

**Council Meeting: May 25, 2010****SUBJECT: Approval of Budget Modification No. 37 to Appropriate an Additional \$150,000 For Outside Counsel Services****REPORT IN BRIEF**

Due to higher than normal activity on a number of significant litigation matters, the 2009-2010 budget allocation for outside counsel services will be depleted at the end of Accounting Period 12 with additional outside litigation costs continuing to accrue in May and June, and with accrued but unbilled costs remaining to be paid. A budget modification in the amount of \$150,000 is requested for outside litigation services.

**BACKGROUND**

The City uses outside litigation counsel for certain land use, personnel and police civil rights cases that the City is not staffed to handle internally. Annual budgeted litigation costs are based on historical average costs, as litigation can vary significantly from year to year depending on the status and activity. The current outside counsel budget is \$450,274.30 and is based on average historical litigation costs, with some years higher and others lower.

For the past two fiscal years, the outside counsel budget allocation has not been fully spent and remaining funds of \$162,602.79 in Fiscal Year 07/08 and \$115,098.75 in Fiscal Year 08/09 were not carried over and were returned to the General Fund Budget Stabilization Fund. If those funds had been carried over to future budget years, then no budget modification would be necessary at this time.

The City makes every attempt to prevent and limit potential claims and litigation. Unfortunately, the City can not control when a plaintiff files a lawsuit and is required to appear and defend the City's position in the litigation. Litigation costs fluctuate depending on the status of a case and whether there is a trial, summary judgment motions, extensive discovery, or alternative dispute resolution proceedings. Costs tend to be lower at the time of initial case filing and increase as the case enters the discovery and trial phase. If a case is not dismissed or settled, litigation costs for trial are substantial.

This fiscal year, the City's outside counsel has been defending three public safety civil rights cases, each of which required preparation for and appearance at either an early neutral evaluation or mediation. The City has drafted and filed multiple motions to dismiss, taken depositions, and prepared public safety witnesses to testify. Outside counsel also must respond to discovery requests and motions from plaintiff's counsel.

The City has three employment cases pending, with trials set for July 12 and September 27, 2010. Discovery has been proceeding in all cases, and outside litigation counsel filed a complex motion for summary judgment in one of the cases. Trial preparation is underway, which requires significant time for City witness preparation and development of trial strategy.

The City is also defending a lawsuit filed under CEQA challenging the Mary Avenue Extension Environmental Impact Report, which went to trial during fiscal year 09/10 with attendant costs and fees and is currently on appeal with the City's opening brief recently filed.

The City continues to have outside litigation counsel defend aggressively against personal injury claims where the facts support the City's position. A trip and fall case is set for trial the week of May 17 and will proceed to trial as soon as there is an available courtroom.

## **DISCUSSION**

In lieu of having permanent litigation staffing in the City Attorney's Office, the City retains outside litigation counsel for land use, police civil rights, and personnel matters resulting in litigation. In general, this approach is cost effective because outside counsel is retained only on an as-needed basis as new litigation is filed. Budgeting for outside litigation counsel is based on average historical costs as actual litigation costs vary year to year based on the number, complexity and status of litigation.

The City has benefited from several years of below-average litigation costs and has not fully expended its budget allocation for outside counsel in Fiscal Years 06/07, 07/08 and 08/09. Litigation cost savings from below-average years are not carried over to be available for above-average litigation years and the 09/10 budget year began with the standard average budget allocation. As discussed above, Fiscal Year 09/10 is the most active year for litigation the City has had in several budget cycles and as a result the current outside counsel litigation budget is not adequate to fund the required defense of pending litigation involving the City.

It is important to note that to limit outside counsel costs the City Attorney's Office elected to handle a number of litigation and other matters in-house that would otherwise have been assigned to outside counsel, including the Abyss litigation, the Below Market Rate housing litigation, and the negotiations and drafting for the Town Center, with cost savings of at least \$200,000.

**FISCAL IMPACT**

Staff recommends approval of Budget Modification No. 37 to appropriate \$150,000 from the Liability and Property Insurance Fund Reserve to Office of the City Attorney Program 751, Comprehensive Legal Services to provide additional funding for outside litigation services.

**Budget Modification No. 37  
 FY 2009/2010**

	<b>Current</b>	<b>Increase (Decrease)</b>	<b>Revised</b>
<b>LIABILITY &amp; PROPERTY INSURANCE FUND</b>			
Reserves:	\$1,232,019	(\$150,000)	\$1,082,019
<b>GENERAL FUND</b>			
Expenditures:			
Comprehensive Legal Services (Program 751)	\$1,923,362	\$150,000	\$2,073,362

Staff expects that the Liability and Property Insurance Fund will end FY 2009/2010 with approximately \$250,000 more in the reserve than expected because the City will be receiving a rebate from the California Joint Powers Risk Management Association (CJPRMA) for our property insurance premium. This rebate was not budgeted because it is dependent upon the experience of the CJPRMA pool. Should the entire \$150,000 not be needed at the end of this fiscal year, it will be returned to the Liability and Property Insurance Fund Reserve.

**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 Senior Center, Community Center and Department of Public Safety; and by making

the agenda and report available at the Sunnyvale Public Library, the Office of the City Clerk and on the City's Web site.

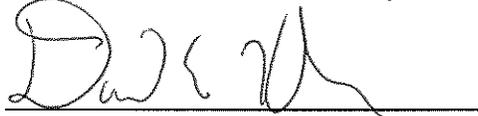
**ALTERNATIVES**

1. Approve Budget Modification No. 37 in the amount of \$150,000 to appropriate an additional \$150,000 for Outside Counsel Services.
2. Do not approve Budget Modification No. 37.

**RECOMMENDATION**

Staff recommends Alternative No. 1: Approve Budget Modification No. 37 to appropriate an additional \$150,000 for Outside Counsel Services.

Prepared and reviewed by:



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