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12/08/2003 08:58 AM

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12-8-03

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Subject: PTO PEDESTRIAN TUNNEL (12/8/2003 Docket Item #20) -- NEED
FOR INDEPENDENT COUNSEL

Alexandrians for Sensible Growth, Inc.
317 Skyhill Road
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703-212-0982
ghparry@fortebrio.com

December 8, 2003

The Honorable Mayor and Members of City Council
City Hall
301 King Street
Alexandria, VA 22314

Dear Mayor and Council Members:

Despite numerous requests -- made by members of Council, ASG, and the public -- the City Manager still refuses to disclose the settlement agreements between the City and the PTO complex developer. We believe it is time to clear the air and restore integrity to this process.

To date, the City -- led by the City Manager -- has repeatedly misled Council and the public, allowing Council to debate enforcement options without informing Council that a settlement agreement had already been signed. Regrettably, because the City Manager still refuses to disclose two settlement agreements, we believe the time has come for action and leadership. We believe only an independent investigation will restore credibility and public confidence to this vitally important process, and therefore urge City Council to take immediate action to appoint an Independent Counsel.

Alexandrians for Sensible Growth requests that City Council:

First, as promptly as possible, appoint an Independent Counsel to provide objective and credible legal advice to City Council concerning the issues raised by the proposed motion to withhold future certificates of occupancy for the three remaining Patent and Trademark Office buildings if the pedestrian tunnel is not completed by June 30, 2004; and

Second, initiate an investigation, with the assistance of Independent Counsel, to examine the conduct of the City Manager during the entire enforcement process for the PTO pedestrian tunnel, including the City Manager's refusal to provide City Council and the public copies of the two

settlement agreements between the developer and the City.

At its meeting on Monday, December 8, City Council is expected to consider a motion to withhold future certificates of occupancy for the remaining three Patent and Trademark Office buildings if the tunnel is not completed by June 30, 2004. The City Manager has stated, however, that if City Council withholds future certificates of occupancy, then the developer, Carlyle Development Corporation, has the right to opt out of providing and paying for all the mitigation measures--in particular, the shuttle bus. Thus, the motion under consideration could have a substantial adverse effect on the City, residents and PTO employees.

The City Manager, in a November 18, 2003 email, discusses the settlement agreement he entered into with CDC. Quoting from the last sentence of the agreement with CDC, he states: "The agreement was and remains contingent on the 'City not imposing any other fines or penalties [or] withholding any permits or approvals in relation to development in Carlyle solely' because the concourse will not be completed by December 30 [sic]."

The City Manager's November 18, 2003 email then goes on to state: "The agreement does not preclude the "City" from doing anything. It simply provides that, if the City takes an action [such as withholding future COs] falling within the contingency, then CDC may decide to withdraw from the agreement."

City Council needs independent legal counsel to advise it as to the legal and practical consequences of the settlement agreement entered into by the City, the proposed motion to withhold future COs, and CDC's right to "withdraw from the agreement" if future COs are withheld.

City Council has been working in an environment over the last four months where "lack of full disclosure" has been standard operating procedure. During this period, the City Manager has withheld from City Council the pertinent information it needs to make effective decisions regarding the delayed PTO tunnel. The withheld information includes:

- (1) the fact that the initial settlement agreement already had been signed by the City Manager approximately two months before this City Council's first discussion about the matter;
- (2) the exact date that the initial settlement agreement was signed;
- (3) a copy of the initial signed settlement agreement;
- (4) the legal implications of the initial signed settlement agreement;
- (5) the date that the supplemental settlement agreement was signed; and
- (6) a copy of the signed supplemental settlement agreement.

The decision by the City Manager to enter into these settlement agreements with CDC -- and then not disclose those agreements -- raises serious questions about his ability to provide unbiased and credible advice to City Council -- advice that it needs and deserves to make decisions on behalf of citizens.

To date, the following questions remain unanswered and cast a shadow of doubt on the ability of the City Manager to provide unbiased advice of the highest quality to the Mayor and City Council:

1. Why does the City Manager continue to refuse to provide City Council and

the public copies of the signed settlement agreement with CDC, executed sometime in July, and the more recent supplemental agreement? No reason is given for refusing to release these documents. The perception is that there is something to hide from City Council and the public.

2. In the event City Council approves a motion to withhold future COs if the tunnel is not completed by June 30, 2004, can CDC:
 - a. cease providing the mitigation measures, such as the shuttle bus, and
 - b. seek reimbursement for all previously funded mitigation measures?
3. If such recourse is available to CDC, is it available:
 - a. when such a motion is passed by City Council, or
 - b. when the City actually withholds the CO?
4. Given the legal and practical consequences of the settlement agreement entered into by CDC and the City, why was City Council not informed of those consequences prior to its discussions about this matter at its September meetings? Did the City Manager plan on providing such information to City Council at any time prior to the December 8 meeting?
5. Are there any provisions in the signed supplemental settlement agreement that impact City Council's ability to enforce the Carlyle SUP? Given the prior conduct of the City Manager, is it appropriate to rely on his assurances and analysis alone that Council still possesses enforcement powers and what the scope of those enforcement powers are?

