



# CITY OF EMERYVILLE

## M E M O R A N D U M

**DATE:** July 5, 2011

**TO:** Emeryville City Council

**FROM:** Patrick D. O’Keeffe, City Manager

**SUBJECT:** Discussion of Directing Staff to Prepare a Report on the Fiscal Impact of the Proposed City Attorney Contract Initiative Pursuant to California Elections Code Section 9212

### **BACKGROUND**

A petition is being circulated pursuant to an April 26 2011 Notice of Intent to Circulate to qualify a ballot measure known as the Emeryville City Attorney Contract Initiative Measure. If approved, the measure would require that the City Council contract out the services of the City Attorney’s Office and prohibit the use of in-house staff attorneys to provide legal services to the City. The initiative seeks to place the measure before the voters for the November 2011 election. One of the principal arguments in support of the initiative is the cost of the current staff of the City Attorney’s Office and the savings that might be obtained by contracting for these services instead of employing in-house staff.

Council Member Jennifer West and Mayor Nora Davis have asked for a discussion item on the Council’s July 5<sup>th</sup> agenda that will allow the Council to consider information regarding the cost of providing legal services to the City and to consider directing staff to obtain additional information.

### **DISCUSSION**

Section 9212 of the California Elections Code provides that during the circulation of a petition, or prior to taking action on a submitted petition, the City Council may refer the proposed initiative measure to any city agency or agencies for a report on the impacts of the measure, including the fiscal impact. Council members have requested financial information on the cost of the City Attorney’s Office which is set forth in this report. In addition, the Council may wish to direct staff to gather additional information as a result of its discussion on July 5<sup>th</sup>.

The cost of the City Attorney position is approximately \$265,000 annually. This includes base salary and all benefits pursuant to the contract with the Management of Emeryville Services Authority. Recently the Council asked the City Attorney’s Office (CAO) to solicit proposals from contract attorneys for outside legal services which are used to supplement the services of in-house staff, primarily in the area of litigation. (Due to the volume of work, and in some cases the special expertise needed, not all legal work can

be handled by COA staff). Staff received interest from eight Bay Area law firms, specializing in municipal law, and their billing rates are as follows:

|                                   |                       |
|-----------------------------------|-----------------------|
| Burke Williams & Sorenson         | \$195 - \$295 / Hour  |
| Myers Nave                        | \$ 200 - \$350 / Hour |
| Hanson Bridgett                   | \$295 - \$350 / Hour  |
| Richards Watson & Gershon         | \$235 - \$300 / Hour  |
| Wulfsberg Reese Colvig & Firstman | \$200 - \$385 / Hour  |
| Cox Castle & Nicholson            | \$350 - \$450 / Hour  |
| Jarvis Fay Doportto & Gibson      | \$235 - \$275 / Hour  |
| Low Ball & Lynch                  | \$190 - \$210 / Hour  |

The average of the mid point of these billing rate ranges is \$282 per hour. The City Attorney is paid approximately \$145 per hour including all benefits. So for a standard work year of 1820 hours, the annual cost of the City Attorney on staff is \$265,000. If we were to contract this service pursuant to the initiative, the annual cost of this one position would be approximately \$513,000 or roughly twice our current cost. This differential is magnified further if you include the legal work that is handled by the Assistant City Attorney at the current in house staff cost of \$94 per hour.

In addition to the disparity in hourly compensation, there is also the issue of actual time spent on legal work by the CAO. There are many hours spent beyond the standard administrative office hours of the City on overtime work for the attendance of COA staff at Council, Planning Commission and committee meetings for which the City does not pay overtime, which would be considered billable hours for an outside contract firm. There are also many overtime hours spent on meeting pressing deadlines involving night and weekend work by COA staff for which the City does not pay additional compensation that would also be considered billable hours for a contract firm. So the \$500,000 annual cost of a contract City Attorney may in fact be higher (and conversely the actual hourly cost of the in-house City Attorney is lower than the \$145/hour currently paid). It is possible to further quantify these costs for comparison but it will take additional staff time to do so and Council direction to proceed.

