

**RESOLUTION NO. 11/12- 31  
CITY OF DAYTON, OREGON**

**Title:** *A Resolution Approving Renewal of a Personal Services Contract for City Attorney Legal Services, July 1, 2012 thru June 30, 2013*

**WHEREAS**, the City has contracted for legal services with the firm of Beery, Elsner & Hammond, LLP, since 1999; and

**WHEREAS**, the City desires to continue to utilize the services of this firm as the City's attorneys; and

**WHEREAS**, the City wishes to renew the Agreement for an additional year with no increase in hourly or monthly rates and no changes in terms;

**The City of Dayton resolves as follows:**

- 1) **THAT** the City of Dayton hereby approves the extension of the Personal Services Contract for City Attorney Services, attached hereto as Exhibit A and made a part hereof, on behalf of the City, which will be bound by its terms;
- 2) **THAT** the Agreement shall be effective for the period July 1, 2012 through June 30, 2013.

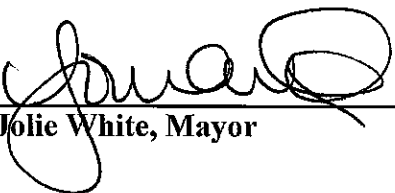
**ADOPTED** this 18<sup>th</sup> day of **June 2012**.

**In Favor:**     **Blackburn, Evers, Frank, Utt, White**

**Opposed:**     **None**

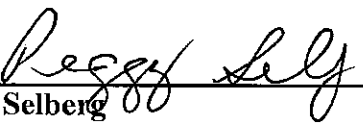
**Absent:**       **Wytoski**

**Abstained:**   **None**

  
\_\_\_\_\_  
Jolie White, Mayor

6/19/12  
\_\_\_\_\_  
Date of Signing

**ATTESTED:**

  
\_\_\_\_\_  
Peggy Selberg  
City Recorder

6/18/12  
\_\_\_\_\_  
Date of Enactment

Attachment - Exhibit A

March 7, 2012

City of Dayton  
Christy Ellis, City Manager  
416 Ferry Street  
PO Box 339  
Dayton, OR 97114

Re: Legal Counsel Services

Dear Christy:

It is our pleasure to continue to serve as legal counsel for the City of Dayton. We are in the process of performing an annual review of all of our existing service agreements to be sure they are up-to-date. Our current contract with the City became effective in June 2011 and continues until June 31, 2012.

We write to let you know that we have decided to forgo any request for a rate increase for the fiscal year 2012-2013. However, in order for us to keep up with rising costs and inflation, a future rate adjustment is likely in 2013-2014. We hope that our deferral of a rate adjustment this fiscal year will in some small measure help the City manage its budget in the coming year.

Please feel free to call with any questions, and our sincere thanks for the opportunity to provide service to the City of Dayton.

Sincerely,



Pamela J. Beery

PJB/sb

**APPENDIX A**

**CITY OF DAYTON  
PERSONAL SERVICES CONTRACT**

**PROVIDE CITY ATTORNEY SERVICES**

**THIS CONTRACT FOR PERSONAL OR PROFESSIONAL SERVICES** ("Contract") is entered into between the City of Dayton, Oregon, located at 416 Ferry Street, P.O. Box 339, Dayton, Oregon 97114 ("City") and Beery Elsner & Hammond, LLP, located at 1750 SW Harbor Way, Suite 380, Portland, Oregon, 97201 ("Contractor"). The City's primary supervisor for this Contract ("Contract Administrator") is Christy Ellis, City Manager.

**THE PARTIES HEREBY AGREE THAT:**

**1. EFFECTIVE DATE; DURATION.** This Contract shall become effective on the date this Contract has been signed by every party hereto and, approved by legal counsel for the City. Unless terminated or extended, this Contract shall expire when City accepts Contractor's completed performance or on June 30, 2011 whichever date occurs first.

**2. STATEMENT OF WORK.** In accordance with the terms and conditions of this Contract, Contractor shall perform the services as scheduled ("Work") and as set forth in Contractor's proposal dated June 9, 2010, attached hereto as Exhibit "A" and incorporated herein by this reference; or

**3. CONTRACT DOCUMENTS.** In the event of a conflict between or among the terms of this instrument, any proposal and/or request for proposals, the following order of precedence shall prevail: (a) this instrument, (b) attached exhibits; (c) the request for proposal, (d) the proposal. Nothing herein shall be considered as an acceptance of the terms of a proposal if the terms of the proposal conflict or are otherwise incompatible with the express terms contained herein or in the City's request for proposal.

City's Request for Proposal dated May 24, 2010, is attached hereto as Exhibit "B" and incorporated herein by this reference. (*Attach RFP if Contract results from RFP solicitation.*)

**4. CONSIDERATION.** City shall pay Contractor  the sum of \$ \_\_\_\_\_ or  at the hourly rate of \$ \_\_\_\_\_ for satisfactory accomplishment of the Work required by this Contract. The **MAXIMUM, NOT-TO-EXCEED AMOUNT** of compensation payable to Contractor under this Contract, which includes any allowable expenses or reimbursement, is \$ \_\_\_\_\_.

**5. BILLING AND PAYMENT SCHEDULE.** At least thirty (30) days prior to due date of payment, Contractor shall prepare and submit to **THE CITY OF DAYTON, ATTENTION: FINANCE DEPARTMENT, PO BOX 339, DAYTON, OREGON 97114**, an invoice of services rendered. Payment shall be made upon Contract Administrator's approval and acceptance of Contractor's completed Work described herein, whereupon Contract Administrator shall submit a payment request to City's Finance Department. If this Contract specifies an end product, an amount up to 10 percent of the total sum of money to be paid for the satisfactory accomplishment of the Work may be withheld until all required Work is completed and accepted. If charges are made for services performed and those charges are to be paid from grant funds, the services shall relate directly to the grant from which the funds are expended. Interim payments to Contractor for

Request for Proposal for City Attorney Services

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partial completion of tasks or services may be made only upon prior written authorization of City. When made, interim payment shall release City from any further obligation for payment to Contractor for Work performed or expenses incurred as of the date of the invoice of services rendered.

**6. AVAILABILITY OF FUNDS.** City has sufficient funds currently available and authorized for expenditure to finance costs of this Contract within City's current fiscal period; provided, however, that continuation or extension of the Contract after the end of the fiscal period in which this Contract is written is contingent upon a new appropriation for each succeeding fiscal period. If sufficient funds are not provided in future City Council-approved budgets of City (or from applicable federal, state, or other sources) to permit City in the exercise of its reasonable administrative discretion to continue this Contract, or if City abolishes the program for which benefit this Contract was executed, City may terminate this Contract without further liability by giving Contractor not less than 30 days' notice. In determining the availability of funds, City may use the annual budget adopted for it by its City Council.

**7. ASSIGNMENT AND SUBCONTRACTORS.** Contractor shall not assign, sell, subcontract, dispose of or transfer rights or delegate duties hereunder, either in whole or in part, without the City's prior written consent; provided, however, that money due to Contractor may be assigned, if the City is given written notice thereof, but any assignment of money shall be subject to all proper setoffs and withholdings in favor of the City. In no instance shall such consent relieve Contractor of any obligations hereunder. Any assignee, transferee or subcontractor shall be considered the agent of the Contractor and be bound to abide by all provisions of this Contract. Contractor, and its surety, if any, shall remain liable to City for complete performance of this Contract as if no such assignment, sale, subcontracting, disposal, transfer or delegation had occurred, unless City otherwise agrees in writing. The provisions of this Contract shall be binding upon and shall inure to the benefit of the parties hereto and their respective successors and permitted assigns, if any.

