



TOWN OF FAIRFAX

STAFF REPORT

April 4, 2018

TO: Mayor and Town Council

FROM: Garrett Toy, Town Manager *GT*

SUBJECT: Approve agreement with Best, Best, & Krieger to increase the hourly billing rate for Town Attorney services

RECOMMENDATION

Authorize the Town Manager to execute agreement with Best, Best, & Krieger for Town Attorney services.

DISCUSSION

The Town currently contracts with Best, Best & Krieger (BBK) for Town Attorney services. Janet Coleson has served as Town Attorney since 2013. Prior to BBK, Ms. Coleson was a partner with Richards, Watson & Gershon (RWG) with whom the Town contracted for her services.

Since 2009, the Town has been paying the same hourly billing rate of \$190 for general town attorney services and \$225 to \$275 per hour, depending on the experience of the attorney, for other services such as litigation, employment and labor services. When Ms. Coleson switched firms, BBK agreed to maintain the existing billing structure.

However, BBK has indicated the rate is no longer viable and needs to be increased to keep up with rising costs and expenses. The proposed new structure is \$225 per hour for general services and \$245 to \$295 for special legal services such as litigation, employment/labor law, and CEQA. The new rates would take effect on April 5th with the approval of the agreement. Another revision is that third party costs (i.e., cost reimbursed by applicants) will be billed at BBK's private client hourly rate without any reductions. However, if the third party is a non-profit developer providing affordable housing, the non-profit will be charged the special legal services rate or receive a 10% reduction in the private client rate depending on the provided legal service. It should be noted that the new rate for general legal services is still one of lowest town attorney billing rates among Marin County jurisdictions. The attached agreement reflects the current services provided by the Town Attorney.

FISCAL IMPACT

Depends on billable hours, but the added costs should be able to be absorbed within the existing budget.

ATTACHMENT

Agreement

AGENDA ITEM # 11

**AGREEMENT FOR TOWN ATTORNEY LEGAL SERVICES
BETWEEN
TOWN OF FAIRFAX
AND
BEST BEST & KRIEGER LLP**

1. PARTIES AND DATE.

This Agreement is made and entered into as of the 4th day of April, 2018, by and between the Town of Fairfax, a municipal corporation of the State of California (“Client”) and Best Best & Krieger LLP, a limited liability partnership engaged in the practice of law (“BB&K”).

2. RECITALS.

2.1 Client wishes to engage the services of BB&K as its Town Attorney to perform all necessary legal services for the Client on the terms set forth below.

3. TERMS.

3.1 Term. The term of this Agreement shall commence on April 5th, 2018 and shall continue in full force and effect until terminated in accordance with Section 3.12.

3.2 Scope of Services. BB&K shall serve as Town Attorney and shall perform legal services (“Services”) as may be required from time to time by the Client as set forth by this Agreement, unless otherwise agreed to by the Client and BB&K. As part of the Services to be performed hereunder, BB&K shall be responsible for the following:

3.2.1 Preparation for, and attendance at, regular meetings of the Client;

3.2.2 Provision of legal counsel at such other meetings as directed by the Client;

3.2.3 Preparation or review of all Client ordinances and resolutions, together with such staff reports, orders, agreements, forms, notices, declarations, certificates, deeds, leases and other documents as requested by the Client;

3.2.4 Rendering to the officers and employees of the Client legal advice and opinions on all legal matters affecting the Client, including new legislation and court decisions, as directed by the Client;

3.2.5 Researching and interpreting laws, court decisions and other legal authorities in order to prepare legal opinions and to advise the Client on legal matters pertaining to Client operations, as directed by the Client;

3.2.6 Performing legal work pertaining to property acquisition, property disposal, public improvements, public rights-of-way and easements, as directed by the Client;

3.2.7 Responding to inquiries and review for legal sufficiency of ordinances, resolutions, contracts, and administrative and personnel matters, as directed by the Client;

3.2.8 Representing and assisting on litigation matters, as directed by the Client. Such services shall include, but shall not be limited to, the preparation for and making of appearances, including preparing pleadings and petitions, making oral presentations, and preparing answers, briefs or other documents on behalf of the Client, and any officer or employee of the Client, in all federal and state courts of this State, and before any governmental board or commission, including reviewing, defending or assisting any insurer of the Client or its agents or attorneys with respect to any lawsuit filed against the Client or any officer or employee thereof, for money or damages.

3.3 Designated Town Attorney. Janet Coleson shall be designated as Town Attorney, and shall be responsible for the performance of all Services under this Agreement, including the supervision of Services performed by other members of BB&K. No change in this assignment shall be made without the consent of the Client.

3.4 Time of Performance. The Services of BB&K shall be performed expeditiously in the time frames and as directed by the Client.

3.5 Assistance. The Client agrees to provide all information and documents necessary for the attorneys at BB&K to perform their obligations under this Agreement.

