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September 29, 2000

Michele B. Bagneris
City Attorney
100 North Garfield Ave., Room 228
Pasadena, CA 91109-7215

Re: Request for Analysis of Legal Issues Related to Kidspace Museum Conditional Use Permit Application; CUP # 3579.

Dear Ms. Bagneris,

On behalf of the Arroyo Seco Foundation ("ASF"), we objected in writing to approval of a Conditional Use Permit ("CUP") for the Kidspace Museum ("Museum") in Brookside Park. On September 20, 2000, we provided you with a copy of our letter of opposition to the Zoning Hearing Officer by facsimile, but your representative at the hearing that same evening had not seen the letter. For your convenience, attached is another copy of that letter. We are writing to ask you to review it to determine whether you agree with our analysis of certain key provisions of the City Charter and Municipal Code.

We have identified various provisions of the City Charter and Municipal Code which we believe would be violated by an approval of a CUP for the Museum project. We are aware that you have prepared a December 9, 1999 Memorandum ("December Memorandum") analyzing various provisions of the City's Charter, Municipal Code, and General Plan. However, as discussed below, we have identified issues which we do not believe the City has considered and, to the best of our knowledge, were not presented until our September 19, 2000 letter. Specifically, the City considered the City Charter's provisions for sale or transfer of dedicated park land, but did not consider the City Charter's prohibitions on *use* of dedicated park land for other purposes. Further, the City considered certain provisions of the Municipal Code, but not sections 3.32.060 prohibiting use of Arroyo Seco land for commercial or institutional purposes or section 17.16.040 defining park and recreation facilities. We strongly urge you to advise Mr. Dave Mercer, the Zoning Hearing Officer, that he may not grant a CUP for the proposed project and request to be informed of your advice to him in any case.

We appreciate the fact that the City already has entered into a lease with Kidspace. However, we believe violation of above cited provisions would constitute grounds for termination of the April 1, 1998 lease between the City and the Museum. Paragraph 38 of that lease provides "Termination for cause shall include ... use of the premises which violates the Pasadena City Charter or Pasadena Municipal Code."

A. **You Have Not Addressed The Specific Definitions of Park and Recreation Uses in the City's Municipal Code, and These Uses Do Not Include Museums.**

The December Memorandum addresses why the Museum might be considered a "park use" under state common law, but does not address the City's specific statutory definitions. (December Memorandum, pp. 3-4.) We do not agree with the conlusion that a private museum operated by a private corporation, as opposed to a public one operated by a municipality, is necessarily a "park use" under these authorities. The City's staff has concluded the Museum is a commercial recreation use. (September 20, 2000 Staff Report, p. 3.) In a July 25, 1997 e-mail message to you, Denver Miller of the City's staff stated "... I have determined that the use is commercial recreation and entertainment not cultural institution."

More importantly, we believe the specific definition of the term "park and recreation facilities" in the City's Municipal Code is controlling. As stated in our September 19, 2000 letter, section 17.16.040's definition of "park and recreation facilities" does not include commercial and institutional uses such as museums. Rather, "park and recreation facilities" are defined as "*Noncommercial* parks, playgrounds, recreation facilities, and open spaces officially designated as a park or recreation facility." (Emphasis added.) Under traditional principles of statutory construction, the omission of the word "museum" from the definition of "park and recreation facilities" leads to the strong inference that such a use is not considered a park use. (See *Fedorenko v. U. S.* (1981) 449 U.S. 490, 512.) The inference that a museum is not a park use is even stronger in view of the fact "museums" are an example of "Cultural Institutions" as defined in the same section of the Municipal Code.

Further, we note that your December Memorandum did not consider the specific definition of "park and recreation use" set forth by the City's Municipal Code. Where a local jurisdiction has specifically defined a term, that specific definition is controlling over common law of general application. As a chartered city, Pasadena "can make and
enforce all ordinances and regulations regarding the municipal affairs subject only to the restrictions and limitations imposed by the city charter, as well as conflicting provisions in the United States and California Constitutions and preemptive state law." (*Grimm v. City of San Diego* (1979) 94 Cal.App.3d 33, 37.) State common law interpretations of what "park use" is certainly do not preempt the provisions of the City Municipal Code. Since the December Memorandum relied upon common law interpretation by state

courts of what “park use” is, we believe reliance is more properly placed on specific City Municipal Code provisions defining that use. The Municipal Code shows the Museum is either a commercial or institutional use, but is not a park and recreation use.

B. You Have Not Addressed The Intent of the City Charter Amendments to Preserve Parkland and to Require Voter Approval Before the Use of Parkland Is Changed.

A large portion of your December Memorandum was concerned with whether or not the Lease of property to the Kidspace Museum was a “sale” or transfer of property as contemplated by Charter section 1601. We will not revisit that issue. Rather, our main concern at this point is that Charter section 1601 requires an election before dedicated park land is “used for other purposes.” Because the Zoning Hearing Officer must make a decision on the allowable *use* of the property, not its sale or transfer, the interpretation of this Charter provision is absolutely critical to his consideration.

The fundamental rules of statutory construction apply in interpreting provisions of a municipal charter. (*DeYoung v. San Diego* (1983) 147 Cal.App.3d 11, 17.) One of the fundamental rules is that the intent of the Legislature must be ascertained so as to effectuate the purpose of the law. "The fundamental task of statutory construction is to 'ascertain the intent of the lawmakers so as to effectuate the purpose of the law. [Citations.]' " (*People v. Cruz* (1996) 13 Cal.4th 764, 774-775.) We believe this rule is very important in the context of interpretation of Charter sections 1601 and 1603. These sections were specifically adopted in 1981 in response to the Hall of Science Museum proposal to prevent conversion of dedicated parkland in the City to use as private museums without a vote of the City’s electorate. This intent should inform your interpretation of Charter section 1601 and 1603. In " 'determining the intent of a statutory enactment it is important to consider the state of the law as it existed prior to the enactment of the provision at issue.' [Citation.]" (*Resure, Inc. v. Superior Court* (1996) 42 Cal.App.4th 156, 164.) Since the City Charter before the addition of section 1601 and 1603 would have allowed the use of dedicated parkland for nonpark purposes but did not do so afterward, it is plain the City’s intent in amending the Charter was to preserve the City’s parkland and obtain voter approval where its use was changed.

C. We Request You Inform Us of Your Advice to the Zoning Hearing Officer and Any Other Action With Regard to the Concerns Raised.

After you consider whether or not your earlier opinions have addressed the

concerns we raise here, we request that you advise us of your determination before the October 18, 2000 Zoning Officer Hearing. It appears to be in all parties' interest to fully analyze critical issues *before* the next hearing so that there are no surprises at the hearing. For example, if a variance from Municipal Code requirements were to be proposed as a possible solution to the violations we identified, we would point out that variances are not allowed from "conditionally permitted land uses and procedural requirements." Municipal Code section 17.82.020. Obviously, it is important to identify and resolve such issues prior to the Zoning Hearing Officer's hearing.

We look forward to your response.

Sincerely,

Douglas P. Carstens

Enclosure: September 19, 2000 Letter to Dave Mercer From Chatten-Brown and Associates

cc: Mr. Dave Mercer (w/o Enclosures)
City Clerk (w/ Enclosure)

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