- 8. TERMINATION.** The parties may effect termination of this Contract in the manners indicated:
- a. **Parties' Right to Terminate for Convenience.** This Contract may be terminated at any time by mutual written consent of the parties.
  - b. **City's Right to Terminate for Convenience.** City may, at its sole discretion, terminate this Contract, in whole or in part, upon 30 days notice to Contractor.
  - c. **City's Right to Terminate for Cause.** City may terminate this Contract, in whole or in part, immediately upon notice to Contractor, or at such later date as City may establish in such notice, upon the occurrence of any of the following events:
    - (i) City fails to receive funding, or appropriations, limitations or other expenditure authority at levels sufficient to pay for Contractor's Work;
    - (ii) Federal or state laws, regulations or guidelines are modified or interpreted in such a way that either the work under this Contract is prohibited or City is prohibited from paying for such work from the planned funding source;
    - (iii) Contractor no longer holds any license or certificate that is required to perform the work; or
    - (iv) Contractor commits any material breach or default of any covenant, warranty, obligation or agreement under this Contract, fails to perform the work under this Contract within the time specified herein or any extension thereof, or so fails to pursue the work as to endanger Contractor's performance under this Contract in accordance with its terms, and such breach, default or failure is not cured within 10 business days after delivery of City's notice, or such longer period as City may specify in such notice.

- d. **Consultant's Right to Terminate for Cause.** Contractor may terminate this Contract upon 30 days' notice to City if City fails to pay Contractor pursuant to the terms of this Contract and City fails to cure within 30 business days after receipt of Contractor's notice, or such longer period of cure as Contractor may specify in such notice.
- e. **Remedies.** (i) In the event of termination pursuant to subsections a, b, c(i), c(ii) or d. of this Section, Contractor's sole remedy shall be a claim for the sum designated for accomplishing the work multiplied by the percentage of work completed and accepted by City, less previous amounts paid and any claim(s) which City has against Contractor. If previous amounts paid to Contractor exceed the amount due to Contractor under this subsection, Contractor shall pay any excess to City upon demand. (ii) In the event of termination pursuant to subsection c(iii) or c(iv) of this Section, City shall have any remedy available to it in law or equity. If it is determined for any reason that Contractor was not in default under subsection c(iii) or c(iv) of this Section, the rights and obligations of the parties shall be the same as if the Contract was terminated pursuant to subsection b of this Section.
- f. **Consultant's Tender upon Termination.** Upon receiving a notice of termination of this Contract, Contractor shall immediately cease all activities under this Contract, unless City expressly directs otherwise in such notice of termination. Upon termination of this Contract, Contractor shall deliver to City all documents, information, works-in-progress and other property that are or would be deliverables had the Contract been completed. Upon City's request, Contractor shall promptly surrender to anyone City designates, all documents, research or objects or other tangible things needed to complete the work.

**9. FORCE MAJEURE.** Neither party shall be held responsible for delay or default caused by war, insurrection, acts of terrorism, strikes, lockouts, labor disputes, riots, terrorist acts or other acts of political sabotage, volcanoes, floods earthquakes, fires, acts of God, acts of the public enemy, epidemic, quarantine restrictions, freight embargoes, lack of transportation, governmental restrictions or priorities, severe weather, or any other uncontrollable or unforeseeable act or circumstance beyond a party's reasonable control and without the fault or negligence of the party. The affected party, however, shall make all reasonable efforts to remove or eliminate such cause of delay or default and shall, upon cessation of the cause, diligently pursue performance of its obligations under this Contract. In the event of such delay, the party delayed shall give written notice of the delay and the reason therefor to the other party within 30 days after the delayed party learns of the delaying event. An extension of time for any such cause shall be for the period of duration of the cause. Delays under this paragraph shall not be the basis for additional compensation payable to the Contractor.

**10. MODIFICATION.** Any modification of the provisions of this Contract shall not be enforceable unless first reduced to writing and signed by both parties. A modification is a written document, contemporaneously executed by City and Contractor, which increases or decreases the cost to City over the agreed sum or changes or modifies the Statement of Services or Delivery Schedule. Any such modification shall be effective only in the specific instance and for the specific purpose identified in the modification. In the event that Contractor receives any communication of whatsoever nature from City that Contractor contends gives rise to any modification of this Contract, Contractor shall, within 15 calendar days after receipt, make a written request for modification to City. Contractor's failure to submit such written request for modification in a timely manner is a basis upon which City may refuse to treat said communication as a modification. In connection with any modification to the Contract affecting any change in price, Contractor shall submit a complete breakdown of labor, material, equipment

and other costs. If Contractor incurs additional costs or devotes additional time on project tasks which were reasonably expected as part of the original Contract or any mutually approved modifications, then City shall be responsible for payment of only those costs for which it has agreed to pay.

**11. ACCESS TO RECORDS.** Contractor shall maintain all books, documents, papers and records relating to this Contract in accordance with generally accepted accounting principles. In addition, Contractor shall maintain any other records pertinent to this Contract in such a manner as to clearly document Contractor's performance. City, state and federal government, and their duly authorized representatives, shall have access to Contractor's books, documents, papers, plans, writings and records that are directly pertinent to this Contract for the purpose of performing examinations and audits and making excerpts and transcripts. Contractor shall retain and keep accessible all such fiscal records, books, documents, papers, plans, and writings for a minimum of three years from the date of Contract expiration, or such longer period as may be required by applicable law, following final payment and termination of this Contract, or until the conclusion of any audit, controversy or litigation arising out of or related to this Contract, whichever date is later. Contractor is responsible for any audit discrepancies involving deviation from the terms of this Contract and for any commitments or expenditures in excess of amounts authorized by City. The state and federal governments and their duly authorized representatives are intended beneficiaries of the terms of this provision.

**12. COMPLIANCE WITH APPLICABLE LAWS.** Contractor shall comply with all federal, state and local laws, ordinances, rules, regulations and executive orders applicable to the Work to be performed under this Contract. Failure or neglect on the part of Contractor to comply with any or all such laws, ordinances, rules or regulations shall not relieve Contractor of these obligations or the requirements of this Contract. Without limiting the foregoing, Contractor shall comply with all federal, state and local civil rights and rehabilitation laws prohibiting discrimination because of race, sex, national origin, religion, age or disability, and shall comply with all applicable provisions of ORS 279C.500 through 279C.565. The provisions of ORS 279C.505, ORS 279C.510, ORS 279C.515, ORS 279C.520 and ORS 279C.530 are hereby incorporated herein by this reference and the applicable terms therein shall be binding upon Contractor. The parties shall comply with any state or federal law or regulation specific to the funding source that supports this Contract.

**13. INDEPENDENT CONTRACTOR; RESPONSIBILITY FOR TAXES & WITHHOLDING.** The Work to be rendered under this Contract is that of an Independent Contractor. Contractor is not to be considered an agent or employee of City for any purpose. Contractor shall be solely and entirely responsible for its acts and for the acts of its agents or employees during the performance of this Contract. As used herein, "Independent Contractor" means that:

- a. Contractor is free from direction and control over the means and manner of providing labor or services, subject only to City's right to specify the desired results.
- b. Contractor is responsible for obtaining all required business registrations or professional occupational licenses.
- c. Contractor furnishes the tools or equipment necessary to perform the contracted labor or services.
- d. Contractor has the authority to hire and fire Contractor's employees.
- e. Contractor is registered under ORS chapter 701 to provide labor or services for which such registration is required.
- f. For labor and services performed as an Independent Contractor in the previous year, Contractor has either filed federal and state income tax returns in the name of

Contractor's business or, in the alternative: Contractor has filed a Schedule C tax form as part of Contractor's personal income tax return.

- g. Contractor represents to the public that the labor or services described herein are to be provided by an independently established business.
- h. Payment to the Contractor is made upon completion or periodic completion of the performance required herein, or is made based on a periodic retainer.

Neither Contractor nor any of Contractor's agents or employees is entitled to any of the benefits (including, but not limited to, social security, workers' compensation and unemployment insurance benefits) that City provides its employees. Contractor shall be responsible for all federal or state taxes applicable to compensation or payments paid to Contractor under this Contract. Unless Consultant is subject to backup withholding, City will not withhold from such compensation or payments any amount to cover Contractor's federal or state tax obligations.

