



Council Agenda Report

To: Mayor Grisanti and the Honorable Members of the City Council

Prepared by: John Cotti, Interim City Attorney

Date prepared: February 22, 2022 Meeting date: February 28, 2022

Subject: First Amended Employment Agreement for Interim City Manager Services between the City of Malibu and Steven L. McClary

RECOMMENDED ACTION: Approve the first amended employment agreement for Interim City Manager Services between the City of Malibu and Steven L. McClary.

FISCAL IMPACT: No additional appropriation is required. Funding for this agreement is included in the Adopted Budget for Fiscal Year 2021-2022.

WORK PLAN: This item was not included in the Adopted Work Plan for Fiscal Year 2020-2021.

DISCUSSION:

On May 10, 2021, the City Council unanimously appointed Steven L. McClary to serve as Interim City Manager while the recruitment process for a permanent City Manager City took place. Since May, the Council has engaged in an extensive search to identify the most qualified and well-suited candidate to serve the Malibu community but has not settled on a candidate for the permanent position.

During his tenure, Mr. McClary has proven to be a competent manager who is uniquely qualified to solve issues facing Malibu. While the recruitment process continues, the Council desires that Mr. McClary continue to serve as Interim City Manager given his increasing familiarity with the community, the issues facing the City, and the organization of the City, including the staff and other individuals who support and advance the City's mission.

ANALYSIS:

Mr. McClary's initial employment agreement was straightforward. The agreement contained a base monthly salary of \$14,580.00, an auto and technology allowance, and reimbursement for any reasonable business and travel expenses incurred on behalf of the City. To date, Mr. McClary received no health or other insurance benefits of any type and accrued no benefits such as vacation or sick leave.

In order to reward Mr. McClary for his performance to date and incentivize him to remain with the City, the Council approved an amended agreement with the following terms:

1. A rolling three-month term which automatically renews at the conclusion of each month of service;
2. A base salary of \$19,296.94 per month;
3. A potential bonus of \$20,000 plus \$5,000 per month beyond the fourth month as an incentive to remain with the position
4. Vacation, sick and administrative leave time;
5. Retirement, medical and disability insurance; and
6. Termination at the City Council's discretion; Mr. McClary can terminate with 21-days' notice).

OPTIONS:

In addition to the recommended action, the Council can provide additional direction to City staff on the terms of the agreement.

ATTACHMENTS:

- A. First Amended Agreement for Interim City Manager Services

CITY OF MALIBU

FIRST AMENDED

INTERIM CITY MANAGER EMPLOYMENT AGREEMENT

This First Amended Interim City Manager Employment Agreement (“Agreement”) is entered into on the execution date shown in the signatures block below, and effective as of the 1ST day of March, 2022 (the “Effective Date”), between the City of Malibu (hereinafter referred to as the “City”) and Steven L. McClary (hereinafter referred to as “McClary”). City and McClary are sometimes referred to in this Agreement as “Party” and collectively as “Parties.”

RECITALS

WHEREAS, the City’s City Manager position is vacant and the City is in the process of recruiting for this position, which process could last an extended period of time (although the City is hopeful that the process can be completed quickly);

WHEREAS, it is the desire of the City Council of the City to retain the services of McClary as Interim City Manager (pending the City’s retention of a permanent City Manager) pursuant to the provisions of the City of Malibu Municipal Code (“MMC”), State law and the terms and conditions of this Agreement; and

WHEREAS, McClary desires to serve as the City’s Interim City Manager pursuant to the provisions of the MMC, State law and the terms and conditions of this Agreement.

NOW, THEREFORE, the Parties hereby mutually agree and promise as follows:

1. Duties, Acceptance of Appointment, Hours of Work, Regional Liaison.

1.1 Duties

McClary shall perform those duties and have those responsibilities that are commonly assigned to a city manager of a city in California, as may be further set forth in the MMC, and those legally permissible and proper duties and functions consistent with the Office of the City Manager, as the City Council shall from time to time assign. McClary shall report to the City Council, which shall also serve as appointing authority for the Interim City Manager. It is expected that McClary will abide by the ICMA Code of Ethics. McClary is encouraged to participate in community and civic affairs.

1.2 Acceptance of Appointment

McClary hereby accepts the appointment as Interim City Manager of the City of Malibu subject to all terms and conditions set forth in this Agreement.