In addition to the issue of hourly costs, consideration also needs to be given to the number of projects, lawsuits, claims, ordinances, contracts and agreements that are managed by the City Attorney. A discussion of the workload of the CAO is set forth in the attached June 26<sup>th</sup> 2009 memo to the Council Finance Committee. This memo was written to respond to concerns that the City was spending TOO MUCH on outside legal services, and it shows how the City is able to contain legal expenses (it has control over) through a combination of lower cost in-house counsel for more routine matters such as writing Council legislation (ordinances, resolutions, etc), and judicious use of more expensive outside contract counsel for matters of litigation and legal issues requiring highly specialized areas of expertise such as brownfields remediation.

The 2009 memo also points out the nature of the work of the City Attorney in managing and directing the legal affairs of the City. The wide range of the legal services requires

someone to be in a central position to determine priorities, manage expenses, coordinate the work load and interact with the Council. This requires a highly skilled individual with a breadth of experience to know when the legal work of staff or a contractor is correct and on point. The hourly cost of this type of managing attorney is on the high end of the scale of the hourly rate quotes we received, as opposed to the average that was used above for comparison.

Finally, like all of our executive management staff, the City Attorney is a hands on manager who is often required to perform detailed work in addition to managing the overall picture. This is due to our small size as an organization and our mandate to contain costs. Our current operation has the advantage of an in-house experienced individual who performs high level management at a lower hourly cost **and** performs drafting and other detailed work at a cost that is below the bottom of the range of contract services.

## **RECOMMENDATION**

If additional information is required, Council should direct staff to pursue its compilation and provide direction on the type of information needed and deadline for returning to Council for a report.

APPROVED AND FORWARDED TO THE  
CITY COUNCIL OF THE CITY OF EMERYVILLE:

---

Patrick O'Keeffe, City Manager

### Attachments:

1. June 26, 2009 Memo to Finance Committee Re: Expenditures for Legal Services

To: Finance Committee

From: Michael G. Biddle, City Attorney/Agency General Counsel

Date: June 26, 2009

Subject: Expenditures for Legal Services

### **Background**

At the March 14, 2009 meeting of the Finance Committee, it was requested that the City Attorney attend the June 2009 meeting and present a report to the Committee detailing a review of legal expenditures encompassing the past three (3) fiscal years (i.e. July 1, 2006 – June 30, 2007; July 1, 2007 – June 30, 2008; July 1, 2008 – June 30, 2009).

Accordingly, with the assistance of the Finance Department, the City Attorney's Office has compiled the following information.

### **Services provided by City Attorney's Office**

The City Attorney's Office is comprised of four (4) full time employees (3 attorneys and 1 paralegal) who provide legal counsel to the City Council, Redevelopment Agency, Planning Commission, City Manager, staff, appointed officials, commissions, boards, and committees on a broad range of municipal issues. Members of the office prepare and negotiate terms of contracts, leases, easements, purchase and sale agreements, development agreements, owner participation agreements, and oversee preparation of appropriate environmental documentation pursuant to CEQA/NEPA for development projects; initiate and draft local legislation to protect the best interests of the City; supervise the prosecution and defense of litigation involving the City and Agency. Major areas of practice include redevelopment, housing, land use, planning and zoning, CEQA, environmental/hazardous materials remediation (Polanco Act), real property transactions, eminent domain, subdivision map act, impact fees, assessments and taxes, public contracting, personnel, labor relations, municipal governance (Brown Act, Public Records Act), elections, conflicts of interest (Political Reform Act), tort claim act, civil litigation and general municipal law.

As the City Council is aware, the City Attorney's Office generally does not handle litigation matters in-house for several reasons. First, litigation is extremely labor intensive and would take staff away from other pressing matters that are equally

important to the on-going operation of the City and Agency; second, there would be a need for expanded in-house research resources, secretarial support, and hiring of personnel with litigation experience; third, litigation tends to be sporadic and thus when matters resolve there is a greater potential to waste City funds on unnecessary resources and staff; fourth, the self-insurance pools of which the City is a member (ERMA and BCJPIA), require the City to utilize the services of pre-approved firms to handle claims/lawsuits covered by the insurance pool; finally, Emeryville is a unique urban city<sup>1</sup> that occasionally finds itself dealing with complex and novel issues, and thus in those instances the City and Agency's interests are better served by calling upon the expertise of outside firms who have experience with similar matters, rather than in-house staff who likely do not have the necessary experience to resolve the matter in the most expedient and cost effective manner.