**14. REPRESENTATIONS AND WARRANTIES; STANDARD OF CARE.** Contractor represents and warrants to City that:

- a. Contractor has the power and authority to enter into and perform this Contract;
- b. When executed and delivered, this Contract shall be a valid and binding obligation of Contractor enforceable in accordance with its terms;
- c. If Contractor provides personal services under this Contract, the Work under this Contract shall be performed in a good and workmanlike manner;
- d. If Contractor provides professional services under this Contract, the Work under this Contract shall be performed in accordance with generally accepted professional practices and principles and in a manner consistent with the level of care, skill and diligence ordinarily exercised by members of the profession currently practicing under similar conditions; and
- e. Contractor shall, at all times during the term of this Contract, be duly licensed to perform the Work, and if there is no licensing requirement for the profession or Work, be duly qualified and competent.

The warranties set forth in this Section are in addition to, and not in lieu of, any other warranties provided.

**15. OWNERSHIP OF WORK PRODUCT.** All work products or any form of property originated or prepared by Contractor that results from this Contract are the exclusive property of City. Contractor understands and agrees that the work to be performed for City under this Contract shall be considered "work for hire" and City shall be deemed the exclusive owner of all rights to copyright the work once performed no matter when it comes into City's physical possession. Reuse of work product by City or others for purposes outside the scope of the Statement of Work of this Contract shall be without liability to Contractor.

**16. INDEMNITY.** With regard to the Contractor's performance in connection with or incidental to the Work, but excluding its performance of professional services and the indemnification and hold harmless aspects thereto as set forth below in this Section, the Contractor shall defend, indemnify, protect and hold the City, its officials, agents, employees and volunteers harmless from and against any and all claims, suits, actions, losses, costs or judgments of any nature for damages or injuries to any person or property, including injury to the Contractor's or its subcontractors' employees, agents or officers, which arise from or are connected with or are caused or claimed to be caused by the negligent, reckless or willful acts or omissions of the Contractor and its subcontractors and their agents, officers or employees, in performing Work herein, and all expenses of investigating and defending against same, including attorney fees and

costs at trial and on appeal: provided, however, that the Contractor's duty to indemnify and hold harmless shall not include any claims or liability arising from the established sole negligence or willful misconduct of the City, its officials, agents, employees or volunteers.

With regard to the Contractor's performance of professional services, Contractor shall defend, indemnify and hold harmless the City, its officials, agents, employees and volunteers from and against any and all claims, costs, suits, actions, losses, expenses and damages, including attorney's fees and costs at trial and on appeal, arising from the willful misconduct or negligent acts, errors or omissions of the Consultant and/or its subconsultants associated with the Work.

**17. INSURANCE.** Contractor, at Contractor's own expense, shall procure and maintain in full force and effect for the duration of Contractor's Work under this Contract the types and coverage amounts of insurance conforming to these minimum requirements:

**WORKERS' COMPENSATION INSURANCE  
AND EMPLOYER LIABILITY INSURANCE**

**Required;**  **Not Required.**

Workers' Compensation Insurance in compliance with ORS 656.017, which requires subject employers to provide Oregon workers' compensation coverage for all their subject workers. Out-of-state employers must provide Oregon workers' compensation coverage for their workers who work in Oregon, unless existence of extraterritorial coverage is established pursuant to ORS 656.126(3). All Contractors and subcontractors required to procure and maintain Workers' Compensation Insurance shall also procure and maintain in full force and effect for the duration of Contractor's or subcontractor's Work under this Contract Employer Liability Insurance with a combined single limit, or the equivalent, of not less than \$500,000 each employee per accident for bodily injury by accident or disease.

Contractor shall require and ensure that each of its subcontractors who provide labor or services in connection with this Contract operates in compliance with ORS 656.017 by providing Oregon workers' compensation coverage for all their subject workers. Contractor shall require proof of such Workers' Compensation Insurance and Employer Liability Insurance by receiving and keeping on file a certificate of insurance from each subcontractor and anyone else directly employed by either the Contractor or subcontractor.

Workers' Compensation Insurance and Employer's Liability Insurance coverage is required under this Contract of all Contractors who are employers. If Contractor is legally exempt from any requirement to provide Workers' Compensation Insurance coverage for the Work to be performed under this Contract, Contractor hereby represents that Contractor understands and agrees that under ORS 656.006(13), an "employer" is any person who contracts to pay remuneration for and secures the right to direct and control the services of any person. Contractor understands and agrees that if Contractor is exempt from coverage under ORS 656.027 and engages individuals in performance of this Contract who are not exempt from coverage under ORS 656.027, then Contractor shall provide Workers' Compensation Insurance coverage for all such individuals. If the Contractor does not provide that insurance, Contractor may be deemed a non-complying employer for purposes of Oregon law and agrees to hold City harmless from and indemnify City against any and all claims for compensation benefits made against the Contractor as a non-complying employer. If Contractor is declaring Contractor exempt from any requirement to provide workers' compensation coverage, Contractor must initial here: \_\_\_\_\_; otherwise Contractor shall procure and maintain the required insurance.

**COMMERCIAL GENERAL LIABILITY INSURANCE**

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**Required;**  **Not Required.**

General Liability Insurance with a combined single limit, or the equivalent, of not less than  \$500,000;  \$1,000,000;  \$2,000,000; or  \$5,000,000 covering, but not limited to, liability for personal injury and property damage. The policy shall be written on an occurrence basis on ISO Form CG 00 01, or its equivalent, and shall include blanket contractual liability coverage for the assumed liability under this Contract and broad form property damage coverage including completed operations. The City of Dayton, and its officials, employees and agents shall be named as additional insureds under ISO Form CG 20 10 (Additional Insureds – Owners, Lessees or Consultants), or its equivalent, with respect to the Work to be provided under this Contract. The Commercial General Liability Insurance coverage required by this Contract is with respect only to the Work described in this Contract, and has no relationship to, or bearing upon, other projects of the insured. The insurance coverage is primary to any self-insurance program.

#### **AUTOMOBILE LIABILITY INSURANCE**

**Required;**  **Not Required.**

Automobile Liability Insurance with an each accident limit, or the equivalent, of not less than  \$500,000, or  \$1,000,000 covering, but not limited to, liability for bodily injury and property damage, together with coverage for "any auto," including owned, non-owned and hired autos used in connection with the performance of the Work. The policy shall be written on an occurrence basis on ISO Form CA 00 01, or its equivalent, including an omnibus insurance clause. The City of Dayton, and its officials, employees and agents shall be named additional insureds under the policy if Contractor's Work entails transporting people for the City. The policy cannot be excess to a self-insurance program; any deductible cannot exceed \$5000. If Contractor is declaring Contractor excused from any requirement to provide Automobile Liability Insurance coverage because Contractor does not use an automobile in connection with Work under this Contract, Contractor may initial here: \_\_\_\_\_; otherwise Contractor shall procure and maintain the required insurance.

#### **PROFESSIONAL LIABILITY INSURANCE**

**REQUIRED;**  **NOT REQUIRED.**

Professional Liability Insurance with a combined single limit, or the equivalent, of not less than  \$500,000;  \$1,000,000;  \$2,000,000; or  \$5,000,000 per claim with a  \$2,000,000 or  \$5,000,000 annual aggregate limit, covering, but not limited to, liability for bodily injury, property damage and economic loss. Contractor shall be responsible for any deductible amounts. If Contractor proposes using subcontractors, in addition to any other requirements of this Contract, City may require subcontractors to provide professional liability insurance of similar type and coverage amount. Contractor, at Contractor's own expense, shall maintain the Professional Liability Insurance in full force for not less 24 months following completion of this Contract. The Professional Liability coverage required by this Contract is with respect only to the Work described in this Contract, and has no relationship to, or bearing upon, other projects of the insured. Coverage must be in effect prior to the commencement of the performance of this Contract. Contractor shall furnish proof of continuous "tail" coverage for 24 months after Contract completion.

#### **CONSULTANT POLLUTION LIABILITY**

**REQUIRED;**  **NOT REQUIRED.**

Contractor's Professional Liability Insurances shall be endorsed to provide liability coverage in an amount not less than  \$1,000,000;  \$2,000,000; or  \$5,000,000 per claim limit, with a  \$2,000,000 or  \$5,000,000 annual aggregate limit, covering, but not limited to, liability for

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bodily injury, property damage and cleanup costs. In lieu of endorsement, the City may accept equivalent coverage under a separate insurance policy.

