

December 16, 2014

**Via E-mail and Overnight Mail**

Anthony Taylor, Esq.  
Special Counsel, City of Irvine  
Aleshire & Wynder, LLP  
18881 Von Karman Avenue, Suite 1700  
Irvine, California 92612  
ATaylor@awattorneys.com

Re: Great Park Performance Review – Gafcon, Inc.

Dear Anthony:

I write on behalf of Gafcon, Inc. (“Gafcon”) to express our continuing and growing concern regarding inaccuracies in your firm’s December 16, 2014 Status Update and Request for Budget Adjustment (“December Status Update”). The December Status Update contains factual errors, both large and small, and repeats many of the incomplete and misleading descriptions of open audit issues included in your October 14, 2014 Status Update (“October Status Update”). For the reasons discussed herein, Gafcon requests that Aleshire & Wynder’s cease its practice of publishing status updates that include false allegations under the guise of a client “update” because these statements, as presented, cause immediate unjust reputational and financial harm to the Company.

We appreciate that the City Council has retained HSNO and your firm to conduct a “forensic audit” concerning the Great Park. However, when the totality of the audit evidence suggests that the allegations against Gafcon and others are unfounded, it is irresponsible to knowingly propagate false allegations into the public realm under any circumstances. This practice began with the release of HSNO’s Preliminary Audit Report in January 2014, which was so replete with errors that only a complete retraction of this document would be appropriate. Unfortunately, Aleshire & Wynder has been perpetuating this same harm by publishing unfounded allegations in its status reports. There is nothing compelling Aleshire & Wynder to re-publish a list of “areas of inquiry” in a status update aimed at increasing the cost of the audit for auditor and legal fees to at least \$1.248 million – especially when significant evidence has already been provided to resolve these issues. Moreover, the fact that the status updates are intended to be summary presentations does not excuse a false or misleading portrayal of the facts and issues. Gafcon requests an immediate public correction of these statements, including the careful, fair and accurate explanation of any of these issues to be addressed during today’s City Council Meeting.

With respect to the “additional areas of inquiry” set forth in Section C, Gafcon reminds the investigators about the following evidence previously provided:

**Item 5: San Juan Capistrano’s Selection of Gafcon Through A Public Bidding Process Was Procedurally Appropriate and Devoid of Any Conflict of Interest or Appearance of a Conflict.**

While the City of San Juan Capistrano public bidding process appears unrelated to a “forensic audit” of the Great Park, we provide you with the following facts. In late 2007, Gafcon was part of a team of consultants that responded to a public request for proposals from San Juan Capistrano Community Redevelopment Agency (“Agency”) regarding the Lower Rosan Ranch. The Agency sent requests to sixty-four firms, and the Gafcon team was one of nine firms that responded. An evaluation panel of the Agency vetted the finalists, rated the Gafcon team highest, and recommended its selection to its Board of Directors. The investigation has now expanded to assess whether San Juan Capistrano Mayor Samuel Allevato, a member of the Agency’s Board of Directors and the referenced “Employee of Forde & Mollrich”, appropriately “Participated In the Hiring [of] Gafcon.”

While Mayor Allevato did vote on the final selection of Gafcon, he did so *only after* consultation with the City Attorney and his fellow Board members following full disclosure of his work at the Great Park. It is important to acknowledge that then-Member Allevato did not play any role in the selection of Gafcon as a contractor by the Agency’s evaluation panel. When the final approval of Gafcon’s selection came before the Board of Directors, Member Allevato sought the advice of the City Attorney, who opined that Member Allevato could participate in the vote on Gafcon’s selection because his work at the Great Park did not create a conflict of interest. In addition to the information Gafcon has provided on this topic, Mayor Allevato has given testimony in this investigation and he has corroborated these facts in a recent letter to you dated December 3, 2014. (*See* Allevato Dec. 3, 2014 letter attached as Exhibit A). Given these undisputed events illustrating the appropriateness of Mayor Allevato’s actions, it is unclear what additional inquiry needs to be made on this topic and why this allegation has been included in the December Status Update. The repetition of this unfounded allegation in the December Status Update is unnecessarily damaging to Gafcon, as well as the reputation of Mayor Allevato.

