

FIFTH AMENDMENT TO CITY MANAGER EMPLOYMENT AGREEMENT

The City of Dana Point ("City") and Michael Killebrew ("Killebrew") hereby enter this fifth amendment (the "Fifth Amendment") to that certain agreement entitled City Manager Employment Agreement (the "Agreement").

RECITALS

A. City desires to continue to employ Killebrew as the City Manager, as provided by Chapter 2.08 of the Dana Point Municipal Code, and upon the term and conditions set out in the Agreement as amended by this Fifth Amendment for the period which commenced April 4, 2020.

B. This Amendment supersedes a fourth amendment (the "Fourth Amendment") to the Agreement that was effective June 20, 2023.

C. Killebrew desires to serve as City Manager of the City of Dana Point based upon the same terms and conditions.

AGREEMENT

NOW, THEREFORE, the parties agree as follows:

1. TERM

The Effective Date of this Fifth Amendment shall be July 2, 2024. The Anniversary Date shall be July 1, 2025, and July 1 of each subsequent year this Fifth Amendment to the Agreement remains in effect shall be deemed the Anniversary Date. Under this Fifth Amendment the term of employment shall continue until terminated by the City or Killebrew, as provided for in this Agreement.

2. DUTIES

As of the Effective Date of the Agreement, City employed Killebrew, and Killebrew accepted employment, as City Manager of the City. Killebrew shall perform the functions and duties specified for the City Manager of the City in Chapter 2.08 of the Dana Point Municipal Code and other ordinances, resolutions, and policies of the City, and shall perform such other legally permissible and proper duties and functions as the City Council of the City (the "Council") may from time-to-time assign, consistent with the Dana Point Municipal Code and other applicable law. The City and Killebrew hereby expressly agree that the employment relationship created by the Agreement, and this Fifth Amendment is "at will" and that Killebrew serves at the will and pleasure of the City Council.

3. NOTIFICATION REQUIREMENTS REGARDING EXPIRATION OR TERMINATION OF AGREEMENT

(a) Potential Renewal of Agreement. On or before June 1, 2025, and in the event this Fifth Amendment is not earlier terminated, Killebrew shall notify Council of the pending expiration hereof as set forth in Section 1 above, after which a closed session shall be scheduled during which Killebrew and Council shall meet to discuss whether this Fifth Amendment shall be renewed or allowed to expire, and if renewed, such terms to which the parties may mutually agree.

(b) Termination by Killebrew. In the event Killebrew terminates his employment as City Manager, Killebrew shall give City at least forty-five (45) days notice of termination in writing in advance of the date of termination, unless otherwise mutually agreed.

(c) All Terminations. Killebrew agrees that in the event Killebrew's employment is terminated, with or without cause, under no circumstances will Killebrew be entitled to, nor shall he contest the existence or nature of Killebrew's "at will" employment status, nor will Killebrew be entitled to seek or receive the remedy of reinstatement to employment with the City in any administrative or legal forum.

(d) Limitations on Termination. In no event shall Killebrew be terminated by the City within ninety (90) days before or ninety (90) days after any City municipal election, including but not limited to an election for the selection or recall of one or more of the members of the City Council.

4. SEVERANCE AND SEVERANCE PAY AND BENEFITS

(a) Termination Without Cause. In the event that Killebrew is involuntarily terminated by the Council without cause, City agrees to pay Killebrew at the time of such termination: (i) a lump sum cash payment ("Severance Pay") equal to six (6) months ("Severance Period") of the base salary Killebrew is receiving on the date of the Council's action to terminate Killebrew, or as many months as then remain on Killebrew's contract term, whichever is less, less legally required or authorized deductions ("Severance Pay"); and (ii) City shall pay Killebrew's Consolidated Omnibus Budget Reconciliation Act ("COBRA") premiums for COBRA insurance coverage otherwise available to Killebrew, for the Severance Period, or as many months as then remain on Killebrew's contract term, or until Killebrew becomes ineligible for COBRA, whichever is less ("Severance Benefit"). The intent of this provision is to satisfy the requirements of Government Code sections 53260-53264, and this provision shall be interpreted in a manner consistent with those statutes. In exchange for and as a condition to receipt of the Severance Pay and Severance Benefit, Killebrew shall execute a release and waiver, in a form acceptable to the City Attorney, releasing the City from any and all claims associated with Killebrew's termination.

