TEL > 415.995.1770 ONE SANSOME STREET, SUITE 3200
FAX > 415.995.1778 SAN FRANCISCO, CA 94105

February 20, 2016

Mayor and City Councilmembers
City of Concord
1950 Parkside Drive, MS/01
Concord, CA 94519

Dear Mayor Hoffmeister and Councilmembers of the City of Concord:

We have read the City Staff Response to the report by attorney Michael Jenkins and respectfully submit this response:

Lennar Did Not Violate Its Agreement with the City. While Lennar is eager to proceed to selection of a developer for the Concord Naval Weapons Station, we strongly disagree with Mr. Jenkins' opinion that Lennar violated the "no lobbying" provision of the Agreement. Put simply, asking a company with whom we do business to consider contributing to a State Assembly election without seeking attribution or attempting to influence the politician—two facts Mr. Jenkins concedes—is not lobbying under any definition. Even Mr. Jenkins noted that his opinion was just an opinion and "[i]t is up to the Council to determine whether it agrees with this conclusion." City Staff echoed this point, noting "the Council could choose to disagree with [Mr. Jenkins'] conclusions, believing that the language of Section 11 was not clear, particularly in light of the fact that receipt of campaign contributions under California's Political Reform Act does not constitute a conflict of interest under the Act, and that political contribution are protected by the First Amendment's freedom of speech.'' We are confident that after the City Council analyzes all the information—what Mr. Jenkins' report says, what it does not say, what the law says, and what the experts say—it will reject his opinion and conclude that Lennar has not violated its agreement with the City.

Modification / Clarification of the Agreement. Lennar does not object to Staff's recommendation to modify the developers' agreements with the City to prohibit making and soliciting campaign contributions, even without communication or attempt to influence. However, we are concerned that Staff's recommendation to "adopt" the "ordinary meaning of the word 'lobbying'" suffers from the same vagueness problems Mr. Jenkins identified in his report.

Final Staff Report. Finally, we do not see how jettisoning the Final Staff Report and returning to a Draft Staff Report cures or addresses the alleged Brown Act violation. Of course Catellus prefers a report that favors Catellus. Lennar prefers a report that favors Lennar. But the developers' desires are beside the point. What should matter are the interests of the City of Concord. If Council believes an open, transparent, objective, and dispassionate analysis of the two developers and their proposals is the best approach for Concord, Council should vote between the developers based on the existing record. If Council believes having a written Staff recommendation between the developers assists Concord—even though Council has the sole responsibility to make a decision—Lennar will not stand in the way.

We are grateful that City Staff has recommended that Lennar move forward in this process. Thank you for your consideration of our position.

Respectfully submitted,

Kofi Bonner
President, Lennar Concord LLC

ANALYSIS

Michael Jenkins' Legal Opinion of "Lobbying" Is Wrong

Michael Jenkins is not a judge. He is an attorney who was asked to come in, after the fact, and give a *legal opinion* on the meaning of the word "lobbying." Mr. Jenkins' opinion is wrong. There are three fundamental flaws with Mr. Jenkins' analysis.

First, Mr. Jenkins is mistaken that soliciting a contribution to Tim Grayson's State Assembly campaign constitutes "lobbying." As Mr. Jenkins found, Mr. Grayson was unaware of any solicitation by or contribution associated with Lennar, and Lennar did not attempt to influence Mr. Grayson in any way. (Jenkins' Report at 24, 26.)

The California Supreme Court has made clear that "California statutes draw a clear distinction between "election campaigning" and "lobbying." *Stanson v. Mott*, 17 Cal. 3d 206, 218 (1976); *see also Fair Political Practices Comm'n v. Agua Caliente Band of Cahuilla Indians*, No. 02AS04545, 2003 WL 733094, at *8 (Cal. Super. Ct. Feb. 27, 2003) ("campaign contributions" and "legislative lobbying activities" are distinct acts).

Mr. Jenkins does not—and cannot—dispute this. So he sidesteps it. According to Mr. Jenkins, California's definition of the word lobbying is irrelevant and, instead, he utilizes what he describes as a "customary" definition based on his dictionary selections. With all respect, it makes no sense to interpret a contract between a *California* developer and a *California* city that utilizes a technical term such as "lobbying" and then to ignore *California's* definition of lobbying. These are sophisticated parties who operate in California with a developed understanding of California municipal and state law. To cast aside a definition that was carefully

constructed by California's legislators and interpreted by California courts for a "water cooler" definition is indefensible and contrary to law.

