

THIRD AMENDMENT TO EMPLOYMENT AGREEMENT

THIS THIRD AMENDMENT TO EMPLOYMENT AGREEMENT (“Third Amendment”) made effective this 19th day of September, 2017, by and between Michael L. Spurgeon, City Manager for the City of Broken Arrow (hereinafter “Spurgeon”) and the City of Broken Arrow, Oklahoma, an Oklahoma Municipal corporation (hereinafter “City”). Terms used and not otherwise defined in this Third Amendment shall be as defined in the August 4, 2015, Employment Agreement, as amended.

WITNESSETH:

WHEREAS, on August 4, 2015, Spurgeon and the City of Broken Arrow entered into an Employment Agreement (hereinafter referred to as the “2015 Employment Agreement”) whereby the City offered certain benefits and set forth the terms and conditions of Spurgeon’s employment as City Manager for the City of Broken Arrow; and

WHEREAS, on June 7, 2016, the 2015 Employment Agreement was amended to modify various provisions contained therein; and

WHEREAS, on October 4, 2016, the 2015 Employment Agreement, as amended was amended a second time to modify various provisions contained therein; and

WHEREAS, the City Council of the City of Broken Arrow and Spurgeon desire to continue the employment relationship, but modify some of the terms set forth in the 2015 Employment Agreement, as amended; and

WHEREAS, modifications to said 2015 Employment Agreement, as amended, are reasonable and proper.

NOW, THEREFORE, in consideration of the covenants and mutual obligations set out herein and in the 2015 Employment Agreement, as amended, and other good and valuable consideration, the sufficiency of which the parties hereto hereby acknowledge, do covenant and agree to the following Amendments:

ARTICLE A **AMENDMENTS TO THE 2015 EMPLOYMENT AGREEMENT, AS AMENDED**

A.1 **Amendment to Section B. Term:** Section B, Term, is hereby amended to read as follows:

It is understood that Spurgeon shall begin the performance of his duties on September 21, 2015 (“Start Date”). This Agreement shall remain in effect for a period of six (6) years from that date. It is the intent of the Council and the Council will make all reasonable efforts to ensure that this Agreement shall remain in effect for the term specified unless modified by mutual consent of the parties or unless terminated as herein provided. It is specifically acknowledged that Spurgeon’s salary and benefits for fiscal years 2019, 2020, 2021, and 2022, are on a year-to-year basis subject to annual appropriation.

A.2 **Amendment to Section C. Salary and Retirement Contributions:** Section C, Salary and Retirement Contributions, is hereby amended to read as follows:

1. The City agrees to pay Spurgeon a base salary, payable in bi-weekly installments at the same time as other City employees are paid. The City shall pay Spurgeon an annual salary of \$178,759.59. Any reduction in Spurgeon's salary as the result of an across-the-board workplace salary reduction shall be commensurate with the percentage of adjustment afforded to other non-union employees.
2. The City shall contribute fifteen percent (15%) of Spurgeon's base salary into his ICMA 401(a) plan. Beginning on September 21, 2018, the City shall contribute 15.5% of Spurgeon's base salary into his ICMA 401(a) plan. Beginning on September 21, 2019, the City shall contribute 16% of Spurgeon's base salary into his ICMA 401(a) plan. Beginning on September 21, 2020, the City shall contribute 16.5% of Spurgeon's base salary into his ICMA 401(a) plan. Said contributions shall be payable in equal installments, on each regularly scheduled payroll date pursuant to the plan document approved by the ICMA and the City. The parties specifically acknowledge that amendment to the Plan Document for the 401(a) Plan may be required on an annual basis.
3. On October 6, 2017, Spurgeon shall receive to a one-time performance-based stipend in the amount of \$10,000.00.