Thus, while litigation involving the City or Agency is sent to outside firms, a significant amount of work associated with managing that litigation remains. Generally there is significant internal work coordinating responses to discovery requests, review and editing of briefs, strategy discussions, settlement discussions and communicating with the City Council or Agency on significant decision points. With respect to personnel matters, the City Attorney's Office has significant involvement with the City Manager, Human Resources Department and the affected Department Head, long before any discipline is imposed and the matter becomes contested. Beyond managing litigation, attached is a memo dated June 24, 2009 addressed to Patrick O'Keeffe, City Manager, which lists various specific matters that the City Attorney's Office will be working on during the coming fiscal year. While this list is not exhaustive, it certainly gives the members of the Finance Committee an idea of tasks that the City Attorney's Office will handle. Examples of matters that will undoubtedly come up during the year that are not included on the list are public records act requests, *Pitchess* motions, conflict of interest issues, encroachment permits, unknown/unforeseen claims, review of project EIRs/Negative Declarations for private development projects, and review of Council/Agency/Planning Commission agenda packets to name a few.

Finally, the cost to the City's General Fund for the City Attorney's Office (4 FTE; 3 Attorneys and 1 paralegal) during the three (3) year time period is as follows:

| Fiscal Year | Budget      | Actual                |
|-------------|-------------|-----------------------|
| 2008/09     | \$705,115   | \$705,115 (estimated) |
| 2007/08     | \$709,646   | \$594,227             |
| 2006/07     | \$668,936   | \$606,042             |
| Total       | \$2,083,697 | \$1,905,384           |

---

<sup>1</sup> Emeryville is the only city within the State of California where nearly the entire land area is located within a redevelopment project area

**Services Provided by Outside Law Firms**

As previously noted, the City and Agency contract with outside law firms primarily for litigation services, and to a lesser extent for transactional services. Legal services provided by outside law firms to the City are paid from the Litigation Fund (Fund 270) and services provided for redevelopment and capital projects are paid from Agency tax increment or bond funds.

**Total Expenditures for Outside Counsel**

| <u>Fiscal Year</u> | <u>Total</u> | <u>City</u> | <u>Agency</u> |
|--------------------|--------------|-------------|---------------|
| 2008/09            | \$2,184,806  | \$400,934   | \$1,783,872   |
| 2007/08            | \$1,295,992  | \$585,724   | \$ 710,268    |
| 2006/07            | \$ 955,990   | \$406,512   | \$ 549,478    |
| 3 Year Total       | \$4,436,788  | \$1,393,170 | \$3,043,618   |

As noted above, during the last three (3) fiscal years a total of \$4,436,788 was paid for outside legal services provided to the City and Agency; of that amount \$1,393,170 was paid for services provided to the City and \$3,043,619 was paid for Agency redevelopment and capital projects.

**Primary Use of Funds for Litigation Services**

Compiled below is a list of all matters in which the City or Agency has utilized outside legal services and the corresponding cost over the past three (3) fiscal years. Those matters with an asterisk (\*) noted after the dollar total are litigation matters or potential litigation matters.

Of the \$1,393,170 paid for services provided to the City, \$1,350,668 was paid for litigation services; the remaining \$42,503 paid for on-going legal advice on utility/telecommunication tax issues and exploration of the Community Choice Aggregation concept with the cities of Berkeley and Oakland.

Of the \$3,043,619 paid for Agency redevelopment and capital projects, \$2,765,409 was paid for litigation services. The remaining \$278,210 paid for Agency redevelopment and capital projects were primarily for transactional services on the Agency matters noted below **without** an asterisk (\*).

While the majority of the transactional work is handled in house, it is often efficient to utilize outside services to supplement that work at the initial stages of the transaction, particularly when time is of the essence. As noted for the upcoming fiscal year, there are several redevelopment projects that will involve the drafting and negotiation of extensive and often complicated agreements between the Redevelopment Agency, the City, and private development/non-profit entities. Drafting these agreements, as well as the various

revisions that take place in the course of a negotiated agreement, require large blocks of un-interrupted time to do so. Unfortunately, one of the downsides of being so readily available to City staff for their questions and attendance to meetings is that members of the City Attorney's Office do not have large blocks of un-interrupted time. Accordingly, the City Attorney's Office will frequently utilize transactional lawyers with the firm of McDonough, Holland & Allen to take on the task of creating the initial draft of the agreement. Thereafter, depending on the complexity of the matter, the time constraints on finalizing a negotiated agreement, as well as other work load commitments, the City Attorney's Office may or may not take over primary responsibility for drafting the document to completion. Regardless, the City Attorney's Office remains principally involved in all transactions and once an agreement is drafted and negotiated to completion, there is still much work left to be done to implement the agreement and the City Attorney's Office conducts all of that work.

