



CUSD RECALL COMMITTEE

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February 10, 2008

Via Email

Trustees Sheila J. Benecke, Marlene Draper,

Mike Darnold and Duane Stiff

Capistrano Unified School District

33122 Valle Road

San Juan Capistrano, California 92675

Re: Complaint #3 re Brown Act Violations
Improper February 11, 2008 Meeting Agenda

Dear Trustees Benecke, Draper, Darnold and Stiff:

The purpose of this letter is to demand that you postpone and remove from the February 11, 2008 Board Agenda Items No. 37 – 41 relating to the construction of several multi-million dollar construction projects at the \$150,000,000 San Juan Hills High School. For the reasons set forth below, taking action on these items would constitute a knowing and intentional violation of the California Public Records Act, the Brown Act and other applicable laws requiring competitive bidding.

This is our third complaint against you in recent weeks. We have been informed from highly placed and very reliable sources that Superintendent Carter has privately stated that CUSD cannot answer the numerous questions raised by the public and by reform Trustees Addonizio, Bryson and Christensen **because a former Assistant Superintendent either destroyed or took all the official SJHHS project files when he “retired” from the school district earlier this year.** Obviously, the answers to these questions could prove very embarrassing to Trustees Benecke, Draper, Darnold and Stiff (and the Fleming-era staff at CUSD) – not to mention possibly expose those involved to legal and criminal liability. We believe these recurring violations demonstrate a specific intention to violate the law and conceal from the public information that you know we have a right to receive – a criminal act. The only way to **correct and cure** these violations (and to avoid legal action to compel such compliance) is for the Board to **rescind completely** the illegal 4-3 vote taken during your December 10, 2007 Board meeting.

I. BACKGROUND.

On January 14th, we delivered to you a complaint for actions that you took during your regular Board Meeting held on December 10th, 2007 in violation of the Brown Act and other applicable laws (our “Original Complaint”).

On January 22nd, we delivered to you a second letter (the “Second Complaint and Public Records Act Request”) detailing new and serious violations of the Brown Act and making a formal request under the California public records act that CUSD make available to us for review, in their entirety, each of the bids described in the Bid Summary Sheet attached as Exhibit A to the staff report for Agenda Item #2 on the January 23rd Special Meeting agenda.

On January 6th, the Orange County Register published a story in which you acknowledged and confirmed you had once again violated the Brown Act.

As of this date, we have never received any response from you.

However, we did receive on February 6th a short, three-sentence letter from Superintendent Carter dated February 4th, informing us that you were placing on the agenda for your February 11, 2008 board meeting “agenda items to cure and/or correct the action of the Board taken on December 10, 2007...”

As of this date, no one at CUSD has provided to us full and complete copies of the public records we requested under the California Public Records Act.

II. SUMMARY OF LEGAL VIOLATIONS.

For the reasons set forth below, the Board of Trustees is prohibited from taking action on these agenda items because doing so would constitute a knowing and intentional violation of the California Public Records Act, the Brown Act and other applicable laws requiring competitive bidding.

1. Violation of the California Public Records Act. In our Second Complaint and Public Records Act Request, we made a formal request under the California public records act that CUSD make available to us for review, in their entirety, each of the bids described in the Bid Summary Sheet attached as Exhibit A to the staff report for Agenda Item #2 on the January 23rd Special Meeting agenda.

You have now admitted you violated the Brown Act on December 10, 2007 when you voted to advertise for bids for a football stadium, aquatics center, track and field and classrooms at San Juan Hills High School. Based upon that single illegal vote, it seems highly likely that many, if not all, of these bids included terms, conditions, assumptions and amounts for the stadium – as well as the classrooms, aquatics center and track and field.

The public records we requested are critical documents relating to these very projects – and the agenda items now being proposed “to cure and/or correct the action of the Board taken on December 10, 2007...”

In enacting the California Public Records Act, the California legislature declared that it is a fundamental and necessary right of every person in this state to have access to information concerning the conduct of the people’s business (See California Government Code Section 6250).

