

RESOLUTION NO. 14-362

A RESOLUTION OF THE CITY COMMISSION OF THE CITY OF KEY WEST, FLORIDA, APPROVING THE ATTACHED SECOND AMENDMENT TO EMPLOYMENT AGREEMENT BETWEEN THE CITY OF KEY WEST AND SHAWN D. SMITH FOR THE POSITION OF CITY ATTORNEY; PROVIDING FOR AN EFFECTIVE DATE

BE IT RESOLVED BY THE CITY COMMISSION OF THE CITY OF KEY WEST, FLORIDA, AS FOLLOWS:

Section 1: That the attached Second Amendment to Employment Agreement between the City of Key West and Shawn D. Smith is hereby approved.

Section 2: That this Resolution shall go into effect immediately upon its passage and adoption and authentication by the signature of the Presiding Officer and the Clerk of the Commission.

Passed and adopted by the City Commission at a meeting held this 2nd day of December, 2014.

Authenticated by the Presiding Officer and Clerk of the  
Commission on 3rd day of December, 2014.

Filed with the Clerk on December 3, 2014.

|                            |            |
|----------------------------|------------|
| Mayor Craig Cates          | <u>Yes</u> |
| Vice Mayor Mark Rossi      | <u>Yes</u> |
| Commissioner Teri Johnston | <u>Yes</u> |
| Commissioner Clayton Lopez | <u>Yes</u> |
| Commissioner Billy Wardlow | <u>Yes</u> |
| Commissioner Jimmy Weekley | <u>Yes</u> |
| Commissioner Tony Yaniz    | <u>Yes</u> |

  
\_\_\_\_\_  
CRAIG CATES, MAYOR

ATTEST:

  
\_\_\_\_\_  
CHERYL SMITH, CITY CLERK



PHONE: (305) 809-3770  
FAX: (305) 809-3771

## Office of the City Attorney

POST OFFICE BOX 1408  
KEY WEST, FL 33041-1408

### Memorandum

TO: Mayor & Commissioners  
FROM: Shawn D. Smith, City Attorney  
RE: Employment Agreement extension  
DATE: 25 November 2014

Mayor and Commissioners

As I indicated in response to Commissioner Wardlow's question at last Tuesday's meeting, I intend to place my employment agreement on the December 2, 2014 meeting for consideration. I've attached my current contract (with 1<sup>st</sup> amendment), which expires on December 22, 2014, for your review along with a proposed second amendment. I appreciate the opportunity to serve and the challenges that come with the position.

I propose to do the same thing I did with the first amendment four years ago and simply change the dates keeping the four year term. I've had Larry review the proposed 2<sup>nd</sup> amendment and the agreement is the same with three exceptions. Initially, I need to reduce the potential severance down from the six months presently in my contract to 20 weeks based upon statutory changes. Second, while I presently have no plans to do so, I'd like a provision that would allow me to teach or do mediations. I would like this because when I retire someday I would like to teach and the mediations would be helpful if I ever decide to run for a judicial position. Of course these would have to be undertakings that in no way conflict with my City obligations or hours of work. I've included a provision whereby any Commission member can object to an undertaking. In reality, I would never bring anything before you that I did not believe was appropriate or free from controversy.

Finally, I would like to have my annual leave rate increased two years early. Since I started with the City, I have accrued vacation leave in the same manner as other employees. I am scheduled to receive fifteen days a year until I reach ten years with the City, at which time the number will increase to twenty. I would like a provision that allows me to accrue the extra five days per year upon conclusion of my eighth year rather than after two more years. I utilized the language provided in the prior manager's contract. As each of you know, while I do take a yearly vacation with my family over the school summer break, I am always available when needed and often do work while not in the office.

Thanks for your time. Please let me know your thoughts and if you would like to discuss in greater detail.

A handwritten signature in dark ink, appearing to read "Shawn D. Smith", is written over a horizontal line.

Shawn D. Smith

## **SECOND AMENDMENT TO EMPLOYMENT AGREEMENT**

This Second Amendment to Employment Agreement is entered into this 2nd day of December, 2014, by and between the City of Key West, Florida, a municipal corporation, (hereinafter "CITY") and Shawn D. Smith, (hereinafter "SMITH").