As an example, in 1999 the Redevelopment Agency entered into a Disposition and Development Agreement with Bay Street Partners for the development of the Bay Street Project. That Agreement was drafted and negotiated on behalf of the Agency by the City Attorney and Dave Beatty of McDonough Holland & Allen. Subsequent to execution of the DDA between the Agency and Bay Street Partners, there have been thirteen (13) implementation agreements drafted and negotiated between the Agency and Bay Street Partners; all thirteen of those agreements were drafted and negotiated on behalf of the Agency by the City Attorney.

Another example is the Pixar project; in 1998 the City Attorney's Office negotiated a Development Agreement and Participation Agreement between the City, Agency and Pixar, which was re-negotiated as Amended and Restated Agreements in 2005, and most recently a First Amendment was finalized in 2008. All of those agreements were drafted and negotiated by the City Attorney's Office, and we are just now finalizing the last of a reciprocal grant of easement for the linear park.

**Total Cost of City Attorney's Office and Outside Legal Counsel as Percentage of City's General Fund Budget and Agency Operating Funds for Fiscal Year 2008/09**

To put these costs in context, the cost of the City Attorney's Office as a percentage of the City's General Fund Budget for Fiscal Year 2008/2009 is approximately 2% (i.e. \$705,115 / \$33,239,649).

The cost of the City Attorney's Office and Outside Legal Counsel as a percentage of the City's General Fund and the Agency's Operating Funds for Fiscal Year 2008/2009 is approximately 3% (i.e. \$705,115 + \$2,106,823 / \$33,239,649 + \$48,969,536).

If the legal costs spent during 2008/2009 defending the Measure C litigation (\$219,273) and the portion of the Site B legal expenses that are potentially recoverable under the Polanco Act (\$1,291,500) are backed out, the cost of the City Attorney's Office and Outside Legal Counsel as a percentage of the City's General Fund and the Agency's Operating Funds for Fiscal Year 2008/2009 is approximately 2% (i.e. \$705,115 +

\$596,050 / \$33,239,649 + \$48,969,536). While the City Attorney’s Office is not guaranteeing that the Agency will recover all or any portion of its attorney fees in the Site B litigation, the Agency did recover its fees on the Site A litigation and will be pressing that same position in resolution of Site B. Additionally, Measure C contains an attorney fee provision as well as penalties for non-compliance.

**Three Fiscal Years: 06/07 through 08/09**

As referenced earlier, compiled below is a list of all the matters, both litigation and transactional, which the City and Agency have utilized the services of outside counsel and the amount expended during the past three (3) fiscal years. For both the City and Agency the matters have been broken up by those that are still pending and those that have concluded. Additionally, for some matters, footnotes are provided with information regarding the matter.

| Matter | City Total  | Agency Total | Total       |
|--------|-------------|--------------|-------------|
|        | \$1,393,170 | \$3,043,618  | \$4,436,788 |

Pending City Matters

|                                 |            |
|---------------------------------|------------|
| Measure C <sup>2</sup>          | \$792,683* |
| ERMA-Personnel <sup>3</sup>     | \$313,645* |
| BCJPIA-Tort Claims <sup>4</sup> | \$153,042* |

<sup>2</sup> Measure C is really a collection of eight (8) separate lawsuits, four (4) of which are still pending. Two (2) separate lawsuits brought by Woodfin in federal court in 2006 and then again in 2007 challenging Measure C were unsuccessful, a restraining order against a City Councilmember was denied, and a writ petition challenging Measure C was also largely unsuccessful other than partial relief invalidating the permit issued due to procedural errors. Pending cases include the initial lawsuit brought by housekeepers in 2006 in which the City intervened, Woodfin’s writ petition challenging the re-issued permit that was upheld by the City Council in March 2009, City’s lawsuit to enforce permit conditions, and Woodfin’s appeal of denial of attorney fees. Total includes \$691,524 in attorney fees to firm of McDonough, Holland & Allen and balance of approximately \$101,000 was for costs of Prince Law & Mediation, an independent investigator.

