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May 29, 2019

**VIA EMAIL AND U.S. MAIL**

Niroop K. Srivatsa  
Interim City Manager  
City of Lafayette  
3675 Mount Diablo Blvd., #210  
Lafayette, CA 94549  
Email: nsrivatsa@ci.lafayette.ca.us

**Re: Coblentz Patch Duffy & Bass LLP Invoices**

Dear Niroop:

We write to address the various invoices the City has sent to O'Brien Land Company, LLC for Coblentz Patch Duffy & Bass LLP's work in connection with the processing of the Terraces of Lafayette 315-unit apartment project. While we understand the City's desire to avoid expenditures of this type, there are significant legal and fairness reasons that preclude shifting the responsibility of paying the Coblentz invoices to O'Brien.

As you may recall, the City retained Coblentz last summer following O'Brien's contractually protected decision to resume processing the project once the voters rejected the 44 single-family home project alternatively known as the Homes at Deer Hill via the June 5, 2018 referendum. The City Council was under relentless pressure, immediately after the referendum vote, from certain vocal project opponents, who were insulting the City Attorney and baselessly second-guessing her advice, hoping that another attorney would somehow provide the City different opinions that might lead to the demise of the project and that the Council would direct that new attorney to search for potentially valid bases upon which the City could attempt to legally deny the project. These facts are reflected clearly in the Council's minutes from its June 11, 2018 regular meeting,<sup>1</sup> its June 13, 2018 special meeting,<sup>2</sup> its June 25, 2018 regular meeting,<sup>3</sup> and its July 3, 2018 special meeting.<sup>4</sup>

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<sup>1</sup> See, e.g., See Minutes of June 11, 2018 Lafayette City Council Regular Meeting, agenda item #8(A), available at [http://lafayette.granicus.com/DocumentViewer.php?file=lafayette\\_faed0308dd84b3951e114870c08ad055.pdf&view=1](http://lafayette.granicus.com/DocumentViewer.php?file=lafayette_faed0308dd84b3951e114870c08ad055.pdf&view=1).

<sup>2</sup> See, e.g., See Minutes of June 13, 2018 Lafayette City Council Special Meeting, agenda item #5(A), available at [http://lafayette.granicus.com/DocumentViewer.php?file=lafayette\\_914903ad483bef59e7eea2fe2978d498.pdf&view=1](http://lafayette.granicus.com/DocumentViewer.php?file=lafayette_914903ad483bef59e7eea2fe2978d498.pdf&view=1).

It appears that, to some extent, certain members of the City Council reacted to the pressure of these arguments, actively questioning the City Attorney on the issues project opponents were raising as if the issues might have merit or warrant revisiting despite the City Attorney's prior and ongoing opinions on those issues. Perhaps most notably, then-Councilmember Ivor Samson also began actively questioning the City Attorney's advice publicly and indicating his displeasure with the Process Agreement stating, among other things, that he:

“does not believe it locks in any entitlements past mid-2014 and one cannot contract around State law, and the Permit Streamlining Act is very clear. He therefore thinks the Council needs to look at a combination of looking at a moratorium on an urgency basis. He did not know what the timing is or how they would combine this with a special session and would leave this up to the City Attorney, but he thinks assistance is needed in determining what the Council can do and how quickly they can do it. Delay could be very dangerous and he was not looking to hear impediments but what can they do and how to do it.”<sup>5</sup>

Similarly, on the cusp of her successful campaign for the City Council, Susan Candell stated that “she believes the City should hire supplemental counsel for this 45-day moratorium period” and that:

“there are three groups of people who have threatened litigation on this property and extra help is needed and fast. She suggested hiring very good land use attorneys, having them work for this short period of time and asked to make sure the right development is proposed for the parcel.”<sup>6</sup>

While we do not know the details of what was occurring behind the scenes at that point last summer, including with then-current and prospective future Councilmembers, several residents posted on Nextdoor to publicize and encourage public participation in the City Council's July 3, 2018 special meeting regarding its

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<sup>3</sup> See, e.g., See Minutes of June 25, 2018 Lafayette City Council Regular Meeting, agenda item #5, available at [http://lafayette.granicus.com/DocumentViewer.php?file=lafayette\\_232970ff2624ec9e393b991f4b3b5120.pdf&view=1](http://lafayette.granicus.com/DocumentViewer.php?file=lafayette_232970ff2624ec9e393b991f4b3b5120.pdf&view=1).

