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8 La Jolla Village Residents Association

9 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
10 **COUNTY OF SAN DIEGO, CENTRAL DIVISION**

11 LA JOLLA VILLAGE RESIDENTS
12 ASSOCIATION, a California non-profit public
13 benefit corporation

14 Petitioner and Plaintiff,

15 v.

16 CITY OF SAN DIEGO, a California municipal
17 corporation; CITY COUNCIL OF THE CITY
18 OF SAN DIEGO, the governing body of the
19 CITY OF SAN DIEGO, and DOES 1 through 10
20 inclusive,

21 Respondents and Defendants.

22 MARK LYON AND ASSOCIATES, a business
23 entity form unknown; RK DEVELOPMENT
24 PARTNERS, a business entity form unknown;
25 MICHAEL KRAMBS, an individual; and DOES
26 11-20, inclusive,

27 Real Parties-in-Interest

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/././

) Case No. 37-2008-00095903-CC-TT-CTL

) Assigned for All Purposed to:
) *Hon. Judith B. Hayes*
) *Department C-68*

) **FIRST AMENDED PETITION FOR WRIT OF**
) **MANDAMUS; COMPLAINT FOR**
) **DECLARATORY AND INJUNCTIVE RELIEF**

) **[California Environmental Quality Act,**
) **Public Resources Code § 21168;**
) **Code of Civil Procedure §§ 1094.5, 1060]**

1 **INTRODUCTION**

2 1. In this action, petitioner and plaintiff LA JOLLA VILLAGE RESIDENTS ASSOCIATION
3 (Petitioner) challenges the actions of respondents and defendants CITY OF SAN DIEGO and CITY
4 COUNCIL OF CITY OF SAN DIEGO (collectively, “City” or “Respondents”) in approving the
5 development of a three-story, mixed-use retail and luxury condominium project with two-levels of
6 subterranean garage, located at 5702 La Jolla Boulevard, at the corner of Bird Rock Avenue, (Project No.
7 87287, hereinafter “Project”) proposed by Real Party-in-Interest MARK LYON AND ASSOCIATES
8 (“Applicant”). Specifically, Petitioner challenges Respondents’ October 14, 2008 approval (R-304-264)
9 of a Planned Development Permit, Site Development Permit, Coastal Development Permit, and Tentative
10 Map for the Project, and Respondents’ certification of a mitigated negative declaration (“MND”) for the
11 Project under the California Environmental Quality Act (“CEQA”).

12 2. Petitioner alleges that substantial evidence in the record before the City establishes that the
13 Project, as approved, may have a significant effect on the environment, and, therefore, the Respondent was
14 obligated to prepare and circulate a full environmental impact report (“EIR”) before approving the
15 Project. In addition, Respondents failed to make the findings required to support its actions under CEQA,
16 State law and local land use planning and zoning laws, and such findings are not supported by substantial
17 evidence in the record. Petitioner accordingly seeks a writ of mandate from this Court, pursuant to Public
18 Resources Code sections 21168 and Code of Civil Procedure sections 1085 and/or 1094.5, setting aside
19 all approvals by Respondents related to the Project as invalid and void. In addition, Petitioner seeks a
20 judicial declaration, pursuant to Code of Civil Procedure § 1060, that the use of deviations under the
21 Planned Development Permits process set forth in the San Diego Municipal Code is contrary to law and
22 public policy.

23 **JURISDICTION**

24 3. This Court has jurisdiction to resolve this controversy under Public Resources Code
25 sections 21167(b), 21168 and Code of Civil Procedure sections 1094.5 and 1060. All Parties and the
26 Project site are located in San Diego County. Venue is proper in the Central Division because Petitioner's
27 causes of action arose, the Project is located, and Respondents and Applicants conduct business within the
28 Central Division.

1
2 **PARTIES**

3 4. Petitioner LA JOLLA VILLAGE RESIDENTS ASSOCIATION (“LJVRA”) is a 501(c)(4)
4 tax exempt California non-profit corporation duly organized and existing under the laws of the State of
5 California and has members who reside in the County and City of San Diego. LJVRA meets all the
6 standing requirements to bring this petition. Board members and supporters of LJVRA reside in the
7 community of La Jolla. The interest that LJVRA seeks to protect is germane to its fundamental purpose.
8 Its purposes are, among other things, to encourage resident participation in the local development
9 decision-making process, and to represent its supporters’ interests in local and City land use proceedings
10 that affect the La Jolla community; and to preserve and enhance the local environment. LJVRA supporters
11 and its attorney submitted written and oral comments critical of the Project, identifying significant,
12 unmitigated environmental impacts that the Project posed, and the lack of statutory basis for the approval,
13 prior to its approval by the City.