Furthermore, experts in the field, including UCLA School of Law Professor Daniel Lowenstein (the first American law professor to specialize in Election Law and author of California's Political Reform Act) and Lance Olson, a senior partner at a law firm that specializes in election and political law make clear that whether you rely on California's statutory definition or the "customary" dictionary definition, lobbying and campaign contributions are two separate things. Lobbying, under any definition, requires a communication to the elected official seeking to influence a decision. Tim Grayson is adamant that nobody took credit for the subject contributions or sought to influence his vote on the Concord Naval Weapons Project in any way. Mr. Jenkins concedes there is no evidence whatsoever to say otherwise.

If the City wanted to prevent the making or solicitation of all campaign contributions (regardless of any influence), it should have and could have said so. Mr. Grayson was running for office at the time the parties entered into the Agreement. The City knew that. It would have been very easy to prohibit a party from making or soliciting contributions to his campaign. Had the City done so, this entire issue could have been avoided.

Second, it is inappropriate for Mr. Jenkins to say that some City representatives "intended" the word "lobby" to include any kind of "outside influence." The former City Attorney, who also negotiated the agreement, apparently had a different understanding.

For the record, Lennar also had the opposite understanding. We did not believe—and do not believe—there was a prohibition against asking companies with whom we do business to support their communities, including through monetary support for causes and candidates we believe are worthy.

Because people can have different understandings of what their contracts mean, California courts uniformly hold that it is the words on the document that matter, not what people say they thought after the fact. *Meyer v. Benko*, 55 Cal. App. 3d 937, 942-944 (1976).

Relatedly, in response to Mr. Jenkins' questions during his inquiry, we explained in writing that soliciting and making campaign contributions are rights guaranteed by the First Amendment. Mr. Jenkins' calls this a "red herring" because parties can "waive" their rights by contract. That misses the point entirely. Of course parties can waive rights. But, according to the Ninth Circuit Court of Appeals, parties retain their Constitutional rights unless their contracts waive such rights clearly, expressly, and unequivocally. *Leonard v. Clark*, 12 F.3d 885, 889-90 (9th Cir. 1993); *see also Ferlauto v. Hamsher*, 74 Cal. App. 4th 1394, 1400 (1999). That certainly is not the case here, as even Mr. Jenkins was forced to concede. (Jenkins Report at 26.)

Third, Mr. Jenkins' insinuation that Lennar must have soliciting contributions to influence the bidding process is false. Whether in San Francisco, Contra Costa County, or elsewhere, Lennar encourages companies with whom it does business to support the local

communities in which we do business. That is an important part of being a good corporate citizen. We are proud of that work, not ashamed of it.

Lennar has been involved in Contra Costa County for almost 20 years. We have built thousands of homes there, including the Windermere community. I am a long-time resident of the nearby community of Walnut Creek.

Likewise, we do not understand how Mr. Jenkins can describe these companies and individuals as having no connection to Concord, Contra Costa County, or the political process. Steven Kay and Fred Naranjo are intimately involved, personally and professionally, in California politics. Both men have contributed to State Assembly campaigns and other elections. Engeo has performed engineering work for Catellus, as well as for another developer who earlier in this process was vying to be selected, Suncal. Engeo's CEO, Uri Eliahu, told Mr. Jenkins point blank that contributing to Grayson's campaign "was his idea and not prompted by a request from Lennar." (Jenkins Report at 24 n. 109.)

At the end of the day, Lennar is committed to showing support for all of the communities in which it does business. Concord is no exception.

Michael Jenkins Rejected All of Catellus's Other Accusations.

Mr. Jenkins was clear that he "did not find merit with any of Catellus' other allegations. The Staff Recommendation concurs.

