

SHUTE, MIHALY
& WEINBERGER LLP

396 HAYES STREET, SAN FRANCISCO, CA
94102
T: (415) 552-7272 F: (415) 552-5816

HEATHER M. MINNER
Attorney
Minner@smwlaw.com

February 05, 2019

City of Cupertino
Mayor Steven Scharf
Cupertino City Hall
10300 Torre Avenue
Cupertino, CA 95014-3202

Re: Legal Retainer Agreement

Dear Mayor Scharf:

This letter sets forth the terms under which Shute, Mihaly & Weinberger LLP ("Firm") will provide City Attorney legal services to the City of Cupertino ("City"). If the City agrees to the terms of this retainer agreement ("Agreement"), please sign one copy of this letter and return it to me at your earliest convenience.

1. Legal Services to Be Provided

The Firm is retained to serve as City Attorney for the City of Cupertino. The primary City Attorney responsible for representing the City will be Heather M. Minner. Heather will attend and provide advice at City Council meetings. Heather will hold office hours at City Hall, 10300 Torre Avenue, Cupertino two days per week, for approximately seven hours per day. Office hour times will be determined in consultation with the City Manager and are anticipated to include attendance at executive team meetings. Richard Taylor will attend City Council and executive team meetings if Heather is unavailable. Other members of the Firm may provide services to the City as directed by Heather or Richard.

In addition, the Firm will perform all services generally understood within the field of municipal law to fall within the category of "general counsel" work as defined under Government Code sections 41801, 41802, 41803 and 41803.5, and shall include, but not necessarily be limited to, the following:

- (a) Representation of and advice to the Council, committees and commissions, and all City officials in legal matters of municipal government.
- (b) Attendance at all City Council meetings, unless excused by the Mayor or Council (attendance at special meetings or study sessions and closed sessions).
- (c) Available to attend up to twelve meetings per year of commissions, public forums, and training sessions such as commission trainings on the Brown Act.
- (d) Consultation with the City Manager, City staff, or authorized representatives to provide legal advice on proposed policies and activities.
- (e) Implement directed communications by City Manager in response to members of the public and press/media.
- (f) Preparation or review of all proposed ordinances, resolutions, contracts, and other documents pertaining to City business.
- (g) Code enforcement, including filing complaints or administrative proceedings for litigation.
- (h) Available to assist with personnel issues (excluding collective bargaining) in coordination with employment law counsel and with general liability claims and litigation in coordination with JPA legal counsel.
- (i) Keep the Council and City Manager informed of the status of litigation involving the City. Attorney shall submit a quarterly status report briefly outlining the status of each litigation, including code enforcement litigation. This status report shall be submitted between the first and fifteenth of the following months (April, July, October and January). Attorney shall also advise the City Council and City Manager of significant developments in litigation involving the City as they occur.
- (j) Provide written legal opinions when requested by the City Manager or a majority of the City Council.
- (k) Assist with management of outside legal counsel and provide advice on available options for City Council or City Manager consideration.
- (l) Manage all attorney correspondence, and, in coordination with City staff, Public Records Act responses.

(m) Assist City Council and appropriate staff in continuing to identify feasibility options toward implementing and achieving the goals, policies and objectives of the City Council.

(n) Consultation with individual City Council members on questions regarding City legal matters as it relates to them as Council members and City business.

(o) Litigation services to include court and administrative proceedings of every type or nature (except those handled by outside counsel) and includes City conferences, file and report reviews, interviews, legal research, site visits and discussions with witnesses and experts prior to formal proceedings.

(p) Provide defense litigation for all actions and other proceedings brought against City, its elected officials, appointed officers and agents, except for litigation related to matters on which the City is represented by outside legal counsel, as identified below. In cases of unusual significance or complexity, retention of additional outside counsel can be approved by City Council.

(q) Prosecution for violations of the Municipal Code and enforcement litigation.

(r) Special projects assigned by City Council.

(s) Real estate transactions.

The Firm represents that it possesses all necessary training, licenses and permits to perform the Services, and that its performance of the services will conform to the standard of practice of a professional that specializes in performing professional services of a like nature and complexity. The Firm further agrees to perform legal services in a manner that complies with the California Rules of Professional Conduct and state laws relating to conflict of interest and self-dealing, including the California Political Reform Act (Government Code section 81000 *et seq.*) and Government Code section 1099 *et. seq.* Violation of the professional conduct and ethics laws is cause for termination of this Agreement and recovery by the City of fees paid for services performed in violation of said rules and laws.

