



November 4, 2021

City of San Clemente – City Hall
910 Calle Negocio
San Clemente, CA 92673
Attn: Councilperson Laura Ferguson

Dear Councilperson Ferguson,

As you are aware, we are currently defending claims filed by the Johansson family relative to an alleged dangerous condition of public property at or near the intersection of Del Cerro and Vista Montana. We are aware that you indicate you were contacted by Mrs. Johansson regarding the matter in early September 2021 and that you responded by sending an email to your City Manager on September 12, 2021, which was copied to Mrs. Johansson that said:

"I have found California case law in which a city may very likely share blame if it knows dangerous conditions exist and doesn't do anything to fix it. I'm not implying anything here but considering these two incidents have been brought to our attention I'd like to know what your plans are for any accident reconstruction or seeking traffic engineering expertise on these matters before something even more tragic occurs.

I look forward to your reply. Please ensure Mrs. Johansson receives your reply as well. "

In addition, we are aware of further communications you have had with residents regarding bridge maintenance wherein you allege that same is lacking. Specifically, you indicated:

"Thank you so much for bringing this to Council's attention. It's unfortunate that we haven't seen a regular maintenance schedule by the City on the Coastal Trail bridges.

I've copied the city manager so that he could read your email, inform us of a reason why these weren't maintained and determine a plan to ensure proper maintenance so that we don't have to replace these and spend even more money as we've already been informed by staff is suggested (at nearly \$5M) for the Mariposa pedestrian bridge on the trail."

Finally, we are aware of another recent communication with a resident regarding street striping wherein you indicate:

"Thank you for your email. I appreciate you raising these serious safety concerns for motorists and cyclists— not to mention the risk of liability for the city. The slurry seal

maintenance project affects many other areas of town as well which still have no striping since the initial work was done a couple of weeks ago."

While we understand your need to communicate with the constituents and show your advocacy, you should refrain from making conclusionary statements regarding failed maintenance, dangerous conditions and insinuating there is liability as to the City. Statements such as this can prove challenging if and when litigation is filed against the City and will no doubt be used as "Exhibit A" for the plaintiff.

Regarding the Johansson matter, you have a duty to the California JPIA on any claim or suit that has been submitted to us for coverage, as this one has. I direct you to pages 24 & 25 of the attached Liability Memorandum of Coverage, Section V., Part C, Number 4, as noted below:

Protected Party's Duties in the Event of Occurrence or Claim

1. In the event of any **Occurrence**, written notice containing particulars sufficient to identify the **Protected Party** and also reasonably obtainable information with respect to the time, place, and circumstances thereof, and the names and addresses of the injured and of available witnesses, shall be given by or for the **Protected Party** to the **Authority's** Claims Administrator as soon as practicable.
2. If a **Claim** is made against a **Protected Party**, the **Protected Party** shall immediately forward to the **Authority's** Claims Administrator every demand, notice, summons or other process received by the **Protected Party** or the **Protected Party's** representative.
3. The **Authority's** Claims Administrator will review the **Claim**, undertake whatever investigation is indicated, and take appropriate action, depending on the circumstances. A **Claim** may be returned to claimant as "insufficient," if it does not contain minimum and essential information about the incident or the identity of the claimant. A **Claim** may also be returned as "late," if the prescribed time for filing has been exceeded. The Claims Administrator may request that the **Member** reject the **Claim**, or take no action until further notice, or such actions may be taken by the Claims Administrator if claims handling authority has been delegated to the **Authority** by the **Member**.
4. The **Protected Party** shall cooperate with the **Authority** and, upon the **Authority's** request, assist in making settlements, in the conduct of **Claims**, attending hearings and trials, securing and giving evidence, obtaining the attendance of witnesses and in enforcing any right of contribution or indemnity against any person or organization who may be liable to the **Protected Party** because of injury or damage with respect to which protection, including any **Defense** obligation, is afforded under this Memorandum; and the **Protected Party** shall not, except at the **Protected Party's** own cost, voluntarily make any payment, assume any obligation or incur any expense. No **Claim** shall be settled without the prior written



consent of the **Authority**, and the Authority shall not be required to contribute to any settlement to which it has not consented. The **Protected Party** shall not take any action whatsoever, subsequent to an **Occurrence** or **Claim** that could increase the liability exposure of, or jeopardize the program or **Authority** in any way. Failure to adhere to the duties set forth in this section can result in denial or rescission of coverage on behalf of the **Protected Party** or **Member**, where the Executive Committee of the **Authority** determines that such failure prejudices the defense of a claim.

Please be aware that the communication already undertaken, and any future correspondence of this sort, is in violation of the above noted section of the Liability Memorandum of Coverage and will give rise to a rescission of coverage, leaving the City of San Clemente to defend these claims out of pocket. In addition, the Johansson family is represented by counsel relative to their claim, therefore there should be no direct communications with them regarding their claims or this location, nor should you be having any with their attorney.

We would like to note that this will be the second notice referencing this type of conduct, with the first coming to the entire council on October 3, 2019 (see attached). Thank you for your cooperation going forward.

