



Agenda Item #: _____

Staff Report

City of Manhattan Beach

TO: Honorable Mayor Montgomery and Members of the City Council

THROUGH: David N. Carmany, City Manager

FROM: Leland C. Dolley, Interim City Attorney

DATE: May 2, 2011

SUBJECT: Presentation to the City Council of the City of Manhattan Beach, California on the selection process for a city attorney

The most important aspect of selecting a city attorney may well be the time spent by the City Council or its designees meeting, talking with, and understanding the philosophy of and legal knowledge of an applicant. In other words, to make an effort to get to know the applicants and test the strength of their knowledge of public law as well as their character and ethical standards.

It is important for the city to choose the candidate most suited to the city's needs and a person who is well qualified for the job and who also has the highest ethical standards.

It is useful for the City Council to know about the differences between a general law city and a charter city. Generally speaking, a charter city, under the constitution of the State of California, may legislate on a wide range of issues on which a general law city cannot. A general law city (Manhattan Beach is a general law city) can legislate only as permitted by the legislature of the State of California. The legislature of the State of California cannot itself legislate on matters which are "local" in nature. In other words, the state may prohibit general law cities from legislating in areas which are a statewide interest (preempted). The City of Manhattan Beach will always seek advice on what matters it can legislate. There is an increasing body of law in which the legislature is attempting to limit the city's ability to legislate on "local" matters.

There are often questions as to what the duties of a city attorney are. In the City of Manhattan Beach, the role of the city attorney is described once in the municipal code and consists of less than four lines in that code:

The City Council may appoint a City Attorney who shall serve as legal counsel to the City and advise City officials in all legal matters pertaining to City business. The City Attorney shall not be a member of the classified service and shall report to and serve at the pleasure of the City Council. The City Attorney shall also serve as City Prosecutor.

(_ 7, Ord. 1995, eff. October 3, 1996)

While this brief description may appear unusual in fact it is not. Many cities have longer descriptions of city attorney duties and some descriptions are nearly the same as those here in the City of Manhattan Beach.

As no duties are assigned by the code, the duties of a city attorney generally include:

1. The primary duty of a city attorney is to provide his or her first loyalty to the city in all aspects including those of a confidential nature.
2. It is often said that a city attorney represents the “city.” This concept has been refined over the years by interpretation and law. The duties of the city attorney are indeed to the city and the city attorney essentially works for the city council. A question is often asked as to whether or not the city attorney “works for” the public. The answer is that the city attorney only works for the public in the sense that he or she may advise the officials elected to the city council or city staff.
3. The city attorney provides legal advice to many of the employees of the city. That legal advice can cover a wide range of subjects. It would include the preparation of ordinances and resolutions or the approval of contracts and reports or the interpretation of statutes, case law, and legal precedent. (The “handbook” of public law is at least 6 inches thick.)
4. It is the duty of the city attorney to be fully advised and capable of rendering the advice for which he or she has been asked.
5. The city attorney should be capable of prosecuting local violations of law and must be able to practice in all courts of the State of California and on occasion in federal courts.
6. The city attorney must be able to advise, and on occasion be active in, personnel matters including discipline and discharge.
7. A city attorney is required to work closely with the city manager to ensure the efficient operation of the city.
8. A city attorney should be conversant with issues occurring in and reoccurring in the community development department, finance department, fire department, human resources department, management services department, parks & recreation department, public works department, engineering department and police department.
9. It would be a good thing for the city attorney to be affable, cooperative, and helpful.
10. A city attorney may be required to provide special advice on the Brown Act and conflicts of interest.

Basically there are two ways in which the office of the city attorney is filled:

1. A full-time in-house attorney who is a city employee.
2. A firm of attorneys which practice full or part-time in municipal law.

While there has been some debate as to which of the two varieties of attorney services are better than the other, it does not fundamentally appear that there is an overwhelming advantage to either form of attorney services.

