

**APPROVED: June 5, 2013**

**TOWN OF NEWMARKET, NEW HAMPSHIRE  
NON-PUBLIC MEETING  
May 8, 2013 5:30 P.M.  
TOWN COUNCIL CHAMBERS**

**PRESENT:**

Council Chairman Gary Levy, Council Vice Chairman John Bentley, Councilor Dan Wright, Councilor Larry Pickering, Councilor Ed Carmichael

Town Administrator Steve Fournier

EXCUSED: Councilor Phil Nazzaro, Councilor Dale Pike

Council Chairman Levy called the meeting to order at 5:30 p.m. Council Vice Chairman Bentley moved to enter non-public session under RSA 91-A: 3 II, c, d, e for the purposes of hiring. Councilor Pickering seconded. Town Administrator Fournier polled the Council. Motion carried unanimously, 5 – 0.

The purpose of the meeting was to interview the 3 candidates for Town Attorney. Council Chairman Levy said he would recuse himself from a vote, as he had an on-going business relationship with Donahue, Tucker & Ciandella. However, he would participate in asking questions.

**Drummond Woodsum:**

Matthew Upton and Keriann Roman gave an overview of the background and experience of the firm. With 25 attorneys, they were the largest firm in New England working in the public sector. They had attorneys who specialized in zoning, planning, development, construction, municipal finance, Right to Know, bonds, tax and utility abatements, labor and employee law, insurance and environmental issues. Attorney Upton said that because of their experience with a wide range of issues, the firm could reduce research costs to the town. He said they had a team approach and were able to respond to questions in a timely fashion. Attorney Upton would be the primary attorney for Newmarket, and Attorney Roman would be his back-up if he could not be reached immediately. Her background was in zoning, code enforcement and planning, although she had experience in land-use issues and in litigation. Attorney Upton said his experience as a former Town Manager gave him an understanding of municipal budgetary procedures, and said his firm was not expensive for what it offered. He said the firm was efficient, and some work could be handled by associate attorneys or paralegals who billed at a lower rate.

**Council Questions:**

Councilor Carmichael asked about experience with the Town Council form of government and Attorney Upton cited his experience as Town Manager for Rye and Belmont, NH. Council Vice Chairman Bentley asked about the training sessions referred to in the proposal. Attorney Upton said he likes to do a free one-on-one session with clients annually, and also conducts training sessions for new board members. Meetings are held monthly for municipal representatives to share information, and the firm holds issue-oriented training sessions for a fee. Councilor Wright asked about the billing process. Attorney Upton said his rate is \$175 per hour, but often

research would be conducted by an associate or paralegal at a lower rate. His bills are itemized by rate and time, and larger bills would also include what was done and by whom. He tries to keep travel time low by scheduling trips efficiently. Attorney Roman added that the office assistant occasionally does back-up work for a small fee. Overall, the firm seeks a long-term relationship and is client focused. Councilor Carmichael asked about the firm's experience with labor relations. Attorney Upton cited his experience with Manchester and familiarity with various attorneys and labor union officials. He said he was preparing an employee handbook for towns to use. The firm has an employee/labor specialist who works with HR issues.

Council Chairman Levy asked, in general, if they had ever had a situation when a client/town wanted a legal opinion that would serve its purposes, but with which they felt uncomfortable, and how had they handled it. He said that most issues don't go to litigation, but he wanted an example of an occurrence involving a request for an opinion. Attorney Upton spoke of a situation when a town fired a department head as he was running a business during work hours and making long distance phone calls on the town's phone. The person filed a wage claim against the town and the municipality wanted to file a counter claim, citing the expense it had incurred for the phone calls. He advised that they not pursue the counter claim, as from phone records he determined that other employees were also making long distance calls using the town's phones. He was asked to not relate this information to the other attorney, but he said he was obliged to do so. He had to tell the town he would not represent them in their suit on that basis, and they would have to find another attorney. The town then dropped the suit.

Council Chairman Levy said that in a general way, he had experience with a town being represented first by the "A Team" attorney, but gradually being shifted to the 3<sup>rd</sup> man down. Attorney Upton said this would not be the case with Drummond Woodsum, and he and Attorney Roman would be the contacts for the town. He added that if the town thought their work or any done by their associates was not up to their expectations, they should contact him. Council Chairman Levy asked what he thought his weaknesses were and for an example of something he felt he could have done better. Attorney Upton said that when he is overwhelmed with work, he sometimes doesn't return phone calls until the end of the day. He added that Attorney Upton or an associate could be reached to address an issue. Council Vice Chairman Bentley said that he understood that unless they needed a specialist, say for environmental law, they would be speaking with Attorney Upton or Attorney Roman, and not someone less experienced. Attorney Upton said that was correct, but he did not think the town would be disappointed with any of the attorneys in the firm.

