Staff Report

Agenda Item: **LEGAL SERVICES AGREEMENT FOR INTERIM TOWN PROSECUTING SERVICES** – Discussion and consideration of a Legal Services Agreement between the Town and the firm of Boyle, Pecharich, Cline, Whittington & Stallings, P.L.L.C. for interim Town prosecuting services.

Staff Contact: Janet Perry, Assistant Town Manager

Meeting Date: August 25, 2009

Background: Prosecuting attorneys exist to provide professional legal work of a criminal nature involving legal research, jury, and court trials, and appeals. A prosecutor's basic obligation is to see that a defendant is accorded procedural justice. While it is not a requirement that a municipality partner with a specific prosecutor or legal firm to provide such services, the Town has seen the benefits to be had from the consistency with one particular individual acting in that position. Given the nature of the work, a prosecutor works closely with the police and residents in the course of resolving crime problems. In doing so, any opportunity to develop familiarity between the legal expert, the community, and Town staff promotes a continuity of service which is a benefit to everyone involved.

Our existing relationship with Kenton D. Jones for providing the Town's prosecuting attorney services began in May, 1988. At that time, Mr. Jones was a prosecutor employed by Boyle, Pecharich, Cline & Whittington (BPCW), the firm providing the Town's legal services. In 1990 Mr. Jones left the employment of BPCW, purchased a small legal firm in Prescott, and pursued a private law practice. At the time, that left BPCW without having prosecution expertise on their staff, and so Mr. Jones continued providing those services for the Town, one day a month, through his own legal firm,

Subsequently, Mr. Jones has also attained the position of Magistrate for the Town of Chino Valley. And, recently, the Arizona Office of Courts (AOC) notified Mr. Jones that he cannot serve in both prosecutorial and judicial capacities due to ethics standards. Because Mr. Jones is interested in pursuing a higher court position, he has decided to retain his position as Magistrate and give up his prosecuting work. The AOC has allowed for Mr. Jones to extend his prosecution services until September 18, 2009. This date was identified specifically, as it will allow Mr. Jones to complete his scheduled September appearance in the Clarkdale Magistrate Court. His final date with Clarkdale will be Wednesday, September 16th. Attached is the letter of resignation provided by Mr. Jones.

While our intention is to go through a new selection process for a Town Prosecutor, that is a lengthy procedure. In order to ensure a smooth turnover, while allowing for continued prosecution services in the meantime, our Town Attorney firm of Boyle, Pecharich, Cline, Whittington & Stallings, P.L.L.C. (BPCW&S) is willing and able to provide those services.

BPCW&S has agreed to furnish those services at the same hourly billing rate paid to Mr. Jones, which is one hundred twenty-five dollars ($125.00) per hour. This interim arrangement also allows for the prosecutorial representative from BPCW&S to participate with Mr. Jones in both the August and September appearance dates in the Clarkdale Magistrate Court. These actions will help to ensure as smooth a transition with pending cases as possible.

BPCW&S recommends that Jonathan A. Millet, Esq. provide the interim Town Prosecutor services for Clarkdale. Mr. Millet is a prosecuting attorney on the staff of BPCW&S, and his resume is attached. BPCW&S is very supportive of Mr. Millet working with Mr. Jones through the transition processes. BPCW&S also has two additional prosecuting attorneys on staff, should other needs be required.

Recommendation: Staff recommends that the Town enter into an agreement for interim Town Prosecutor services with Boyle, Pecharich, Cline, Whittington & Stallings, P.L.L.C.

Law Office of
KENTON D. JONES, PLLC
Clarkdale Prosecutor

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August 18, 2009

Clarkdale Mayor Doug Von Gausig
TOWN OF CLARKDALE
P.O. Box 308
Clarkdale, AZ 86324

Re: *Resignation as Town Prosecutor*

Dear Mayor,

It is not by accident that I have waited until the eleventh hour to submit my resignation as Town Prosecutor. I am proud to have been the Town's Prosecutor for more than twenty years. During that time I have worked with the finest people I could imagine in the most stable municipal environment I am aware of. I have benefitted mightily during those years from 1) the faith the Town has always shown in me and my approach to the Municipal Court issues and the upholding of Clarkdale's community standards, and 2) the doors that have opened to me based upon the experience I gained while working for the Town.

