

# CITY OF LAGUNA NIGUEL

## AGENDA ITEM CITY COUNCIL

SEPTEMBER 5, 2017

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**TO:** Honorable Mayor and Council Members

**FROM:** Debbie Bell, Interim Assistant City Manager/Management Services Director

**SUBJECT:** Outside Legal Services – Burke, Williams & Sorensen, LLP

**SUMMARY:** On July 15, 2017, the City entered into an agreement for independent outside legal services with Burke, Williams & Sorensen, LLP ("BWS") to respond to various legal issues being raised by the actions of former Mayor Jerry Slusiewicz and the related questions from City Council Members. The billing rate is \$350 per hour and the agreement is not to exceed \$25,000. Based on the continuing need for independent outside legal services and in accordance with the City's Purchasing Policy, City Council approval is necessary for an amendment to the BWS agreement to increase the amount to not to exceed \$75,000. Staff recommends that the City Council approve the First Amendment to the agreement with BWS for independent outside legal services, authorize the Interim City Manager to execute the proposed First Amendment and appropriate necessary funds for this purpose.

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### BACKGROUND/ANALYSIS

City Attorney Terry Dixon has served as City Attorney since the City's incorporation in 1989. For time to time, City Attorney Dixon utilizes outside legal counsel to assist with complex legal issues, provide specialized legal expertise, or to provide independent opinions on matters where there may be a potential conflict of interest. There are no procedures or protocol on when an outside attorney can be retained. This has been left to the City Attorney's discretion.

By approximately July 15, 2017, it appeared very clear to the City Attorney that independent legal assistance was required because of various actions of the former Mayor.

1. The former Mayor had attempted to force the City to not pursue the (a) June 5, 2017, complaint from the Laguna Niguel Community Theatre regarding actions of former Mayor and (b) the June 8, 2017, complaint from former City Manager Rod Foster alleging that actions of the former Mayor had caused him to leave City employment and requesting the Council protect City employees from, by threatening to publically disclose what the former Mayor characterized as very damaging information against the City that was contained in a draft Agreed-Upon Procedures Report being prepared for the City auditors, The Pun Group.

2. There appeared to be serious interest in the former Mayor being removed from the office of Mayor. This was considered to be significant matter and the City Attorney wanted to ensure that appropriate procedures were followed for such an action.
3. Serious questions had been raised regarding the actions being taken by the City's auditors in preparing the "Agreed-Upon Procedures Report."
4. Questions had been raised by former Mayor regarding the payments the City had been making to West Coast Arborists.

Based on the tenor and content of the conversations with the former Mayor and the nature of the questions raised by City Council Members in relation to the complaints received against former Mayor, City Attorney Dixon discussed the need for outside counsel with former-City Manager Foster, who entered into an agreement with BWS in an amount not to exceed \$25,000 as allowed by the City's Purchasing Policy.

BWS provided assistance with regard to the calling of the July 24, 2017, Special City Council meeting and the issues addressed at that meeting. At this Special City Council meeting, the City Council directed City Attorney Dixon to retain outside legal counsel to assist in the review of the issues raised at that meeting. Also, BWS assisted in providing legal assistance regarding the calling of the August 14, 2017, Special meeting of the City Council at which former Mayor resigned as Mayor.

At this point, it is clear that additional legal work will be required from BWS. It is unclear as to how much work will be required. It appears that at least the following issues will require outside legal services.

1. Overseeing the workplace investigation of former Mayor Slusiewicz' actions.
2. Additional work regarding the West Coast Arborists matter.
3. Potential follow-up legal work regarding The Pun Group Agreed-Upon Procedures Report.
4. Potential challenges to the special meetings held on July 24, 2017, and August 14, 2017, including potential litigation against the City.

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#### **FISCAL IMPACT**

Requires an appropriation of \$50,000 from the unappropriated General Fund reserve. There are sufficient funds for this purpose.

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**RECOMMENDATION**

Staff recommends amending the existing agreement with Burke, Williams & Sorensen, LLP, to provide independent outside legal services in an amount not to exceed \$75,000; authorize the Interim City Manager to execute this amendment; and to appropriate \$50,000 from the General Fund reserve for this purpose.

