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December 12, 2014
Via Email Only

William Bogaard, Mayor
Members, City Council
City of Pasadena
100 N. Garfield Ave.
Pasadena, CA 91109-7215

Re: *Modern Parking v. Pasadena* – Protest re 12/15/14
Agenda Item #22

Dear Mayor Bogaard and City Council Members:

On behalf of Modern Parking, Inc., we urge you to table item #22 on next Monday's City Council agenda due to a failure by the City staff to conduct a reasonable investigation of bias and improprieties in the Proposal-Selection process. We further urge you instruct the staff not to return the matter without completing a reasonable investigation that establishes that the improprieties set out in our office's previous communication to you did not occur.¹ Finally, we urge you to instruct the City Attorney's Office and/or City Manager's Office to respond to Modern Parking's Public Records Act requests with the same speed and transparency that the City Clerk's Office has practiced on PRA requests.

Modern Parking appreciates that Council Members' responses to my previous email led to pulling what is now Agenda Item #22 from the December 8 agenda. City Attorney Bagneris subsequently communicated in a telephone conversation to Mr. Gronemeier that the item was being pulled because of the issues raised in our Contracting Issues Memo so that those issues could be investigated before deciding how to proceed. However, it is patently clear that no adequate investigation of those issues was undertaken, and that, consequently, item #22 should not have been returned to the agenda. You can know

¹For your convenience and for the record, our Office's "Contracting Issues" Memo is attached anew to the email sending you this letter.

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Item 22

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with virtual certainty that no reasonable investigation was undertaken because either the Parking Manager admitted his bias against Modern Parking or else the City failed to take the step necessary to determine his bias.

The evident bias against Modern Parking by the City's Parking Manager is at the heart of the irregularities laid out in our Contracting Issues Memo. The Parking Manager was positioned to carry out that bias to prejudice Modern Parking throughout the Proposal-Selection process by releasing proprietary information to competing proposers, by manipulating the selection criteria, by relying upon or referencing the undisclosed audit (as was done at the Finance Committee), and in other ways that could probably only be determined in discovery during litigation. Any reasonable investigation needed to determine whether the Parking Manager openly expressed his bias by the statement we allege on p. 5 of the Contracting Issues Memo – *i.e.*, **“my goal is to get rid of Modern Parking.”** After indicating that this quotation was from a reliable source, in the footnote on p. 5 in the Contracting Issues Memo, we indicated that the statement can be corroborated:

“We are prepared to allow corroboration of this information by allowing the source to be interviewed by a process that protects her/his anonymity.”

Obviously, whoever carried out the investigation referred to by Ms. Bagneris needed to contact us to interview the reliable source under conditions protecting her/his anonymity.² Since we were not contacted, the identity of the reliable source could not have been known nor interviewed. One of two conclusions can thus be drawn. (1) The Parking Manager could have been confronted with his alleged statement and admitted he made it; in that case, the City Staff would be asking you to consummate the proposal-selection process knowing that the process was tainted by bias. (2) The Parking Manager did not admit his statement showing bias – either because he denied it or because he wasn't asked about it – so the investigation

²It warrants emphasis that we are not saying that the identity of the reliable source would not be disclosed to an acceptable interviewer; rather, we are saying that the interviewer would need to agree not to disclose the reliable source without her/his permission. Obviously, the interviewer needs to know the identity of the reliable source.

willfully ignored determining from a reliable source whether he made the statement that directly shows bias.

Compounding the inadequate investigation is the stonewalling that prejudices Modern Parking – stonewalling that has been characteristic of the City Manager/City Attorney Offices on PRA requests and that is similar to that which led Judge Chalfant to admonish the City to “stop playing games.” In contrast to the speedy responses to PRA requests that our Office has experienced with the City Clerk’s Office, the City Manager’s and the City Attorney’s Offices have delayed until after next Monday’s Council meeting on producing readily-available public records that we seek concerning the Proposal-Selection process. As Mr. Gronemeier reported to the Council at its last meeting, the City Clerk’s office began producing difficult-to-find legislative history documents the day after his request; all of the relevant records were produced in less than 10 days. We have sought the emails to and from the Parking Manager and his assistant that refer to Modern Parking – records that can much more easily be obtained than legislative history documents because they can be identified by simple word-searches of the employees’ emails. The City helped itself to an unjustified 14 day extension of time in order to delay its response date until December 19 and to thereby prevent Modern Parking from obtaining that evidence in time for its potential use Monday. We requested the “audit” that City staff referred to in conversations with Modern Parking and in the Finance Committee; although the City Manager acknowledged receipt of the request and presumably knew that he was legally required to respond within 10 days, 14 days later he has not deigned to respond to us – thereby once again insuring that we do not have the information in time for Monday’s Council meeting.

