

MEMORANDUM

Date: September 23, 2022

From: Costa Vatikiotis, Mayor

To: Board of Commissioners

Subj: Authorization to Seek Special Counsel Concerning Past Administrative Procedural Matters

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I wish to thank Commissioner Eisner for bringing the discussion of the staff emails concerning the Anclote Harbor Apartments project forward for a public airing. With this public airing, there should also be an end objective in mind. Here, it is to understand what happened and how it affects the Anclote Harbor Apartments project overall, including its approval.

For me, these emails simply describe “bad government.” I believe the residents were cheated out of a full and fair public process. I have made this view known to both the City Manager and the City Attorney. Whether or not there was any wrongdoing, the emails portray a most casual work relationship between the City staff and the developer and its agents to where there may not have been any intentional wrongdoing, but by the staff dropping its guard, it played into the hands of the Developer achieving its objective at the expense of the public. One of the City’s litigators described the business approach of the developer as “dispassionate.” He got it right. Unfortunately, our staff at the time did not.

These 750 or so emails cover a period from mid-2017 to mid-2020 and prior to the first public hearing on the Anclote Harbor Apartments project. To be clear, this matter does not involve our current Planning Director. All this happened before she returned to the City. Also, I have discussed this request for a Special Counsel with the City Manager, and he believes one is needed, as well. Both, he and I agree we need to set the record straight in hopes of starting to put this matter behind us and move the City forward. The Anclote Harbor Apartments project and the issues surrounding the project have been devastating in terms of being a major distraction and consuming significant amounts of staff time. Without getting into any detail, the City Manager suggests there is more to this matter than what the written record shows. Also, in fairness to the City Manager and our current Planning staff, the Planning Director has already reviewed and analyzed the changes that were made to the Land Development Code and Comprehensive Plan during that time period and is prepared to discuss them publicly. She will be looking for direction as to rolling back the changes, keeping them, or modifying them from what was approved. At this point, the City Manager and the Planning Director are waiting for the appropriate time to bring these forward. Now may not be the right time.

Why do we need a Special Counsel? We are currently looking for a new City Attorney and a law firm to serve the City. Also, the City Attorney and at least one other attorney from his law firm, were involved in some of these public matters that the emails describe. So, we need objectivity.

Also, the Special Counsel needs to be, well, a specialist, specifically in Malpractice Law, Constitutional Law, and Land Use Law. Consequently, the Special Counsel will likely be a law firm involving more than one attorney with one attorney being the liaison with the City. This approach was taken successfully by the City on a different matter twenty five years ago.

Between the time of my first memorandum to the Commission dated August 29, 2022, concerning this matter and now, I have reviewed many public records, not just the emails. Some of these records suggest the business relationships involved in this matter more specifically than what is known publicly. I have also researched the legal principles that may be involved in this matter. Obviously, I am not an attorney licensed to practice law. However, I can read and I have a fiduciary responsibility and duty to the City residents. Also, as one ethics class instructor once said when it comes to ethics, "if it doesn't feel right, it probably isn't," and from what I have seen and read, it doesn't feel right.

The issues that I am concerned with and the possible wrongdoing involve 14th Amendment rights of due process in administrative procedures, ethics and voting conflicts, attorney misconduct and other issues involving attorney Standards of Professional Conduct and fiduciary responsibility. I recognize these are serious. However, I have a reasonable basis for listing those here. I am not going to personalize this matter by naming or identifying individuals. I will share those details and leave all the rest regarding the law to the Special Counsel at the appropriate time if one is approved.

As an example of one concern, based on the emails, the Conditional Use Ordinance was apparently amended during this time period to the benefit of the Anclote Harbor Apartments project. Its amended form was subsequently used in the approval of the Anclote Harbor Apartments project. Based on the emails, the idea of changing one provision of the ordinance, specifically the 12 month expiration deadline from being tied to obtaining a building permit to that of an approved site plan, was that of the developer's attorney. Moreover, the change was not initiated by any policy concern from the City Commission. In fact, this part of the ordinance had been in place for at least 25 years. Also, the fact that the change was to the benefit of the Anclote Harbor Apartments was not stated publicly by the former Planning Director during the public meetings or included in the staff reports. This ordinance change occurred in early 2019. The Developer had decided to proceed with the project in November, 2018. The City Manager did not advise the City Commission in writing that there was a proposed apartment project on the former WalMart site until late 2019, although at least one sitting Commissioner in 2019 and one former Commissioner who was in office in 2017 and met with the Developer knew of the project beforehand. To be clear, 320 of 404 apartments that are planned are on the portion of the former Walmart parcel for which a conditional use was needed.