The Firm's services under this agreement do not include matters related to the following specialized services, which the firm expects will primarily be handled by outside legal counsel:

- Disciplinary proceedings and other matters related to employment law.
- Workers' compensation claims and litigation.
- Labor negotiations and interpretation of M.O.U.s with represented employees.
- Bond counsel.
- Government tort claims filed against the City and general liability litigation covered by the City's Joint Powers Association (JPA) pool providers.

However, the City Attorney may be secondarily involved with these outside legal counsel matters upon request by the City Manager or Council. And the City Attorney will be apprised of these matters as is relevant to her duties as the City Attorney.

2. Legal Fees, Costs, and Billing Practices

(a) General Services: General Services are those legal services to be provided by the Firm as described in Section 1 of this Agreement, excluding Special Services and Reimbursable Matters as defined below in Subsections 2(b) and (c) of this Agreement. The Firm will provide General Services for a monthly retainer fee of \$50,000 for the first 200 hours billed during the month. If General Services do not reach 200 hours in a given month, the retainer fee will be reduced by \$250 for each hour less than 200 worked that month.

If General Services exceed 200 hours per month, the following hourly billing rates apply for that additional time:

Partner	\$300
Jr. Partner	\$275
Associate III	\$265
Associate II	\$255
Associate I	\$220
Planner	\$185
Paralegal	\$115
Law Clerk	\$80

Consulting
Attorney/Of
Counsel \$300

(b) Special Services: Special Services include the following:

- Code enforcement administrative proceedings and litigation.
- Litigation services, including arbitration, mediation and administrative proceedings before agencies other than the City.
- Real estate transactions;
- The Firm's existing special matters for the City, specifically advice related to the Vallco project and Lehigh Quarry, and CEQA advice related to the Cupertino Village Hotel project, the Westport project, Apple Campus 2, and De Anza Hotel.
- CEQA and land use advice on major development applications, specific plans, and general plan amendments.
- Advice related to ballot measures.
- Special projects assigned by the City Council.

The Firm's hourly billing rates for these Special Services will be as follows:

Partner	\$375
Jr. Partner	\$345
Associate III	\$330
Associate II	\$315
Associate I	\$270
Planner	\$240
Paralegal	\$145
Law Clerk	\$95
Consulting Attorney/Of Counsel	\$375

(c) Reimbursable Matters: Reimbursable Matters are those matters for which City expenses are reimbursed by private parties; for example, processing development applications on a cost recovery basis, or reimbursement pursuant to an indemnity agreement. The Firm is providing City Attorney legal services described above at significantly less than commercial rates because public funds pay for these City Attorney services. Compensation for Reimbursable Matters, however, are at standard rates, to ensure reasonable parity between the rates charged by applicants' attorneys and the City Attorney. The Firm's hourly billing rates for Reimbursable Matters will be as follows:

Partner	\$550
Jr. Partner	\$510
Associate III	\$485
Associate II	\$460
Associate I	\$395
Planner	\$350
Paralegal	\$210
Law Clerk	\$140
Consulting Attorney/Of Counsel	\$550

(d) Recovery Matters: In the event the Firm represents the City in matters in which the City becomes eligible, as part of a negotiated settlement or successful conclusion of litigation, to recover attorneys' fees from adverse parties, under Code of Civil Procedure section 1021.5 or other applicable law ("Recovery Matters"), the Firm will be entitled to recover attorneys' fees at higher rates than the hourly billing rates for General and Special Services listed above and the rates for Reimbursement Matters. Under state law, those fees should be assessed on the basis of commercial rates. For your information, commercial rates for the types of litigation services being provided under this Agreement currently range from \$550 to \$750 per hour for a partner, and are likely to increase over time.

Any amounts for attorneys' fees or costs incurred by the Firm actually received by us or by City, as a result of agreement or court order in Recovery Matters, shall be divided between the City, which shall be reimbursed for fees actually paid to the Firm for work covered by the recovery, and the Firm, which shall be compensated consistent with prevailing market rates (i.e., the difference between the award and the

amount reimbursed to the City). This fee distribution scheme is not set by law but is negotiable between the firm and City.

(e) Bills and Costs: Fees will be charged in increments of one-tenth of an hour. Beginning in January 2021, the Firm will annually increase these billing rates consistent with any annual increase in the Consumer Price Index (October over October time period) for All Urban Consumers (not seasonally adjusted) San Francisco-Oakland-San Jose area (1982-1984 = 100) as published by the Bureau of Labor Statistics, U.S. Department of Labor, rounded to the nearest whole \$1. The Firm will implement the increase each year on January 1st, or as soon thereafter as the CPI information is published. If City declines to pay for the Firm's services at any increased rates, the Firm will have the right to withdraw as City's attorneys. The Firm has errors and omissions insurance coverage applicable to the services being provided under this Agreement.

