

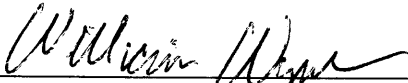


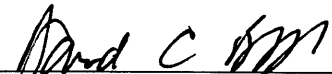
City of Carson

Report to Mayor and City Council

January 17, 2012
New Business Discussion

SUBJECT: CONSIDER ENTERING INTO A RETAINER AGREEMENT WITH GIRARDI & KEESE TO BRING A PUBLIC NUISANCE ACTION ON BEHALF OF THE CITY OF CARSON TO ABATE A PUBLIC NUISANCE INVOLVING SOILS CONTAMINATION IN THE CAROUSEL TRACT


Submitted by William W. Wynder
City Attorney


Approved by David C. Biggs
City Manager

I. SUMMARY

At recent City Council meeting, numerous residents requested that the City Council consider bringing a “public nuisance” action to abate the soils contamination alleged to exist in, on, under, or upon the so-called Carousel Tract. At that time Mayor Dear requested that this matter be placed on future closed and open session agendas as appropriate.

In response to these urgings, the Office of the City Attorney was directed by the City Council to undertake the necessary legal research to determine whether, in the opinion of legal counsel, the City could, in good faith, assert a cause of action for public nuisance abatement in connection with alleged soils contamination within the Carousel Tract.

Since then in a series of privileged and confidential oral and written closed session briefings of the City Council, the Office of the City Attorney has opined on this subject matter, and the City Council instructed the City Attorney to open negotiations with the law firm of Girardi & Keese for possible representation of the City in filing and prosecuting a legally warranted public nuisance abatement action for alleged soils contamination within the Carousel Tract.

Attached is a retainer agreement between the City and the law firm of Girardi & Keese to provide such representation to the community on a *pro bono* basis (Exhibit No. 1). The agreement is approved by the City Attorney as to form, and is ready for Council consideration and possible action in the sound discretion of the Council.

II. RECOMMENDATION

CONSIDER and provide direction.

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III. ALTERNATIVES

1. APPROVE entering into the attached *pro bono* retainer agreement with the law firm of Girardi & Keese to prosecute a public nuisance abatement action in the name of the People of the State of California, and AUTHORIZE the Mayor to execute the agreement following approval of the same as to form by the City Attorney.
2. DECLINE to enter into the retainer agreement with Girardi & Keese.

IV. BACKGROUND

The contamination of real property constitutes a public nuisance. The Civil Code defines a nuisance as something that is injurious to health, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property. (*Civ. Code*, § 3479.)

"A public nuisance is one which affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal." (*Civ. Code*, § 3480.) In contrast, "[e]very nuisance not included in the definition of the last section is private." (*Civ. Code*, § 3481.)

In determining whether something is a public nuisance, the focus must be upon whether an entire neighborhood or community or at least a considerable number of persons are affected in the manner and by the factors that make the thing a nuisance under *Civil Code* § 3479. (See *Eaton v. Klimm* (1933) 217 Cal. 362, 368 [18 P.2d 678]; *Venuto v. Owens-Corning Fiberglas Corp.* (1971) 22 Cal. App. 3d 116, 123 [99 Cal. Rptr. 350]; *Biber v. O'Brien* (1934) 138 Cal. App. 353, 357 [32 P.2d 425].) In other words, a private nuisance does not become a public nuisance merely because the public may be said to be affected in some tangential manner rather than specifically in the manner set forth in *Civil Code* § 3479.

"*Anything* which is injurious to health ... or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property ... is a nuisance." (*Civ. Code*, § 3479, italics added.)

"A public nuisance is one which affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal." (*Civ. Code*, § 3480.)

"[P]ublic nuisances are offenses against, or interferences with, the exercise of *rights common to the public*." (*People ex rel. Gallo v. Acuna* (1997) 14 Cal.4th 1090, 1103 [60 Cal. Rptr. 2d 277, 929 P.2d 596], original italics.) "Of course, not

every interference with collective social interests constitutes a public nuisance. To qualify, and thus be enjoined [or abatable], the interference must be both *substantial* and *unreasonable*." (*People ex rel. Gallo v. Acuna* (1997) 14 Cal.4th 1090, 1105 [60 Cal. Rptr. 2d 277, 929 P.2d 596] (*Acuna*).) It is substantial if it causes significant harm and unreasonable if its social utility is outweighed by the gravity of the harm inflicted. (*Acuna*, at p. 1105.)

Pollution cases present peculiar problems in applying principles of nuisance law. Often they do not fit easily into the continuing-use/permanent-encroachment dichotomy because the harmful effects of the pollution may continue beyond the termination of the activity that gave rise to the harm.

In such instances some courts have found that contamination may be shown to be a continuing nuisance by evidence that the contaminants continue to migrate through land and groundwater causing new and additional damage on a continuous basis. (See *Newhall Land & Farming Co. v. Superior Court* (1993) 19 Cal. Cal. App. 4th 334, 341 [23 Cal. Rptr. 2d 377]; *Capogeannis v. Superior Court*, *supra*, 12 Cal. App. 4th at pp. 673, 681; *Arcade Water Dist. v. U.S.* (9th Cir. 1991) 940 F.2d 1265, 1268 ["In determining under California law whether the nuisance is continuing, the most salient allegation is that contamination continues to leach into Arcade's Well 31."].)