<sup>3</sup> The City is a member of Employers Risk Management Authority, which provides insurance coverage for employment related claims, subject to a \$50,000 deductible payable by the City and which sums are paid out of the City’s Litigation Fund. Covered claims are required to be handled by law firms pre-approved by ERMA and the City generally utilizes the services of the firms of Liebert Cassidy and Jackson Lewis. The City is required to make payment directly to the law firm handling a particular claim until the \$50,000 deductible is reached, and thereafter all bills are paid by ERMA to the law firm. The total sum noted includes \$280,419 in attorney fees with respect to fifteen (15) separate employment matters and the balance of approximately \$33,226 was for costs of private attorneys (Karen Kramer, McNamara Dodge) that were called upon to investigate claims as well as court reporters (Atkinson-Baker, Wheeler & Hallford, Legalink, Inc., Net Transcripts, DENOISE.com) and arbitrators (Catherine Harris, Fred Dorazio, Thomas Angelo).

<sup>4</sup> The City is a member of Bay Cities Joint Powers Insurance Authority, which provides insurance coverage for tort claims, subject to a \$10,000 deductible payable by the City and which sums are paid out of the City’s Litigation Fund. Covered claims are required to be handled by law firms pre-approved by BCJPIA and the City generally utilizes the services of the firm of Low Ball & Lynch. All legal bills, expenses, costs and settlements are paid by BCJPIA to the recipient and then the City is billed on a monthly basis until the \$10,000 deductible is paid as to each separate claim. The total noted includes deductibles of \$38,652 for

UUT Issues<sup>5</sup> \$ 13,750

Concluded City Matters

Civic Center<sup>6</sup> \$ 49,851\*

CCA<sup>7</sup> \$ 25,516

Copier Machine<sup>8</sup> \$ 41,447\*

Miscellaneous \$ 3,236

Total – City \$1,393,170

Pending Agency Matters

Site B<sup>9</sup> \$2,350,745\*

53/55<sup>th</sup> Ped Bike Acquisition<sup>10</sup> \$ 44,154\*

HSP-Greenway Acquisition<sup>11</sup> \$ 28,703\*

---

sixteen (16) claims in fiscal year 2006/2007, \$36,408 for twenty-four (24) claims in fiscal year 2007/2008, and \$77,982 for eleven (11) claims in fiscal year 2008/2009.

<sup>5</sup> Don Maynor is a private practitioner located on the Peninsula and provides ongoing advice to Emeryville and numerous other municipalities on utility user, telecommunication, and other related tax issues. The City of Emeryville pays \$5,000 per year in 4 equal installments of \$1,250.

<sup>6</sup> Civic Center litigation was handled by the firm of Wulfsberg Reese & Sykes of Oakland. City faced claims from contractor and subcontractors of approximately \$2,950,000 and paid out nothing. The City was paid \$366,000 for design deficiencies by project architect and structural engineer and retained \$442,500 of construction contract as liquidated damages for a total recovery of \$808,500.

<sup>7</sup> The firm of Miller Owen & Trost was jointly hired by the cities of Emeryville, Berkeley and Oakland to provide legal advice regarding the concept of community choice aggregation (CCA) relative to the cities being an alternative energy supplier vis-à-vis PG&E. The City Council recently voted not to pursue CCA.

<sup>8</sup> The firm of Low Ball & Lynch was hired to represent the City on a breach of contract claim regarding cancellation of a multi-year lease of several copiers seeking approximately \$100,000 in damages. The City eventually settled by paying Lyon Financial \$25,000.

<sup>9</sup> Site B is a collection of five (5) parcels of land owned by four (4) separate landowners the Agency is seeking to acquire, remediate of hazardous materials, and then redevelop. Three (3) of the five (5) parcels have been acquired through negotiation and the Agency has filed eminent domain proceedings to acquire the other two (2) parcels (Robinson and Koeckritz). The Agency has also filed lawsuits against three (3) of the property owners (Adams, Robinson and Koeckritz), Union Oil, Chevron and Sherwin-Williams pursuant to the Polanco Redevelopment Act to recover approximately \$14 million in cleanup costs expended and future potential costs of groundwater remediation of \$8 million to \$17 million. Numerous cross-complaints have been filed by the defendants against each other, including claims against the City of Emeryville which was recently rejected by the Court, and Union Pacific Railroad. The Agency has paid \$434,003 to the firm of McDonough Holland & Allen for property acquisition/eminent domain services. Approximately \$1,916,742 has been paid to the firm of Cox Castle & Nicholson for environmental remediation services which are subject to recovery from the defendants under the Polanco Act.

