

CITY OF DANA POINT MEMORANDUM

DATE: July 19, 2022
TO: Honorable Mayor and City Council
FROM: Shayna Sharke, City Clerk
SUBJECT: Item 10 – City Attorney Contract

This Staff Report is being provided after the Agenda was published. The enclosed report and recommendations are a result of the performance evaluation held during Closed Session.

c: City Manager

CITY OF DANA POINT
AGENDA REPORT

Reviewed By:	
DH	___
CM	<u>X</u>
CA	___

DATE: JULY 19, 2022

TO: CITY COUNCIL

FROM: JOSEPH L. MULLER, MAYOR
MICHAEL FROST, MAYOR PRO TEM

SUBJECT: CONTRACT AMENDMENT TO THE EXISTING AGREEMENT FOR
LEGAL SERVICES – RUTAN AND TUCKER

RECOMMENDED ACTION:

That the City Council authorize the Mayor to execute an amended professional services agreement with Rutan and Tucker.

BACKGROUND:

The law firm of Rutan and Tucker has been representing the City since December 2002. The last contract amendment to adjust the City Attorney hourly rates and retainer was considered in 2007.

The City Council Subcommittee consisting of Mayor Muller and Mayor Pro Tem Frost, as designated by the City Council, recently provided Mr. Munoz with his annual performance review based on input from the City Council, and subsequently have reviewed the current contract in place with Rutan and Tucker.

DISCUSSION:

Based upon a review of rates, consideration of the quality of legal services necessary for cities with similar development issues and demographics, Rutan & Tucker's twenty years of consistent, exceptional and very successful representation of the City, as well as evaluating new best practices in rate structures, the sub-committee is proposing the following contract adjustments:

1. Adjust the rate for legal services by \$22 per hour, from \$302/hour to \$324/hour to account for past CPI increases that did not occur. During three prior years (FY11, FY12 and FY16) when the City was facing some challenging financial times, the City Attorney unilaterally waived the contracted annual Consumer Price Index (CPI) increase, cumulatively and compounded from FY11 through FY22 totaling 7.3%. The proposed change in hourly rate provides for the rate

- to return to what it would have been absent those forgone raises. Cumulatively the City has saved approximately \$700,000 due to not incurring those CPI adjustments to the hourly rate.
2. For General City legal matters (i.e. routine time advising the City Council and City departments), the subcommittee recommends providing a 5% raise, or \$16/hour, to compensate the City Attorney for his experience level beyond what has been afforded over the years through the CPI increase. The base rate, plus the recaptured CPI and this proposed 5% raise bring the General City legal matters hourly rate to \$340.
 3. Finally, the subcommittee recommends adding a category of billing designated as "Special legal matters". Since the contract was last evaluated, an industry practice has come about where separate billing rates are provided for General City business and another rate for more specialized matters (i.e., litigation, receiverships, California Coastal Commission matters, etc.). These types of matters are typically directed by, and within the control of the City Council. "Special Hours" are recommended to be billed at \$356/hour.
 4. The subcommittee also recommends that a provision similar to what is in the current agreement remain, which is to allow for an annual rate adjustment for the retainer, general matters and special matters based on CPI. The monthly retainer will continue to cover hours for both the Planning Commission and City Council meeting days.

The goal of this proposed amended contract is to keep the rates for the City competitive while keeping Rutan & Tucker under contract and representing the City. Nothing in the contract prohibits the City Council from renegotiating or terminating the agreement at any time after providing a 30-day notice.

STRATEGIC PLAN IMPLEMENTATION:

Strategic Goal 4: Effective, efficient, and innovative government to serve our community with integrity.

FISCAL IMPACT:

The proposed adjustment to the hourly rate for General Hours, along with splitting some of the legal matters out and charging a special rate, when applied to actual hours billed to and paid by the City (not by 3rd parties) in 2021, results in an estimated \$136,000 increased cost. The actual cost cannot be known given the fluid nature of legal issues that the City is confronted with in any given year.

ALTERNATIVE ACTIONS:

Other alternatives as identified by the City Council.

ACTION DOCUMENTS:

PAGE NO.

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ACTION DOCUMENT A**AGREEMENT FOR PROVISION
OF CITY ATTORNEY SERVICES**

The City of Dana Point (“CITY”) and Rutan & Tucker LLP, a California limited liability partnership (“ATTORNEY”) hereby enter this agreement (the “Agreement”) for City Attorney Services effective as of July 1, 2022.

RECITALS

A. CITY and ATTORNEY entered a contract dated December 9, 2002, by which ATTORNEY has been providing city attorney services for CITY, and which was most recently amended as of July 1, 2007.