<sup>4</sup> See, e.g., See Minutes of July 3, 2018 Lafayette City Council Special Meeting, agenda item #5 and 7(B), available at [http://lafayette.granicus.com/DocumentViewer.php?file=lafayette\\_2b1939cf79e27926e30dfd680bbfa29d.pdf&view=1](http://lafayette.granicus.com/DocumentViewer.php?file=lafayette_2b1939cf79e27926e30dfd680bbfa29d.pdf&view=1).

<sup>5</sup> See, e.g., See Minutes of June 11, 2018 Lafayette City Council Regular Meeting, agenda item #8(A), available at [http://lafayette.granicus.com/DocumentViewer.php?file=lafayette\\_faed0308dd84b3951e114870c08ad055.pdf&view=1](http://lafayette.granicus.com/DocumentViewer.php?file=lafayette_faed0308dd84b3951e114870c08ad055.pdf&view=1).

<sup>6</sup> See, e.g., See Minutes of June 25, 2018 Lafayette City Council Regular Meeting, agenda item #5, available at [http://lafayette.granicus.com/DocumentViewer.php?file=lafayette\\_232970ff2624ec9e393b991f4b3b5120.pdf&view=1](http://lafayette.granicus.com/DocumentViewer.php?file=lafayette_232970ff2624ec9e393b991f4b3b5120.pdf&view=1).

consideration of the decision whether to retain additional legal counsel with respect to the project (Attachment 1).

Susan Candell wrote that “I believe that many who voted Yes on L feel the same way about the property. These next 15 days are CRITICAL. The city must immediately retain legal counsel experienced in land use law, municipal law, and litigation to properly handle the re-zoning and resubmitted 315 apartments.” In a separate post in the same thread Ms. Candell complained that “[o]ur current attorney is not an expert, and Ivor Sampson has found the perfect person who can jump in after the vote tonight. This will be money well spent! Please support Ivor and his choice! He is the only attorney on Council, and we are very lucky to have him!”

At the July 3 meeting, various project opponents again publicly second-guessed the City Attorney’s prior and ongoing advice regarding the project and angled for the Council to retain a different attorney. The minutes for that meeting reflect then-Councilmember Samson’s admission that he was principally responsible for the City’s consideration of a different attorney. Mr. Samson acknowledged that:

“[h]e has stated that the City needs to get the best possible objective legal advice in order to put them in a position where they have maximized their legal options in order to provide a legal foundation for the Council in directing their policy going forward. This is his goal and this is why he requested they consider outside counsel.

He said these are very complicated matters and he believes the City needs assistance of specialized real estate litigation counsel to guide them through some of this morass.”<sup>7</sup>

The July 3 minutes also reflect that then-Councilmember Samson received a recommendation for a particular firm from a known and vocal project opponent and that Mr. Samson followed that recommendation by meeting in person with certain attorneys at the recommended firm. And following the opponent’s recommendation and Mr. Samson’s meeting with those attorneys, Mr. Samson formally recommended that the City hire that firm. Then-Mayor Don Tatzin recognized the “unacceptable” perception resulting from these facts and indicated he could not support the retention of that firm.

The City Council ultimately voted not to retain the firm Mr. Samson recommended and instead retained Coblenz, several days later, on a short-term contract for the period covering July 9, 2018 to July 28, 2018.<sup>8</sup> At the City Council’s August 13,

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<sup>7</sup> See, e.g., See Minutes of July 3, 2018 Lafayette City Council Special Meeting, agenda item #7(B), available at [http://lafayette.granicus.com/DocumentViewer.php?file=lafayette\\_2b1939cf79e27926e30dfd680bbfa29d.pdf&view=1](http://lafayette.granicus.com/DocumentViewer.php?file=lafayette_2b1939cf79e27926e30dfd680bbfa29d.pdf&view=1).

