3A
4/18/13

City of
FRESNO

Lee Brand
Councilmember
District 6

RESOLUTION ESTABLISHING "LITIGATION MANAGEMENT ACT"

April 10, 2013

To: Fresno City Council Members, Mayor, City Manager and City Attorney
From: Councilmember Lee Brand

Agenda Item
Recommend that the Fresno City Council adopt Resolution no. _____ better known as the "Litigation Management Act" to develop policies and best practices that ensure efficient management and handling of litigation cases with the intent of reducing litigation expenses for the City.

Background
In 2010, the Council approved the Council Management and Transparency Policy for the City Attorney's office authored by former Councilmember Borgeas. It was amended in 2012. This Act is intended to supplement the prior resolutions and incorporate into the Litigation Management Act.

The primary focus of this Act is the development of litigation strategies and establishment of cost controls. Some of the salient policies included in the Act include the following:

- This Act will bifurcate plaintiff litigation strategy and risk management strategy. There is a fundamental difference between the two. When you are sued in a risk management case you have to defend yourself and spend money in legal defense costs. When you elect to become a plaintiff by suing someone else you are incurring expenses by your decision to sue.

- Plaintiff strategy is separated into three classifications: contingency fee cases, business related cases (i.e. breach of contract), and land use/CEQA cases. The policies outline a decision-making tree to establish litigation guidelines.

- Risk management strategy is separated into three categories based on the anticipated damage exposure.

City Hall • 2600 Fresno Street • Fresno, California 93721-3600 • (559) 621-8000 • FAX (559) 621-7896
www.fresno.gov • lee.brand@fresno.gov

- This Act establishes a Litigation Exposure Reduction Ad Hoc Committee composed of the City Manager, City Attorney, outside counsel (if needed), the Risk Manager and two Council members. This committee will screen pending litigation expected to exceed $250,000 in costs.

- This Act will enable a local law firm preference. Any time the City Attorney initiates an RFP/Q for outside legal services, local area firms shall receive a 5% preference

- A Litigation Cost Control Policy will be included to provide tighter cost control measures including establishing detailed case budgets, better communication with the Council on case development, reviewing budgets that have exceeded 80%, and working with the Litigation Exposure committee.

- There will be a post litigation review and assessment for any case that exceeds $500,000 in total litigation/award costs to the City

Recommendation

It is recommended that the Council pass this Act to implement needed cost control policies to reduce City litigation costs.

RESOLUTION NO. _____

A RESOLUTION OF THE COUNCIL OF THE CITY OF FRESNO, CALIFORNIA, ESTABLISHING THE LITIGATION MANAGEMENT ACT FOR THE CITY ATTORNEY'S OFFICE.

WHEREAS, pursuant to Charter Section 803, the City Council has control of all legal business and proceedings of the City; and

WHEREAS, the City Council adopted the Council Management and Transparency Policy for the City Attorney's Office in Resolution No. 2011-115, as amended in Resolution No. 2012-237; and

WHEREAS, the City Council desires to establish the Litigation Management Act ("Act") to supplement the Council Management and Transparency Policy, by developing policies and best practices to efficiently manage litigation cases and expenses; and

WHEREAS, the City Council desires to establish a Litigation Exposure Reduction Ad Hoc Committee, to oversee the case budget, status, and strategies on pending litigation expected to exceed $250,000 in fees and costs, and on other high profile matters; and

WHEREAS, the Act includes a Litigation Cost Control Policy for managing cases, controlling costs, and maintaining close communications with the City Attorney, City Council, and the Litigation Exposure Reduction Ad Hoc committee; and

WHEREAS, the Act will provide a 5% preference to local law firms in any Requests for Proposals or Request for Qualifications issued by the City Attorney for outside legal services.

NOW, THEREFORE, BE IT RESOLVED by the Council of the City of Fresno as follows:

SECTION 1. The Litigation Management Act, which is attached as Exhibit "A," is hereby adopted.