B. CITY and ATTORNEY desire to amend and fully restate their agreement as set forth herein.

COVENANTS

Based upon the foregoing Recitals and for good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, CITY and ATTORNEY hereby agree as follows:

ARTICLE 1.**APPOINTMENT OF CITY ATTORNEY**

1.1 Pursuant to Government Code Section 36505, City Council of CITY hereby appoints ATTORNEY to provide contract city attorney services for CITY.

1.2 A. Patrick Muñoz, a partner with ATTORNEY shall serve as City Attorney for CITY, who shall be primarily responsible to perform or cause to be performed the work described in this Agreement.

1.3 The City Attorney shall be entitled to appoint one Assistant City Attorney and Deputy City Attorneys as necessary to perform the services referenced in this Agreement. The selection of the attorney to act in the capacity of Assistant City Attorney and/or Deputy City Attorney shall be subject to the approval of the City Manager.

ARTICLE 2.**RESPONSIBILITIES OF ATTORNEY**

2.1 ATTORNEY shall perform any and all work necessary for the provision of City Attorney services to CITY, including without limitation the following: attendance at regular City Council and Planning Commission meetings; drafting and review of ordinances, resolutions and agreements; weekly office hours at City Hall from 1:30 p.m. to 5:00 p.m. on all regularly scheduled City Council meeting days, and from 9:00 a.m. to 5:00 p.m. on all regularly scheduled Planning

Commission meeting days; provision of legal services to the City Council, City Manager, and Boards, Commissions, Committees, officers and employees of CITY as requested by CITY's City Council or in accordance with such policies and procedures as may be established by CITY from time to time; attendance at meetings other than the regular City Council and Planning Commission meeting on an as-requested basis; provision of litigation and bond counsel services on an as requested basis; and provision of such other legal services as shall be necessary.

2.2 ATTORNEY represents the tasks and services required herein will be performed by ATTORNEY, or under its direct supervision, and that all personnel engaged in such work shall be fully qualified and shall be authorized and permitted under applicable state and local law to perform such tasks and services.

2.3 ATTORNEY shall not subcontract any portion of the work required herein without prior written approval of CITY; provided, however, that ATTORNEY shall be authorized to retain on behalf of CITY expert witnesses for litigation matters and other nonlegal subcontractors as may be necessary to enable ATTORNEY to perform the required services required hereunder. Retention of any expert witness or other subcontractors costing more than \$10,000.00 shall require prior consent of the City Manager.

2.4 ATTORNEY shall perform all work required hereunder in a prompt and professional manner and shall exercise the standards of care required for the provision of legal services. Upon request or in accordance with such procedures as CITY may establish from time to time, ATTORNEY shall periodically report to CITY regarding the status of all legal matters being handled by ATTORNEY in accordance with City Council Policy 227.

2.5 ATTORNEY shall comply with all applicable federal, state and local laws, ordinances, and regulations.

2.6 ATTORNEY shall make no change in the character or extent of the work required by this Agreement, except as may be authorized in writing by CITY. Such supplemental work authorization shall set forth the specific changes of work to be performed and/or adjustment of fees to be paid to ATTORNEY by CITY.

2.7 The above provisions notwithstanding, ATTORNEY shall not represent any party before the City Council of CITY or any of CITY's commissions, boards, or committees. Nor shall ATTORNEY represent any party in any litigation when CITY is an adversary party in such litigation.

ARTICLE 3. **RESPONSIBILITIES OF CITY**

3.1 CITY shall provide full information to ATTORNEY and cooperate with ATTORNEY to the extent necessary to enable ATTORNEY to provide all services required pursuant to this Agreement.

3.2 CITY shall provide an office to ATTORNEY at City Hall for ATTORNEY's use during ATTORNEY's office hours. Said office shall be wired for access to the Internet to enable ATTORNEY to perform such legal research as may be necessary during ATTORNEY's office

hours. CITY shall provide at its expense such legal books for ATTORNEY's use at City Hall as City Council may approve from time to time during the normal budgetary process.

ARTICLE 4. PAYMENT

4.1 CITY shall compensate ATTORNEY for services as provided herein.

4.1.1 Retainer: CITY shall compensate ATTORNEY for Retainer Services at a rate of \$11,776.00 per month. Retainer Services shall mean attendance at office hours at City Hall on regular City Council and Planning Commission meeting days, as well as attendance at all regular City Council and Planning Commission meetings, as referenced in Section 2.1 of this Agreement. Notwithstanding any provision hereof to the contrary, dates and times during which office hours are provided may be adjusted by mutual agreement of ATTORNEY and the City Manager in a manner they find most efficient. The monthly rate for Retainer Services shall apply without regard to the number of hours of legal services actually provided or the identity of ATTORNEY's attorney who performs the work.