Beyond being my client, the people of Clarkdale have been my friends. Caring as deeply as I do about those friends I have happily made my way from Prescott once or twice a month since the Spring of 1988 to assist those friends in shouldering their professional and, sometimes, personal burdens. There was never a time, in all those years, that the trip to Clarkdale felt like a chore. Knowing that, please understand that it doesn't make me sad to submit this resignation, it makes me sick.

But it is time to move on, and move on we will. I am very pleased that in moving on we do so with absolute certainty that the stability nurtured in Clarkdale over many, many years beyond even my time with the Town will continue and will serve her well from the direction given by the Mayor and Council, to the maturity and strength brought to her by a great Town Manager, to the tenure and incredible competence of its Police Officers and Department, to your Municipal Judge whom I have watched learn and grow into the chair he occupies and who now aggressively administers the responsibilities inherent in his position.

And these comments would be for naught if I failed to mention Clarkdale's unswerving, ever-vigilant underpinning that protects the Town from the maladies that plague most small

towns. Always aspired to but never surpassed or even equaled, Rob Pecharich is a boundless resource for the Town that amazes me each and every time I call him and say, "Rob, I have a problem I need to talk through with you." Rob is a well for the Town to draw from that never runs dry. While illustrating an incredible passion for his work generally, Rob has an even greater passion for the Town of Clarkdale and that is a rare and treasured quality in a day of disposable loyalties and continual compromise.

Please know how much I never wanted this day to come, and accept my resignation as Clarkdale's Town Prosecutor effective September 18, 2009. And, most assuredly, know that I will always be watching and continuing to support and praying for the very best for the Town of Clarkdale.

Sincerely,

Kenton D. Jones

cc: Gayle Mabrey

LEGAL SERVICES AGREEMENT

Town Prosecutor

This Legal Services Agreement is made and entered into on the 25th day of August, 2009 between the Town of Clarkdale ("Town") and Boyle, Pecharich, Cline, Whittington & Stallings, P.L.L.C., hereinafter called Town Prosecutor.

WHEREAS the Town desires to enter into an agreement for a Town Prosecutor to prosecute criminal and civil traffic matters, criminal misdemeanors, and other civil matters within the jurisdiction of the Clarkdale Magistrate Court ("Court"); and

WHEREAS the Town understand that the prosecutor is responsible to administer justice and is not simply an advocate and that this responsibility carries with it specific obligations to see that defendants are accorded procedural justice and that guilt or innocence is decided upon the basis of available evidence; and

WHEREAS the Town Prosecutor is licensed to practice law in the State of Arizona and is willing to provide such legal services upon the terms and conditions set forth below:

NOW, THEREFORE, the Town and Town Prosecutor hereby agree as follows:

I. TERM; TERMINATION. This Agreement shall be effective as of the date first set forth above and shall remain in full force and effect until terminated as set forth herein. Either party may terminate this Agreement without cause upon thirty (30) days written notice to the other party. In the event Town Prosecutor fails to provide legal services consistent with the standards set forth in this Agreement, Town Prosecutor shall be deemed to be in breach of this Agreement and the Town may, at its sole discretion, immediately terminate this Agreement.

