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**STAFF REPORT: Planning & Building Services Department**



**REPORT TO: Council**  
**MEETING DATE: May 14, 2012**  
**REPORT NO.: B.12.10**  
**SUBJECT: Prosecutorial Legal Services**  
**PREPARED BY: D. Finbow, Director, Planning & Building Services**

**A. Recommendations**

**THAT** Council receive Staff Report B.12.10 respecting Prosecutorial Legal Services.

**B. Background**

**Purpose:**

The purpose of this report is to apprise Council of arrangements made with respect to Prosecutorial Legal Services and a possible budget over expenditure related to legal services within the Building & By-law Services Division of the Planning & Building Services Department.

**Current Prosecution Services Situation:**

Currently, the Town utilizes the services of James Russell, J.B. Russell Paralegal Services or Wayne DeWitt, Municipal Law Enforcement Officer, to prosecute *Provincial Offences Act* matters in the Provincial Offences Court. Both James Russell and Wayne DeWitt are licenced by the Law Society of Upper Canada to provide paralegal services in the Province.

**Pending Change in Prosecution Services:**

Given upcoming complex prosecutions, including prosecutions in which Mr. DeWitt will be providing evidence, it was determined that the Town required specialized legal services. These complex prosecutions include Zoning By-law matters and *Building Code Act* offences. With respect to other prosecutions, such as parking related offences, Property Standards, Dog Control By-law and the *Dog Owner's Liability Act*, it is intended that the Town continue with the paralegals previously mentioned.

With regard to specialized legal services, Town staff were aware that Middlebro' & Stevens LLP provided prosecutorial services for a number of public sector clients including the Provincial Offences Court (County of Grey), the City of Owen Sound and the Grey Bruce Health Unit. Town staff recently met with and discussed our prosecutorial needs with Middlebro' & Stevens LLP and following this meeting, and subsequent to our request, Middlebro' & Stevens LLP provided the attached Retainer for Prosecutorial Services and a Prosecution Retainer Agreement.

Town staff has conferred with two of Middlebro' and Stevens LLP clients and both have provided excellent references.

### **Prosecution Retainer Agreement & Rates:**

The Prosecution Retainer Agreement has been reviewed by the Town's solicitor who has advised that he has no issue with respect to its form.

It is Town staff's opinion that the rates quoted by Middlebro' & Stevens LLP are competitive for the Owen Sound area and are reflective of rates charged to other public sector clients.

### **Impact on 2012 Budget:**

With respect to the costs associated with this matter, it is difficult to determine at this time but it is expected that they will exceed \$15,000.00 in 2012 and, with other legal work, the budgeted amounts of \$2,000.00 and \$5,000.00 for the Building and By-law work groups respectively will be exceeded by a total of approximately \$15,000.00 (it is noted that the Short Term Accommodation Enhancement Report previously considered by Council included a consideration for legal costs). Town staff will monitor expenses, and revenues from prosecutions/convictions, and advise of the budgetary impact through our normal controls.

### **Purchasing Policy Compliance:**

The Town's Purchasing Policy and Procedure exempts the retention of legal services from the Town's Purchasing Process. Further, the Town's Purchasing Policy indicates that the Department Head jointly with the Manager of Purchasing have the approval for negotiations from \$5,001.00 to \$50,000.00.

### **Summary:**

So that the Town is best positioned to be successful in our legal proceedings, Town staff are of the opinion that the retention of Middlebro' & Stevens LLP is appropriate.

### **C. The Blue Mountains' Strategic Plan**

*"Managing growth to ensure the ongoing health and prosperity of the community".*

### **D. Environmental Impacts**

N/A

### **E. Financial Impact**

TBD

**F. In Consultation With**

N/A

**G. Attached**

Retainer for Prosecutorial Legal Services  
Prosecutorial Retainer Agreement

Respectfully submitted,

David Finbow  
Director, Planning & Building Services

# MIDDLEBRO' & STEVENS LLP

*Barristers & Solicitors*

EDMUND J. STEVENS, B.A., LL.B., Partner  
KELLY L. GRAHAM, B.A. (Hons.), LL.B., Partner  
JOHN D. MIDDLEBRO', B.A. (Hons.), LL.B., Partner  
JILL T. SAMPSON, B.A. (Hons.), LL.B., Associate  
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and regular mail