A full-time in-house city attorney is available within the city hall to provide services as needed. A firm practicing municipal law most often will make available one or more attorneys to be in the city hall at such times as are designated by the city council or city manager. Often the full-time in-house city attorney engages other attorneys and firms on matters which can be time consuming to the full-time city attorney. The city attorney employee is most often entitled to certain or all benefits provided to the city employees. The contracting firm would not require the city to pay benefits. The firm contracting with the city will most often have a number of attorneys skilled in most or all of the issues relating to the municipal practice. Contracting firms can call on one of their members to advise in specialized areas.

It should be noted again that the major issue concerning regarding municipal lawyers is not based on whether or not the attorney is a city employee or if the city contracts with a law firm. The main issue should always be the character, skill, and ethics of the person who fills the position of city attorney.

The cost factor: The cost/budget for the city attorney's department has been around \$510,000 including outside council (and not including recent litigation). Of the firms who have so far provided responses to RFP (and although they were not asked to) 1 of 3 offering in-house services, quoted \$85 - \$145 per hour. Firms which proposed contracts quoted \$215 - 245, Associate/Partner another \$200 - \$300 and a third \$300 - \$500 (5 firms did not include a fee schedule).

Because of the nature of the engagement, the selection process is the key factor which should ensure that the city is well represented by its city attorney.

There are numerous ways in which to make a selection of a city attorney (and, of course, other positions within the city), from the very casual to the very complex.

The City Council may wish to consider one of the following:

1. The city council can take unto itself the complete selection process reviewing request for proposals. Generally the city council may then conduct interviews either publicly or in closed session and make a determination who shall be the city attorney on any basis it thinks is appropriate.
2. On rare occasions there is no RFP process and the city attorney is selected with little, and sometimes no, real investigation.

3. The city council may delegate the city manager or other official the authority to undertake the RFP process after which a report would be made to the council for a decision with or without a recommendation. The council may assign the selection or recommendation to a subcommittee or a council or another body to provide a recommendation to the council for decision.
4. A critical factor is the wording and preparation of an RFP. The RFP should let the applicants know exactly what the requirements are of the city. There should be information submitted as background which can and should be checked. The city council may also inquire of other cities how their selection process has been undertaken in the past. The interview process should be carefully thought out. The interview process is one of the most important processes available to understand and know the skill, quality and ethics of an applicant. On occasion, city councils have invited a person knowledgeable about city attorneys to sit in and assist the council in questioning the applicant.

The Brown Act does provide, because of the need for privacy, that a closed session may be held during the process of selecting a city attorney. While it is possible in some respects to publicly engage in the process and selection of a city attorney, great care needs to be attended to in order to preserve privacy issues relating to the applicant.

While this memo should provide some information and guidance to the city council, it is by no means exhaustive. I will be pleased to answer any questions as the council thinks appropriate.

Below is a synopsis for each department's interaction with the city attorney's office:

CITY CLERK'S OFFICE

- Assist with the Preparation of the Closed Session Agenda (Confirm Government Code Sections) and Brown Act Compliance
- Since the City Clerk does not participate in Closed Session, City Attorney provides direction on action taken to be included in Closed Session Minutes
- All City Contracts must originate with the City Attorney's office so that it can be "Approved as to Form"
- Provide Direction Regarding the Different Types of Insurance to Attach to Contracts
- Provide Direction to General Services Manager and City Clerk Regarding Legal Requirements for Bid Notices and Request for Proposals
- Review and Approve of Public Notices
- Review and Approve Summary Ordinances
- Review and Approve Resolutions
- Review and Approve Ordinances
- Legal Support Regarding Public Records Requests
- Election Support (Letters to Candidates, Penal Code Sections, etc.)
- City Clerk's Office Receives Subpoenas, Claims and Litigations. City Clerk staff date stamps the document, logs it in and then forwards the document to the City Attorney for immediate processing

CITY MANAGER'S OFFICE

- Prosecution Update Monthly
- Liability Summary
- Status Report General and Auto Liability Claims in Litigation and Non-Litigation on Claims \$5,000 or more

COMMUNITY DEVELOPMENT

The Community Development utilizes City Attorney services extensively. I have provided a list of examples by division for your consideration. Accessibility and expertise is my top priority as land use issues become more litigious and our residents expect timely responses to their questions in order to continue with their project as quickly as possible.