**COMMERCIAL CRIME INSURANCE**

REQUIRED;  NOT REQUIRED.

Commercial Crime Insurance not less than \$50,000 including, but not limited to, coverage for theft or loss of client property.

**CONTRACTOR POLLUTION LIABILITY INSURANCE**

REQUIRED;  NOT REQUIRED.

Contractor Pollution Liability Insurance in an amount not less than  \$1,000,000;  \$2,000,000; or  \$5,000,000 per claim limit, with a  \$2,000,000 or  \$5,000,000 annual aggregate limit, covering, but not limited to, liability for bodily injury, property damage and cleanup costs.

**WAIVER OF SUBROGATION**

REQUIRED;  NOT REQUIRED.

If Waiver of Subrogation is required, Contractor hereby waives Contractor's right to recover from the City, and its officers, agents, employees and volunteers for any damages arising out of Work performed under this Contract and covered by insurance. Any Commercial General Liability Insurance policy and/or Automobile Liability Insurance policy required under this Contract shall be endorsed to provide for a waiver of underwriter's rights to subrogation as to additional insureds.

**18. INSURANCE CERTIFICATION; OTHER INSURANCE REQUIREMENTS.** Before Contractor commences Work under this Contract, Contractor shall furnish City, through its Risk Manager, with acceptable certificates evidencing the types, amounts and issuers of insurance coverage meeting the minimum requirements of this Contract. The certificate shall specify all of the parties who are Additional Insureds. If a certificate of insurance coverage is unavailable from a particular insurer, alternative proof of insurance coverage acceptable to City shall be arranged. Renewal certificates of insurance shall be furnished no later than 15 days before the expiration of the policy. Any deductibles or self-insured retentions must be stated on the certificate of insurance, which shall be sent to and approved by City's Risk Manager in advance to commencement of Work under this contract.

In all instances concerning all forms of insurance required by this Contract:

- a. The insurance shall be issued by a company authorized to do insurance business in the State of Oregon or by a non-admitted insurer subject to the Oregon Surplus Lines Law (ORS 735.400 to 735.495);
- b. Upon request, complete copies of insurance policies, trust agreements, etc. shall be provided to City;
- c. Contractor shall be financially responsible for all pertinent deductibles, self-insured retentions and/or self-insurance amounts;
- d. Umbrella or Excess Liability Insurance may be used to achieve the above minimum liability limits, so long as policy is endorsed to state it is "As Broad as Primary Policy." If Umbrella or Excess policy is evidenced to comply with minimum limits, a copy of the Underlying Schedule from the Umbrella or Excess Liability Insurance policy may be required;

- e. Contractor shall provide City not less than 30 days written notice of Contractor's intent to cancel, terminate or make any material change affecting required insurance coverage;
- f. Until such time as the insurance is no longer required by the City. Contractor shall provide the City with renewal or replacement evidence of insurance no less than 30 days before the expiration or replacement of the required insurance. If at any time during the period when insurance is required by the Contract, an insurer shall fail to comply with the requirements of this Contract, as soon as Contractor has knowledge of any such failure, Contractor shall immediately notify the City and immediately replace such insurance with an insurer meeting the requirements
- g. Except for Professional Liability Insurance, the insurance shall be provided by a carrier with A.M. Best's Rating of A- or better and Financial Performance Rating of 7 or better. Contractor's Professional Liability Insurance policy shall be written by an insurer satisfactory to City and may be written on a claims made basis, provided Contractor, at Contractor's own expense, maintains the Professional Liability Insurance in full force for not less 24 months following completion of this Contract; and
- h. The insurance provided by Contractor and its subcontractors shall apply on a primary basis and be required to respond and pay prior to any other available coverage. Any insurance maintained by the City shall be excess of and shall not contribute with the insurance provided by Contractor and its subcontractors.

City reserves the right to review the types of coverages and limits of insurance required herein from time to time. In the event that City changes its insurance requirements after this Contract has been signed, City will provide notice to Contractor of the new requirements. Contractor shall promptly modify its coverage to comply with the new requirements and provide City with updated evidence of coverage. Contractor will be entitled to an adjustment in the Contract price for any increase in premium resulting from such changes, provided Contractor can establish with reasonable certainty that the increased premium was due to changes required by City. Premium savings from any changes shall be refunded to City.

**19. LIMITATION OF LIABILITIES.** Neither party shall be liable for (i) any indirect, incidental, consequential or special damages under the Contract or (ii) any damages of any sort arising solely from the termination of this Contract in accordance with its terms; provided, however, this provision does not apply to liability arising under or relating to Section 8(e)(ii)(Termination) or Section 14 (Representations and Warranties; Standard of Care).

**20. NOTICE.** Except as otherwise expressly provided in this Contract, any communications between the parties hereto or notices to be given hereunder shall be given in writing by personal delivery, facsimile, or mailing the same, postage prepaid, to Contractor or City at the address or number as identified herein above, or to such other addresses or numbers as either party from time to time may designate in writing. Any communication or notice so addressed and mailed shall be deemed to be given five (5) days after mailing. Any communication or notice delivered by facsimile shall be deemed to be given when receipt of the transmission is generated by the transmitting machine. To be effective against City, such facsimile transmission must be confirmed by telephone notice to the Contract Administrator. Any communication or notice by personal delivery shall be deemed to be given when actually delivered.

**21. NO THIRD PARTY BENEFICIARIES.** City and Contractor are the only parties to this Contract and are the only parties entitled to enforce its terms. Nothing in this Contract gives, is intended to give, or shall be construed to give or provide any benefit or right, whether directly, indirectly or

otherwise, to third persons unless such third persons are identified by name herein and expressly described as intended beneficiaries of the terms of this Contract.

**22. CONFLICT OF INTEREST.** Contractor hereby represents that no employee of the City, or any partnership or corporation in which a City employee has an interest, will or has received any remuneration of any description from Contractor, either directly or indirectly, in connection with the letting or performance of this Contract, except as specifically declared in writing.

**23. HAZARD COMMUNICATION.** Contractor shall notify City before using products containing hazardous chemicals to which City employees or patrons may be exposed. In accordance with the OR-OSHA Hazard Communication Rules in OAR chapter 437, division 155, Contractor shall provide City with a Material Safety Data Sheet for any goods provided under this Contract that may release, or otherwise result in exposure to a hazardous chemical under normal conditions of use (OAR 437-155-005(2), 437-155-025). In addition, Contractor must label, tag, or mark such goods.

**24. DISCLOSURE OF SOCIAL SECURITY NUMBER.** Contractor must provide Contractor's Social Security Number unless Contractor provides a federal tax ID number. Social Security numbers provided pursuant to this authority will be used for the administration of state, federal and local tax laws.

**25. DISPUTE RESOLUTION.** Any disputes under this Contract not resolved by the parties through direct communication shall be dealt with first by the aggrieved party giving the other party written notice of the dispute and, within 20 days after receipt of said notice, the receiving party submitting to the aggrieved party a written response. The notice and response shall include a statement of each party's position and a summary of the evidence and arguments supporting its position. Any disputes not resolved by this process shall be submitted to mediation before commencement of litigation.

The mediator shall be named by mutual agreement of the parties or by obtaining a list of five qualified persons from the parties and alternatively striking names. The mediator shall have the duty and responsibility to assist the parties in resolving all issues submitted for mediation. The parties shall cooperate and operate to resolve all matters in dispute with the assistance of the mediator. The parties shall share the mediator's fees and expenses equally, unless they agree otherwise. The mediation shall terminate by: (a) written agreement signed by the parties; (b) determination by the mediator that the parties are at an irresolvable impasse; or (c) two unexcused absences by either party from the mediation session. The mediator shall not participate in any claim or controversy arising out of this Contract and may not be called as a witness to testify in any proceeding involving the subject matter of mediation. ORS 36.100 to 36.245 shall apply to the entire process of mediation.

The mediation shall commence at a mutually acceptable time and place within sixty days of the date of the aggrieved party's notice. Mediation may continue as often and as long as thereafter as the mediator and the parties reasonably deem necessary to exchange relevant information and to attempt to resolve the dispute. Should the mediation fail to settle such dispute within 60 days of the commencement of mediation, or if the party receiving said notice do not meet within sixty days of said notice, either party may terminate mediation. The parties shall share equally the costs of the mediator. Each party shall be responsible for its own costs of mediation.