3.6 Independent Contractor. BB&K shall perform all legal services required under this Agreement as an independent contractor of the Client and shall remain, at all times as to the Client, a wholly independent contractor with only such obligations as are required under this Agreement. Neither the Client, nor any of its employees, shall have any control over the manner, mode or means by which BB&K, its agents or employees, render the legal services required under this Agreement, except as otherwise set forth. The Client shall have no voice in the selection, discharge, supervision or control of BB&K's employees, representatives or agents, or in fixing their number, compensation, or hours of service.

3.7 Fees and Costs. BB&K shall render and bill for legal services in the following categories and at rates set forth in Exhibits "A" and "B" and in accordance with the BB&K Billing Policies set forth in Exhibit "C", all of which are attached hereto and incorporated herein by reference. In addition, the Client shall reimburse BB&K for reasonable and necessary expenses incurred by it in the performance of the Services under this Agreement. Authorized reimbursable expenses shall include, but are not limited to, printing and copying expenses, mileage expenses at the rate allowed by the Internal Revenue Service, to court appearances or destinations other than Town offices and to Town offices for other than Council or Commission meetings, bridge tolls, long distance telephone and facsimile charges, computerized research time (e.g. Lexis or Westlaw), research services performed by BB&K's library staff, extraordinary mail or delivery costs (e.g. courier, overnight and express delivery), court fees, deposition and discovery costs and similar costs relating to the Services that are generally chargeable to a client. However, no separate charge shall be made by BB&K for secretarial or word processing services.

3.8 Billing. BB&K shall submit monthly to the Client a detailed statement of account for Services. The Client shall review BB&K's monthly statements and pay BB&K for Services rendered and costs incurred, as provided for in this Agreement, on a monthly basis.

3.9 Annual Reviews. The Client and BB&K agree that a review of performance and the compensation amounts referenced in this Agreement should occur at least annually.

3.10 Insurance BB&K carries errors and omissions insurance with Lloyd's of London. After a standard deductible, this insurance provides coverage beyond what is required by the State of California. A separate schedule containing BB&K's insurance policies will be available for inspection upon Client's request.

3.11 Attorney-Client Privilege. Confidential communication between the Client and BB&K shall be covered by the attorney-client privilege. As used in this article, "confidential communication" means information transmitted between the Client and BB&K in the course of the relationship covered by this Agreement and in confidence by a means that, so far as the Client is aware, discloses the information to no third persons other than those who are present to further the interests of the Client in the consultation or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which BB&K is consulted, and includes any legal opinion formed and advice given by BB&K in the course of this relationship.

3.12 Termination of Agreement and Legal Services. This Agreement and the Services rendered under it may be terminated at any time upon thirty (30) days' prior written notice from either party, with or without cause. In the event of such termination, BB&K shall be paid for all Services authorized by the Client and performed up through and including the effective date of termination. BB&K shall also be reimbursed for all costs associated with transitioning any files or other data or documents to a new law firm or returning them to the Client.

3.13 Entire Agreement. This Agreement contains the entire Agreement of the parties with respect to the subject matter hereof, and supersedes all prior negotiations, understandings or agreements.

3.14 Governing Law. This Agreement shall be governed by the laws of the State of California. Venue shall be in Marin County.

3.15 Amendment; Modification. No supplement, modification or amendment of this Agreement shall be binding unless executed in writing and signed by both parties.

3.16 Waiver. No waiver of any default shall constitute a waiver of any other default or breach, whether of the same or other covenant or condition. No waiver, benefit, privilege, or service voluntarily given or performed by a party shall give the other party any contractual rights by custom, estoppel, or otherwise.

3.17 Invalidity; Severability. If any portion of this Agreement is declared invalid, illegal, or otherwise unenforceable by a court of competent jurisdiction, the remaining provisions shall continue in full force and effect.

3.18 Counterparts. This Agreement may be signed in counterparts, each of which shall constitute an original.

3.19 Delivery of Notices. All notices permitted or required under this Agreement notices shall be deemed made when personally delivered or when mailed, forty-eight (48) hours after deposit in the U.S. Mail, first class postage prepaid and addressed to the party at its applicable address. Actual notice shall be deemed adequate notice on the date actual notice

occurred, regardless of the method of service. All notices permitted or required under this Agreement shall be given to the respective parties at the following address, or at such other address as the respective parties may provide in writing for this purpose:

Client: Town of Fairfax
142 Bolinas Road
Fairfax, CA 94930
Attention: Town Manager

BB&K: Best Best & Krieger LLP
2001 N. Main Street, Suite 390
Walnut Creek, CA 94596
Attention: Janet Coleson

3.20 Indemnification.

(A) BB&K agrees to indemnify Town, its officers, employees and agents against, and will hold and save each of them harmless from, any and all actions, suits, claims, damages to persons or property, losses, costs, penalties, obligations, errors, omissions or liabilities (herein "claims or liabilities") that may be asserted or claimed by any person, firm or entity arising out of or in connection with the work, operations or activities of BB&K, its agents, employees, subcontractors, or invitees, provided for herein or arising from the acts or omissions of BB&K hereunder, or arising from BB&K's performance of or failure to perform any term, provision, covenant or condition of this Agreement, except to the extent such claims or liabilities arise from the negligence or willful misconduct of Town, its officers, agents or employees.