**Item 6: The Political Contributions By The Design Studio Were Lawful And No Political Payments Were Reimbursed By The City.**

As discussed in detail in Gafcon’s October 22, 2014 response to the October Status Update, the Design Studio could lawfully make political donations. As you know, Gafcon has voluntarily disclosed the small number of political donations made by the Design Studio. When these donations became an issue of the audit, Gafcon retained attorney Steve Churchwell of Churchwell and White to assist with this highly specialized area of the law. Mr. Churchwell’s is the former General Counsel of the California Fair Political Practices Commission and a leading expert in political contributions.

There is simply no factual or legal basis for suggesting that the City reimbursed the Design Studio for any political donation. Mr. Churchwell’s letter to you of September 16, 2014

provided legal support for the ability of the Design Studio to make lawful political donations and support political measures. (See Churchwell letter attached as Exhibit B). Although Mr. Churchwell invited discussion on this topic, neither your firm nor HSNO have ever contacted Mr. Churchwell. If the authoritative legal analysis in Mr. Churchwell's letter, which has been in your possession for three months, did not fully resolve this issue for the audit, then your office should immediately contact Mr. Churchwell and commence discussions. It is improper to continually publish such serious allegations unsupported by law or fact and to completely ignore the information provided by a credible source.

**Item 2: The Portrayal Of The Close Out Agreement Continues To Be Misleading, As It Suggests Overpayment To The Design Studio And Omits Material Facts.**

Gafcon has repeatedly objected to the misleading portrayal of the Close Out Agreement in the status updates. The allegation regarding the Close Out agreement has been the subject of extensive discussions between our offices, and Gafcon has provided undisputed evidence several months ago on this topic, including checks paid by the City and attorney correspondence regarding the agreement. (See Bates Nos. GAFCONGP0034418- GAFCONGP0034421; GAFCONCP0032898 to GAFCONGP0033826). The Close Out Agreement also received significant attention in Gafcon's October 22, 2014 response to the October Status Update.

In summary, Gafcon continues to object to the assertion that the City paid the Design Studio "\$1.4 Million" under the agreement without also disclosing that the City only paid Gafcon \$554,585 for all invoices that were in dispute –significantly less than Gafcon sought in the settlement for services provided. It also fails to disclose that while the Close Out Agreement did not appear on a public City Council agenda, the City Council did approve the \$554,585 settlement amount. Similarly, the December Status Update continues to omit the undisputed fact that the remaining \$833,000 of the \$1.4 million represented payments that *were not in dispute and not part of the Close Out negotiations*.<sup>1</sup> In other words, the Great Park CEO, Mike Ellzey, Brendan McDevitt, Corporation Staff, Program Manager Bovis, the City Attorney and various other parties within the City agreed to payment of the invoices totaling \$833,000. The December Status Update's exclusion of these material facts leaves the public to erroneously question whether the Design Studio received a large, potentially secret payment it did not earn. This harm to Gafcon's reputation was entirely preventable by a full and fair disclosure of these facts or simply a revision of the word choice in the December Status Update.<sup>2</sup> We request that you amend the December Status Update in order to provide full and complete information on this issue.

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<sup>1</sup> This amount was paid to Gafcon through a separate check than the settlement amount. (See GAFCONCP0032898 to GAFCONGP0033826).

<sup>2</sup> For example, Section C, point 2 could have simply provided: "While the settlement amount for disputed invoices with the Design Studio was approved by the City Council, the Close Out Agreement was executed without being placed on a public City Council agenda for approval of the complete contract."