On this matter, the City Manager and City Attorney are unfortunately displaying the same hunkering down to support errant staff rather than addressing problems head-on, the same lack of transparency, and the same stonewalling that we have previously seen and that has led to the City being publicly bruised. We urge you, as the City’s democratically elected decision-makers, to hold your public servants accountable. You need what Modern Parking needs – a good-faith, genuine investigation that addresses these alleged improprieties. If a genuine investigation establishes that our allegations are unfounded, we’ll walk away. But, if a good-faith, genuine investigation corroborates the allegations, then you need to get your public servants back on the right track taking the appropriate steps to correct these improprieties.

Gronemeier-Mayor/Council Letter re Agenda Item #22 for 12/15/14 Meeting

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Sincerely yours,

~~GRONEMEIER & ASSOCIATES, P.C.~~

By Elbie J. Hickambottom, Jr.
Attorneys for Modern Parking, Inc., and Mohammed Islam

cc via email: Client

Dale L. Gronemeier

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Modern Parking, Inc. Re City of Pasadena Contracting Issues

Executive Summary

Despite a long and successful track record managing City of Pasadena parking structures, Modern Parking, Inc., is not even among the four finalists interviewed for the contract to continue managing those parking structures. The selection process was fatally compromised when City staff sent Modern Parking's proprietary business information to all competitors, thereby violating the City's own express prohibition and arming Modern Parking's competitors with the information necessary to underbid it. The City's Parking Manager has expressly stated that he is working to get rid of Modern Parking. His motivation appears to be either or both (1) retaliation for Modern Parking's constitutionally-protected free petition and free speech rights and/or (2) his bias against Modern Parking's sole shareholder's national origin. The unusual exclusion of the incumbent contractor appears to be a sub-rosa disqualification determination without according Modern Parking its due process rights. The sub-rosa disqualification determination was in part accomplished by manipulating the rating criteria to disadvantage Modern Parking.

Modern Parking's Management of Pasadena's Parking Garages

Modern Parking, Inc., is a California Corporation; its CEO Mohammed Islam is the sole shareholder. It operates more than 30 parking facilities in Pasadena. It has operated the Holly garage since 2000 and has operated five city-owned parking structures since 2005. Three of these garages are being sold; the purchaser has told the Parking Manager that it does not want to change the parking operator from being Modern Parking. The City has six times extended Modern Parking's initial contract; an amendment for a seventh extension to December 2015, was prepared by the City and circulated to Modern Parking. But in October the City opted instead to send out an RFP to competitively select the contractor.

The Parking Manager's Improper release of Modern Parking's proprietary financial information

The Parking Manager released to all potential RFP proposers 24 months of Modern Parking's monthly billing statements for each of the 5 garages. His action is unprecedented; it places Modern Parking at a competitive disadvantage in both this proposal and other current proposals or bids in the Los Angeles market. Insofar as we know, there is no other instance in which the City of Pasadena has released such proprietary information to potential competitors.

The City, the California Public Records Act,¹ and the Public Contract Code² generally recognizes that such proprietary information is protectible and cannot be disclosed. For example, the City's RFPs characteristically contain a "Notice Regarding Disclosure of Contents of Document" that allows the contractor to designate proprietary information as "Confidential." For both the 2005 City RFP and the 2014 RFP, Modern Parking's responses took advantage of that Notice by putting its financial information in a sealed envelope and designating it as "confidential;" as a consequence, the City was on notice that Modern Parking's financial records were proprietary information and that it had a duty to protect the information. While the information released by the Parking Manager was not what was in the sealed envelopes accompanying Modern Parking's 2005 and 2014 Proposals, the information contained within the monthly statements disclosed in different form the same type of information and thereby gave other proposers detailed knowledge of Modern Parking's cost and pricing structure. Another City received a PRA request for such statements; that City recognized its obligation to protect such proprietary information and accorded Modern Parking the opportunity to redact the proprietary information from the billing statements before releasing them. In contrast, Pasadena's Parking Manager failed in his duty to protect Modern Parking's proprietary information.