II. TOWN PROSECUTOR'S OBLIGATIONS.

a. Town Prosecutor shall be fully responsible for knowing and following the standards of professional conduct as defined by applicable professional traditions, ethical codes, and law in the prosecutor's jurisdiction.

b. Town Prosecutor shall prosecute all criminal and civil traffic matters, criminal misdemeanors, and other civil matters within the jurisdiction of the Court and shall have legal knowledge, skill, thoroughness and preparation necessary for said prosecution.

c. Town Prosecutor shall be fully responsible for all aspects of prosecuting criminal and civil matters without any further involvement by the Town. Town Prosecutor shall appear at all proceedings as required.

d. Town Prosecutor shall provide personal consultation with Court staff as required. Town Prosecutor shall use reasonable diligence to maintain communication with Court staff, defendants or defendants' attorney until such time that the matter is completed, and shall use reasonable diligence in notifying defendants of Court action as required.

e. Town Prosecutor duties will include prosecution of all criminal and civil traffic matters, criminal misdemeanors, and other civil matters within the jurisdiction of the Court through trial and to appeal.

f. Town Prosecutor may provide legal advice to the police agencies concerning police functions and duties in criminal matters whenever practicable.

g. Town Prosecutor shall immediately notify the Court and the Town in writing if the Town Prosecutor believes that the prosecution of a particular matter or defendant represents a conflict of interest. The Town will then appoint a special prosecutor to handle the matter.

h. Town Prosecutor shall provide to the Town in writing the names, addresses, telephone numbers and email addresses of any attorneys that can be used as special prosecutors in the event the Town Prosecutor is unavailable or has a scheduling conflict.

j. Except as provided for in Section VI below, the Town shall reimburse Town Prosecutor for the costs and expenses incurred in legal prosecution for the Town pursuant to this Agreement, including but not limited to long distance telephone calls, copies, photographs, out of pocket costs advanced on behalf of the Town and mileage at the then IRS approved rate per mile.

k. Town Prosecutor shall maintain current case logs and disposition records, and shall provide monthly billing statements containing sufficient information as requested by the Town for the purpose of audit and evaluation of the Town Prosecutor's performance under this Agreement. The Town reserves the right to request additional information regarding the Town Prosecutors' representation.

l. Town Prosecutor shall submit billing statements to the Town by the fifteenth (15th) day of the month following the billed month.

m. Town Prosecutor shall disclose any involvement in Professional Discipline issues or any receipt of Professional Complaints prior to acting on behalf of the Town. Town Prosecutor must at all times remain an active member in good standing of the State Bar of Arizona. Town Prosecutor must immediately inform the Town and the Court of any changes in Town Prosecutor's membership status. Failure to maintain membership status and/or failure to promptly apprise the Town and the Court of changes in status may result in immediate termination of this Agreement.

n. Town Prosecutor further agrees that this Agreement contemplates personal services, that this agreement is not assignable, and that Town Prosecutor will not enter into subcontracts of this Agreement. However, Town Prosecutor may use other approved Town Prosecutors to assist under service of contract, as described in Section II, paragraph 'h'.

o. Town Prosecutor will maintain continuous Professional Liability insurance in minimum amounts of $1,000,000 per individual claim and $1,000,000 per aggregate claim. A Certificate of Insurance evidencing proof of this coverage shall be provided to the Town within thirty (30) days of the effective date of this Agreement. It is the responsibility of the Town Prosecutor to

provide evidence of continued coverage in the event of an expiration/renewal date or lapse in coverage.

III. COMPENSATION. The Town shall pay Town Prosecutor for serving as Town Prosecutor under this Agreement one hundred twenty-five dollars ($125.00) per hour. In the event there is a dispute regarding the reasonable amount of time the Town Prosecutor spends providing legal prosecution services pursuant to this Agreement, the parties will seek to resolve the dispute in good faith. If a resolution cannot be achieved, then the parties agree to submit the dispute to arbitration as provided for in Section XI below.

IV. INDEPENDENT CONTRACTOR. The Town Prosecutor is being retained pursuant to this Agreement as an independent contractor and not as an employee. Once a matter has been referred to the Town Prosecutor for representation, the Town shall not have the authority to supervise or control the actual work of the Town Prosecutor, nor shall the Town have any involvement whatsoever regarding the Town Prosecutor's work on behalf of the Town. The Town's only involvement and responsibility shall be for the Town to pay the Town Prosecutor's reasonable fees as approved by the Town pursuant to this Agreement.

