

RESOLUTION NO. 2021/68

**RESOLUTION OF THE CITY COUNCIL OF THE CITY OF ANTIOCH
APPROVING THE THIRD AMENDMENT TO THE EMPLOYMENT AGREEMENT
BETWEEN THE CITY OF ANTIOCH AND THOMAS LLOYD SMITH FOR
CITY ATTORNEY SERVICES**

WHEREAS, on February 5, 2019, the City Council approved an employment agreement and amendment with Thomas Lloyd Smith ("Thomas Smith" or "Smith") for City Attorney services and authorized the Mayor to sign the agreement;

WHEREAS, on February 11, 2020, the City Council approved a second amendment to the employment agreement and amendment with Thomas Lloyd Smith for City Attorney services and authorized the Mayor to sign the agreement;

WHEREAS, the City Council desires to approve a Third Amendment to the February 5, 2019 employment agreement and amendments with Thomas Lloyd Smith for City Attorney services;

WHEREAS, the Third Amendment reflects direction provided to the Administrative Services Director on March 9, 2021 in closed session following the evaluation of Thomas Lloyd Smith's performance.

NOW, THEREFORE, BE IT RESOLVED by the City Council of the City of Antioch as follows:

Section 1: The Third Amendment to the Employment Agreement between the City of Antioch and Thomas Lloyd Smith for City Attorney services attached to this Resolution as "Exhibit A" is hereby approved and the Mayor is authorized to execute this Agreement.

* * * * *

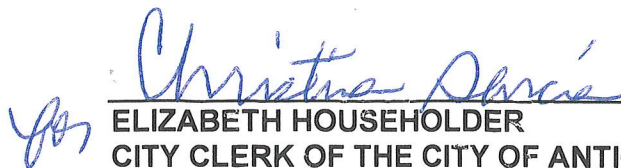
I HEREBY CERTIFY that the foregoing resolution was passed and adopted by the City Council of the City of Antioch at a regular meeting thereof, held on the 13th day of April, 2021, by the following vote:

AYES: Council Members District 1 Torres-Walker, District 2 Barbanica, District 3 Ogorchock, Mayor Pro Tem (District 4) Wilson and Mayor Thorpe

NOES: None

ABSTAIN: None

ABSENT: None


ELIZABETH HOUSEHOLDER
CITY CLERK OF THE CITY OF ANTIOCH

**THIRD AMENDMENT TO EMPLOYMENT AGREEMENT BETWEEN CITY OF
ANTIOCH AND THOMAS LLOYD SMITH**

The City of Antioch ("City") and Thomas Lloyd Smith ("Thomas Smith" or "Smith") previously entered into that certain Employment Agreement and Amendment dated February 5, 2019, whereby Smith was employed as the City Attorney of the City and the Second Amendment to the Employment Agreement and Amendment, which became effective on March 1, 2020 (collectively "agreements"). In this Third Amendment, the parties hereby agree to modify and amend the Agreements as follows:

1. Section 8 – Compensation

A. Salary. Shall be replaced with:

Effective March 1, 2021 the City agrees to pay Thomas Lloyd Smith for the performance of his duties and functions an annual salary as follows: Two Hundred and Twenty-One Thousand Four Hundred and Thirty-Six Dollars (\$221,436). The City Attorney's salary will also be tied to the Management Employees Benefit Document dated October 1, 2016 through September 30, 2021 Item 1. Compensation, Section.

Salary will be paid in installments at the same time that other employees of the City are paid. Smith shall not be entitled to receive payment or credit for, and the City shall not pay or credit Smith for, overtime, compensated time off in lieu of overtime or other compensation except as expressly provided in this Agreement. Smith acknowledges that the position of City Attorney is exempt from the provisions of the Fair Labor Standards Act ("FLSA").

2. Except as modified herein all of the remaining terms and provisions of the Agreement and Amendment dated February 5, 2019 shall remain in effect. If any conflicts exist between the Agreement and Amendment, Second Amendment and this Third Amendment, the Third Amendment shall govern.

