Does Not Equate To The Power to Convert Such A Road To A Toll Road.

The TCA argues that since its constituent members have the statutory power to convert an existing street or highway into a freeway or expressway, that the TCA has the same authority, and of course it does. Sts. & Hwy. Code §§ 941.1 and 1800. If all that the TCA were attempting was to turn Newport Coast Drive into

a freeway or expressway, this opinion and subsequent litigation would be entirely unnecessary. But that argument, based upon the statutory authority of an agency created under the Joint Exercise of Powers Act to exercise the powers statutorily granted to its constituent jurisdictions is irrelevant unless there is also statutory authority for the County of Orange or any one of the member cities of the TCA to convert an existing street or highway into a toll road, and that power simply does not exist.

Since a county or city is authorized only to convert an existing highway to a freeway or an expressway, and since the authority of the TCA under the Joint Exercise of Powers Act is no greater than the authority of the cities and county which signed the Joint Powers Agreement. As the cities and county do not have the power to convert an existing street or highway to anything except a freeway or expressway, TCA does not have that power either. See Government Code §§ 6502 and 6508.

Section 6502 simply authorizes two or more public agencies jointly to exercise any power which both have in common, while the separate agency which is authorized to be created to administer such an agreement is granted no more than the common power specified in the agreement. Government Code §§ 6506-6508.

No statute or case has ever construed Section 941.1 or Section 1800 of the Streets & Highway Code to grant to a city or county the power to convert an existing street or highway into a toll road. Since neither the county nor the cities are authorized to convert a public street into a toll road, neither is the TCA.

In the recent case of Citizens Against Gated Enclaves v. Whitley Heights Civic Association (March 23, 1994) --- Cal.App.4th --- ('94 Daily Journal D.A.R. 3832), the Court of Appeal dealt with a similar situation, and struck down an attempt to limit the use of previously public streets. In so holding, the Court held that the streets of a city belong to the people of the state and every citizen of the state has the right to use those streets, subject to legislative control by the state and not by a municipality. 1994 Daily Journal D.A.R. at 335, and see City of Lafayette v. County of Contra Costa (1979) 91 Cal.App.3d 749, 754-757. The only permissible regulation of a public street is as to the manner of use. Id. It is the legislature, and not a city or county or joint powers agency which since no exercise those city and county powers, which may exercise control as to the traffic thereon or the manner of use of such streets; all persons have an equal right to use them for the purposes of travel by proper means. Id.

It is settled law that the right of control over street traffic is part of the sovereign power of the state and not of the inferior public entities such as cities or counties. Ex parte Daniels (1920) 183 Cal. 636, 639. Citizens having an inalienable right to use all of the public streets, are subject only to reasonable regulations adopted by the legislature: the use of

highways for purposes of travel and transportation is not a mere privilege, but a common and fundamental right, of which the public individuals cannot rightfully be deprived. Escobedo v. State of California (1950) 35 Cal.2d 870, 875-876 (overruled on other grounds), Rios v. Cozens (1972) 7 Cal.3d 792, 799. Consequently, in the absence of legislative authority to the contrary, a city or county may not restrict the right to travel upon one of its streets. See City of Lafayette v. County of Contra Costa, supra, 91 Cal.App.3d at 754. And the entire field of regulations of the use of existing city and county streets and highways is subject to state regulation and no local authority is entitled to enact or enforce any law to the contrary. Vehicle Code § 21. Moreover, no exceptions may be implied to the broad powers retained by the legislature to the exclusions of the power of cities, counties and joint power agencies. City of Lafayette v. County of Contra Costa, supra, 91 Cal.App.3d at 756-757.

The TCA has not provided any authority that removal of a public road and replacing it with a road to its excess is restricted of the imposition of a toll is a power delegated to it or to its constituent county and city by the legislature, and no such authority appears. Indeed, the express language of Section 66484.3 only permits TCA to exercise the power to establish and collect toll charges and pay the cost of construction of a new road, which the conversion of any portion of Newport Coast Drive to a toll road is clearly not.

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As amended in 1987, Section 66484.3(f) merely authorizes the TCA to construct a toll road but subsection (g) narrowly defines construction to include "design, acquisition of rights-of-way, and actual construction," but does not authorize the conversion, realignment or supplanting of a previously existing highway.

Indeed, the TCA assumes away the question entirely when it suggests that although it does not have the express power to convert a free public road into a toll road, that power is "necessary to the exercise" of the powers expressly granted to it, because that argument is utterly without any limits. If without any further grant of authority, the TCA may turn a portion of a public road into a portion of a toll road without an express statutory grant of that right, it may also and with equal reason have the power to take any property it wishes and do with that property what it will, so long as such taking and such use was arguably for toll road purposes.

