

**REPORT TO THE CITY COUNCIL**

Council Meeting of June 12, 2012

Agenda Section: Consent

SUBJECT: **Consideration of Item Authorizing Mayor to Execute New Contract With Cota Cole, LLP For City Attorney Services**

Prepared By: Thomas E. Ebersole, City Attorney

Approved By: Mark Lewis, City Administrator

RECOMMENDATION:

Authorize Mayor to execute new contract with Cota Cole, LLP for City Attorney Services.

HISTORY / BACKGROUND:

The City currently is under contract with Cota Cole LLP for the provision of City Attorney Services. Under the current contract with Cota Cole, the City pays Cota Cole a monthly retainer of \$8,333.00 for all non-litigation services under 56 hours a month, plus \$150.00 an hour for additional services. To accommodate the 2012 Budget, Cota Cole has agreed to amend the contract to eliminate the provision calling for additional fees for services above 56 hours.

FINANCIAL IMPACT:

The proposed contract retains the retainer amount to be paid by the City, but eliminates the charges for additional hours for regular city attorney services. It also retains the previous litigation rates for attorney services outside of the standard retainer amount.

ALTERNATIVES:

The City Council has the following alternatives to consider (The Alternative recommended by staff is set forth above):

1. Authorize the Mayor to execute the attached proposed amended agreement.
2. Provide alternate direction to staff.

ATTACHMENTS:

The proposed contract with Cota Cole LLP.

SPECIAL INSTRUCTIONS:

None.

**CITY OF CHOWCHILLA
CITY ATTORNEY SERVICES AGREEMENT**

This Agreement is effective this 1st day of July 2011, by and between the City of Chowchilla ("City"), and the law firm of Cota Cole LLP as City Attorney ("Attorney").

RECITALS

1. City desires to engage Attorney as City Attorney of the City of Chowchilla, pursuant to the requirements and the authority set forth in applicable state law, including but not limited to, Government Code section 41800 *et seq.*, and City of Chowchilla Municipal Code.
2. The City and Attorney desire to set forth in this Agreement the terms, conditions, and benefits of such engagement.
3. Attorney desires to accept the engagement as City Attorney as set forth herein.
4. This Agreement is subject to the Cota Cole LLP Billing Policies attached hereto as Exhibit 1 and incorporated herein. The Billing Policies are applicable and in effect unless otherwise changed by the terms of this Agreement.

NOW, THEREFORE, in consideration of the mutual covenants herein contained, the parties agree as follows:

SECTION 1. DUTIES AND FIRM STATUS

City hereby retains Attorney as City Attorney to perform such functions and duties and to provide legal advice and perform legal services for the City consistent with the role of a City Attorney and as specified in the California Government Code and in the City of Chowchilla Municipal Code and as the City Council shall from time to time assign. Thomas E. Ebersole shall serve as the City Attorney. Other members of the Attorney's firm may be called upon to provide legal services to the City under the supervision and direction of City Attorney, as necessary.

SECTION 2. COMPENSATION

A. Fixed Monthly Fee

City shall pay to Attorney a fixed monthly fee of **Eight Thousand, Three Hundred Thirty Three Dollars (\$8,333.00)** for up to fifty six hours of all non-litigation legal services performed by Attorney. City and Attorney agree no charge will be billed by Attorney for travel time to the City or other locations within 50 miles of the Madera office of the Attorney.

The scope of those services includes attendance at two regular monthly City Council meetings, one monthly Planning Commission meeting, staff meetings as required, occasional special meetings of the City Council, and all related transactional and advisory legal services. This fixed fee is subject to review and adjustment by mutual agreement, based on the amount of legal services needed by the City and performed by Attorney in the future. Any services provided

in excess of the fifty six hours a month, not including litigation matters, shall be paid at the rate of \$150.00 an hour.