(b) Termination by City For Cause. In the event Killebrew is terminated for cause as defined herein, City shall have no obligation to pay the Severance Pay and Severance Benefit described above in Section 4, subpart (a). In the context of the Agreement, and this Fifth Amendment, "for cause" shall mean that Killebrew has been terminated because of the commission, attempted commission, violation, or conviction of any criminal law committed at any time (except minor traffic infractions), gross negligence or malfeasance, incompetence, insubordination, and/or

the violation of any rules or policies applicable to the general employees of the City. Killebrew has an affirmative duty to report to the Mayor if he is arrested or if he is under investigation for alleged criminal activity.

5. SALARY AND OTHER COMPENSATION

(a) Base Salary. Commencing on or about July 1, 2024, the base salary noted in the Agreement shall be adjusted such that City shall pay Killebrew an annual base salary, exclusive of benefits, in the sum of Two Hundred Eighty-Six Thousand, Seventeen Dollars (\$286,017) per year, payable in installments at the same time and by the same methods as other City employees are regularly paid. On January 1, 2025, Killebrew's annual base salary, exclusive of benefits, shall be adjusted to Two Hundred Ninety-Eight Thousand, Eight Hundred and Eighty-Seven Dollars (\$298,887) per year. On or about Killebrew's Anniversary Date each year, the Council shall conduct a performance evaluation of Killebrew. The Council agrees to review Killebrew's salary and benefits at the time of Killebrew's annual performance evaluation each year this Fifth Amendment remains in effect and may in its sole and absolute discretion grant Killebrew an increase in base salary or other benefits or compensation as it deems appropriate based on merit and performance.

(b) Retirement. Killebrew shall be a member of the City's retirement plan adopted and existing pursuant to its contract with the State of California Public Employees Retirement System ("PERS"). City shall pay the full amount of the required employer's contribution for the benefit of Killebrew, and Killebrew shall pay the full amount of the employee's required contribution consistent with other City employees deemed Classic Members by PERS. In the event that other City employees deemed Classic Members by PERS are required to pay an additional amount of pay toward unfunded pension liability pension costs, then Killebrew shall pay the same amount.

6. BENEFITS

(a) Cafeteria Plan. City shall pay to Killebrew's health, and disability insurance plans as offered in the City's Cafeteria Plan the same amount as is paid for other City employees (currently set at One Thousand Seven Hundred Eighteen Dollars (\$1,718.00) per month.

(b) Deferred Compensation. City shall make payments on behalf of Killebrew, in an amount equal to five percent (5%) of Killebrew's base salary (prorated if adjustments occur) per year, with prorated payments made on a per pay period basis, to MissionSquare Retirement, the City's current deferred compensation provider, as deferred compensation.

(c) Comprehensive Annual Leave. City shall provide Killebrew with annual leave in the amount of 240 hours (i.e., thirty (30) days) per year as Comprehensive Annual Leave (CAL). CAL credits shall be accrued at the rate of 9.23 hours per biweekly pay period. CAL shall be subject to the provisions hereof. In order to encourage Killebrew to use his accrued CAL, it is allowed to accrue up to a maximum of 480 hours (i.e., sixty (60) workdays). Once Killebrew has reached the maximum accrual for CAL, Killebrew will cease to accrue more CAL until the accrued CAL Credits fall below the sixty (60) workday level.

