MICHAEL J. AGUIRRE
SAN DIEGO CITY ATTORNEY

OFFICE OF
THE CITY ATTORNEY
CITY OF SAN DIEGO
MICHAEL J. AGUIRRE
CITY ATTORNEY

CIVIL DIVISION
1200 THIRD AVENUE, SUITE 1620
SAN DIEGO, CALIFORNIA 92101-4100
TELEPHONE (619) 236-6220
FAX (619) 236-6018

July 9, 2008

Honorable Edmund G. Brown, Jr.
Attorney General
State of California Department of Justice
P.O. Box 944255
Sacramento, CA 94244-2550

Re: City Attorney Requests Additional Review of "Report of the California Attorney General: San Diego City Attorney Michael Aguirre's Allegations of 'Corruption' Against San Diego Mayor Jerry Sanders Regarding the Sunroad Building Project."

Dear Mr. Attorney General:

I am writing in response to correspondence I received on 2 June 2008[1] from Chief Assistant Attorney General Dane Gillette, who declined to address a number of factual inaccuracies and omission in your report. This letter and the attached report by my office are intended to provide you with more information that bears directly on your duties as Attorney General of the State of California.

Throughout 2006 and 2007, a local San Diego developer, Sunroad Enterprises ("Sunroad"), constructed a 180-foot building in violation of state and federal height restrictions, as well as safety and planning codes. Both Sunroad and the City of San Diego ("City") were repeatedly put on notice by the Federal Aviation Administration ("FAA") and the California Department of Transportation ("Caltrans") that the construction of the building was a violation of existing permitting codes. Regardless of the warnings, Sunroad continued to build with the City's consent. Representatives of Sunroad had made in excess of $13,000 in campaign contributions to Mayor Sanders' first run for mayor and ballot propositions Sanders supported.[2] It was not until late 2007 that work on the building was formally stopped. The contiguity of these events led to the suspicion of a "pay for play" relationship.

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[1] 2 June 2008 letter from Dane Gillette, Chief Assistant Attorney General, to Michael J. Aguirre, City Attorney; Re: "Report of the California Attorney General: San Diego City Attorney Michael Aguirre's Allegations Against Mayor Jerry Sanders Regarding the Sunroad Project. (Exhibit 1)

[2] Hall, Matthew T.; "Sanders cleared in Sunroad dealings"; *San Diego Union-Tribune;* 21 May 2008; "Aguirre accused Sanders of a back-room deal and giving special access to Feldman, who with his associates gave more than $3,000 to Sanders' mayoral campaign and $10,000 to ballot measures he pushed." (Exhibit 2)

As I have previously reported to your office, there were serious legal issues related to Sunroad which were apparently not considered by you. Specifically, you failed to assist the San Diego City Attorney's Office in investigating the Sunroad matter, though your help was repeatedly sought.[3]

Instead, representatives of your office interfered with the service of a duly issued search warrant in a criminal investigation that involved the Sunroad case. Representatives of your office then issued a report at the request of Mayor Sanders which seems more a political or defense document rather than a independent, investigative report. The report appears to have reached a pre-determined conclusion. It also included blatant errors and omissions of facts.

Please find attached to this letter an in-depth analysis of the many investigative and analytical deficiencies in your "Report of the California Attorney General: San Diego City Attorney Michael Aguirre's Allegations of 'Corruption' Against San Diego Mayor Jerry Sanders Regarding The Sunroad Building Project."

Perhaps the most significant point that your report omits is that, on 19 January 2007, Caltrans made clear to the City in a letter that there were "apparent" violations of law perpetrated by a developer and the City was assisting in this violation of law. The letter, written by Jeff Brown, Aviation Safety Officer for Caltrans, to the City of San Diego stated:

> "The City's apparent failures to enforce the Notice, which enables the developer to violate State law and seems to disregard public safety, is of great concern to the Department…[W]e directly informed the City that any construction of the buildings above a height of 160 feet Above Ground Level (AGL) was a violation of California Public Utilities Code (PUC) Section 21659…As stated above, the City's December 21, 2006 letter, particularly when reviewed with respect to Sunroad's November 21, 2006, letter to the City requesting many permanent construction features under the pretense of 'weather proofing' the building, makes it difficult to regard the City's actions as anything other than an attempt to undermine State law."[4]

The letter made clear the developer, Sunroad, was violating state and federal height restrictions and permitting processes in its continued construction of a 180-foot office building. Worse, the letter stated that the City was acting complicity in the violation of state and federal codes by allowing the developerto continue construction on the 180-foot building.