A.3 **Amendment to Section D. Termination and Severance:** Section D, Termination and Severance, is hereby amended to read as follows:

1. The City Council shall have the right to terminate the services of Spurgeon at any time so long as he is functioning as the City Manager. Although Spurgeon acknowledges that he is an employee at will under established Oklahoma law, a severance agreement is appropriate and in the interest of both parties.
2. In the event the City Council terminates Spurgeon's employment while acting in his capacity as City Manager before September 21, 2018, for any reason not amounting to affirmative misconduct, malfeasance in office, conviction or plea of Guilty or *Nolo Contendere* for a crime involving moral turpitude, or the physical inability to perform the duties of office, the City shall give Spurgeon a severance benefit of seven (7) months' salary.
3. In the event the City Council terminates Spurgeon's employment while acting in his capacity as City Manager from September 21, 2018, through September 20, 2019, for any reason not amounting to affirmative misconduct, including, but not limited to, an act of dishonesty, theft, or misappropriation of City property, malfeasance in office, conviction or plea of Guilty or *Nolo Contendere* for a crime involving moral turpitude, or the physical inability to perform the duties of office, the City shall give Spurgeon a severance benefit of eight (8) months' salary.

4. In the event the City Council terminates Spurgeon's employment while acting in his capacity as City Manager from September 21, 2019, through September 20, 2020, for any reason not amounting to affirmative misconduct, including, but not limited to, an act of dishonesty, theft, or misappropriation of City property, malfeasance in office, conviction or plea of Guilty or *Nolo Contendere* for a crime involving moral turpitude, or the physical inability to perform the duties of office, the City shall give Spurgeon a severance benefit of nine (9) months' salary.
5. In the event the City Council terminates Spurgeon's employment while acting in his capacity as City Manager from September 21, 2020, through September 21, 2021, for any reason not amounting to affirmative misconduct, including, but not limited to, an act of dishonesty, theft or misappropriation of City property, malfeasance in office, conviction or plea of Guilty or *Nolo Contendere* for a crime involving moral turpitude, or the physical inability to perform the duties of office, the City shall give Spurgeon a severance benefit of ten (10) months' salary.
6. In the event of termination, the City shall also pay to Spurgeon the City's portion of the medical and dental insurance for the duration of the severance period as set forth above, plus all accrued leaves. Severance Pay, the City's portion of the medical and dental insurance and all accrued leaves shall be paid in an amount owed, minus applicable federal and state deductions and payroll taxes, on a bi-weekly basis for a period of one year, unless otherwise negotiated.
7. For the purposes of complying with the severance provisions of this Agreement, appropriations held as unencumbered fund balances in any fund of the City of Broken Arrow or the Broken Arrow Municipal Authority shall be deemed to be available and authorized for transfer to the appropriate salary and benefit expenditure accounts to insure fulfillment of this provision of the 2015 Employment Agreement, as amended.
8. In the event Spurgeon voluntarily resigns his position with the City without inducement as set forth in this Section D, then Spurgeon shall not be entitled to severance pay and benefits. In the event of such voluntary resignation, Spurgeon shall give the City not less than thirty (30) days written notice in advance of his date for leaving the duties of office. The City shall also pay to Spurgeon all accrued leaves, minus applicable federal and state deductions and payroll taxes.

A. 4 **Amendment to Section E.(1) Performance Reviews and Merit Consideration:** Section E.(1) Performance Reviews and Merit Consideration, is hereby amended to read as follows:

The City Council will conduct a formal evaluation of Spurgeon's performance on or before September 21st of each year during the term of this Agreement. Spurgeon shall be entitled to not less than fourteen (14) days to provide written responses to any allegations of unsatisfactory performance. Further, no later than June 14, 2021, the Council shall meet and confer and advise Spurgeon as to the Council's intent to enter into good faith negotiations for a new Employment Agreement.

A.5 **Amendment to Section F, Paid Leaves:** Section F, Paid Leaves, is hereby amended to read as follows:

1. Spurgeon shall be entitled to paid holidays, funeral leave and military leave, as set forth in Article IX, Section 2 of the Broken Arrow Code of Ordinances. The accrual and use of such leaves shall be on the same basis as any regular, full-time, non-union employee as set forth in the Broken Arrow Code of Ordinances. Spurgeon's accruals of vacation and sick leave as of September 30, 2017, shall remain intact and available for use throughout the term of this Agreement.
2. Spurgeon shall always designate an acting Manager to serve in his absence.
3. Beginning on October 1, 2017, and continuing each year thereafter throughout the term of this Agreement, Spurgeon shall accrue paid time off at the rate of 300 hours per year. On September 21, 2018, and continuing each year thereafter throughout the term of this Agreement, Spurgeon shall have the option to sell back seven (7) days of paid time off.