The unauthorized release of Modern Parking's proprietary information subverted the RFP process by accomplishing what the proposers themselves are prohibited from doing. The RFP contains a form "Declaration of Non-Collusion by Contractor." Among other things, it requires proposers to certify in Section (d) that Contractor "did not, directly or indirectly, submit his proposal price or any breakdown thereof, or divulge information or data relative thereto, to any

¹*E.g.*, Government Code §6254.15

²*E.g.*, Public Contract Code §20216(b).

corporation, partnership, company, association, organization, bid depository, or to any member or agent thereof, or to any individual or group of individuals, except the City of Pasadena, or to any person or persons who have a partnership or other financial interest with said bidder in his business.” The City’s unauthorized disclosure of Modern Parking’s proprietary information de facto violated this requirement.

Unfortunately, by the Parking Manager’s actions in releasing Modern Parking’s financial statements, the information on Modern Parking’s proposal price and breakdown have been released to all other proposers, who are not only direct competitors of Modern Parking but who have now been provided with an unfair advantage meant to be prohibited by the foregoing provision. This proprietary information improperly disclosed Modern Parking’s pricing structure – which thereby armed its competitors with the information to underbid Modern Parking. It not only damaged Modern Parking but, by giving other proposers knowledge about the financial assumptions in Modern Parking’s likely proposal, it may also have damaged the City by denying it the best competitive proposal.

**Modern Parking has been subjected to
a sub rosa non-responsible proposer determination
that violates its due process rights**

Modern Parking has been excluded from consideration for continued operation of the City’s parking structures by its not being ranked among the top four candidates interviewed. It is highly unusual that a long-term incumbent would be excluded from consideration for renewal by not even being one of the finalist interviewed; presumptively, such exclusion could only be justified by the incumbent contractors’ serious non-performance of contractual duties—so serious that it would warrant a determination that Modern Parking is a non-responsible proposer. We of course do not yet have the information as to what happened during the rating process; obtaining such information is what we would typically obtain through discovery in litigation. But there is already strongly suggestive circumstantial evidence indicating that there was a sub-rosa determination of a non-responsible proposer that denied Modern Parking its due process rights to notice, an opportunity for a hearing, and written findings.

The Director of Parking reported to the City Council in July 2014 that two audits of parking operations were conducted “to identify deficiencies in current practices so as to improve existing operations”. None of this information has ever

been provided to Modern Parking either verbally or in writing. When an opportunity arose to ask Department of Transportation staffer about the audits, he indicated that he was unaware of any problems with the operators. On August 13, 2014, Modern Parking received notice from the Parking Manager that he scheduled a meeting on August 20, 2014 in the City Attorney's office to discuss findings of the most recent audit. Three days later a message was left that he needed to reschedule the meeting. No further communication on this matter has been received. At the last Finance Committee meeting, the staff orally referred to a "second audit" that is in the City Attorneys' office.³ Modern Parking has never had the opportunity to address – either by rebutting or by correcting any problems – any purported audit issues because it has never been informed of the alleged audit issues.

While on the one hand developing audit issues with Modern Parking but refusing to disclose them, the City altered its rating system for the apparent purpose of disadvantaging Modern Parking's 2014 proposal. In 2005, the category of "Cash Management, Reporting, and Audit Program" was 10% of the proposers' ratings. But in 2014, contemporaneously with the apparent development of undisclosed purported audit issues in this category, the category was increased to 25%. Giving this category the highest weight cannot be justifiably correlated with the operation of the parking structures because the cash from their operation overwhelmingly goes directly to the City rather than through the contractor; if anything, the operational reality would arguably warrant a reduction in the importance of the category rather than more than doubling its importance. The only apparent justification for increasing the importance of this category was to disadvantage Modern Parking because of the surreptitious auditing processes. The category "Proposer's Attributes/References/Experience" – a category favoring Modern Parking – was reduced from 25% in 2005 to 20% in 2014. It thus appears that part-and-parcel of the exclusion of Modern Parking from consideration for renewal of its contract

³We urge decisionmakers whose first impulse might be to ask to see this audit to resist such a temptation because they would thereby themselves become complicit in a sub-rosa determination of non-qualification. Modern Parking is at a loss to imagine anything in an audit that could justify its non-qualification. But irrespective of whether there is something allegedly damaging to it in this undisclosed audit or, as it believes, the undisclosed audit is just a smokescreen, the fundamental principle that has to be observed is that no person in the City can use adversely to Modern Parking an audit that has not been disclosed to Modern Parking and concerning which Modern Parking has not had an opportunity to rebut.

has been the manipulation of the ratings system in order to insure that Modern Parking received a disqualifyingly low rating. *De facto*, this process has been a sub-rosa determination that Modern Parking is not a responsible proposer because the surreptitious audits have purportedly established that Modern Parking has not been competently managing the parking structures.