City will also reimburse Firm for payments to third parties incurred in the course of representation. City will not reimburse for ordinary costs of business, including but not limited to, overhead costs, staff time, long-distance telephone, facsimile, postage, and routine photocopying. City will reimburse for non-routine photocopying costs (e.g., litigation matters, document review, color copies, and large print jobs) at a cost of 10 cents per page and will reimburse for charges for electronic legal research time.

The Firm will not charge travel time for travel to and from the City for office hours, regularly scheduled City Council meetings, or up to twelve other Commission meetings. City agrees to pay for all mileage reimbursement costs (\$0.58 per mile as may be adjusted from time to time). City also agrees to pay for one-half the attorney time traveling to and from meetings or site visits for Special Services or meetings other than those listed above. In the event of travel outside of the City on City business, City agrees to pay all transportation costs, lodging, parking, and meals, as well as one-half the hourly rates for attorney travel time.

The Firm will provide detailed monthly billing statements for fees and costs incurred. City agrees to pay the Firm's billed costs and fees within thirty (30) days following billing. Monthly statements shall set forth a description of all work performed, hours worked, identify person undertaking work, and rates charged.

3. Insurance

The Firm agrees to maintain insurance in the following amounts:

1. Comprehensive General Liability Insurance with coverage limits of not less than One Million Dollars (\$1,000,000) including products and operations hazard, contractual insurance, broad form property damage, independent consultants, personal injury, underground hazard, and explosion and collapse hazard where applicable.

2. Automobile Liability Insurance for vehicles used in connection with the performance of this Agreement with minimum limits of One Million Dollars (\$1,000,000) per claimant and One Million dollars (\$1,000,000) per incident.

3. Worker's Compensation insurance as required by the laws of the State of California.

4 Professional Errors and Omissions Insurance with coverage limits of not less than One Million Dollars (\$1,000,000).

The policy or policies required by this Agreement shall be issued by an insurer admitted in the State of California and with a rating of at least A: VII in the latest edition of Best's Insurance Guide, or a California approved Surplus Lines carrier (e.g., Lloyd's of London).

4. Authorized Representative of City

The City Council as a whole shall direct the Firm's provision of services under this Agreement. The City designates the City Manager as the authorized representative to be the primary person to communicate with the Firm regarding the subject matter of this Agreement. This designation is intended to establish a clear line of authority and to minimize potential uncertainty, but not to preclude communication between the Firm and other representatives of City. Unless directed otherwise by City, all correspondence and bills will be directed to the designated authorized representative.

5. Discharge and Withdrawal

City may discharge the Firm at any time, with or without cause, by providing written notice to the Firm, which is effective upon receipt by the Firm. Discharge without cause will normally include a ninety (90) work day notice period to permit transition of matters and responsibilities to new counsel. In the event of discharge, if the Firm is City's attorney of record in any proceeding, the Firm will promptly provide City with a substitution of attorney form if requested by the City. City will execute and return the substitution of attorney form immediately upon receipt from the Firm.

The Firm may withdraw upon ninety (90) work days' prior written notice, with or without cause. The Firm may withdraw at any time as permitted under the Rules of Professional Conduct of the State Bar of California. A valid reason for withdrawal by the Firm would include, but not be limited to, City's consent, City's breach of this Agreement, City's failure to pay fees and costs as provided in this Agreement, City's conduct renders it unreasonably difficult for the Firm to carry out the representation effectively, or any fact or circumstances that would render the Firm's continuing representation unlawful or unethical. At such time as the Firm's services conclude, all unpaid fees for legal and related services and costs and expenses will immediately become due and payable.

6. Case Files

After the Firm's services conclude, the Firm will, upon City's request, deliver the files for all City matter to City. If City does not request the files, the Firm will retain them for a period of five years after the matter is closed. If City does not request delivery of the files before the end of the five-year period, the Firm will have no further obligation to retain the files and may, at the Firm's discretion, destroy them without further notice to City. At any point during the five-year period, City may request delivery of the files. If City so requests, paper copies of original documents (or the originals themselves) will be provided free of charge. City agrees to pay for any additional fees or costs incurred to produce copies of electronic files, if City requests those files.