<sup>10</sup> This acquisition involves the creation of pedestrian and bicycle access through two (2) pieces of occupied commercial property which is being contested at every stage by the two (2) property owners. The firm of McDonough Holland & Allen is assisting the City Attorney's Office with this acquisition and the costs incurred include approximately \$20,000 for appraisal services.

<sup>11</sup> This acquisition involves the creation of the last remaining segment of the Emeryville Greenway through five (5) parcels of surface parking owned by one (1) property owner. The firm of McDonough Holland & Allen is assisting the City Attorney's Office with this acquisition and the costs incurred include approximately \$20,000 for appraisal services.

|                                      |    |        |
|--------------------------------------|----|--------|
| Wareham-Transit Center-DDA           | \$ | 13,623 |
| AB 1389 Compliance                   | \$ | 5,923  |
| TMG-Marketplace-OPA                  | \$ | 3,631  |
| RCD-Ambassador Site-DDA              | \$ | 4,554  |
| Magnolia Terrace                     | \$ | 0      |
| ECCL                                 | \$ | 0      |
| Art Center                           | \$ | 0      |
| Catellus/Safeway OPA                 | \$ | 0      |
| Diversified Property Swap @ Stanford | \$ | 0      |
| Hollis/Powell/Peladeau Property Swap | \$ | 0      |

Concluded Agency Matters

|  |    |                    |
|--|----|--------------------|
| Clear Channel <sup>12</sup>                      | \$ | 322,944*           |
| Wareham-Emery Station Greenway-OPA <sup>13</sup> | \$ | 78,028             |
| Pulte-Glashaus-Purchase & Sale                   | \$ | 31,995             |
| Adeline Place-Money Mart- DDA                    | \$ | 23,158             |
| Marinas Int'l-Lease                              | \$ | 18,436             |
| \$3.8M EUSD Loan                                 | \$ | 10,032             |
| Oakwalk-OPA                                      | \$ | 18,876             |
| Bridgewater OPA                                  | \$ | 17,957             |
| Placeworks-Jug Liquor-DDA                        | \$ | 5,882              |
| TMG-Christie Ave Park Acquisition                | \$ | 18,863*            |
| Novartis/Chiron                                  | \$ | 153                |
| General Redevelopment Advice                     | \$ | 19,539             |
| Celis-UST Claim                                  | \$ | 10,373             |
| Promenade Lease Issues                           | \$ | 6,658              |
| Miscellaneous                                    | \$ | 9,391              |
| <b>Total – Agency</b>                            |    | <b>\$3,043,618</b> |

<sup>12</sup> The Agency paid the firm of McDonough Holland & Allen the sum noted for eminent domain services to acquire the billboard previously owned by Clear Channel Outdoor located on the former Ambassador Laundry site. Note that said sum included the costs of the appraiser which amounted to approximately \$40,000. The Agency did not pay anything for the condemned billboard. Instead, the City agreed to extend the lease for the existing billboard in the South Bayfront area for an additional 15 years at \$155,000 per year in rent (subject to annual CPI increases), or \$2,325,000 minimum in rent to the City over the 15 year term . Additionally, the Agency agreed to allow the billboard on the Ambassador site to remain until the workforce housing development is ready, at a monthly rent of \$12,000 per month. Since the settlement was executed, the Agency has collected approximately \$100,000 in rent and given the time anticipated before the site is redeveloped; the Agency will likely collect a total of \$350,000 to \$400,000 in rent.

<sup>13</sup> This is an example where the expeditious nature of the transaction coupled with pressing demands stemming from Site B litigation discovery requests required the City Attorney's Office to utilize Jerry Ramiza, a transactional lawyer with the firm of McDonough Holland & Allen, to take the laboring oar to complete the drafting and negotiation of the agreement with the City Attorney's involvement.

## **General Questions**

Finally, there were several general questions raised at the prior March meeting.