14 5. Defendant and Respondent CITY OF SAN DIEGO is a California municipal corporation.
15 Defendant and Respondent CITY COUNCIL OF THE CITY OF SAN DIEGO (“City Council”) is the
16 City’s governing body. The City, through the City Council, is the lead agency responsible under the
17 California Environmental Quality Act (“CEQA”) for evaluating the environmental impacts of the Project.
18 City, through the City Council, is also the agency responsible for approving all components of the Project.

19 6. Real party-in-interest MARK LYON AND ASSOCIATES, INC. is the applicant and
20 recipient of the approvals challenged herein, and is identified as the applicant for the Project approvals.

21 7. Petitioner is informed and believes that real party-in-interest MICHAEL KRAMBS is the
22 owner of record of the property at 5702 La Jolla Boulevard, which is the location of the Project and as
23 such has an interest in this litigation.

24 8. Petitioner is informed and believes that real party-in-interest RK DEVELOPMENT
25 PARTNERS, a business entity form unknown, has an ownership or other interest in the Project and/or the
26 property that is the subject of this action. It is further alleged on information and belief that RK
27 DEVELOPMENT PARTNERS is owned and controlled by Real Party-in-Interest MICHAEL KRAMBS.
28

1 16. On or about February 6, 2006, Applicant Mark Lyon and certain of his colleagues
2 proposed an amendment to the La Jolla PDO to eliminate the two-story limit and allow three stories
3 throughout La Jolla’s Planned District.

4 17. This proposal to eliminate the two-story limit garnered immediate and significant
5 organized community opposition, which culminated in its rejection by the La Jolla CPA on May 4, 2006.

6 18. On June 21, 2006, Applicants re-submitted the Project to the City, still with three stories,
7 and on December 22, 2006, a Third Project Re-Submittal to the City was recorded.

8 19. On February 6, 2007, the Project was considered and rejected by the La Jolla Community
9 Planning Association (“La Jolla CPA”), which is the city-recognized planning group that has jurisdiction
10 over the Project. The La Jolla CPA denied “the old design,” because the findings for a Planned
11 Development Permit could not be made. It instructed the Applicants to return with a new design.
12 Applicants did not return to the La Jolla CPA, but instead revised various elements of the Project and
13 went directly to the City to seek approval.

14 20. On April 10, 2007, the current rendition of the Project was submitted to the City.

15 21. On or around January 29, 2008, the City released a Draft Mitigated Negative Declaration
16 for the Project - the MND at issue here. A number of individuals and organizations submitted written
17 comments on the negative declaration, many of which stated that the Project would have significant
18 environmental impacts and that a full EIR was therefore required.

19 22. The Project was brought before the Planning Commission on May 22, 2008. Because this
20 version of the Project had not been shown to the community, community members requested and were
21 granted a continuance with instructions that the Project be brought before the La Jolla CPA for
22 consideration.

23 23. On June 5, 2008 the Project was brought before the La Jolla CPA and was rejected based
24 on “the following considerations:

25 (a) That Bird Rock Station (the Project) does not comply with the current Planned
26 District Ordinance, including, but not limited to, incorporation of a third story design.

27 (b) That the public benefits claimed for this project are insufficient to justify the
28 requested deviations from the La Jolla PDO.

1 (c) That approval of the third story element of the Project establishes a precedent that
2 significantly diminishes the enforceability of key elements of the current PDO for future
3 developments in La Jolla.

4 (d) That the three story element cannot be justified as just a deviation to the PDO and
5 should require a variance.”

6 24. The Project came back to the City Planning Commission on July 17, 2008, and was
7 approved without conditions by the Commissioners, who cited aesthetic reasons for their approval.

8 25. The Project was heard by the City Council on October 14, 2008. During the period leading
9 up to the hearing, and at the hearing itself, members of the public presented evidence and opinion from
10 various sources, including expert opinion, establishing that the Project, even after implementation of the
11 mitigation measures identified in the MND, would have a significant adverse effect on the environment.