4.1.2 General Services: CITY shall compensate ATTORNEY for General Services, regardless of which of ATTORNEY's attorneys performs the work, at the composite rate of \$340.00 per hour; provided paralegals and office staff shall be billed to CITY at the lower of the above composite rate or their actual design rate established by ATTORNEY. General Services is intended to mean services provided by ATTORNEY that do not fall within the categories of Retainer Services, Special Services, Reimbursable Services, Bond Services or Non-Covered Services as defined herein.

4.1.3 Special Services: CITY shall compensate ATTORNEY for Special Services, regardless of which of ATTORNEY's attorneys performs the work, at the composite rate of \$356.00 per hour; provided paralegals and office staff shall be billed to CITY at the lower of the above composite rate or their actual design rate established by ATTORNEY. Special Services shall include litigation (excluding administrative code enforcement actions and City Prosecutor matters), intellectual property matters, Coastal Act and CEQA issues requiring a level of work such that a new matter is opened, property acquisition and disposition, water quality and environmental matters, and such other matters as agreed upon by ATTORNEY and the City Manager. In evaluating whether a matter meets the criteria of Special Services the intent of the parties is that such matters mean services requiring a special degree of knowledge and skill, and typically shall apply to services provided by ATTORNEY that are within the City Council's discretion to control, such as when the Council decides to initiate litigation or pursue special projects.

4.1.4 Reimbursable Services: Reimbursable Services are services for which CITY is required to be reimbursed by third parties (whether by agreement with such third parties, due to a court order, or otherwise), and ATTORNEY may bill CITY at its current design rates for all such services.

4.1.5 Non-Covered Services: From time to time CITY may request services which are beyond the scope of what is standard in the industry for a contract City Attorney firm to

provide, such as US Tax Court litigation, pursuing claims of bad faith conduct by insurers, and intellectual property litigation. Should CITY request ATTORNEY to provide services in such instances, ATTORNEY may charge its current design rates, but shall only do so upon entering a written addendum to this Agreement reflecting the City Council's consent for ATTORNEY to provide services in the matter at its design rates.

4.1.6 Bond Counsel: If requested to provide bond counsel services to CITY, ATTORNEY's regular design rates shall apply.

4.2 Adjustment in the above rates (other than ATTORNEY's design rates) shall occur on an annual basis effective July 1, in an amount equal to percentage change in the Consumer Price Index for All Urban Consumers for the Los Angeles – Long Beach - Anaheim area, for the 12-month period ending January of the same calendar year. Any other changes may be considered by the City Council for as part of CITY's annual review of ATTORNEY'S performance.

4.3 In addition to its billing for legal services, ATTORNEY shall be paid for all of its reimbursable costs. As used herein, the term "reimbursable costs" shall include the following: ATTORNEY's normal hourly charge for paralegal services; charges for any expert witnesses, consultants or subcontractors authorized to be retained by ATTORNEY on behalf of CITY; long distance telephone charges (excluding telephone calls between ATTORNEY's office and City Hall); conference call service charges; reasonable travel expenses (excluding mileage reimbursement for travel between ATTORNEY's office and City Hall); document reproduction expenses; telecopier charges; mobile internet connection charges; computerized research charges; litigation expenses, including without limitation court filing fees, court reporter's fees, jury fees, witness fees, and the like; personal messenger service charges; and other reasonable and necessary out-of-pocket expenses. The term "reimbursable costs" shall not include any overhead or administrative charge relating to ATTORNEY's office or ATTORNEY's normal cost of equipment and supplies except as expressly set forth herein.

4.4 ATTORNEY shall bill CITY monthly for services performed pursuant to this Agreement. ATTORNEY shall establish such separate billing matters as deemed appropriate by CITY and consistent with this Agreement. Each bill shall be itemized and shall reflect the date each task is performed, the amount of time spent performing each task, a brief description of the task performed, the identity of the ATTORNEY performing each task, and the total monthly charge. Reimbursable costs shall be separately itemized. CITY shall pay all fees and reimbursable costs due to ATTORNEY within 30 days after receipt of invoice.

ARTICLE 5.