**The first set of related questions asked what internal system of the City is controlling outside legal expenses; and is there a need to establish an internal control system overseeing outside legal costs?**

The City Council adopts a budget every two (2) years which establishes an estimate of possible expenditures in the Litigation Fund for the coming budget period. That estimate is arrived at and presented to the City Council by the City Attorney in consultation with the City Manager based on known existing claims and litigation and the City's prior experience in the preceding budget cycle. While the City Attorney and City Manager do their collective best to accurately forecast the litigation exposure for the City in the coming two (2) year budget cycle, the only thing that is certain about the cost of claims and litigation against a City is that it is uncertain. Accordingly, the best method to control outside legal expenses is to try and avoid litigation in the first instance.

As an example, on the employment side the City provides its managers and supervisors frequent training on best management practices and the support of the Human Resources Department, City Attorney's Office and the expertise of outside employment counsel as needed. Thus the City anticipates that some expense will be incurred on outside counsel to provide advice on employment matters that inevitably arise in the course of a budget cycle as a cost prevention measure. On the tort claim side, the City's Public Works Department and City Attorney's Office are cataloging the condition of the City's sidewalks and creating a schedule for repair of sidewalks to reduce potentially costly "trip and fall" claims. Further, when viable claims are presented to the City for consideration the City does not reject them out of hand, but seeks to resolve those that have merit. Also Bickmore & Associates, the claims adjuster for BCJPIA, routinely provide instructional programs on topics to its member clients to educate on best practices to avoid claims (e.g. construction project management issues).

Nevertheless, despite best efforts to avoid litigation, the City is a target for those so inclined. Generally legal billings for active litigation are submitted on a monthly basis and are reviewed and approved by the City Attorney before they are authorized for payment. The description of services and time allotted to tasks are reviewed for accuracy and reasonableness and since the City Attorney is the primary person managing outside counsel on litigation not covered by insurance, confirming the services provided and the time billed is fairly easy to reconcile. Additionally, legal bills for matters that are covered by ERMA and BCJPIA are also reviewed and approved by the claims adjuster for those insurance pools (i.e. Bickmore & Associates). Further, every month the City Attorney receives an expenditure report from the Finance Department that details the prior month's expenditures, the remaining fiscal year budget and the overall balance in the Litigation Fund.

For fiscal year 2008/2009 and 2007/2008 the Litigation Fund budgeted \$450,000 for each fiscal year, yet \$181,250 of the total was set aside in each fiscal year for a required settlement payment. Accordingly, \$268,750 was available for City related litigation expenses in each fiscal year and as noted earlier the City has spent \$400,934 in 2008/2009 and \$585,724 in 2007/2008. Thus in fiscal year 2008/2009 the City spent \$132,184 more than budget and \$316,974 more than budget in 2007/2008. If Measure C expenditures are removed from the equation in 2008/2009 (i.e. \$219,273) and 2007/2008 (i.e. \$397,586), then in both fiscal years the expenditures are approximately \$80,000 below budget. While Measure C was certainly a piece of known litigation in 2006 when the 2006/2007 – 2007/2008 budget was adopted and in 2008 when the 2008/2009 – 2009/2010 budget was adopted, the measure of Woodfin’s zeal to litigate what has turned out to be a \$200,000 back wage issue was never fully appreciated, nor frankly understood. Accordingly, the issue really is not about controlling outside legal expenses, but predicting the uncontrollable nature of outside forces. And if you remove that unpredictable element from the equation for fiscal year 2007/2008 and 2008/2009, the City’s legal expenses were well within what had been anticipated.

On the Agency side of the equation, legal expenses are generally billed to the project budget; however, there are instances where expenses are incurred before a project account is created and thus these expenses will initially get charged to the Litigation Fund and then subsequently backed out and charged to the project. Project budgets tend to be very general, not well defined, and thus perhaps this is an area that Agency staff can improve to better account for all costs to a project, and not just legal expenses. That said, other than Agency initiated litigation in eminent domain (e.g. Site B, Clear Channel billboard) or enforcement of the Polanco Act (Site B), Agency costs over the past three (3) fiscal years for transactional services in support of the City Attorney’s Office have amounted to approximately \$278,000 spread across seventeen (17) different projects at an average cost of approximately \$16,353 per project.

Accordingly, given the current oversight provided by the City Council at the overall budgeting level, the review and approval of expenditures by the City Attorney and monitoring by the Finance Department, as well as the external oversight provided by ERMA and BCJPIA, creation of another layer of bureaucracy is unnecessary.