12 26. Despite the comments of Petitioner and other members of the public documenting the
13 significant impacts that the Project may threaten, both in itself and cumulatively with other projects, the
14 City approved a Coastal Development Permit, Site Development Permit, Planned Development Permit and
15 Tentative Map for Project # 87287 on the basis of the MND.

16 27. On October 17, 2008, Respondent City filed a Notice of Determination with the office of
17 the County Clerk, which states that Respondent has determined that the Project, “in its approved form, will
18 not have a significant effect on the environment” and that it was approved on the basis of a mitigated
19 negative declaration.

20 **PRELIMINARY ALLEGATIONS**

21 28. Petitioner incorporates all previous paragraphs as if fully set forth.

22 29. Petitioner participated in the administrative review process for the approval challenged
23 herein, and submitted detailed written and oral comments setting forth the concerns raised in this action.
24 The issues presented in this action were brought to the attention of CITY and Applicants during the
25 administrative review process by Petitioner, members of the public, or both.

26 30. Petitioner has exhausted administrative remedies in compliance with Public Resources
27 Code section 21177.

28 31. Petitioner commenced this action within 30 days of the filing of the notice of determination

1 for the Project in compliance with Public Resources Code section 21167(b), taking into account that the
2 30th day fell on a Sunday.

3 32. Petitioner has performed all conditions precedent to filing this action in compliance with
4 the requirements of Public Resources Code section 21167.5 by providing respondents with notice of this
5 action prior to filing the lawsuit, and by filing a proof of service with the court at the time of filing this
6 action.

7 33. Within 10 days of filing the Petition, Petitioner served a notice of its intention to prepare
8 the administrative record themselves.

9 34. Petitioner provided the California Attorney General with notice of this action and
10 requested that the Attorney General intervene in the action because of the importance of this case to the
11 citizens of the City of San Diego, the County of San Diego, and the State of California.

12 35. Petitioner is entitled to attorney's fees pursuant to Code of Civil Procedure section 1021.5
13 in that:

14 a. The successful disposition of this lawsuit will result in the enforcement of
15 important rights affecting the public interest and will confer significant benefits upon the public or
16 large class of persons. Petitioner seeks to enforce provisions of important state and local
17 environmental laws for the benefit of the public, and to rectify certain procedural improprieties
18 which will benefit all future participants in the decision making process employed by the
19 respondents;

20 b. The necessity and financial burden of private enforcement are such as to make the
21 award appropriate; and,

22 c. Such fees will not be paid out of any recovery.

23 36. The actions of respondents herein complained of were arbitrary and capricious and
24 petitioner is entitled to recover attorney's fees pursuant to Government Code § 800.

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26
27 **FIRST CAUSE OF ACTION**
(Violation of CEQA – Pub. Res. Code § 21168.)

28 37. Petitioner incorporates all previous paragraphs as if fully set forth herein.

1 38. At all times relevant to this action, City was the “Lead Agency” responsible for the review
2 and approval of the Project under Public Resources Code section 21067.

3 39. A lead agency may not approve a development project without performing the proper
4 environmental review required by CEQA.

5 40. Under Public Resources Code section 21080, a lead agency may only adopt a negative
6 declaration for a proposed project if there is no substantial evidence, in light of the whole record before
7 the agency, that the project may have a significant effect on the environment. If there is substantial
8 evidence, in light of the whole record before the agency, that a project may have a significant effect on the
9 environment, then the agency must prepare or require preparation of a full EIR for the project.

10 41. There is substantial evidence, in light of the whole record before Respondents, that the
11 Project would have a significant effect on the environment. Specifically, there is substantial evidence in
12 the form of facts, reasonable assumptions predicated upon facts, and expert opinion to support facts that
13 the Project would have significant adverse direct, indirect, and cumulative impacts on the environment,
14 including but not limited to: traffic; geology, hydrology and drainage of soils; and the applicable Land Use
15 Plan, neighborhood character and community welfare, both in Zone 4’s Bird Rock and the rest of La
16 Jolla’s Planned District.

17 42. There is substantial evidence, in light of the whole record before the City, that the Project
18 would have cumulatively considerable effects when viewed in connection with the effects of other future
19 projects within the two-story limit zones of the La Jolla Planned District, which were not considered or
20 addressed by the MND or Respondent.