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[3] 17 May 2007 letter from San Diego City Attorney Michael J. Aguirre to California Governor Arnold Schwarzenegger; Re: "Compliance with FAA Notice of Hazard". (Exhibit 3)

[4] 19 January 2007 Department of Transportation Letter from Jeff R. Brown to James T. Waring, with copies to Mayor Jerry Sanders and City Attorney Michael J. Aguirre. (Exhibit 4)

Despite this harsh rebuke from Caltrans, representatives of your office not only failed to assist, but acted to undermine the criminal investigation conducted by San Diego City Attorney's Office into this matter. The Criminal Division of the San Diego City Attorney's Office initiated an investigation into possible conspiracy to commit political corruption, conducted by a former high ranking City of San Diego official in the Sunroad affair. The template used by the City Attorney's Office to identify the specter of potential criminal wrongdoing was drawn from a report issued titled, "Conflict of Interest," issued by the Office of the Attorney General,[5] which was based on the work on the Fair Political Practices Commission. The City of San Diego Municipal Code[6] follows the guidelines and principles as established by the FPPC and the Office of the Attorney General. In turn, the City Attorney's Office submitted an affidavit seeking a search warrant, which was granted by the San Diego Superior Court under seal on 21 March 2007.[7] On 22 March 2007, a copy of the sealed search warrant was leaked to the office of Mayor Jerry Sanders. The sealed search warrant was leaked to the *San Diego Union-Tribune* before it could be issued and on 23 March 2007 information about the existence of the documents appeared in the newspaper.[8] The next day, on 24 March 2007, an editorial appeared in the *San Diego Union-Tribune* that stated that Police Chief William Lansdowne refused to serve the search warrant.[9] Of specific concern, Mr. Gillette, a senior attorney general in San Francisco, was quoted in a San Diego newspaper and opined on the contents of the sealed affidavit and search warrant:

> Yesterday, officials in the state Attorney General's Office said they also agreed with Lansdowne, which is why they declined to conduct the search.
>
> Dane Gillette, a senior assistant attorney general based in San Francisco, cited 'concerns over the adequacy of the affidavit in support of the search warrant.'[10]

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5 "Conflicts of Interest"; Office of the Attorney General; Bill Lockyer, Attorney General. Specifically, page 60 of the report stated: "The restrictions prohibit the following former officials from accepting compensation to act as the agent, attorney or representative of another person for purposes of influencing specified government agencies through oral or written communications." (Exhibit 20).

6 City of San Diego Municipal Code § 27.2550. (Exhibit 21).

7 State of California – County of San Diego Search Warrant; The People of the State of California to any Sheriff, Police Officer, or Peace Officer in the County of San Diego; signed by George "Woody" Clarke, Judge of the Superior Court County of San Diego. P. 2. (Exhibit 5)

8 Hasemyer, David; "City has warrant to search builder's office | Dispute is over height of tower near airport"; *San Diego Union-Tribune*; 23 March 2007. (Exhibit 6)

9 24 March 2007; "Smear tactics | Aguirre probe exposes prosecutorial abuse"; *San Diego Union-Tribune.* (Exhibit 7)

10 Roth, Alex, and Hasemyer, David; "Aguirre, chief escalate war of words | City attorney sees obstruction of justice"; *San Diego Union-Tribune;* 30 March 2007. (Exhibit 8)

The news report made no reference to how Mr. Gillette obtained a copy of the sealed warrant and the affidavit. It is, however, possible the sealed warrant was first passed through the San Diego office of the Attorney General's Office before being received by Mr. Gillette in San Francisco. It is also worth noting that Mr. Gillette provided no formal written analysis of the adequacy of the search warrant under the State's Conflict of Interest Code or the City's Municipal Code despite the fact that written codes were clearly established under both bodies of law.

It is important to note that before concluding the affidavit for the warrant was deficient, Mr. Gillette did not speak nor did he attempt to speak with the City Attorney's Office. His conclusions about the search warrant were erroneous.

The issue of how a sealed affidavit and search warrant were leaked to a political official in the City of San Diego and later to the press was never investigated despite a written request to the Attorney General's Office to conduct an inquiry into the matter.