As a matter of a minor factual correction, we also note that the December Status Update suggests that the deposition of Gafcon's CFO is necessary to resolve points 3 and 6 of Section C. While Gafcon's Chief Financial Officer ("CFO") has attended interviews with you and HSNO on several occasions to demonstrate Gafcon's commitment to cooperate and to respond to all inquiries, we understand that you do not actually intend to take the deposition of the CFO. Instead, you have requested the deposition of Robin Duveen, Gafcon's current Chief Operating Officer ("COO"). Notably, Mr. Duveen was not Gafcon's COO during his tenure at the Design Studio but he did serve as the Project Manager for the Design Studio for the Schematic Design phase. We understand that Mr. Duveen will testify that he is not aware of any instance in which invoices from Forde & Mollich were modified "To Make It Appear That \$100,000 Worth Of Services Were Performed". While completely unfounded, this allegation is especially usual because Forde & Mollich was paid pursuant to a flat fee of \$100,000 monthly, which had been approved formally by the City Council of Irvine and widely reported in the media. Separately, we understand Mr. Duveen will also testify as to the falsity of the allegation that the City reimbursed the Design Studio for any political contributions. Gafcon looks forward to the opportunity for Mr. Duveen to supplement the significant evidence already provided by Gafcon on these and other topics.

Furthermore, we note that additional funds are sought by the City on behalf of HSNO to "updat[e] their prior preliminary audit report". As you know, the allegations in HSNO's Preliminary Audit Report comprise the vast majority of the Scope of Services for Phase 2 of the Investigation.<sup>3</sup> As we have repeatedly discussed, HSNO's Preliminary Audit Report was replete with false, misleading and erroneous findings that were not based on fact or evidence. The Company believes that the entire Preliminary Audit Report must be retracted in order to mitigate the harm caused by the release of a document riddled with error.

Finally, the publication and re-publication of allegations known to be false are compounding the unjust harm caused to Gafcon. The Company is currently making proposals for two significant public projects in Southern California. In both instances, the investigation of the Great Park has become an issue in the selection process. If these public entities select another contractor as a result of the continual publication of allegations known to be willfully false, it will add to the millions of dollars the Company has already lost due to the reputational harm associated with willfully false statements publicly made in the name of this investigation. Gafcon has repeatedly notified the City regarding these ongoing damages, and the responsibility of all parties associated with this audit to correct the record and to be prepared to account for Gafcon's damages which continue to accrue due solely to improper conduct in this investigation.

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<sup>3</sup> Resolution of the City Council of the City of Irvine Authorizing an Investigation into the Financial Management of the Orange County Great Park, Approving a Scope of Work for a Forensic Investigation, and Authorizing the City Council Subcommittee and Retained Special Counsel to Facilitate the Investigation and Issue Subpoenas, Exhibit A (January 28, 2014).

Anthony Taylor, Esq.  
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We look forward to your prompt response. As always, please feel free to contact me at (949) 725-4080.

Very truly yours,



Kathleen M. Marcus  
STRADLING YOCCA CARLSON & RAUTH

KMM:ccc  
Enclosures

## Exhibit A

December 3, 2014

Via Email

Anthony Taylor, Esq.  
Special Counsel, City of Irvine  
Aleshire & Wynder, LLP  
18881 Von Karman Avenue, Suite 1700  
Irvine, California 92612

RE: HSNO's Forensic Contract Performance Review

Dear Mr. Taylor:

This letter further addresses questions raised at my October 10, 2014 deposition relating to a 2009 contract between the San Juan Capistrano Community Redevelopment Agency (the "Agency"), Gafcon, Inc., and its subconsultants, Fuscoe Engineering, LGC Inc. and KTG Y, Inc. This particular contract concerned economic and land planning services, and coincided with my tenure as a Board Member of the Agency. When the topic of this contract arose during my deposition, I was not provided a sufficient opportunity to fully explain the circumstances associated with my involvement in the Agency's approval of this contract. Therefore, to avoid any misunderstanding, I am supplementing the information provided during my deposition with this letter so that you can include the full and accurate facts in your report to the City of Irvine.

As we discussed during my deposition, I joined Forde and Mollrich as an employee in August 2007. I had recently retired as police lieutenant for the City of Irvine Police Department after approximately twenty-seven years of service to the Irvine community. My assignment with Forde & Mollrich involved work on the Orange County Great Park project.