**26. SURVIVAL.** Expiration shall not extinguish or prejudice City's right to enforce this Contract with respect to any breach of a Contractor warranty or any default or defect in Contractor performance that has not been cured. All representations, indemnifications, warranties and

guarantees made in, required by or given by the Contractor in accordance with this Contract, as well as all continuing obligations indicated in the Contract, will survive final payment to the Contractor, completion of the Work and termination or completion of the Contract.

**27. TIME IS OF THE ESSENCE.** Time is of the essence under this Contract.

**28. GOVERNING LAW.** This Contract is entered into and is to be performed in Oregon and shall be governed and construed in accordance with the laws of the State of Oregon, without resort to any jurisdiction's conflict of laws, rules or doctrines. Any claim, action, suit, or proceeding between City and Contractor arising from or relating to this Contract shall be brought and conducted solely and exclusively within the Circuit Court of Yamhill County, Oregon, or, if the claim must be brought in a federal forum, the United States District Court for the District of Oregon. Contractor hereby consents to *in personam* jurisdiction of said courts.

**29. CAPTIONS.** The captions or headings in this Contract are for reference purposes only and shall not affect in any way the meaning or interpretation of this Contract.

**30. COUNTERPARTS.** This Contract may be executed in several counterparts, all of which when taken together shall constitute one agreement binding on all parties, notwithstanding that all parties are not signatories to the same counterpart. Each copy of the Contract so executed shall constitute an original.

**31. MERGER.** This Contract (including, to the extent provided herein, any attached exhibits) constitutes the entire and integrated agreement between the parties and supersedes all prior contracts, negotiations, representations or agreements, either written or oral. There are no understandings, agreements, representations, oral or written, not specified herein regarding this agreement.

**32. WAIVER.** City's failure to enforce a provision of this Contract shall not constitute a continuing waiver, shall not constitute a relinquishment of City's right to performance in the future and shall not operate as a waiver of City's right to enforce any other provision of this Contract.

**33. SEVERABILITY.** If any term or provision, or portions thereof, of this Contract is declared by an arbiter or a court of competent jurisdiction to be illegal, invalid, void, or otherwise unenforceable, each such term or provision shall be enforced only to the extent it is not in violation of law or is not otherwise unenforceable; all other provisions and requirements of this Contract shall remain in full force and effect insofar as possible to preserve the lawful anticipated benefits of this Contract to the parties.

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#### **Certification**

The individual signing on behalf of Contractor hereby certifies and swears under penalty of perjury: (a) the number shown on this form is Contractor's correct taxpayer identification; (b) Contractor is not subject to backup withholding because (i) Contractor is exempt from backup withholding, (ii) Contractor has not been notified by the IRS that Contractor is subject to backup withholding as a result of a failure to report all interest or dividends, or (iii) the IRS has notified Contractor that Contractor is no longer subject to backup withholding; (c) s/he is authorized to act on behalf of Contractor, s/he has authority and knowledge regarding Contractor's payment of taxes, and to the best of her/his knowledge, Contractor is not in violation of any Oregon tax laws; (d) Contractor is an independent Contractor as defined in ORS 670.600; and (e) the Contractor data set forth herein is true and accurate.

---

The parties, by their signature below, acknowledge having read and understood the Contract and agree to be bound by its terms and conditions.

Request for Proposal for City Attorney Services  
Page 12 of 13

**AGREED TO BY THE PARTIES HERETO:**

**CITY OF DAYTON, OREGON**

BY: *Christy Ellis*  
TITLE: *City Manager*  
DATE: *9/22/10*

BY: *Penzance*  
TITLE: *Owner / Partner*  
DATE: *15 September 2010*

APPROVED AS TO LEGAL SUFFICIENCY: *Penzance*  
City Attorney

Federal Tax ID#: 93-1234801; or  SSN: \_\_\_\_\_

This payment information must be provided for Contract approval. This information will be reported to the Internal Revenue Service (IRS) under the name and taxpayer identification submitted. (See IRS 1099 for more information.) Information not matching IRS records could subject Contractor to backup withholding.

EXHIBIT A  
Statement of Work

Compensation

Payment will be made to ATTORNEY for services identified based upon a detailed monthly billing showing work performed. Payment will be made within thirty (30) days of CITY's receipt of the detailed monthly billing from ATTORNEY.

Hourly rates are:

Partners and Of Counsel	\$190.00 per hour
Associates	\$165.00 per hour
Paralegals	\$125.00 per hour
Legal Assistants	\$ 95.00 per hour

*It is understood that the above rates may be adjusted or changed by ATTORNEY on not more than a yearly basis with not less than sixty (60) days written notice to CITY.*

Costs

CITY shall reimburse ATTORNEY for out-of-pocket expenses at ATTORNEY'S direct cost without additional markup.

*Including flat fee arrangement described  
in September 26, 2010 email as needed*

*CSB/lyg*

**Christy Ellis**

**From:** Paul Elsner [Paul@gov-law.com]  
**Sent:** Tuesday, September 21, 2010 8:43 AM  
**To:** Christy Ellis  
**Cc:** Sheila Benson; Heather Martin; Peggy Selberg; Yen Huynh  
**Subject:** RE: Personal Services Agreement for Legal Services

Christy:

We know ... I think this email acknowledging the flat fee arrangement of \$300.00 for one (1) Council meeting per month (which sum is inclusive of travel time to and from the City but not travel cost reimbursement as set at the IRS mileage rate) should suffice.

That is my recollection of our discussion ... I certainly hope that is the same as yours. If it is, attach this email to the executed agreement.

Regards,

PAUL C. ELSNER  
BEERY ELSNER & HAMMOND, LLP  
1750 SW HARBOR WAY, SUITE 380  
PORTLAND, OR 97201  
T (503) 226 7191 | F (503) 226 2348  
[WWW.GOV-LAW.COM](http://WWW.GOV-LAW.COM)



Please consider the environment before printing this email.

Caution! This communication may be a privileged attorney-client communication or attorney work product. Please do not distribute, forward or retransmit without prior approval. If you have received this e-mail by mistake, please notify me by reply e-mail and delete all copies. Thank you.

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**From:** Christy Ellis [mailto:cellis@ci.dayton.or.us]  
**Sent:** Monday, September 20, 2010 6:00 PM  
**To:** Paul Elsner; Heather Martin  
**Cc:** Peggy Selberg  
**Subject:** Personal Services Agreement for Legal Services

Thank you for sending a signed copy of the personal services agreement. The Statement of Work does not include the "flat fee" arrangement we discussed regarding attendance at City Council meetings. Please amend the Statement of Work (Exhibit A) to include this information. Thank you.

Christy





**CONFIDENTIAL COMMUNICATION**

THIS E-MAIL MESSAGE AND ANY ATTACHMENTS MAY CONTAIN CONFIDENTIAL INFORMATION OR PRIVILEGED MATERIAL AND IS INTENDED FOR USE SOLELY BY THE ABOVE REFERENCED RECIPIENT. ANY REVIEW, COPYING, PRINTING, DISCLOSURE, DISTRIBUTION, OR OTHER USE BY ANY OTHER PERSON OR ENTITY IS STRICTLY PROHIBITED AND MAY BE ILLEGAL. IF YOU ARE NOT THE NAMED RECIPIENT, OR BELIEVE YOU HAVE RECEIVED THIS EMAIL IN ERROR, PLEASE IMMEDIATELY NOTIFY THE CITY OF DAYTON AT (503) 864-2221 AND DELETE THE COPY YOU RECEIVED.