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**PREPARED**

**BY:**

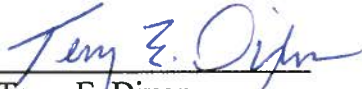


Debbie Bell

Interim Assistant City Manager/Management Services Director

**REVIEWED**

**BY:**



Terry E. Dixon,

City Attorney

**REVIEWED**

**BY:**



Stephen Erlandson,

Interim City Manager

Attachment:

Agreement with Burke, Williams & Sorensen, LLP, effective July 15, 2017

**ATTACHMENT**



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Oakland, California 94612-3501  
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www.bwslaw.com

Direct No.: 510.903.8840  
Our File No.: F0002-0001  
tbrown@bwslaw.com

July 15, 2017

City of Laguna Niguel  
Rod Foster, City Manager  
30111 Crown Valley Parkway  
Laguna Niguel, CA 92677

Re: Agreement for Legal Services

Dear Mr. Foster:

We are pleased to represent the City of Laguna Niguel with respect to the matters described in this Agreement. The following sets forth the terms pursuant to which **BURKE, WILLIAMS & SORENSEN, LLP** ("Burke") and **the CITY OF LAGUNA NIGUEL** ("Client") agree that Burke will provide legal services to Client. The hallmark of any productive professional relationship is effective communication, and we would invite you to contact us at any time during or after our representation with regard to any questions you may have associated with our representation or the matters described herein.

**1. CONDITIONS.** This Agreement will not take effect, and Burke will have no obligation to provide legal services, until Client returns a signed copy of this Agreement. The effective date of this Agreement will be July 15, 2017.

**2. SCOPE OF SERVICES.** Client hires Burke to provide legal services in the matters set forth in Attachment "A" to this Agreement. No representation outside of the matters set forth in Attachment "A" to this Agreement shall be provided by Burke to Client. No representation of any directors, officers, employees, shareholders, or any other persons or entities affiliated with Client shall be provided unless such representation is expressly included in Attachment "A" to this Agreement. Burke will provide those legal services reasonably required to represent Client. Burke will take reasonable steps to keep Client informed of progress and to respond to Client's inquiries. If a court action is filed, Burke will represent Client, as requested by City. Services in any matter not described above will require a separate written agreement or a written modification to this Agreement.

**3. CLIENT'S DUTIES.** Client agrees to be truthful with Burke, to cooperate, to keep Burke informed of any information or developments which may come to Client's

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attention, to abide by this Agreement, to pay Burke's bills on time, and to keep Burke advised of Client's address, telephone number, and whereabouts. Client will assist Burke in providing necessary information and documents and will appear when necessary at legal proceedings.

**4. CONFLICTS OF INTEREST.** Before accepting representation of Client, Burke has undertaken reasonable and customary efforts to determine whether there are any potential conflicts of interest or adversity of positions between Client and any other person or entity that would bar Burke from representing Client in general or in any of the specific matters listed in Attachment "A". Burke has reviewed this issue in accordance with the Rules of Professional Conduct adopted in California. Burke believes that those rules, rather than the rules of any other jurisdiction, are applicable to Client's representation. Client's execution and return of the enclosed copy of this letter represents an express agreement to the applicability of the Rules of Professional Conduct adopted in California to any and all representation arising under this Agreement.

**5. DISCLOSURE.** Pursuant to the requirements of California Business & Professions Code Section 6148, Burke hereby discloses that it maintains professional errors and omissions insurance.

**6. LEGAL FEES AND BILLING PRACTICES.** Client agrees to pay by the hour at Burke's prevailing rates for all time spent on Client's matter by Burke's legal personnel. Current hourly rates for legal personnel are set forth in Attachment "B" to this Agreement.

Burke's rates are subject to change on 30 days' written notice to Client. Rates shall automatically increase annually on January 1 of each year as set forth in Attachment "B" to this Agreement. If Client declines to pay increased rates, Burke will have the right to withdraw as attorney for Client.