1.3 Hours of Work

It is understood that McClary will serve in a full time capacity as Interim City Manager during the Term of this Agreement. McClary's duties may involve expenditures of time in excess of eight hours per day, 40 hours per week, and may also include time outside normal office hours such as attendance at City Council meetings. As a full time managerial employee of the City, McClary shall be exempt from paid overtime compensation. Provided that McClary serves in a full time capacity, McClary may work flexible hours at his discretion and judgment in order to meet the needs of his position and the City.

1.4 Devotion to City Business

The Interim City Manager is a full-time position. McClary shall not engage in any business, educational, professional, charitable, or other activities that would conflict or materially interfere with performance of his duties, except as may be specifically authorized by the City Council.

2. Term.

This Agreement shall be deemed effective beginning on March 1, 2022, and shall be for an initial term of three (3) months, with an additional one (1) month being automatically added to the term at the end of every completed month of the Agreement, unless otherwise terminated by the City in accordance with the provisions of Section 9 of this Agreement.

3. Compensation.

3.1 Salary

City agrees to pay McClary, and McClary agrees to accept from City, as compensation for services rendered by him pursuant to this Agreement, a monthly salary, commencing on the Effective Date, in the amount of Nineteen Thousand, Two Hundred and Ninety-Six Dollars and Ninety-Four cents (\$19,296.94), payable in installment payments in the same manner and at the same times as salaries of other executive managers of the City are paid.

3.2 Allowance for Automobile and Technology

The City shall provide McClary an Automobile and Technology Allowance in the amount of Five Hundred Dollars (\$500.00) per month.

3.3 Benefits

McClary shall be entitled to the following benefits during the Term of the Agreement:

3.3.1 Retirement. During the Term of this Agreement, City shall contribute the employer's and McClary's portion of McClary's membership in the Public Employees Retirement System up to the maximum contribution amount established by the City Council pursuant to Resolution No. 14-66.

3.3.2 Medical and Other Insurance. City shall pay the full monthly premiums for full family medical, dental and vision insurance for McClary and his dependents.

3.3.3 Life Insurance. City shall pay the premium for a term life insurance policy with coverage equal to McClary's annual salary.

3.3.4 Disability Insurance. City shall pay the premium for a long-term disability insurance plan covering McClary.

3.3.5 Other Benefits. City shall provide and pay for all other insurance mandated by State law.

3.3.6 Waiver. McClary waives any other insurance benefits not expressly provided for herein.

3.4 Sick Leave, Vacation and Holidays, and Administrative Leave

3.4.1 Sick Leave. McClary shall be entitled to ninety-six (96) hours of sick leave per year, prorated on a monthly basis. McClary may accumulate a maximum of four hundred and eighty (480) hours of sick leave. In the event of termination or resignation from employment prior to the expiration of the Term of this Agreement, McClary shall be entitled to compensation for fifty percent (50%) of accumulated and unused sick leave, up to the maximum set forth above. McClary shall not be entitled to compensation for unused sick leave other than as set forth herein.

3.4.2 Vacation and Holidays. McClary shall be entitled to earn vacation leave at the rate expressed in hours as set forth in the City's Personnel Rules. McClary may accumulate vacation leave up to a maximum of four hundred and eighty (480) hours. McClary shall also be entitled to the same number of paid holidays per year as provided in the Municipal Code. In the event of separation from employment, McClary shall be entitled to compensation for one hundred percent (100%) of accumulated and unused vacation days, up to the maximum set forth above. McClary shall be allowed to use vacation time as it accrues and will not need to wait until the end of the typical 6-month probation period.

3.4.3. Administrative Leave. McClary shall be entitled to fifty-four hours (54) of administrative leave per fiscal year, prorated on a monthly basis. McClary may accumulate administrative leave hours up to a maximum of ninety (90) hours. In the event of termination or resignation from employment prior to the expiration of the Term of this Agreement, McClary shall be entitled to compensation for one hundred percent (100%) of accumulated and unused administrative leave hours, up to the maximum set forth above. McClary shall not be entitled to compensation for unused administrative leave other than as set forth herein.

4. Performance Evaluation.

The City Council may review McClary's job performance at its discretion.

5. Bonds.

City shall bear the full cost of any fidelity or other bonds required of McClary under MMC §2.12.060.

6. General Business Expenses.

6.1 City agrees to budget and pay for travel and subsistence expenses of Interim City Manager for professional and official travel, board and task-force meetings, conferences, and occasions to adequately continue the professional development of McClary and to pursue necessary official functions for City, all upon prior approval of the City Council.