(B) Town acknowledges BB&K is being appointed as Town Attorney pursuant to the authority of Government Code Section 36505, and has the authority of that office. Accordingly, the Town is responsible pursuant to Government Code Section 825 for providing a defense for the Town Attorney for actions within the scope of its engagement hereunder. Therefore, Town agrees to undertake its statutory duty and indemnify BB&K, its officers, employees and agents against and will hold and save each of them harmless from, any and all claims or liabilities that may be asserted or claims by any person, firm or entity arising out of or in connection with the work, operations or activities of BB&K within the course and scope of its performance hereunder, but nothing herein shall require Town to indemnify BB&K for liability arising from its own negligence or alleged negligence. In connection herewith:

(i) Town will promptly provide a defense and pay any judgment rendered against BB&K, its officers, agency or employees for any such claims or liabilities arising out of or in connection with such work, operations or activities of Town hereunder; and

(ii) In the event BB&K, its officers, agents or employees is made a party to any action or proceeding filed or prosecuted against Town for such damages or other claims solely arising out of or in connection with the work operation or activities of Town hereunder, Town agrees to pay to BB&K, its officers, agents or employees any and all costs and expenses incurred by attorney, its officers, agents or employees in such action or proceeding, including, but not limited to, legal costs and attorneys' fees.

IN WITNESS WHEREOF, the Client and BB&K have executed this Agreement for Town Attorney Legal Services as of the date first written above.

TOWN OF FAIRFAX

By: _____ Date: _____
Garrett Toy
Town Manager

Attest:

Michele Gardner
Town Clerk

BEST BEST & KRIEGER LLP

By: _____ Date: _____
Janet Coleson
Partner

EXHIBIT "A"
TO
AGREEMENT FOR TOWN ATTORNEY LEGAL SERVICES
BETWEEN
TOWN OF FAIRFAX
AND
BEST BEST & KRIEGER LLP

Legal services shall be billed to Client at the rates set forth in the chart below.

1. Basic Town Attorney Legal Services - Description. Basic Town Attorney legal services shall include all services provided to Client that are not otherwise specifically identified below as either Special Legal Services, Third Party Reimbursable Legal Services, or Public Finance Legal Services ("Basic Town Attorney Legal Services").

2. Basic Town Attorney Legal Services — Rates. The Client shall pay for Basic Legal Services at the following rates:

All Attorneys \$225/hour

3. Special Legal Services - Description. Special Legal Services shall include the following types of services:

- A. Litigation and formal administrative or other adjudicatory hearing matters
- B. Labor relations and employment matters
- C. Non-routine real estate matters (e.g. CC&R's, deed or title work)
- D. Land acquisition and disposal matters (including pre-condemnation)
- E. Taxes, fees and charges matters (e.g. Prop. 218 & Mitigation Fee Act)
- F. Public construction disputes
- G. Non-routine contract negotiation matters (including non-BB&K model agreements and franchise agreements)
- H. Non-routine land use and development matters (including general plan updates, Williamson Act issues, annexations and development agreements)
- I. Environmental matters (e.g. CEQA, NEPA, endangered species)
- J. Water law matters (e.g. water rights & quality)
- K. Tax and ERISA related matters
- L. Toxic substances matters (e.g. CERCLA, RCRA)
- M. Complex public utility matters (e.g. electric, natural gas, telecommunications, water, rail or transit that involve state or federal regulatory issues)
- N. Renewable energy and energy efficiency project contracts and power purchase agreements
- O. Advocacy matters (e.g. legislative and regulatory)
- P. Other matters mutually agreed upon between BBK and the Town Manager

4. Special Legal Services — Rates. The Client shall pay for Special Legal Services at the following rates:

All Attorneys \$245 - \$295/hour depending upon attorney's experience

5. Agreement Regarding Rate Categories. If BB&K believes that a matter falls within the Special Legal Services or Third Party Reimbursable Legal Services rate categories, BB&K shall seek approval from the Town Manager or his/her designee. The Town Manager's or his/her designee's approval of such a request from BB&K shall not be unreasonably withheld.

6. Additional Billing Personnel.

If, as, and when BB&K employs additional or different billing personnel, including, but not limited to paralegals or law clerks, this Agreement may be supplemented by written administrative memoranda, providing for the categories and billing rates for such personnel, which memoranda may be approved by the Town Manager.