CITY OF ANTIOCH

By:  Date: 6/21/21
Lamar Thorpe, Mayor of the City of Antioch

Attest:

 Date: _____.
Elizabeth Householder, City Clerk of the City of Antioch

By:  Date: _____.
Thomas Lloyd Smith

RESOLUTION NO. 2020/25

**RESOLUTION OF THE CITY COUNCIL OF THE CITY OF ANTIOCH
APPROVING THE SECOND AMENDMENT TO THE EMPLOYMENT AGREEMENT
BETWEEN THE CITY OF ANTIOCH AND THOMAS SMITH FOR
CITY ATTORNEY SERVICES**

WHEREAS, on February 5, 2019, the City Council approved an employment agreement and amendment with Thomas Smith. for City Attorney services and authorized the Mayor to sign the agreement; and

WHEREAS, the City Council desires to approve a Second Amendment to the February 5, 2019 employment agreement and amendment with Thomas Smith for City Attorney services; and

WHEREAS, the Second Amendment reflects direction provided to the Administrative Services Director on January 28, 2020 in closed session following the evaluation of Thomas Smiths performance.

NOW, THEREFORE, BE IT RESOLVED by the City Council of the City of Antioch as follows:

Section 1: The Second Amendment to the Employment Agreement between the City of Antioch and Thomas Smith for City Attorney services attached to this Resolution as "Exhibit A" is hereby approved and the Mayor is authorized to execute this Agreement.


* * * * *

I HEREBY CERTIFY that the foregoing resolution was passed and adopted by the City Council of the City of Antioch at a regular meeting thereof, held on the 11th day of February 2020, by the following vote:

AYES: Council Members Wilson, Motts, Thorpe, Ogorchock and Mayor Wright

NOES: None

ABSENT: None



ARNE SIMONSEN, CMC
CITY CLERK OF THE CITY OF ANTIOCH

**SECOND AMENDMENT TO EMPLOYMENT AGREEMENT BETWEEN CITY OF
ANTIOCH AND THOMAS SMITH**

The City of Antioch ("City") and Thomas Smith ("Smith") have previously enter into that certain Employment Agreement and Amendment dated February 5, 2019 ("Agreement"), whereby Smith was employed as the City Attorney of the City. The parties agree to modify and amend the Agreement as follows:

1. Section 8 – Compensation

A. Salary. Shall be replaced with:

Effective March 1, 2020 the City agrees to pay Smith for the performance of his duties and functions an annual salary as follows: Two Hundred and Four Thousand Seven Hundred and Fifty Dollars (\$204,750). The City Attorney's salary will also be tied to the Management Employees Benefit Document dated October 1, 2016 through September 30, 2021 Item 1. Compensation, Section A. Salaries for cost of living and equity adjustments which states:

Effective the first full pay period after October 1, 2020 an increase of 3.00%.

Salary will be paid in installments at the same time that other employees of the City are paid. Smith shall not be entitled to receive payment or credit for, and the City shall not pay or credit smith for, overtime, compensated time off in lieu of overtime or other compensation except as expressly provided in this Agreement. Smith acknowledges that the position of City Attorney is exempt from the provisions of the Fair Labor Standards Act (FLSA).


2. Except as modified herein all of the remaining terms and provisions of the Agreement and Amendment dated February 5, 2020 shall remain in effect. If any conflicts exist between the Agreement and Amendment and this Second Amendment, the Second Amendment shall govern.

City of Antioch

By: 
Sean Wright, Mayor

Date: 3/10/20

Attest:


Arne Simonsen, CMC, City Clerk of the City of Antioch

Date: 3/13/2020

By: 
Thomas Smith

Date: 3/10/2020

**CITY OF ANTIOCH
AGREEMENT WITH THOMAS SMITH FOR
CITY ATTORNEY SERVICES**

This Agreement ("Agreement"), dated for reference purposes only the 5th day of February, 2019, is made and entered into at Antioch, California by and between the City of Antioch, California ("City") and Thomas Smith ("Smith"). This Agreement (the "Agreement") shall be effective on the date the Agreement is signed by Smith and the City ("Effective Date").