INDEPENDENT CONTRACTOR

5.1 The designated City Attorney in ATTORNEY's office shall be directly responsible and shall report to the City Council in accordance with applicable California law. Otherwise, ATTORNEY is an independent contractor and not an employee of CITY and neither CITY nor any of its employees shall have any control over the conduct of ATTORNEY or any of ATTORNEY's employees, except as herein set forth, and ATTORNEY expressly warrants not to, at any time or in any manner, represent that ATTORNEY, or any of ATTORNEY's agents, servants, or employees, are in any manner agents, servants, or employees of CITY, it being

distinctly understood that said ATTORNEY is and shall at all times remain as to CITY a wholly independent contractor and that ATTORNEY's obligations to CITY are solely such as are prescribed by this Agreement.

5.2 This Agreement contemplates the personal services of ATTORNEY and ATTORNEY's partners and employees, and it is recognized by the parties hereto that a substantial inducement to CITY for entering into this Agreement was, and is, the professional reputation and competence of ATTORNEY and ATTORNEY's employees. Neither this Agreement nor any interest therein may be assigned by ATTORNEY, except upon written consent of CITY. Nothing herein contained is intended to or shall be construed as preventing ATTORNEY from employing or hiring as many employees as ATTORNEY may deem necessary for the proper and efficient execution of this Agreement.

ARTICLE 6. **TERMINATION**

6.1 The Term of this Agreement shall commence on July 1, 2007 and shall continue thereafter unless terminated by either party hereto pursuant the terms of this Agreement. CITY may terminate this Agreement upon providing ATTORNEY thirty (30) days' written notice prior to termination. ATTORNEY may terminate this Agreement on the giving of ninety (90) days written notice to the CITY of such termination. ATTORNEY will comply with all obligations required of it pursuant to the State Bar Act in connection with such termination and the transition to replacement counsel. ATTORNEY shall be compensated for its costs and services rendered through the effective date of such termination.

ARTICLE 7. **MISCELLANEOUS**

7.1 Notices. Any notice to be given under this Agreement shall be given by enclosing the same in a sealed envelope, postage prepaid, and depositing the same in the United States Postal Service, addressed to ATTORNEY at 18535 Jamboree Road, Ninth Floor, Irvine, California, 92612, Attention: A. Patrick Muñoz, and to CITY at 33282 Golden Lantern Drive, Dana Point, California, 92629, Attention: City Manager.

7.2 Non-Discrimination. In connection with the execution of this Agreement, ATTORNEY shall not discriminate against any employee or applicant for employment because of race, religion, color, sex, or national origin. ATTORNEY shall take affirmative action to ensure that applicants are employed, and that employees are treated during their employment, without regard to their race, religion, color, sex, or national origin. Such actions shall include, but not be limited to the following: employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship.

7.3 Interpretation of Agreement. This Agreement shall be construed and interpreted both as to validity and performance of the parties in accordance with the laws of the State of California.

7.4 Integrated Agreement. This Agreement contains all of the agreements of the parties and cannot be amended or modified except by written agreement. No prior oral or written understanding shall be of any force of effect with respect to those matters covered in this Agreement.

7.5 Corporate Authority. The persons executing this Agreement on behalf of the parties hereto warrant that they are duly authorized to execute this Agreement on behalf of said parties and that in so executing this Agreement the parties hereto are formally bound to the provisions of this Agreement.

7.6 Insurance and Indemnification.

(a) Insurance.

(i) ATTORNEY carries Professional Liability/Errors and Omissions insurance in the amount of \$20,000,000 and will do so throughout the term hereof. Insurance shall continue to be effective to cover all claims made within three (3) years of the completion of the work in the Agreement.

(ii) The amount of said coverage will not be materially changed without ATTORNEY notifying CITY of such change in writing.

(iii) ATTORNEY shall carry Workers Compensation insurance in amounts that satisfy all legal requirements, or otherwise comply with all laws and regulations relating to such coverage.

(iv) ATTORNEY shall carry General Liability insurance, with coverage limits in an amount satisfactory to CITY, and shall name CITY as an additional insured there under throughout the term hereof.

(b) Indemnification. ATTORNEY does hereby agree to hold CITY, and its elected and appointed officers and officials, employees and other agents free and harmless from any claim, demand, or judgment which may arise based upon personal injury or damage to property to a third party arising out of the performance of services by ATTORNEY hereunder.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be duly executed with all the formalities required by law on the date first written above.

“CITY”

CITY OF DANA POINT

By: _____
Joseph L. Muller, Mayor

ATTEST:

Shayna Sharke, City Clerk

“ATTORNEY”

RUTAN & TUCKER, LLP

By: _____
A. Patrick Muñoz