Your proposal to construct a football stadium, aquatics center, track and field and additional classrooms at San Juan Hills High School is the “people’s business.” In addition, your latest proposal to “cure and or correct” the actions you took in violation of the Brown Act by approving Agenda Items No. 37 – 41 on this Monday’s Board Agenda is also the “people’s business.”

We have a legal right to know all the details, and to review and analyze all of these public records, before the Board conducts any discussion and takes any action with respect to these matters.

California Government Code Section 6253(b) requires that you shall “make the records promptly

available.” Section 6253 (c) requires that you respond to our request for public documents *within ten days*. In addition, Section 6253(d) prohibits you from taking any action to “delay or obstruct the inspection or copying of public records.”

These are only the bare minimum standards.

In fact, in Section 6253(e), the legislature urged all governmental agencies to find ways to provide citizens with faster, greater, and more efficient access to public records.

Your complete failure to respond to our public records act request once again demonstrates a pattern and specific intent to conceal from the public, information that you knew should have been made available to the public.

Unfortunately, by your complete lack of response to our Second Complaint and Public Records Act Request, you have once again failed to satisfy even the bare minimum legal standard.

CUSD obviously has the records we requested readily available because you are now proposing to take action this Monday to approve and award the bid to Mepco Services, Inc. – one of the more than 20 bids that were delivered to CUSD in direct response to the illegal vote that you took during your December 10, 2007 meeting.

There is no legal basis upon which you can further delay and withhold this critical information. As a result, we hereby demand that:

(a) Produce the Public Records. You produce and make available to us full and complete copies of all the requested public records so that we may review and analyze them with our legal counsel prior the Board of Trustees taking any formal action to approve any of the suspect bids; and

(b) Postpone Agenda Items No. 37 – 41. Postpone and remove from the February 11 Board Agenda Items No 37-41 relating to the construction of several multi-million dollar construction projects at the \$150,000,000 San Juan Hills High School.

You cannot legally discuss or take any action on these agenda items until after you have complied with the California Public Records Act and provided us with full and complete copies of all the requested public records and a reasonable period of time to review and analyze these materials with our legal counsel. Taking action on these items before you have provided us with full and complete copies of all the requested public records and a reasonable period of time to review and analyze these materials with our legal counsel would constitute a knowing and intentional violation of the California Public Records Act.

2. Violations of the Brown Act. For the reasons set forth below, it would be a violation of the Brown Act for the CUSD Board of Trustees to discuss and take action on the February 11th Board Agenda Items No. 37 – 41 relating to the construction of several multi-million dollar construction projects at the \$150,000,000 San Juan Hills High School.

(a) Agenda Item #37 (Partial Rescission) is Flawed and Illegal. As set forth in our Original Complaint, on a 4-3 vote, Trustees Benecke, Draper, Darnold and Stiff voted to approve seeking bids for the stadium complex. However, even though there was nothing on the agenda related to seeking bids for a multi-million dollar aquatics center, additional two story modular classrooms, or a new track and field at SJHHS, each of you also voted to approve sending these highly controversial projects out for bid – **all without any prior notice to the public -- a clear violation of the Brown Act**. As a result, we demanded that CUSD place an item on its next official Board agenda calling for the complete rescission

of the illegal vote taken during the December 10, 2007 Board meeting.

Agenda Item #37 on the February 11th agenda is flawed and illegal for the following reasons:

(i) Must Rescind Entire Illegal Action. Agenda Item #37 does not call for a rescission of the illegal vote taken on December 10th, but only for “**a portion of the previous motion...**” This is not sufficient. Please remember that on December 10th, only a single motion was made and only a single 4-3 vote was taken to approve the stadium complex, aquatics center, additional two story modular classrooms, new track and field, and other facilities at SJHHS. (This is confirmed by the minutes from the December 10, 2007 meeting and the January 23rd staff report for agenda item #1 and the February 11th staff report for Item #37). You now admit that single motion/vote was illegal. As a result, the only way to correct and cure that illegal act is to now completely rescind the illegal vote.