The Attorney that is selected should be very familiar with our codes and policies and have a broad range of knowledge. Manhattan Beach's codes are very unique and complicated resulting in on-going land use discussions in the early stages of development. I have estimated that we require approximately 50 hours a month of legal services, which does not include Planning Commission meetings, or specific lawsuits associated with land use issues. Many of these special situations were routinely handled by our previous attorney.

1. Planning (approximately 20 hours a month, not including Planning Commission meetings)

- Code Amendments (tattoo, food trucks, massage, medical marijuana, Tree Ordinance, New Year's hours, Mansionization, Historic Preservation, Telecommunications, Green Zoning, Hazardous Mitigation Plan)
- Current land use law court decisions and upcoming decisions (General Plan, Coastal, Map Act, CEQA)
- Brown Act and conflicts of interest issues (Planning Commission)
- Attendance at Planning Commission meetings as needed (Strata, Shade, Code Amendments, Strand)
- Code interpretations (Next G Telecom, Metro PCS Aviation Telecom)
- Review of agreements (Community Development Block Grant-CDBG and Congestion Management Plan –CMP, Live Oak Telecom)
- Review of professional contracts and services
- State Subdivision Map Act (Certificates of Compliance, Tract Maps)
- State Planning and Zoning laws
- General Plan including Housing Element
- Development Agreements (Manhattan Village Mall, Raleigh Studios)
- Review of EIRs (Metlox, Manhattan Village Mall)
- Appeals and lawsuits (Dr Zukotynski tree, Perry 26th Street tree, Jamgochian Ardmore height, Plastic bags)
- Encroachment Permit appeals, lawsuits, and modifications to standard Permit, liability and conditions (Birkenfeld, Wattles)
- Interpretation of Use Permits, Variance and other discretionary application conditions
- Preparation and review of Resolutions, findings, facts and conditions
- Roadway and ROW dedications (Manhattan Village Mall)
- Interpretation of State Solar Rights Act
- Advice on adjacent City's projects impacting Manhattan Beach (Plaza El Segundo, NRG Power Plant)
- Input on State agency regulations (California Coastal Commission, California Energy Commission, State Housing and Community Development)

2. Building (approximately 10 hours a month and more for specific cases)

- New Codes: State, Municipal, Agency AQMD, Stormwater;
- Conflict of Interest for inspectors, plan checkers, Board of Building Appeals, Code Enforcement, Managers;
- Insurance issues public right of way;
- Undergrounding process, appropriateness of naming/removing specific contractors from City-approved list;
- Sewer back up complaints/litigation; Backwater Valve litigation;
- Contract reviews re:/ consultants (Melad, Accela, CoreLogic, Anacomp, Doculynx);

- Public Records Request (architect vs engineer vs designer, appropriate responses and response times);
- Witness and subpoena preparation and consultations – appropriate fees, how to respond, timing of response, discussions with attorneys to clarify appropriateness of request or reduce time for employee to repond/appear);
- Neighbor disputes re: close/illegal/failing construction;
- Permit revocation or suspension of permits;
- Crane booms across property lines to bring in pre-fab phased construction;
- Shoring noise, vibrations, notification, damage (undermining neighbors building, window, walkways, stairs);
- Regional Water Quality Control Board relations (if City liable for stopping work on alleged contaminated soil jobsite);
- Definition of illegal dwelling (additional kitchen, too many tenants, additional locked doors/entries);
- Review of Easements for sewer/utilities, lot mergers