The conduct of the City Manager and the numerous unanswered questions demand that City Council:

First, appoint Independent Counsel to provide objective and credible advice concerning the issues raised by the proposed motion to withhold future certificates of occupancy for Patent and Trademark Office buildings if the pedestrian tunnel is not completed by June 30, 2004; and

Second, initiate an investigation, with the assistance of Independent Counsel, to examine the conduct of the City Manager during the entire enforcement process for the PTO pedestrian tunnel.

It is time to restore integrity to the process that the City engages in when making and enforcing agreements with developers. The first step toward restoring integrity is to appoint Independent Counsel who will assist City Council in addressing these major issues.

Respectfully,

Ginny Hines Parry, President
Alexandrians for Sensible Growth, Inc.

ATTACHMENT -- TIMELINE: The PTO Pedestrian Tunnel



PTO tunnel time| 6 Dec 2003.doc

TIMELINE: The PTO Pedestrian Tunnel

(updated December 6, 2003)

March 2000 -- City Council approves Carlyle Development Corporation (CDC) Special Use Permit (SUP). City staff memo recommends withholding certificates of occupancy for Patent and Trademark Office (PTO) buildings if pedestrian tunnel under Duke St. for PTO employees walking to the King St. Metro not completed by December 31, 2003.

April 10, 2003 -- According to City staff, "[o]n April 10, 2003, CDC sent a letter to the City stating that the schedule for construction of the concourse appears to be in serious jeopardy." No public disclosure of this information.

May 6, 2003 -- Council general elections.

May 27, 2003 -- Council discusses failure of CDC to perform as required by the SUP. See Oral Presentations by Members of Council, Item c. at: <http://207.192.134.164/dsr/FY03Dock.nsf/15d1d7946ef59a9d85256ab8006d24a7/bc75a59a3950b2b885256d430072cc9e?OpenDocument>

Meeting minutes state that Director of the Department of Transportation and Environmental Services Richard Baier "reported that he will have a better idea on the construction time for the concourse, and that it will require that it come back to Council as a major [special use permit] amendment." (Brackets in original.)

Councilman William Euille asks staff to explain in a memo to Council "when did we know this, how did it happen, why is it happening and why is it just now evolving to get to this level to the Council."

June 12, 2003 -- Alexandrians for Sensible Growth writes Council and requests withholding certificates of occupancy until tunnel is completed.

June 18, 2003 -- CDC faxes proposed settlement agreement to City Manager.

June 23, 2003 -- Memo No. 1 to Council from City Manager with unsigned settlement agreement attached. Although agreement not signed by City, City Manager states that CDC "has committed" and "has agreed" to these terms.

June 24, 2003 -- Last Council meeting before swearing in of new Council. No discussion of tunnel issue.

July 1, 2003 -- New Mayor and Council sworn in.

Mid-to-late July 2003 -- City Manger apparently signs settlement agreement proposed by CDC (this is not acknowledged until City Manager's November 18, 2003 email); Council not informed that City is committing to CDC's proposed settlement.

August 15, 2003 -- Memo No. 2 to Council from City Manager with unsigned settlement agreement attached. Memo does not disclose that settlement agreement already signed by City.

September 9, 2003 -- Council discusses tunnel delay. See Item No. 22 at: <http://207.192.134.164/dsr/FY04Dock.nsf/2e049dac70da53b1852566760074a3d8/795a23d3b61e427c85256dab0051a374?OpenDocument>

Meeting minutes state: "Mayor Euille said the City Manager should have the sense from Council that there is no need to rush to issue a Certificate of Occupancy by October 10 until it flushes out the concerns expressed this evening, and that Council should revisit the matter as soon as possible with answers to the questions raised."

City Manager does not disclose that settlement agreement already signed by City and that if permits or approvals withheld, "CDC may decide to withdraw from the agreement." (City Manager's November 18, 2003 email.)

September 22, 2003 -- Memo No. 3 to Council from City Manager with unsigned settlement agreement attached. Memo does not disclose that settlement agreement already signed by City.

September 23, 2003 -- Council discusses tunnel and adopts motion (1) implementing City Manager's September 22, 2003 memo, and (2) directing City Manager to establish performance benchmarks between now and June 30, 2004 and penalties for CDC's failure to meet the benchmarks. See Item No. 20 at: <http://207.192.134.164/dsr/FY04Dock.nsf/2e049dac70da53b1852566760074a3d8/2246e006bfca014d85256dd00048d5e6?OpenDocument>

Councilman Ludwig Gaines advocates for treating matter as an SUP amendment and requests public hearing. Council's discussion proceeds with no knowledge that City has already signed a settlement agreement with CDC.