21 43. Petitioner retained a traffic expert to review the MND and traffic studies in the record.
22 After reviewing the MND and traffic study, Petitioner's traffic expert noted that according to the traffic
23 study itself, the Project would increase the “volume-to-capacity ratio” along La Jolla Boulevard by 4% to
24 5%. The expert noted that the threshold for significance established by City of San Diego is a 2%
25 increase in the “volume-to-capacity ratio.” Thus, the project would have a significant impact on the
26 environment. Such comments were submitted to the City Council before public comment at the final
27 hearing.

1 50. The City, through the City Council, abused its discretion and the requirements of the local
2 land use laws by approving the deviations from the La Jolla Planned District Ordinance included in the
3 Planned Development Permit, which are not allowable pursuant to either deviation or variance.

4 51. The violations of the La Jolla Planned District Ordinance, if they are allowable at all,
5 would require at a minimum a variance, and as such the City Council’s approval of these violations as
6 “deviations” is a subversion of local planning and zoning laws and the policy underlying these laws,
7 including the variance procedures of SDMC § 126.0801, et seq. The City did not require Applicant to
8 follow the procedure for obtaining a variance, the Applicant did not seek a variance, nor could the
9 requirements for a variance be met.

10 52. The City’s approval of the third story under a Planned Development Permit, Site
11 Development Permit and Coastal Development Permit establishes a precedent that significantly
12 diminishes, if not eliminates, the enforceability of key elements of the current Planned District Ordinance
13 for future developments in La Jolla. As such, it works as a de facto rezoning of key elements of the La
14 Jolla Planned District without the required process, protections and benefits of environmental review,
15 community-wide noticing, and Coastal Commission ratification.

16 53. The City Council failed to address and consider all the evidence presented and failed to
17 make the findings necessary to issue the Planned Development Permit, Site Development Permit and/or
18 Coastal Development Permit. Any subsequent resolution that includes such findings would be a post hoc
19 rationalization of the October 14, 2008 action of the City Council.

20 54. The City Council did not, and cannot, make the findings required by the San Diego
21 Municipal Code to approve a Planned Development Permit, Site Development Permit and/or Coastal
22 Development Permit for the Project.

23 55. The findings upon which the City Council based its approval of the Planned Development
24 Permit, Site Development Permit and/or Coastal Development Permit were not supported by the evidence.
25

26 56. The failure of the City Council to either discuss or adopt specific findings at the October
27 14, 2008 hearing deprived the public of a “fair trial” on the merits of the Project.
28

1 “deviation” may be used to circumvent the variance requirements, undermine the variance process, and
2 render it moot when applied to the issuance of Planned Development Permits.

3 64. SDMC § 126.0805, “Findings for Variance Approval,” provides:

4 The decision maker may approve or conditionally approve an application for a variance
5 only if the decision maker makes the following findings:

6 There are special circumstances or conditions applying to the land or premises for which
7 the variance is sought that are peculiar to the land or premises and do not apply generally
8 to the land or premises in the neighborhood, and these conditions have not resulted from
9 any act of the applicant after the adoption of the applicable zoning regulations;

10 The circumstances or conditions are such that the strict application of the regulations of the
11 Land Development Code would deprive the applicant of reasonable use of the land or
12 premises and the variance granted by the City is the minimum variance that will permit the
13 reasonable use of the land or premises;

14 The granting of the variance will be in harmony with the general purpose and intent of the
15 regulations and will not be detrimental to public health, safety, or welfare; and

16 The granting of the variance will not adversely affect the applicable land use plan. If the
17 variance is being sought in conjunction with any proposed coastal development, the
18 required finding shall specify that granting of the variance confirms with, and is adequate
19 to carry out, the provisions of the certified land use plan.

20 65. It is alleged, on information and belief, that the City will contend that deviations are
21 applied solely to minor exceptions to the strict application of the zoning ordinances and municipal code,
22 and deviations, as such, do not constitute variances under the law.

23 66. Petitioner alleges that there is no objective, codified standard in the Municipal Code that
24 delineates what is a minor or insignificant deviation from the applicable zoning ordinance and what is
25 deemed sufficiently significant to constitute a variance from planned district ordinances, zoning
26 ordinances, or other Municipal Code requirements.

