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VIA FACSIMILE AND U.S. MAIL

William Woollett, Jr.  
Chief Executive Officer  
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Re: City of Irvine -- Newport Coast Drive Right-of-Way

Dear Mr. Woollett:

You have asked us for our legal opinion regarding recent actions by the City of Irvine's City Council regarding the Newport Coast Drive right-of-way. In particular, you have asked us to comment on the following issues:

1. Does the City have any binding contract or other explicit legal obligation to transfer to the San Joaquin Hills Transportation Agency ("SJHTCA") certain Newport Coast Drive roadway easements necessary to completion of the San Joaquin Hills Transportation Corridor ("Corridor")?
2. Does the City's threatened violation of its legal obligations expose the City to substantial monetary damages? If so, what is the probable measure of these damages?
3. Can the SJHTCA properly resort to the Courts to compel the City to transfer the roadway easements, regardless of the City's desire? If so, would the City bear the expense of this legal action?

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**Short Answer:**

The City has a binding legal obligation to transfer the roadway easements. This obligation arises from two sources: the explicit terms of the Joint Powers Agreement, and general principles of eminent domain law.

Any failure to transfer the easements would expose the City to substantial monetary damages, including delay damages which could exceed \$225,000.00 for each day the City's actions interfered with completion or opening of the Corridor. The City would also bear the SJHTCA's legal expenses in obtaining title to the right-of-way through eminent domain.

**Assumed Facts:**

The City of Irvine is one of the signatories of the First Amended and Restated Joint Exercise of Powers Agreement Creating the San Joaquin Hills Transportation Corridor Agency ("JPA"). As of November 9, 1988, the City entered into the JPA, and became a member of the SJHTCA.

The City Council of the City of Irvine recently voted to refuse to release certain roadway easements to the SJHTCA and to refuse to approve the Major Thoroughfare Agreement. These easements encumber the right-of-way for Newport Coast Drive. This right-of-way is crucial to completion of the San Joaquin Hills Transportation Corridor ("Corridor") and the opening of the Corridor to traffic.

**Discussion:**

The JPA provides that "when it is within its power to do so, each party shall be individually responsible for the preservation and acquisition by dedication pursuant to Title 7, Divisions 1 and 2, of the Government Code of rights-of-way and similar property interests within its territory which are necessary to accomplish the purposes of this agreement." (JPA, p.10, art. 4.4.) In other words, since entering into the JPA, the City has been obligated to preserve the Corridor right-of-way for the SJHTCA.

The JPA also sets forth specific remedy in the event a member agency fails to meet these requirements. The JPA provides:

[I]n the event that a Party fails to acquire these rights-of-way by the above-mentioned means . . . . or fails to preserve such rights-of-way and property

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interests by the above-mentioned means . . . that Party shall compensate the Agency for all costs (including attorneys' fees) incurred by the Agency in acquiring said rights-of-way and property interests. (ibid.)

These two provisions impose a contractual obligation on member agencies such as the City. Under these provisions, the City has a binding obligation to "preserve" right of way for the Corridor. This obligation is an "individual responsibility," accepted by each of the member agencies when it signed the JPA.

The SJHTCA also has a separate avenue for acquisition of the roadway easements, independent of the JPA. No dispute exists that the SJHTCA has the power of eminent domain. It has statutory authority to acquire real property pursuant to, inter alia, California Government Code sections 6502; 66484.3(f); 25350.5 and 37350.5 and Streets and Highways Code, sections 113, 943 and 31201. Moreover, the SJHTCA's proposed use for the easements is deemed a "more necessary public use" than the City's use. (See, Gov't Code, § 666484.3, subd. (f); Sts. and Hy. Code, § 31201.). Moreover, the Corridor is a more necessary public use since the SJHTCA seeks to facilitate the use of the easements by the State, as part of State Route 73. (See Code Civ. Proc. 1240.640.) The easements do not fall into any protected class of public property; they are intended for the very use the SJHTCA contemplates: surface transportation.

Significantly, the City would bear the ultimate expense of any condemnation proceeding. The JPA makes clear that the City must "compensate the Agency for all costs (including attorneys' fees)" incurred by the Agency in this context. Most importantly, the Agency could pursue condemnation without the consent or cooperation of the City. The outcome of such an action would not depend on the consent, or lack of consent of the City.

The City's failure to honor its obligations under the JPA would also potentially expose the City to substantial delay damages. The Agency would have the right to institute a separate lawsuit against the City for such damages for breach of the contractual obligations listed above. The Corridor is a complex construction project. Even ostensibly minor delays can create major delays and significant adverse consequences. The measure of such damages could include lost toll revenues; damages due the contractor; and other increased construction expenses. In another context we recently approximated these damages as capable of accruing at the rate of \$225,000.00 per day.

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**Conclusion:**

The City's recent decision regarding the Newport Coast Drive easements and the Major Thoroughfare Agreement puts the City at risk of a violation of the JPA. The City's action is not likely to prevent the SJHTCA from ultimately acquiring the easements - - by eminent domain if necessary. The City's actions could, however, expose the City to substantial liability for damages. At the very least, the City may be liable for the SJHTCA's legal fees and cost in obtaining title to the easements. In addition, we note that the City will continue to have personal injury liability for accidents and other injuries occurring on Newport Coast Drive as long as the City retains an easement interest.

Very Truly yours,



Robert D. Thornton  
of NOSSAMAN, GUTHNER, KNOX & ELLIOTT, LLP

JCM/cjd