The Claremont Institute

Center for Constitutional Jurisprudence

c/o Chapman University School of Law
One University Drive
Orange, California 92866
(714) 628-2587

October 8, 2006

The Honorable John Larson, Mayor
The Honorable Charles Antos, Gordon Shanks, Ray Ybaben, and Michael Levitt
Members of the City Council
City of Seal Beach
211 8th Street
Seal Beach, CA

Dear Mayor Larson and Members of the City Council:

We have been retained by a group of homeowners in the City of Seal Beach ("City") concerned about the harm to their property values caused by the City's attempt to impose new, retroactive building restrictions on their property.

We have reviewed the extant procedural history of Ordinance 1553, and find it to be legally defective. On September 14, 2006, the City published notice of a Planning Commission hearing to be held six days later on September 20, 2006. As you are certainly aware, California Government Code § 65090(a), enforceable against the Seal Beach Planning Commission pursuant to § 65853, requires such notice to be published "*at least 10 days prior* to the hearing." And Government Code § 65091 requires that notice of hearings considering zoning changes shall be mailed to affected property owners at least 10 days prior to the hearing. The City's own Municipal Code emphasizes these requirements by way of reiteration. See Seal Beach Municipal Code, Art. 27 Section 28-2705(B) ("Amendments to the ordinance codified herein or changes to zoning districts shall be by written notice published in a newspaper of general circulation *not less than 10 days* before the hearing date"); *id.,* subsection (D) ("Changes of zone initiated by the City shall be by written notice *mailed to the affected property owner(s), and to all property owners and to all addresses within 300 feet* of the property to be affected, and published in a newspaper of general circulation, not less than 10 days before the hearing date"). Moreover, the same publication included notice of a City Council hearing to ratify the recommendation of the Planning Commission that had not yet been made—unless, of course, the September 20, 2006 Planning Commission hearing was simply a sham from the outset.

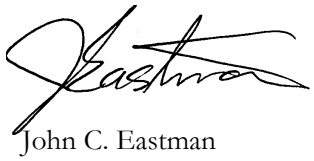
These statutory notice requirements are designed so that citizens have a voice in the development of local governmental policy, a voice to which elected and appointed officials are *supposed* to be responsive. Compliance with the notice requirements is particularly important when a proposed ordinance will effect a regulatory taking of private property; in such cases, the statutory requirements define the process that is required, and which is enforceable as a matter of federal constitutional law, by means of the Due Process clause of the Fourteenth Amendment. See, e.g., *Horn v. County of Ventura,* 24 Cal 3d 605 (1979) (due process requires reasonable notice and opportunity to be heard before land use decision resulting in significant or substantial deprivation of property). By flouting the statutory notice requirements, the Planning Commission and City Council have acted not only contrary to state and local law, therefore, but may well have acted unconstitutionally as well.

We call attention to this matter so that the City will have the opportunity to cure the legal defects before final consideration of this ordinance, lest the proposed ordinance be subject to legal challenge

and likely invalidation. California case law makes clear that enactments from a defectively-noticed meeting can be invalidated as a result of the defective notice. *See Sounhein v. City of San Dimas*, 11 Cal. App. 4th 1255 (1992); *Scott v. City of Indian Wells*, 6 Cal. 3d 541 (1972). And although anyone challenging the ordinance will have to demonstrate that "the error was prejudicial," causing the complainant to "suffer[] substantial injury . . . and that a different result would have been probable," Cal. Gov. C. Title 7 § 65010(b), those requirements are easily met here because court decisions tend to find that a city's failure to adhere to these statutory requirements result in "substantial harm" to property owners, and that, especially when general notice is defective, "a different result would have been probable" under Govt. C. § 65010(b). The California Court of Appeal held in *Sounhein*, for example, that defect in notice was "not harmless or non-prejudicial," and the California Supreme Court held in the *Scott* case that it was "clear that failure to consider the rights, desires, suggestions, and welfare of an entire class of affected landowners may well yield a 'different result.'" The Court of Appeal likewise held in *Taschner v. City Council of the City of Laguna Beach* that "[w]here interested persons have been *denied notice* and opportunity to have their claims, suggestions and welfare considered *by a planning commission . . . in connection with a contemplated zoning action*, it is reasonable to conclude that a *different result would have been probable* had such notice and opportunity to be heard been afforded." 31 Cal. App. 3d 48, 64 (1973) (overturned on other grounds).