October 29, 2003 -- Community meeting at Minnie Howard School on tunnel (most of Council in attendance).

a. Memo No. 3 (dated September 22, 2003) to Council from City Manager made available again with unsigned settlement agreement attached. The community meeting proceeds with no knowledge that City Manager already had signed a settlement agreement with CDC.

b. Near the end of the meeting, in response to a question, City Attorney states that an agreement with CDC regarding the tunnel previously had been signed. He states he does not know when it was signed. City Manager is present for the entirety of the meeting but says nothing.

October 30, 2003 -- City Manager receives an email from a resident of Alexandria requesting the date that the settlement agreement with CDC signed; Council cc'd.

October 31, 2003 -- Councilman Ludwig Gaines emails Council colleagues that no additional certificates of occupancy for PTO buildings should be issued if tunnel not completed by June 30, 2004. Councilman Andrew Macdonald concurs.

November 3, 2003 -- Vice Mayor Del Pepper and Councilmen Rob Krupicka and Paul Smedberg write City Manager requesting the docketing of their motion that CDC and the PTO be formally informed that "City Council will not approve additional Certificates of Occupancy . . . without the completion of the Duke Street Concourse."

November 11, 2003 -- Alexandria resident emails list of questions to Council regarding tunnel process; City Manager cc'd.

November 14, 2003 -- Alexandria resident again emails City Manager and cc's Council requesting date that the settlement agreement was signed and providing notice that the request also would be made orally at the November 15 Council meeting's public discussion period. No response from City Manager.

November 15, 2003 -- At the public discussion period of Council's meeting, Alexandria resident again requests the date that the settlement agreement was signed. City Manager is present and does not respond.

November 18, 2003 -- City Manager responds via email to request for information and states that settlement agreement with CDC signed in mid- to late July 2003. City Manager states that if City withholds any permits or approvals, "CDC may decide to withdraw from the agreement."

November 24, 2003 -- Alexandria resident emails City Manager list of questions concerning the SUP enforcement process: (1) On what date in July was the initial settlement agreement signed by a representative of the City? (2) Could a copy be obtained of the signed initial and all subsequent settlement agreements between CDC and the City? No response to date.

December 4, 2003 -- Washington Post publishes Alexandrians for Sensible Growth letter to the editor requesting Council at its December 8 meeting to ask City Manager why settlement agreements with CDC not provided to Council and why SUP violation settled without input from Council.

December 8, 2003 -- City Manager to provide Council with update concerning tunnel and Council expected to consider motion to withhold additional certificates of occupancy if tunnel not completed by June 30, 2004.

Alexandrians for Sensible Growth, Inc.

updated December 6, 2003



Ginny Hines Parry
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12/08/2003 10:28 AM

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FOR INDEPENDENT COUNSEL

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ghparry@fortebrio.com

December 8, 2003

The Honorable Mayor and Members of City Council
City Hall
301 King Street
Alexandria, VA 22314

Dear Mayor and Council Members,

Yesterday the City Manager sent Tom Parry the email below, stating that the City is mailing to Tom a copy of the settlement agreement with CDC signed in July. ASG urges you to obtain and review a copy before tonight's meeting--focusing on the "contingency" language in the last sentence.

There is now even more reason for ASG's request for appointment of an Independent Counsel. The City Manager now states that "no other agreements/documents pertaining to the concourse have been signed." The City staff's November 19 memo to Council, however, indicates that the performance milestones and \$3000 per day penalties have been agreed to with CDC. City Council is urged to investigate the status of the agreement calling for milestones and related penalties.

Thank you for your consideration of this matter.

Ginny Hines Parry
President
Alexandrians for Sensible Growth, Inc.

-----Original Message-----

From: Phil.Sunderland@ci.alexandria.va.us
[mailto:Phil.Sunderland@ci.alexandria.va.us]
Sent: Sunday, December 07, 2003 12:55 PM
To: Tom Parry
Subject: Re: Additional questions re tunnel

Mr. Parry:

As to your additional questions:

1. Not sure, but, as I told you earlier, sometime in mid to late July
2. I will have it mailed to you
3. No other agreements/documents pertaining to the concourse have been signed

"Tom Parry"
<tparry@mptechlaw.com>
Sunderland"
<phil.sunderland@ci.alexandria.va.us>
11/24/2003 03:17 PM
"Vice Mayor"
<delpepper@aol.com>,"
"Councilman"
"Chris"
<jenkinsc@washpost.com>
questions re

To: "City Manager"
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"Councilman Gaines"
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"Councilwoman Woodson"
<council@joycewoodson.net>,
Jenkins"
Subject: Additional
tunnel

Dear Mr. Sunderland,

Thank you for your November 18 response concerning the tunnel SUP enforcement process. For the moment, I have three additional questions:

1. On what date in July was the initial settlement agreement concerning the tunnel signed by a representative of the City?
2. Could I obtain a copy of that initial settlement agreement concerning the tunnel with signatures of representatives of CDC and the City?
3. Could I obtain a copy of any subsequent agreement concerning the tunnel entered into by CDC and the City?

Thank you for your assistance.

Tom Parry
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