



**Council Meeting: April 24, 2012**

**SUBJECT: APPROVAL OF AGREEMENT WITH THOMAS WHITELOW LAW FIRM FOR INTERIM CITY ATTORNEY SERVICES**

**BACKGROUND**

A vacancy exists in the position of City Attorney due to the resignation of David Kahn. It is appropriate and necessary to appoint an Interim City Attorney until the City Council can complete a systematic search for an individual to fill the vacant position on a regular basis.

**DISCUSSION**

Thru a multi-prong outreach effort of the City Attorney's Office, the City Manager's Office and the Human Resources Department Mr. Martello was identified and agreed to interview for the Interim City Attorney position.

During a closed session meeting on April 11, 2012, the City Council interviewed Michael Martello with the law firm of Thomas Whitelaw law firm to provide services as the Interim City Attorney for the City of Sunnyvale. After this meeting, staff was directed by the City Council to enter discussions with Mr. Martello to provide City Attorney services for the City of Sunnyvale while the recruitment process is conducted.

Mr. Martello is associated with the law firm of Thomas Whitelaw and the City of Sunnyvale will enter into an agreement with this firm naming Michael Martello as the Interim City Attorney. The agreement for services will be in the amount of \$25,500 per month. The agreement will begin May 21, 2012.

**FISCAL IMPACT**

This cost will be absorbed within the Office of the City Attorney's budget for FY 2011-12 and possibly FY 2012-13 depending upon the recruitment timeline.

**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 the contract with Michael Martello of Thomas Whitelaw law firm for the services of Interim City Attorney for the City of Sunnyvale.
2. Do not approve the contract with Michael Martello of Thomas Whitelaw law firm and continue to search for an Interim City Attorney.

**RECOMMENDATION**

Staff recommends approval of Alternative No. 1.

Reviewed by:

Teri Silva, Director, Department of Human Resources

Approved by:

Gary M. Luebbers  
City Manager

**Attachments**

- A. Contract for Services

**CITY OF SUNNYVALE**  
**INTERIM CITY ATTORNEY EMPLOYMENT AGREEMENT**

This Agreement is dated April 24, 2012 and is made by and between the City Council of the City of Sunnyvale on behalf of the City of Sunnyvale (hereinafter, "CITY" or "EMPLOYER"), and the law firm of Thomas Whitelaw & Katz (hereinafter "THOMAS WHITELAW") for the appointment of a designated senior attorney to serve as Interim City Attorney ("ICA") pursuant to the following terms and conditions.

In consideration of the mutual promises contained herein, the parties agree as follows:

**SECTION 1: RECITALS**

A. With the retirement of the current city attorney, the City is in need of an interim city attorney while they recruit and hire a new permanent city attorney.

B. Thomas Whitelaw has, as one of its senior counsel, an experienced former city attorney, Michael D. Martello (hereinafter, "MARTELLO" or "ICA"), who has served as City Attorney for other cities in the State of California, and has agreed to serve in the role Interim City Attorney for the City of Sunnyvale until the recruitment and appointment of a permanent successor.

C. The City Council has evaluated Mr. Martello's qualifications and has approved his appointment under Section 908 of the Sunnyvale Charter to serve as Interim City Attorney pursuant to the terms of this Agreement.

**SECTION 2: DUTIES**

A. Thomas Whitelaw agrees to assign MARTELLO to perform the functions and duties of ICA for the City of Sunnyvale, as well as such other duties as EMPLOYER shall from time to time assign, which are reasonably related to the position of City Attorney.

B. Commencing Monday, April 16, 2012, a transition period will begin whereby Martello will begin interacting with the City Attorney and his staff as set forth more specifically below.

C. Martello will assume the full-time duties of ICA on May 21, 2012.

**SECTION 3: TERM**

A. The term of this Agreement shall begin upon execution by the Parties and Martello will continue to serve until relieved of duty by the City Council either upon replacement or upon thirty (30) days' notice by CITY or sixty (60) days' notice by MARTELLO of their intent to terminate this Agreement. THOMAS WHITELAW and MARTELLO understand and agree that MARTELLO serves at the pleasure of EMPLOYER and may be

terminated at the will of EMPLOYER and without cause, subject only to the notice provisions set forth in Section 12 of this Agreement.

#### **SECTION 4: WORK SCHEDULE**

A. ICA will devote his full time, skills and attention to the duties of the ICA and devote at least forty (40) hours per week on average to those duties in the Sunnyvale City Attorney's office, and such additional time as is required for the professional representation of the EMPLOYER. During the term of this Agreement, ICA shall not accept any employment inconsistent with the terms hereof and any speaking, writing or attending to other professional matters on behalf of the clients of THOMAS WHITELOW shall be on MARTELLO's own time and should not present a conflict or cost or expense to EMPLOYER.

B. In recognition that this is a temporary interim appointment, ICA shall not accrue any sick leave, vacation or paid time off during the term hereof; however, ICA may take pro-rated time off consistent with the allowances provided to other management employees provided that ICA fully discharges the duties of the office and complies with the hours requirement set forth above.