**Second, is there a need for an audit of individual billings to see if staff are contacting outside counsel directly without the approval or knowledge of the City Attorney?**

All bills are reviewed by the City Attorney and based on experience no such audit is warranted. The firms that are hired by the City Attorney’s Office are acutely aware that they work for the City Attorney’s Office and not any particular department. Accordingly, all outside attorneys are well aware that they need to coordinate their work through the City Attorney’s Office. Only once in 20 years has that directive proven to be difficult for an attorney to follow and he was relieved of any further representation of the City. That said, on certain matters and in particular instances, some department heads are given the latitude to contact outside counsel provided the City Attorney is kept informed. Likewise

on certain issues outside counsel is afforded the ability to contact staff/department heads directly as needed in specific instances, again provided the City Attorney is kept informed. With the advent of e-mail and its wide spread use as the primary means of communication, this is very easy to monitor. Thus there is no need to audit billings as suggested.

**Third, does the City limit the number of outside attorneys it utilizes; and when do agreements come before the City Council?**

It was stated that the City is using 18 different outside law firms, which is not accurate. In 2006/2007 the City utilized ten (10) different law firms on outside matters, as well as 2 private attorney's to conduct independent investigations of employment related complaints. In 2007/2008 the City utilized nine (9) different law firms on matters, as well as three (3) private attorneys to conduct independent investigations of employment related complaints. In 2008/2009, the City has utilized seven (7) different law firms on matters, as well as one (1) private attorney to conduct an independent investigation of an employment related complaint. At present six (6) different law firms are working on pending matters for the City and Agency.

In reality the City and Agency primarily utilize four (4) firms on a recurring basis. Through ERMA, the City utilizes Liebert Cassidy and Jackson Lewis on employment matters. Further, the City utilizes Liebert Cassidy for preventative advice as well as employment arbitration/litigation and Jackson Lewis primarily for employment arbitration/litigation. Through BCJPIA, the City utilizes Low Ball & Lynch for litigation of tort claims. And finally the City and Agency utilize McDonough Holland & Allen for redevelopment, eminent domain and general municipal transactional and litigation matters.

The other firms that have been utilized by the City or Agency have been for fairly discrete matters and their services terminated once the matter has been resolved: Cox Castle & Nicholson for environmental/hazardous materials litigation on Site B; Wulfsberg Reese & Sykes for Civic Center construction litigation; Miller Owen & Trost for CCA; Miller Starr & Regalia for Promenade lease matters; Best Best & Krieger for receivership petition; Diepenbrock Harrison for Celis Gas Station claim to State UST fund.

Liebert Cassidy, Jackson Lewis, and Low Ball & Lynch are hired by and contract separately through ERMA and BCJPIA respectively. The firm of McDonough Holland & Allen was first retained in June and July 1993 to represent the City and Agency in the Kaiser Hospital and Chiron development projects, respectively, and thereafter it appears there was a general retainer agreement for services authorized on an as-needed basis. The terms of the general retainer agreement were recently updated and administratively approved by the City Attorney in February 2007. Authorization to utilize Cox, Castle & Nicholson, Wulfsberg Reese & Sykes, and Best Best & Krieger were provided in closed session at the time the litigation was initiated. The retention of Miller Owen & Trost for the CCA project was authorized in open session by the City Council in 2005. Miller Starr

& Regalia's services were for lease issues on the Promenade project and were under \$15,000, and thus authorized by the then City Manager administratively. Dipenbrock Harrison's services were related to a long standing underground storage tank claim for the old Celis gas station which is now a portion of the Oak Walk Project. This project file originated as a component of the Catellus Development-East Bay Bridge project and the extension of 40<sup>th</sup> Street. The attorney who has handled issues dealing with the State of California UST Fund was initially with McDonough Holland & Allen in their Sacramento office and this matter was handled by him pursuant to the aforementioned general retainer agreement. The attorney, Michael Brady, has since moved on to Diepenbrock Harrison and this matter stayed with him. He has now moved on to another firm but essentially all work is completed on this project.

### **Conclusion**

Emeryville is a unique City with significant and substantial redevelopment and capital projects underway, which coupled with the normal activities of a city in the urban core, demand significant legal support. It is hoped that this report provides the Finance Committee with the information it needs to determine whether the City is receiving the value it needs and deserves.

Respectfully submitted,

Michael G. Biddle  
City Attorney