

RESOLUTION NO. 968

**A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF UNIVERSITY PLACE
APPROVING AN AGREEMENT BETWEEN KRISTA SWAIN AND THE CITY OF
UNIVERSITY PLACE FOR PROSECUTION SERVICES**

WHEREAS, in fall of 2020, the City of University Place executed an Agreement with Pierce County for Prosecution, Defense, Probation, and Court Services; and

WHEREAS, the Agreement was amended to provide for Pierce County's contracting out the prosecution services to Krista Swain; and

WHEREAS, beginning January 1, 2022, the City is obligated to contract for its prosecution services; and

WHEREAS, the City Council deems that entering into the proposed Agreement with Krista Swain is in the best interests of the residents of the City of University Place;

NOW THEREFORE, the City Council of the City of University Place resolves as follows:

Section 1. City Manager Authorized to Execute Agreement. The City Council hereby authorizes the City Manager to execute the Agreement for Legal Services between Krista Swain and the City of University Place for Prosecution services in substantially the form accompanying this Resolution.

Section 2. Completion of Transaction. The City Manager or designee is authorized to take and execute any additional measures or documents that may be necessary to complete this transaction and to implement the Agreement, which are consistent with the executed Agreement and the terms of this Resolution.

Section 3. Corrections. Upon approval by the City Attorney, the City Manager or designee are authorized to make necessary corrections to the proposed Agreement, including the correction of clerical errors; references to other local, state, or federal laws, codes, rules, or regulations; or numbering and section/subsection numbering, as necessary as may be consistent with the associated Agreement and the terms of this Resolution.

Section 4. Effective Date. This Resolution shall take effect immediately upon its adoption.

ADOPTED BY THE CITY COUNCIL ON DECEMBER 6, 2021.

Caroline Belleci, Mayor

ATTEST:

Emelita J. Genetia, City Clerk

APPROVED AS TO FORM:

Matthew S. Kaser, City Attorney

AGREEMENT FOR LEGAL SERVICES

This Agreement for Legal Services (Agreement) is made and entered into this ____ day of November, 2021, by and between the City of University Place (the City), a Washington municipal corporation, and Krista White-Swain (City Prosecutor) for the purpose of providing prosecutorial services to the City of University Place.

WHEREAS, the City entered into an Agreement with Pierce County to provide municipal court services, and related legal services beginning January 1, 2021; and

WHEREAS, Section I(B)(3) of the Agreement between the City of University Place and Pierce County includes the prosecution of traffic infractions, non-traffic infractions, criminal traffic and non-criminal traffic misdemeanors, and gross misdemeanors occurring within the municipal boundary of the City of University Place by the Pierce County Prosecuting Attorney; and

WHEREAS, because the Pierce County Prosecuting Attorney's Office advised that it did not have sufficient personnel, or other resources, to increase its workload by undertaking prosecution for the City of University Place in addition to its existing prosecutorial duties for both felony and misdemeanor cases in Pierce County, the City and Pierce County agreed that Pierce County would contract for those prosecutorial duties on behalf of the City through December 31, 2021; and

WHEREAS, City Prosecutor has successfully provided and is willing to continue to provide prosecutorial services to the City of University Place; and

WHEREAS, the parties desire to enter into this Agreement for the continued performance of prosecutorial services on behalf of the City of University Place.

NOW, THEREFORE, the City and the City Prosecutor agree as follows:

1. Incorporation of recitals:

The above recitals are hereby incorporated into and made a part of this Agreement.

2. Scope of services:

- a. Primary Services: The City Prosecutor shall serve at the pleasure of the City Manager of the City of University Place, under the direction of the City Council. The principle of the City Prosecutor is Krista White-Swain, duly licensed in the State of Washington as an Attorney at Law. Under the supervision of the City Prosecutor, other attorneys may assist the City Prosecutor as necessary. The City Prosecutor, and any other attorneys that assist the City Prosecutor shall be licensed to practice law in the State of Washington and in active status at all times during the term of this Agreement.
- b. Conflict Services: In the event of a conflict with the City Prosecutor of a case requiring a "conflict prosecutor," such shall be the responsibility of the City Prosecutor to obtain

substitute coverage, with a qualified and properly licensed State of Washington attorney. However, the expense of a “conflict prosecutor” shall be the responsibility of the City.