Of equal concern, after the search warrant was leaked to the Mayor and later the media, Ms. Dumanis said she would never investigate Mayor Sanders under any circumstance. In a press meeting during the week of 9 July 2007, Dumanis stated, "Jerry is somebody I have known for about 14 years…and if any investigation was to come to this office regarding Jerry Sanders it would have to go to the Attorney General's Office. So I felt comfortable standing up and vouching for the integrity of Jerry Sanders."[11]

Meanwhile, on 7 June 2007, I was asked in a press conference whether I believed Mayor Sanders' handling of the Sunroad affair could be considered corrupt. I responded that it could be considered a form of corruption.

My comment was made in the context of a political dispute between the Mayor and myself at a press conference to a series of reporters regarding an issue that had been extensively covered in the local media. An editorial appeared in the *San Diego Union-Tribune* on 13 June 2007 that was critical of my use of the word corruption and labeling my allegations as "false charges."[12] In response, I wrote a letter to the editor that explained my stance. I wrote:

> When he took office, Mayor Jerry Sanders told the people of this city that 'San Diego's municipal government has failed its citizens and become an embarrassing and corrupt impediment to progress.'

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[11] Braun, Gerry; "Virtue club list is short – just ask Dumanis"; *San Diego Union-Tribune*; 11 July 2007. (Exhibit 9)

[12] Klein, Herbert G.; "It's time to stop the name-calling"; *San Diego Union-Tribune;* 13 June 2007. (Exhibit 10)

> He promised voters he would 'tell the whole truth – what happened, why it happened and how it will be fixed.'…
>
> Unfortunately, the mayor engaged in an embarrassing and corrupt course of action when he allowed a campaign contributor, who had raised thousands of dollars for the Sanders campaign, to construct a building near the city's airport at Montgomery field in defiance of Federal Aviation Administration safety standards and California state law…
>
> Mayor Sanders can still recover and find his way, but he needs to do what promised. No more delays, denials or deceptions. No more embarrassing, corrupt favors to campaign contributors. Rather, the mayor needs to tell us the whole truth, what happened, why it happened, and how it will be fixed again so that it never happens again, as he promised.[13]

My letter characterizing Mayor Sanders' actions were taken directly from the language he used in a 12 January 2006 speech to describe operations within the City of San Diego.[14] Your effort to police the content of political discussion regarding this matter is an inappropriate effort to interfere with the first amendment right to free speech and the right to make public statements as a public official. Should elected officials in San Diego anticipate you will police public statements and letters to the editor of local newspapers in the future?

On 20 June 2007, Mayor Sanders requested the Attorney General's Office to "investigate" the matter.[15] The next day, on 21 June 2007, Mr. Gillette responded that the Attorney General's Office would conduct the investigation.[16] Also on 21 June 2007, Mayor Sanders held a news conference with District Attorney Bonnie Dumanis, Sheriff Bill Kolender, and Police Chief Bill Lansdowne.[17] At the press conference, Mayor Sanders stated that he was

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[13] Aguirre, Michael J.; "City Attorney Aguirre calls Mayor Sanders 'corrupt'"; *San Diego Union-Tribune*; 15 June 2007. (Exhibit 11)

[14] 12 January 2006 Mayor Jerry Sanders State of the City Address pp. 1-3, 12, Exhibit 1. (Exhibit 12)

[15] 20 June 2007 letter from Mayor Jerry Sanders to Edmund G. Brown, Attorney General for the State of California; Carbon copied: Dane Gillette, Chief of Criminal Division; Gary W. Schons, Senior Assistant Attorney General. (Exhibit 13)

[16] 21 June 2007 letter from Dane R. Gillette, Chief Assistant Attorney General, to Jerry Sanders, Mayor of the City of San Diego; Re: "Request for Investigation". (Exhibit 14)

[17] 21 June 2007; "A Message from Mayor Jerry Sanders" (Exhibit 15)

not corrupt and announced that the Attorney General's Office had agreed to conduct an "investigation."[18]

At the onset of the "investigation" by the Attorney General's Office, I received two writings for clarification of the corruption charges and any documents supporting the charge of corruption in a press conference and a letter to the editor. I did not respond to either request, believing the Attorney General's Office (specifically Mr. Gillette who opined publicly on a sealed search warrant) held a conflict of interest and was unable to conduct an objective and honest investigation. Moreover, the writings made no mention of the legal foundation for the investigation. Worse, after these writing were received by my office, I heard nothing about the "investigation" for 11 months until the report was released two weeks before the primary election for City Attorney. While you may have not known about the election, clearly the author of the report or the investigators was aware of the political sensitivity of its release in proximity to the election. It is, however, impossible to ascertain who wrote, investigated, or released the report as no member of your office signed it.

