



Midpeninsula Regional
Open Space District

R-14-43
Meeting 14-07
February 26, 2014

AGENDA ITEM 4

AGENDA ITEM

Authorization to Expend \$25,000 in Additional Monies for Legal Services by the Law Firm Shute, Mihaly & Weinberger LLP on the Preparation of an Amicus Brief in Support of the Appellant in the No Toxic Air Appeal in the Sixth District Court of Appeal and the Application that Accompanies it, for a Total Authorized Amount of \$54,000

GENERAL MANAGER'S RECOMMENDATION

A handwritten signature in black ink, appearing to be "J. G. ...", written over the printed text of the recommendation header.

Increase the authorization for the General Counsel for litigation services by Shute, Mihaly & Weinberger LLP, regarding the pending appeal of the trial court's vested rights decision in *No Toxic Air, Inc. vs. Santa Clara County, et al.* ("No Toxic Air"), as follows:

1. Increase the total amount authorized by \$25,000 from the previously approved amount of \$32,000, to a total not to exceed amount of \$57,000.

SUMMARY

The District has a contract with Shute, Mihaly & Weinberger LLP to prepare an amicus curiae brief. The original estimate for preparation of the amicus curiae brief and the application was estimated between \$22,000 and \$32,000, excluding the addition of any other amici. If other parties elected to join in the amicus brief, Shute, Mihaly indicated that it would need to coordinate with the other parties and, as a result, the cost of the brief and application would increase. The City of Los Altos, Town of Los Altos Hills, Town of Portola Valley, City of Sunnyvale, Committee for Green Foothills, and Breathe California, all decided to join in the amicus, which increased the costs as anticipated. As a result, an additional \$25,000 is required for a total not to exceed amount of \$57,000, with a related budget adjustment in the amount of \$25,000. A portion, but not all, of these additional costs will be offset by contributions from some of the participating amici.

DISCUSSION

The District entered into a Legal Retainer Agreement with Shute, Mihaly & Weinberger LLP ("litigation counsel") on September 10, 2013, to prepare an amicus curiae brief in support of the appellant in the case *No Toxic Air, Inc. vs. Santa Clara County, et al.* (commonly known as the "vested rights case").

This is the case challenging the County determination granting broad and extensive vested rights to the Lehigh Quarry. If left undisturbed, the County's vested rights determination leaves the County without the power to require a conditional use permit for many areas of the mining

operation. Without that power, the County would not have the authority to require CEQA analysis of mine impacts, nor would consideration of mitigation or public input be available for the affected mine areas, including areas of particular concern to the District. The plaintiffs in the vested rights case believed that the determinations by the County were not supported by the record or the law. The District was not a party to that suit, but the outcome of the suit could have a significant effect on whether the County had the authority to regulate certain aspects of the mining operation that have a direct impact on District land and users and staff at Rancho San Antonio.

As a result of these concerns, the District entered into the above-noted representation agreement with litigation counsel, to prepare an amicus brief in support of plaintiffs in their appeal from an adverse lower court ruling. In approving this action, the Board of Directors also directed staff to check with other affected cities in the area to see if there was interest in joining in the amicus.

The original estimate for preparation of the amicus curiae brief and the application was between \$22,000 and \$32,000, excluding any addition of other amici. If other parties join in the amicus brief, litigation counsel indicated that they would need to coordinate with the other parties and those costs would increase. The City of Los Altos, Town of Los Altos Hills, Town of Portola Valley, City of Sunnyvale, Committee for Green Foothills, and Breathe California all decided to join in the amicus, which increased the costs as anticipated. As a result, an additional \$25,000 is required for a total not to exceed amount of \$57,000.

Several, but not all, of the fellow amicus parties have agreed to share in these costs in varying amounts. Once the final bill is received on this matter, the District will request reimbursement from these parties as agreed. We anticipate the cumulative amount resulting from these reimbursements to be approximately \$17,300.

No ruling on the case is expected until late summer or fall of this year.

FISCAL IMPACT

These additional costs will be absorbed through expenditure savings in the District's FY2013-14 Services and Supplies budget. Reimbursements of approximately \$17,000 are expected from the agencies who signed the amicus brief.

BOARD COMMITTEE REVIEW

No Board Committee review is required for this portion of the Project.

PUBLIC NOTICE

Public notice of this Agenda Item was provided per the Brown Act. No additional notice is required.

CEQA COMPLIANCE

The proposed action is not a project under CEQA and no environmental review is required.

NEXT STEPS

Upon Board authorization, the General Manager and General Counsel will amend the contract with Shute, Mihaly & Weinberger LLP to reflect the additional \$25,000 in fees and costs.

Responsible Department Head:
Kirk Lenington, Natural Resources Manager

Prepared by:
Sheryl Schaffner, General Counsel