

## **Second Amended Employment Agreement**

This Second Amended Employment Agreement (the "Agreement") is made and entered into this 26th day of January, 2021 (the "Effective Date"), by and between the Town of Erie, a Colorado municipal corporation with an address of 645 Holbrook Street, P.O. Box 750, Erie, Colorado 80516 (the "Town"), and Malcolm Fleming, an individual with an address of 1115 West Enclave Circle, Louisville, Colorado 80027 ("Fleming") (each a "Party" and collectively, the "Parties").

Whereas, on January 8, 2019, the Parties entered into an Employment Agreement to outline the terms under which Fleming would accept employment as the Town Administrator (the "Employment Agreement");

Whereas, on February 25, 2020 the Parties entered into the First Amended Employment Agreement to provide for an increase in the base compensation to Fleming; and

Whereas, the Parties wish to amend the Employment Agreement yet again to provide for an increase in the base compensation to Fleming.

**Now therefore, for the consideration hereinafter set forth, the receipt and sufficiency of which are hereby acknowledged, the Parties agree as follows:**

1. Employment. Pursuant to the terms of this Agreement, the Town agrees to employ Fleming as Town Administrator, and Fleming accepts such employment. As the Town Administrator, Fleming shall be responsible for the organization and efficient administration of all administrative departments of the Town, in accordance with applicable law and the job description attached hereto and incorporated herein by this reference. Though Fleming is an employee of the Town, Fleming shall not be subject to the Town's personnel manual, except for the determination and payment of benefits as set forth in Section 4. During the term of this Agreement, Fleming agrees to remain in the exclusive employ of the Town and neither to accept nor to become employed by any other employer. The term "employed" shall not be construed to include occasional teaching, writing, or consulting, as approved by the Board of Trustees, performed on Fleming's time off with prior written approval of the Board of Trustees.

2. Term. This Agreement shall begin on the Effective Date and continue for an indefinite term; provided that Fleming's first day of employment with the Town was January 9, 2019; and further provided that nothing in this Agreement shall prevent, limit or otherwise interfere with the right of the Town's Board of Trustees to terminate the services of Fleming at any time for any reason, and nothing in this Agreement shall prevent, limit or otherwise interfere with the right of Fleming to resign at any time, for any reason. Nothing contained in this Agreement shall be deemed or construed as creating any property or other right to a continuation of Fleming's employment. For

purposes of this Agreement, the anniversary date of Fleming's employment with the Town shall be January 9th of each year (the "Anniversary Date").

3. Compensation. For his employment as Town Administrator, Fleming shall be compensated at an annual base salary of \$186,701, payable in installments at the same time as other management employees of the Town are paid. This salary shall commence retroactively as of January 9, 2021. In addition, the Board of Trustees may adjust the base salary and benefits as the Board of Trustees determines appropriate, in the Board's sole discretion. Fleming shall be a full-time employee and shall be considered an exempt employee for purposes of the Fair Labor Standards Act and shall not be entitled to overtime.

4. Benefits. In addition to the Compensation set forth in Section 3, Fleming shall receive the following benefits during his employment as Town Administrator:

a. *Insurance.* Health, life, vision and dental insurance shall be paid by the Town for Fleming and his dependents in the same manner as for all other full-time employees of the Town.

b. *Disability.* The Town shall pay for short-term and long-term disability benefits for Fleming in the same manner as for all other full-time employees of the Town.

c. *Holidays, Vacation and Sick Leave.* Fleming shall receive paid holidays, vacation leave and sick leave earned in the same manner as for an employee with at least 9 years of service to the Town.

d. *Retirement.* The Town agrees to pay, in installments at the same time as other management employees of the Town are paid: (i) an amount equal to 10% of Fleming's base salary into Fleming's International City Management Association Retirement Corporation ("ICMA-RC") 457 Plan; and (ii) an amount equal to Fleming's personal contribution into the Town of Erie Savings Plan, not to exceed 5% of Fleming's base salary. All of the Town's contributions shall vest immediately on Fleming's first day of employment. The contribution into the Town of Erie Savings Plan for 2021 shall be retroactive to January 9, 2021.

e. *Other Benefits.* Fleming shall receive medical leave, workers' compensation and other benefits paid by the Town in the same manner as for all other full-time employees of the Town.

f. *Mileage.* In exchange for Fleming's use of his personal vehicle for travel for Town business, the Town shall reimburse Fleming for mileage, at the current federal rate. Mileage for commuting to and from work shall not be eligible for reimbursement.