- c. Independent practice: The City acknowledges that the City Prosecutor has an independent law practice and that it may perform services for clients other than the City. The City Prosecutor agrees not to perform services where the same would interfere with his/her obligations under this Agreement or constitute a conflict of interest or ethical violation as defined in the Rules of Professional Conduct for Prosecutors established by the Washington State Supreme Court.
- d. Professional judgment: The City Prosecutor, in the course of his/her prosecutorial duties, shall make decisions involving, but not limited to, the charging of crimes, plea agreements, compromises, sentencing recommendations, review and revocation of probation, independently of the City, the University Place Police Department and the Chief of Police. These decisions shall be made in accordance with accepted prosecutor ethics, cannons and current practices; and, where provided, with due consideration for any opinion expressed by the City Attorney for the City of University Place.

3. Term of Agreement:

This Agreement shall take effect on January 1, 2022. This Agreement shall terminate on December 31, 2024, unless otherwise terminated earlier as provided by Section 4 of this Agreement.

4. Termination:

- a. Termination for Default: If the City Prosecutor defaults by failing to perform any of the obligations of this Agreement or becomes insolvent or is declared bankrupt or commits any act of bankruptcy or insolvency or makes an assignment for the benefit of creditors, the City may, by depositing written notice to the City Prosecutor in the U.S. mail, postage prepaid, terminate this Agreement, and at the City's option, obtain performance of the work elsewhere. If this Agreement is terminated for default, the City Prosecutor shall not be entitled to receive any further payments under this Agreement until all work called for has been fully performed. Any extra cost or damage to the City resulting from such default(s) shall be deducted from any money due or coming due to the City Prosecutor. The City Prosecutor shall bear any extra expenses incurred by the City in completing the work, including all increased costs for completing the work, and all damage sustained, or which may be sustained by the City by reason of such default.
- b. Termination for Conflict of Interest: The City may, in its sole discretion, by written notice to the City Prosecutor, immediately terminate this Agreement if it is found after due notice and examination by the City that there is a violation of the Ethics in Public Service Act, Chapter 42.52 RCW.

- c. Termination for Non-Availability of Funds: Every obligation of the City in this Agreement is conditioned upon the availability of funds appropriated or allocated for the purpose of such obligation; and if funds are not allocated and available for the continuance of this Agreement, then this Agreement may be terminated by the City at the end of the period for which funds are available, provided that at least seven (7) day's advance notice is provided to the City Prosecutor.
- d. Termination for Disciplinary Action: The City may, in its sole discretion, by written notice to the City Prosecutor, immediately terminate this Agreement if an order is issued by the Washington State Bar Association or Washington Supreme Court that suspends or disbars the City Prosecutor.

5. Services Provided:

The City Prosecutor shall perform those services described in Exhibit A, attached hereto and incorporated herein by this reference. In performing such services, the City Prosecutor shall at all times comply with Federal, State, and local statutes, ordinances, and rules applicable to the performance of such services. Compliance with these standards goes to the essence of this Agreement. The City Prosecutor shall request and obtain prior written approval from the City if the scope of services is to be modified in any way.

6. Fees and Costs:

The City shall pay the City Prosecutor according to the rate and method set forth in Exhibit B, attached hereto and incorporated herein by this reference. Where Exhibit B requires payments by the City, payment shall be based upon billings, supported by documentation of units of work actually performed and amounts earned, including where appropriate, the actual number of days worked each month, total number of hours for the month, and the total dollar payment requested, unless otherwise prohibited by the Rules of Professional Conduct. Unless specifically stated in Exhibit B or approved in writing in advance by the City, the City will not reimburse the City Prosecutor for any costs or expenses incurred in the performance of this Agreement.

7. Indemnification & Hold Harmless:

The City Prosecutor shall defend, indemnify and hold the City, its officers, agents, officials, employees and volunteers harmless from any and all claims, injuries, damages, losses or suits including attorney fees, arising out of or in connection with the performance of this Agreement, except for injuries and damages caused by the sole negligence of the City. Should a court of competent jurisdiction determine that this Agreement is subject to RCW 4.24.115, then, in the event of liability for damages arising out of bodily injury to persons or damages to property caused by or resulting from the concurrent negligence of the City Prosecutor and the City, its officers, officials, employees, and volunteers, the City Prosecutor's liability hereunder shall be only to the extent of the City Prosecutor's negligence. It is further specifically and expressly understood that the indemnification provided herein constitutes the City Prosecutor's waiver of immunity under Industrial

Insurance, Title 51 RCW, solely for the purposes of this indemnification. This waiver has been mutually negotiated by the parties. The provisions of this section shall survive the expiration or termination of this Agreement.