The test most often stated in contamination cases is whether the nuisance can be abated at any time. (See *Wilshire Westwood Associates v. Atlantic Richfield Co.*, *supra*, 20 Cal. Cal. App. 4th at p. 744; *Capogeannis v. Superior Court*, *supra*, 12 Cal. Cal. App. 4th at p. 677; *Mangini I*, *supra*, 230 Cal. App. 3d at p. 1146.) This test, in various forms and actions, has long been applied. For example, in *Kafka v. Bozio* (1923) 191 Cal. 746, 751 [218 P. 753, 29 A.L.R. 833], in which the defendant's building was progressively leaning onto the plaintiff's property, the court held that where a continuing or recurring injury results from a condition wrongfully created and maintained, the nuisance will be considered to be continuing.

Based on the foregoing summary review of an extremely complex area of the law, the Office of the City Attorney is of the opinion that the City can, in good faith, allege a cause of action on behalf of the people for alleged public nuisance arising out of claims for pollution contamination of the properties within the Carousel Tract and we have so advised the City Council.

The Council has directed the Office of the City Attorney to enter into negotiations with the firm of Girardi & Keese for possible representation of the city in a legally appropriate and factually warranted public nuisance abatement action. That agreement is attached hereto, and several of its features are noteworthy in this staff report.

First, the agreement is a no-fees or costs agreement meaning the City will not have to incur the costs of legal fees, ligation costs and expenses, or litigation expert fees and expenses. *Second*, the agreement includes the defense and representation of the City in any cross-complaint or third party action in which the City may be named as a defendant or real party in interest also at no-fees or costs to the City. *Finally*, the agreement contains an affirmative covenant to indemnify and hold the City harmless from any claim for damages or attorneys' fees arising out of such representation.

These features are consistent with the directive of the City Council as expressed in lawfully convened closed sessions to consider initiating litigation.

V. FISCAL IMPACT

The attached retainer agreement will be entered into on a *pro bono* basis, meaning the city of Carson will incur no out of pocket costs for the legal fees, litigation costs, expenses, and litigation experts fees and expenses incurred by the Girardi & Keese firm.

VI. EXHIBITS

1. Retainer Agreement (pgs. 5-8).

Prepared by: William W. Wynder, City Attorney

TO:Rev091911

Reviewed by:

| | |
|-------------------------|----------------------|
| City Clerk | City Treasurer |
| Administrative Services | Development Services |
| Economic Development | Public Services |

Action taken by City Council

Date_____ Action_____

GIRARDI | KEESE

ATTORNEY-CLIENT CONTINGENT FEE RETAINER AGREEMENT

This contingent fee retainer agreement (the "Agreement") is the written fee contract that California law requires lawyers to have with their clients. We, GIRARDI & KEESE, 1126 Wilshire Boulevard., Los Angeles, California ("G & K"), will provide legal services to you, the City of Carson, a California general law city & municipal corporation (the "Client"), on the terms set forth below.

1. CONDITIONS. This Agreement will not take effect, and G & K will have no obligation to provide legal services to Client, until Client's Mayor, having been duly authorized to do so by Client's City Council, returns a signed copy of this Agreement to G & K.

2. SCOPE OF SERVICES. Client is hiring G & K as attorneys to represent Client in prosecuting an action, in the name of the People of the State of California, to allege, prove, and obtain an appropriate remedy for a public nuisance existing in, under, or upon the geographic area(s) at or near the Carousel Housing Tract located within the city of Carson, California, arising out of, related to, or sustained from exposure to toxic chemicals as the same may be warranted by the facts and the law; such action to be brought against certain defendants, including but not limited to, Shell Oil Company, doing business as Shell Oil Products US. This scope of services shall also include, without limitation, representing Client in any cross-complaint or third-party action that may be brought against Client by any defendant, cross-defendant, or third-party plaintiff, or in any legal action arising out of or related to this scope of services.

G & K will work in coordination with Client's City Attorney (and/or such additional Assistant City Attorney(s) as the City Attorney may designate) in the prosecution of this matter at all times.

G & K will take reasonable steps to keep Client, through its City Manager and City Attorney, informed of developments and will respond to Client inquiries. If a court action is filed, G & K will represent Client until a settlement or judgment, by way of arbitration or trial, is reached in a complaint, cross-complaint, or third party action where Client is named as a plaintiff, defendant, or a Real Party in Interest.

G & K will, at Client's direction, oppose any motion for a new trial or any other post-trial motions filed by an opposing party, or will make any appropriate post-trial motions on Client's behalf in. After judgment G & K will not represent Client on any appeal, or in any proceedings, unless the parties to this Agreement make a separate Agreement governing any such appeal.

3. INSURANCE DISCLOSURE. G & K represents and warrants that it does not meet any of the criteria for errors and omissions (malpractice) coverage set forth in Business and Professions Code Section 6147.