Sincerely,



Norm Lefmann
Assistant Executive Officer
California Joint Powers Insurance Authority

Encl. Memorandum of Liability Coverage
October 3, 2019 Letter

cc: Kathy Ward, Mayor
Gene James, Mayor Pro Tem
Steve Knoblock, Councilperson
Chris Duncan, Councilperson
Scott Smith, Esq., City Attorney
Erik Sund, City Manager





October 3, 2019

Mayor Pro Tem Dan Bane
City of San Clemente
910 Calle Negocio
San Clemente, CA 92673

Dear Mayor Pro Tem Bane:

RE: Council Conduct Pertaining to Open Claims

As you know, the California Joint Powers Insurance Authority provides liability protection to the City of San Clemente for claims falling within the provisions of the Memorandum of Coverage—Primary Liability. The MOC provides specific direction as to the responsibilities of members and the Authority in regard to the handling and defense of claims.

I am writing to address concerns we have relative to certain actions taken by a member or members of the city council regarding the employment-related complaint of employee Bill Humphreys and his subsequent claim for damages. The claim has been tendered to and accepted for coverage by the California JPIA under the Primary Liability Program. We are providing a defense to the City and the employees named in the claim, Erik Sund and James Makshanoff. We have assigned attorney Mitch Dean of Daley & Heft to represent all potential defendants.

In the wake of the employment complaint made by Mr. Humphreys, we are aware that the City engaged the services of Carl Botterud to conduct an impartial investigation of the allegations that were made against Mr. Sund and Mr. Makshanoff. At the conclusion of the investigation, the allegations against Sund and Makshanoff relative to discrimination and harassment were not sustained. A complaint of lack of performance reviews was sustained in part, as the reviews were found to have been given to Mr. Humphreys more than 30 days past the due date as per City policy. It is our understanding that the city council met in closed session on August 20, 2019 and at that time decided to provide a copy of the internal investigation report to counsel for Mr. Humphreys – Ms. Heidi De Groot.

We are aware that there have been multiple occasions where one or more members of the city council have proactively contacted Ms. De Groot. While the investigation was pending, we are aware that a member of city council contacted Ms. De Groot and requested permission to be present during the interview of her client, to which De Groot agreed. We are further aware that

the investigator, Mr. Botterud, did not allow the council member to be in attendance. We are also aware that on September 10, 2019, a member of council contacted Ms. De Groot, once again, to discuss whether she had been contacted by the City Attorney and received the investigation report.

The California JPIA highly discourages council members from becoming involved in employment matters, especially those involving confidential investigations. The California JPIA requests that members not contact opposing counsel on matters that we have accepted for coverage and are actively defending. Doing so can be harmful to mounting an effective defense and may be construed as a failure to cooperate in the defense of the claim, thereby jeopardizing coverage. (See Pages 23-24; 18/19 MOC – Primary Liability Program).

C. Protected Party's Duties in the Event of Occurrence or Claim

(iv) The **Protected Party** shall cooperate with the **Authority** and, upon the **Authority's** request, assist in making settlements, in the conduct of **Claims**, attending hearings and trials, securing and giving evidence, obtaining the attendance of witnesses and in enforcing any right of contribution or indemnity against any person or organization who may be liable to the **Protected Party** because of injury or damage with respect to which protection, including any **Defense** obligation, is afforded under this Memorandum; and the **Protected Party** shall not, except at the **Protected Party's** own cost, voluntarily make any payment, assume any obligation or incur any expense. No **Claim** shall be settled without the prior written consent of the **Authority**, and the **Authority** shall not be required to contribute to any settlement to which it has not consented. The **Protected Party** shall not take any action whatsoever, subsequent to an **Occurrence** or **Claim** that could increase the liability exposure of, or jeopardize the program or **Authority** in any way. (Underlining added)

It is our further belief that during the council member's call with Ms. De Groot, the issue arose as to whether the City Attorney had presented the possibility of settlement. Further, that if he had done so, the City Attorney's office had not been authorized to do so. Again, this should not be discussed with opposing counsel.

It should be made clear that, as this claim has been accepted for coverage by the California JPIA, the **Authority** is in control of the settlement or other resolution of the case, and we have had discussions with the City Attorney in this regard. (see Page 2; 18/19 MOC – Primary Liability Program).



B. Defense and Settlement

The **Authority**, at the shared expense of its **Members**, and out of funds of the **Program** deposited or obligated to be deposited by its **Members**, shall investigate, negotiate, settle, or Defend, at the Authority's sole discretion, any Claim which has been tendered to the Authority and which in the sole opinion of the **Authority** is encompassed by this **Program**. The **Authority** shall control selection of defense counsel. **Defense Costs** incurred by the **Protected Party** prior to the tender of the **Claim**, as required by Section 5. CONDITIONS AND RESPONSIBILITIES, to the **Authority** are the sole obligation of the **Protected Party**. The date of the tender of the **Claim** shall be the date written notice of said **Claim** is received at the **Authority's** offices (or its designated Claims Administrator). (Underlining added)

It is in our collective best interest to ensure that there is open, comprehensive, and respectful dialog during closed session when addressing confidential issues affecting the City. But these conversations must remain confidential. Further, actions like those discussed above are inappropriate and may be damaging to the City's defense. They must be stopped immediately. The continuance of activity that may be damaging to the defense of the claim may jeopardize the City's coverage.

Please communicate our concerns with your fellow council members.

Please contact me if you have any questions.

Sincerely,



Jonathan R. Shull
Chief Executive Officer

cc: City Attorney Scott Smith
City Manager James Makshanoff