V. INCOME TAX DESIGNATION AND INDEMNIFICATION. The Town shall not withhold from sums becoming payable to the Town Prosecutor under this Agreement any amounts for federal, state, or local taxes, including federal or state income taxes, employment taxes (including Social Security and Medicare taxes), and unemployment taxes. The Town shall report all payments to the Town Prosecutor on Internal Revenue Service Form 1099. The Town Prosecutor agrees that any tax obligation of the Town Prosecutor or its employees or agents arising from the payments made under this Agreement will be the Town Prosecutor's sole responsibility. The Town Prosecutor assumes full responsibility for filing any applicable tax forms. The Town Prosecutor will indemnify the Town for any tax liability, interest, and/or penalties imposed upon the Town by any taxing authority based upon the Town's failure to withhold any amount from the payments for tax purposes.

VI. INTERPRETER FEES. The Court shall provide and pay for interpreters for non-English speaking defendants for all in-court proceedings, pretrial conferences, interviews and out of court conferences requiring an interpreter.

VII. EXTRAORDINARY EXPENSES. Any extraordinary expense, including but not limited to, expert witness fees, deposition costs, court reporter transcription costs, and service of process fees shall be paid by the Town. Town Prosecutor shall seek prior approval of said expenses.

VIII. GENERAL PROVISIONS.

a. This Agreement is not intended to, and will not, constitute, create, give rise to, or otherwise recognize a joint venture, or relationship, partnership or formal business organization of any kind, and the rights, obligations, and relationship of the parties shall be that of Town and Town Prosecutor. The parties agree that neither Town Prosecutor nor any person supplied by Town Prosecutor in the performance of its obligations under this Agreement are Town employees, and that no rights of personnel rules or employee benefits apply or accrue to such persons.

b. The provisions of this contract are severable. If any section, subsection, sentence, clause or phrase of this Agreement is for any reason held illegal, invalid or void by the decision of any court or regulatory body of competent jurisdiction, such decision shall not affect the validity of the remaining portions hereof.

IX. NON-DISCRIMINATION. The Town Prosecutor shall comply with Arizona Executive Order No. 99-4 to the extent applicable to this Agreement, and all other federal or state laws, rules and regulations, including the Americans with Disabilities Act.

X. INDEMNIFICATION. The Town Prosecutor agrees to defend and hold the Town, its elected officials, employees and agents, harmless from any claims arising out of the acts or omissions of the Town Prosecutor while performing under this contract. This indemnification provision shall survive the termination of the Agreement.

XI. ARBITRATION. If a dispute arises out of or relates to this Agreement, or breach thereof, and if the dispute cannot be settled through negotiation, the parties agree first to settle the dispute through mediation before resorting to arbitration, litigation, or some other dispute resolution procedure. In the event that the parties cannot agree upon the selection of a mediator within ten (10) days, either party may request the Presiding Judge of the Superior Court of Yavapai County to assign a mediator from a list of mediators experienced in municipal prosecution, maintained by the Arizona Municipal Risk Retention Pool.

XII. TERMATION BY TOWN. The Town may terminate this Agreement pursuant to the provisions of A.R.S. § 38-511.

XIII. COMPLIANCE WITH ARIZONA'S WORKERS' COMPENSATION STATUTES. In compliance with A.R.S. § 23-902(D), the parties agree as follows:

a. The Town does not have the authority to supervise or control the actual work of the Town Prosecutor or the Town Prosecutor's employees or agents.

b. Neither the Town Prosecutor nor any of its employees or agents are entitled to workers' compensation benefits from the Town.

c. The Town Prosecutor and its employees or agents are not required to perform work exclusively for the Town. The Town recognizes that the Town Prosecutor can and does make the same services available to the general public and that nothing in this Agreement shall preclude the Town Prosecutor or any of its employees and agents from performing services for any other person or entity.