RECITALS

WHEREAS, the City requires the services of a person with proven qualifications to fill the position of City Attorney; and

WHEREAS, the City, acting by and through its City Council, desires to employ the services of Smith as City Attorney and to appropriately compensate him for such services; and

WHEREAS, Smith desires to be employed by the City as City Attorney for appropriate compensation and conditions of employment;

NOW, THEREFORE, in consideration of the mutual promises, terms and conditions contained in this Agreement, the parties agree as follows:

Section 1 – Appointment. The City agrees to employ and appoint Smith to the position of City Attorney for the City of Antioch, California, upon the commencement of the Term defined below. Smith accepts employment as City Attorney and agrees to serve as such. Smith serves at the pleasure of a majority of the City Council, and nothing in this Agreement shall prevent, limit or otherwise interfere with the right of the City Council to terminate the services of Smith at any time, subject only to the provisions in this Agreement.

Section 2 – Term. This Agreement shall start no sooner than March 1, 2019 and shall continue for a period of three years from Smith's first date of employment or until terminated pursuant to this Agreement.

Section 3 – Duties. Smith's employment shall be full time. As City Attorney, Smith shall perform the duties and functions of the City Attorney identified in State law, the Antioch Municipal Code, the ordinances, resolutions, policies, rules and regulations existing thereunder and other duties and functions as the City Council may assign. Smith agrees: (1) to perform all duties and functions in a professional and ethical manner to the best of his skill and ability and (2) to use his best efforts to promote and advance the interests and the City Council's goals and objectives.

Smith understands and agrees that the position of City Attorney is not a part time position and will require Smith to work greater than a customary forty (40) hour week. Although City Hall is generally open to the public during regular set work hours, Smith shall perform his obligations as full time City Attorney during regular work hours and on such evenings, weekends and other times as are necessary. Smith also acknowledges that the position of City Attorney is a position of high visibility before the public and agrees that he shall conduct himself before the public and City staff, both during and outside of regular working hours, in a manner that reflects favorably on the City.

Section 4 – No Other Employment. Smith agrees not to undertake any other employment during the term of this Agreement unless such work will not interfere with the accomplishment of his duties herein and is authorized by the express consent of the City Council, which consent shall not unreasonably be withheld. Smith further agrees to confer with the City Council before undertaking any non-paid projects for organizations other than the City which may require a substantial time commitment by Smith and interfere with the accomplishment of his duties as City Attorney.

Section 5 – Termination by Smith. Smith may terminate this Agreement and resign as City Attorney at any time, for any reason, upon 45 days' prior written notice to the City. Upon receipt of written notice from Smith, the City may elect to immediately remove Smith from his position as City Attorney or to allow Smith to remain as City Attorney for all or any part of the notice period. If the City removes Smith from his position as City Attorney prior to the expiration of the notice period, the City will pay Smith an amount equal to the salary and benefits that Smith would have received if he had remained in the City Attorney position until the expiration of the notice period, less legally required withholdings. If the City advises Smith that he should continue to perform his duties and functions as City Attorney during the notice period, and Smith fails to do so, Smith will receive no salary or benefits after the last date on which he actually performs his City Attorney duties and functions.

Section 6 – Termination by City.

- A. **Termination for Good Cause.** The City Attorney may be discharged for good cause. Good cause includes criminal conviction for acts other than vehicle violations or the exercise of personal civil rights unrelated to City employment, acts of moral turpitude or fiscal malfeasance, or, as determined in the reasonable discretions of the City Council, a complete or near complete failure to perform in his position of City Attorney, if that failure continues for a period of thirty (30) days after Smith receives written notice from the City Council specifying the acts or omissions deemed to constitute that failure.