(ii) There are “Financial Implications.” The Board violated the law when it took the illegal actions of December 10th. That illegal act has already resulted in substantial costs and expenses to the school district – costs and expenses that the staff report fails to disclose. The staff report for agenda item #37 is incorrect and misleading because it states “There are no financial implications associated with this item at this time.” In reality, as evidenced by the staff reports attached to the agenda for the January 23rd Special Meeting as well as for the February 11th regular meeting, CUSD staff has already expended a tremendous amount of time, effort and school district resources in an effort to obtain bids for each of these items. When the Board votes to rescind the illegal vote from December 10th, the school district will have “wasted” much if not all of that time, effort and money. Those costs and expenses are real and substantial and must be disclosed to the public under the heading of “Financial Implications.”

(b) Agenda Item #38 (Advertise For Bids for Modular Classrooms) is Flawed and Illegal.

(i) Where are the classrooms? CUSD had applied to the State for funds (and received funds from the state) to construct a high school for 2,400 students at SJHHS – but CUSD only constructed classrooms for 1,700 students. CUSD received the money to build all the classrooms – the school district has admitted this in writing and it's also documented on the State Allocation Board website. Nonetheless, the classrooms have not been built and CUSD staff now claims they don't have the money.

(ii) Financial Implications. The staff report is incomplete and misleading because it states that the project would be funded from Ladera CFD funds. However, no mention is made of the fact that CUSD has previously allocated these very same CFD funds to pay the COP debt obligation on the \$52,000,000 Administration Building. As a result, if these CFS funds were to be allocated to pay for this particular project, then:

(a) those Ladera CFD funds would no longer be available to pay the COP debt obligation for the administration building – thereby exposing the general fund to pay for the COP debt obligation; and

(b) those Ladera CFD funds would no longer be available to improve any of the schools actually located in Ladera Ranch (which is unfair to the residents of Ladera Ranch who pay those taxes).

These serious financial implications must be disclosed to the trustees and the public in the staff report.

(c) Agenda Item #39 (Waiver of Authorization to Advertise For Bids for Synthetic Track) is Flawed and Illegal. See rationale presented in Sections 2(d) and 3, below.

(d) Agenda Item #40 (Award of Stadium/Track Bid) is Flawed and Illegal. Agenda Item #40 on the February 11th agenda is flawed and illegal for the following reasons:

(i) Board Must First Properly Vote to Authorize Advertising for Bids. As set forth above, CUSD must rescind the entire illegal vote (including the decision as to whether to advertise for bids on the stadium) that was taken in violation of the Brown Act during the December 2007 meeting. The second line of the staff report is incorrect when it states that *“This bid was properly advertised...”* because the Board’s 4-3 single motion/vote to advertise for bids was in violation of the Brown Act because the motion and vote included numerous items that were not properly agendized. As a result, the Board cannot award the bid to Mepco Services, Inc. because the CUSD Board has never legally voted to approve advertising for bids. No bid may be accepted until the Board has first legally voted to approve advertising for bids for the stadium complex.

(ii) All Bids Were Solicited Illegally and Must Be Rejected.

(iii) Synthetic Track is Not Part of the Stadium. In addition to the football stadium, Agenda Item #40 is now also proposing to award a bid for a “Synthetic Track.” At no time was this synthetic track part of the football stadium and at no time has the Board approved going out to bid for a synthetic track. In fact, prior staff reports and agendas expressly stated that the track was a facility to be approved separate and apart from the stadium. For example:

(a) the December 10th staff report clearly defines the “stadium complex” by stating, *“one of the facilities yet to be built is the stadium complex, inclusive of bleachers and associated concession and restroom buildings.”* (emphasis added). The track and field was never defined as part of the stadium.