SECTION 2. The Litigation Exposure Reduction Ad Hoc Committee is hereby established, which shall comply with all applicable laws, including the Ralph M. Brown Act, if required.

SECTION 3. This resolution shall become effective and in full force upon its final passage.

* * * * * * * * * * * * * *

STATE OF CALIFORNIA)
COUNTY OF FRESNO) ss.
CITY OF FRESNO)

I, YVONNE SPENCE, City Clerk of the City of Fresno, certify that the foregoing resolution was adopted by the Council of the City of Fresno, at a regular meeting held on the day of _____, 2013.

AYES :
NOES :
ABSENT :
ABSTAIN :

Mayor Approval: _____, 2013
Mayor Approval/No Return: _____, 2013
Mayor Veto: _____, 2013
Council Override Vote: _____, 2013

YVONNE SPENCE, CMC
City Clerk

BY:_____
Deputy

APPROVED AS TO FORM:
CITY ATTORNEY'S OFFICE

BY: Tei Yukimoto
Tei Yukimoto, Supervising Sr. Deputy Attorney
Dated: 4/11/13

TY:elb[61538elb/ty/RESO] 4/9/13

CITY OF FRESNO

LITIGATION MANAGEMENT ACT

April 8, 2013

The following policies are enacted to develop and refine City litigation strategy that will provide better case management and better control of City litigation costs.

This page intentionally left blank.

TABLE OF CONTENTS

		Page
FOREWORD		3
ARTICLE I	DEFINITIONS	4
ARTICLE II	PURPOSE OF ACT	5
ARTICLE III	RELATIONSHIP TO RESOLUTION NO. 2011-115, AS AMENDED WITH RESOLUTION 2012-237	6
ARTICLE IV	CITY RISK MANAGEMENT LITIGATION POLICY	7
ARTICLE V	THE CITY AS A PLAINTIFF: STRATEGY	7
	1. Contingent Fee Cases	7
	2. Business Related (Breach of Contract or other business interest affecting City)	8
	3. Land Use Disputes and/or CEQA	8
ARTICLE VI	RISK MANAGEMENT DEFENDANT LITIGATION STRATEGY	10
ARTICLE VII	LOCAL PREFERENCE FOR CONTRACTING PRIVATE LAW FIRMS	11
ARTICLE VIII	LITIGATION RISK ANALYSIS MODEL	11
ARTICLE IX	LITIGATION EXPOSURE REDUCTION AD HOC COMMITTEE	11
ARTICLE X	LITIGATION COST CONTROL POLICY	12
ARTICLE XI	POST LITIGATION REVIEW AND ASSESSMENT	13
ARTICLE XII	TRANSPARENCY	13
ARTICLE XIII	ONE-YEAR REVIEW	14
ARTICLE XIV	EFFECTIVE DATE	14

This page intentionally left blank.

FOREWORD

I want to extend my gratitude for the previous work done by my former Council colleague and friend Andreas Borgeas. Mr. Borgeas authored the Council Management and Transparency Policy for the City Attorney's office in 2011 and amended in 2012. This Act supplements his policy by expanding and enhancing the previous resolutions with a primary emphasis on development of legal strategies and controlling litigation costs.

Lee Brand, Fresno City Councilmember District 6

This page intentionally left blank.

ARTICLE I
DEFINITIONS

California Environmental Assessment Act (CEQA)
The California Environmental Assessment Act is a state statute that requires state and local agencies to identify the significant environmental impacts of their actions and to avoid or mitigate those impacts, if feasible.

City
"City" means the City of Fresno, a municipal corporation.

E-Discovery Costs
Electronic discovery refers to any process in which electronic data is sought, located, secured, and searched with the intent of using it as evidence in a civil or criminal case.

Enterprise Funds
A fund established to account for operations that are financed and operated in a manner similar to private business, where the intent of the government body is that the cost of providing goods or services to the general public on a continuing basis be financed or recovered primarily through user charges. These funds are restricted.

Fresno City Charter Section 800
This Charter Section establishes a City Attorney and City Clerk that shall be appointed by and serve at the pleasure of the Council, but may be removed only by a majority vote of the entire Council.