7. No Guarantee

Nothing in this Agreement and nothing in the Firm's statements to City will be construed as a promise or guarantee about the outcome of this matter. The Firm makes no such promises or guarantees.

8. Conflicts

The Firm does not have, and shall not acquire, any interest not disclosed to City that creates a legal conflict with its performance of services under this Agreement, unless the City consents in writing to such conflict.

9. Independent Contractor

The Firm shall at all times herein be deemed an independent contractor wholly responsible for the manner in which it performs the services under this Agreement and fully liable for the acts and omissions of its employees, subconsultants and agents.

Under no circumstances shall this Agreement be construed as creating an employment, agency, joint venture or partnership relationship between City and the Firm, and no such relationship shall be implied from performance of this Agreement. The terms in this Agreement referring to direction from the City Manager shall be construed as providing for direction as to the scope of services, and not as to the means and methods by which a result is obtained. The Firm shall pay all other taxes including but not limited to any applicable City of Cupertino business tax, not explicitly assumed in writing by City hereunder. The Firm shall comply with all valid administrative regulations respecting the assumption of liability for the payment of payroll taxes and contributions as above described and to provide any necessary information with respect thereto to proper authorities.

Notwithstanding the Firm's independent contractor relationship with City, City may, from time to time (i.e. annually), and at its sole discretion, conduct an evaluation of the Firm's services as City Attorney, including conducting such evaluation in closed session as permitted under Government Code section 54957.

10. Indemnification and Liability

To the fullest extent permitted by law, the Firm shall indemnify and hold harmless City and its officers, agents, departments, officials, representatives and employees (collectively 'Indemnitees') from and against any and all claims, loss, cost, damage, injury (including, without limitation, injury to or death of an employee of Firm or its subconsultants), expense and liability of every kind, nature and description (including, without limitation, incidental and consequential damages, court costs, paralegal and attorneys' fees (including costs attributable to in-house paralegals and attorneys), City staff costs, litigation expenses and fees of expert consultants or expert witnesses incurred in connection therewith and costs of investigation) that arise from or relate to, directly or indirectly, in whole or in part, from the services under this Agreement, or any part thereof, but only to the proportionate extent caused by any negligent act or omission of the Firm, any subconsultant of the Firm, anyone directly or indirectly employed by them, or anyone that they control (collectively "Liabilities"). Irrespective of any language to the contrary in this Agreement, the Firm has no duty to provide or to immediately pay for an up-front defense of City against claims or allegations unproved in a final judgment in all courts, but shall reimburse those litigation costs and expenses referenced herein that are incurred by the City to the proportionate extent caused by the negligence of the Firm, any subconsultant of the Firm, anyone directly or indirectly employed by them, or anyone that they control. The Firm's indemnification and hold harmless obligation shall not exceed the Firm's finally determined percentage of liability based upon the comparative fault of the Firm. The

parties agree, to the fullest extent permitted by law, to submit to mediation, any dispute, cause, or controversy arising out of or relating to the validity, enforceability, interpretation, performance, or breach of this section, including, but not limited to, the determination of liability based upon the comparative fault of the Firm (the "Claims"). In the event the parties do not resolve any Claims through mediation, then the Firm and City agree to binding arbitration of such Claims through JAMS, under California Code of Civil Procedure sections 1280 through 1294.4. The parties further agree that this Agreement is intended to be strictly construed to provide for mediation followed by arbitration, if necessary, as the sole and exclusive means for resolution of all disputes under this section (including, but not limited to, the determination of liability based upon the comparative fault of the Firm) to the fullest extent permitted by law. The parties expressly waive any entitlement to have such controversies decided by a court or a jury. Any mediation and/or arbitration of Claims under this section shall occur in Santa Clara County, California. The parties shall be responsible for their own attorneys' fees and related hearing costs and shall split equally the costs for the mediator and/or arbitrator. The provisions of this section shall survive the completion of the services or termination of this Agreement.

* * *

If any provision in 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. This Agreement may be modified by subsequent written agreement.

This Agreement will be effective when it is signed by you. However, this Agreement will apply to any services, including transition, we may provide in connection with the engagement before the effective date.

We look forward to working with you as City Attorney for the City of Cupertino. If this Agreement is satisfactory, please execute it and return a copy to me.

Very truly yours,

SHUTE, MIHALY & WEINBERGER LLP



Heather M. Minner

This Contract was approved by the City Council at its regular meeting of _____ 2019.

ACCEPTED AND AGREED:

City of Cupertino

_____ Date: _____
Timm Borden, Interim City Manager

Attest: _____ Date: _____
Grace Schmidt, City Clerk