6.2 City recognizes that McClary may incur expenses of a non-personal, job-related nature that are reasonably necessary to his service to the City. The City agrees to either pay such expenses in advance or to reimburse the expenses, so long as the expenses are incurred and submitted in accordance with the City’s normal expenditure reimbursement procedures. To be eligible for reimbursement, all expenses must be supported by documentation meeting the City’s normal requirements and must be submitted within time limits established by the City.

6.3 Notwithstanding the above, to the degree the City must make budget reductions, appropriate reductions in General Business Expenses commensurate with reductions in other citywide accounts may be made at the sole discretion of the City Council.

7. Abuse of Office or Position.

Pursuant to Government Code Sections 53243, 53243.1 and 53243.2, if McClary is convicted of a crime involving an abuse of his office or position, all of the following shall apply: (1) if McClary is provided with administrative leave pay pending an investigation, McClary shall be required to fully reimburse City such amounts paid; and (2) if City pays for the criminal legal defense of McClary (which would be in its sole discretion, as it is generally not obligated to pay for a criminal defense), McClary shall be required to fully reimburse City such amounts paid. For purposes of this Section, abuse of office or position means either: (1) an abuse of public authority, including waste, fraud, and violation of the law under color of authority; or (2) a crime against public justice, including, but not limited to, a crime described in Title 7 (commencing with Section 92) of Part 1 of the Penal Code.

8. Notices.

Any notice required or permitted by this Agreement shall be in writing and shall be personally served upon the other Party, or sent by United States Postal Service, postage prepaid and addressed to the appropriate Party as follow:

If to City: City of Malibu
23825 Stuart Ranch Road
Malibu, CA 90265
Attn: City Clerk

If to Interim City Manager: Steven L. McClary

Interim City Manager
8877 Denver Street
Ventura, CA 93004

Notice shall be deemed given as of the date of personal service or upon the date of deposit in the course of transmission with the United States Postal Service.

9. Termination.

9.1 At-Will Employee

McClary shall serve at the will and pleasure of the City Council. Nothing in this Agreement shall prevent, limit or otherwise interfere with the right of the City Council to suspend from duty, remove from office or otherwise terminate the services of McClary at any time, at the sole discretion of the City Council. This Agreement may be terminated as follows.

9.2 Termination - Council Vote

The City Council may remove McClary with or without cause, by motion adopted by the affirmative votes of a majority of the members of the City Council.

9.3 Termination By City Not For Cause

If the City terminates McClary without Cause (as defined in Section 9.4 below), McClary shall be entitled to an amount equal to McClary's base salary for one (1) month plus an additional five thousand dollars (\$5000.00) for every month that McClary served in the position of Interim City Manager beyond four (4) months after the Effective Date. Thereafter, all of City's obligations under this Agreement shall cease. Notwithstanding any other provision herein, in accordance with Government Code Section 53260, the cash payment that McClary may receive in the event of the termination of this Agreement, as set forth in this Section, shall not exceed an amount equal to the monthly base salary of McClary multiplied by the number of months left on the unexpired term of this Agreement.

9.4 Termination By City For Cause

At any time, and without prior notice, City may terminate McClary for Cause. In such event, City shall pay McClary all compensation then due and owing; thereafter, all of City's obligations under this Agreement shall cease. Termination shall be for "Cause" if McClary : (i) acts in bad faith and to the detriment of the City; (ii) willfully and unequivocally refuses or fails to act in accordance with any specific direction or order of the City; (iii) exhibits in regard to his employment gross unfitness or chronic unavailability for service, unsatisfactory performance, misconduct, dishonesty, habitual neglect, or incompetence; (iv) is convicted of a crime involving dishonesty, breach of trust, or physical or emotional harm to any person resulting in incarceration; and/or (v) breaches any material term of this Agreement.

In compliance with Government Code Section 53243, to the extent the City provides: (i) paid leave to McClary pending an investigation; (ii) funds for the legal criminal defense of McClary; and/or (iii) a cash settlement to McClary related to the termination of McClary pursuant

to Section 9.3 of this Agreement, McClary shall fully reimburse City for any and all amounts paid by City which fall within any such categories in the event that McClary is convicted of a crime involving the abuse of his office or position.

9.4 Resignation

McClary may voluntarily resign his position as Interim City Manager, at any time and with twenty-one (21) days advance notice.

9.5 Death

If, during the Term, the Interim City Manager dies, the Interim City Manager's estate shall receive accrued salary, but shall not be entitled to any additional compensation or payment.

