



Office of the Mayor

ACTION CALENDAR

April 20, 2021

To: Members of the City Council
From: Mayor Jesse Arreguín
Subject: Appointment of City Attorney

RECOMMENDATION

Adopt a Resolution confirming the appointment of Farimah Faiz Brown as City Attorney and approving an employment agreement to be effective immediately.

FINANCIAL IMPLICATIONS

The salary and benefits for the City Attorney are included in the Fiscal Year 2021 Department Budget. The position is paid 100% from the General Fund (budget code 010-1701-410-11-01). The monthly salary is \$24,140.

CURRENT SITUATION AND ITS EFFECTS

Prior to 2020, the position of City Attorney was appointed by and under the sole direction of the City Manager. At the November 3, 2020 General Municipal Election, Berkeley voters approved Measure KK which amended various administrative provisions of the City Charter, including Section 113 regarding the Office of City Attorney.

Measure KK updated the terms and duties of the City Attorney and made the position a Charter officer, subject to appointment by the City Council. Charter Section 113 specifies that the City Attorney shall be appointed by a vote of five members of the Council, serving at the will of the Council for an indefinite period, and removed only by a vote of five members of the Council, and shall receive such salary as may be fixed by the Council. Therefore, the City Council is required to now appoint a permanent City Attorney.

The City Council met in closed session on January 25, 2021 and March 30, 2021 to discuss the appointment of the City Attorney. The Council discussed the possible appointment of the current City Attorney, Farimah Brown, and was favorably impressed.

In accordance with the City Charter, Section 113 of Article XVI, I am recommending that the City Council appoint Farimah Faiz Brown as Berkeley City Attorney and approve an employment agreement to be effective immediately. The agreement provides that Ms. Brown will serve as City Attorney for an indefinite term in this at-will position and may be removed at any time by a vote of five members of the City Council. The salary rate I am recommending is \$289,680 per year. This amount was proposed with mutual agreement

between the City Council and Ms. Brown and is based on a compensation survey of salary and benefits for City Attorney and County Counsel positions in the San Francisco Bay Area. Berkeley is unique from many other cities in that we have our own Public Health Department, Mental Health Division, Zero Waste Division, Fire Department, and other functions normally provided by County government. As such benchmarking compensation to County Counsel positions, which are similar in scope to the complex work of Berkeley City Attorney is appropriate. This salary level would bring Ms. Brown up to the market median in the region.

The agreement also provides for payment of professional dues and fees necessary for performance of her duties as City Attorney. In addition, the agreement allows the City to pay for travel and meal expenses for professional and office travel, meetings, and occasions adequate to continue the professional development of Brown and to adequately pursue necessary official functions for the City. The City will also pay tuition, travel, and meal expenses of Ms. Brown for short courses, institutes, and seminars necessary for her professional development, subject to budget limitations. All reimbursements for travel and meal expenses shall be processed pursuant to applicable city regulations which apply to all city employees. Finally, her benefits will remain the same as those she received while serving as the City Attorney and applicable to all regular at-will employees.

Within three months of adoption of the employment agreement, the City Council will meet in closed session to jointly establish objective, verifiable measures of her performance to be completed during the first year and the City Council will provide Ms. Brown with a performance evaluation at the end of the first year. Thereafter, the City Council will provide an annual performance evaluation, at which time Ms. Brown will present on goals and priorities for the City Attorney Department and key accomplishments over the past year.

Ms. Brown has served as Berkeley City Attorney since July 10, 2017 and has done an exceptional job managing a department of up to 13 FTE, balancing an increasing litigation portfolio, in addition to providing ongoing legal advice to all City Departments and the City Council. Ms. Brown has provided legal guidance on a variety of complex legal and policy matters including COVID-19 public health orders and their enforcement, policing policy, groundbreaking environmental legislation, and the creation of initiatives and bond measures. Her excellent record warrants her appointment as City Attorney.

BACKGROUND

The City Attorney's Office provides legal advice to the City in order to minimize liability and ensure conformance to legal requirements. The City Attorney determines the merits of claims and defends against suits filed, while also filing suits on behalf of the City. The City Attorney's Office advises the City Council and all City departments, and represents the City in lawsuits where the City is a party. The Office handles advice and litigation in all areas of the City's operations. There are a total of 13 FTE in the City Attorney's Office, including attorneys and support staff.

ENVIRONMENTAL SUSTAINABILITY

There are no identifiable environmental effects or opportunities associated with the subject of this report.

RATIONALE FOR RECOMMENDATION

Ms. Brown graduated from U.C. Hastings College of Law in 1998 and has specialized in municipal law for over two decades. She graduated Phi Beta Kappa from U.C. Berkeley in 1994.