Modern Parking vigorously denies that there is any basis to exclude it from consideration because of its performance of the current contract, but the surreptitious process prevents it from being able to address allegations or audit findings that have not been disclosed to it. A contractor deemed by a public agency to be a non-responsible proposer has a due process right to notice of the basis for the non-responsibility determination, an opportunity to be heard, and written findings.⁴ Pasadena Municipal Code §4.08.131(D) accurately implements these due process requirements for determining non-responsibility. This right to a due process hearing cannot be circumvented by the City calling a determination of non-responsibility something else.⁵ It appears that the Parking Manager has engineered a sub-rosa determination of non-responsibility against Modern Parking that has denied it its due process rights protected by the federal state constitutions, California caselaw, and the Pasadena Municipal Code.

The Parking Manager has vowed to get rid of Modern Parking

Modern Parking had a good relationship with the City's parking staff from 2000-2009. Things changed shortly after the current Parking Manager was hired in 2010; some of that history is set forth in the following sections. Whatever his reasons, the current Parking Manager is plainly biased against Modern Parking. We know from a reliable source that the Parking Manager has expressly stated that "my goal is to get rid of Modern Parking."⁶

⁴*City of Inglewood-LA Co. Civic Center Auth. V. Sup. Ct.* (1971) 7 Cal. 3rd 861, 870-871.

⁵*D. H. Williams Const. Inc. V Clovis Unified Sch. Dist.* (2007) 146 Cal. App. 4th 757, 764 (City purported to find bidder non-responsive but legal effect was a non-responsible determination; relief ordered that agency was required to offer contract to excluded bidder unless within 15 days it asserted it was not a responsible bidder and gave it its due process rights).

⁶We are prepared to allow corroboration of this information by allowing the source to be interviewed by a process that protects her/his anonymity.

The Parking Manager is retaliating against Modern Parking's constitutionally protected free speech/ free petition conduct

The Parking Manager has impermissibly sought to restrict Modern Parking and its representatives from advocating its positions to other officers and employees of the City when such restrictions would violate constitutional free speech/free petition rights protecting their right to do so. Having had limited success in muzzling them, it appears that the Parking Manager's intent to get rid of Modern Parking constitutes impermissible continued retaliation for their proper exercise of free speech/free petition rights.

Modern Parking had a practice of meeting every six months or so with the Director of Transportation (the Parking Manager's boss) to discuss "big picture" items such as opportunities to secure a fly-away service to LAX and Bob Hope Airports, and prospects for expanded ZipCar service. Also, since Modern Parking manages rideshare programs for many corporate clients, these periodic meetings offered it an opportunity to keep the City apprised of congestion relief policies. Shortly after his appointment, the Parking Manager directed Modern Parking to discontinue any such meetings since he believed they were held "behind his back".

Over the many years of working under contract with the City, Modern Parking has met with Robert Montano and sometimes with Eric Duysart on economic development matters, such as parking for the Playhouse District and Trio in particular. In that instance, the issue was the loss of up to 300 parking spaces due to development and required identification of possible remedies. Mr. Montano asked for information on the Paseo Project, and, since the parking was City owned, Modern Parking staff complied. This action resulted in a harsh reprimand from the Parking Manager that Modern Parking was not to communicate with the Economic Development staff or any other City staff. Modern Parking requested that the City resolve this internal issue regarding providing of information; the matter was ultimately resolved by a letter allowing Modern Parking to continue its collaborative work with other City staff. That particular issue may have been resolved but not the relationship with the Parking Manager.

The next major conflict with the Director of Parking involved the Convention Center after Modern Parking was awarded a contract with the Pasadena Convention Center. The Parking Manager directed Modern Parking to provide him with a copy of the contract and related information. Given the prior

experience mentioned above and considering that the Convention Center is not a regular City Department but rather a separate City-created entity, Modern Parking suggested that he contract Mr. Michael Ross regarding his request. This angered the Parking Manager and relations further deteriorated.