4 May 2012

File B120246

Mr. David Finbow, Director of Planning  
Town of the Blue Mountains  
32 Mill Street, P.O. Box 310  
Thornbury, Ontario  
N0H 2P0

Dear Sir:

**RE: RETAINER FOR PROSECUTORIAL LEGAL SERVICES ENCLOSED**

Thank you for meeting with Greg Miller, Wayne DeWitt, and myself at my office to discuss arrangements for the prosecution of provincial offences for which the Municipality is responsible in law. Briefly, I understand that the Municipality is most interested in prosecuting short-term accommodation property owners who may be violating the local zoning by-law, together with any fire code, building code, noise violation, or other infraction which may arise from time to time. I am pleased to advise that our firm is interested in being engaged by the Municipality as prosecutors, and I am enclosing herewith our proposed Retainer Agreement for the Municipality's consideration at your request. Our firm has significant experience and expertise where the prosecution of Provincial Offences is concerned, and we hope to apply it for the Town's benefit.

Please note that we have 6 prosecutors (3 active and 3 backup) who appear weekly in the Provincial Offences Court at Grey County and the proposed hourly rates are based on a combination of market rates, level of expertise and seniority. We hope you will find the same satisfactory.

You requested an outline for prosecution service in a typical offence matter and we are happy to suggest an estimate here. We anticipate, in the usual course, that the prosecution of a zoning by-law or other offence will follow a normal pattern for prosecutorial intake and litigation as below. We base the rough time estimates on our experience in prosecuting for other municipalities with experienced investigators.

**Pre-charge consultation (.5 – 1.5 hrs.)** – often we are consulted in advance of charges being laid by investigative personnel for preliminary opinions where the gathered or anticipated evidence is reviewed and assessed by prosecutorial staff, either on the telephone or in person. Typically, such meetings are advisable so that prosecutors can give advice to enforcement officials or a pre-charge assessment where the strength of the evidence is concerned. In typical or routine cases this is not always necessary.

**Reading & review of Crown Brief (.5 – 1.5 hrs.)** – a review and screening of the Crown Brief is necessary in every case to determine whether a reasonable prospect of success exists for prosecution if a charge is laid. The length of time spent is always a product of the complexity of the evidence and its volume.

**First appearance & subsequent appearances (.5 – 1.0 hr., including travel time)** – Typically, attendances at the Provincial Offences Court for the first appearance after summons and any “set date” appearances where substantive rights are not determined are not lengthy. However, occasionally prosecutors are obliged to wait at court while other cases are called. Travel time to and from court is very minimal in Owen Sound. A guilty plea and sentencing submissions may form part and parcel of these appearances.

**Judicial Pre-Trial stage (1 – 2 hrs., including travel time)** – Typically, matters that are anticipated to occupy 4 or more hours of trial time must be pre-tried by a Justice of the Peace. These appointments are private and last at least 1 hour in length, depending on the complexity of the subject matter. Occasionally, there are multiple Judicial Pre-Trial appearances where the issues or allegations are complex.

**Trial stage (2.5 hrs. – multiple days)** – Simple trials with more than two witnesses do not usually take less than 2.5 hours to complete and, depending on the complexity of the evidence and the length of legal argument can occupy more than 1 day at trial. Each matter is different and depends on the strength of the evidence, resistance offered by individual defendants, court availability, etc. Lengthier trials are typically set in blocks of 2 days or more, locally.

**Various correspondence & legal research and preparation (1 – 5 hrs.)** – Throughout the course of a prosecution, there can be various correspondences exchanged between prosecutors and defence counsel or witnesses, dissemination of disclosure, telephone calls and conferences, legal research, preparation of authorities, interviewing of witnesses, etc. Some of this non-legal administrative work can be carried by support staff at the firm, who typically charge lower hourly rates to a file.

As you can appreciate, the nature and cost of each prosecution is unique, and dependent on a number of factors. However, the experience level of our prosecutors eliminates any unnecessary preparation time or costs associated with any learning curve, as we discussed.

