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VIA HAND DELIVERY

Cynthia Bessemer, Deputy District Attorney
Sacramento District Attorney's Office
Sacramento, California

Dear Ms. Bessemer:

I have been asked to offer my opinion as to whether certain billing practices employed by the Isleton City Attorney in connection with the approval of a medicinal marijuana grow facility fall within what is considered normal and customary practice in the offering and discharge of legal services to municipal clients. The opinions expressed here are my own and are based solely on my background and experience, which I describe below. These opinions are not intended as advice to any practitioner.

By way of background, I began working in municipal law as a law clerk in the Thousand Oaks City Attorney's office in January 1980. I have served as City Attorney for three cities for a total of nearly 21 years, having retired from public service in November 2010. From 1987 to 1991 I was engaged in private practice representing both public agencies and private clients. During my time as City Attorney of Mountain View (1994 to 2010), I served as the Chair of the City Attorneys' Fair Political Practices Commission committee and regularly interacted with the FPPC, California Attorney General's office and to a lesser extent, with our local district attorney and the California State Legislature on conflict of interest and ethical issues involving the law. I am the principal author of "Providing Conflict of Interest Advice (2008)," a 167-page practice book offered to city attorneys through the League of California Cities. Since my retirement in November, I have served as volunteer special counsel and lecturer for the Institute of Local Government on ethics projects. The ILG is a joint effort between the League of California Cities and the California State Association of Counties. I am also associated as Senior Counsel with the law firm of Thomas Whitelaw of Irvine, representing both public and private clients.

I have been asked the following two questions:

(1) **Is it a common practice for contract city attorneys to charge for extra services at an increased hourly rate?** The answer is "yes." The key considerations in evaluating the appropriateness of such an arrangement in a particular case are two-fold: (a) whether the work or assignment falls within contract services that should already be provided under the legal services agreement between the City and its city attorney; and (b) whether the fees are reasonable (e.g. within the market rate or price for similar services).

(a) I have worked on dozens of development agreements (DAs) and Disposition and Development Agreements (DDAs) for both public and private clients. Even as an in-house city attorney with a 3-4 person staff of attorneys, I have typically found myself raising the possibility of bringing in outside counsel to help facilitate the drafting and public review of development agreements and DDAs. This is desirable sometimes due to their complexity, but always due to the speed required by the development process.

In a city with contract city attorney services, the legal services agreement typically outlines the core services to be provided, and in order to be competitive, most contract city attorneys discount their hourly rate for core services. The legal services agreement between the city and city attorney sometimes spells out an agreed-to hourly rate for extra services, but whether spelled out or not, the city is free to secure extra services from their city attorney, his or her firm, or from other outside counsel.

In returning to the key considerations mentioned, above, I would never expect that the negotiation and drafting of a development agreement or DDA would fall within the core services, unless it was specifically listed as a core service, which was not the case with the Isleton agreement.

(b) Second, were the fees reasonable (e.g. within the market rate for similar services? Clearly the answer is "yes." I am familiar with the rates charged by both municipal firms and by municipal practitioners and can state without fear of contradiction that $250 per hour is not only reasonable, but toward the lower end of the fee spectrum given both: (1) the experience necessary and complexity of the assignment; and (2) the level of expertise offered by an attorney as qualified in this area law as Mr. Larsen. I have billing rates for both public and private clients. The range of my hourly rates is $300 to $400 per hour.

(2) **Is it common practice to pass through staff costs to applicants based on an hourly rate for projects that require extra time or attention?** The answer is "yes." In fact, over the last 10 to 15 years this method of covering costs has become the basis for the delivery of nearly all municipal services in the land development permitting context.

What has now become a system for the recovery of the cost of staff time spent processing, negotiating and reviewing projects on a routine or daily basis was predated by the cost recovery mechanism at issue here. Long before cities began hiring consultants to prepare fee studies to substantiate the recovery of fees for staff time spent on nearly every project, cities and counties routinely required applicants for everything from a development agreement to a landfill agreement to pay or reimburse the city or county the costs for processing same.

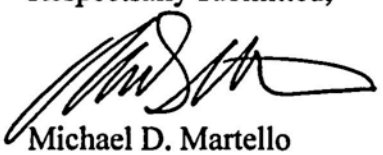
I spent 12-18 months while Mountain View City Attorney negotiating the DDA and ground lease for the development of what now is Google's worldwide headquarters (Google's five-building complex is located on land leased from the city). Google's predecessor covered all the city's costs through an upfront payment to the city. We did several of these agreements and the payments would range from $50,000 to $250,000. Some were facilitated through hourly reimbursement agreements similar to the one at issue, here.

Often, after the DA or DDA was signed, the agreement provided that any city work to review or approve a request following the approval or development which required outside assistance would be paid for directly or reimbursed to the city. An example of this also arises from the Google headquarters complex. The complex was originally built by Silicon Graphics (SGI). Several years after opening, SGI approached the City and sought to exercise their right under the lease to sell their buildings and assign the ground lease to Goldman Sachs. The city agreed to drop everything and help, but the request came in the middle of December and bodies were getting scarce. SGI and Goldman paid for all of the outside legal and consulting services, and, to the best of my recollection, paid the City's outside attorneys, directly. At that time (approx. Dec. 2000), I believe our outside counsel's hourly rate was $400 to $500 per hour (L. Engel from Brobeck, Phleger, and Harrison).

One further point: At the risk of being repetitive, when I offered the observation that cost recovery for staff time is now the norm; consider the preparation of an environmental impact statement (EIR). As you may know, these can be immensely controversial and heavily scrutinized by an often suspicious public. In my experience EIR's typically cost between $100K and $1M to prepare and process. The City selects the outside consultant and the developer pays for the preparation. The cost is calculated hourly and staff time and/or outside consultant time is often reimbursed as well. Sometimes the city writes the check to the EIR consultant—often the check comes directly from the applicant developer.

Finally, as a career municipal attorney and one both fascinated by and committed to increasing both transparency and ethical behavior in local government, I cannot find fault with what I know of this case. I am particularly buoyed by the fact that the development agreement process itself is a very public process when compared to other agreements which a public agency can enter into and secondly, it is my understanding that the terms of reimbursing or paying for the extra legal services was set forth in the application documents and in the development agreement. That alone leads me to conclude that no one was trying to hide the ball and were well-intentioned, irrespective what an outsider might think of marijuana farms.

Respectfully submitted,



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