In October 2007, the Agency decided to obtain proposals from economic and land planning firms concerning the City's desire to study land improvements in the area known as Lower Rosan Ranch. The Agency created an evaluation panel consisting of Agency Chairman Mark Nielsen, Vice Chairman Tom Hribar, Planning Commissioners Sheldon Cohen and Ginny Kerr, HOA President Tom Gronewald and City Planning Director Steven Apple to rate the prospects and recommend a preferred firm to the Board of Directors. The Agency sent requests for proposals to sixty-four firms. In December of 2007, nine firms submitted proposals ranging in cost from \$139,000 to \$285,000, with the average firm cost proposal being \$199,000. Gafcon, Inc., along with Fuscoe Engineering, LGC Inc., and KTG Y Inc., submitted a proposal for approximately \$149,000.

In January 2008, the Agency's evaluation panel selected the Gafcon team, along with three other firms of interest, to interview. Shortly thereafter, the Agency's evaluation panel

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chose the Gafcon team and recommended that the Board approve the selection. *I had no involvement whatsoever in the evaluation panel's selection process.*

When I learned that the evaluation panel had selected the Gafcon team, I considered the fact that some of the members of Gafcon's team also were working with me and my employer, Forde & Mollrich, at the Orange County Great Park project. Although I did not view this as problem or a conflict of interest, I took multiple steps to ensure the propriety of my Board activities. First, I consulted with the City Attorney of San Juan Capistrano regarding whether it would be appropriate for me to vote on the approval of the selection of the Gafcon team. The City Attorney confirmed that my work at Forde & Mollrich and the Orange County Great Park did not prevent me from appropriately casting a vote as a Board Member on the approval of the evaluation panel's recommendation. Second, when this agenda item came before the Board of Directors of the Agency, I disclosed my work on the Orange County Great Park and my involvement with members of the Gafcon team to my fellow Board members. Since neither the City Attorney nor the other Board members expressed concern regarding my participation in the vote, and because I personally did not perceive any conflict of interest, I joined the entire Board in the unanimous approval of the evaluation panel's recommendation of the Gafcon team.

Should this issue be included in your final report, I trust and expect that you will fulfill your duties as Special Counsel to the City of Irvine by accurately reflecting all relevant information -- and, in particular, the foregoing information -- concerning this matter.

Very truly yours,



Sam Allevato

cc: Forde & Mollrich  
Gafcon, Inc.  
Fusco Engineering  
LGC, Inc.  
KTTY, Inc.

313545452.1



## Exhibit B

September 16, 2014

Steve Churchwell  
D 916.468.0945  
[steve@churchwellwhite.com](mailto:steve@churchwellwhite.com)

VIA USPS AND EMAIL ([ataylor@awattorneys.com](mailto:ataylor@awattorneys.com))

Anthony Taylor, Esq.  
Aleshire & Wynder LLP  
18881 Von Karman Ave., Suite 1700  
Irvine, CA 92612

**Re: *Great Park Design Studio – Political and Charitable Contributions***

Dear Mr. Taylor:

I have been retained by Gafcon, Inc. to assist in responding to recent allegations in the media concerning four expenditures by the Great Park Design Studio in 2008. Three were charitable contributions to nonprofit organizations. The other was a \$2,500 dollar political contribution made for the purpose of sponsoring a table at the annual Harry S. Truman Awards dinner honoring women mayors in Orange County. I offer two important points that I trust will resolve any lingering concerns about these matters.

First, there seems to be some confusion over whether the Great Park Design Studio (“Design Studio”) could lawfully make a campaign contribution out of its corporate treasury funds. I can assure you that there is absolutely no question that the Design Studio, a private joint venture established by two private corporations, could lawfully make such contributions.

The Design Studio was not tax-exempt under Section 501(c)(3) of the Internal Revenue Code. Thus, the prohibition on candidate contributions by charitable nonprofit organizations clearly does not apply.