8. Insurance Requirements:

The City Prosecutor shall maintain insurance coverage as follows:

- a. The City Prosecutor shall, at the City Prosecutor's own expense, maintain, with an insurance carrier authorized or eligible under RCW Chapter 48.15 to do business in the State of Washington, professional liability insurance, with minimum coverage as outlined below.
- ~~b. The City shall be named as an additional insured on all required policies except professional liability insurance, and such insurance as is carried by the City Prosecutor shall be primary over any insurance carried by the City. The City Prosecutor shall provide a certificate of insurance to be approved by the City Risk Manager prior to contract execution, which shall be attached to this Agreement.~~
- ~~c. Such insurance policies or related certificates of insurance shall name the City as an additional insured on all general liability, automobile liability, employers' liability, and excess policies. A forty five (45) calendar day written notice shall be given to prior to termination of or any material change to the policy(ies) as it relates to this Agreement.~~
- d. In the event of nonrenewal or cancellation of or material change in the coverage required, thirty (30) days' written notice will be furnished to the City prior to the date of cancellation, change or nonrenewal, such notice to be sent to the City Risk Manager, 3609 Market Place W., Ste. 200, University Place, WA 98466.

8. Non-Discrimination:

The City Prosecutor, with regard to the services to be provided under this Agreement, shall not discriminate against any employee, applicant for employment, on the basis of race, religion, creed, color, national origin, age, veteran status, sex, sexual orientation, gender identity, marital status, political affiliation or the presence of any sensory, mental or physical disability in the selection and retention of employees or procurement of materials or supplies.

9. Notices:

Notices to the parties as follows:

To the City:

Stephen P. Sugg, City Manager
3609 Market Place W., Ste. 200

University Place, WA 98466
253.566.5656

To the City Prosecutor:

Krista White Swain
PO Box 1087
Enumclaw, WA 98022
253.927.3919

10. Taxes:

- a. The City will pay sales and use taxes imposed on goods or services acquired hereunder as required by law. The City Prosecutor must pay all other taxes including, but not limited to: Business and Occupation Tax, taxes based on the City Prosecutor's gross or net income, or personal property to which the City does not hold title. The City is exempt from Federal Excise Tax.
- b. The City Prosecutor understands and acknowledges that the City will not withhold Federal or State income taxes. All compensation received by the City Prosecutor will be reported to the Internal Revenue Service at the end of the calendar year in accordance with the applicable IRS regulations. It is the responsibility of the City Prosecutor to make the necessary estimated tax payments throughout the year, if any, and the City Prosecutor is solely liable for any tax obligation arising from the City Prosecutor's performance of this Agreement. The City Prosecutor hereby agrees to indemnify the City against any demand to pay taxes arising from the City Prosecutor's failure to pay taxes on compensation earned pursuant to this Agreement.

11. Dispute Resolution:

- a. Continuation of Performance: In the event that any dispute or conflict arises between the parties while this Agreement is in effect, the City Prosecutor agrees that, notwithstanding such dispute or conflict, the City Prosecutor shall continue to make a good faith effort to continue to cooperate and continue to work toward successful completion of the services described in Exhibit A.
- b. Meet and Confer Process: In the event that any party believes another party has breached a term of this Agreement, it may request in writing that the parties meet and confer in good faith for the purpose of attempting to reach a mutually satisfactory resolution of the problem within fifteen (15) days of the date of service of said request.
- c. Notice of Disagreement: Within fifteen (15) days of the meet and confer process, if a party is not satisfied with the result of the meet and confer process, or at any time if the complaining party elects not to utilize the meet and confer process described in Section 11(b) the complaining party may provide written notice to the affected party that identifies and describes any alleged breach of this Agreement ("Notice of Disagreement"), with particularity, if available, and sets forth the action required to

remedy the breach.