It was also clear that Mr. Gillette was unable to conduct an objective investigation. Any finding of potential illegal action by Mayor Sanders, his staff, or the City, would be inconsistent with Mr. Gillette's initial assessment of the search warrant and refusal to investigate as I repeatedly requested. As a result, the Attorney General's investigation was as much an attempted exoneration of Mr. Gillette as it was an exoneration of Mayor Sanders.

We are asking that someone in your staff objectively review the report and correct the facts. The following 13 factual inaccuracies have been identified by my office:

1. Your office stated in the report, "We lack accounting of which documents he sought and received from the mayor's office on May 30." This statement illustrates the deficiency of the investigation completed by the representatives of your office. If, in fact, your investigators interviewed the Mayor and his staff, the investigators should have been able to obtain the cover letter the Mayor's office included with the documents in response to my public requests on 2 February 2007 and 30 May 2007. In fact, the cover letter issued by the Mayor includes a detailed list of the more than 200 documents given to the City Attorney's Office.[19] After all, five members of the Mayor's staff were the only people your

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[18] 21 June 2007; "Remarks by Mayor Jerry Sanders: Regarding Mr. Aguirre's Charge of 'Corruption' and Sunroad". (Exhibit 16)

[19] 2 February 2007 memorandum from James T. Waring, Deputy Chief of Land Use and Economic Development, to Michael Aguirre, City Attorney; Subject: "Sunroad Enterprises/Sunroad Holding Corporation". 30 May 2007 memorandum from Abby Jarl, Assistant, to Michael J. Aguirre, City Attorney; Subject: "Response to Request under Provision of San Diego City Charter Section 40. (Exhibit 17)

investigators interviewed. These investigators should have, at least, been capable of asking for these documents.

2. Your report concluded: "Nothing overtly alarming, hidden or improper appears in Sexton's and Barwick's working with Sunroad to perfect a proposal that required significant concessions by Sunroad or in their presenting that proposal to the FAA." As the attached report will show, Sunroad knowingly disregarded Federal Aviation Administration codes and the rules and regulations of the California Public Utilities Commission. The evidence presented in this report – which was overlooked or ignored by your office – will show that Mayor Sanders approved the lifting of the Stop Work Order. If you believe, in your final analysis, that there is "[n]othing overtly alarming, hidden or improper" about using City and County resources to help a developer change a law after he's broken it, then our views on the proper use of public resources are dramatically different. It is also worth noting, in the Office of the Attorney General's report tilted, "Conflict of Interest," careful instruction is given that public officials that receive campaign contributions should not be in direct communication with individuals with business pending legislative action.[20] Any in-depth analysis of this was absent from your recently released report.

   The findings of your report that "[n]othing overtly alarming or improper" occurred stands in sharp contrast with letters written by the California Department of Transportation. Specifically, the California Department of Transportation wrote a letter to the City on 19 January 2007 which stated, "The City's apparent failures to enforce the Notice, which enables the developer to violate State law and seems to disregard public safety, is of great concern to the Department…[W]e directly informed the City that any construction of the buildings above a height of 160 feet Above Ground Level (AGL) was a violation of California Public Utilities Code (PUC) Section 21659…As stated above, the City's December 21, 2006 letter, particularly when reviewed with respect to Sunroad's November 21, 2006, letter

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20 "Conflicts of Interest"; Office of the Attorney General; Bill Lockyer, Attorney General. Specifically, page 53 of the report stated: "Covered officials must disqualify themselves from participating in the proceeding if they have received contributions of more than $250 during the previous 12 months from a party or a person who is financially interested in the outcome of the proceeding." The Office of the Attorney General report on "Conflict of Interest" also defines "proceeding" on page 55 by stating, "The law covers proceedings involving a license, permit, or other entitlement for use. These terms include all business, professional, trade and land use licenses and permits, and all other entitlements for use, including all entitlements for land use, all contracts (other than competitively bid, labor, or personal employment contracts), and all franchises. (§ 84308(a)(5).) The law covers conditional use permits, zoning variances, rezoning decisions, tentative subdivision and parcel maps, and consulting contracts (but does not apply to general land use plans or general building and development standards). (*City of Agoura Hills v. Local Agency Formation Com.* (1988) 198 Cal.App.3d 480; *In re Curiel* (1983) 8 FPPC Ops. 1.) Ministerial decisions also are not covered. (Cal. Code Regs., tit. 2, § 18438.2(b)(3).)" (Exhibit 20).

to the City requesting many permanent construction features under the pretense of 'weather proofing' the building, makes it difficult to regard the City's actions as anything other than an attempt to undermine State law."[21] When the information in this letter is taken in context with the City's lifting of the Stop Work Order in December 2006 and the subsequent work with the developer to have the law changed, it becomes apparent that the City allowed the law to be broken and then used City resources to assist the developer to change the law to allow the building to remain.