The time charged will include the time Burke spends on telephone calls relating to Client's matter, including calls with Client, witnesses, opposing counsel or court personnel. The legal personnel assigned to Client's matter may confer among themselves about the matter, as required and appropriate. When they do confer, each person will charge for the time expended, as long as the work done is reasonably necessary and not duplicative. Likewise, if more than one of the legal personnel attends a meeting, court hearing or other proceeding, each will charge for the time spent. Burke will charge for waiting time in court and elsewhere and for travel time, both local and out-of-town.

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## 7. COSTS AND OTHER CHARGES.

(a) Burke will incur various costs and expenses in performing legal services under this Agreement. Client agrees to pay for all costs, disbursements and expenses in addition to the hourly fees. The costs and expenses commonly include: service of process charges, filing fees, court and deposition reporters' fees, jury fees, notary fees, deposition costs, long distance telephone charges, messenger and other delivery fees, postage, photocopying and other reproduction costs, travel costs including parking, mileage, transportation, meals and hotel costs, investigation expenses, consultants' fees, expert witness, professional, mediator, arbitrator and/or special master fees, unavoidable administrative staff and secretarial overtime, and other similar items. Except for the items listed below, all costs and expenses will be charged at Burke's cost.

In-office photocopying/page:	\$ .20
In-office color photocopying/page	\$ 1.00
Facsimile charges/page:	\$ 1.00
Mileage/mile:	\$ .575 (per IRS notices)
Other:	

(b) Out-of-town travel. Client agrees to pay transportation, meals, lodging and all other costs of any necessary out-of-town travel by Burke's personnel. Client will also be charged the hourly rates for the time legal personnel spend traveling.

(c) Experts, Consultants and Investigators. To aid in the preparation or presentation of Client's case, it may become necessary to hire expert witnesses, consultants, investigators, and outsourced support services. Client agrees to pay such fees and charges. Burke will select any expert witnesses, consultants, investigators or support services to be hired, and Client will be informed of persons chosen and their charges.

Additionally, Client understands that if the matter proceeds to court action or arbitration, Client may be required to pay fees and/or costs to other parties in the action. Any such payment will be entirely the responsibility of Client.

**8. BILLING STATEMENTS.** Burke will send Client periodic statements for fees and costs incurred. Each statement will be payable within 30 days of its mailing date. Client may request a statement at intervals of less than 30 days. If Client so requests, Burke will provide one within 10 days. The statements shall include the

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amount, rate, basis of calculation or other method of determination of the fees and costs, which costs will be clearly identified by item and amount.

**9. INTEREST CHARGES.** If a billing statement is not paid by its due date, interest will be charged on the principal balance (fees, costs, and disbursements) shown on the statement. Interest will be calculated by multiplying the unpaid balance by the periodic rate of .833% per month (TEN PERCENT [10%] ANNUAL PERCENTAGE RATE). The unpaid balance will bear interest from the date of the invoice until paid.

**10. LIEN.** Client hereby grants Burke a lien on any and all claims or causes of action that are the subject of the representation under this Agreement. The lien will be for any sums owing to Burke at the conclusion of services performed. The lien will attach to any recovery Client may obtain, whether by arbitration award, judgment, settlement or otherwise. The effect of such a lien is that Burke may be able to compel payment of fees and costs from any such funds recovered on behalf of Client even if Burke has been discharged before the end of the case. Because a lien may affect Client's property rights, Client may seek the advice of an independent lawyer of Client's choice before agreeing to such a lien. By initialing this paragraph, Client represents and agrees that Client has had a reasonable opportunity to consult such an independent lawyer and—whether or not Client has chosen to consult such an independent lawyer—Client agrees that Burke will have a lien as specified above.