9.6 Compensation Upon Termination

If McClary's employment as Interim City Manager should conclude on a date that is prior to the final day of a month, McClary's monthly Salary and Automobile and Technology Allowance pursuant to this Agreement shall be pro-rated for the portion of the month prior to the conclusion of McClary's services.

9.7 Employment of Regular City Manager

While McClary may be considered for the position of regular City Manager, he shall have no right to such employment, and nothing in this Agreement nor in his performance of duties as Interim City Manager shall entitle him to special consideration for such employment.

10. Other Terms and Conditions of Employment.

The City, only upon written agreement with McClary, shall fix any such other terms and conditions of employment, as it may determine from time to time, relating to the performance of McClary, provided such terms and conditions are not inconsistent with or in conflict with the provisions of this Agreement, the MMC, or any other law, ordinance or City resolution.

11. Indemnification.

11.1 City shall defend, hold harmless and indemnify McClary against any tort, professional liability claim or demand or other legal action, whether groundless or otherwise, arising out of any alleged act or omission occurring in the performance of McClary's duties or resulting from the exercise of his judgment or discretion in connection with the performance of his duties, unless the act or omission involved unlawful conduct. City shall not unreasonably refuse to provide for legal representation at City's expense. Legal representation, provided by City for McClary, shall extend until a final determination of the legal action including any and all losses, damages, judgment, interests, settlements, fines, court costs, and the reasonable costs and expenses of legal proceedings, including appeals, and including attorneys' fees, and expert witness fees and all other trial and appellate costs, and other liabilities incurred, imposed upon, or suffered by McClary in connection with or resulting from any claim, action, suit, or proceeding, actual or

threatened, arising out of or in connection with the performance of McClary's duties under this Agreement.

11.2 City agrees to pay all reasonable litigation expenses of McClary throughout pendency of any City-related litigation to which McClary is a party, witness or advisor to the City. Such expense payments shall continue beyond McClary's employment with the City as long as litigation is pending. Post-employment, City agrees to pay McClary for reasonable consulting fees, travel expenses and other costs, when McClary serves as a witness, advisor or consultant to City regarding pending litigation.

12. General Provisions.

12.1 This writing constitutes the entire agreement between the Parties with respect to the subject matter hereof, and supersedes all prior oral or written representations or written agreements on the subject matter hereof, which may have been entered into between the Parties.

12.2 No modification or revision to this Agreement shall be of any force or effect, unless the same is in writing and executed by the Parties hereto.

12.3 Each Party agrees and acknowledges that no representations, inducements, promises, or agreements, orally or otherwise, have been made by any Party, or anyone Interim on behalf of any Party, which are not embodied herein and that any agreement, statement, or promise not contained in this Agreement shall not be valid or binding on either Party.

12.4 If any provision, or portion thereof, contained in this Agreement is held unconstitutional, invalid or unenforceable, the remainder of this Agreement, or portion thereof, shall be deemed severable, shall not be affected and shall remain in full force and effect.

12.5 Neither this Agreement, nor any right, privilege or obligation of McClary herein shall be assigned or transferred by him without the prior written consent of the City Council. Any attempt at assignment or transfer in violation of this provision shall, at the option of the City Council, be null and void and may be considered a material breach of this Agreement.

12.6 This Agreement shall be governed by and construed in accordance with the law of the State of California. Venue shall be in Los Angeles County.

12.7 This Agreement shall be construed as a whole, according to its fair meaning, and not in favor or against any Party. By way of example and not in limitation, this Agreement shall not be construed in favor of the Party receiving a benefit or against the Party responsible for any particular language in this Agreement.

12.8 McClary acknowledges that he has had an opportunity to consult legal counsel in regard to this Agreement, that he has read and understands this Agreement, that he is fully aware of its legal effect, and that he has entered into it freely and voluntarily and based on his own judgment and not on any representations or promises other than those contained in this Agreement.

12.9 In any dispute arising out of this Agreement, the prevailing party shall recover its reasonable attorneys' fees and costs.

IN WITNESS WHEREOF, the Parties have executed this Interim City Manager Employment Agreement on the first day of March, 2022.

INTERIM CITY MANAGER

Steven L. McClary, Interim City Manager

CITY OF MALIBU

Paul Grisanti, Mayor

ATTEST:

Kelsey Pettijohn, City Clerk

APPROVED AS TO FORM:

THIS DOCUMENT HAS BEEN REVIEWED
BY THE CITY ATTORNEY'S OFFICE

John C. Cotti, Interim City Attorney