5. Severance.

a. *Amount and Payment.* If Fleming is terminated without cause, he shall receive an amount equivalent to 12 months of Fleming's then-current annual salary plus the benefits set forth in Section 4 (the "Severance Payment"). The Severance Payment shall be paid once as a lump sum amount, provided that the retirement contributions set forth in Section 4.d shall be paid pre-tax into Fleming's ICMA-RC 457 Plan and Town of Erie Savings Plan, subject to all required withholding. The Severance Payment shall not be considered an extension of employment. If the amount of the ICMA-RC 457 contribution included in the Severance Payment exceeds the then-current limit under the IRS Code for a contribution to a deferred compensation plan, the remainder shall be paid to Fleming in a lump sum as taxable compensation.

b. *Termination for Cause.* If the Town Board of Trustees terminates Fleming's employment for cause, Fleming shall not be entitled to the Severance Payment. For purposes of this Agreement, "for cause" means any of the following: (i) if Fleming is convicted of any criminal act involving personal gain to Fleming; (ii) if Fleming is convicted of a felony or any crime of moral turpitude; and (iii) if Fleming fails to perform any material term of this Agreement or his job description, or fails to meet his performance goals, and such failure continues for 30 days after written notice from the Town Board of Trustees specifying the failure and expected corrective action. Termination of Fleming's employment by the Town Board of Trustees for any reason other than for cause as defined above, including without limitation non-appropriation of funds pursuant to Section 9.j, shall be deemed termination without cause and shall entitle Fleming to receive the Severance Payment.

c. *Resignation.* If Fleming resigns from his position as Town Administrator, Fleming shall not be entitled to the Severance Payment.

6. Performance Evaluations. The Town Board of Trustees shall review and evaluate Fleming's performance at least twice every 12 months. Within 90 days of the Anniversary Date each year, Fleming and the Board of Trustees shall work together to develop concrete, reasonable performance goals for the next year of employment, with concrete, reasonable timelines. Fleming's achievement of those goals within those timelines shall be used to determine future salary modifications.

7. Professional Development. Subject to such amounts as may be budgeted, the Town, in its sole discretion, shall pay for expenses related to Fleming's continuing professional development, which includes attendance at various national or state conferences, seminars, and continuing education programs. At a minimum, the Town shall pay for Fleming's membership in the International City/County Management Association ("ICMA"), the Colorado City & County Management Association ("CCCMA"), the Colorado Municipal League ("CML"), and the Urban Land Institute ("ULI"), and shall pay for Fleming's attendance at the ICMA Annual Conference, the CML Annual Conference and the CCCMA Annual Conference. The Town shall reimburse Fleming's expenses for

other memberships, registration, travel, meals or lodging in association with business-related conferences, education or other meetings, according to approved accounts in each annual budget.

8. Indemnification. The Town shall defend, hold harmless and indemnify Fleming against claims and causes of action that may arise in the performance of Fleming's duties for the Town in accordance with the Colorado Governmental Immunity Act, C.R.S. § 24-10-101, *et seq.*, as amended. Fleming shall not, however, be indemnified for any act or omission that is willful and wanton as those terms are defined in the Colorado Governmental Immunity Act.

9. Miscellaneous.

a. *Governing Law and Venue.* This Agreement shall be governed by the laws of the State of Colorado, and any legal action concerning the provisions hereof shall be brought in Boulder County, Colorado.

b. *No Waiver.* Delays in enforcement or the waiver of any one or more defaults or breaches of this Agreement by the Town shall not constitute a waiver of any of the other terms or obligation of this Agreement.

c. *Integration.* This Agreement constitutes the entire agreement between the Parties, superseding all prior oral or written communications.

d. *Third Parties.* There are no intended third-party beneficiaries to this Agreement.

e. *Notice.* Any notice under this Agreement shall be in writing and shall be deemed sufficient when directly presented or sent pre-paid, first class United States Mail to the party at the address set forth on the first page of this Agreement.

f. *Severability.* If any provision of this Agreement is found by a court of competent jurisdiction to be unlawful or unenforceable for any reason, the remaining provisions hereof shall remain in full force and effect.

g. *Modification.* This Agreement may only be modified upon written agreement of the Parties.

h. *Assignment.* Neither this Agreement nor any of the rights or obligations of the Parties shall be assigned by either Party without the written consent of the other; provided that Fleming's heirs shall be entitled to enforce this Agreement should Fleming become legally incapacitated or deceased, as applicable and provided by law.

i. *Governmental Immunity.* The Town and its officers, attorneys and employees are relying on, and do not waive or intend to waive by any provision of this Agreement, the monetary limitations or any other rights, immunities or protections

provided by the Colorado Governmental Immunity Act, C.R.S. § 24-10-101, *et seq.*, as amended (the "Act"), or otherwise available to the Town and its officers, attorneys or employees. In addition, while engaged in the performance of services under this Agreement and within the scope of his authority, Fleming shall be entitled to assert immunity under the Act.

j. *Subject to Annual Appropriation.* Consistent with Article X, § 20 of the Colorado Constitution, any financial obligation of the Town not performed during the current fiscal year is subject to annual appropriation, shall extend only to monies currently appropriated, and shall not constitute a mandatory charge, requirement, debt or liability beyond the current fiscal year.

In Witness Whereof, the Parties have executed this Agreement as of the Effective Date.

**Town of Erie, Colorado**

\_\_\_\_\_  
Jennifer Carroll, Mayor

**Attest:**

\_\_\_\_\_  
Heidi Leatherwood, Town Clerk

**Employee**

\_\_\_\_\_  
Malcolm Fleming

## JOB DESCRIPTION

See Erie Municipal Code § 1-6A-2, as amended.