Moreover, the Design Studio was not a de facto public agency. In the Siegel Opinion (1977) 3 FPPC Ops. 62, the Fair Political Practices Commission (“FPPC”) devised a four-part test for determining whether a private entity is a de facto state or local public agency.

- (1) Whether the impetus for formation of the entity originated with a government agency.
- (2) Whether the entity is substantially funded by, or its primary source of funds is, a government agency.
- (3) Whether one of the principal purposes for which the entity was formed is to provide services or undertake obligations that public agencies are legally authorized to perform and which, in fact, they traditionally have performed.
- (4) Whether the entity is treated as a public entity by other laws.

In a subsequent opinion, the FPPC held that not all four of the Siegel factors need be present for an entity to be considered a local government agency. (In re Vonk (1981) 6 FPPC Ops. 1.) It is only necessary that the entity satisfy enough of the four factors for its overall character to correspond to that of a local government agency. Never has one factor been sufficient, and in almost every case, control of the entity by one or more government agencies was the most important factor. (See, e.g., Rasiah Advice Letter, FPPC File No. A-01-020.)

None of the four factors apply under the present situation, except arguably Factor 2, which will be discussed in greater detail below. As for Factor 1, the Design Studio was, as stated above, a private joint venture established by two for-profit corporations. No federal or state legislation, or local ordinance or resolution was the impetus for its formation.

Second, the Design Studio's purpose was to plan and design the Great Park for the City of Irvine. It would be erroneous to suggest that the second Siegel factor was met on the sole basis that the checks used to pay its invoices were drawn on public monies. Indeed, the FPPC carefully used the word "funded" in the second factor, instead of the word "paid." By specifically using the word "funded," the FPPC clearly intended to cover traditional funding mechanisms for quasi-public entities, for example: (1) grants; (2) in-kind benefits such as the provision of staff; (3) interest-free loans, or (4) free or discounted office space. Vendors are not funded. Never has the FPPC stated or implied that a vendor, such as consulting or design firms, even those paid exclusively by public entities, should be considered a de facto public agency!

Third, no government agency delegated its traditional functions to the Design Studio. Planning and designing a world-class park twice the size of Central Park and costing more than a \$1 billion dollars is not something that any city could have performed with their "in-house" staff

Finally, no other law treated the Design Studio as a public entity. The Design Studio was not required to comply with the Ralph M. Brown Act or the California Public Records Act. Likewise, the Design Studio could not avail itself of the privileges of being a governmental entity under tax or security laws.

The Court of Appeal recently held that even if a private corporation enters into such a joint venture with a public agency, the resulting entity is not a public agency. In *Eden Township Healthcare District vs. Sutter Health* (2011) 202 Cal.App.4th 208 (review denied 2012), a public hospital district ("ETHD" or "District") and a private hospital operator ("Sutter Health") formed a nonprofit known as Eden Medical Center ("EMC") to operate a hospital. EMC had 11 directors, five of whom were also members of the District's board. Sutter Health was the "General Member" or EMC, and ETHD was the "Community Member."

An issue in the litigation was whether the CEO of EMC, George Bischaney, qualified for the "government salary" exception (see Gov. Code § 1091.5(a)(9)) to the conflict of interest law commonly known as Government Code section 1090. The court concluded that "this exception does not apply to our facts because Bischaney's employer is not a governmental entity ... ." (*Eden Township Healthcare District*, 202 Cal.App.4th at p. 222.)

Just as certainly, the Design Studio was never a de facto governmental entity under any relevant California law. Therefore, it was free to make campaign contributions to both candidates and ballot measure committees, as well as make donations to nonprofits.

Finally, while anyone is free to investigate anything they want back to the beginning of time, I don't believe that it is the best use of taxpayer funds to review acts for which the applicable statutes of limitation have long since expired.

I offer these observations in a spirit of cooperation and in the hope of assisting you in completing your assigned duties in an efficient and expeditious manner.

Please do not hesitate to contact me if you would like to discuss these issues further.

Very truly yours,

CHURCHWELL WHITE LLP



Steve Churchwell  
Partner

cc: Kathleen Marcus