If the attached Retainer Agreement is satisfactory, please have the appropriate officer of the municipality execute the same and return at your first convenience. We look forward to hearing

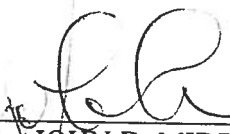
from the Municipality and to providing our input on the template enforcement file currently under discussion. We would also be pleased to provide our sample prosecution materials and templates to assist your investigator and help streamline the investigative and prosecutorial procedure.

We trust this is the information you require, but if you have any further questions I welcome your call. We thank you for your interest in our firm and we look forward to serving the Municipality.

We remain,

Yours very truly,

**MIDDLEBRO' & STEVENS LLP**



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Per: JOHN D. MIDDLEBRO'  
JDM:fcg  
Encls. Retainer Agreement



## PROSECUTORIAL RETAINER AGREEMENT

TO: **MIDDLEBRO' & STEVENS LLP, Barristers & Solicitors**  
P.O. Box 100  
1030 2<sup>nd</sup> Avenue East,  
Owen Sound, Ontario  
N4K 5P1  
(519) 376-8730  
(519) 376-7135 (fax)  
[jdm@msslaw.ca](mailto:jdm@msslaw.ca)

**THE TOWN OF THE BLUE MOUNTAINS (“the Municipality”)** retains and instructs you (“You”, the “Prosecutors”, the “Firm”, etc.) to advise it and to act on its behalf with respect to the prosecution of provincial offences for which it is responsible in law and arising within the Grey County Provincial Offences Court catchment area, and such other matters and laws within its scope of administration as it may instruct from time to time either orally or in writing, including but not limited to investigative and charge consultations by enforcement personnel, legal opinions during or about prosecutions, research and preparation for court attendances, conduct of trials and appeals.

THE MUNICIPALITY UNDERSTANDS in entering this retainer that there exists a legal separation of function between prosecutors, enforcement agencies and the body politic, including the MUNICIPALITY and its council, and further that prosecutors are subject to special rules and duties in law as officers of the court, and further that they are bound by the *Rules of Professional Conduct* for lawyers, the guidelines contained in the *Martin Report*, and the common law. The MUNICIPALITY UNDERSTANDS that prosecutors must act as **non-partisan advocates** for the court, and in the larger public interest at all times; on occasion, this may not accord with the political interests and goals of the MUNICIPALITY or its Council, notwithstanding that it must pay legal accounts for prosecutorial services.

As such, the MUNICIPALITY pledges to and shall comply with all policies, municipal codes and procedures including but not limited to

1. the Association of Municipalities of Ontario Conflict of Interest Guidelines, and
2. the Memorandum of Understanding and any Local Side Agreement governing the administration of the Provincial Offences Court in Grey County,

and undertakes that neither council as a whole nor any of its councillors shall attempt to exercise or exert political influence or pressure upon or communicate instruction or direction to prosecutors regarding the conduct of prosecution litigation before the courts and who are lawfully employed and carrying out their duties as prosecutors for the Municipality.

The Prosecution shall provide updates and reports to the MUNICIPALITY from time to time as may be required for cases before the courts or for pending charges upon which it has been consulted.

THE MUNICIPALITY AUTHORIZES you to employ such counsel, staff, experts and agents as you consider necessary or proper for the conduct of proceedings and agrees to pay all reasonable amounts that they may charge for their services and expenses they incur on its behalf.

THE MUNICIPALITY ACKNOWLEDGES that you may render accounts to it on an ongoing basis (usually monthly) for fees, disbursements and HST. THE MUNICIPALITY ACKNOWLEDGES that all accounts are final (not interim) for the services described therein and the MUNICIPALITY agrees to pay these accounts on receipt, subject to any right of assessment (found in the *Solicitors Act* of Ontario), including Harmonized Services Tax and any interest on account(s) remaining unpaid



after thirty days. THE MUNICIPALITY UNDERSTANDS that you may withdraw your services, subject to court approval if required, if it does not pay your account(s) when rendered.