- Catellus falsely accused Lennar of improperly lobbying City Council through Willie Brown. (Catellus Sept. 24, 2015 Letter at 2-3.) Mr. Jenkins found no evidence to substantiate Catellus' claim. (Jenkins Report at 27.) City Staff agrees: there is "no evidence" that any meetings between Mr. Brown and Mr. Grayson constituted lobbying by Lennar (Staff Report of Feb. 23, 2016 at 2);

- Catellus also claimed that Lennar had entered into an agreement with a local developer who, in turn, would lobby City Council. (Catellus Sept. 24, 2015 Letter at 3.) When asked by the City and Mr. Jenkins, Catellus would not identify the local developer with whom Lennar had agreed. Mr. Jenkins found no evidence to substantiate Catellus' claim. (Jenkins Report at 37);

- Catellus has insinuated that Lennar improperly lobbied City Council by soliciting letters of support from members of the community. (Jenkins Report at 27-28). Mr. Jenkins rejected that specious contention, concluding that shoring up support from the community is precisely what the competing developers were supposed to be doing. (Jenkins Report at 28.) City Staff agrees: soliciting letters of support was not prohibited. (Staff Report of Feb. 23, 2016 at 2);

- Catellus also suggested that Lennar had improper discussions with City Council at community events. (Jenkins Report at 29.) The Council adamantly denied the

accusations and Mr. Jenkins found no evidence to substantiate the claim. (Jenkins Report at 29.) City Staff agrees: any conversations between Councilmembers and Lennar representatives "at various public events" were proper and did not constitute lobbying (Staff Report of Feb. 23, 2016 at 3);

- Without any basis whatsoever, Catellus alleged that Lennar influenced the City Council or City Staff to remove from the Staff Report a recommendation favoring one developer over the other. (Catellus Sept. 24, 2015 Letter at 3-5.) Mr. Jenkins found no evidence that Lennar had anything to do with this change. (Jenkins Report at 32, 36). City Staff agrees: "there is no evidence that Lennar was behind this effort." (Staff Report of Feb. 23, 2016 at 3.)

Conclusion

Lennar's response to the Jenkins Report and Staff Recommendation is simple and straight-forward: [1] there is no ground to conclude Lennar violated its agreement with the City and, therefore, no legal basis to terminate the agreement; and [2] we ask the Council to make its decisions based on fact and law, not rumor or innuendo, and in the interests of the Concord community.

Our company has been under the same management for over 50 years, and we have earned our reputation for excellence and integrity. We are proud of who we are and what we have accomplished. We follow the rules. We abide by our contracts. We did so here. We will defend our name, reputation, and legal rights.

Law Offices of
OLSON
HAGEL &
FISHBURN
LLP

February 23, 2016

Mayor and City Council Members
City of Concord
1950 Parkside Drive
Concord, CA 94519

Re: Investigative Report by Michael Jenkins of Jenkins & Hogin, LLP, Regarding Concord Naval Weapons Station Master Development Selection

Mayor Hoffmeister, Members of the City Council, and Interim City Attorney Brian Libow:

I am the founder and senior partner of Olson Hagel & Fishburn LLP, a firm specializing in political and election law since 1977. My firm routinely advises on and interprets state and local campaign and lobby laws in California. My legal opinion on the definition of the term "lobbying" stems from years of experience advising clients on compliance with the Political Reform Act and local ordinances. I was asked by Lennar Homes of California, Inc. to memorialize my opinion on this subject as it applies to the conclusions reached by the February 11, 2016 report by Michael Jenkins ("the Jenkins report").[1] It is my determination, as set forth below, that Mr. Jenkins erred by concluding that campaign contributions by individuals and companies connected to Lennar constituted "lobbying" in violation of Section 11 of the Agreement to Negotiate with the City ("Agreement").

This conclusion runs afoul of both the technical and commonly understood meanings of the term "lobbying." Moreover, the Jenkins report erroneously concludes that the term lobbying must include any effort (not just campaign contributions) to influence a council member even though those words were not used and could have easily been inserted in the Agreement if the intent was to give such broad meaning to the word lobbying. Finally, while concluding that contributions made by third parties must have been given for the purpose of influencing Mayor Grayson on behalf of Lennar in order to constitute "lobbying" under the Agreement, the Jenkins report fails to cite any evidence of such a purpose. In fact, the evidence is to the contrary: Not even the Mayor, the allegedly intended recipient of the influence, was aware of any connection between the contributions and Lennar.