d. The Town does not provide the Town Prosecutor or any of its employees or agents with any business registrations or licenses required to perform the specific services set forth in this Agreement, including but not limited to any legal licenses or continuing legal education requirements.

e. The Town does not pay the Town Prosecutor a salary instead of an amount fixed by contract.

f. Except as provided for herein, the Town will not terminate this Agreement prior to the expiration of the term of this Agreement, unless the Town Prosecutor or any of its employees or agents breach this Agreement or violate any laws of the State of Arizona.

g. The Town does not provide tools to the Town Prosecutor or any of its employees or agents and the Town Prosecutor shall provide at its own expense, all materials, equipment or other items necessary to carry out the terms of this Agreement.

h. The Town does not dictate the time for performance of any of the services under this Agreement.

i. The Town shall pay the Town Prosecutor in the name appearing on this Agreement.

j. The Town will not combine business operations with the person performing the services rather than maintaining these operations separately.

By signing below, the parties confirm that they have read this Agreement and agree to its terms.

Town of Clarkdale

_____ _____

By Doug Von Gausig, Mayor Date

Boyle, Pecharich, Cline, Whittington & Stallings, P.L.L.C.

_____ _____

By Robert S. Pecharich Date

Attested By

_____ _____

Kathy Bainbridge, Town Clerk Date

Jonathan A. Millet, Esq. Arizona State Bar No. 025635
125 North Granite Street, Prescott, Arizona 86301-3001 · (928) 445-0122 · jmillet@bpcws.com

EXPERIENCE

Boyle, Pecharich, Cline, Whittington & Stallings, P.L.L.C., *Associate*, Prescott, AZ (Jan. 2009 to present)
Practice areas: commercial transactions, commercial and construction litigation, real estate, landlord-tenant law, and estate planning.

The Ledbetter Law Firm, P.L.C., *Associate*, Cottonwood, AZ (Aug. 2007 to Jan. 2009)
Practice areas: insurance defense, criminal defense, commercial litigation, and personal injury. Successfully litigated one jury trial; advocated in five arbitrations and mediations, nine substantive hearings, and six oral arguments. Conducted 11 depositions. Drafted seven motions for summary judgment, five complaints, three answers, multiple disclosure statements, and four contracts.

Coconino County Attorney's Office, *Law Clerk*, Flagstaff, AZ (May 2006 to Aug. 2006)
Drafted over 40 evidentiary and pre-trial motions, responses, and bench memoranda. Wrote responses to two petitions for appellate review.

U.S. Senate Judiciary Committee, Senator Jon Kyl, *Legal Fellow*, Washington, DC (Jan. 2006 to May 2006)
Assisted in nomination proceedings for the Honorable Samuel A. Alito; Assisted in Committee Markup Sessions for 2006 Immigration Bill, summarizing 350 amendments and drafting two.

Arizona Attorney General's Office, Transportation Section, *Law Clerk*, Phoenix, AZ (May 2005 to July 2005)
Drafted motion for summary judgment and other motions involving eminent domain issues.

EDUCATION

University of Arizona James E. Rogers College of Law, *J.D.*, Tucson, AZ (May 2007)

Journal:	Articles Editor, ARIZONA JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW.
Teaching:	Co-taught Law Practice Management with Professor Winton Woods (spring 2007). Taught Contracts Tutorial to first-year law students. (fall 2005, fall 2006).
Honors:	Dannie Lee Chandler Award for Public Service and First Amendment Rights; 3.2 GPA, Dean's List (three semesters); Dean's Achievement Scholarship.
Experience:	Judicial Intern for the Honorable Clark W. Munger (fall 2005).

Arizona State University College of Business, *B.S., Computer Information Systems*, Tempe, AZ (May 2002)

Honors:	*Magna cum laude*; 3.72 GPA; Dean's Honors List (three years).

COMMUNITY INVOLVMENT AND INTERESTS

Prescott Rotary Club; Foster Parent; The Church of Jesus Christ of Latter-Day Saints.
Spanish (fluent); cycling; blogging; journal writing.