<sup>8</sup> See, e.g., See Minutes of July 9, 2018 Lafayette City Council Regular Meeting, agenda item #10(C), available at [http://lafayette.granicus.com/DocumentViewer.php?file=lafayette\\_b070d50cc2a726931718f79256f9d9a0.pdf&view=1](http://lafayette.granicus.com/DocumentViewer.php?file=lafayette_b070d50cc2a726931718f79256f9d9a0.pdf&view=1).

2018 regular meeting, Robert Hodil, the Coblenz attorney handling this matter, provided his first public statements regarding the questions the City Council asked him to consider during the period of Coblenz's initial retainer. In short, debunking various baseless, frequently-made arguments against the project, Mr. Hodil confirmed that:

1. The Terraces Project Alternative Process Agreement remained in effect and was not an illegal de-facto Development Agreement;
2. The Permit Streamlining Act was intended to protect project applicants and did not "time out" the 2011 project application; and
3. The project is protected by the Housing Accountability Act, which prevents the City from using general plan and zoning changes that have occurred since the City deemed the project application complete in 2011 as a basis for disapproving the project.<sup>9</sup>

As shown below, the Council's August 13 minutes reflect the Council's decision, on a 4-1 vote, to extend the Coblenz contract for an additional period of time, and to pay for the additional representation out of the City's general fund:

#### Then-Mayor Tatzin

- "He received a request from a Councilmember to continue on with some sort of retention agreement with Mr. Hodil's firm. They both spoke and Mr. Hodil contacted him back with an email and he indicated that the Council did not know how much assistance they would need and exactly when in the process but they wanted the ability to bring in the firm on an as-needed basis."

#### Then-Councilmember Samson

- "What he is looking for is something that is not task-based as none of the Councilmembers are land use experts and thinks they are in a situation where the City is liable to be sued at some point by somebody, whether it is Save Lafayette, the developer, a third party, but his concern is that the City be legally positioned in the strongest possible way so that whatever policy decisions the Council makes have a firm legal foundation."
- "He would prefer to see to ask [sic] the firm to track the application process proactively, advise the City Council of any issues that they see forthcoming so that the Council can have the opportunity to make

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<sup>9</sup> See, e.g., See Minutes of August 13, 2018 Lafayette City Council Regular Meeting, agenda item #13(B)(2), available at [http://lafayette.granicus.com/DocumentViewer.php?file=lafayette\\_50bdc5e7624009e1aa5a53dd9d83a1ad.pdf&view=1](http://lafayette.granicus.com/DocumentViewer.php?file=lafayette_50bdc5e7624009e1aa5a53dd9d83a1ad.pdf&view=1).

decisions about what actions they want to take or not take, and then be able to direct the firm accordingly to take or not take those actions. He recognizes the firm would charge the City for an individual task they ask them to undertake, but he was looking for more comprehensive and integrative advice.”

Councilmember Anderson

- “[H]e agreed with Councilmember Samson’s statement s [sic] and he hoped to find a way to get there. It would seem that based on the conversation the one place where there is a critical issue is the question of the HAA and the EIR documentation that accompanies the project as it moves forward. He asked if this was something the firm would be able to work with the City on, assess and advise them on what is reasonable in terms of denying a project based upon health and safety impacts.”

Then-Councilmember Mitchell

- “[A]sked if all financial costs associated with outside counsel is public information.”

Then-City Manager Steve Falk

- “[S]aid yes; the financial cost would be public information, but he wants to be sure the Council understands that heretofore the legal costs the City has incurred relating to the Deer Hill Road property has been borne by the developer. In this instance, because the City Attorney is ably providing legal advice on these matters, staff does not believe it is appropriate to send a bill to the developer for this additional cost. Therefore, the additional costs associated with the outside firm would likely be funded by the General Fund. He would issue this to the Council as cautionary advice because legal advice can run up quickly and this is something taxpayers would be paying for.”