  
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(Client Initial Here)

  
\_\_\_\_\_  
(Burke Initial Here)

**11. DISCHARGE AND WITHDRAWAL.** Client may discharge Burke at any time. Burke may withdraw with Client's consent or for good cause. Good cause includes Client's breach of this Agreement, refusal to cooperate or to follow Burke's advice on a material matter or any fact or circumstance that would render Burke's continuing representation unlawful or unethical. When Burke's services conclude, all unpaid charges will immediately become due and payable. After services conclude, Burke will, upon Client's request, deliver Client's file, and property in Burke's possession unless subject to the lien provided in Paragraph 11 above, whether or not Client has paid for all services.

**12. DOCUMENT RETENTION POLICY.** Client is entitled upon written request to any files in Burke's possession relating to the legal services performed by Burke for Client, excluding Burke's internal accounting records and other documents not reasonably necessary to Client's representation, subject to Burke's right to make copies of any files withdrawn by Client. Once a matter is concluded, Burke will close the file, and Client will receive notice thereof. Client's physical files may be sent to storage



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offsite, and thereafter there may be an administrative cost for retrieving them from storage. Thus, it is recommended that Client request the return of a file at the conclusion of a matter. Under Burke's document retention policy, Burke normally destroys files five (5) years after a matter is closed, unless other arrangements are made with Client.

All client-supplied materials and all attorney end product (referred to generally as "client material") are the property of Client. Attorney end product includes, for example, finalized contracts, pleadings, and trust documents. Attorney work product is the property of Burke. Attorney work product includes, for example, drafts, notes, internal memoranda and electronic files, and attorney representation and administration materials, including attorney-client correspondence and conflicts materials.

After the close of a matter, Burke will notify Client of any client materials that remain in Burke's possession. Client will be invited to retrieve these client materials within 45 days of notice, or Client may direct Burke to forward the client materials to Client, at Client's expense. If within 45 days of this notice Client fails to retrieve the client materials or request Burke to forward them, Client authorizes Burke to destroy the client materials.

After the 45-day period, Burke will, consistent with all applicable rules of professional conduct, use its discretion as to the retention or destruction of all attorney work product and any client materials that remain with Burke.

**13. TECHNOLOGY.** At its discretion, unless otherwise stated, Burke will employ technology to facilitate electronic discovery. This may include scanning of paper documents, culling of documents, converting electronically stored information into a format suitable for review, the usage of electronic review software, etc. Applicable associated costs, including electronic storage and transfer costs, will be billed to Client.

**14. DISCLAIMER OF GUARANTEE AND ESTIMATES.** Nothing in this Agreement and nothing in Burke's statements to Client will be construed as a promise or guarantee about the outcome of the matter. Burke makes no such promises or guarantees. Burke's comments about the outcome of the matter are expressions of opinion only. Any estimate of fees given by Burke shall not be a guarantee. Actual fees may vary from estimates given.

**15. MEDIATION/ARBITRATION; WAIVER OF JURY TRIAL.** If a dispute arises out of or relating to any aspect of this Agreement between Client and Burke, or the breach thereof, and if the dispute cannot be settled through negotiation, Burke and

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Client agree to discuss in good faith the use of mediation before resorting to arbitration, litigation, or any other dispute resolution procedure. Nothing herein shall limit or otherwise affect your right under Sections 6200-6206 of the California Business and Professions Code to request arbitration of any fee dispute by an independent, impartial arbitrator or panel of arbitrators through a bar association program created solely to resolve fee disputes between lawyers and clients. However, should discussions, mediation or the non-binding arbitration provided through a local bar association program not resolve the dispute, the dispute shall be determined by binding arbitration before the American Arbitration Association under its then prevailing commercial arbitration rules, except that discovery may be taken in that arbitration pursuant to the California Code of Civil Procedure. The claims or controversies subject to this provision shall include, without limitation, any claim of professional negligence or malpractice. The arbitration shall be held in Oakland, California, unless we mutually select another venue, and judgment may be entered upon the arbitrator's award by any court having jurisdiction. Should you refuse or neglect to appear or participate in the arbitration proceedings, the arbitrator is empowered to decide the claim or controversy in accordance with the evidence presented. You should realize that by accepting the arbitration provision, YOU WILL WAIVE YOUR RIGHT TO A JURY TRIAL AND THE RIGHT, EXCEPT UNDER LIMITED CIRCUMSTANCES, TO APPEAL THE ARBITRATOR'S DECISION.