While abolishing all property rights within the Corridor may be convenient or useful to the TCA, there is no constitutional basis to turn the TCA into an absolute monarch with absolute extra-constitutional powers by implication, and there is no hint in Section 66484.3 or any other law that this result was ever contemplated or intended by the legislature.

In short, having failed to offer any direct statutory authority for doing what manifestly neither the Count, of Orange nor the

which was apparently intended to constitute the SJHTC and simultaneously designated it a freeway. Sts. & Hwy. Code § 373. This designation has never been changed. Consequently, SJHTC will not become a state highway unless it is a freeway.

In 1984, the legislature enacted Government Code § 66484.3 which permitted the collection of developer fees for the purpose of constructing bridges and major thoroughfares. In 1986, a Joint Exercise of Powers Agreement was executed by the County of Orange and certain cities for the purpose of conducting transportation planning, financing and the construction of a major thoroughfare (in the) SJHTC, which also created the San Joaquin Hills Transportation Corridor Agency ("TCA").

In May 1987, a draft Environmental Impact Report describing a proposed alignment of Pelican Hill Road ("PHR") was circulated, describing the preferred alignment for PHR as being either parallel to or overlapping the alignment of the future, SJHTC freeway. Certified adopted EIR

It was not, however, until the September 1987 amendments to Government Code § 66484.3 that the TCA was authorized to seek to use the collection of tolls as an additional means of financing the construction of a thoroughfare in the Corridor and it was not until October 1988, when the 1986 Joint Exercise of Powers Agreement which had created the TCA was amended, that the TCA was authorized to do so pursuant to the authority of Section 66484.3.

For this reason, no agreement entered into by the TCA made by the County of Orange, any city, any landowner and any other entity, and no notice disseminated or hearing held, could have involved the effect or impact of the SJHTC as a toll road, because the collection of tolls for the use of any portion of the Corridor was neither contemplated nor known.

This is a vitally important fact, one which is repeatedly and consistently glossed over by TCA in its March 25 letter. Because the Corridor was not a toll road but was (and still is; Sts. & Hwy. Code § 373) a freeway or expressway, its alignment and the issue of whether any arterial street was parallel to or absorbed in the Corridor was irrelevant. Whether Bonita Canyon Road, Pelican Hills Road, or Newport Coast Drive was understood prior to 1987 to be part of or separate from the Corridor was therefore utterly irrelevant, because it (made) no earthly difference to any person travelling from MacArthur Boulevard to Coast Highway on what is now Newport Coast Road whether that travel was on an arterial street, an expressway or a freeway, except to the extent that higher speeds were permitted on a freeway or expressway.

Consequently, the Attorney General must disregard each and every reference by TCA to provisions of law or notice given while the alignment of the arterial route variously known as Bonita Canyon Road, Pelican Hill Road and Newport Coast Drive was aligned with subsumed under the generally designated San Joaquin Hill

constituent cities may do, the TCA has failed to provide any statutory justification for the act which it intends.

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THE ROAD IS PART OF A QUID PRO QUO FOR A COASTAL PERMIT AND IS MEMORLIZED IN THE IRVINE COAST DEV. PERMIT, AS THE LCP REQUIRED

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JOINT POWERS AGREEMENT HAS NOT THE AUTHORITY TO AMEND 1988 LOCAL COASTAL PROGRAMS BY TOLLING PELICAN HILLS NEWPORT COAST ROAD OR A PART.

[] ADD IRVINE COAST DEVELOPMENT AGREEMENT

COUNTY OF ORANGE FILED JUN 9 1988

PAGE 9 1.2.27. 1988 LOCAL COASTAL PROGRAM

PAGE 11 2.0 "CONSISTENCY WITH COUNTY'S GENERAL PLAN AND CERTIFIED LOCAL COASTAL PROGRAMS."

2.3 "SUMMARY OF MAJOR PUBLIC BENEFITS."

** BENEFITS TO BOTH COUNTY (INCLUDING WITHOUT LIMITATIONS, THE EXISTING AND FUTURE RESIDENTS AND POPULATIONS OF COUNTY) AND OWNER.

PAGE 12 2.3.1 "TRANSPORTATION IMPROVEMENTS"

PELICAN HILL RD.

* RELIEVES CONGESTION DIVERSION OF TRAFFIC FROM PACIFIC COAST HIGHWAY MACARTHUR & PCH.