If the City elects to terminate this Agreement for good cause, it will pay Smith for all earned pay and accrued, unused vacation leave at the time it notifies Smith of the termination decision, less legally required withholdings. Smith will be entitled to no pay or benefits after the date that the City notifies him that this Agreement and his employment by the City have been terminated for good

cause. If the City Council intends to terminate this Agreement for good cause, it will provide notice of its intention to Smith with a written explanation of the basis for that decision, sent to Smith's last known home address at least thirty (30) calendar days prior to the City Council meeting in which the termination will be considered, and Smith shall have the opportunity to resign during this period. In lieu of thirty (30) calendar days' notice, the City may place Smith on thirty (30) calendar days paid administrative leave. Smith will have the right to meet with the City Council for the purposes of discussing the basis for his proposed termination for good cause prior to a final vote on his termination, which will take place in closed session unless Smith timely exercises any right he possesses under Government Code section 54957(b)(1)-(2), if applicable. In order to exercise his right to meet with the Council, Smith must provide a written request to meet to the Mayor of the City and the City Manager within five (5) calendar days of the date of the meeting in which termination of employment will be considered. Failure to timely provide such written notice shall constitute a waiver of the right to be heard. Unless he timely exercises his right under Government Code section 54957(b)(1)-(2), to the extent those provisions are applicable, Smith shall have no right to be heard publicly by the City Council prior or subsequent to a final vote on his termination and hereby waives any right to be heard publicly under the Antioch Municipal Code; provided however that no provision of this Agreement shall constitute a waiver of Smith's rights in law or equity to recover damages caused by an abuse of this provision by the City.

- B. Termination Without Good Cause. If the City elects to terminate this Agreement and Smith's employment without good cause as defined in this Agreement, it shall not be required to provide any reasons for that decision to Smith or anyone else. A Notice of Termination Without Cause shall be provided in writing.

The City will pay Smith for all earned pay and accrued, unused vacation leave up to but not including the effective date of termination, less legally required withholdings. Additionally, the City will pay Smith his monthly salary and health benefits amounts (meaning just what is known as the flexible benefits or cafeteria plan amount) at the rate he is earning on the date he is given notice that this Agreement and his employment are being terminated, less legally required withholdings ("severance payment") for six (6) months following such notice, or until he receives comparable employment within such time, at which point the severance payments shall be discontinued. Comparable employment shall mean employment paying a salary equal to or more of his then current City Attorney salary.

- C. Smith shall not be entitled to any severance payment if he is terminated, resigns or retires following his arrest for a felony, a crime of moral turpitude, or a documented incident of dishonesty affecting the affairs of the City.

Further, pursuant to Article 2.6 of Division 2 of Title 5 of the California Government Code (sections 43243 et seq.), if Smith is convicted of a crime involving abuse of his position, as defined under State law, he shall not be entitled to paid leave during the investigation, any cash settlement paid related to termination, or any severance payment and Smith shall reimburse the City any such salary or benefits or payments provided in this circumstance.

Section 7 – Inability to Perform Essential Duties and Functions. Smith agrees that if he is unable to perform the essential duties and functions of the City Attorney position for any reason for more than 120 consecutive calendar days, the City may terminate this Agreement. If the City elects to terminate this Agreement based on Smith's inability to perform the essential duties and functions of the City Attorney position, it will also advise Smith in writing sent to Smith's last known home address. Such termination shall not be deemed termination for "good cause" as defined in this Agreement, unless Smith chooses to contest the termination pursuant to Section 6.A. above. At the time the City provides such notice, it will pay Smith for all earned pay and accrued, unused vacation leave, less legally required deductions. However, Smith will not be entitled to any severance payments described above pursuant to Section 6.b of this Agreement.

If termination of this Agreement is the result of the death of Smith, the City shall pay all salary and benefits then due to Smith's legal heir(s).

Section 8 – Compensation.

- A. **Salary.** The City agrees to pay Smith for the performance of his duties and functions an annual salary as follows: One hundred ninety-five thousand dollars (\$195,000). The City Council shall determine annually whether Smith shall be granted a cost of living adjustment (COLA) provided other Executive Management employees and whether Smith shall be granted any additional salary increase.

Salary will be paid in installments at the same time that other employees of the City are paid. Smith shall not be entitled to receive payment or credit for, and the City shall not pay or credit Smith for, overtime, compensated time off in lieu of overtime or other compensation except as expressly provided in this Agreement. Smith acknowledges that the position of City Attorney is exempt from the provisions of the Fair Labor Standards Act (FLSA).