Fresno City Charter Section 803
This Charter Section sets forth the qualifications to become City Attorney and the powers and duties of the City Attorney.

General Funds
Revenues of the City that are not otherwise restricted as to their use, including monies from local property and sales tax, and other revenue sources. The General Fund pays for core City services including police, fire, public works and parks.

Legal Expenses
Legal expenses include charges for attorney fees, court costs, case administration costs (travel, photocopies, etc.), expert witness fees, and any other expenses properly attributable to a lawsuit.

Local Business Preference
For purposes of this Act, a local law firm shall mean a law firm with the fixed primary or branch office with a 25-mile radius of Fresno City Hall, located at 2600

Fresno Street in the City of Fresno and which has fixed primary or branch offices was established prior to the City inviting bids or proposal for professional law services.

Request for Proposal/Qualifications (RFP/Q)
A Request for Proposal/Qualifications is a solicitation by the City to provide a competitive process for selecting private law firms to work on certain legal cases for the City. In addition to providing a bid for services pursuant to the guidelines of the RFP, each responding law firm will include their qualifications.

Risk Management
This is a City department charged with analyzing the City's insurance and other risk exposure issues and, working with the City Attorney's office, develop strategies and plans to resolve risk management cases.

ARTICLE II
PURPOSE OF ACT

The purpose of this Act is to develop policies and best practices that ensure efficient management and handling of litigation cases with the intent of reducing litigation expenses to the City.

Objectives of Act:

1. To outline the management of and strategies for cases: (a) where the City is a plaintiff; and (b) where the City is a defendant;

2. To establish fiscal controls that will assist in the management of the expense of litigation for the City;

3. To establish criteria to be utilized in the evaluation of the potential risk presented by the cases involving the City; and

4. To develop a detailed methodology that will measure, with a high degree of accuracy, the probability of success in certain types of litigation actions involving the City.

5. To implement the objectives with the intent to reduce defense costs and insurance costs.

Accomplishment of the above stated objectives will enhance the comprehensive approach to case management; it will define policy guidelines for pursuing cost-effective plaintiff cases; it will assist with establishing criteria to improve the probability of success in defending liability cases; and it will outline criteria to ensure favorable mitigation and cost recoveries in City initiated land use lawsuits.

ARTICLE III
RELATIONSHIP TO RESOLUTION NO. 2011-115, AS AMENDED WITH RESOLUTION 2012-237

The Council Management and Transparency Policy ("Policy") for the City Attorney's Office was adopted by the Council on June 9, 2011. It was subsequently amended on December 20, 2012. This Act is intended to supplement the prior Resolutions (No. 2011-115 and No. 2012-237) and incorporate into this Litigation Management Act, the provisions contained therein. The salient points include:

1. The City Attorney will provide a written report to Council on a quarterly basis that includes those legal matters that are reasonably estimated to require more than 100 hours of attorney time; the quarterly report shall list first those matters deemed by the City Attorney to be "high value" or "high exposure" in terms of potential monetary risk, exposure to an award of attorney's fees and costs, and/or are high profile, or involve significant political/policy considerations;

2. The City Attorney will also provide a written quarterly report to Council on all legal matters that are reasonably estimated to exceed a budgeted sum of $150,000 for the City's attorney's fees and costs; the City Attorney shall report to Council when any matter is anticipated to exceed $250,000 in attorney's fees and costs, and will present an estimated budget for the completion of the matter;

3. The City Attorney is charged with the retention of contract counsel, as necessary to represent the City's interest, and will not retain contract counsel whose fees exceed $400 per hour, unless the contract counsel has specialized skills justifying a higher amount; in such a case, the City Attorney shall report the retention of attorneys at the higher hourly rate to Council;

4. The City Attorney's Office will be required to produce the following to Council, which shall be amended to conform to this resolution:

    1. An Annual City Attorney's Office Report.
    2. A Quarterly Service and Litigation Log.
    3 Adhere to the Work Management Policy.