[1] To the best of my knowledge, neither I nor my firm have ever represented Lennar in any other capacity prior to this, and I was not engaged on this matter until after reading the Jenkins report and forming my own conclusion as to its analysis.

I. Summary of Facts and Report Conclusions[2]

In January 2014, the City of Concord commenced a three-part selection process to identify a Master Developer for Phase I of the Concord Reuse Project Area Plan. After several levels of review, the list of potential developers was narrowed to Lennar and Catellus, both of which entered into identical Agreements to Negotiate with the City. The Agreements included, among other things, a prohibition on "discussions, negotiations and lobbying" with members of the City Council, the Planning Commission, or designated employees.

In June 2015, G.F. Bunting & Co., Engeo, Scarborough Insurance, and Steven Kay made contributions to Mayor Tim Grayson's campaign for Assembly. On August 21, 2015, Catellus's attorney, Mr. Andrew Giacomini of Hansen Bridgett, sent a letter to the Concord City Attorney requesting an investigation regarding these campaign contributions. Mr. Giacomini sent a second letter on September 24, 2015, alleging that Lennar attempted to influence the Master Developer Selection process in violation of Section 11 of the Agreement. In addition to other allegations, the September 24th letter alleged that Lennar had orchestrated campaign contributions to Mayor Grayson's Assembly campaign in an effort to influence his vote on the Master Developer selection.

The Interim City Attorney for the City of Concord subsequently engaged Jenkins & Hogin, LLP as independent counsel to investigate the allegations raised in the September 24th letter and report back to the City Council its findings and conclusions with respect to those allegations.

Among other conclusions, the Jenkins report opines that the term "lobbying" in Section 11 of the Agreement should only be given its "ordinary or popular sense" meaning. Citing two dictionaries, the report concludes that lobbying includes "influencing government decisions." From this the report broadly claims that "lobbying" must be defined to include "any other actions intended to influence" city officials. The report also opines that the exclusion of campaign contributions from the definition of "lobbying" in the California Political Reform Act has no bearing on Section 11. The report notes, "...if the donation of campaign contributions was meant to influence Mayor Grayson, then the contributions violated the lobbying prohibition." (Jenkins report, Page 23.)

Based on this broad definition of lobbying – that is contrary to California law – the report concludes that if Lennar "orchestrated" campaign contributions "for the purpose of influencing" Mayor Grayson, Lennar would have violated Section 11 of the Agreement. The Jenkins report then concludes that the purpose of the contributions was, in fact, to influence the decision of Mayor Grayson even though there is no evidence that supports that conclusion. In fact, the report acknowledges that Mayor Grayson knew nothing about the contributions or any asserted

[2] All facts cited herein are derived from the Jenkins report.

connection to Lennar; such knowledge would be a necessary component of any alleged effort to influence him. (Jenkins report, Page 26.)

II. Summary of the Relevant Sections of the Agreement

Section 11 of the Agreement provides, in part: "Developer shall not engage in discussions, negotiations or lobbying of any City Council or Planning Commission members, or other City employees or officials as may be designated by the LRA Executive director from time to time (collectively, "Excluded City Parties"), unless requested to do so by the City Designated Team for specific purposes related to the negotiations." If Developer violates its obligations under Section 11, the "...City may immediately terminate this Agreement by written notice to Developer without affording Developer any opportunity to cure such violation."

Section 18 of the Agreement provides that the agreement is to be construed in accordance with the law of the State of California.

III. Legal Analysis

As the Jenkins report notes, the Agreement itself does not contain a definition of the word "lobbying" (Jenkins report, Page 22), but Section 18 of the Agreement does make clear that the Agreement is governed by California law.

Citing only Civil Code Section 1644, the Jenkins report quickly and summarily concludes that the term "lobbying" was understood by the parties to mean the term "as it is commonly understood in the English language, not in its technical sense." (Jenkins report, Page 23.) The report dismisses the definition of "lobbying" provided in the California Political Reform Act and concludes that "if the donation of campaign contributions was meant to influence Mayor Grayson, then the contributions violated the lobbying prohibition." (*Id.*)

Under statutory rules of contract interpretation, the mutual intention of the parties at the time the contract is formed governs interpretation (Civil Code Section 1636). Civil Code Section 1639 provides that the intent of the parties is to be inferred, if possible, solely from the written provisions of the contract.