- d. Response to Notice of Disagreement: Within fifteen (15) days of service of a Notice of Disagreement, the recipient shall provide a written response, either denying or admitting the allegations set forth in the Notice of Disagreement and, if the truth of the allegations is admitted, setting forth in detail the steps it has taken and/or will take to cure the breach. Failure to serve a timely response shall entitle the complaining party to proceed immediately to arbitration, as described in Section 11(e).
- e. Binding Arbitration Procedure: Subject to prior compliance with the Meet and Confer process set out in Section 11(b) and the Notice and Response processes in Sections 11(c) and 11(d), any party has the right to initiate binding arbitration to resolve any dispute arising under this Agreement if the matter complained of remains unresolved. The arbitration shall be conducted according to the following procedures:
 - i. The arbitration shall be administered by the American Arbitration Association in accordance with its Commercial Arbitration Rules. The arbitrator shall be selected pursuant to such rules; provided that s/he must be a licensed attorney, knowledgeable in municipal law. The parties and the arbitrator shall maintain strict confidentiality with respect to the arbitration.
 - ii. The arbitration shall be held in the Pierce County, unless otherwise agreed on by the parties. The arbitrator shall be empowered to grant specific performance on the terms and conditions of this Agreement. The arbitrator shall not have the power to grant equitable and injunctive relief or to award punitive damages. The provisions of the Washington Rules of Civil Procedure are incorporated into, and made a part of, this Agreement; provided that no discovery authorized by said section may be conducted without leave of the arbitrator, who shall decide to grant leave based on the need of the requesting party and the burden of such discovery in light of the nature and complexity of the dispute.
 - iii. If either party requests a hearing, the arbitrator shall set the matter for hearing. Otherwise, the arbitrator shall decide whether to set the matter for hearing.
 - iv. An award made upon written briefs of the parties, or after a hearing by the arbitrator, shall be made in writing and give the reasons for the decision. Judgment on the award rendered by the arbitrator may be entered in any court having jurisdiction. The costs and expenses of the American Arbitration Association and the arbitrator shall be shared equally by and between the parties unless the arbitrator rules otherwise.
- f. Enforcement: Any award in arbitration held pursuant to this section may be enforced by bringing an action in the Superior Court for Pierce County, Washington.

12. Miscellaneous:

- a. Assignment & Subcontracting: The City Prosecutor shall not assign or subcontract any

portion of the services contemplated by this Agreement without the written consent of the City.

- b. Attorneys' Fees: If either party commences legal action to enforce or interpret the terms of this Agreement, each party agrees to bear its own costs or fees, unless otherwise ordered by an arbitrator pursuant to Section 11 of this Agreement, or as prohibited by RCW 4.24.115.
- c. Independent Contractor Status: The City Prosecutor's services shall be furnished as an independent contractor and nothing herein contained shall be construed to create a relationship of employer-employee.
- d. No Guarantee of Employment: The performance of all or part of this Agreement by the Contractor shall not operate to vest any employment rights whatsoever and shall not be deemed to guarantee any employment of the Contractor or any employee of the Contractor or any subcontractor or any employee of any subcontractor by the City at the present time or in the future.
- e. Record Keeping & Reporting: The City Prosecutor's services shall be furnished as an independent contractor and nothing herein contained shall be construed to create a relationship of employer-employee or master-servant, but all payments made hereunder and all services performed shall be made and performed pursuant to this Agreement by the City Prosecutor as an independent contractor.
- f. Audits & Inspections: The records and documents with respect to all matters covered by this Agreement shall at all times be subject to inspection, review or audit as allowed by law during the performance of this Agreement.
- g. Venue & Choice of Law: This Agreement shall be deemed to be made and construed in accordance with the laws of the State of Washington, and venue for any action arising out of this Agreement shall be in Pierce County, Washington.
- h. Agreement Interpretation:
 - i. All captions, headings or titles in the paragraphs or sections of this Agreement are inserted for convenience of reference only and shall not constitute a part of this Agreement or act as a limitation on the scope of the particular paragraph or sections to which they apply.
 - ii. As used herein, where appropriate, the singular shall include the plural and vice versa, and masculine, feminine, and neuter expressions shall be interchangeable.
 - iii. Interpretation or construction of this Agreement shall not be affected by any determination as to who is the drafter of this Agreement, this Agreement having been drafted by mutual agreement of the parties.
- i. Severability & Survival: If any term or provision of this Agreement or the application

thereof to any person or circumstance shall, to any extent, be held to be invalid or unenforceable by a final decision of any court having jurisdiction on the matter, the remainder of this Agreement or the application of such term or provision to persons or circumstances other than those as to which it is held invalid or unenforceable shall not be affected thereby and shall continue in full force and effect, unless such court determines that such invalidity or unenforceability materially interferes with or defeats the purposes hereof, at which time either party shall have the right to terminate the Agreement.