///

///

ARTICLE IV
CITY RISK MANAGEMENT LITIGATION POLICY

The purpose of this Act is to evaluate and prepare a defense strategy for all lawsuits or threatened lawsuits filed against the City, regardless of the potential value of the claim. Similarly, it is the purpose of this Act to establish the policy, the philosophy and the business practices that will effectively prosecute cases where the City has elected to bring suit.

The criteria generally used to evaluate each case and the decision making process in handling each case is discussed in Article V and VI below.

ARTICLE V
THE CITY AS A PLAINTIFF: STRATEGY

The decision making process and litigation strategy for cases where the City is a plaintiff shall be distinct from cases where the City is a defendant. Strategy and decision making policies for plaintiff's cases shall be separated into the following three categories:

1. Contingent Fee Cases

Contingent fee cases are those cases where the City is a plaintiff in a lawsuit and/or a class action lawsuit, and/or the legal fees and costs are recovered only after a settlement is reached or a judgment is awarded. In these cases the City generally does not incur any out-of-pocket expenses until funds are received. Contingent fee cases are covered by a contract, and any financial awards to the City are based upon these contractual provisions.

The criteria to be considered by the City in deciding to participate in a contingent fee case include the following:

1) Is the pursuit of this litigation in the best interests of the City;

2) Is there any adverse exposure to the City by participating in the case;

3) Has a serious and thorough attempt been made to resolve the matter without litigation;

4) Is the probability of collecting damages in this case greater than 50%;

5) What is the estimated time line for reaching a resolution in this case; and

6) If successful, what will be the disposition of the net proceeds from the case assuming the case seeks monetary damages as part of its initial objectives.

2. Business Related (Breach of Contract or other business interest affecting City)

In the course of conducting the City's business, disputes will arise that can adversely affect the interests of the City. The City may elect to file suit to recover damages and/or enforce contractual provisions. These cases may include, but are not limited to, contractual relationships with private or government entities that provide services for the City or the business actions of either private or government entities that may adversely affect the City.

The criteria to be considered by the City in deciding to initiate legal action for business related disputes include the following:

1) Is the pursuit of this litigation in the best interests of the City;

2) Is there adverse exposure to the City by participating in this case;

3) Has a detailed cost-benefit analysis been completed to determine the potential cost of litigation and the potential benefit or award from prevailing in this case;

4) Are General Funds (un-restricted) or Enterprise Funds (restricted) the source of litigation expenses;

5) Has a serious and thorough attempt been made to settle this case without litigation;

6) What is the estimated time line for reaching a resolution in this case:

7) Reevaluation of the case at scheduled times during the pendency of the case to limit the accumulation of excessive fees and costs, as well as to assess whether the objectives of the litigation are being met; and

8) If successful, what will be the disposition of the net proceeds (if applicable) from this case.

3. Land Use Disputes and/or CEQA

Land use cases involve disputes between existing or proposed property developments and the City, wherein the City's interests may be adversely affected without the resolution of the land use and/or environmental issue(s).

Land use cases are separated into two categories: (1) suits against other government agencies; and/or (2) suits against private property owners.

The criteria to be considered by the City in deciding to initiate legal action for land use and/or CEQA cases includes the following:

1) Is this pursuit of litigation in the best interests of the City;

2) Is there adverse exposure to the City by pursuing this case;

3) Have other non-defendant government agencies affected by the proposed litigation been consulted with regarding the reason for the suit and potential consequences;

4) Has a detailed cost-benefit analysis been completed to determine the potential cost of litigation and the potential benefit or award from prevailing in this case;

5) Are General Funds (un-restricted) or Enterprise Funds (restricted) the source of litigation costs;

6) In cases where the defendant is a private party, have there been sufficient discussions and/or meetings with the principals and were all reasonable methods of resolution to settle the case exhausted before proceeding with litigation;

7) In cases where the defendant is a government agency, have there been sufficient discussions and meetings with appropriate government officials and elected officials and/or were all reasonable methods of resolution to settle the case exhausted before proceeding with litigation;

8) What is the estimated time line for reaching a resolution in this case:

9) If successful, what will be the disposition of the net proceeds (if applicable) from this case and what is the fiscal impact on the General Fund.