Then-Councilmember Samson

- “What he is talking about is getting additional resources so that the City’s legal options are protected, whatever policy action they may choose to take with regard to the Terraces in the future, such as approving it, disapproving it, or someplace in between. That will come a different day. What he wants to make sure is that whatever action this Council takes has a firm legal foundation and this is what they are discussing tonight.”

Then-Vice Mayor Burks

- “ He has complete confidence in BBK as well and their City Attorney. He believes that this though does represent a very unique and acute time for

the City to have another set of eyes and the only way to do it comprehensively and professionally is to make the investment and commitment and to have them continue to be retained in a way that gives the City the most value and that they spend the money they must spend. To him, this is what Councilmember Samson suggested a few hours ago.”

Then-Councilmember Samson

- “[W]hat he suggested is to retain Coblentz on an on-going basis to monitor the status and process of the Terraces application, to advise the Council of issues as they arise, to provide choices for actions they may need to take and then to be authorized to take such actions as the Council may authorize at any point. To him, this is an active role that the Council wants Coblentz to do . . . He would like Coblentz to provide the best legal foundation for whatever policy decision this Council wishes to make with regard to the Terraces down the road.”

Then-Mayor Tatzin

- “[H]e thinks they need to come up to some middle ground where the Council and the community has some expectation of what the range of cost may be and that the Council can decide whether it wants to incur those costs . . . He did not want to have a situation where those bills come in and the Council is just surprised.”

Then-Councilmember Samson

- “[S]aid he thinks Mayor Tatzin’s concerns about finances are legitimate. He does not think anyone wants an outrageous legal bill at the end of three months, but by the same token they will need to spent [sic] money to get effective representation.”

Councilmember Anderson

- “[A]sked if it was reasonable to budget a certain amount of money for this focused on the Terraces and to simply have a check in on expenditures as they approach the limit and decide that based upon the work done whether to extend it . . . He suggested setting a cap in terms of their efforts.”

Then-Mayor Tatzin

- “[S]aid he is happy to have Coblentz involved but thinks given what the Council heard from Mr. Hodil tonight, he basically confirmed that the process agreement is valid, that processing the project is appropriate because of provisions of the HAA, and basically confirmed the previous advice the Council had been given. Therefore, he respects the majority opinion but will not support the measure.”

Moreover, various comments from project opponents also indicated a desire to pay the Coblentz invoices even if the money would come from the City's general fund. For example, Eliot Hudson spoke at the August 13 meeting and stated that:

“[w]ith respect to costs, he cannot say how critical the people he knows in this community consider this issue to be for the City. To the extent these are my taxes, he asked to please spend the dollars when needed and asked not to limit them. This project has a lot to do with the entire character of Lafayette as this is an incredibly important property. So, he urged the Council to retain the Coblentz law firm, do not do it on a basis that hamstring the Council's ability to call them as needed and those determinations can always be made on a case-by-case basis but they need to be up to speed so when issues come up, they can deal with them on an expedited, efficient and informed basis.”

And then-City Council candidate Susan Candell candidate stated that:

- “having been the person who did a lot of work on the Homes at Deer Hill EIR, health and safety impacts of the Terraces dwarfs the Homes at Deer Hill effort . . . Therefore, having an attorney going in like Coblentz who may be the right firm to attack those and determine strategies the City has is important.”

The City Council again considered extending the Coblentz contract at its special meetings of September 10, 2018 and September 24, 2018. The minutes of those meetings reflect that Coblentz was retained specifically to assist the City as it processes the project, with a scope of work that specifically includes CEQA compliance issues. In addition, to protect the City's general fund, the engagement letter includes a fee cap that cannot be exceeded without the City's prior written authorization.

Then-Mayor Tatzin indicated the he was against extending the retention of Coblentz despite the fact that “he has a great deal of respect for the firm [and] thought the work done to date has been very good [because he] did not think it differed materially from the work BBK has done, understands people disagree with this, and the rates are noticeably higher, and the lack of familiarity with Lafayette is noticeably lower, and he did not see a reason to switch.” The Council ultimately voted 3-1-1 to authorize the City Manager to sign the engagement letter, which to our knowledge remains in effect today.