### **WITNESSETH**

WHEREAS, CITY and SMITH entered into an Employment Agreement on the 8<sup>th</sup> day of November, 2006, which was subsequently amended on July 6, 2010 (hereinafter the "Agreement"); and

WHEREAS, CITY and SMITH desire to again amend their Agreement in order to modify the terms and conditions.

NOW, THEREFORE, in mutual consideration of the benefits conferred upon the parties by the terms of this Amendment, CITY and SMITH agree as follows:

**Section 1:** That the first sentence of paragraph 5(A) of the Agreement is amended to provide as follows: The normal term of this agreement will be for a period of one hundred forty-four (144) calendar months, commencing at 9:00 A.M. on the 22<sup>nd</sup> day of December, 2006, and ending at 5:00 P.M. on the 21<sup>st</sup> day of December, 2018.

**Section 2:** That the following language be added at the conclusion of Paragraph 4 "Notwithstanding the foregoing, Attorney shall be permitted to teach or conduct mediations so long as it does not interfere with the Duties and Responsibilities specified herein. Prior to any undertaking, Attorney shall provide each Commission member with notice of the specifics of the proposal. If any Commission member objects, Attorney shall not undertake the obligation unless approved by subsequent majority vote of the City Commission."

**Section 3:** That paragraph 5(E) be modified to reduce potential severance payments from the current six calendar months to the twenty weeks specified by Florida Statute 215.425(4)(A) as follows"...~~six (6) calendar months~~ twenty (20) calendar weeks...."

**Section 4:** That the following language be added to the conclusion of Paragraph 3: "Annual leave shall accrue at the rate of 20 days per year, which shall be advanced yearly on December 22<sup>nd</sup>."

**Section 5:** Except as modified herein, the Agreement as amended shall remain in full force and effect.

IN WITNESS WHEREOF, the parties have made this Second Amendment to Agreement on the date first written above.

CITY OF KEY WEST, FLORIDA



CHERYL SMITH, CITY CLERK

By: \_\_\_\_\_

CRAIG CATES, MAYOR

SHAWN D. SMITH

## **FIRST AMENDMENT TO EMPLOYMENT AGREEMENT**

This First Amendment to Employment Agreement is entered into this 6th day of July, 2010, by and between the City of Key West, Florida, a municipal corporation, (hereinafter "CITY") and Shawn D. Smith, (hereinafter "SMITH").

### **WITNESSETH**

WHEREAS, CITY and SMITH entered into an Employment Agreement on the 8<sup>th</sup> day of November, 2006, (hereinafter the "Agreement"); and

WHEREAS, the CITY and SMITH now desire to amend their Agreement in order to modify the terms and conditions.

NOW, THEREFORE, in mutual consideration of the benefits conferred upon the parties by the terms of this Amendment, CITY and SMITH agree as follows:

**Section 1:** That the first sentence of paragraph 5(A) of the Agreement is amended to provide as follows: The normal term of this agreement will be for a period of ninety-six (96) calendar months, commencing at 9:00 A.M. on the 22<sup>nd</sup> day of December, 2006, and ending at 5:00 P.M. on the 21<sup>st</sup> day of December, 2014.

**Section 2:** That the following language be added at the conclusion of Paragraph 5(F) "Unless otherwise agreed, Attorney shall provide 120 days written notice prior to any such resignation."

**Section 3:** Except as modified herein, the Agreement as amended shall remain in full force and effect.

IN WITNESS WHEREOF, the parties have made this First Amendment to Agreement on the date first written above.

CITY OF KEY WEST, FLORIDA

By: \_\_\_\_\_

CRAIG CATES, MAYOR

ATTEST: \_\_\_\_\_

CHERYL SMITH, CITY CLERK

SHAWN D. SMITH

## EMPLOYMENT AGREEMENT

**THIS AGREEMENT** is entered into on November 8, 2006 by and between the City of Key West, Florida, a local governmental agency operating under the laws of the State of Florida and the Charter of the City of Key West, Florida, ("City"), whose main business address is 525 Angela Street, Key West, Florida 33040, and SHAWN D. SMITH, an attorney licensed to practice law in the State of Florida, ("Attorney"), whose residence address is 13 Blue Water Drive, Key West, Florida 33040; and City and Attorney hereby agree as follows:

1. **Recitals.** The following recitals are an integral part of this Agreement and have been accepted as true by the parties and are part of the inducement for each party to execute this Agreement.