27 67. An actual and present controversy has arisen in that Petitioner claims that the City’s use of
28 deviations constitutes a violation of law and public policy because a deviation may be granted to any
zoning regulation or Municipal Code section for which a deviation is not explicitly prohibited, to such an
extent as the City deems justified, and may be granted under findings which provide unlimited discretion
to the City Council or administrator and thus may be arbitrarily and capriciously granted. This lack of

1 objective standards to ensure fairness and uniformity in the granting of deviations undermines important
2 public policy and public interests that are fundamental to land use planning and zoning laws.

3 68. Petitioner alleges that the City's Municipal Codes applicable to granting deviations
4 constitute illegal and unjustified variance procedures in that such laws not require the City to make the
5 minimum findings enunciated under SDMC § 126.0805.

6 69. A declaration of law is necessary in this case to avoid numerous and repetitious lawsuits,
7 each challenging the applicability of the deviation procedure to individual projects.

8 70. Petitioner has a clear, present and beneficial right to the proper performance by the City of
9 its duties and compliance with the laws and legal principles as set forth below. Petitioner has no plain,
10 speedy or adequate remedy under the law, except for the relief herein sought.

11 71. Petitioner seeks the court to declare the law as to the applicability of San Diego Municipal
12 Code § 126.0805 to the City's deviation procedure, and order the City to define, refine and/or discontinue
13 its use of “deviations” until the Municipal Code either requires findings for a deviation that meet the
14 requirements of the variance procedures, or until “deviation” is defined in such a manner that it does not
15 conflict with or undermine public policy and/or the variance procedures of the Municipal Code.

16
17 **PRAYER FOR RELIEF**

18 **Petitioner prays for the Court to grant the following relief:**

- 19 1. A peremptory writ of mandate ordering respondents:
- 20 (a) to set aside all approvals of the Bird Rock Station (Project No. 87287) including,
21 but not limited to: the Coastal Development Permit, the Planned Development
22 Permit, the Site Development Permit, and the Tentative Map;
- 23 (b) to set aside its approval, certification and adoption of the mitigated negative
24 declaration;
- 25 (c) to refrain from granting any additional permits, entitlements, or other approvals
26 related to the Project until it has taken action necessary to bring such approvals into
27 compliance with CEQA, State statutes and local ordinances.
- 28 2. For an order declaring that the CITY’s use of deviations violates the law and that the CITY

1 require findings for a deviation that meet the requirements of the variance procedures, or define deviation
2 so that it does not conflict with or undermine public policy and/or the variance procedures of the
3 Municipal Code;

4 3. For an order staying the effect of the CITY's approval of Project No. 87287 pending the
5 outcome of this proceeding;

6 4. For a preliminary and permanent injunction directing Respondents and Real Parties-in-
7 Interest, and all persons acting in concert or participating with them, to cease and refrain from engaging in
8 any action related to the Project that could result in any change or alteration in the physical environment
9 until CITY takes any necessary action to bring its approvals into compliance with CEQA;

10 5. For a preliminary and permanent injunction, restraining and enjoining CITY from
11 approving any three-story projects in any of the two-story limit zones in La Jolla, as described in the La
12 Jolla Planned District Ordinance;

13 6. For costs of suit;

14 7. For an award of attorneys' fees pursuant to Code of Civil Procedure section 1021.5 and
15 Government Code § 800, and;

16 8. For such other legal or equitable relief that the Court deems just and proper.

17
18 Date: December 18, 2008

19 _____
20 Todd T. Cardiff, Esq.
21 Attorney for Petitioner
22 La Jolla Village Residents Association
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1 **VERIFICATION**

2 I, Steve Haskins, declare:

3 I am an officer and board member of the LA JOLLA VILLAGE RESIDENTS ASSOCIATION, a
4 California public benefit corporation organized and existing under the laws of California, and am
5 authorized to make this verification on its behalf.

6 I have read the foregoing First Amended Petition for Writ of Mandamus and Complaint for
7 Declaratory and Injunctive Relief and know the contents thereof. I declare the allegations contained
8 therein are true to my knowledge, except as to those matters which are alleged on information and belief,
9 and as to those matters I believe them to be true.

10 I declare under penalty of perjury, under the laws of the State of California, that the foregoing is
11 true and correct and that this verification was signed on this 18th day of December, 2008 in La Jolla,
12 California.

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Steve Haskins
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