

1 **AGREEMENT**

2 **35337**

3 THIS AGREEMENT is made and entered this 18th day of September,
4 2019, pursuant to City Council authorization on September 17, 2019 by and between the
5 CITY OF LONG BEACH, a municipal corporation ("City"), and THOMAS B. MODICA
6 ("Acting City Manager").

7 WHEREAS, City Manager Patrick West has announced his retirement
8 effective September 20, 2019; and

9 WHEREAS, City Charter Section 303 provides, "whenever a vacancy occurs
10 in the office of the City Manager, the City Council shall proceed to appoint a City Manager.
11 Until a City Manager is appointed and has assumed the duties of the office, the Assistant
12 City Manager shall be designated as the Acting City Manager ..."

13 WHEREAS, pursuant to the City Charter, it is the desire of the Council to
14 employ Assistant City Manager, Thomas B. Modica as Acting City Manager, commencing
15 on September 20, 2019, while the Council conducts a national search for a new City
16 Manager; and

17 WHEREAS, the Council and the Acting City Manager desire to incorporate
18 certain conditions of employment, working conditions and benefits of the Acting City
19 Manager into a written agreement;

20 NOW, THEREFORE, in consideration of the mutual covenants herein
21 contained, the parties agree as follows:

- 22 1. Duties. Pursuant to City Charter Section 303, the City hereby agrees
23 to appoint and employ Thomas B. Modica as Acting City Manager of the City of Long
24 Beach, California to perform the functions and duties specified in Section 302 of the City
25 Charter of the City and such other legally permissible and proper duties and functions as
26 the Council shall from time to time assign. Thomas B. Modica shall assume the office of
27 Acting City Manager and begin performance of such duties on September 20, 2019. The
28 parties mutually agree that by accepting the position of Acting City Manager, Thomas B.

OFFICE OF THE CITY ATTORNEY
CHARLES PARKIN, City Attorney
411 West Ocean Boulevard, 9th Floor
Long Beach, CA 90802-4664

1 Modica is not and will not be precluded from applying for the permanent City Manager
2 position.

3 2. Term.

4 A. Council and Acting City Manager acknowledge that Section
5 303 of the City Charter of the City provides that the Assistant City Manager shall be
6 employed in the position of Acting City Manager until a new City Manager has been
7 appointed and has assumed the duties of that office.

8 B. In the event the Acting City Manager is not selected as the new
9 City Manager, the Acting City Manager shall revert to his former position of Assistant City
10 Manager. Acting City Manager recognizes and agrees the Assistant City Manager serves
11 at the pleasure of the City Manager. If the Acting City Manager reverts to the position of
12 Assistant City Manager and is terminated by the new City Manager during the first six
13 months then this termination of the Assistant City Manager shall be subject to the
14 provisions set forth in Subsections A and B of Section 3 of this Agreement at the then
15 current compensation of the Assistant City Manager.

16 C. Nothing in this Agreement shall prevent, limit or otherwise
17 interfere with the right of the Council by a majority vote of all members to terminate the
18 services of the Acting City Manager at any time, without notice, subject only to the
19 provisions set forth in Subsections A and B of Section 3 of this Agreement.

20 D. Nothing in this Agreement shall prevent, limit or otherwise
21 interfere with the right of the Acting City Manager to resign at any time from his position
22 with City, subject only to Subsection C of Section 3 of this Agreement.

23 3. Termination and Severance Pay.

24 A. If the Acting City Manager is involuntarily terminated by action
25 of the Council during Acting City Manager's employment hereunder and if the Acting City
26 Manager is willing and able to perform his duties under this Agreement, then City shall pay
27 to Acting City Manager a lump sum cash payment equal to three (3) months' aggregate
28 salary and the cash equivalent of the Acting City Manager's fringe benefits for said three

1 (3) month period. Further, the Acting City Manager shall be paid for any accrued sick
2 leave, vacation, holidays, compensatory time and other accrued but unpaid or unused
3 benefits provided. The Acting City Manager may at his option accept the “lump sum”
4 payment or remain on the City payroll for a three month equivalent period of time. This
5 period of time shall be calculated by the Department of Human Resources so that the
6 value is equivalent to the three month lump sum pay out described above, however, if the
7 Acting City Manager is terminated because of his conviction of a felony or any offense
8 involving a violation of his official duties, or for any unlawful act involving personal gain to
9 him, or because of his legal disqualification from office, then City shall have no obligation
10 to pay the three month lump sum or equivalent designated in this paragraph.