She has been in her current role as the City Attorney since 2017. Under her leadership, Berkeley won a major victory against the Federal government when it challenged the City of Berkeley's zoning regulations enacted to protect the integrity of one of the City's significant historic resources (the Post Office building downtown). More recently, she has played a key role in supporting the City's COVID-19 response, helped with the development of ballot measures, including a police oversight measure, as well as regulations to respond to the economic impacts of the pandemic, including a legally-sound outdoor commerce ordinance, a cap on third-party food delivery fees, and an eviction moratorium for tenants.

Before Berkeley, she was the Senior Assistant City Attorney for the City of Alameda, where she played a major role in land use and development projects as the lead lawyer for the Community Development Department and the Base Reuse Department. She helped with securing over 1000 acres of land from the U.S. Navy to begin the process of reintegrating the decommissioned Naval Air Station into the rest of the island and starting to transform the underutilized former Base into civilian use with commercial operations, housing, open space, and a transportation network, including a ferry terminal. Her city clients included the City Council, the Planning Board, the Community Development Department, and the IT Department. She also provided legal support for the City-owned Utility (Alameda Municipal Power), Finance, Fire, Human Resources, and Public Works.

Immediately before joining Alameda, Ms. Brown was a land-use attorney with the City of Oakland. There, she advised the City Council, its various committees, the Planning Commission, and several City Departments, including the Planning and Building Department, on many aspects of land use law. She was also a staff attorney to the Mayor's Blue Ribbon Commission on Housing, and helped advise a group of 17 commissioners on legal aspects of housing issues, particularly condominium conversions in Oakland. Additionally, she helped the City prepare, negotiate, and process development agreements and subdivision improvement agreements with property owners. This was important in supporting the City's efforts to achieve a cooperative planning process resulting in the protection of open space and other assets, as well as ensuring that public infrastructure and improvements are built as the City grows. She prepared one of Oakland's first development fee regulations and negotiated one of Oakland's first conservation and open space easements, ensuring that certain tracts of land would remain protected as a buffer zone in perpetuity. In addition, in her work as part of the land use team, she helped defend the City's land-use decisions in administrative and judicial settings, including CEQA cases.

Before Oakland, she was an attorney with the City of Livermore, where she dealt with a wide array of City clients and land use and planning issues.

She advised the Planning Commission, Design Review Committee, and Scenic Route Element Subcommittee, Community Development Department (Planning, Engineering, Housing, and Building Divisions), Water Resources Division, Redevelopment Agency, and City Council, working closely with these City clients, she counseled them on a broad range of issues such as California's initiative process, growth management, adequacy and consistency of the City's General Plan, Specific Plans, the Subdivision Map Act, zoning requirements, use permits, variances, takings issues, permit-streamlining requirements, CEQA, historic preservation issues, as well as other areas of municipal law such as the Brown Act, the Public Records Act, and conflict-of-interest laws.

ALTERNATIVE ACTIONS CONSIDERED

None.

CONTACT PERSON

Jesse Arreguin, Mayor 510-981-7100

Attachments:

1: Resolution

Exhibit A: Agreement Between City of Berkeley and Farimah Faiz Brown

RESOLUTION NO. ##,###-N.S.

APPOINTMENT OF FARIMAH FAIZ BROWN AS CITY ATTORNEY

WHEREAS, in November 2020, Berkeley voters approved Measure KK amending various administrative provisions of the City Charter, including Section 113 relating to the terms and duties of the Office of City Attorney; and

WHEREAS, Section 113 of the City Charter provides that the City Attorney is the chief legal counsel of the City of Berkeley and prescribes the responsibilities of the office of City Attorney; and

WHEREAS, the City Charter makes the City Attorney a Charter officer subject to appointment and removal by five members of the City Council; and

WHEREAS, the City Council is now required to appoint a City Attorney, which is an at-will position for an indefinite term; and

WHEREAS, Farimah Faiz Brown has served as Berkeley City Attorney since July 10, 2017 and has done an exceptional job managing a department of up to 13 FTE, balancing an increasing litigation portfolio, in addition to providing ongoing legal advice to all City Departments and the City Council; and

WHEREAS, Ms. Brown has provided legal guidance on a variety of complex legal and policy matters including COVID-19 public health orders and their enforcement, policing policy, groundbreaking environmental legislation, and the creation of initiatives and bond measures; and

WHEREAS, Ms. Brown graduated from U.C. Hastings College of Law in 1998 and has specialized in municipal law for over two decades; and

WHEREAS, prior to her service in Berkeley, she served as a Senior Assistant City Attorney for the City of Alameda and has over sixteen years of municipal law experience. She also worked as a Deputy City Attorney in the Livermore and Oakland City Attorneys' Offices, and provided advice and representation on all areas of municipal law; and

WHEREAS, her qualifications and excellent record of service as City Attorney since 2017 warrants her permanent appointment.