Again, these public actions were taken without identifying that the reason for the change was tied substantially to one project. By concealing this reason, it deprived residents of their due process right to comment on the proposed ordinance change in the context of the project for which it was being changed. To me, there are obvious reasons why the project was kept out of the public eye during this timeframe. I will reserve describing those with the Special Counsel.

I should also point out something that may not be so obvious in this discussion. The City government between mid-2017 and mid-2020 was complicit in this matter. The City government and its staff held the public hearings and largely concealed key information associated with the ordinance changes and their purpose. So wherever the Special Counsel leads us in this matter, there may be exposure to the City government, as well.

If this Commission proceeds with a Special Counsel, I respectfully request to be made the liaison for identifying prospective law firms for you to consider. I have discussed this point with the City Manager, and he is comfortable with letting me work directly with our Purchasing Director. The City Manager should not be involved. I have some experience with the process and what is needed from my time as City Manager.

Lastly, I have described several concerns that have a legal basis. Whether or not they are valid will first be left to the Special Counsel first to determine. The basic premise to moving forward with this effort is to understand what happened and how it affects the Anclote Harbor Apartments project overall, including its approval. Hopefully, there will be a lesson learned from all of this. One being that residents have rights, too.

Thank you.

MEMORANDUM

Date: October 5, 2022

From: Costa Vatikiotis, Mayor

To: Board of Commissioners

Subj: Authorization to Seek Special Counsel (Supplemental Information)

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In the main memorandum, I provided a general overview of why I believe we need a special counsel to investigate recent past administrative procedural matters. In addition, we have reached a point where this matter needs to be put in the hands of someone else to free-up the Commission's time to move the City forward. The public's preoccupation with the approval of 404 apartments with its only accesses onto one the most dangerous stretches of highway in the United States and to the objection of the majority residents for other reasons, as well, requires explanation, not only why but how. In addition, I believe a number of procedural staff and City Attorney policies will come out of this investigation and its subsequent understanding to ensure something like this does not happen again.

As you know, I identified several hundred emails concerning the work-up by the City staff, the Morgan Group, and its agents of the Anclote Harbor Apartments for its approval. Commissioner Eisner will discuss those emails publicly. I made the Commission aware of those in late August in a rather discreet memorandum. Since then, I have also reviewed many other "pieces of the puzzle," specifically Form 8B's for Commissioners fully disclosing voting conflicts of interest, Form 1's Statements of Financial Interests, Code of Ethics for Public Officers, Rules and Standards of the Florida Bar, numerous related cases and opinions for those, and case law and examples of Constitutional Tort.

Now that I have completed my review, let me again state the obvious, I am not an attorney. I do not know whether there has been any criminal, civil, or administrative wrongdoing. But in my opinion as an experienced layperson, there is a strong possibility that there are actionable issues. There appear to be improprieties by any standards of good government, and the public was deprived of its rights to good government. In any case, in my opinion, there is sufficient written evidence of questionable activities as they pertain to Florida's ethics rules for public officers and employees, and the Florida Bar rules for attorneys to have an independent expert examine the written record.

Also, at this point also, there is the question of whether a Special Counsel should take over any litigation involving the Morgan Group and the Concerned Citizens? I do not believe it would be wise to have a new City Attorney involved in the litigation. For the litigation involving the Concerned Citizens, the City and the Morgan Group are co-defendants. However, for the City Attorney and Special Counsel, this situation may reflect questionably on their independence. In

the future, the circumstances may change. (Please see question 11 below.) There may be separate legal and administrative actions that come out of this investigation that do not involve the Concerned Citizens.

Here are some of the questions and the reasoning for the Special Counsel to address. As in my previous memorandum concerning this matter, I am not going to identify individuals by name.