11 B. If the Council at any time, without the consent of the Acting
12 City Manager, reduces the salary or other financial benefits of the Acting City Manager in
13 a greater percentage than an applicable across-the-board reduction for all employees of
14 City, or if City refuses, following notice, to comply with any other provision benefitting the
15 Acting City Manager herein, then the Acting City Manager may, at his option and provided
16 that he gives notice to the Council within thirty (30) days after the effective date of such
17 reduction, be deemed to be “terminated” at the date of such reduction or such refusal to
18 comply within the meaning and context of the severance pay provisions of this Agreement.

19 C. If the duties, responsibilities or authority of the office of the
20 Acting City Manager are reduced by an amendment of Section 302 of the City Charter,
21 Acting City Manager may, at his option and provided that he gives notice to the Council
22 within thirty (30) days after the effective date of such reduction, be deemed to be
23 “terminated” within the meaning and context of the severance pay provisions of this
24 Agreement.

25 D. If the Acting City Manager elects voluntarily to resign his
26 position with City, the Acting City Manager shall give to the Council a minimum of forty-five
27 (45) days’ notice; and he shall not be entitled to severance pay.

28 4. Disability. If the Acting City Manager is permanently disabled or is

1 otherwise unable to perform his duties because of sickness, accident, injury, mental
2 incapacity or health for a period of four (4) consecutive weeks beyond any accrued sick
3 leave, or for twenty (20) working days over a thirty (30) working day period beyond any
4 accrued sick leave, Council shall have the option to terminate this Agreement, subject to
5 the severance pay provisions of subsection A of Section 3 of this Agreement by giving to
6 the Acting City Manager notice of such termination. However, the Acting City Manager
7 shall be paid for any accrued sick leave, vacation, holidays, compensatory time and other
8 accrued but unpaid or unused benefits.

9 5. Compensation. City shall pay to Acting City Manager for his services
10 performed hereunder a base salary of \$276,815.68 for a twelve (12)-month period, at the
11 hourly rate of \$132.629 per hour. Subsequent salary adjustments shall be determined
12 from time to time by Council and established by Resolution.

13 6. Performance and Salary Evaluation. The Council shall review and
14 evaluate the performance and salary of the Acting City Manager at least annually. Said
15 review and evaluation shall be in accordance with specific criteria, goals and objectives
16 developed jointly by the Council and the Acting City Manager. Criteria, goals and
17 objectives may be added or deleted as the Council may from time to time determine, in
18 consultation with the Acting City Manager. Such criteria, goals and objectives shall be
19 generally attainable within the applicable time limitations, annual operating and capital
20 budgets and appropriations. The Council shall provide an adequate opportunity for the
21 Acting City Manager to discuss his evaluation with the Council.

22 7. Fringe Benefits; Other Terms and Conditions of Employment. In
23 addition to the benefits specifically enumerated herein for the Acting City Manager, all of
24 the provisions of the City Charter, as well as City's Personnel Ordinance, Salary
25 Resolution and other rules and regulations of the City relating to vacation and sick leave,
26 retirement and pension system contributions, holidays, health and life insurance, physical
27 examinations, and other fringe benefits and working conditions as they now exist or
28 hereafter may be amended, shall also apply to the Acting City Manager as they would to

1 the other management employees of City.

2 8. Executive Leave. The Acting City Manager shall be entitled to fifteen
3 (15) days of executive leave (as such term is defined in the City's Personnel Ordinance)
4 each calendar year. In the event that the Acting City Manager foregoes the taking of such
5 executive leave (or portion thereof), Acting City Manager shall be paid a sum computed by
6 multiplying his hourly rate of compensation by the number of executive leave hours which
7 the Acting City Manager shall forego.