A. City desires to employ an attorney licensed to practice law in the State of Florida to be the attorney for the City of Key West (the "City Attorney").

B. City has determined that it is in the best interests of the citizens of the City of Key West that the City Attorney will be a full-time employee of the City.

C. After an extensive selection process, the City voted to hire Shawn D. Smith as City Attorney at a duly noticed public meeting on October 24, 2006.

2. **Employment.** Attorney is hereby employed by City as City Attorney.

3. **Full Time Employment and Customary Benefits.** City and Attorney agree that the position of City Attorney will be a full-time position. The parties recognize the hours worked by Attorney will necessarily require time outside typical office hours. Attorney will dedicate an average of at least forty (40) hours per week to the duties specified herein. Attorney shall receive all benefits typically accruing to employees of the City, including but not limited to the entitlement to annual and sick leave, parking privileges, health, dental, vision and prescription drug coverage.

4. **Sole Client.** In partial consideration for the agreements to be performed by the City for the benefit of Attorney as contained elsewhere in this Agreement, Attorney agrees that he will not provide legal services, whether for a fee or pro bono, for any other person or entity without the express written approval of the City. It is the general intent of this section that Attorney will have no other private or public clients. Notwithstanding the foregoing, City recognizes that the Attorney currently has a large private practice that will have to be wound down to comply with the terms of this agreement. Accordingly, City and Attorney agree that Attorney shall immediately upon the execution of this agreement, with due diligence and best efforts, endeavor to close that private practice. Attorney will not engage any new clients upon execution of this agreement. Unless otherwise agreed as provided herein, Attorney's private practice will be closed within six months of the execution of this agreement. City further recognizes that during the term of this agreement, Attorney may receive compensation for services performed prior to the execution of this agreement and during the wind down period specified above.

5. **Term of Agreement; Termination; Cancellation.**

A. **Normal Term.** The normal term of this Agreement will be for a period of forty-eight (48) calendar months, commencing at 9:00 A.M. on the 22<sup>nd</sup> day of December 2006 and ending at 5:00 P.M. on the 21<sup>st</sup> day of December 2010. However, City and Attorney agree that there will also be a "transition term" under this agreement, as specified in subparagraph B below, which is not included as part of the "normal term" of this agreement.

B. **Transition Term.** It is recognized between City and Attorney that it is in the best interests of the parties and the citizens of the City of Key West that a transition period between the current City Attorney and the City Attorney described herein occur. Accordingly, notwithstanding any other provision of this Agreement, Attorney and City further agree as follows:

1. Immediately upon execution of this Agreement and until commencement of the Normal Term specified above, Attorney will devote at least ten hours per week to working with the current City Attorney and City staff to ensure a smooth transition between attorneys. Such time shall include but not be limited to attendance at various Board and Commission meetings, review of case files and meetings with key City staff on relevant issues.

2. Attorney shall be compensated at an hourly rate of SEVENTY-NINE DOLLARS (\$79.00) per hour for work performed during the transition term and until such time as the commencement of the Normal Term of employment specified in paragraph 5A above.

3. During this transition term it is recognized that Attorney is an independent contractor and not a City employee. Accordingly, attorney shall not be entitled to any benefits or other remuneration until the commencement of the "Normal Term" specified above. The current City Attorney shall verify the hours expended by Attorney and payment shall be made to Attorney upon submission of an invoice in accordance with City's standard payment process.

**C. Extension of Term.** This Agreement will automatically renew for successive periods of one year unless either the City or Attorney gives the other written notice of its or his intent to modify or terminate the Agreement. Such written notice will be given not less than one hundred twenty (120) days prior to the expiration of any then existing term of this Agreement. For a renewal term year, the base salary will be increased in the same manner as the yearly increases specified in paragraph six of this agreement.

**D. Termination of Agreement**

1. **By City for Cause.** This Agreement may be terminated by City only for cause, and only by majority vote of the City Commissioners at a public meeting at which the issue is duly noticed and held. At least six members of the Commission shall be present and voting on the issue. At least fifteen (15) days prior to the date on which the agenda for the City Commissioners is prepared that contains the item of termination to be acted upon, City will provide to Attorney a detailed written statement of the reason or reasons for which termination is being sought. The statement will include, but not be limited to, the act or acts, omission or omissions, or default or defaults which form the basis for which termination is sought, along with the relevant date or dates, time or times, and location or locations.