10) Reevaluation of the case at scheduled times during the pendency of the case to limit the accumulation of excessive fees and costs, as well as to assess whether the objectives of the litigation are being met.

Additional Considerations for Land Use and/or CEQA cases: The above criteria for City initiated lawsuits involving land use and/or CEQA is primarily focused on financial considerations. In some cases, additional considerations may be evaluated, including the impact on the City's General Plan and the overall fiscal condition of the City's General Fund. Further, strategy decisions may determine certain criteria are not applicable.

///

ARTICLE VI
RISK MANAGEMENT DEFENDANT LITIGATION STRATEGY

The most common litigation matters involving the City arise from events or actions covered by the Governmental Tort Claims Act. The City and/or its employees are defendants in these actions. The Risk Management Division of the City receives the initial tort claim (or Claim for Damages) and Risk Management policies and procedures are applied to address these claims. Once the claimant files a lawsuit the defense of the Risk case will be subject to this Act. Risk Management cases include, but are not limited to, employment related claims; labor issues; personal injury claims; wrongful death; Constitutional violations; property damage claims; and some breach of contract claims

Litigated cases will be segregated into three categories: 1) those cases where projected damages are less than $250,000; and 2) those cases where projected damages are greater than $250,000 and less than $1,000,000; and 3) those cases where projected damages exceed $1,000,000.

The criteria for defending risk management related cases should include the following:

1. What is the projected financial exposure in the case, including damages and attorney fees;

2. Should the case be managed in-house or do the issues presented require outside counsel with expertise in a specialty practice?;

3. Can this case be resolved through mediation/settlement conference;

4. On cases where legal expenses are projected to cost in excess of $250,000, the Litigation Exposure Reduction Committee described in Article IX below shall review the case; and

5. On cases where the potential exposure to the City exceeds $1,000,000, the Litigation Exposure Reduction Committee described in Article IX below shall review the case and, depending on the type of case and overall exposure to the City, consult with appropriate outside counsel to thoroughly review the case.

To insure all potential risk management cases are screened as early as possible, it is recommended the City Manager timely notify Council of all potential litigation threats including providing any correspondence or documentation that identifies the potential risk and relay any verbal communications that substantiate a potential risk to the City.

///

ARTICLE VII
LOCAL PREFERENCE FOR CONTRACTING PRIVATE LAW FIRMS

Any time the City Attorney's office initiates a Request for Proposal for Legal Services to law firms with expertise in specialty areas where the City is frequently sued (CEQA, use of force; constitutional claims; civil rights cases; and other unique specialty areas), the City will comply with the Fresno Municipal Code (FMC) Section 4-109 and shall extend a 5% preference for local law firms in cases where such an application is relevant and permissible.

ARTICLE VIII
LITIGATION RISK ANALYSIS MODEL

This policy directs the City Attorney's office to explore available risk management analysis software and/or consultants to be used by the City. This search should be directed at best practices in litigation risk analysis in both the private and public sector. The City Attorney will report their findings, the cost of such a model and recommendations to the Council within 90 days at a regularly scheduled meeting.

ARTICLE IX
LITIGATION EXPOSURE REDUCTION AD HOC COMMITTEE

The purpose of this ad hoc Committee is to engage in an early assessment of Pending litigation where there is a significant exposure to the City, where attorney's fees and costs will exceed $250,000, to discuss potential early resolution of the case, and additionally to occasionally review high profile case budgets, status, and strategy.

The Committee will meet from time to time and will be composed of the City Attorney, outside counsel, or their representative, the City Manager or their representative, the Risk Management Director and two Council members. The two Council members shall be selected by a majority vote of the Council and serve a two-year term.