THE MUNICIPALITY ACKNOWLEDGES that your fees will be based on the time spent on each matter on its behalf, or in the aggregate if more than one matter is contemporaneously litigated, and the time spent by your staff, subject to adjustments for the amount involved, complexity of the issues, the results obtained, urgency and other factors used by legal practitioners in setting a reasonable fee. You have agreed to make time records available to THE MUNICIPALITY for its review at any mutually convenient time if the MUNICIPALITY has any question or concern about them. Disbursements will include such items as transcripts, court fees, travel costs, meals, computerized legal research, word processing, facsimile charges and fees for counsel, agents and experts, photocopy charges (currently \$0.35 per page) and delivery charges. (Where possible, travel costs and meal charges, etc. may be shared and divided among other clients attending the same court date.) Reasonable file opening and/or closing and archival storage charges may be applied from time to time.

THE MUNICIPALITY UNDERSTANDS that Middlebro' & Stevens LLP currently has six practitioners sworn by the courts as prosecutors, and that the hourly rate for

John D. Middlebro' **CONFIDENTIAL**; \*\*

Jill T. Sampson **CONFIDENTIAL**;

Fiona M. Hamilton **CONFIDENTIAL**

Edmund J. Stevens is **CONFIDENTIAL**; \*

John H. E. Middlebro' **CONFIDENTIAL** our; and \*

Kelly L. Graham **CONFIDENTIAL** r, and \*

(\*\* indicates lead prosecutor and primary client contact lawyer)

(\*indicates a backup prosecutor/lawyer capable but not likely to be assisting unless required.)

THE MUNICIPALITY authorizes you to use other lawyers, clerks and students as you deem appropriate at the established rates by your firm for their services. (Currently, most office staff will charge time expended on your matter at

**CONFIDENTIAL**

The Hourly Rates set out herein shall be guaranteed for a period of 3 years after which time they may be increased upon reasonable notice provided in advance.

THE MUNICIPALITY ACKNOWLEDGES that prime responsibility for prosecutions and the greatest portion of work done on its behalf will be borne by **John D. Middlebro', Jill T. Sampson, and Fiona M. Hamilton** and that the other solicitors listed above will primarily be used during absences, vacation and for scheduling conflicts.

While not normally required, THE MUNICIPALITY AGREES TO DEPOSIT with you, in trust, such sums of money if and when requested in writing from time to time and acknowledges that this/these sums will be held by you in a non-interest bearing account. THE MUNICIPALITY authorizes and directs you to use such funds to pay for any disbursements incurred by you (ie. For Expert reports) on its behalf and any accounts for fees. THE MUNICIPALITY agrees to make further deposits on

request if these funds become depleted and the MUNICIPALITY understands that you may require a further monetary retainer to cover anticipated fees and disbursements in advance of a trial or other major court appearance.

THE MUNICIPALITY AUTHORIZES AND DIRECTS you to receive any funds to which it may become entitled in connection with any matter and deposit them in your trust account. THE MUNICIPALITY authorizes you to apply such funds to any of your outstanding unpaid accounts to it for fees and disbursements.

THE MUNICIPALITY MAY TERMINATE this retainer at any time upon written notice to the Firm and you may withdraw your services in appropriate circumstances upon reasonable notice to THE MUNICIPALITY, subject to any required court approval.

THE MUNICIPALITY ACKNOWLEDGES that Middlebro' & Stevens LLP has a privacy policy, that a copy of it is published on its website at [www.mslaw.ca](http://www.mslaw.ca), and that it has had an opportunity to review it.

THE MUNICIPALITY CONSENTS herein to the use of electronic mail (e-mail) for communications passing between Middlebro' & Stevens LLP and any investigator, witness, complainant, other counsel, its officers, administrators, directors, employees, agents and servants, and defendants and their counsel, and acknowledges that confidentiality of information cannot always be protected when e-mail is used.

THE MUNICIPALITY ACKNOWLEDGES receipt of a copy of this retainer agreement in three pages.

DATE: \_\_\_\_\_, 2012.

**THE TOWN OF THE BLUE MOUNTAINS**

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 PER:  
 TITLE:

"I have authority to bind the Municipality."