2. **By Attorney for Breach.** This Agreement may be terminated by Attorney upon a breach of this Agreement by City, provided the City has not cured the breach within thirty (30) days following receipt of the notice of the breach. If the breach has not been cured, termination will be effective on the thirty-first (31<sup>st</sup>) day following receipt of written notice from Attorney by the City.

3. **By Normal Expiration.** This Agreement is terminated upon its normal expiration date as stated in Section 5.A.

4. **Definition.** As used in paragraph D.1 above, "for cause" will mean (a) dishonesty with respect to the business and operation of the City; (b) confirmed violation of the City's drug policy; (c) unlawful refusal to cooperate in an investigation regarding any aspect of the business or operation of the City, which investigation is conducted by or at the express direction of the City; (d) conviction of a crime which is classified as a felony or a crime involving moral turpitude; or (e) gross neglect or willful or intentional misconduct.

**E. Cancellation by City.** City may cancel this Agreement without cause, effective thirty (30) days after giving written notice to Attorney. Such cancellation will be by majority vote of the City at a duly noticed public meeting, with at least six City Commissioners present and voting. Upon the effective date of cancellation, Attorney will be entitled to receive from City, and within fifteen (15) days will be paid by City, a sum equal to the total of the prospective benefits that would have been earned by Attorney as if still employed under this Agreement for the six (6) calendar months following the effective date of cancellation. For purposes of this section, "prospective benefits" shall mean the combined base salary, transportation allowance, dues, fees, and costs required to be paid under "professional memberships"; the contributions to be made under the City's Retirement System; all unused sick leave and annual leave hours without regard to any caps imposed by the City. However, in no event will City be required to compensate attorney for more than the number of months and benefits remaining during any unexpired term under this Agreement.

**F. Resignation by Attorney.** In the event that Attorney resigns from the position of City Attorney prior to the normal expiration date of this Agreement, he will not be entitled to any payment for any sums provided for in paragraph 5E above. To effect such resignation, Attorney shall deliver written Notice of Resignation to the City through the City Clerk. Such resignation shall be accepted by the City without prejudice and without recourse to any administrative or civil proceedings, and the resignation shall be effective as of the date given in the written notice.

**G. Appointment to County, State, or Federal position.** In the event that Attorney accepts an appointment to a county, state or federal judicial or quasi-judicial position during the initial term or any extension term of this Agreement, Attorney will give written notice to the City through the City Clerk. The acceptance of the appointment shall be considered as a resignation by Attorney.



**6. Base Salary.** The City will pay to Attorney, as and for a base salary, the sum of ONE HUNDRED SIXTY-FIVE THOUSAND DOLLARS (\$165,000.00) per annum for the first year of employment; the base salary shall increase each year of this Agreement at the same percentage rate as afforded to City department heads and managers in each particular fiscal year.

**7. Transportation Allowance.** Attorney agrees that he will be responsible for providing his own motor vehicle for transportation within the limits of Monroe County that may be necessary, required, or appropriate in fulfilling his responsibilities and duties under this Agreement. In lieu of the preparation, maintenance, submission, review, approval, and auditing of detailed travel expense reimbursement forms, and as partial consideration for Attorney's entering into this Agreement, City agrees to pay to Attorney the sum of TWO HUNDRED FIFTY DOLLARS (\$250.00) per month as and for a transportation allowance. For travel out of Monroe County by motor vehicle, Attorney will be reimbursed by City on a per trip basis at the rate allowed for under Chapter 112, Florida Statutes, or at the rate allowed by any City Ordinance, whichever is greater.

**8. Travel Reimbursement.** City agrees to pay to or reimburse Attorney for the costs of meals, other expenses and lodging incurred by Attorney that may be necessary, required, or appropriate in fulfilling Attorney's duties and responsibilities under this Agreement. Meals, other expenses and lodging will be paid for or reimbursed at the rates specified in Section 112.061, Florida Statutes, or as permitted under City Ordinance, whichever is greater.

**9. City Retirement System.** City agrees that Attorney will be a member of the General Employees Retirement Plan of the City. City and Attorney will contribute such amounts at such times in accordance with standard City policy and procedure.