Your report states, "According to Mayor Sanders, he met [Sunroad President and Owner Aaron] Feldman to discuss the building issue consistent with his practice in all the city's business to meet with individuals on both sides of an issue, whether he agrees or disagrees with the individual's position and regardless whether the individual is a supporter or detractor of his." This is not supported by the record as established by Mayor Sanders' comments on a local radio show, where he admitted to allowing the lifting of the Stop Work Order and construction to commence on the top of the Sunroad building after the City had been notified the building was in violation of state and federal law.

3. Your report stated, "There was no 'back room deal.'" This statement is not supported by the record and its only element of truth may be the proximity of the room that the deal was made in. Based on the Mayor's comment, as outlined above, that the decision to lift the Stop Work Order was made after a meeting with Mayor Sanders and his staff and Sunroad Owner and President Aaron Feldman.

4. Your report stated, "It is false to assert that the mayor 'allowed' Sunroad to construct an illegal building which endangered public safety." This statement is directly contradicted by the record. The record showed that a Stop Work Order was issued to Sunroad in October 2007 and lifted on 21 December 2007. Specifically, Mayor Sanders appeared on a local radio show and stated that he had approved lifting the Stop Work Order and allowing construction to recommence on the portion of the building the FAA and Caltrans had deemed in violation of federal and state codes. As discussed further in the attached report, Mayor Sanders stated on the program, "Aaron Feldman asked to come over and explain his side of the story... He also felt that it was if we couldn't winterize that building, it was going to create damage in that couldn't be taken care of and if they sued us we were going to owe a lot more money for that. I talked with Jim Waring, we had conversations, and basically the decision was made to let the building be winterized…I thought that the right decision was to let it be

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[21] See Exhibit 4 of this letter.

winterized."[22] In this interview, Mayor Sanders stated that he directly participated in the decision to allow Sunroad to continue work on the building. Worse, after the City was in receipt of the 19 January 2007 letter from Caltrans – which was well covered in the local media – neither Mayor Sanders nor his staff ordered the construction to cease on the top of the Sunroad building.

5. Your report concludes, "The mayor had publicly announced, with the apparent concurrence of the city attorney, that he and 'his staff' would make a compromise proposal to the FAA to resolve the FAA height concerns regarding the Sunroad building." The statement, made on 18 May 2007, is not supported by the record. As elementary investigative techniques by your staff should have shown, the City Attorney's Office had filed a complaint in December 2006 to lower the building to 160 feet. The opinion of the City Attorney's Office did not change in the following months. In fact, the California Department of Transportation lauded the City Attorney's Office in its attempts to have the building height lowered. Your report relies on the fact that Mayor Sanders and I appeared at a news conference where Mayor Sanders announced both the re-enforcement of the Stop Work Order and his plan to reduce the height of the building to 166 feet. In my comments at the press conference, I lent my support only to the re-enforcement of the Stop Work Order. Again, my office continued the court battle to reduce the building to 160 feet.

6. In the evidence the City Attorney's Office collected for this letter, more than 55 people of interest were identified who received e-mails, memorandums, sat in meetings, or reviewed plans related to the construction of the Sunroad Centrum 12-story building and the process of having the top 20 feet of the building removed. The unsigned report issued by your office interviewed only the four people that the report sought to clear of corruption charges. Worse, in an interview with the *San Diego Union-Tribune,* Sunroad President and Owner Aaron Feldman stated that City officials told Mr. Feldman to "stay out of" discussions with the FAA regarding height limits. The article in the *San Diego Union-Tribune* stated:

> [Sunroad President and Owner Aaron Feldman] said he didn't understand the hazard notice the Federal Aviation Administration sent to Sunroad in April 2006, warning that the building was a hazard to planed landing in bad weather at Montgomery Field less than a mile away.
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> For guidance, Feldman said that his team turned to City Hall.