As of the effective date of this Fifth Amendment, Killebrew may by December 15 of each calendar year, make an irrevocable election to buy back CAL which will be earned the following calendar year. Killebrew shall submit his irrevocable election in the same manner required by all other City employees eligible to cash out CAL. The City will buy back CAL up to three times each calendar year, and each buy back is limited to a maximum of eighty (80) CAL hours. The maximum calendar year buy back is two hundred forty (240) CAL hours, and Killebrew must have used a minimum of eighty (80) hours of accrued CAL for time off during the prior calendar year. If Killebrew's employment is terminated, Killebrew shall receive compensation for any accrued but unused CAL.

(d) Life Insurance. City shall provide Killebrew with life insurance coverage at its expense through a term life insurance policy having a death benefit in the amount of \$50,000, to be provided as part of the City's existing group term policy.

(e) Vehicle. Killebrew's duties as the City Manager will require that he have exclusive and unrestricted use of an automobile at all times. As a result of these duties, the City will provide Killebrew with an automobile. Because Killebrew is essentially on 24-hour call and available to respond to any emergency, the automobile will be available for both business and personal use. The automobile will be operated by Killebrew and other authorized City personnel. City agrees to maintain and pay for liability, property damage, and comprehensive insurance and to pay for the purchase, gas, operation, maintenance, repair, or replacement of a City provided automobile. Killebrew agrees to keep the automobile in excellent condition and will make sure that all service is performed per the factory maintenance schedule, with such maintenance costs being covered by City in conformance with existing City practices. As of the Effective Date of this Fifth Amendment, Killebrew is using a City owned vehicle per this Subsection 6(e). At Killebrew's option, he may cease using a City vehicle and instead commence receiving a vehicle allowance from City of \$600.00 per month.

7. PROFESSIONAL DEVELOPMENT, OUTSIDE PROFESSIONAL ACTIVITIES AND GENERAL EXPENSES

(a) Professional Development.

(i) Subject to the Council's discretion to adopt and amend the budget, City agrees to pay for professional dues and subscriptions on behalf of Killebrew which are reasonably necessary, as determined by the Council, for Killebrew's full participation in national, regional, state or local associations and organizations necessary and desirable for Killebrew's continued professional participation, growth and advancement, or for the good of the City. Furthermore, City shall pay for any additional professional dues and subscriptions as may be approved by the Council from time to time.

(ii) Subject to the Council's discretion to adopt and amend the budget, City agrees to pay within the adopted budget the reasonable travel and subsistence expenses of Killebrew for official travel, meetings, and events reasonably necessary to continue the professional development of Killebrew and reasonably necessary to fulfill official and other functions for the City, all as determined to be reasonable and necessary by the Council. Such meetings and events may include, but are not limited to national, regional, state, and local conferences of governmental groups and committees in which Killebrew serves as a member.

(b) Outside Professional Activities. Killebrew agrees to remain in the exclusive employ of the City of Dana Point while employed by the City of Dana Point. This section shall not prohibit occasional teaching, writing, or speaking for compensation, provided that Killebrew gives advance written notification to the Council of such teaching, writing, or speaking engagements. Any teaching, writing, or speaking engaged in by Killebrew during the term of this Fifth Amendment shall not interfere with Killebrew's performance of Killebrew's duties and obligations.

(c) General Expenses. The City shall reimburse Killebrew for all reasonable City-related business expenses incurred by him in accordance with submittal, processing, and payment policies of the City. City shall bear full cost of any fidelity or other bonds required of Killebrew under any law or ordinance.

8. PERFORMANCE EVALUATION

The Council and Killebrew may annually define such goals and objectives for the City which they mutually determine necessary for the proper operation of the City in the attainment of the Council's policy objectives, and the Council and Killebrew may further establish a priority among those various goals and objectives to be reduced to writing. The process of considering the establishment and priority of goals and objectives of the City shall be conducted and completed generally in June of each year ("Goals and Objectives") and may occur in connection with Killebrew's annual performance review.

(a) The Council, following informal and nonbinding consultation with Killebrew, shall periodically assess the Goals and Objectives and how they relate to the performance of Killebrew.

(b) The Council shall review and evaluate the performance of Killebrew at least once annually.