**10. Duties and Responsibilities.**

**A. General.** Attorney will have those responsibilities and perform those duties which are listed in the City Charter, the City Code of Ordinances, and which are listed in the Position Description attached hereto as exhibit "A" and incorporated herein. If a duty or responsibility contained in the Position Description is in conflict with a duty or responsibility contained in this Agreement, the duty or responsibility in this Agreement will prevail.

**B. Availability.** Attorney will be reasonably available to City Commissioners and key City staff twenty-four (24) hours per day. Such availability will be by telephone or electronic messaging, or in person. Attorney will obtain and maintain cellular telephone service and provide to City Commissioners and key City staff the telephone number. City agrees that such telephone service is of benefit to the City, and agrees to pay to Attorney the sum of ninety-five dollars (\$95.00) per month as partial reimbursement of the costs of obtaining and maintaining cellular telephone service.

**C. Ethical Considerations.** City and Attorney agree that, in general, it is the City Commission as a political body that is the client entity of the Attorney. However, as recognized by the Rules of Professional Conduct of The Florida Bar, the attorney-client relationship for organizational and governmental agencies is not the same as the attorney-client relationship for private individuals, and Attorney's professional relationship with the City will be consistent with the requirements of Rule 4-1.13 of the Rules of Professional Conduct of The Florida Bar.

**D. Performance Review.** The City shall review the performance of Attorney once annually within sixty (60) days of Attorney's anniversary of hire date. Within six (6) months of the execution of this Agreement, City and Attorney shall develop a form for use in such performance review, which will delineate a series of objective criteria for review. Based upon the results of any annual performance review, the City may elect to raise the percentage increase in the base salary amount due for the coming year above that specified in paragraph six.

**11. Professional Development and Memberships.** The City shall pay for all reasonable and customary professional dues for the Attorney as budgeted, including membership in the Florida Bar and its relevant sections, and the Monroe County Bar Association. The City also agrees to budget for and to pay the reasonable costs incurred by Attorney in attending seminars, continuing legal education courses, City-related events and out-of-county meetings as may be necessary or appropriate to Attorney's duties and responsibilities under this Agreement.

12. **Personal Leave.** The City and Attorney agree that, due the variety of hours worked and requirements of the position of City Attorney, interference with Attorney's family life is to be expected and it is recognized that Attorney may from time to time absent himself during normal business hours for personal or family time; provided, however, that Attorney remains reasonably available to City Commissioners, the City Manager, and key City staff by telephone or other electronic means. Such personal time or family time will not be considered or debited against vacation time.

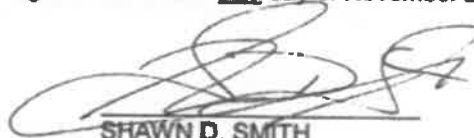
13. **Indemnification.** The City will defend, hold harmless, and indemnify Attorney against any tort, professional liability, or other legal demand, claim, or action which is related directly or indirectly to Attorney's lawful actions in his capacity as City Attorney.

14. **Miscellaneous Provisions.** This agreement is made in the State of Florida and be governed by Florida law. This is the entire agreement between the parties and may not be modified or amended except by a written document signed by the party against whom enforcement is sought. This agreement may be signed in more than one counterpart, in which case each counterpart will constitute an original of this agreement. Paragraph headings are for convenience only and are not intended to expand or restrict the scope or substance of the provisions of this agreement. Wherever used herein, the singular will include the plural, the plural will include the singular, and pronouns will be read as masculine, feminine or neuter as the context requires. If any provision of this agreement is held invalid or unenforceable, the remainder of the agreement shall remain in full force and effect, and the offending provision shall be amended to the nearest legally permissible term as permitted by law so as to effectuate the intent of the parties. This Agreement is a joint result of the parties' negotiations and shall not to be construed against any party on the basis of authorship. The prevailing party in any litigation, arbitration or mediation relating to this agreement will be entitled to recover its reasonable attorneys' fees from the other party for all matters, including, but not limited to, appeals. Venue for any litigation involving this agreement shall be Monroe County, Florida.

IN WITNESS WHEREOF the parties have executed this Agreement on this 27 day of November 2006.



MORGAN MCPHERSON,  
MAYOR CITY OF KEY WEST



SHAWN D. SMITH



CHERYL SMITH CITY CLERK