B. Litigation Matters

All legal services performed by Attorney for City in **litigation matters** are not included in the fixed monthly fee and shall be billed separately at the rate of **\$190.00 per hour** for Lead/Trial Attorney and **\$170.00 per hour** for other attorneys, plus costs. Paralegal services shall be billed at the rate of **\$110.00 per hour**. Litigation matters are defined for these purposes as any court action or any adjudicatory proceeding before an administrative agency, hearing officer, mediator, or arbitrator. Attorney will provide a detailed hourly bill for all such services on a monthly basis, when litigation legal services are being performed by Attorney.

Billable time includes reviewing materials, drafting letters and pleadings, research, telephone calls, consultations, depositions, appearances in court (including waiting for the case to be called), and any other time required to represent the City in each matter. Additional billing policies are set forth in Exhibit 1 to this Agreement.

Statements are generated monthly and are due and payable within 30 days of the statement date; any amounts not paid within 30 days of the statement date accrue interest at the current legal rate per annum from the statement date until paid. Attorney shall have the right to discontinue rendering services to the City for nonpayment of fees, which will be considered a breach of this Agreement by the City.

C. Confidentiality and Absence of Conflicts

An attorney-client relationship requires mutual trust between the client and the attorney. It is understood that communications exclusively between counsel and the client are confidential and protected by the attorney-client privilege.

To also assure mutuality of trust, Attorney maintains a conflict of interest index. The California Rules of Professional Conduct defines whether a past or present relationship with any party prevents Attorney from representing City. Similarly, City will be included in Attorney's list of clients to ensure it complies with the Rules of Professional Conduct.

Attorney warrants that no conflict exists with the firm's current representation of other public entities and private clients. Based on that check, Attorney has determined that it can provide legal services as City Attorney for the City of Chowchilla.

Attorney did disclose to the City that it provides special counsel services to the County of Madera, usually in the areas of personnel and related litigation. Although unlikely, the possibility exists that a conflict could arise. In the event that such a situation arises during any representation by the firm, Attorney would advise the City Council and City Administrator, and would either (1) avoid representation of both the City and County or, (2) following full disclosure, would obtain written consent from the City and County to proceed. By entering into

this contract the City acknowledges the disclosure of this potential conflict and consents to continued representation under the terms set forth herein.

SECTION 3. TERMINATION AND SEVERANCE

A. In the event City terminates this Agreement and discharges Attorney from its engagement hereunder, for no reason or for any reason, City shall pay to Attorney the sum due for services provided to the date of termination.

B. City may discharge Attorney at any time subject to a ten-day written notice and the provisions of Section 3A above. If at the time of withdrawal or discharge, Attorney is representing City in any proceeding, then City will sign a Substitution of Attorney form immediately upon receipt of such a form from Attorney.

C. Notwithstanding the above, Attorney may withdraw from representation at any time as permitted under the Rules of Professional Conduct of the State Bar of California with 30-day written notice to City.

SECTION 4. OTHER TERMS AND CONDITIONS OF AGREEMENT

A. The City Council, with mutual consent of the City Attorney, may amend or add any such other terms and conditions of engagement as it may determine from time to time, relating to the performance of Attorney.

B. Notwithstanding the withdrawal or discharge of Attorney, City will remain obligated to pay at the agreed rate for all services already provided and to reimburse Attorney for all costs advanced before the withdrawal or discharge related to work performed in litigation matters under Section 2B above.

C. City agrees that Attorney shall have a lien on any and all sums recovered or received by Attorney on City's behalf, for payment of any fees owing and/or any unreimbursed costs advanced for City.

D. City and Attorney agree that in the event of a dispute between the parties concerning this Agreement, the prevailing party in arbitration or other legal proceeding will be entitled to recovery of reasonable attorney's fees and costs from the other party.

E. City and Attorney also agree that the City Administrator is the responsible person for providing daily contact and direction to Attorney on behalf of City. Attorney agrees to coordinate the services to be provided with City to the extent required by the City Council and the City Administrator.

SECTION 5. PERFORMANCE EVALUATION

A. The City Council shall review and evaluate the performance of Attorney at least once annually commencing one year from the effective date of this Agreement. Said review and evaluation shall be in accordance with specific criteria developed jointly by City and Attorney. Said criteria may be added to or deleted from as the Council may from time to time determine, in consultation with Attorney. Further, City shall provide Attorney with a summary written statement of the findings of the Council and provide an adequate opportunity for Attorney to discuss its evaluation with the Council.