1. **Is it Constitutional Tort when the purpose of proposed legislation is concealed publicly, thereby depriving the public their right to due process on the legislation in the context of its true purpose?** The basis for this question is background literature concerning Fourteenth Amendment Rights and its relevance to administrative processes.
2. **Can an ethics complaint be filed against individuals who are no longer in their position for an alleged violation if the statute of limitation has not expired?** There are three individuals that are possibly in these circumstances.
3. **Is it an ethics violation for a Commissioner to vote on legislation where the true purpose of the legislation was not disclosed publicly but where the Commissioner may have known it was crafted to benefit a project where the Commissioner would benefit financially, as well?** There is evidence between Form 8B's, Form 1's, and the Commissioner's knowledge of the project that suggest it was known that the purpose of the legislation was to benefit a specific project, and the project would benefit him personally.
4. **Is it an ethics violation to not disclose publicly the full nature of a conflict of interest prior to a vote for which the conflict exists, but include the additional disclosure later in the Form 8B?** Specifically, a Commissioner A did not disclose that he would personally benefit from approval of a project and not just his relatives. Why is that important? In a previous matter, another Commissioner B stated adamantly in an email to the Commission in June, 2020, he would not support an upcoming project that would financially benefit any Commissioner. Commissioner B subsequently voted "NO" on the project where Commissioner A disclosed he would benefit financially. In the subsequent matter, the final approval vote was 3 YES's to 1 NO. If there had been public disclosure of a personal benefit, given that Commissioner B was adamant he would not support projects where Commissioners gained financially, the vote may have been 2 YES's to 2 NO's. As such, the approval of the project would have been denied.
5. **Can an ethics complaint be filed against a former department head for concealing the true reason for a proposed legislation?** This situation happened twice. In both cases, the legislation was presented as something that was needed to avoid past issues from recurring. There was no evidence of a discussion of these reasons in the written staff communications. Instead, the written communications are clear that the two separate legislative changes benefited two specific projects. In one case, the legislation

provided a developer a monetary benefit. In the other legislation, it reduced the risk to a developer of the project's approvals expiring and having to be reheard.

6. **Can an ethics violation be filed against a charter official who knew of but did not take action to prevent ethics violations from occurring?** There are ample emails where Charter Officials who had oversight responsibilities were copied on the activities of the City staff working with a developer's agents to amend City Ordinances to benefit the developer's project but where the true reasons for those amendments were not disclosed publicly at meetings where the proposed legislations were voted on.
7. **Is it a violation of an attorney's rules of professional conduct for communicating and materially participating with non-attorney City staff in crafting legislation where a City Attorney is in place for such communications?** I have asked the City Manager, City Clerk, and City Attorney in writing whether they knew of any City rules or policies governing these types of communications. The City Manager and City Clerk were not aware of any. The City Attorney did not respond. There are Florida Bar rules against this type of communication. Moreover, it is considered misconduct by an attorney to knowingly allow Florida Bar rules to be violated by another attorney.
8. **Is it considered misconduct by a City Attorney to merely observe while a City Commission is intentionally misled by City staff as to the true purpose of legislation?** I believe the basis for this is an attorney's fiduciary responsibility to his client. In this case, there is ample literature citing that the City Attorney's client is the City Commission, and not the City staff or individual Commissioners.
9. **Is it a breach of fiduciary responsibility for a City Attorney to merely observe while questionable activities occur that may involve ethics and Florida Bar rule violations without intervening or reporting such activity to this client?** I find it interesting that one former City Attorney in a memorandum to the Commission dated May 17, 2017 expressed concern over the Board of Adjustment not following its procedures and the ramifications. Yet, nothing was said about the ongoing questionable activity between the City staff and a developer's agents, including its attorney. In fact, in the first Commission quasi-judicial meeting of December 8, 2020, for the Anclote Harbor Apartments project the question of disclosing any ex parte communications was not asked of the Commission and the Commissioner that had a voting conflict disclosed his conflict of interest (in part) at the time of the motion and second for approval and not at the start of the proceedings.
10. **What does all this questionable activity, the potential for ethics and Florida Bar rule violations, a violation of the public's right to due process in adopting any ordinances that were used in the approval of the Anclote Harbor Apartments project mean? Does any of this have an effect on the project's approval?**

**11. If the Commission proceeds with a Special Counsel, should the Court, Concerned Citizens Group, and the Morgan Group be notified formally that the City has commenced an investigation?** The Special Counsel may or may not find any actionable issues in the investigation that involve the Morgan Group or that affect the approval of the Anclote Harbor Apartments project. However, if he or she does, it would seem prudent beforehand to have advised the Court, the Concerned Citizens, and the Morgan Group of the investigation.

**12. If actionable issues are identified that involve the Developer's agents, would the Developer be liable, as well?**

I understand that the answers to many of these questions depend on circumstances and details. Also, these questions may not be related to all the issues that a Special Counsel identifies. In any case, I recognize that by posing these questions, they may also appear judgmental, but they are not. They are simply questions that need answers for the reasons stated in the first paragraph. The first step in obtaining those answers is through a Special Counsel. If a Special Counsel is appointed, I intend to let him or her do their job while focusing on other matters important to City residents. Thank you.