8 9. Mileage Allowance. The City shall give to the Acting City Manager a
9 monthly mileage allowance in the same manner as provided for other department heads in
10 the City's Salary Resolution.

11 10. Indemnification. Subject to the provisions of this Agreement, City
12 shall defend, save harmless and indemnify Acting City Manager against any claim for
13 negligent tort or omissions, professional liability claim or demand, or other legal action,
14 arising out of an alleged negligent act or omission occurring in the performance of his
15 duties as Acting City Manager. Said indemnification shall extend beyond termination of
16 employment to provide full and complete protection to Acting City Manager for any acts
17 undertaken or committed in his capacity as Acting City Manager, regardless of whether
18 the notice of filing of a lawsuit for such tort, claim, demand, or other legal action occurs
19 during or following employment as the Acting City Manager.

20 11. City shall pay for or provide any fidelity or other bonds required of the
21 Acting City Manager under any law, rules or regulation.

22 10. Notices. Notices hereunder shall be in writing and personally
23 delivered or deposited in the U.S. Postal Service, first class, postage prepaid, addressed
24 as follows:

25 City: Offices of the Mayor and City Council
26 Eleventh Floor
27 411 West Ocean Boulevard
28 Long Beach, California 90802

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Attorney: Office of the City Attorney
Ninth Floor
411 West Ocean Boulevard
Long Beach, California 90802

Acting City Manager: Thomas B. Modica
Acting City Manager
Tenth Floor
411 West Ocean Boulevard
Long Beach, California 90802

Notice shall be deemed given as of the date of personal delivery or as of the date of deposit in the mail.

11. General Provisions.

A. This Agreement constitutes the entire understanding between the parties and supersedes all other agreements, oral or written, with respect to the subject matter herein.

B. This Agreement shall not be amended except in a written amendment which expressly refers to this Agreement, is signed by the parties and authorized by a vote of the Council.

C. This Agreement shall be governed by and construed in accordance with the laws of the State of California. Both parties shall comply with all laws, ordinances, rules, regulations and the City Charter with respect to the subject matter of this Agreement.

D. If there is any legal proceeding between the parties to enforce or interpret this Agreement or to protect or establish any rights or remedies hereunder, the prevailing party shall be entitled to its costs and expenses, including reasonable attorney's fees and court costs (including appeals).

E. This Agreement shall be binding on and inure to the benefit of the heirs and legal representatives of the Acting City Manager.

F. Severability. The parties have attempted to create an Agreement that is lawful an enforceable in all respects. Should any provision of this

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1 Agreement, or any portion thereof, be declared or be determined to be illegal, invalid, void
2 or otherwise unenforceable, such invalidity shall not affect the enforceability of the
3 remaining terms hereof.

4 G. This Agreement is not intended or designed to or entered for
5 the purpose of creating any benefit or right for any person or entity of any kind that is not a
6 party to this Agreement.

7 H. The failure or delay of the City or the Council to exercise any
8 right or remedy hereunder shall not operate as a waiver of that or any other right or
9 remedy. No waiver of any breach shall be effective unless in writing and signed by the
10 party waiving the breach; the waiver of any breach shall not constitute a waiver of any
11 other or subsequent breach. The payment of money by the City shall not operate as a
12 waiver of any provision hereof.

13 IN WITNESS WHEREOF, the parties hereto have caused this document to
14 be executed, in duplicate, with all of the formalities required by law.

CITY OF LONG BEACH, a municipal corporation

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17 Dated: September 19, 2019

By P West
City Manager

"City"

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21 Dated: September 18, 2019

By T B Modica
Thomas B. Modica

"Acting City Manager"

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24 Approved as to form on 9/18, 2019.

25 CHARLES PARKIN, City Attorney

26 By: Charles Parkin
27 Charles Parkin
28 City Attorney