7. Annual Adjustments; Other Mutual Adjustments. The rates or amounts provided for in Sections 1 through 6 above may be increased as follows: Individual rates which are specific to individual attorneys and/or legal personnel are reviewed annually and may be increased from time to time with advanced written notice to the client. In addition to such rate increase, either BB&K or the Client may initiate consideration of a rate increase at any time.

EXHIBIT "B"
TO
AGREEMENT FOR TOWN ATTORNEY LEGAL SERVICES
BETWEEN
TOWN OF FAIRFAX
AND
BEST BEST & KRIEGER LLP

THIRD PARTY REIMBURSABLE BILLING POLICIES

1. Third Party Reimbursable Legal Services - Description. Third Party Reimbursable Legal Services shall include legal services provided to the Town for which the Town receives reimbursement from a developer or other third party. These reimbursable legal services typically include review of CC&Rs; establishment of financing districts (i.e., Community Facilities Districts; Assessment Districts; Landscape and Lighting Maintenance Districts); and land use/environmental projects for which the Town is entitled to reimbursement.

2. Third Party Reimbursable Legal Services - Rates. The Client shall pay for Third Party Reimbursable Legal Services at BB&K's then current published standard private client rates. When the Third Party is a non-profit developer providing non-market rate housing, the rate shall be the Special Legal Services Rate with the exception of environmental review/advice and litigation which shall be charged at standard private client rates less ten percent (10%). Upon execution of this Agreement, BB&K shall provide a copy of its published rate schedule to the Client. BB&K shall also provide annual written updates to the Client when changes are made to the published rate schedule.

EXHIBIT "C"
TO
AGREEMENT FOR TOWN ATTORNEY LEGAL SERVICES
BETWEEN
TOWN OF FAIRFAX
AND
BEST BEST & KRIEGER LLP

BB&K BILLING POLICIES

Our century of experience has shown that the attorney-client relationship works best when there is mutual understanding about fees, expenses, billing and payment terms. Therefore, this statement is intended to explain our billing policies and procedures. Clients are encouraged to discuss with us any questions they have about these policies and procedures. Clients may direct specific questions about a bill to the attorney with whom the client works or to Judy Ismael of our Accounting Department. Any specific billing arrangements different from those set forth below will be confirmed in a separate written agreement between the client and the firm.

Fees for Professional Services

Our fees for the legal work we will undertake will be based in substantial part on time spent by personnel in our office on that client's behalf. In special circumstances which will be discussed with the client and agreed upon in writing, fees will be based upon the novelty or difficulty of the matter, or the time or other special limitations imposed by the client.

Hourly rates are set to reflect the skill and experience of the attorney or other legal personnel rendering services on the client's behalf. Hourly rates are reviewed annually to accommodate rising firm costs and to reflect changes in attorney status as lawyers attain new levels of legal experience.

Fees For Other Services, Costs and Expenses

We attempt to serve all our clients with the most effective support systems available. Therefore, in addition to fees for professional legal services, we also charge separately for some other services and expenses to the extent of their use by individual clients. These charges include but are not limited to, mileage at the current IRS approved rate per mile, extraordinary telephone and document delivery charges, copying charges, computerized research, court filing fees and other court-related expenditures including court reporter and transcription fees. No separate charge is made for secretarial or word processing services; those costs are included within the above hourly rates.

Monthly Invoices and Payment

Best Best & Krieger LLP provides our clients with monthly invoices for legal services performed and expenses incurred. Invoices are due and payable upon receipt.

Each monthly invoice reflects both professional and other fees for services rendered through the end of the prior month, as well as expenses incurred on the client's behalf that have

been processed by the end of the prior month. Processing of some expenses is delayed until the next month and billed thereafter.

Our fees are not contingent upon any aspect of the matter and are due upon receipt. All billings are due and payable within ten days of presentation unless the full amount is covered by the balance of an advance held in our trust account. If a bill is not paid within 30 days, a late charge of one percent per month on the unpaid invoice shall be added to the balance owed, commencing with the next statement and continuing until paid.

It is our policy to treat every question about a bill promptly and fairly. It is also our policy that if a client does not pay an invoice within 60 days of mailing, we assume the client is, for whatever reason, refusing to pay. We will then advise the client by letter that the client may pay the invoice within 14 days or the firm will take appropriate steps to withdraw as attorney of record. If the delay is caused by a problem in the invoice, we must rely upon the client to raise that with us during the 14-day period.

From time to time clients have questions about the format of the bill or description of work performed. If you have any such questions, please ask them when you receive the bill so we may address them on a current basis.

Changes in Budgets

Because of the uncertainties involved, any estimates of anticipated fees that we provide at the request of a client for budgeting purposes, or otherwise, can only be an approximation of potential fees.

BEST BEST & KRIEGER LLP