California Civil Code Section 1644 provides: "The words of a contract are to be understood in their ordinary popular sense, rather than according to their strict legal meaning; unless used by the parties in a technical sense, or unless a special meaning is given to them by usage, in which case the latter must be followed." California Civil Code Section 1645 continues: "Technical words are to be interpreted as usually understood by persons in the profession or business to which they relate, unless clearly used in a different sense."

Contrary to the views expressed in the Jenkins report, Section 1644 does not exclude consideration of statutory definitions; case law in California indicates that courts look to both dictionary and statutory definitions in order to arrive at the "ordinary" meaning of a term. (See

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Contrary to the views expressed in the Jenkins report, Section 1644 does not exclude consideration of statutory definitions; case law in California indicates that courts look to both dictionary and statutory definitions in order to arrive at the "ordinary" meaning of a term. (See

AIU Ins. Co. v. Superior Court (1990) 51 Cal. 3d 807.) The Jenkins report ignores the fact that the courts routinely rely upon both statutory and dictionary definitions when interpreting the terms of an agreement. The report's failure to consider California's statutory definition is fatal to its analysis and ultimate conclusion that the term "lobbying" should be broadly defined to reflect one presumed "common sense" definition.

Dismissing the statutory definition of lobbying is incorrect for two reasons: (1) Even if the ordinary meaning of "lobbying" is to be applied, the courts have made clear that the statutory definition of lobbying is relevant in determining the ordinary meaning of the term; (2) The sophisticated parties involved in the Agreement likely understood the term "lobbying" in its technical sense and the more technical statutory definition would therefore better reflect their understanding and intent. The proper inquiry in interpreting Section 11 of the Agreement is therefore, first, how the term "lobbying" should be understood in an ordinary sense, including consideration of the statutory definition, and, second, how the term should be understood in a technical sense, assuming that sophisticated parties would have intended such usage.

A. The Political Reform Act definition of "lobbying" is relevant in assessing the meaning of that term in the Agreement whether the term is to be understood in an ordinary sense or a technical sense.

Section 18 of the Agreement references California Law. The California Political Reform Act ("PRA") governs lobbying and lobbying activity in California. That law requires lobbyists and lobbyist employers to carefully track and report lobbying activities. The PRA defines lobbying as "...to communicate...with...any...official...for the purpose of influencing legislative or administrative action." (Government Code Sections 82039 and 82037, emphasis added.) "Influencing legislative or administrative action" is defined as: promoting, supporting, influencing, modifying, opposing or delaying any legislative or administrative action by any means, including but not limited to the provision or use of information, statistics, studies or analyses."(Government Code Section 82032.) The PRA does not define lobbying to include the act of making or otherwise facilitating a campaign contribution. Under the relevant California law, it is therefore clear that the making of a campaign contribution is not considered lobbying activity and therefore would not constitute a violation of Section 11 of the Agreement.

1. The "ordinary" meaning of the term "lobbying" does not include campaign contributions.

As noted above, when a technical meaning of a term is not intended, the courts interpret the ordinary meaning of an undefined term of a contract by looking to both the dictionary definition and statutory definition (See *AIU Ins. Co. v. Superior Court* (1990) 51 Cal. 3d 807.) The Jenkins report failed to consider California's statutory definition of "lobbying" when it reached its conclusion. If the report had properly considered that law, it could not have reached the conclusion that the Agreement had been violated.

The PRA defines lobbying in a way that does not include the making of a campaign contribution. It is readily apparent that most individuals making a campaign contribution are not, in fact, lobbying a public official when they do so. The PRA therefore correctly limits the definition of lobbying to those activities that involve the specific kinds of contacts with public officials that are made for the purpose of influencing legislative or administrative action.

Even if the Jenkins report correctly considered the dictionary definition in determining the "ordinary" meaning of the word, its treatment of the dictionary definition is missing an important factor: the requirement that there be some communication with the public official, for a specific purpose.