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22 Mayor Jerry Sanders' comments on 14 June 2007 on the *Roger Hedgecock Show.*(Exhibit 18).

> 'We were told to stay out of it, that the city and the FAA would work on this,' he said.
>
> Feldman refused to reveal which city officials advised him to proceed with construction…[23]

However, neither Mr. Feldman nor any other representatives of Sunroad were interviewed by your investigators. This fact is appalling in light of Mr. Feldman's statement that a City official told him to proceed with the construction. Nor was Mr. Feldman interviewed about his meeting with Mayor Jerry Sanders. Again, your investigators interviewed only five members of the Mayor's staff in your preparation for your investigation. There was no evidence in the report to suggest that you investigators sought to verify the statements made in the few interviews that were conducted.

7. Your report stated, "The Chief Inspector advised Escobar-Eck that the proposals were reasonable and necessary to protect the building's lower floor." This is also a false statement of fact because the Chief Inspector is not the final authority on these decisions. The San Diego Municipal Code and state law make clear that only the Chief Building Official of a City may rescind a Stop Work Order issued by the Chief Building Official. In the case of the Sunroad building, Isam Hasenin, Chief Building Official for the City of San Diego, advised against lifting the Stop Work Order to allow the construction of the building above 160 feet. Mr. Hasenin sent an e-mail on 19 December 2006 to Marcella Escobar-Eck, Director of the City's Development Services Department, which stated, "I have reviewed the plans with senior structural staff and would recommend against allowing any work in the topmost floor, the roof, and penthouse." As is illustrated in the attached report, Ms. Escobar-Eck, who is not a civil engineer, overruled Mr. Hasenin at the direction of Mayor Sanders and Mr. Waring. After Mr. Hasenin was overruled by Ms. Escobar-Eck, he moved to San Francisco. The investigators from the Attorney General's Office failed to interview Mr. Hasesin.

8. Your report stated, "Escobar-Eck consulted with city building official Hasenin and [City Inspector Joe] Harris who agreed that the proposed measures were reasonable to insure against weather damage." This statement is not supported by the record. As stated above, Mr. Hasesnin communicated directly to Ms. Escobar-Eck that work on the top of the Sunroad building should not be permitted. Worse, your office failed to contact Mr. Hasenin to discuss his side of the issue. Rather,

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[23] Hasemyer, David, and McDonald, Jeff; "He's low profile no longer | Sunroad's reclusive owner speaks out"; *San Diego Union-Tribune;* 8 July 2007. (Exhibit 19)

your office contacted only Mayor Sanders, Mr. Waring, and Ms. Escobar-Eck, those who sought to be exonerated from any wrongdoing. This egregious failure by your office to employ even the most basic investigative techniques is of great concern.

9. Your report stated, "In early May 2007, Sunroad's counsel, Steve Strauss, called Waring to propose a second solution. That solution called for lowering the building to 166 feet 3 inches." This statement is not supported by the record. In fact, according to the proposal by Sunroad attorney Strausss, the majority of the building would be lowered to 166 feet; however, a portion of the building would remain at 180 feet.

10. Your report stated, "That proposal would have entailed changing the bad weather western approach from circling north near the Centrum 12 building to circling south - a route already approved by the FAA." This statement is misleading and not supported by the record. As the attached report will show, the FAA approved the southern route on an emergency basis only during the construction of the building. This southern route is an alternate approach over single-family residential neighborhoods rather than directing the planes to the traditional northern approach over commercial and industrial zoned land in Kearny Mesa. By permanently creating the southern route over residential housing and avoiding the northern route over commercial and industrial areas, the residents of that neighborhood would be detrimentally impacted by the noise of the aircraft and would be put in harm's way in the event of an airplane crash. In order to permanently direct a flight path over a residential neighborhood, a public process – that includes public meetings and environmental impact studies – would be required to determine the effects of noise impacts and other potential dangers. By changing the flight path away from the industrial area, the value of the Sunroad property would increase dramatically because the zoning designation could change to allow additional construction on high-rise residential towers.