Both the First Amendment to the U.S. Constitution and Article I, §§2-3 of the California Constitution protect the free speech and free petition rights of Modern Parking to lobby the City in its interests and to freely communicate its policy positions to any City officers or employees.⁷ Retaliation because of the exercise of such rights is plainly impermissible.⁸ Because the expressed animus of the Parking Manager to Modern Parking arises from these tainted sources, the retaliation is redressible under the Reconstruction Civil Rights Act⁹ and would enable Modern Parking to recover the full range of tort damages (past and future income losses, punitive damages against individuals) and attorneys fees.

Prepared by:

GRONEMEIER & ASSOCIATES, P.C.

Dale L. Gronemeier

Elbie J. Hickambottom, Jr.

⁷*Garretson v. Post* (2007) 156 Cal. App. 4th 1508, 1524.

⁸*Care Partners, LLC v. Lashway* (9th Cir. 2008) 545 F. 3rd 867, 877.

⁹42 U.S.C. §1983.

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The next major conflict with the Director of Parking involved the Convention Center after Modern Parking was awarded a contract with the Pasadena Convention Center. The Parking Manager directed Modern Parking to provide him with a copy of the contract and related information. Given the prior

experience mentioned above and considering that the Convention Center is not a regular City Department but rather a separate City-created entity, Modern Parking suggested that he contract Mr. Michael Ross regarding his request. This angered the Parking Manager and relations further deteriorated.

Both the First Amendment to the U.S. Constitution and Article I, §§2-3 of the California Constitution protect the free speech and free petition rights of Modern Parking to lobby the City in its interests and to freely communicate its policy positions to any City officers or employees.⁷ Retaliation because of the exercise of such rights is plainly impermissible.⁸ Because the expressed animus of the Parking Manager to Modern Parking arises from these tainted sources, the retaliation is redressible under the Reconstruction Civil Rights Act⁹ and would enable Modern Parking to recover the full range of tort damages (past and future income losses, punitive damages against individuals) and attorneys fees.

Prepared by:

GRONEMEIER & ASSOCIATES, P.C.
Dale L. Gronemeier
Elbie J. Hickambottom, Jr.

⁷*Garretson v. Post* (2007) 156 Cal. App. 4th 1508, 1524.

⁸*Care Partners, LLC v. Lashway* (9th Cir. 2008) 545 F. 3rd 867, 877.

⁹42 U.S.C. §1983.



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December 14, 2014
Via Email Only -

Mark Jomsky, City Clerk
City of Pasadena
100 N. Garfield Ave.
Pasadena, CA 91109

Re: Protest to Agenda Item #22 on 12/15/14 City Council
Agenda

Dear City Clerk Jomsky:

On behalf of Modern Parking, Inc., submitted herewith for inclusion in the record on Item #22 on the City of Pasadena City Council's December 15, 2014, meeting agenda is this Protest to the City Council taking any action to authorize entering into a contract with Parking Concepts, Inc., for the operation and maintenance of five City parking garages. Besides this letter, this Protest consists of the attached two documents: (1) "Modern Parking, Inc. Re City of Pasadena Contracting Issues" and (2) December 12, 2014, Elbie J. Hickambottom, Jr., letter to the Mayor and the City Council Members.

The City of Pasadena has no procedure for Protests of RFP-Proposal awards, so I am forced to make up a procedure in order to avoid a potential argument that Modern Parking has failed to exhaust its administrative remedies. The City's failure to have a protest procedure raises serious due process issues, as it fails to give adequate notice to proposal proponents of the procedure they should follow and gives unbridled discretion on the protest procedure to City officials, which allows them to act arbitrarily and capriciously.

Gronemeier-Jomsky Protest

December 14, 2014

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Looking forward to your continuing courtesy and cooperation, I am, sincerely yours,

GRONEMEIER & ASSOCIATES, P.C.



By Dale L. Gronemeier
Attorneys for Modern Parking, Inc.

cc via email: Mayor and Council Members via email
Clients
Elbie J. Hickambottom, Jr.

Attachments: (1) "Modern Parking, Inc. Re City of Pasadena Contracting Issues"
(2) December 12, 2014, Elbie J. Hickambottom, Jr., letter to the Mayor and the City Council Members.

ModernParkingCorrespondence008.121414Protest.wpd