3. Traffic (approximately 10 hours a month)

- Interpretations on the California Vehicle Code requirements (OV/RV Ordinance, general posting throughout City)
- Legal opinions on traffic resolutions, ordinances, or regulations we may develop (Downtown Parking Management Plan, OV/RV, meter rate changes)
- Liability implications to the City for traffic designs or controls we may develop (bike route on Valley/Ardmore, traffic pilot programs)
- Traffic accident claims against the City (Wong vs. City MB, Michelle Serpico)
- Coastal Commission appeals (Downtown Parking Management Plan)
- Encroachment Permit Appeals (Birkenfeld/Ziskin)
- Grant applications (Safe Route to School, HSIP)
- Contract review (Downtown/North End Valet Program, Beach Cities Transit Line 109, Traffic Engineer contract)

4. Code Enforcement (approximately 10 hours a month)

We are always looking for interpretations or advice from the City Attorney regarding legal issues as pertaining to code enforcement.

- Interpretations of the encroachment standards
- Interpretations of Sign code
- Interpretations of illegal units
- Substandard housing
- Abandoned vehicles on private property
- Fences creating a safety hazard
- Interpretation of the California Penal Code and the California Vehicle Code
- Conduct office conferences when needed

HUMAN RESOURCES

Liability

This is the area in which the CA assisted HR the most.

- Wendy (Legal Secretary) works with Human Resources (HR) Risk Manager to process the city's liability claims. CA's office maintains all the City's liability claim paperwork.
- The City Attorney (CA) works with HR (Risk Manager) and Third Party Administrator (TPA) regarding settlement and litigation of liability claims. The CA interfaces with the various liability attorneys the City utilizes on these claims.
- CA handles claims that were not handled by the TPA and subsequent litigation. Examples include *Save The Plastic Bag Coalition v. City of Manhattan Beach*, *Jamgotchian v. the City of Manhattan Beach*, et al. (Jammer IV).
- CA works with the Dispute Resolution Service/HR to resolve potential claims before he would have to get Joan Jenkins (prosecutor) involved.
- CA advises Risk Manager on public right away concerns/insurance requirements when residents want to build on the right of way.
- CA reviews various city contracts/permits and evaluates necessary insurance requirements pertaining to the contract. CA advises on any requested deviation regarding insurance requirements.
- CA interfaces with TPA/HR and mediator (when appropriate) to mediate liability claims.
- CA writes quarterly report update to City Council regarding pending cases and their status.

Employee/Labor Relations

- As appropriate the CA works with HR regarding legal employee/labor relations issues such as employee separation (settlement agreement), contract interpretation, discipline. However, on significant cases HR and the affected Department work with a labor lawyer. Also, the CA does not participate in employee appeals such as to the Civil Service Commission or Arbitration and those are handled by an external labor lawyer. HR/Department keep the CA informed about the cases as appropriate.
- CA sits at negotiations table. This has only happened during recent negotiations as in prior negotiations CA not at table. City contracts with Liebert, Cassidy, Whitmore (Peter Brown) to provide legal negotiations advice.

Worker's Compensation

- CA is not involved in Worker's Compensation (WC) claims or litigation. However, HR keeps the CA informed on significant WC cases such as the Vasquez claim and the Goodrich claim. The WC attorneys who handle the litigation of the claims are employed by the TPA on the City's behalf.

FINANCE:

- Contract language development, review and approval
- Proposition 218 & 62 revenue issues, including user fees, ratepayer protest processes, etc.
- Compliance with various statutes such as Landscape and Lighting Act, Business Improvement District laws, etc.
- Revenue and collections laws
- Business License issues such as recent permitting of food trucks

There are many other things that come up throughout the year that we seek guidance on.

My biggest concern with a contracted attorney is office hours and availability. With an in-house attorney, we had immediate access to resolve an issue, which would facilitate progress. We need to ensure that we have similar responsiveness whether the service is in-house or contract.