The report states that "lobbying" is defined by Merriam-Webster dictionary as "influencing government decisions" and by dictionary.com as "trying to influence public officials." (Jenkins report, Page 22.) A review of the full Merriam-Webster dictionary entry on the term "lobby" demonstrates that the definition of "lobby" is not as simple as "influencing government decisions," as the Jenkins report asserts. In addition to involving some kind of act aimed at influencing public officials, lobbying is commonly understood to involve some type of communication with the official one seeks to influence. Merriam-Webster provides that the "simple" definition of "lobby" is "to try and influence government officials for or against something" or "to try to get something you want by talking to the people who make decisions."

A review of various dictionary definitions of the terms "lobby," "lobbying," and "lobbyist," leads to the same logical conclusion that a common sense understanding of the term "lobbying" would include a requirement that one engage in some form of communication with an official in order to influence his or her decision. This important – and limiting element – is provided in the PRA definition, which limits lobbying to "communications" with government officials.

Moreover, the plain language of Section 11 of the Agreement supports the conclusion that the parties intended for the term "lobbying" to involve some type of communication. The Agreement prohibits "discussions, negotiations and lobbying" public officials. The most common sense reading of this phrase in its entirety is that it was intended to prohibit specific kinds of direct communications. A campaign contribution, without more, would not qualify as lobbying even under this broader definition."

2. **The "technical" definition of lobbying found in the Political Reform Act should govern because the parties involved understood the technical meaning of this term.**

While we believe the Jenkins report erroneously applied the law in supplying an "ordinary sense" test for the definition of lobbying, there is a second and equally important reason the report is flawed. We believe it was quite reasonable to assume the sophisticated parties to this agreement intended to refer to lobbying in its technical sense.

As evidence of the parties' intent to use the commonly understood definition of lobbying, the Jenkins report cites conversations with the staff who drafted the Agreement, Mr. Wright and Mr. Ramiza. The report notes: "In drafting this section, Mr. Ramiza advised me that he used the word 'lobbying' as it is commonly understood in the English language, not in its technical sense. Mr. Ramiza's understanding of the lobbying prohibition is that it intended to preclude an end-run by either finalist directly or indirectly to the decision-makers." (Jenkins report, Page 23.) From this the Jenkins report concludes that the term "lobbying" must be defined to mean "any other actions intended to influence." (Jenkins report, Page 23.)

There are several problems with reliance upon these statements to justify ignoring the technical meaning of the term lobbying. First, the statements of the drafters are not highly relevant since they are not persons who entered into the Agreement. The Agreement was executed by the City Manager and Presidents of the development companies. It is the understanding of these persons that is relevant to the meaning of the parties.

Second, although the staff may have had broad goals such as "precluding any outside influences" or "preclud[ing] an end-run" by finalists either "directly or indirectly," that is not the language used in the Agreement. While the Jenkins report suggests that if the parties had meant to exclude campaign contributions, they could have said that in the Agreement, the same point could be made with regard to the staff's purported intent: if Section 11 was intended to preclude a broad range of "indirect" activities such as campaign contributions, the Agreement easily could have been drafted more broadly to include either "any other actions intended to influence" or even "the making of campaign contributions."

As evidence that the parties to the Agreement understood the term "lobbying" to prohibit the making of campaign contributions, the Jenkins report cites to the fact that neither developer questioned the meaning of the term "lobbying" in Section 11, nor did they ask whether the term was meant to exclude activities such as making campaign contributions (Jenkins report, Page 23.) The report ignores another logical explanation for the lack of questions from the developers regarding the meaning of Section 11: the parties clearly understood the meaning of the term "lobbying" in California and clearly understood that "lobbying" does not include making a campaign contribution.

Government officials and individuals involved in government relations are frequently faced with the question of what constitutes a "contribution" and what constitutes "lobbying" under both state and local laws in California. These definitions govern interactions between government officials and individuals representing companies such as Lennar and Catellus. In fact, both Lennar and Catellus are registered lobbyist employers with the State of California and file quarterly disclosure reports disclosing various categories of lobbying expenditures, as required by the PRA. Such reports do not include campaign contributions as lobbying expenditures. Given the parties involved, it is more than reasonable to infer that the parties to the Agreement understood what the term "lobbying" meant in the normal "technical" sense as defined in the Political Reform Act and elsewhere on the local level in California.