## I. EXECUTIVE SUMMARY

Beery, Elsner & Hammond, LLP is a Martindale-Hubbell AV-rated law firm dedicated to the provision of outstanding legal services to its local government clients. The firm limits its representation to public bodies in Oregon and Washington and has developed a solid and unparalleled foundation in local government law. Key strengths of our firm include:

- » **OVER 120 YEARS OF COMBINED EXPERIENCE** dedicated exclusively to representing local governments, both as in-house and outside counsel;
- » **WIDE-RANGING EXPERTISE** in the key areas of land use and zoning law, growth management, labor law and personnel, construction law, including construction of public works projects, real estate law, water and utility law, intergovernmental relations, public works agreements and financing, and public contracting;
- » **AN UNPARALLELED REPUTATION** in the Oregon local government community as effective counsel to and advocates for our clients. Our depth and expertise in areas relevant to city government is unmatched by any other law firm in the state; and
- » **TAILORED, COST-EFFECTIVE LEGAL SERVICES**, completely free of conflicts of interest from non-public clients.

We have been privileged to serve as Dayton's City Attorney since June 1, 1999. In that eleven years, we have provided top quality, cost effective advice on the full range of issues facing the City. These have included such complex and important projects as:

- The joint well field with Lafayette, which we handled through appeal to the Oregon Court of Appeals in a case of novel importance in Oregon land use law;
- Intergovernmental agreements and appeals to implement the proposed bypass;
- Assistance with land use regulations and real estate issues surrounding the City's acquisition of a new Community Center.

We hope you will agree the members of our firm possess the precise set of qualities to continue an effective and trusted relationship with Dayton.

The firm is the partnership of Pamela J. Beery, Paul C. Elsner and David F. Doughman. It was established in January 1998 with the sole objective of providing expert advice and representation to local governments.

Pam has 29 years of experience representing the interests of local governments, including five years as Beaverton's City Attorney. Paul has 27 years of experience in local government law and was Deputy City Attorney at the City of Portland and Assistant General Counsel at the Port of Portland.

David F. Doughman, with nine years of experience, is now a partner, having come to the firm in 2004. David specializes in land use and public contracting law. He has also developed a solid base of knowledge on a wide array of municipal topics including development review, land use appellate practice and litigation. He is the firm's procurement expert.

The firm includes four other attorneys. Thomas Sponsler has been Of Counsel with the firm for nearly five years and brings over 30 years of experience as a government lawyer, including serving as the Multnomah County Attorney for six years and Gresham City Attorney for 19 years. Tom has significant expertise in the legal requirements applicable to local governments in Oregon, including election law, charters and governance, and public meeting and records law.

Christopher D. Crean has over 15 years of experience, including service in the Multnomah County Counsel's office and in the Oregon Legislative Counsel's office. Chris's practice emphasis is land use and governmental relations. He is at the forefront of growth management issues and land use legislation in Oregon.

Nancy L. Werner joined the firm in 2007 and brings eight years of experience in litigation and telecommunications law. She worked as a right-of-way manager for the City of Tigard for two years and is a recognized expert in Oregon in telecommunications and utility regulation.

Heather R. Martin joined the firm in March, 2008 following her move to Oregon from North Carolina where she served as an associate at the law firm of Parker Poe Adams & Bernstein. She also has a Masters in Public Administration from the University of North Carolina-Chapel Hill. Heather's practice focuses on land use and development, election law and employment law.

In addition to the firm's seven attorneys, we have two seasoned legal assistants and an office manager (also trained as a paralegal) who help manage deadlines and assure the delivery of cost-effective and timely services.

Our depth, experience and commitment to local government gives the firm the ability to provide a full range of legal service to each of our clients, whether in our role as general counsel or special counsel. Throughout their careers, the attorneys at BE&H have established and maintained outstanding reputations among their colleagues as municipal lawyers of the highest caliber in both legal skill and ethical behavior.

As requested in the City of Dayton’s Request for Proposals, this proposal describes in detail the manner in which Beery Elsner & Hammond, LLP meets each identified qualification and requirement of the City. We very much value—and would like to continue—our long relationship with the City of Dayton.

## **II. STATEMENT OF UNDERSTANDING**

In the next section of our response, we detail the experience and qualifications of the attorneys in our firm. The City has also requested a statement of understanding of the services the City anticipates the successful candidate will be able to perform. As demonstrated by our 11 years of service to the City, we are fully capable of performing all of the services identified in Section IV of the RFP, the Scope of Work. Our qualifications demonstrate that we are well versed in all of the requisite areas of municipal law, and we are accustomed to providing each of the mentioned services.

In addition to our service as Dayton City Attorney, we serve as City Attorney for many other cities and governmental entities in Oregon. The role of City Attorney is one we understand well.

Beery, Elsner & Hammond is designed as a full-service law firm for local governments. The firm is proud to have a growing list of clients from all over the state. We serve as general counsel to 13 cities and seven other local government entities, and as special counsel in land use, telecommunications law and many other areas for over 70 additional clients. A partial client list includes:

### Cities (where BE&H serves as City Attorney):

City of Cornelius (11 years)	City of Hillsboro (2 years)
City of Dayton (8 years)	City of Molalla (4 years)
City of Mt. Angel (7 years)	City of Fairview (11 years)
City of North Plains (11 years)	City of Gervais (2 years)
City of Sandy (35 years)	City of Gladstone (30+ years)
City of Sherwood (5 years)	City of Happy Valley (7 years)
City of Willamina (2 years)	City of Forest Grove (2 years)

### Other governmental and intergovernmental entities:

- Canby Utility Board (26 years)
- Clackamas Community College (5 years)
- Tualatin Hills Park and Recreation District (2 years)
- Metropolitan Area Communications Commission (11 years)

### III. OUR ATTORNEYS: EXPERIENCE AND QUALIFICATIONS

The seven attorneys in our firm have more expertise and experience in key areas of local government law than any other firm in Oregon and arguably the Northwest. The partners have dedicated their entire professional careers to the practice of local government law and have served both as in-house and outside counsel to a variety of municipal clients.

We are a Martindale-Hubbell AV-rated law firm, the highest possible rating for expertise and ethical standards in our profession. In addition, three of our lawyers - Pam Beery, Paul Elsner and Tom Sponsler - have also been selected to be among the "Best Lawyers in America"® which lists only the very top lawyers in each area of identified practice, including municipal law, as chosen by our colleagues. In fact, three of the five municipal lawyers listed in this prestigious registry in Portland practice at BE&H.

Following is a summary of the specific areas of expertise of our firm's attorneys, classified first by attorney and then by subject area.

#### A. Expertise of Our Attorneys

##### **Paul C. Elsner, Partner**

- » Property acquisition, including condemnation
- » Labor and employment law
- » Constitutional law, including civil rights, ADA and discrimination issues
- » Municipal liability and risk management, including law enforcement liability
- » Building codes, enforcement and nuisance abatement
- » Litigation and appellate practice

##### **Pamela J. Beery, Partner**

- » Land use, zoning, growth management and development
- » Telecommunications law and franchising, including cable regulation
- » Public works, utilities and infrastructure financing
- » Real property transactions
- » Litigation and appellate practice
- » Municipal finance

**David F. Doughman, Partner**

- » Land use and development review
- » Public contracting, purchasing
- » Telecommunications law, wireless facility siting
- » Local budget law

**Thomas Sponsler, Of Counsel**

- » Charters, statutes and home rule authority
- » Elections and ballot measures
- » Special district formation and administration
- » Intergovernmental agreements
- » Annexation and urban service delivery
- » Public meetings, records and ethics laws

**Christopher D. Crean, Senior Associate**

- » Land use and development review
- » Property taxation and litigation
- » Government relations, legislative drafting and advocacy
- » Constitutional and administrative law
- » Water and environmental law
- » Litigation and appellate practice

**Nancy L. Werner, Senior Associate**

- » Telecommunications law
- » Utility regulation, right of way management
- » Litigation, appellate and administrative law practice
- » Real estate transactions and financing
- » Municipal finance

**Heather R. Martin, Associate**

- » Employment law
- » Land use and development review
- » Water and utility law
- » Telecommunications law, wireless facility siting
- » Real estate transactions and conveyances

## **B. Experience in Significant Municipal Law Practice Areas**

The City has requested that we demonstrate expertise in specific identified areas of municipal law. Following is a description of our experience in the six areas identified by the City, and in five additional key practice areas critical to a full-service municipal law firm.