By way of dollars:

- The City Attorney's total program budget for FY 11-12 is \$509,933. Of that, the Attorney's salary and benefits total \$280,900. The legal secretary salary and benefits total \$107,500. The rest is support through contract services, reference books, supplies, etc. Within the contract services line item, \$65,000 is for the contract City Prosecutor, and \$10,000 for other outside legal expenses. \$25,000 is allocated for building maintenance and operations as well as IT support. Those costs will not go away if the attorney is contracted out.
- Legal services within other departmental budgets totaled \$26,200 in FY 2009-2010. For the current fiscal year we will most likely spend \$40,000 (includes budgeted labor negotiations). It is important to note that HR utilizes Workers Compensation and Liability attorneys through AdminSure that is not reflected in our budget.
- The totals do not include any of the extraordinary legal expenses this year for City Manager, City Attorney, etc. issues.

PARKS & RECREATION:

Parks and Recreation uses City attorney services for:

1. Contracts/Agreements for:

- Special events such as the Manhattan Beach Open Volleyball Tournament, Pumpkin Races, and proposed City/Community events.
- Use of privately owned facilities for recreation classes/events
- Outside agencies using City facilities (e.g. botanical garden, boy/girl scouts)
- 175 class instructors
- Joint Powers Agreement (school district)
- Artists/Exhibitions
- Sports Leagues
- L.A. County (Beaches and Harbors; Open Space District, etc.)

PARKS & RECREATION: (continued)

2. Liability/Claims

- Releases/waivers/indemnification related to transportation classes, capital improvement projects, contractors.

3. Miscellaneous

- Requests for Proposals
- Grants
- Use of Public Arts Trust Funds/Interpretation
- Commissions – Brown Act questions/concerns/interpretation
- Marriott grounds lease
- Free speech questions that arise regarding using City facilities/parks right of ways

PUBLIC WORKS:

- Approval of consultant contracts and construction contracts as-to-form.
- Review of bids to determinate responsible bidders and responsive bids.
- Advice regarding contractor claims during public works contracts.
- Support during legal actions filed by or against the City relative to public works construction.
- Revisions to standard contract documents as needed.
- Interpretation of legislation affecting Public Works, such as Municipal codes.
- Creation/review of Resolutions, Ordinances and MOU's
- Written response to vendors/residents concerning violation of contracts or Codes
- Review of NPDES permit conditions with regional partners

POLICE DEPARTMENT:

- Approve various contracts, MOUs, JPAs, and other legal documents; usually around agreements that we need to sign.
- It appeared to me that Bob Wadden's expertise was primarily in land use, liability, contracts and Brown Act issues.
- Although Bob gave advice now and then on personnel issues and criminal law, I was often uncomfortable with his interpretation and sought advice from one of the legal counsels that help LA County Chiefs and Cal-Chiefs.
- It would be nice to have a CA experienced in criminal law and personnel issues (this is our greatest need), but it has always been my understanding that the City Attorney is primarily the Council's legal counsel....not City employees...thus, it is very important for them to be well versed in land use, liability and Brown Act issues.

POLICE DEPARTMENT: (continued)

- Most Police Departments turn to firms like Liebert-Cassidy-Whitmore for labor issues and a variety of others for liability issues (David Lawrence and Associates; Manning, Marder and Ramirez come to mind as good ones).
- We used to have a \$30K line item for such issues, but didn't use it much, and hence, it has been reduced all the way down to only \$5K.
- In short, as long as we can continue to call the firms I mentioned on an "as needed" basis, and have the budgeted funds to pay for it, a part-time legal counsel for the City may very well work. If we hire a large firm with expertise in all the fields I mentioned, that would be great.

FIRE DEPARTMENT:

- Grant documents
- Vendor agreements and contracts
- Labor/management issues
- Representation when staff are required to give a deposition
- Emergency vehicle operations and accidents
- Risk management for fire and EMS operations
- Public records requests
- Advice on release of medical records and HIPAA matters
- Automatic and mutual aid agreements
- Claims for fire and EMS activities
- Other contracts and agreements

Probably the most pressing issue in our future is AB 210 and the efforts of the State and County to control emergency ambulance transportation in our City.