#### **SECTION 5: TRANSITION**

A. It is anticipated that ICA will begin the transition period before formal execution of this Agreement. Specifically, ICA will be present in the City Attorney's office for three days during the week of April 16, 2012 and three days during the week of April 23, 2012 in order to interact with the current City Attorney and his staff. Beginning with the transition period, ICA has agreed to receive and send City-related emails and voice mails and participate in any direct correspondence or contacts between the City Attorney's office and ICA, between that time and when he assumes his full duties on May 21, 2012.

B. THOMAS WHITELOW and ICA have offered MARTELLO's time during the transition period at no salary cost to EMPLOYER, provided EMPLOYER reimburses the cost of reasonable travel from Orange County to Sunnyvale, and the cost of lodging for the 6-day on-site transition period.

#### **SECTION 6: EMPLOYMENT STATUS**

A. EMPLOYER is employing MARTELLO as a contract employee reporting directly to the City Council and working with the City Manager and staff with the same status as a permanent City Attorney appointed pursuant to the Charter. The California Government Code rights and immunities shall apply to this appointment and to the benefit of THOMAS WHITELOW and the ICA. (Title I, Division 3.6 of the California Government Code.)

#### **SECTION 7: RETENTION PAYMENTS**

A. EMPLOYER shall pay to THOMAS WHITELOW the amount of \$25,500 per month for services provided under this Agreement. The first payment is due on May 15, 2012 with successive payments on the 15<sup>th</sup> of each month following the May payment, during the term of this Agreement. If ICA's employment terminates prior to the expiration of 30 days from each

payment date, the payment shall be pro-rated based on percentage of the 30-day period worked and any unearned fee will be refunded to the EMPLOYER.

B. THOMAS WHITELOW agrees to pay any and all expenses of MARTELLO, including lodging and travel past the transition period, above.

C. **SECTION 8: REVIEWS/EVALUATIONS**

A. At the request of the City Council, MARTELLO will participate in reviews and evaluations of his performance and the City Attorney's office with the City Council at intervals and at times determined appropriate by the City Council.

**SECTION 9: PROFESSIONAL FEES AND INSURANCE**

A. THOMAS WHITELOW has paid professional fees and for the ICA's California State Bar dues. EMPLOYER may secure any insurance or bonds, including professional liability insurance, as it may determine necessary at EMPLOYER's own cost.

**SECTION 10: GENERAL BENEFITS AND RETIREMENT**

A. As a contract employee, neither MARTELLO nor THOMAS WHITELOW shall receive any benefits currently provided by EMPLOYER to other management or other employees (e.g., health, medical, dental, etc.), and both MARTELLO and THOMAS WHITELOW shall provide their own such benefits as they determine appropriate at their own cost. MARTELLO understands that, as a contract employee, he specifically does not accrue and that he is not entitled to claim any retirement benefits through the State PERS Retirement System, or any other system connected with his retention as the ICA pursuant to this Agreement.

**SECTION 11: OTHER EXPENSES**

A. EMPLOYER agrees to reimburse MARTELLO for any out-of-pocket expenditures incurred by MARTELLO for the benefit of EMPLOYER so long as such reimbursement is made in accordance with the rules and policies of EMPLOYER.

**SECTION 12: NOTICES**

A. Notices pursuant to this Agreement shall be given by deposit in the custody of the United States Postal Service, first-class postage prepaid, addressed as follows:

1. EMPLOYER: City of Sunnyvale, Attn: City Manager, 456 W. Olive Avenue, Sunnyvale, CA 94086;

2. THOMAS WHITELOW: Attn: Joseph E. Thomas, Managing Partner, 18101 Von Karman Avenue, Irvine, CA 92612;

3. With a copy to Michael D. Martello at [martello.michael@gmail.com](mailto:martello.michael@gmail.com).

Alternatively, notices required pursuant to this Agreement may be personally served in the same manner as is applicable to civil judicial practice. Notice shall be deemed given as of the date of personal service or three (3) days after the date of deposit of such written notice in the course of transmission in the United States Postal Service.

IN WITNESS WHEREOF, EMPLOYER and CITY have caused this Agreement to be signed and executed in its behalf by its Mayor and duly attested by its City Clerk, and THOMAS WHITELAW on behalf of the Firm and MARTELLO on behalf of himself, have both executed this Agreement, effective on the day and year first written above.

ATTEST:

By: \_\_\_\_\_  
City Clerk

Approved as to Form:

By: \_\_\_\_\_  
David Kahn, City Attorney

“EMPLOYER”  
City of Sunnyvale

By: \_\_\_\_\_  
Anthony Spitaleri, Mayor

THOMAS WHITELAW

By: \_\_\_\_\_  
Joseph E. Thomas, Managing Partner

“ICA”

By: \_\_\_\_\_  
Michael D. Martello