The record thus clearly reflects that when the Council extended the Coblentz contract in August and September of 2018 it explicitly determined to pay for those expenses out of the City's general fund and not from any payments O'Brien might make. The record reflects no ambiguity on the point. Under the equal dignities doctrine, *City of Sausalito v. County of Marin*, 12 Cal.App.3d 550 (1970), the City cannot shift these expenses to O'Brien via staff edict. Moreover, given its

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constitutional right to procedural due process, it is unclear if even the City Council could elect to shift the burden of these legal expenses to O'Brien given the open-ended and potentially adversarial reasons it hired new counsel other than the City Attorney. Indeed, although then-Councilmember Samson repeatedly mischaracterized the decision before the Council as a policy matter, when it is in fact plainly and only an adjudicative matter, as the de facto City Council leader of the City's effort to find a new attorney to handle the project Mr. Samson could not have been more clear that a key goal in retaining Coblenz was to maximize the City's legal options, including potentially denying the project despite the strict requirements of the Housing Accountability Act.

Sincerely,

MILLER STARR REGALIA



Bryan W. Wenter, AICP

BWW/kli

Attachment 1: Excerpts from June 30, 2018 Nextdoor thread

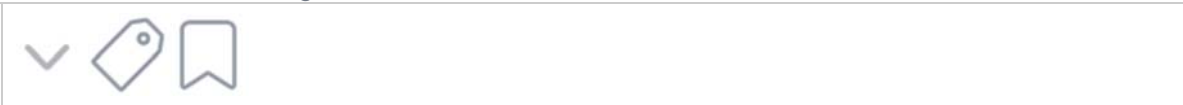
cc: Greg Wolff, Acting Planning Director  
Michele Rodriguez, Adjunct Planner  
Dennis O'Brien  
Caryn Kali  
Dave Baker  
Allan Moore, Esq.  
Arthur F. Coon, Esq.



# Post in General



Mike Griffiths, Acalanes Ridge



## TWO IMPORTANT CITY COUNCIL MEETINGS FOR YOU TO ATTEND IF YOU CAN

Tuesday July 3 at 5pm - Public comment to add additional legal expertise to defend city rights and voter wishes and to counter what the developer is proposing for Deer Hill (council will then go into closed session to come up with plan) Monday July 9 at 7pm - Full meeting to review planning commission recommendation rezoning Deer Hill to Low Density, Single Family Residential (R65 zoning, one house per 1.5 acres equals 14 homes) in conformance with the General Plan. Both meetings will serve to strengthen the position of the city and the voters against large developments - Deer Hill could otherwise set a precedent for other developments in Lafayette. PLEASE ATTEND AND SPEAK YOUR MIND - OTHERWISE EMAIL THE CITY CLERK [jrobbins@ci.lafayette.ca.us](mailto:jrobbins@ci.lafayette.ca.us) BEFORE NOON THE DAY OF THE MEETING

3d ago · 39 neighborhoods in General



Thank



Reply





Susan Candell

, Springhill Area · 1d ago

Thank you Keith. I believe that many who voted Yes on L also feel the same way about the property. These next 15 days are CRITICAL. The city must immediately retain legal counsel experienced in land use law, municipal law, and litigation to properly handle the re-zoning and the resubmitted 315 Apartments.



1 Thank





Susan Candell

, Springhill Area·2h ago

The rezone in 2010 was legal, but not implemented because of failed legal advice. The citizens set back the clock, and this time the rezone by Planning Commission is R65, or 14 Homes, up from the R5 in 2010, or 5 Homes. The vote on that comes back next week. Everything the city is doing this time so far is legal and defensible, but two very important documents need to be produced, the first on by July 15 in response to the developers resubmission of the 315 apartments, and the other to defend the new rezone. These documents must be perfect and they must be quick. An independent counsel with land use expertise can create these. Written well and lawsuits could be averted. Written poorly and lawsuits will fly. Our current attorney is not a land use expert, and Ivor Samson has found the perfect person who can jump in after the vote tonight. This will be money well spent! Please support Ivor and his choice! He is the only attorney on Council, and we are very lucky to have him!



3 Thanks