Town Administrator Fournier asked about Attorney Roman's experience with collateralization. She said some of the FDIC rules had recently changed. Under state law large amounts of unneeded funds have to be collateralized, and interest has to be perfected to prevent loss. She said the base agreement is important, but it is also important to have a relationship with banks and the banks with a third party bank/trustee. She had written the base agreement that one bank is using for its clients. The town still maintains authority over the funds while they are held in trust. Council Chairman Levy asked about investing funds, for example directly in a T bill. Attorney Roman said she did not think that would satisfy the statutory requirements for securing the funds and the risk was higher. She would recommend putting the funds in a bank with a third party trustee.

Attorney Upton asked when the town would be changing attorneys and if there was any outstanding litigation. Town Administrator Fournier said they were planning on hiring a Town Attorney at the beginning of the fiscal year, July 1<sup>st</sup>, and hoped to have current litigation settled by then. Council Chairman Levy asked whether the firm required a contract, and if so, for how long. Attorney Upton said they normally had an engagement letter signed, and normally hold their price for three years. However, the town would not be bound by a contract. Council Chairman Levy referred back to Attorney Upton's answer to his question about dealing with a client's request for a legal opinion that he did not think was appropriate. He asked if he had another example he would

want to share. Attorney Upton said that happens frequently and sometimes he has to tell a town that there is not enough information in performance evaluations to support firing someone. Attorney Upton gave an example of telling a town not to tear down a house with a lien because she felt the court would not support the action and the town would lose the fees paid to her. She said she always apprises a town of the risks in litigation. Council Chairman Levy said he did not think it appropriate for an attorney to merely tell the client what he wants to hear. Attorney Upton said he had learned as a law clerk in New Hampshire's Supreme Court that one should not reason backwards from the wanted result, but build to the result.

**Mitchell Municipal Group:**

Mitchell Municipal Group was represented by all four of its attorneys: Walter Mitchell, Judith (Jae) Whitelaw, Laura Spector-Morgan and Steven Whitley. Attorney Mitchell stated his firm specializes in representing municipalities and it has no private clients. Currently the firm represents between 50 and 60 municipalities, and while they are busy, they are not too busy to accept another client. He stressed that theirs is a service business, and they work as a team, answering calls and meeting deadlines in a timely fashion. He said the firm tries to inject common sense into its advice. He realized that they would give advice and recommendations, but the Council would be the decision maker. He said they do not handle union negotiations. Attorney Whitelaw said she specializes in utility abatements and town charters, although she also has experience with labor law. Attorney Spector-Morgan deals with employment law, Attorney Mitchell with tax law and Attorney Whitley with code enforcement.

**Council Questions:**

Councilor Carmichael asked if the firm worked with other town councils, and Attorney Mitchell said they represent Durham and many cities. Attorney Whitelaw had worked on the Somersworth town charter. Councilor Pickering asked about billing and mileage. Attorney Mitchell said all lived around Concord, so the billing would be from that point if he came to Newmarket. However when possible he would arrange appointments when he was in the area for another client. He said the firm billed on an hourly basis, but some clients preferred a flat fee and either arrangement could be made. Itemized statements would be sent even with a flat fee arrangement for comparison with the hourly fee. Billing arrangements can be adjusted or changed.

Council Chairman Levy asked about any issues they may have had with a town asking for a legal opinion that would suit its agenda while the request made them feel uncomfortable as it was inappropriate. He said mostly the town seeks legal opinions and does not go to litigation so the legal opinions are not challenged. He asked for examples of how this was handled. Attorney Spector-Morgan said if the town has a goal and they firm can make an appropriate legal argument to reach the goal, then they will continue, but first apprise the town of the odds. She gave as an example the case of the Newmarket Planning Board and Mr. Cheney and the question of his being allowed ownership of some land after his subdivision was conditionally approved. She said she could see where the argument was coming from, but didn't think it was particularly strong. As he had not met the conditions of the approval it was rescinded and it was upheld. Attorney Whitelaw said they had no problem telling a client no. However, they would look at the goal and determine if there was a credible legal way to attain it. They would apprise the town of possible outcomes first. Attorney Mitchell added that they would not right an opinion unless it was legally credible. Council Chairman Levy said that in his experience the best attorneys advise clients against pursuing a goal that is not legally credible as is the ethical thing to do. Attorney Mitchell said the firm values its reputation and in the event of a court case, knows that the judges trust them. He said it was pointless to present an incredible argument whether in court or in an opinion.