The ad hoc Committee may meet as needed and discuss high profile litigated cases. The ad hoc committee may review the case budget, status, and strategy. The ad hoc Committee may not give direction to legal counsel or staff, but it may provide recommendations to the City Council, through the City Attorney, by attorney client privileged memorandum or in closed session.

///

///

ARTICLE X
LITIGATION COST CONTROL POLICY

Litigation costs for outside counsel continue to increase each year. Certain cases represent significant financial exposure for the City and legal expenses in big cases can exceed $1,000,000. High profile law firms can charge fees in excess of $500 per hour. It is essential for the City to develop clearly defined cost management policies and practices to reduce the cost of litigation and reduce the City's exposure to lawsuits.

This Article amends Item 2 of the December 20, 2012 Amendment to City Resolution No. 2011-115 (Council Management and Transparency Act for the City Attorney's Office) as follows: legal matters that are reasonably estimated to exceed a budgeted sum of $250,000 for the City Attorney's fees and costs shall require a written budget that must be approved by a majority vote of the Council; and 2) the City Attorney shall report to the Council when any matter is anticipated to exceed $250,000 in attorney's legal expenses.

This Article amends Item 3 of the December 20, 2012 Amendment to City Resolution No. 2011-115 (Council Management and Transparency Policy for the City Attorney's Office) as follows: The City Attorney must present a recommendation to the Council, in a Closed Session, requesting retention of a contract counsel representing the City's interest with fees that exceed $400 per hour. A majority vote of the Council shall be required to hire an outside counsel whose fees exceed $400 per hour, other than for outside counsel providing legal services related to municipal bond issues.

Cost control case management includes the following:

1. The Litigation Exposure Reduction [Ad Hoc] Committee will engage in early assessment of pending litigation where there is a significant exposure to the City, and where attorney's fees and costs will exceed $250,000;

2. The Committee may report their findings and recommendations, including a review of the proposed budget for a case in a Closed Session meeting;

3. As needed, the progress of the case including a report on the costs to date for the case may be presented to Council;

4. The Council may take action on the findings and/or recommendations of the Committee;

5. When a case has exceeded 80% of its approved budget, the case shall be presented to Council in Closed Session to review the budget established for the case;

6. In cases where the City is the plaintiff and the legal costs and fees have exceeded the approved budget, the City Attorney shall provide an assessment of the probability of prevailing in the case, an estimate of the monetary amount of a judgment in favor of the City, and a projection of the City's total legal costs; and

7. Any significant change or turn of events in a high profile/high exposure case including but not limited to written settlement offers, significant change in material facts in the case through discovery, deposition or court room testimony or any other event that materially alters the projected outcome of the case must be reported to the Council in a Closed Session at the next regularly scheduled meeting or a special meeting if circumstances require prompt action by the Council.

ARTICLE XI
POST LITIGATION REVIEW AND ASSESSMENT

At the conclusion of any lawsuit that is high profile and/or the legal fees, court costs and/or where a judgment award exceeds $500,000, there shall be a mandatory post litigation review and assessment conducted by the City Attorney's Office. Participants will include the City Attorney, the staff attorney(s) assigned to the case, outside counsel (s) assigned to the case and the Litigation Exposure Reduction Committee and/or Council body.

The purpose of this review is to discuss policies and procedures that were followed; to recommend appropriate policy or procedural changes that could improve the prosecution or defense of the case; and to recommend policy or procedure changes that could reduce the risk of similar litigation.

A summary of the meeting will be presented to Council in Closed Session or through a tray memo.

ARTICLE XII
TRANSPARENCY

Pursuant to the City Resolution No. 2011-115 (Council Management and Transparency Policy for the City Attorney's Office) litigation issues defined therein shall be included in the City Attorney's annual report.

///

///

ARTICLE XIII
ONE-YEAR REVIEW

One year from the implementation of the provisions of this Act, the City Attorney shall give a presentation to the Council evaluating the effectiveness of this Act and any suggested amendments to improve policies and practices set forth in this Act.

ARTICLE XIV
EFFECTIVE DATE

This resolution shall take effect April 18, 2013.

This page intentionally left blank.