Lest there be any doubt that there are significant numbers of concerned citizens and affected property owners who would have participated in the Planning Commission hearing of September 20, 2006, had the statutorily-required notice been provided, please see the petition attached to this letter. We urge you to listen to your constituents and send this matter back to the Planning Commission for a properly-noticed hearing at which the concerns of affected property owners can be heard as required by law.

Sincerely,



John C. Eastman
Director, The Claremont Institute
Center for Constitutional Jurisprudence

PROOF OF PUBLICATION
(2015.5 C.C.P.)

STATE OF CALIFORNIA,
County of Orange

I am a citizen of the United States and a resident of the county aforesaid; I am over the age of eighteen years, and not a party to or interested in the above-entitled matter. I am the principal clerk of the printer of the SEAL BEACH SUN, a newspaper of general circulation, printed and published weekly in the City of Seal Beach, County of Orange and which newspaper has been adjudged a newspaper of general circulation by the Superior Court of the County of Orange, State of California, under the date of 2/24/75. Case Number A82583; that the notice of which the annexed is a printed copy (set in type not smaller than nonpareil), has been published in each regular and entire issue of said newspaper and not in any supplement thereof on the following dates, to-wit:

September 14

all in the year 2006.

I certify (or declare) under penalty of perjury that the foregoing is true and correct.

Dated at Seal Beach, CA,
this 14 day of September, 2006.

Donna M. Roth
Signature

PUBLICATION PROCESSED BY:
THE SEAL BEACH SUN
216 Main Street
Seal Beach, CA 90740
(562) 430-7555

This space is for the County Clerk's Filing Stamp

Proof of Publication of

CITY OF SEAL BEACH ★ INCORPORATED ★ OCTOBER 27, 1915 ★ ORANGE COUNTY, CALIFORNIA

NOTICE IS HEREBY GIVEN that the Planning Commission and City Council of the City of Seal Beach will each hold a public hearing in the City Council Chambers, 211 Eighth Street, Seal Beach, California, to consider the following item:

ZONE TEXT AMENDMENT 06 - 1
REDUCE ALLOWABLE HEIGHT FROM 35 FEET TO 25 FEET ON THE REAR HALF OF LOTS 37.5 FEET WIDE OR WIDER RMD and RHD ZONES, PLANNING DISTRICT 1 - "OLD TOWN"

Meeting Dates: Planning Commission – September 20 at 7:30 PM; City Council – September 25 at 7:00 PM.

Request: To reduce the allowable building height within the RMD and RHD District 1 ("Old Town") zones from the current allowable variable building height standards based on the width of a property to a consistent standard of a maximum height of 25 feet regardless of the lot width. This amendment proposes the following amendments:

1. Amend Article 7, Residential Medium Density Zone (RMD Zone), District 1, as follows:
   - Amend Section 28-701.A.1, Maximum Height, Main Buildings and Second Dwelling Units to allow 2 stories and a maximum height of 25 feet.
2. Amend Article 8, Residential High Density Zone (RHD Zone), District 1, as follows:
   - Amend Section 28-801.F, Maximum Height, Main Buildings and Second Dwelling Units to allow 2 stories and a maximum height of 25 feet.

Environmental Review: This project is categorically exempt from CEQA review.

Code Sections: Seal Beach Municipal Code, Sections 28-701, 28-801, 28-2600 – 28-2614

Applicant: City of Seal Beach

At the above time and place all interested persons may be heard if so desired. If you challenge the proposed actions in court, you may be limited to raising only those issues you or someone else raised at the public hearing described in this notice, or in written correspondence delivered to the City of Seal Beach at, or prior to, the public hearing.

DATED this 11th day of September, 2006
SB-0091
Linda Devine, City Clerk, City of Seal Beach
Published in the Seal Beach Sun 9/14/2006