(b) the December 10th staff report also confirmed the track was not part of the stadium and that it would require a separate Board action by stating *“The proposed all-weather track is planned for installation after the stadium has been completed (pending board approval) in order to prevent irreparable damage from construction activities.”* (emphasis added)

(c) most importantly, the minutes from the December 10th meeting also expressly confirm the track and field were never considered part of the stadium complex, but rather were some of the additional facilities (along with the additional classrooms and aquatics center) that were illegally added into the December 10th agenda item that only covered the football stadium. The minutes state in pertinent part, *“OCDE legal counsel to the Board was present at the Board meeting and provided an opinion regarding the track and field (and amendment) not included within this item was appropriate for action.”* (emphasis added)

(iv) Board Previously Approved a Bid and Paid for the Track – Where is it? On April 2, 2007, the CUSD Board of Trustees awarded a bid to Edge Development (which company was not the low bidder) to install the synthetic field turf and all weather track at SJHHS. As a result, approval of this item on the Board’s agenda relating to the track would be redundant: CUSD has already spent the money and paid Edge Development to construct this track – but the track has not been built. What happened to all this money previously authorized by the Board on April 2nd? Where is the track the CUSD Trustees already paid for? Did staff provide to the trustees and the public incorrect and misleading information on April 2, 2007? This is highly disturbing and CUSD must answer these questions. The Board may not legally award a bid on February 11th because the Board has previously awarded a bid and paid money to Edge Development to install the exact same track.

(v) Bids Opened on January 17, 2008 – Public Records Act Request.

Exhibit A to the staff report for this item is the “Bid Summary” sheet, which confirms the bids were opened on January 17th. The bids themselves are not attached. However, based upon the single illegal vote on December 10th (that purported to authorize advertisement for bids for the stadium, classrooms, aquatics center and track and field), it seems highly likely that many, if not all, of these bids included bid amounts for the stadium – as well as the classrooms, aquatics center and track and field. For this reason, each of these bids must be rejected and new bids obtained – if and when the CUSD Board lawfully votes to advertise for bids for each of these separate projects. Each of those bids should be made available to the Trustees and to the public in the published staff report. As set forth above, in our Second Complaint and Public Records Act Request, we made a request under the California public records act that CUSD make available to us for review, in their entirety, each of the bids described in the Bid Summary Sheet attached as Exhibit A to this staff report. You have failed to respond to this request and are currently in violation of the Public Records Act. We hereby demand, once again, pursuant to the terms of the California public records act that CUSD make available to us for review, in their entirety, each of the bids described in the Bid Summary Sheet attached as Exhibit A to this staff report. As set forth under item #1 above, we also demand that CUSD take no action with respect to Agenda Items No 37-41 until after you have complied with the California Public Records Act and provided us with full and complete copies of all the requested public records and a reasonable period of time to review and analyze these materials with our legal counsel.

(vi) Financial Implications. The staff report is incomplete and misleading because it states that the project would be funded from Ladera CFD funds. However, no mention is made of the fact that CUSD has previously allocated these very same CFD funds to pay the COP debt obligation on the \$52,000,000 Administration Building. As a result, if these CFS funds were to be allocated to pay for this particular project, then:

(a) those Ladera CFD funds would no longer be available to pay the COP debt obligation for the administration building – thereby exposing the general fund to pay for the COP debt obligation; and

(b) those Ladera CFD funds would no longer be available to improve any of the schools actually located in Ladera Ranch (which is unfair to the residents of Ladera Ranch who pay those taxes).

These serious financial implications must be disclosed to the trustees and the public in the staff report.

(e) Agenda Item #41 (Advertise for Bids for Aquatics Facilities) is Flawed and Illegal. Agenda Item #41 on the February 11th agenda is flawed and illegal for the following reasons:

(i) Board Must Approve A Design Concept Before Seeking Bids.

(ii) January 8th 2008 Approval of “Cost Estimator” Was Improper and Should be rescinded.

(iii) Financial Implications. The staff report for agenda item #3 is insufficient and misleading to the public because it fails to include any estimate of the costs associated with completing an aquatics center at SJHHS. That estimated cost to the district should be disclosed to the Trustees and to the public under the heading of “Financial Implications.”

