



# City of Sunnyvale

## Agenda Item-No Attachments (PDF)

---

File #: 22-1032, Version: 1

---

### **REPORT TO COUNCIL**

#### **SUBJECT**

Approve the Third Amendment to Outside Counsel Agreement with Downey Brand for Litigation Services Pertaining to the Pending Litigation San Francisco Baykeeper v. City of Sunnyvale Increasing the Not-to-Exceed Contract Amount by \$250,000 for a new Not-to-Exceed Contract Amount of \$750,000 and Approve Budget Modification No. 6

#### **BACKGROUND**

Approval is requested for a Third Amendment to the Outside Counsel Agreement with the law firm of Downey Brand for legal services and representation of the City in the matter of San Francisco Baykeeper v. City of Sunnyvale (United States District Court Case Number 5: 20-CV-00824-EJD). Melissa A. Thorne, a partner in the law firm Downey Brand in Sacramento, is a lawyer focusing on stormwater and wastewater regulatory issues with experience in complex litigation matters. Ms. Thorne and her firm were retained by the City Attorney under Section 908 of the City Charter to represent the City and provide legal services, consultation and advice concerning the above referenced case in litigation.

The initial Legal Services Agreement between the City of Sunnyvale and Downey Brand for representation the matter of San Francisco Baykeeper v. City of Sunnyvale was entered into on December 13, 2019, for an amount of \$50,000. The First Amendment to Legal Services Agreement entered into on July 10, 2019 increased the amount of allowed compensation to \$100,000. Council authorized a budget modification and Second Amendment to the Agreement in April 2021 (RTC No. 21-0435) increasing the not-to-exceed contract amount by \$400,000, for a new not-to-exceed contract amount of \$500,000 and Approve Budget Modification No. 19. The complex nature of the discovery, including depositions and pre-trial motions were greater than expected and with a possible trial date being set for January 17, 2023 the cost of litigation will soon exceed the Council authorized not to exceed contract amount.

#### **EXISTING POLICY**

Pursuant to Sunnyvale Charter Section 1305, at any meeting after the adoption of the budget, the City Council may amend or supplement the budget by motion adopted by affirmative votes of at least four members so as to authorize the transfer of unused balances appropriated for one purpose to another, or to appropriate available revenue not included in the budget.

#### **Discussion**

The Complaint was filed by Baykeeper on February 4, 2020, and a First Amended Complaint was filed on April 28, 2020. Plaintiff alleges violations of the Clean Water Act and a federal discharge permit related to bacteria. The City of Sunnyvale filed a Motion to Dismiss in June 2020, which was

denied by the Court in December 2020 and a Second Motion to Dismiss in October 2022, which is still pending with the Court.

It is necessary to request additional funding in the amount of \$250,000 for legal services through the approval of the Third Amendment to the Outside Counsel Agreement, for a new not-to-exceed amount of \$750,000. This amount includes the anticipated costs and expenses for a trial in this matter which reflect the new 2022 rates charged by Downey Brand. If the case settles before trial, the full amount of \$750,000 will not be necessary.

### **ENVIRONMENTAL REVIEW**

The action being considered does not constitute a “project” with the meaning of the California Environmental Quality Act (“CEQA”) pursuant to CEQA Guidelines section 15378(b)(4) in that it is a fiscal activity that does not involve any commitment to any specific project which may result in a potential significant impact on the environment.

### **FISCAL IMPACT**

Budget Modification No. 6 has been prepared to appropriate \$250,000 to Project 835480 - Baykeeper Litigation Expenses from the Wastewater Management Fund Rate Stabilization Reserve. Through FY 2021/22, \$386,629 has been spent of the original \$500,000 appropriation. With this budget modification, total funding available would be \$363,371 for FY 2022/23.

#### **Budget Modification No. 6 FY 2022/23**

	Project Budget	Increase/ (Decrease)	Revised
<b><u>Wastewater Fund</u></b>			
<u>Expenditures</u>			
Project 835480 - Baykeeper Litigation Expenses	\$500,000	250,000	750,000
<u>Reserves</u>			
Wastewater Management Fund - Rate Stabilization Reserve	60,260,431	(250,000)	60,010,431

### **PUBLIC CONTACT**

Public contact was made by posting the Council agenda on the City's official-notice bulletin board outside City Hall, at the Sunnyvale Public Library, Senior Center, Community Center and in the Department of Public Safety Lobby. In addition, the agenda and report are available at the Sunnyvale Public Library, Office of the City Clerk, and on the City's website.

### **RECOMMENDATION**

Authorize the Agency Counsel to execute a Third Amendment, in substantially the same form as

Attachment 1 to the report, to the Legal Services Agreement with the law firm of Downey Brand, LLP to increase the not-to-exceed amount \$250,000 for a new not-to-exceed contract amount \$750,000 and approve Budget Modification No. 6 in the amount of \$250,000.

Prepared by: Nohely Gonzalez, Paralegal  
Reviewed by: Tim Kirby, Director of Finance  
Reviewed by: John A. Nagel, City Attorney  
Approved by: Kent Steffens, City Manager

## **ATTACHMENTS**

1. Draft Third Amendment to Legal Services Agreement