NOW THEREFORE, BE IT RESOLVED by the Council of the City of Berkeley that it hereby appoints Farimah Faiz Brown as City Attorney for the City of Berkeley effective immediately, on the terms and conditions set forth in the employment agreement attached hereto as Exhibit A.

Exhibits

A: Agreement Between City of Berkeley and Farimah Faiz Brown

AGREEMENT

This agreement is made and entered into on April 20, 2021, between the City of Berkeley, a Charter City, organized and existing under the laws of the State of California (“City”), and Farimah Faiz Brown (“Ms. Brown”). The City and Ms. Brown are referred to herein collectively as the “Parties.”

This Agreement is made with reference to the following facts and objectives:

- A. The Office of the City Attorney is established by the Charter of the City of Berkeley (“City Charter”), Article XVI, Section 113.
- B. The City invests the City Council with the sole authority to appoint a City Attorney; and the City Council desires to employ the professional services of Ms. Brown as the City Attorney for the City of Berkeley.
- C. Ms. Brown agrees to serve as the City Attorney of the City of Berkeley in accordance with the Berkeley City Charter.
- D. Both the City and Ms. Brown wish to set forth in writing the terms and conditions of Ms. Brown’s employment as City Attorney for the City of Berkeley.

Therefore, in consideration of the mutual promises and covenants set forth herein, the Parties agree as follows:

1. COMMENCEMENT AND TERMINATION

The City Council hereby employs Ms. Brown as the City Attorney, and Ms. Brown hereby accepts said employment commencing on April 20, 2021. Pursuant to Charter Section 113, Ms. Brown shall serve at the pleasure of the Council and may be removed from office by the City Council with or without cause. In the event of such removal from office, Ms. Brown shall be eligible to receive severance payment in accordance with the provisions of Sections 3.d through 3.g of this Agreement. In the event that Ms. Brown voluntarily resigns her employment, she shall give notice as provided in Section 3.f of the Agreement.

2. DUTIES

Pursuant to the City Charter, Section 113, the City shall employ Ms. Brown as City Attorney of the City of Berkeley to perform the functions as legal counsel to the City of Berkeley and in a manner consistent with the City Charter, Ordinances of the City of Berkeley, California Constitution, and California Statutes, and such other laws and regulations as may be applicable. Ms. Brown will also perform other legally permissible and proper duties and functions as the City shall from time to time assign to Ms. Brown which are reasonably related to the duties and functions of a City Attorney.

3. COMPENSATION AND EVALUATION

- a. The City shall pay Ms. Brown for services rendered by her pursuant to this Agreement an annual base salary of \$289,680. Said salary shall be paid on the dates and in the manner consistent with the payroll procedures in use for City of Berkeley

career employees. In addition, Ms. Brown shall receive such employee benefits as are payable to the City's regular-at-will employees under the City's Unrepresented Employee Manual, and any cost of living increases Council approves for regular-at-will employees.

The City, in its sole and absolute discretion, may adjust the annual base salary of Ms. Brown at such times and to such extent as the City may determine. In exercising its discretionary authority, the City shall act fairly and in good faith with Ms. Brown. In no case shall Ms. Brown's annual base salary be decreased unless such decrease is a percentage consistent with a decrease applicable to all employees of the City generally.

Within three months of appointment, the City Council shall jointly establish objective, verifiable measures of her performance to be completed during the first year and the City Council shall provide Ms. Brown with a performance evaluation at the end of the first year. During the initial performance evaluation, Ms. Brown shall present to the City Council on her goals and priorities for the City Attorney Department. An assessment of salary increase shall be part of the evaluation process. For each subsequent year during the term of this Agreement, the parties shall endeavor to establish prospective objective, verifiable measures of performance for the ensuing year. As part of the annual performance evaluation, Ms. Brown shall present on goals and priorities for the City Attorney Department and key accomplishments over the past year.