  
\_\_\_\_\_  
(Client Initial Here)

  
\_\_\_\_\_  
(Burke Initial Here)

**16. ATTORNEYS' FEES CLAUSE.** The prevailing party in any action or proceeding arising out of or to enforce any provision of this Agreement, with the exception of a fee arbitration or mediation under Business and Professions Code Sections 6200-6206, will be awarded reasonable attorneys' fees and costs incurred in that action or proceeding, or in the enforcement of any judgment or award rendered.

**17. ENTIRE AGREEMENT.** This Agreement contains the entire agreement of the parties. No other agreement, statement, or promise made on or before the effective date of this Agreement will be binding on the parties.

**18. SEVERABILITY IN EVENT OF PARTIAL INVALIDITY.** If any provision of this Agreement is held in whole or in part to be unenforceable for any reason, the remainder of that provision and of the entire Agreement will be severable and remain in effect.

**19. MODIFICATION BY SUBSEQUENT AGREEMENT.** This Agreement may be modified by subsequent agreement of the parties only by an instrument in writing

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signed by both of them, or an oral agreement only to the extent that the parties carry it out.

**20. EFFECTIVE DATE.** This Agreement will govern all legal services performed by Burke on behalf of Client commencing with the date Burke first performed services. The date at the beginning of this Agreement is for reference only. Even if this Agreement does not take effect, Client will be obligated to pay Burke the reasonable value of any services Burke may have performed for Client.

THE PARTIES HAVE READ AND UNDERSTOOD THE FOREGOING TERMS AND AGREE TO THEM AS OF THE DATE BURKE FIRST PROVIDED SERVICES. IF MORE THAN ONE CLIENT SIGNS BELOW, EACH AGREES TO BE LIABLE, JOINTLY AND SEVERALLY, FOR ALL OBLIGATIONS UNDER THIS AGREEMENT. CLIENT SHALL RECEIVE A FULLY EXECUTED DUPLICATE OF THIS AGREEMENT.

DATED: 7.17.2017.

**CITY OF LAGUNA NIGUEL**

By: 

Rod Foster

City Manager

Address: 30111 Crown Valley Pkwy.

Laguna Niguel, CA 92677

Telephone: (949) 362-4300

DATED: 7.17.2017

**BURKE, WILLIAMS & SORENSEN, LLP**

By: 

Thomas B. Brown

Partner

Enclosure: return copy

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Attachment "A"

1. General Municipal Law Advice and Litigation

Burke's services will include providing advice and litigation support and representation on matters of general municipal law, as requested and directed by the City, and such other services as requested and directed by the City.

The legal services provided pursuant to the Agreement shall not exceed \$25,000 without approval by the City Council of the City of Laguna Niguel.



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July 15, 2017

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Attachment "B"

Rates for Attorneys and other timekeepers through December 31, 2016.

\$350	Thomas B. Brown and all Burke partners
\$275	Associates
\$145	Law Clerks
\$135	Paralegals

Effective each January 1, the foregoing base rates shall be increased based on the U.S. Department of Labor Bureau of Labor Statistics Los Angeles-Riverside-Orange County Consumer Price Index-All Urban Consumers ("CPI-U"), using the CPI-U for each prior October as the base and the value to escalate the hourly rates in the ratio of the most recent October CPI-U value, rounded up to the nearest \$5 increment.

The U.S. Dept. of Labor Bureau of Labor Statistics (BLS) website will be the source of the data utilized (if the URL is changed, the parties shall agree on the replacement web page to be as close as reasonably possible to the page detailed herein):  
[http://data.bls.gov/PDQ/servlet/SurveyOutputServlet?data\\_tool=dropmap&series\\_id=CUURA421SA0,CUUSA421SA0](http://data.bls.gov/PDQ/servlet/SurveyOutputServlet?data_tool=dropmap&series_id=CUURA421SA0,CUUSA421SA0)