11. Your report stated that Mayor Sanders did not intend to mislead the public regarding Ted Sexton. Your report concluded, "The mayor explained to us at the time that he had forgotten the March letter exchange with the Airport Authority and that, which he was aware that Sexton worked on the Sunroad building issue, he thought (correctly) Sexton was working on a range of issues related to the city's airport operation." This conclusion is not supported by the record, as will be illustrated in this report. Specifically, in one of the radio shows that your investigators cite, the mayor was pointedly asked if Mr. Sexton "is trying to discover a way to change the flight patterns of Montgomery Field to allow the too-tall building to remain the same height because it's no longer a hazard?" and the Mayor flatly replied, "No." Here, Mayor Sanders provides two blatantly

contradictory answers regarding his knowledge about whether Mr. Sexton was working on the Sunroad issue. Mayor Sanders told a radio show host that Mr. Sexton was not working on the airport issue. Meanwhile, Mayor Sanders told your investigators that he was aware, at that time, that Mr. Sexton was working on the airport issue. This is an extremely important fact that your report blatantly ignored. The fact is, on the radio show, Mayor Sanders mislead the public by stating that he did not know that Mr. Sexton was working on the Sunroad issue. However, at the time the radio interview took place, Mayor Sanders had met repeatedly with Sunroad President Aaron Feldman, Airport Authority Chairman Alan Bersin, and Mr. Sexton – all to discuss the Sunroad building height issue.

12. Your report stated, "[Sunroad's building permit] was issued by DSD, before the mayor and his staff were aware of the problem with the Sunroad building." This statement is contradicted by the record. As will be discussed in greater detail in the attached report, the building permit was issued to Sunroad on 7 July 2006. Gary Halbert, then Director of the City's Development Services Department, stated in an interview that City staff reporting directly to Mayor Sanders were made aware as early as June 2006 about the problems related to the height of the Sunroad buildings and the related warnings from federal regulators. Specifically, Halbert stated that he notified Mr. Waring of the problems. Mr. Waring, Deputy Director of Land Use and Economic Development, reported directly to Mayor Sanders.

13. Perhaps most importantly, your unsigned report stated, "The Centrum 12 building had been proposed at 180 feet and had been permitted at that height." This statement is contradicted by the record. As will be illustrated in the attached report, the building permit issued to Sunroad Enterprises did not specify a height. The building permit, however, stated that the building was approved to include 12 stories. But, the Sunroad Centrum building, as the report illustrates, was constructed to include 14 stories – a fact that was omitted from the Attorney General's report.

Aside from the numerous factual inaccuracies in the Report, the authority of your office to issue such a report in response to a request to do so by Mayor Sanders is highly irregular. It does not appear that it was commissioned, investigated, or issued with any legal basis or authority. Again, the timing of Mayor Sanders' request on 20 June 2007 and Mr. Gillette's response on 21 June 2007 was irregular and highlights Mr. Gillette's need to undertake an inquiry regarding his role in quashing a properly issued search warrant. Viewed in totality, the report appears to be a political favor to an elected official.

To assist your analysis of the impropriety of the Report, I raise several questions for your consideration:

(1) What is the legal basis for an Attorney General investigation made at the request of a non-prosecutorial, local politician?

Your report explains that the Attorney General investigation was conducted at the request of a mayor:

> The Attorney General agreed to a request by Jerry Sanders, the Mayor of the City of San Diego, to inquire into allegations of corrupt conduct made against the mayor by Michael Aguirre, the City Attorney of San Diego. This report is the product of our inquiry and evaluation of that matter.

(Report, p. 1.) Attached to your report is a 21 June 2007 letter entitled "Re: Request for Investigation," from Dane R. Gillette of the Department of Justice to the Mayor of the City of San Diego, which further explains:

> Your June 20, 2007 letter to Attorney General Brown has been forwarded to me for response. In light of the serious allegations and the importance of maintaining public confidence in its elected officials, the Attorney General's Office will, as you requested, investigate the charges of public corruption. The investigation will be handled by the San Diego office of the Attorney General.

I have not come across any law which provides the Department of Justice with the authority to conduct investigations at the request of non-prosecutorial, local politicians. A search of your website reveals no other investigations of this kind by your Department.

To the contrary, California Government Code section 11157 provides the Attorney General with authority to aid in an investigation if requested "by the head of a department," not by a local politician:

> The Attorney General is the legal adviser of each department in all matters relating to the department and to the powers and duties of its officers. **Upon request of the head of a department, the Attorney General,** or under his direction, the district attorney of any county in which the proceeding is brought, **shall aid in any investigation**, hearing, prosecution or trial **had under the laws in which the department is required to administer**, and shall institute and prosecute all necessary actions or proceedings for the enforcement of such law and for the punishment of all violations thereof.

