

South Portland City Council
Position Paper of the City Manager

Subject:

ORDER #96-14/15 – Retaining the law firm of Foley Hoag, LLP of Boston, Massachusetts for legal services on behalf of the City and its Code Enforcement Director relating to the *Portland Pipe Line Corporation, et al. v. City of South Portland, et al.* litigation. Passage requires majority vote.

Position:

This item is brought forward to retain the Boston law firm of Foley Hoag, LLP, with Jonathan M. Ettinger, Esq. as the lead attorney, as special legal counsel to the City and its Code Enforcement Director for purposes of defending against Portland Pipe Line Corporation (“PPLC”) and American Waterways Operators (“AWO”) lawsuit against the City and its CEO.

PPLC and AWO, a national trade association for the inland and coastal tugboat, towboat and barge industry, filed suit in U.S. District Court for the District of Maine in Portland, Maine against the City and its CEO (in her official capacity only) on February 6, 2015. This lawsuit was precipitated by the City Council’s July 21, 2014 enactment of the so-called “Clear Skies Ordinance,” which are specifically amendments to the City’s Zoning Ordinance related to the bulk loading of crude oil onto marine tank vessels in certain zoning districts.

Among other things, PPLC and AWO allege that the ordinance conflicts with the federal Pipeline Safety Act and federal Ports and Waterways Safety Act in violation of the U.S. Constitution’s supremacy clause; violates the commerce clause of the U.S. Constitution; violates the principles of maritime preemption; and that the City and its CEO violated PPLC and AWO’s civil rights such that they are entitled to an award of attorney’s fees pursuant to 42 U.S.C. § 1988.

Given the nature and extent of the claims made against the City and its CEO, the City Manager and the Corporation Counsel are recommending to the City Council that the City retain the expertise of special legal counsel with an extensive energy and environmental practice in order to defend the City and its CEO in this lawsuit. The

Boston law firm of Foley Hoag has been identified as one with a preeminent national environmental law practice, including an environmental litigation practice. Its website address is <http://www.foleyhoag.com>. The law firm has extensive experience litigating federal preemption, commerce clause and maritime law cases. Foley Hoag also has a deep tradition of providing legal advice to government and quasi-public entities, including state agencies, quasi-governmental agencies and municipalities. The hourly billing rates of anticipated personnel range from \$265-\$650 per hour. It is anticipated that the City Council will need to consider a supplemental appropriation order related to its defense costs in the near future.

Requested Action:

Passage of ORDER #96-14/15.


City Manager



CITY OF SOUTH PORTLAND

LINDA C. COHEN
Mayor

JAMES H. GAILEY
City Manager

SUSAN M. MOONEY
City Clerk

SALLY J. DAGGETT
Jensen Baird Gardner & Henry

District One
CLAUDE V.Z. MORGAN

District Two
PATRICIA SMITH

District Three
MELISSA LINSKOTT

District Four
LINDA C. COHEN

District Five
BRAD FOX

At Large
MAXINE BEECHER

At Large
THOMAS E. BLAKE

IN CITY COUNCIL

ORDER # 96-14/15

WHEREAS, on July 21, 2014, by Ordinance #1-14/15, the City Council enacted certain amendments to Chapter 27, Zoning, of the South Portland Code of Ordinances;

WHEREAS, as a result of the enactment of Ordinance #1-14/15, the City and its Code Enforcement Director have recently been sued in U.S. District Court for the District of Maine by Portland Pipe Line Corporation and American Waterways Operators (collectively "Plaintiffs");

WHEREAS, the lawsuit alleges a number of federal and State law claims against the City and its Code Enforcement Director, including, without limitation, allegations that Ordinance #1-14/15 (a) conflicts with the federal Pipeline Safety Act and federal Ports and Waterways Safety Act and so violates the U.S. Constitution's supremacy clause, (b) violates the commerce clause of the U.S. Constitution, and (c) violates the principles of maritime preemption;

WHEREAS, the lawsuit also alleges that the City and its Code Enforcement Director violated Plaintiffs' civil rights such that Plaintiffs are entitled to an award of attorney's fees pursuant to 42 U.S.C. § 1988;

WHEREAS, given the nature and extent of the claims made against the City and its Code Enforcement Director, the City Council desires the expertise of legal counsel with a preeminent energy and environmental practice, including environmental litigation practice, in order to defend the City and its Code Enforcement Director in this lawsuit;

WHEREAS, the Boston law firm of Foley Hoag, LLP's Environmental Practice, including its Environmental Litigation Practice, has long been recognized not simply as one of the preeminent practices in New England, but one with national and international scope;

WHEREAS, Foley Hoag, LLP has extensive experience litigating federal preemption, commerce clause and maritime law cases;

WHEREAS, Foley Hoag, LLP has a deep tradition of providing legal advice to government and quasi-public entities, including state agencies, quasi-governmental agencies and municipalities;

WHEREAS, the legal services that can be provided by Foley Hoag, LLP are in their nature unique and not subject to competition;

WHEREAS, it is anticipated that the City and its Code Enforcement Director's defense costs will exceed \$15,000; and

WHEREAS, it is anticipated that the City Council will consider a supplemental appropriation order related to its defense costs in the near future;

NOW, THEREFORE, BE IT ORDERED, that Foley Hoag, LLP, with Jonathan M. Ettinger, Esq. as the lead attorney, is hereby retained as special legal counsel to the City and its Code Enforcement Director for purposes of defending against Plaintiffs' lawsuit and assisting the City's general counsel, Jensen Baird Gardner & Henry, with the same; and

BE IT FURTHER ORDERED, that the City Manager be, and hereby is, authorized and directed to execute any engagement letter necessary for the retention of Foley Hoag, LLP as special counsel to the City and its Code Enforcement Director.

Fiscal Note: Less than \$1,000

Dated: March 2, 2015