(c) Notwithstanding any term or provision of the Agreement or this Fifth Amendment to the contrary, Killebrew shall serve at the will and pleasure of the Council, and the Council shall be entitled to terminate the employment of Killebrew without cause.

(d) In connection with each annual performance evaluation, the City Council may grant Killebrew a performance bonus in an amount of up to 5% of his base salary. Whether or not to grant a bonus and the amount of any such bonus shall be determined in the sole discretion of the City Council. It is the understanding and intent of the City and Killebrew that the performance bonuses are not reportable compensation to PERS and are not to be included in the calculation of Killebrew's PERS retirement allowance.

9. CONFLICT OF INTEREST PROHIBITION

Killebrew shall not engage in any business or transaction or have a financial or other personal interest or association, direct or indirect, that is in conflict with the proper discharge of his official duties or that would tend to impair the independence of his judgment or action in the performance of his official duties. Killebrew shall also be subject to the conflict-of-interest provisions of the Government Code of the State of California, the City's Municipal Code, and any other conflict of interest regulations applicable to Killebrew's employment with the City.

10. PROVISIONS OF GOVERNMENT CODE SECTION 53243.4

(a) In the event that the City provides paid leave to Killebrew pending an investigation of a crime involving abuse of his office or position covered by Government Code section 53243.4 and should that investigation lead to either a criminal conviction or a civil or administrative penalty by the FPPC or any similarly authorized agency, Killebrew shall fully reimburse the City for any salary provided for that purpose.

(b) In the event that the City provides funds for the legal criminal defense of Killebrew pending an investigation of a crime involving abuse of his office or position covered by Government Code section 53243.4 and should that investigation lead to either a criminal conviction or a civil or administrative penalty by the FPPC or any similarly authorized agency, Killebrew shall fully reimburse the City for any funds provided for that purpose.

(c) In the event that the City provides Killebrew with severance, or any other type of cash settlement related to the termination of Killebrew, and Killebrew subsequently is convicted of a crime, or subjected to civil or administrative penalties, resulting from abuse of his office or position covered by Government Code section 53243.4, Killebrew shall fully reimburse the City for any such severance or cash settlement.

11. ENTIRE AGREEMENT

This Fifth Amendment contains the entire agreement between the parties concerning the subject matter set forth herein and no promise, representation, warranty, or covenant not included in this Fifth Amendment has been or is relied upon by any party hereto concerning the offer and acceptance of employment described herein.

12. NO CONTINUING WAIVER

No waiver of any term or condition of this Third Amendment by either party shall be deemed a continuing waiver of such term or condition.

13. INTEGRATION AND AMENDMENT

This Fifth Amendment represents the entire understanding of the City and Killebrew as to those matters contained herein, and no prior oral or written understanding shall be of any force or effect with respect to those matters covered by this Fifth Amendment. Except as specifically authorized by this Fifth Amendment, this Fifth Amendment may not be modified, altered, or amended, except in writing approved by the City Council and Killebrew, and signed by the Mayor of the City and Killebrew.

14. PARTIAL INVALIDITY

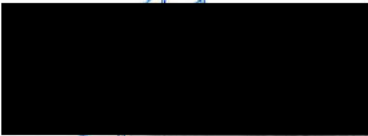
The invalidity or unenforceability of any provision of this Fifth Amendment will not affect the validity or enforceability of the other provisions hereof.

15. GOVERNING LAW

This Fifth Amendment will be governed by and construed in accordance with the laws of the State of California.

IN WITNESS WHEREOF, the parties hereto have executed this Fifth Agreement as of the date first set forth hereinabove.


CITY

By: 
Jamey M. Federico, Mayor

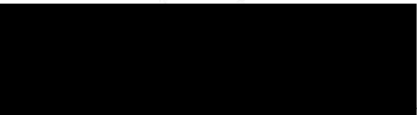
KILLEBREW

By: 
Michael A. Killebrew, City Manager

ATTEST:


Shayna Sharke, City Clerk

APPROVED AS TO FORM:


Patrick Munoz, City Attorney