- b. In the event that Ms. Brown is removed from office by the City Council without cause and during such time as Ms. Brown is able and willing to perform her duties under this Agreement, the City shall (1) provide Ms. Brown with notice at least one (1) month in advance of the final date of employment; and (2) pay Ms. Brown as severance pay (i) a lump-sum cash payment in an amount equal to two (2) months of salary, for every month of service as the City Attorney after the date of this Agreement, but under no circumstances shall said payments exceed twelve (12) months of salary; and (ii) any vacation leave accrued as of the date of termination.
- c. Notwithstanding the provisions of Section 3.b, in the event the Council terminates Ms. Brown for cause, the City shall have no obligation to provide any severance pay. As used in this section, "cause" shall mean conviction of, or no contest plea, to a felony or any crime involving moral turpitude or personal gain. In the event the City terminates Ms. Brown for cause, Ms. Brown shall be entitled only to such salary accrued to the date of termination, and such other termination benefits and payments as are required by law.
- d. In the event that Ms. Brown voluntarily and without the official request of the City resigns as City Attorney, Ms. Brown shall give written notice to the City at least thirty (30) days in advance of the final date of employment, unless the parties otherwise agree. Such resignation shall not be deemed to be a "removal" or "termination" within the meaning and context of the herein severance pay provisions.
- e. If, for a period of four (4) successive weeks beyond the expiration of any accrued sick leave and vacation, Ms. Brown is disabled or is otherwise unable to perform her

duties because of sickness, accident, injury, mental incapacity, or ill health, the City shall have the option to terminate this Agreement. If the City exercises this option, Ms. Brown shall nonetheless be compensated for any accrued leave time and other accrued benefits, including, but not limited to, long-term disability insurance benefits for which Ms. Brown is eligible; however, Brown shall not receive the severance pay described in Section 3.d. above.

4. VACATION AND SICK LEAVE

a. Ms. Brown shall be credited with thirty (30) days of vacation as of the commencement of employment as City Attorney and shall receive thirty (30) days of annual vacation leave annually. Annual vacation leave shall be administered in the same manner as vacation is administered for department head employees of the City with regard to timing of credits and buyback policy. Maximum vacation accrual is ninety (90) days including the initial vacation credits and existing vacation accrual balances. Ms. Brown shall be credited with fifteen (15) days of sick leave as of the commencement of employment as City Attorney and shall accrue fifteen (15) days of sick leave annually with unlimited accumulation. Sick leave may be used in accordance with policies applicable to department head employees of the City. Ms. Brown shall retain such vacation and sick leave balances she has earned by virtue of her employment with the City of Berkeley.

b. The City shall pay for professional dues and subscriptions of Ms. Brown necessary for her performance as City Attorney, including but not limited to annual dues to the State Bar of California, local bar associations such as the Alameda County Bar Association and/or other specialty bar associations, subject to budget limitations and prior review and approval by the City.

c. The City shall pay travel and meal expenses of Ms. Brown for professional and office travel, meetings, and occasions adequate to continue the professional development of Brown and to adequately pursue necessary official functions for the City. The City also shall pay tuition, travel, and meal expenses of Ms. Brown for short courses, institutes, and seminars that are necessary for her professional development and for the good of the City, subject to budget limitations. All reimbursements for travel and meal expenses shall be processed pursuant to applicable city regulations which apply to all city employees. Ms. Brown may request, and the City in its sole discretion may approve for funding, graduate level education programs, which may include reimbursement for tuition, books and travel.

5. AMENDMENT

The City and Ms. Brown may at any time mutually agree to amend or terminate this agreement. Any such agreement shall be in writing.

6. ENTIRE AGREEMENT

This agreement supersedes any other agreements, written or oral, expressed or implied, between the City and Ms. Brown.

7. INDEMNIFICATION

The City shall defend, hold harmless, and indemnify Ms. Brown against any claims, demands, or legal actions, whether specious, frivolous, or otherwise, arising out of an alleged act or omission, direct or indirect, occurring within the scope and during the course of Ms. Brown’s employment with the City. Ms. Brown will cooperate in good faith with the City with respect to defense of such claims, demands, or legal actions.

8. SEVERABILITY

In the event that any term of this agreement is finally held or determined to be illegal or void by a court having jurisdiction over the City and Ms. Brown, the remainder of this Agreement shall remain in full force and effect unless the term or terms held to be illegal or void are wholly inseparable from the remaining provisions of the Agreement. If any part of this Agreement is determined to be illegal or void by a court of competent jurisdiction, the parties shall meet and confer to re-negotiate such illegal or void term(s).

9. GOVERNING LAW

This Agreement shall be governed by the laws of the State of California.

IN WITNESS WHEREOF, the parties have executed this Agreement which shall be effective upon approval by the City Council.

CITY OF BERKELEY

FARIMAH FAIZ BROWN

By _____

By _____

Jesse Arreguin, Mayor