- B. **Benefits.** During the term of this Agreement and his employment hereunder, Smith shall be entitled to receive benefits on the same terms and conditions as other Executive Management employees of the City as set forth in the current City of Antioch Management Benefit Document (the current City of Antioch Management Benefit Document dated October 1, 2016 through September 30, 2021 is attached as Exhibit 1), unless otherwise set forth in this Agreement:

- Retirement benefits available on the same terms and conditions as other Executive Management employees hired on or after January 1, 2013, who are new members of CalPERS and who were not in a reciprocal system, will be enrolled in the State-wide formula of 2% @ 62; three-year average final compensation period. In accordance with PEPRA, these employees shall pay a PERS Employee Contribution Rate of 50% of the Normal Cost, as determined annually by CalPERS, or as may be amended through the Management Benefit Document for Executive Management employees.
- Smith shall not be entitled to the City of Antioch's Medical-After-Retirement benefit, but shall be entitled to a contribution to a Medical-After-Retirement Account (MARA) if offered to other Executive Management employees.
- Smith shall accrue vacation leave at the rate of 120 hours annually upon hire and shall move to the next accrual level in the Management Benefit Document at the start of the fourth (4th) year of employment. Upon initial hire, Smith shall be granted 120 hours of vacation accrual and allowed to use 40 hours without a waiting period.

Except as expressly set forth in this Agreement, Smith shall not be entitled to, nor be paid for, any other benefits available to non-Executive Management employees of the City.

Section 9 – Performance Evaluations. The City Council recognizes that for the City Attorney to respond to its needs and to grow in the performance of the City Attorney's job, the City Attorney needs to know how the City Council members evaluate the City Attorney's performance. To assure that the City Attorney gets this feedback, the City Council shall conduct an evaluation of the City Attorney's performance on or about the six (6) month anniversary of the first date of employment of Smith; Smith shall initiate the six-month performance update discussion. The City Council and the City Attorney shall jointly define goals and performance objectives which they deem necessary for the proper operation of the City in the attainment of the City Council's policy objectives, and shall establish the relative priority among the various goals and objectives. The City Council shall review and provide the City Attorney with a written evaluation of his performance based on criteria established by the City Council with the City Attorney's assistance. The City Council and the City Attorney shall jointly establish written performance goals and objectives within the first 30 days of the first date of employment of Smith.

The City Council shall conduct such evaluation and goal-setting at least annually thereafter. In the annual evaluation, the City Council and City Attorney shall jointly define such goals and performance objectives and shall further establish a relative priority among those goals and objectives. The City Council shall review and consider Smith's performance as City Attorney at least annually as close as reasonably possible to the first date of employment of Smith. The review shall be discussed with Smith and reduced to writing.

Section 10 – Professional Development. Understanding the need for Smith to remain current about principles of municipal law, the City agrees to pay for his attendance at professional conferences and training opportunities, and appropriate continuing education materials, subject to budgetary constraints that may occur from time to time. The City will also pay Smith's annual dues to the California State Bar, including membership in the Public Law Section but no other optional sections or enhancements, and basic membership in the Contra Costa County Bar Association.

Section 11 – Confidential Information. Smith agrees that he will not reveal any confidential information about the City, City officials, or City employees that he learns while performing the duties and functions of City Attorney.

Section 12 – City Property. Smith agrees that all materials, regardless of their form, that he receives, creates or produces in connection with this Agreement and/or his employment as City Attorney are and will remain the exclusive property of the City. Smith will immediately deliver all originals of such materials to the City that are in his possession or control upon termination of this Agreement.

Section 13 – Assistance in Litigation. Smith agrees that he will furnish information and proper assistance to the City as it may reasonably require with any litigation in which it is or may become involved, either during or after the termination of this Agreement. Smith further agrees that he will not discuss, reveal or convey any information or documents pertaining to the City to any person or entity, or to any attorney for or representative of any person or entity, with actual or potential claims adverse to the City except pursuant to duly issued legal process or as otherwise authorized by the City. Smith agrees to notify the City immediately upon receipt of any legal process pertaining to the City. This provision shall not apply to any criminal investigation targeting any City official or employee.