EXHIBIT NO. 01



4. CLIENT'S DUTIES. Client agrees to be truthful with G & K, to cooperate in the preparation of Client's claim(s) or defense(s), as the case may be, to keep G & K informed of developments, and to abide by this Agreement. Any decisions regarding settlement of the case, and the terms of any settlement, are reserved exclusively to the discretion of the Client's City Council, in a duly convened and lawfully notice meeting.

5. LEGAL FEES, COSTS, AND BILLING PRACTICES. G & K will represent Client within the scope of services set forth in Paragraph 2, above, on a *pro bono* basis and at no attorneys' fees or litigation or expert costs to Client. The parties to this Agreement agree that, to the maximum extent permitted by law, any attorneys' fees or costs that are assessed, awarded or ordered paid by the Court shall belong to G & K, as compensation for its services under this agreement. The parties further agree that G & K will indemnify and hold harmless Client from and against any award of damages, costs, sanctions, or expenses incurred in connection with representing Client in such cross-action.

6. NEGOTIABILITY OF FEES. The legal fees to which G & K may be entitled to receive in this case is not set by law, but are negotiable between G & K and Client, and are entered into pursuant to California law, as set out in *County of Santa Clara v. Superior Court*, 50 Cal. 4th 35 (Cal. 2010).

7. COSTS AND LITIGATION EXPENSES. G & K will incur various costs and expenses in performing legal services under this Agreement. In the event that an award or settlement is obtained, the parties agree that G & K shall be reimbursed for all out of pocket costs, disbursements, and expenses, to the extent of the funds specified or earmarked in any award or settlement for payment of costs, disbursements and expenses.

Costs typically include court fees, service of process charges, photocopy services, notary fees, computer-assisted legal research, long distance telephone charges, messenger and delivery fees, postage, in-office photocopying at \$0.20 per page, facsimile charges, deposition costs, parking, mileage at \$0.45 per mile, investigation expenses, consultants' fees, expert witness fees, and other similar items. All such costs and expenses will be charged at G & K's cost. If there is no recovery, Client is not responsible for costs. Costs will only be reimbursed to the extent recovered and ordered by the court. In no event will Client be out of pocket for costs.

G & K shall not be required to obtain Client's consent before incurring routine costs, but shall consult with Client's City Attorney, who shall retain authority over approving or disapproving material costs, including retaining outside investigators, consultants, or expert witnesses.

8. APPROVAL NECESSARY FOR SETTLEMENT. G & K will not make any settlement or compromise of any nature of any of Client's claims or defenses without the prior approval of Client's City Council, obtained as the result of a duly convened and lawfully noticed meeting.

9. LIMITATION OF REPRESENTATION. G & K are representing you only on the matter described in Paragraph 2. G & K's representation does not include independent or related



matters that may arise, provided, however, that G & K will agree to represent and defend the Client on any cross-complaint as described elsewhere in this Agreement.

10. DISCHARGE AND WITHDRAWAL. Client's City Council may discharge G & K at any time, on written notice to us, and we will immediately after receiving such notice cease to render additional services.

G & K may withdraw from representation of you (a) with Client's consent, (b) on court approval, (c) if no court action has been filed, on reasonable notice to you; or (d) in the event the Attorneys perceive a conflict of interest making withdrawal from further representation of the Client advisable, as described below.

Client understands that in the event that G & K is required to withdraw from the representation due to a conflict, Client might be required to locate replacement counsel. Client might incur additional expense in locating and retaining replacement counsel and withdrawal might occur at an inconvenient time, thus increasing the difficulty or expense of the litigation.

11. CONCLUSION OF SERVICES. After G & K's services conclude, G & K will, upon Client's request, acting through its City Attorney deliver your file to Client, along with any funds or property of Client's in our possession.

12. DISCLAIMER OF GUARANTEE. Nothing in this Agreement and nothing in our statements to Client will be construed as a promise or guarantee about the outcome of Client's matter. G & K makes no such promises or guarantees. G & K's comments about the outcome of Client's matter or defense are expressions of opinion only.

13. EFFECTIVE DATE. This Agreement will take effect when Client, acting through its Mayor, has performed the conditions stated in Paragraph 1.

14. Client is fully aware that G & K represents private landowners and residents in the City of Carson for claims arising out of contamination left by Shell and the developers of certain Carson neighborhoods. Client hereby consents to this dual representation by G & K.

Client has read and understood the foregoing terms and agrees to the same. By signing this Agreement, I/we acknowledge receipt of a fully executed duplicate of this Agreement.

CLIENT:

CITY OF CARSON, a general law city
& municipal corporation

By: _____
Its: Mayor Jim Dear
Date: January __, 2012

[SIGNATURES CONTINUE ON NEXT PAGE]



ATTEST:

Chief Deputy City Clerk

APPROVED AS TO FORM:

City Attorney

GIRARDI & KEESE

By: _____
THOMAS V. GIRARDI

Date: January __, 2012

[END OF SIGNATURES & AGREEMENT]

