



City of Sunnyvale

Agenda Item-No Attachments (PDF)

File #: 21-0435, Version: 1

REPORT TO COUNCIL

SUBJECT

Approve the Second Amendment to Outside Counsel Agreement with Downey Brand for Litigation Services pertaining to the pending litigation San Francisco Baykeeper v. City of Sunnyvale and Approve Budget Modification No. 19 in the amount of \$500,000

REPORT IN BRIEF

Approval is requested for a Second 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). The Second Amendment to the Agreement is needed to cover the fees and costs associated with proceeding to trial in this case, which are estimated to be \$500,000. Consequently, it is necessary to request additional funding in the amount of \$400,000 for these services. Approval of Budget Modification No. 19 is also requested to appropriate funding from the Wastewater Enterprise Fund to fund the Second Amendment.

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.

BACKGROUND

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 Agreement was entered into on December 13, 2019, and the First Amendment was entered into in July 2020, with a not to exceed amount of \$100,000. The term of the Agreement expires on December 13, 2023.

DISCUSSION

The Legal Services Agreement between the City of Sunnyvale and Downey Brand for representation in 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.

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 on June 15, 2020, which

was denied by the Court on December 28, 2020. A Settlement Conference was held on January 20, 2021, and a further Settlement Conference was held on March 18, 2021. If the case does not resolve, a Trial Setting Conference is set for June 10, 2021. Discovery is ongoing.

It is necessary to request additional funding in the amount of \$400,000 for legal services through the approval of the Second Amendment to the Outside Counsel Agreement, for a new not-to-exceed amount of \$500,000. This amount includes the anticipated costs and expenses for a trial in this matter. If the case settles before trial, the full amount of \$500,000 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

Staff is recommending approval of Budget Modification No. 19 to fund a new project in the amount of \$500,000. Year to date expenditures have been charged to Program 750 - Comprehensive Legal Services. These charges will be moved out of the operating budget and into this new project prior to the end of the fiscal year.

**Budget Modification No. 19
FY 2020/21**

	Current	Increase/ (Decrease)	Revised
<u>Wastewater Fund</u>			
<u>Expenditures</u>			
New Project - Baykeeper	\$ 0	\$ 500,000	\$ 500,000
Litigation Expenses			
<u>Reserves</u>			
Rate Stabilization Reserve	\$ 43,744,331	(\$ 500,000)	\$ 43,244,331

PUBLIC CONTACT

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

RECOMMENDATION

Authorize the City Attorney to execute a Second 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 by \$400,000, for a new not-to-exceed contract amount of \$500,000 and Approve Budget Modification No. 19 in the amount of \$500,000

Prepared by: Amanda Lopez, Paralegal
Reviewed by: Tim Kirby, Director of Finance

Reviewed by: Kent Steffens, City Manager
Reviewed and Approved by: John A. Nagel, City Attorney

ATTACHMENTS

1. Draft Second Amendment to Legal Services Agreement