Section 14 – Governing Law. This Agreement will be construed and enforced in accordance with the laws of the State of California.

Section 15 – Headings. The headings used in this Agreement are provided for convenience only and may not be used to construe meaning or intent.

Section 16 – Assignment. Neither this Agreement nor any interest in this Agreement may be assigned.

Section 17 – Severability. If any provision or portion of this Agreement is held to be invalid or unenforceable, this Agreement, including all of the remaining terms, will remain in full force and effect as if such invalid or unenforceable provision(s) or portion(s) had never been included.

Section 18 – Notices. Notices pursuant to this Agreement will be deposited with the United States Postal Service, postage prepaid and addressed as follows:

City:
Mayor's Office
City of Antioch
P.O. Box 5007
Antioch, CA 94531-5007

With a copy to: City Manager
 City of Antioch
 P.O. Box 5007
 Antioch, CA 94531-5007

Smith:
Thomas Smith
At his then current address on file with the City

Section 19 – Modification. This Agreement may only be modified by a writing executed by the parties, the City Council having approved the modification on behalf of the City.

Section 20 – Entire Agreement. This Agreement supersedes any and all other agreements, either oral or in writing, and contains all agreements between Smith and the City regarding his employment as City Attorney. Smith and the City agree that no representations, inducements, promises or agreements, oral or otherwise, have been made to either party, or anyone acting on behalf of either party, which are not stated herein, and that no agreement, statement, or promise not contained in this Agreement will be valid or binding on either party.

Section 21 – Effective Date. This Agreement will become effective on the date of execution by the parties and the Term shall commence as defined herein.

Section 22 – Mediation of Disputes. In the event that any dispute arises between the parties regarding the interpretation or implementation of any provision of this Agreement, the parties shall first submit the dispute to voluntary mediation prior to the filing of any lawsuit. If the parties cannot agree on selection of a mediator, then the matter shall be submitted to the Judicial Arbitration and Mediation Services ("JAMS-ENDISPUTE") office in Walnut Creek, California, with a panelist to be assigned by that office's administrator.

Section 23- Venue. In the event any party seeks to enforce this agreement or any of its terms by a civil action in court, following mediation as provided in the preceding paragraph, the venue for any such action shall be in Contra Costa Superior Court.

[Signatures on the following page]

City of Antioch

By: /s/ SEAN WRIGHT Date 02-05-2019
Sean Wright, Mayor

Approved as to form:

Derek Cole, Interim City Attorney

By:  Date 1/27/2019
Thomas Smith

Exhibit 1: City of Antioch Management Benefit Document October 1, 2016 through
September 30, 2021

**AMENDMENT TO EMPLOYMENT AGREEMENT BETWEEN CITY OF ANTIOCH AND
THOMAS SMITH**

The City of Antioch ("City") and Thomas Smith ("Smith") have entered into that certain Employment Agreement dated February 5, 2019 ("Agreement"), whereby Smith was employed as the City Attorney of the City. The parties agree to modify and amend the Agreement as follows:

1. **Section 9 – Performance Evaluation** of the Agreement is amended to include the following paragraph.

The City Council shall determine annually whether the City Attorney shall be granted an additional salary increase based on achievement of defined goals and objectives. The City Council shall use the following salary range (Step C through Step E) as a guideline to determine additional compensation. Step A \$176,871; Step B \$185,715; Step C \$195,000; Step D \$204,750; Step E \$214,988. Each step is an increase of 5%.

2. Except as modified herein all of the remaining terms and provisions of the Agreement dated February 5, 2019 shall remain in effect. If any conflicts exist between the Agreement and this Amendment, the Amendment shall govern.

City of Antioch

By: /s/ SEAN WRIGHT Date: 02-05-2019
Sean Wright, Mayor

Approved as to form:

Derek Cole, Interim City Attorney

Attest:

for Christine Davis Date: 2-6-2019
Arne Simonson, CMC, City Clerk of the City of Antioch

By: Thomas Smith Date: 1/29/2019
Thomas Smith