Councilor Wright said with each attorney having a specialty he wanted to know who would represent the town on an on-going basis. Attorney Mitchell would be the primary attorney with Attorney Spector-Morgan acting as

his backup. However, if another attorney had more expertise in an issue, he would be called upon. Council Vice Chairman Bentley said he had noticed the tendency of firms to offer a seasoned attorney at start up, but then after a while switching to a less experienced one. Attorney Whitley said they consult with each other on issues for consistency, and he certainly would consult with whoever else had been working with the town before proceeding. Council Chairman Levy asked if the firm required a contract or if this could be open-ended with the town leaving the firm with notice. Attorney Mitchell said they did not require a contract, and would have no problem if the town had to leave.

Council Chairman Levy asked for a tangible example of the firm's weaknesses or situations that could have been handled differently. Attorney Spector-Morgan said they don't do a lot of environmental law, and they refer out complicated cell tower issues. Attorney Whitelaw said she felt they were very good at communicating with customers, but occasionally they did not recognize early enough that they and the client were speaking of different things. Attorney Spector-Morgan said she had a case in which she had to explain to a town how to fill out a permit for a junk yard. The town never filled it out because they didn't understand the directions, so she has to go back and work with them again.

Town Administrator Fournier said the town was looking to have a law firm start at the beginning of the next fiscal year, but would continue with the present attorney if the outstanding court cases had not been settled by then. Procedurally, the firm would contact him first, and if a Councilor or other board member contacts the firm directly, he is told immediately. Council Chairman said the rates were between \$170 and \$185, and asked if the firm would waive the travel fees. Attorney Mitchell first said no, but said they could discuss it and could consider doing this if they had an offer. To Councilor Bentley's question, he said they would split fees if they had another appointment in the area. If an issue arose between Newmarket and Durham, Attorney Mitchell said he would refer both towns to another firm.

#### **Donahue, Tucker & Ciandella:**

Attorney John Ratigan gave a brief overview of the firm. He said they had a broad municipal practice in everything except bonds. They represent a number of municipalities in Rockingham and Strafford Counties and have a broad representation throughout the state. He introduced Attorney Kate Miller, who has a specialty in telecommunications law and Attorney Chris Hilson who is experienced in code enforcement. Attorney Ratigan has a long history of working with municipalities.

#### **Council Questions:**

Councilor Carmichael asked about the firm's experience with labor. Attorney Ratigan said he was experienced with labor law, and Attorney Doug Mansfield was very knowledgeable with labor law and union negotiations. Council Vice Chairman Bentley asked who would be representing the town. Attorney Ratigan said he would be doing most of the work, but would refer code enforcement issues to Councilor Hilson and the cable contract to Attorney Miller. Council Vice Chairman Bentley said he felt it was important to build a relationship with a law firm, and not have a bait and switch situation. Attorney Ratigan assured him that this would not be the case, and added that the newest attorney in the firm came to them with 5 years experience.

Councilor Wright asked how many towns have a retainer rather than an hourly rate. Attorney Ratigan said there were 3, and they seemed to like it. Attorney Hilson said a retainer streamlines the billing process and the town can plan ahead during the budget process. Attorney Miller added that she felt it was important for towns to call for preventative advice, and they seemed to feel more comfortable doing that with a retainer. Town Administrator Fournier asked what would not be covered by the retainer and Attorney Ratigan said exceptional cases such as the EPA and some other odd things, but those would be decided ahead of time. The town could

decide to change the form of payment. Council Chairman Levy asked if it would be a problem if the town gave notice that it wanted to leave the firm after a number of years, and Attorney Ratigan said it would not. He said he had experience working with Town Councils and on Town Charters, and would have no problem attending charter meetings if asked. He had worked with Peterborough, which has a moderate Town Charter. They do not have a default budget, but schedule another session to decide on a budget if the proposed one fails.

Council Chairman Levy asked what he would do if a client called and he felt they were asking for a certain level of advice that was not correct and with which he did not feel comfortable. He added that most legal opinions don't go to litigation and aren't legally challenged, but in this case the advice asked for could lead the town down the wrong path. Attorney Ratigan gave the case of a Town Councilor who came to see him with a business partner and told him what he wanted him to do for him. He was using his influence, and Attorney Ratigan read to him from the statute that said what he was doing was a felony. He asked him to repeat what he had said and the Councilor stomped out of the office, but they were able to have a working relationship and he felt the Councilor realized he had overstepped his bounds. He also said he deals with the Town Administrator and if contacted by anyone else, he always reports the contact to him. When he writes a legal opinion, he writes to the client as a whole, not to an individual, and he had never written an opinion that he thought compromised his professionalism. Council Chairman Levy asked Attorney Ratigan about any weaknesses he had or about anything he felt he had not handled well and regretted. Attorney Ratigan cited a recent case in which an informed decision was made and the client agreed to not put an expert witness on the stand. Unfortunately, the judge did not agree and they didn't get the opinion they wanted. Now, he said, if he had to present the case again, he would use an expert witness.