Civil Code Section 1645 requires that technical terms be interpreted as usually understood by persons in the profession or business to which they relate. The persons involved in the making of the Agreement were representatives of government and government relations officials who have reason to frequently encounter the technical definitions of "contribution" and "lobbying," as defined by the Political Reform Act.

B. The conclusion that the contributions in question were made "for the purpose of influencing" the Mayor are unsupported by any evidence.

Based on the Jenkins report's broad definition of "lobbying" as anything that is done for the purpose of influencing a decision, the report asserts "...if the donation of campaign contributions was meant to influence Mayor Grayson, then the contributions violated the lobbying prohibition." (Jenkins report, Page 23.) Even if the City Council accepts the flawed, overly-broad definition of "lobbying" provided by the Jenkins report, the City Council should take notice of the fact that the Jenkins report cites no actual evidence that the campaign contributions in question were made for the purpose of influencing Mayor Grayson.

The Jenkins report itself acknowledges that evidence of an intent to influence is key to reaching a conclusion that the Agreement was violated. According to the report, "if the donation of campaign contributions was meant to influence Mayor Grayson, then the contributions violated the lobbying prohibition." (Jenkins report, Page 23, emphasis added.)

The report provides two possible explanations of Lennar's solicitation of campaign contributions. The first is that Lennar orchestrated the contributions without any expectation of receiving anything in return. According to the report, "[t]his would be consistent with Mayor Grayson's insistence that he was unaware of the relationship between the contributors and Lennar until the issue was brought to light by the press and Catellus." (Jenkins report, Page 25.) The report then posits the alternative possibility that "Lennar orchestrated one, and possibly three, contributions with the specific intent of generating goodwill with Mayor Grayson in order to enhance its position in the Master Developer selection process." (Jenkins report, Page 26.)

The report provides no evidence demonstrating the "specific intent" that it claims. It concludes that the fact that Lennar solicited a contribution by a third party rather than making it directly reflects an understanding that contributions were prohibited. (Jenkins report, Page 26.) Of course, Lennar was under no legal or contractual obligation to disclose any conversations or requests for contributions by others, and there may be many reasons to discuss contributions with third parties that are unrelated to this project. The Jenkins report simply characterizes these communications with others as "clandestine" and "anonymous" in an effort to put them in an unfavorable light, but there is simply no evidence of the "specific intent" that the Jenkins analysis itself requires.

Setting aside the speculation, the only "evidence" in the Jenkins report indicates that Lennar discussed contributions with two of the donors to Mayor Grayson but it fails to demonstrate any connection between the contributions and an intent to influence this project. In

fact, one of the contributors emphatically denied that his contribution was made at the request of Lennar, stating instead that the contribution was "his idea." (Jenkins report, fn. 109.) The interview with the other contributor provides no evidence that the contribution was made for the purpose of influencing Mayor Grayson. Instead, the contributor stated that he made the contribution as an "accommodation" to a client—something he said the company does routinely. (Jenkins report, Pages 25-26.)

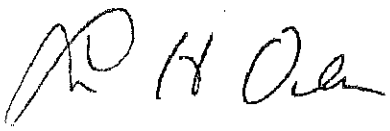
Moreover, it is impossible that the campaign contributions were an "attempt to influence" Mayor Grayson's decision since the Mayor had no knowledge that these contributions were in any way connected to Lennar. The report acknowledges: "There is no evidence that Lennar and Mayor Grayson collaborated in this endeavor or that Mayor Grayson was even aware of it at the time." (Jenkins report, Page 26.) The Jenkins report thus implicitly acknowledges that there is no evidence that these discussions were connected to the decision on this project in any way by presuming that Lennar was attempting to "advance its interests in the selection process, whether or not it actually did so." But that only underscores why communication is a critical element of lobbying – one cannot be attempting to influence an official act if the official himself is unaware of action taken.

IV. Conclusion

For all of the above reasons, we believe that the conclusions found in the Jenkins report, with respect to whether contributions to Mayor Grayson's Assembly campaign constituted lobbying by Lennar in violation of Section 11 of the Agreement, are erroneous.

Very truly yours,

OLSON HAGEL & FISHBURN LLP



LANCE H. OLSON

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