(iv) January 8, 2008 Special Meeting Approvals re SJHHS Are Fruit of the Poisonous

Tree. On January 8th, another Special Meeting was held. A number of agenda items related to moving forward with the facilities at SJHHS that were the subject of the illegal 4-3 vote taken in the Board's December 2007 meeting. Trustee Ellen Addonizio objected to the Board taking any further action on any of these items because she believed the Brown Act had been violated in December, and that it would not be appropriate for the Board to take any actions to further pursue the development of those facilities until the Board had remedied those Brown Act violations. She moved to continue those items until the Brown Act issues had been resolved. Unfortunately, her motion was ignored and she left the meeting in protest to avoid a further violation of the Brown Act.

3. Violations of California Competitive Bidding and Public Works Laws. For the reasons set forth below, it would be a violation of the California laws governing competitive bidding and public works for the CUSD Board of Trustees to discuss and take action on the February 11th Board Agenda Items No. 37 – 41:

(a) CUSD Is Required to Follow the Competitive Bidding Process. Like most public agencies in California, school districts are subject to competitive bidding laws when purchasing or leasing equipment, materials or supplies, or when contracting for services, repairs, or public projects. The proposed projects at SJHHS are public works projects as defined under the Public Contract Code. As such, CUSD is required to award contracts for these projects pursuant to the competitive bidding process. The basic competitive bidding rules appear at Public Contract Code Sections 20110-20118.4 for K-12 districts.

(b) CUSD Must State the Work to Be Done and Reject Bids That Are Non-responsive. CUSD must reject bids that are “non-responsive,” i.e., bids that do not comply with all statutory requirements or do not substantially conform to the notice calling for bids and the specifications. Because CUSD has failed or refused to produce the bids we requested under the Public Records Act, we have not been able to determine whether the projects advertised were consistent with the projects bid and, more importantly, consistent with the projects now sought to be approved by staff following the proposed partial rescission. It is not possible to determine whether the bids have been analyzed to assure that they have been consistently separated by project, especially with respect to the estimated expenses common to all projects when originally and improperly bid. CUSD is required to break out the cost of each project. But without confirmation of the bids before and after the proposed partial rescission, there is no way of knowing whether the work advertised was the same work bid either before or after the proposed rescission.

(c) CUSD Is Required to Award Public Works Contracts to the Lowest Responsible Bidder. As the district's governing body, the Board of Trustees is responsible for securing bids and letting each contract to the lowest responsible bidder, or else reject all bids. Because CUSD has failed or refused to produce the bids we requested under the Public Records Act, it is not possible to analyze the bids to determine whether each contract will be awarded to the lowest responsible bidder.

(d) For all purposes, any purchase in violation of applicable bidding laws is illegal, void, and unenforceable. When a contract is subject to competitive bidding requirements and has been executed without compliance, the courts have concluded the contract is void and unenforceable.

(e) CUSD Could Be Exposed to Unnecessary Risks and Delays. CUSD would be taking an undue risk to proceed under circumstances where the legality of the bidding process is clearly in question, the legal advice they are getting is highly suspect and from an attorney who erred on Brown Act compliance advice before. The trustees would be illegally awarding a contract that could be challenged, the vendor would be entitled to be paid for work already performed, and the bidding process would have to start over. CUSD would not be able to just “move on” without trailing liability, costs and delays for

such non-compliance, and it is doubtful the Board would be able to point to bad advice from legal counsel, again, as an excuse to avoid evidence of their intent to violate the law or their guilt.

(f) CUSD Should Err on the Side of Caution. Competitive bidding requirements serve several important purposes. Bidding laws exist to protect the public from misuse or waste of public funds, provide all qualified bidders with a fair opportunity to enter the bidding process, stimulate competition in a manner conducive to sound fiscal practices, and eliminate favoritism, fraud, corruption, and abuse of discretion in the awarding of public contracts. Proceeding under the proposed partial rescission of the December 10th vote serves none of these purposes and exposes CUSD to further liability, costs and delays.

(i) Must Rescind and Start Process Over. The only prudent solution would be to rescind the December 10th vote in its entirety and to start the process over to assure compliance with the Brown Act and the competitive bidding laws. Only in this way can we be certain that compatible bids have been properly considered for purposes of determining the lowest responsible bidder and otherwise complying with the requirements of the competitive bidding laws.