Councilor Wright noted that the retainer increased 5% every year. Attorney Ratigan said they should look at the history of what they had spent. He said they were there to build a relationship and would allow the town to change its method of payment and look at year 2. He felt the numbers were good, but said everything is negotiable and both sides were at risk. Council Chairman Levy asked how he would handle a retainer if the costs went upside down. Attorney Ratigan said a deal is a deal and it is difficult to predict what legal costs will be. He tries to choose a medium range figure, and some years the costs are over and some years under. Attorney Hilson added that they ignore the equation when the numbers are getting close because otherwise the public would be hurt and they have an ethical obligation to serve the client. Attorney Ratigan said the firm had other revenues and was in business to serve clients. He felt they had a good sense of the community of Newmarket. Town Administrator Fournier said they were looking to start with a new law firm at the beginning of the next fiscal year, July. Attorney Ratigan advised them to continue with the present firm for litigation if it had not been settled by that time.

#### **Council Discussion:**

Town Administrator Fournier said he was leaning toward DTC or Drummond, as he felt they needed a larger firm than Mitchell, and to Councilor Pickering's question added he felt they might be spread too thin. Councilor Wright said he was not impressed with them. Council Vice Chairman Bentley said he had called references for Mitchell and DTC, and some used both firms, but he felt DTC had the edge. He said he did not have his notes with him, but some had told him to look very hard at the retainer before making a decision because there was a lot it did not cover. He said he was leaning toward DTC first and Drummond second, and Councilor Carmichael agreed. Council Chairman Levy said they could follow up and that litigation is very expensive. He thought they should get some clarification because Attorney Ratigan had said everything was negotiable. Council Chairman Levy felt that Drummond sounded amazing but gave a poor example for the inappropriate client request answer and seemed somewhat stunned by the weaknesses question. Mitchell seemed to have a problem answering the question, while DTC had given them a good example. Council Vice Chairman Bentley said he thought the

example Drummond gave of the phone calls was a good example because it saved the client spending funds unnecessarily, but that he would have liked to have more examples.

Town Administrator Fournier said he had spoken with the Town Administrator from Peterborough, and she liked having a retained because she wasn't afraid to tell any department head to get a legal opinion. Councilor Wright said he liked what Attorney Miller had said about preventative phone calls. Council Chairman Levy said that no one likes to be upside down with a retainer, and he was concerned about shortcuts. Town Administrator Fournier said positions could flip the next year or they could choose to change the method of payment. Council Chairman Levy said he liked that no one had balked at not signing a contract. Town Administrator Fournier said he had worked with DTC and Mitchell in the past and had met Attorney Upton. Council Chairman Levy said he had hired Attorney Ratigan and Attorney Hilson in the past, but had not discussed town issues with anyone at DTC. Town Administrator Fournier said that If Attorney Ratigan received a call from a Board member, he would immediately call him to let him know. Councilor Pickering said he liked Drummond Woodson very much but also liked the convenience of having DTC close by. Councilor Wright said he had seen Attorney Ratigan in court and he was impressive. He favored hiring him and felt they could decide on the retained question later. Council Chairman Levy said that Attorney Ratigan had never told him anything just because he wanted to hear it, but he tells what the truth is. Town Administrator Fournier said he feels he is very ethical.

Town Administrator Fournier said he will burn CDs from the tape of the interview and get them to Councilors Nazzaro and Pike. He will collect the CDs once they are through with them. The full Council will vote on hiring in non-public session, and then make an announcement of their decision in public session. There may have to be a special non-public session as there is a lengthy non-public session with attorneys on the Cheney/lot 13 case scheduled for May 15th. If Councilors have further questions for any of the candidates, they should direct them through the Town Administrator. However, it was hoped that there would be a decision on hiring by the first meeting in June, and Town Administrator Fournier said he was going to suggest that the new attorney start working with the Charter Commission before July.

Councilors should try to schedule some time at the polls on May 14<sup>th</sup> for the Charter Commission election and a majority has to be present when the polls close to certify the vote.

Council Vice Chairman Bentley moved to leave non-public session at 7:45 and Councilor Pickering seconded. Town Administrator Fournier polled the Council. Motion passed unanimously, 5 – 0.

Council Vice Chairman Bentley moved to adjourn and Councilor Pickering seconded. Motion carried unanimously and the meeting adjourned at 7:45 p.m.

Respectfully submitted,

Ellen Adlington, Recording Secretary