B. Annually, commencing on the effective date of this Agreement, the Council and Attorney shall define such goals and performance objectives that they jointly determine necessary for the effective continued relationship between City and Attorney. Said goals and objectives shall be reduced to writing.

C. In effecting the provisions of this Section, the City Council and Attorney mutually agree to abide by the provisions of applicable laws.

SECTION 6. NOTICES

Notices pursuant to this Agreement shall be given by deposit in the United States Postal Service, postage prepaid, as follows:

CITY: Mayor, City of Chowchilla
130 S. Second Street
Civic Center Plaza
Chowchilla, California 93610

ATTORNEY: Cota Cole LLP
Attention: Dennis Cota
2261 Lava Ridge Court
Roseville, California 95661

Alternatively, notices required pursuant to this Agreement may be personally served in the same manner as applicable to civil judicial process. Notice shall be deemed given as of the date of personal service or as of the date of deposit of such written notice in the United States Postal Service.

SECTION 7. DOMICILE OF ATTORNEY

City understands and acknowledges that Attorney may purchase, rent, lease, or otherwise obtain a domicile or residence outside the city limits of City. City shall not require Attorney during the term of this Agreement to move his domicile into the city limits of the City. Nor shall

the Attorney's failure to move his domicile into the city limits of the City be grounds for the City to terminate this Agreement for cause or otherwise.

SECTION 8. INSURANCE

Cota Cole LLP carries errors and omissions insurance that provides aggregate coverage in excess of \$1,000,000.00.

SECTION 9. GENERAL PROVISIONS

A. The text herein shall constitute the entire agreement between the parties. There are no oral agreements or understandings or any other written agreements which directly or indirectly affect the terms and conditions of this Agreement.

B. If any provision, or any portion thereof, contained in this Agreement is held unconstitutional, invalid, or unenforceable, the remainder of this Agreement, or portion thereof, shall be deemed severable, shall not be affected, and shall remain in full force and effect.

C. No addition, modification, amendment, or deletion to this Agreement shall be valid unless it is in writing and executed by the parties to this Agreement.

D. This Agreement shall be binding upon and inure to the benefit of the heirs at law and executors of Attorney.

E. City and Attorney agree that the construction and interpretation of this Agreement and the rights and duties of City and Attorney hereunder shall be governed by the laws of the State of California.

F. Attorney shall act as an independent contractor in providing the services described in this Agreement. Attorney shall be solely responsible for the supervision, payment and protection of its agents, employees, experts or consultants, if any, and furnish the services in Attorney's own manner and method. In no respect shall Attorney, its agents, employees, experts or consultants, if any, be considered employees of City.

G. Attorney agrees to scrupulously avoid performing services for any party or entering into any contractual or other relationship with any party which might create a conflict with the rendering of services under this Agreement. Attorney shall immediately inform City of any conflict of interest or potential conflict of interest which may arise during the term of this Agreement by virtue of any past, present, or prospective act or omission of Attorney.

H. Attorney agrees to comply with all federal, state and local laws, rules, and regulations, now or hereafter in force, pertaining to the services performed pursuant to this Agreement.

I. Venue for any proceeding under this Agreement shall be in the County of Madera.

J. Attorney agrees to comply with all applicable fair employment and equal opportunity practices and not to discriminate against any applicants or employees of Attorney because of their membership in a protected class.

IN WITNESS WHEREOF, the City of Chowchilla has caused this Agreement to be signed and executed on its behalf by its Mayor and duly attested by its City Clerk, and Attorney has signed and executed this Agreement the day and year first above written.

CITY OF CHOWCHILLA

By: _____
Janan Hebert, Mayor

COTA COLE LLP

By: _____
Dennis M. Cota, Managing Partner

By: _____
Thomas E. Ebersole, City Attorney

ATTEST:

Nanci Lima, MMC
Chief Deputy City Clerk

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