- j. Waiver: Waiver of any breach or condition of this Agreement shall not be deemed a waiver of any prior or subsequent breach. No term or condition of this Agreement shall be held to be waived, modified or deleted except by an instrument, in writing, signed by the parties hereto.
- k. Integration & Binding Effect:
 - i. This Agreement constitutes the entire agreement between the parties. There are no terms, obligations, covenants or conditions other than those contained herein. No modifications or amendments of this Agreement shall be valid or effective unless evidenced by an agreement in writing signed by both parties.
 - ii. All of the covenants, conditions and agreements in this Agreement shall extend to and bind the legal successors and assigns of the parties hereto; provided that this section shall not be deemed to permit any transfer or assignment otherwise prohibited by this Agreement.
- l. Amendment & Modification: No amendment or modification of this Agreement shall be of any force or effect unless it is in writing and signed by the parties.
- m. Force Majeure: No party to this Agreement shall be held responsible for delay or default caused by terrorism, natural disasters, riots, acts of God, and/or war that is beyond the reasonable control of its appropriations.

13. Signature Authority:

This Agreement may be executed in counterparts, each of which shall be one and the same Agreement.

Signatures on the following page.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed, effective the day and year first set forth above.

CONTRACTOR:

CITY OF UNIVERSITY PLACE

Krista White-Swain

Stephen P. Sugg, City Manager

Approved as to form:

Matthew S. Kaser, City Attorney

UNOFFICIAL DOCUMENT

EXHIBIT A

1. **Services.** The City Prosecutor shall represent the City as a prosecuting attorney in the enforcement of its ordinances and prosecution of criminal and criminal traffic matters (gross misdemeanors and misdemeanors). The duties of the City Prosecutor shall include, but not be limited to providing prosecution for the city of University Place criminal matters, including reviewing, preparing and filing complaints, attending in person, virtually, telephonically or by recommendation, hearings including arraignments, pretrials, motions, readiness and trial; hearing appearances on two Monday afternoons per month and arraignments as scheduled on Thursday afternoons. However, the City may elect to appear at arraignment calendars with a written recommendation for conditions of release in lieu of an in-person appearance.

The City, through its police department and such other departments, shall provide that support necessary to assist in the prosecution of criminal matters, including, but not limited to, the providing and forwarding of copies of all police reports and relevant documents in a timely manner and service of subpoenas as requested. Any requests for City Prosecutor services not regularly scheduled shall be promptly relayed by the City and/or the court.

2. **Additional Services.** In addition, the City Prosecutor shall provide the following services:
 - a. One (1) Spanish speaking domestic violence victim advocate included in the fee described in number 1 of Exhibit B; and
 - b. Specially set hearings which occur on a date other than regular pretrial or arraignment calendars, for in custody cases, motions, review calendars, traffic infractions, extended hearings, readiness or trials, for which there will be a \$500 separate billing for each additional half- day.

EXHIBIT B

1. **Retainer.** As compensation for the services to be rendered by the City Prosecutor as described in Exhibit A, the City agrees to pay to the City Prosecutor \$6,000.00 per month.
2. **Additional Compensation.** Each additional one-half day of hearing or trial, not included in the services described in Exhibit A, shall be billed separately in the amount of \$500.00.
3. **Expenses.** The City shall reimburse the City Prosecutor for any reasonable out-of-pocket expenses that may be required in the performance of his/her duties as City Prosecutor on behalf of the City. Expenses of witnesses, expert witnesses (including SMD) and interpreters, as may be required from time to time in the preparation and prosecution, shall be the sole responsibility of the City.
4. **Payment Terms.**

Method of Payment. Payment by the City for the services will only be made after:

- a. The work has been performed and/or items provided and an itemized invoice has been submitted which describes the specific work performed and/or items provided, the name of the entity or person performing the work or providing the services or items, and the cost broken down by work, hourly rate, or item cost as applicable; and
- b. The invoice has been submitted to and approved by the City representative who is managing the contract.

Contractor Responsible for Taxes. The City Prosecutor shall be solely responsible for the payment of any taxes imposed by any lawful jurisdiction as a result of performance and payment under this Agreement.