

MEMORANDUM
Office of the City Attorney



Date: August 17, 2011
To: Mayor Esteves and Members of the City Council
From: Michael Ogaz, City Attorney
Subject: **Contract with Outside Counsel for Defense of City in
*Milpitas Coalition for a Better Community v. City of Milpitas***

Background: A lawsuit was filed by the Milpitas Coalition for a Better Community on July 15, 2011. The Ordinance passed by the Council on April 19, 2011, approving the Walmart expansion project in lieu of holding a special election contained provisions requiring the store developer (Walmart) to defend and indemnify the City if it is sued on the project. Based on those provisions, Walmart has agreed to pay for outside attorneys to defend the City in this matter.

After review and consideration of numerous law firms who have litigation experience in the area of land use, CEQA and election law, the City Attorney has recommended entering into a contract with Burke, Williams and Sorensen for the defense of the City. A contract with that firm is attached and presented for Council approval.

Fiscal Impact: None. The cost of litigation to be paid by Walmart.

Recommendation: Approve the contract for attorney services with Burke, Williams and Sorensen for defense of the City in the above-mentioned lawsuit and authorize execution of the contract by the City Attorney.

Attachment: Contract with Burke, Williams and Sorensen, LLP.

August 19, 2011

Michael Ogaz
City Attorney
City of Milpitas
455 E. Calaveras Boulevard
Milpitas, CA 95035-5411

Re: Engagement As Legal Counsel

Dear Mr. Ogaz:

You have requested that Burke, Williams & Sorensen, LLP (the "Firm") provide legal services to the City of Milpitas (the "Client"). Our service as legal counsel requires that we provide the Client with this formal engagement letter. Accordingly, this letter will set out and confirm the retention by the Client of the Firm to provide the legal services described below.

In this regard, the Client should know that California Business and Professions Code Section 6148 requires a written fee contract between attorneys and their clients to set forth the scope of the legal services which the attorneys have been retained to perform, and the fees which the attorneys will charge to perform those services. This letter, when signed by the Client in the space provided below and returned to us, is intended to fulfill the requirements of that Section.

(a) Scope of Services

The Client is hiring the Firm to represent, advise and assist the Client, as directed by the City Attorney, in connection with the litigation filed against the Client in *Milpitas Coalition for a Better Community v. City of Milpitas*, Santa Clara County Superior Court No. 111CV 205163.

(b) Compensation

The Client agrees to pay the Firm for the legal services provided hereunder at its prevailing hourly rates. Thomas B. Brown will be the attorney chiefly responsible for

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providing the aforementioned legal services. The hourly rate to be charged for Mr. Brown's services is \$295.00 per hour. The services of other attorneys in the Firm also may be used as is necessary and appropriate to provide the Client with the most cost-effective legal service. Hourly rates for other attorneys shall be \$295 for partners and \$250 for associates.

The Client and the Firm anticipate that the fees and other charges incurred by the Client under this agreement will be reimbursed by a third party pursuant to an indemnity and defense provision. The firm will provide both a direct invoice for the Client with a separate, redacted invoice that preserves attorney-client privilege for the Client to forward to the third party for reimbursement. Invoices shall be sent in electronic form. The Client agrees that the Firm has no attorney-client or contractual relationship with the third party, and that the Client is responsible for payment to the Firm of fees and other charges incurred under this agreement.

(c) Costs and Expenses

In addition to the Firm's legal fees, the Firm may also incur various costs and expenses in performing legal services under this agreement. The Client agrees to pay for those reasonable costs and expenses in addition to the hourly or other fees. To the extent applicable to the rendering of services, these costs and expenses commonly include long distance telephone calls, messenger and other delivery fees, postage, parking, photocopying and other reproduction costs, word processing charges, fax charges, charges for computer research, travel expenses outside Alameda County, and other similar items.

(d) Billings

The Firm will bill the Client for its legal services and costs on a monthly basis, with the understanding and agreement that each bill will be paid in full within 30 days thereafter. The bills will describe legal work performed, will itemize fees charged in increments of 1/10th of one hour, and will describe costs incurred.

(e) Termination

The Client may discharge the Firm at any time by written notice effective when received by the Firm. If the Firm is the attorney of record for the Client in any proceeding, the Client will execute and return a Substitution of Attorney form

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immediately on its receipt from the Firm. At termination, the Firm will return client's files and records promptly enough following client's written request to avoid putting client's case at risk. Unless the parties otherwise agree in writing, the Firm will provide no further services and advance no further costs on the Client's behalf after receipt of the notice.

The Firm may withdraw from the engagement with the Client's consent or for good cause. Good cause includes the breach of this contract by the Client, the Client's failure to pay the Firm's bills in a timely manner, the Client's refusal to cooperate with the Firm or to follow the Firm's advice on a material matter or any fact or circumstance that would render the Firm's continuing representation unlawful or unethical.

Notwithstanding a discharge or the Firm's withdrawal, the Client will remain obligated to pay the Firm for all legal services provided under this contract and to reimburse the Firm for all costs incurred prior to termination.

In accordance with California Business and Professions Code Section 6148(a)(4), the Firm informs the Client that it maintains errors and omissions insurance coverage applicable to the services to be rendered.

Although the Firm may offer an opinion about possible results regarding matters for which it is providing legal representation and consultation, the Firm cannot of course guarantee any particular result. The Client acknowledges that the Firm has made no promise that any opinion or advice offered in the future will constitute a guaranty.

The Firm will not use the name of the Client in law firm advertising without Client consent.

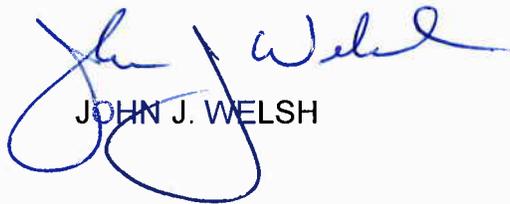
Please carefully review the terms of this letter agreement and, if they are acceptable, execute the enclosed copy and return it to me in the envelope provided.

We wish you to know that the Firm is committed to providing efficient and responsive services to its clients in a professional relationship based on mutual trust, confidentiality and prompt and candid communication. We appreciate the opportunity to be of service and look forward to working with you.

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Please feel free to contact me with any questions you may have.

Very truly yours,



JOHN J. WELSH

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The above terms and conditions are agreed to:

Dated: August ____, 2011

City of Milpitas

By: _____

Its: _____