### **1. Land Use and Zoning Law, including Growth Management**

Land use law is one of the firm's "calling card" practice areas, and we are well known as experienced land use attorneys.

Land use has been a primary practice area for Pam Beery over her 29-year career. She is a recognized land use expert in the state and has handled land use matters at all levels from development review and local hearings through appeals at the Land Use Board of Appeals, the Oregon Court of Appeals and Supreme Court, the US District Court for the District of Oregon, and local circuit courts. Pam was recently appointed as a land use Hearings Officer for Washington County and has worked extensively on urban growth boundaries and annexation matters.

Pam is joined in this practice area by David Doughman and associates, Christopher Crean and Heather Martin, who each have many years of experience practicing land use law. Together this team of attorneys offers depth and responsiveness in land use matters of widely varying scope and complexity. David has extensive land use appellate experience. Chris is recognized for his expertise in legislative matters, and Heather works with our many clients on development review, hearings and appeals.

Because our practice is limited to representing local governments, we have extensive experience in growth management tools and requirements. Our work in this area includes the financing of infrastructure, the intricate relationship between state, regional and local laws affecting growth, the review of development proposals and advice in public/private partnerships to achieve quality growth and development. We are the law firm selected to advise the local governments in Washington County in the current (and unprecedented) Urbanization Forum effort, a cooperative study of governance and the management of growth over the coming fifty years.

### **2. Labor, Personnel and Employment Law**

Two of our attorneys - Paul Elsner and Tom Sponsler - have extensive experience in personnel and employment law matters. They are joined in this practice area by associate Heather Martin.

As the chief legal officer for both the City of Gresham and Multnomah County, Tom Sponsler handled a wide array of personnel and employment law issues over his 25-year career representing those two entities. He continues that wise counsel and advice working with the firm's clients.

Beginning with his appointment in 1991 as Assistant General Counsel with the Port of Portland and continuing through to the present, Paul Elsner has advised public bodies on all aspects of human resources and personnel legal issues.

Heather Martin has a Masters of Public Administration degree and her practice also emphasizes personnel law. She has conducted administrative hearings, prepared and revised personnel rules, participated in employment mediations, and maintains currency with changing regulations in this practice area.

Our experience includes representing public bodies in grievance arbitrations, advising local governments on the provisions of the Fair Labor Standards Act, the federal and state Family Medical Leave Acts, COBRA requirements, disciplinary matters including suspensions and terminations, USERRA rights and obligations, wage and hour laws, and deferred compensation plans.

### **3. Construction Law**

We have significant experience advising our local government clients in all aspects of construction law, including procurement, permitting, contract forms, dispute resolution, financing, and litigation. We have advised our clients through complex projects including (for example) multimillion dollar municipal buildings, road and bridge construction, recreational facilities, utility projects including transmission, treatment and storage facilities, and a host more.

We understand both the legal and policy implications of undertaking construction projects, including the prevailing wage, safety and public bidding requirements applicable to public projects. We have also negotiated complex intergovernmental agreements for infrastructure construction and utility undergrounding.

### **4. Real Estate Law and Transactions**

Many of our local government clients find it necessary to participate in real estate transactions as purchaser or condemner as well as a variety of other roles. Pam, Paul, Nancy and Heather all have expertise and are conversant in this important area of law.

While at the Port of Portland, Paul provided legal advice in numerous complex real estate transactions, preparing and reviewing complex purchase and sale agreements, leases, closing documents, and negotiating the key provisions in these documents for the Port. Paul is our chief condemnation attorney and handles cases through



negotiation, litigation and dispute resolution for clients throughout the state. He is assisted in litigation by associates Heather Martin and Nancy Werner. Nancy also brings several years of experience from large law firms representing clients in complex real estate transactions and finance matters including airport infrastructure and financing agreements.

We have substantial experience in acquisition and disposition of real estate from the local government perspective, and have structured transactions for parks and open space, rights of way, public buildings, urban renewal projects and economic development plans.

### **5. Municipal Water Law**

Nancy Werner, Heather Martin and Chris Crean are the firms water law experts. We have drafted a significant amount of legislation which forms the basis of the current legal structure in this area. Our expertise includes water permit amendment procedures, transfer of municipal rights, use of water associated with municipal rights on non-appurtenant land, and the protection of municipal water rights from cancellation.

Our attorneys understand not only the complex and specialized legal framework applicable to water law, but also understand the importance of these issues in the context of water supply treatment and transmission, land use impacts (particularly environmental and farm and forest land use regulations) and the operations of municipal water utilities.

The firm has extensive experience in dealing with legal issues pertaining to the planning and construction of water treatment plants, intake storage and transmission facilities. As mentioned earlier in this response, we assisted Dayton in the establishment of its critical water supply improvements, including defending the project successfully against challenges all the way to the Oregon Court of Appeals.

### **6. Environmental Law**

As part of our active land use and real estate practice areas, we have become proficient in environmental law from the municipal perspective. We work with state and federal environmental regulations, including multi-jurisdictional permitting for complex projects with environmental impacts. In this context, we have handled environmental law issues arising from the development of municipal water treatment plants, storm water management and wetland impacts and mitigation. We have participated in local and regional development of environmental protection regulations and understand the legal issues created by the impact of growth and development on the environment.

## **7. Litigation and Administrative Law**

All of the firm's attorneys are experienced in multiple aspects of litigation and administrative law and appeals. We routinely handle appeals at the Land Use Board of Appeals, Court of Appeals, and federal and state courts. We are admitted to practice at the Ninth Circuit Court of Appeals and the United States Supreme Court, but are equally comfortable conducting litigation in Oregon's Circuit Courts where inverse condemnation, Measure 37 and 49, writ of review proceedings and other litigation of importance to our clients is most often filed. We work closely with our clients' insurance counsel in cases where insurance is available to defend litigation, resulting in both reduced cost and outstanding results.

Our firm successfully represented cities all over the state in federal court litigation filed by Qwest Corporation, achieving a landmark result preserving franchise fees and local government authority to regulate rights-of-way. The case ended in 2009 with a complete victory for Oregon municipalities.

Given our significant experience with litigation, we also understand the value of avoiding the cost and disruption created by a City's involvement in that arena. We work to avoid litigation by carefully advising our clients on the cost and consequences of a proposed course of action. That said, if our client is involved in litigation, we are confident of our ability to provide the very best expertise available.

## **8. Telecommunications Law**

With the adoption of the Telecommunications Act of 1996 and related regulatory changes from the Federal Communications Commission and the Oregon Legislature, telecommunications is fast becoming one of the most important municipal law issues. Pam Beery and Nancy Werner have developed this as a prominent area of expertise, representing the Metropolitan Area Communications Commission (a coalition of 13 local governments in Washington County, including Washington County itself) and a number of cities in franchise administration, cellular facility siting, and renewal negotiations with cable providers. Pam has been retained as special counsel to numerous local governments in this area and is recognized as an expert by her colleagues. It is fair to say that Pam is recognized to be among the very best telecommunications lawyers in the West.

Pam was appointed by Governor Kitzhaber to a statewide Task Force on this topic which reported to the 2001 Legislature. She was appointed by the FCC's Chairman to the Federal Communication Commission's Local and State Government Advisory Committee (LSGAC), providing advice to the FCC on key issues relevant to local and state government in the area of telecommunications law and policy. In 2008 and 2009, Pam and Nancy continue to serve on the League of Oregon Cities statewide telecommunications task force as its legal advisors.

Heather Martin and David Doughman also have significant expertise in the land use and regulatory implications of the siting of wireless communications facilities. We represent local governments in the land use review of facilities, in the leasing of public property as deemed appropriate by the City, and regulation of these facilities' occupancy of the City's rights of way.

#### **9. General Government and Public Records and Meetings Law**

Our firm is recognized for its expertise in general advice on a wide range of topics fundamental to the operation of government. Examples include public meetings and public records law, contracts, ordinance drafting and review, and authority matters. Our attorneys regularly conduct training and presentations in these areas. We are accustomed to assisting with election law matters, Ethics Commission matters, and a wide range of similar general government law topics. We are well-versed in the lawful conduct of public meetings, hearings and executive sessions, and have decades of experience advising elected and appointed officials in matters including parliamentary procedure and the conduct of public meetings. Because we specialize in this field and limit our practice to representing local governments, we are to date on developments in the law and best practices for drafting codes, ordinances, resolutions, and administrative policies.