(Cal. Gov. Code § 11157, emphasis added)

Another provision explains that a prosecuting attorney or the Attorney General may ask for assistance from other agencies in conducting investigations:

> **At the request of a prosecuting attorney** or the Attorney General, **any agency**, bureau, or department of this state, any other state, or the United States **may assist in conducting an investigation of any unlawful activity that involves matters within or reasonably related to the jurisdiction of the agency**, bureau, or department. This investigation may be made in cooperation with the prosecuting attorney or the Attorney General. The prosecuting attorney or the Attorney General may disclose documents or information acquired pursuant to the investigation to another agency, bureau, or department if the agency, bureau, or department agrees to maintain the confidentiality of the documents or information received to the extent required by this article.

(Cal. Gov. Code § 11180.5, emphasis added.) The Mayor of the City of San Diego is not a prosecuting attorney.

(2) Did you, or the head of a different department, commission this investigation?

It does not appear from your report that you, the head of the Department of Justice, commissioned this investigation pursuant to California Government Code section 11180:

> The head of each department may make investigations and prosecute actions concerning:
>
> (a) All matters relating to the business activities and subjects under the jurisdiction of the department.
>
> (b) Violations of any law or rule or order of the department.
>
> (c) Such other matters as may be provided by law.

The letter from Mr. Gillette explains that the reason for the investigation was the "importance of maintaining public confidence in its elected officials" and that the San Diego Office of the Attorney General would be handling the investigation. The report does not set forth any basis derived from (a) through (c). There is no explanation regarding how the Mayor's request relates to the business activities and subjects under the jurisdiction of the Department of Justice; there is no explanation regarding how the Mayor's request investigates a violation of law of "the department;" and there is no explanation regarding any other law that provides the Attorney General with authority to investigate the Mayor's request.

(3) In conducting the investigation, why did your deputies interview only those people purportedly exonerated by the report, and fail to utilize the investigative authority granted by state law?

Your report indicates that only four people were interviewed: "Mayor Sanders; Fred Sainz, Director of Communications and Press Secretary for the Mayor's Office; Jim Waring, Deputy Chief Operating Officer for Land Use and Economic Development during the relevant time period; and Marcela Escobar-Eck, the Director of the Department of Development Services from October 2006 through August 2007." (Report, p. 4.) No individuals from my office, the California Department of Transportation, the Federal Aviation Administration, or the developer, Sunroad Enterprises, were interviewed.

Finally, the release of the report issued by your office was extremely unusual. San Diego Mayor Jerry Sanders held a press conference to announce that your office issued the report and its findings on 20 May 2008.[24] However, your office did not publicly issue the report for another five days, on 25 May 2008.[25] This is an extremely extraordinary release of an investigation by the highest law enforcement agency in the state of California.

Your report contradicts the purported reason for its preparation given by Mr. Gillette, namely, that it would maintain "public confidence": The Department of Justice's interference with a local political campaign *destroys* public confidence in its elected officials.

We gave your office the opportunity to be interviewed regarding the inconsistencies listed above including your office's authority to conduct an investigation which sought to exonerate a political official in a political dispute, your offices authority to attempt to regulate free speech in the media, and your offices unusual practice of allowing elected political officials release your investigative reports. Your office declined to comment on any of these matters.[26]

Again, I urge you to take immediate action to restore the citizens' trust in our justice system by withdrawing the Report issued by your office.

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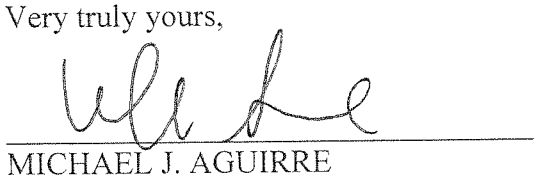
[24] 20 May 2008; Press release issued by San Diego Mayor Jerry Sanders; "Remarks By Mayor Jerry Sanders: Attorney General Brown Finds No Factual or Legal Basis to Allegations Made Against Mayor by City Attorney Regarding Sunroad Isse". (Exhibit 21).

[25] 25 May 2008; Press release issued by Office of the Attorney General Edmund G. Brown Jr.; "California Department of Justice: No Mayoral Corruption During Sunroad Project". (Exhibit 22).

[26] 8 July 2008 e-mail from James Hume, Chief Deputy Attorney General, to Kevin Christensen, Investigator for the San Diego City Attorney's Office. Subject: "San Diego City Attorney's Draft Letter and Sunroad Investigative Report. (Exhibit 23)

Very truly yours,



MICHAEL J. AGUIRRE
San Diego City Attorney