(ii) Board Should Not Expose District To Unnecessary Risks, Costs and Delays. Contracts awarded in violation of the competitive bidding laws are void and unenforceable, and if the district were to award such a contract to a contractor and later be determined at fault for doing so, any such contractor could recover its cost up to the time of cancellation of the contract, and the district would have to bear the expensive and delay of starting the process over. The district already has violated the Brown Act, the Public Records Act and, likely, the competitive bidding laws, and will continue to do so if it proceeds with a partial rescission as recommended by its counsel. It would be imprudent and unacceptable for the Board to expose the district to further liability, costs or delays by awarding such contracts in the face of such risks and legal violations.

III. DISTRICT WIDE FACILITIES NEEDS ASSESSMENT. We believe consideration of additional luxury projects relating to SJHHS that have never been approved by the Board and which would require additional expenditures of CUSD's limited tax dollars (e.g. the stadium, the aquatic center, etc.) must be added into the on-going district-wide facilities analysis so the Board could then rank those projects in terms of priority against all of the other potential new projects in the school district. There simply is no legitimate reason for Trustees Benecke, Draper, Darnold and Stiff to consider these additional projects at SJHHS outside the district-wide facility analysis. Failure to do so would create a discriminatory, two-tiered system at CUSD, one where (i) SJHHS would continue to be given special, exalted, preferential treatment; and (ii) all other schools across CUSD would be lumped together as second class facilities forced to divvy-up whatever scraps are left over.

IV. CONCLUSION.

The October 2007 District Attorney's report showed that you routinely violated the Brown Act in an effort "to control and limit public participation in open meetings, as well as an unflattering concern for community reaction and 'what the press will do' concerning actions of the board or the failures of the school system it manages." As described above, we have also learned that CUSD cannot answer many of the questions raised by the public and by reform Trustees Addonizio, Bryson and Christensen **because a former Assistant Superintendent either destroyed or took all the official SJHHS project files when he "retired" from the school district earlier this year.** Obviously, the answers to these questions could prove very embarrassing to you (as well as to the Fleming-era staff at CUSD) – not to mention possibly expose those involved to legal and criminal liability. Your illegal vote at the December 10th meeting, as well as your refusal to provide us the public records we requested last month pursuant to the California

Public Records Act, demonstrate a specific intent to conceal from the public, information you knew should have been made available to us – a criminal act.

Therefore, for the reasons set forth above, we hereby demand that:

(a) You produce and make available to us full and complete copies of all the public records previously requested pursuant to the California Public Records Act so that we may review and analyze them with our legal counsel prior the Board of Trustees taking any formal action to approve any of the suspect bids; and

(b) You either:

(i) postpone and remove from the February 11 Board Agenda Items No 37-411; or

(ii) **completely rescind** all matters covered by the illegal vote on December 10th.

Your failure to comply with these demands will leave us with no choice but to commence an action against you for mandamus or injunction for the purpose of obtaining a judicial declaration that your actions are indeed illegal. Please be aware that pursuant to California Government Code Section 54960.5, the court may require you to pay all of our attorneys' fees and costs in connection with bringing such a legal action. Given the severe budget crisis the district now faces – and the significant likelihood that we would prevail in such an action, we strongly urge you to comply with our demands.

We also urge you to remember you recently promised the Orange County District Attorney that you would completely, faithfully and in an uninterrupted manner comply with the Brown Act. Given that you already admitted this week you broke that promise in December – we would urge you to demonstrate your ongoing commitment to comply with the Brown Act by refusing to “stretch the law to its limits” and by exercising caution and restraint by rescinding completely all matters covered by the illegal vote on December 10th.

Sincerely,

/s/ Thomas K. Russell

Thomas K. Russell
Spokesperson
CUSD Recall Committee

cc: Hon. Ellen Addonizio, Trustee
Hon. Anna Bryson, Trustee
Hon. Larry Christensen
A. Woodrow Carter, Superintendent
Tony Rackaukas, Orange County District Attorney
William Feccia, Senior Assistant District Attorney
Dan Hess, Deputy District Attorney