#### **10. Public Contracting and Agreements**

Negotiation, review, and drafting a wide array of contracts and other transactional documents for our municipal clients constitutes a significant portion of our practice. This includes urban planning and annexation agreements, development agreements for construction of infrastructure, and intergovernmental agreements concerning service delivery and utilities (i.e., fire, sewer, water, stormwater, police services). In the area of public contracting, we have also developed legally and administratively sound policies and agreements that we find can help streamline the administration of contracts and reduce client costs.

In response to recent changes in public contracting law, we have developed a comprehensive set of regulations and have adapted them for many of our clients. This has enabled each of these clients to establish extensive new regulations at a very reasonable cost.

We are also experienced in drafting and negotiating intergovernmental agreements on a wide array of topics, including police services, storm water management, planning and population forecasting, delivery of services (including library, building permit, and other shared services).

## **11. Public Finance and Infrastructure Financing**

Our firm has substantial experience in the critical practice area of public finance. We are well versed in local budget law and legal issues surrounding the financing of infrastructure needed to accommodate growth and development.

In particular, we have:

- designed and implemented Systems Development Charge (SDC) ordinances;
- defended appeals of city SDC charges and other financing tools;
- created advance financing ordinances and development agreements to allow for over-sizing of public facilities;
- negotiated and developed intergovernmental agreements for grants and other financing mechanisms for public improvements; and
- successfully advocated for statutory changes to the local budget laws.

We devote a significant portion of our practice to assisting our clients with development agreements, infrastructure financing and construction, and the provision of public utilities to existing and growing populations.

In closing, we hope you will find that our firm is uniquely qualified to continue in its role as City Attorney for Dayton. We have the experience and have a proven track record of representation that has been cost effective, competent and well suited to the City's needs.

### **C. Examples of Complex Municipal Issues Handled by Members of our Firm**

Over the course of our careers, we have had the opportunity to handle dozens of complex municipal issues on a wide range of subjects. A few examples include:

- Successful defense of federal court litigation through the Ninth Circuit Court of Appeals for cities throughout Oregon in the landmark case of Qwest Corporation v. City of Portland (2001 to present)
- Successful implementation of new urban growth boundary for the City of North Plains, resulting in the community's ability to implement its vision for growth while maintaining livability (2005)
- Successful annexation of over 2,000 acres to the City of Redmond (2006)
- Preparation of new Charter for the City of Hillsboro through extensive public processes, including meetings with elected and appointed officials, business and citizen interests (2007)

- Real property transactions for the City of Troutdale, involving roadway option and purchase agreement for acquisition of real property necessary for roadway through existing shopping center to provide access to city property to be developed by urban renewal agency (2007)
- Condemnation and complex urban renewal transactions for the Portland Development Commission (2005 to present)
- Complex legal advice, appeals and negotiations concerning Happy Valley boundaries in light of incorporation of the new City of Damascus (2004 to 2007)
- Construction and financing of new city hall for Happy Valley (2007-2008); new library for North Plains (2005-6); new city hall for Fairview (1999-2001)
- Acquisition of 5 million gallon per day capacity interest in Wilsonville water treatment plant and 30 million gallon per day transmission project, providing Sherwood with new water supply (ongoing)
- Creation of first successful water authority in Oregon (Sunrise Water Authority, 2000)
- Condemnation, permitting and construction of transmission and outfall to Molalla River, Clean Water Act litigation for City of Molalla (2005-2007)

#### **IV. OUR PLAN FOR SERVICE TO DAYTON**

The City's RFP requests documentation of the successful candidate's ability to deliver professional and cost-effective services. In addition to our substantive qualifications detailed in the previous sections, we offer the following proposed structure to provide City Attorney services to Dayton.

##### **A. Proposed lead attorney and team members**

Heather Martin will serve as the lead attorney; she has significant real estate and land use experience. The other primary attorney will be Paul Elsner. All of the seven attorneys at our firm will be available to assist in representing the City, based on the identified needs and the City's preference.

The lead attorney will marshal the firm's resources in a cost-effective and efficient manner. He will assign work based on the nature of the issue, which attorney has relevant expertise, and client preferences. In order to maintain our current cost-effective service to the City, we will continue our 11-year practice of generally assigning lower rate attorneys to advise the City with assistance from the entire firm as needed. In this regard, we are open to working with the City in any fashion the City deems appropriate.

There are few local government legal issues our lawyers have not seen before and, for this reason, the firm is able to provide highly competent service at an attractive cost. We work very much as a team, sharing knowledge and collaborating to be sure the City's interests are fully protected.

**B. Accessibility, timeliness, and responsiveness**

Our firm has a proven track record of service to our clients, including the ability to respond to critical time deadlines and to produce complex products on short notice. We currently represent 13 municipal clients as general counsel, and more than 70 others as special counsel. As such, we are accustomed to balancing the needs of multiple clients to deliver a quality product within the time allotted.

We have an office on the edge of downtown Portland that is easily accessible and fully staffed during regular business hours. We routinely communicate by e-mail, telephone, and facsimile. This enables us to be in direct contact and to reduce costs and any impact of distance from our office to City Hall.

We return all telephone calls the same business day or the following day. We request a due date for every client request for legal service and meet that deadline or communicate the need for additional time. We are able to attend meetings on very short notice, often the same or the following day.

We understand the City Council's meeting schedule and can accommodate it. We are also available to attend other meetings as requested.

The test of our responsiveness is our clients' satisfaction— we are confident that if the City contacts any one of them we will receive high marks. A short list of references is included below.

## **V. CONFLICTS OF INTEREST**

The principle of avoidance of conflicts of interest is fundamental to our practice and a unique strength of BE&H.

Our firm was formed in January, 1998 with the objective of providing legal services and counsel *only* to local governmental bodies. Our personal and professional goals are centered on this work because we recognize how difficult it is to fully and effectively provide legal counsel to local government when other members of the same firm may be representing other interests that may be opposed to the interests of local government.

We have succeeded in limiting our practice exclusively to the representation of local governments, and believe this to be one of the most important strengths we can offer to our clients. In the rare circumstance when one local government client's interests are adverse to another, we strictly follow the rules of professional responsibility for lawyers to assure that every client receives full and competent representation.

We are not aware of any other firm in Oregon that limits its representation the way we do with the pure objective of being able to fully and zealously advocate on behalf of our municipal clients.

## **VI. FEE STRUCTURE/ BILLING AND REPORTING SYSTEM**

The City's RFP seeks documentation that the firm has a viable billing and fee reporting system. On a related note, the RFP also describes a desire for efficient service delivery. We are able to easily meet these requirements, based on our rates and on our expertise.

The rates we offer are reasonable and in our view represent excellent value. They are:

<b>Partners, and Of Counsel:</b>	\$190.00 per hour
<b>Associates:</b>	\$165.00 per hour
<b>Paralegals:</b>	\$125.00 per hour
<b>Legal Assistants:</b>	\$95.00 per hour

We work closely with staff to stay within the identified budget and are willing to work on a not-to-exceed basis for special projects. In addition to a consideration of rates, we believe it is important for our clients to consider the overall cost for obtaining legal services. Our firm, based on the experience of its partners, and lower rates for associates and support staff, offers highly expert and cost-effective legal services. We do this by taking advantage of our experience—we don't have to research every issue to provide answers. We often create documents or forms that can serve as models for new ones, thereby saving the cost of starting from scratch. More routine tasks, and work requiring research or time-consuming production of documents or analysis, can be done at least initially by an associate, paralegal or legal assistant.

We do not require or desire a monthly retainer for our services. We are willing to negotiate a flat rate for travel time to Dayton for City Council meetings, staff meetings and other instances when our presence is requested.

We submit statements each month showing all services performed, who performed them, and what the cost of the services was. We bill for out-of-pocket costs such as postage and mileage without markup.

We have years of experience representing a wide array of local governments as outside counsel and often have ideas for cost-effective ways to get things done.