A.6 **Amendment to Section J. Car and Technology Allowance:** Section J, Car and Technology Allowance, is hereby amended to read as follows:

1. Because of Spurgeon's need to attend to obligations of his employment both inside and outside the City of Broken Arrow, it is desirable to make arrangements for Spurgeon's transportation. As such, the City shall pay Spurgeon a car allowance of \$750.00 per month. Spurgeon shall, at his sole expense, obtain automobile insurance coverage in a minimum amount of \$500,000.00 for personal property and \$1,000,000.00 in general liability coverage. The City shall further reimburse Spurgeon at the IRS standard mileage rate for any business use of his vehicle for travel to locations beyond a 75-mile radius of the Broken Arrow city limits. At Spurgeon's option, he may use a city pool vehicle rather than his personal vehicle for travel beyond a 75-mile radius.
2. Because of Spurgeon's need to facilitate communication in the furtherance of City business, it is desirable to make arrangements for internet and phone service and related technology. As such, the City shall pay Spurgeon a monthly allowance of \$300.00 for wireless phone and internet service. Spurgeon shall be responsible for securing appropriate and necessary technology, including a phone and internet service.

A.7 **Amendment to Section K, Residency, Relocation, Housing Allowance and Related Expenses:** Section K, Residency, Relocation, Housing Allowance and Related Expenses is hereby amended to read as follows:

K. RESIDENCY

Spurgeon shall establish and maintain personal permanent residency within the corporate boundaries of the City of Broken Arrow within six (6) months after his Start Date and at all times during his period of employment.

A.8 **Addition of a new Section O. Defined Contribution Special Incentive Plan:** A new section O, Defined Contribution Special Incentive Plan, shall be inserted to read as follows:

O. DEFINED CONTRIBUTION SPECIAL INCENTIVE PLAN

The City agrees to establish a defined contribution special incentive plan for the benefit of Spurgeon. Effective September 21, 2018, and on or before the same day of each year thereafter, for a period of three (3) years upon annual renewal of Spurgeon's Agreement through the budgetary process, the City shall cause to be accrued as a liability in favor of Spurgeon, the sum of \$18,000.00 as a defined contribution special incentive plan for Spurgeon. The City may consider an adjustment in the allocation in subsequent years, based on the job performance of Spurgeon. Said fund proceeds shall be placed in a plan with the Oklahoma Municipal Retirement Fund (OMRF) subject to the terms and conditions of the plan document as approved by the City Council. In the event Spurgeon completes the entire remaining four (4) years of service as set forth in Section B, Spurgeon shall be entitled to receive the entire balance of the defined contribution special incentive plan, including all accrued interest. If Spurgeon voluntarily leaves the employment of the City prior to completing the required four (4) year length of service term as set forth in this Agreement, then Spurgeon shall forfeit unto the City any and all right, title or interest Spurgeon may have in and to said plan. If the City removes Spurgeon pursuant to his Employment Agreement, Spurgeon shall be entitled to receive the balance in the special incentive plan which shall have accrued up to the date of Spurgeon's separation of service from the City, unless Spurgeon is removed for affirmative misconduct, including, but not limited to, an act of dishonesty, theft, or misappropriation of City property, malfeasance in office, conviction or plea of Guilty or *Nolo Contendere* for a crime involving moral turpitude, or the physical inability to perform the duties of office, in which case Spurgeon shall forfeit unto City any and all right, title or interest Spurgeon may have in and to said defined contribution special incentive plan. The parties agree that nothing in this paragraph shall impose any future year fiscal obligation on the City and shall be funded on an annual basis.

**ARTICLE B
CONTINUING TERMS OF AGREEMENT**

B.1 Except as amended hereby, all terms of the 2015 Employment Agreement, as amended, shall remain in full force and effect without modification or change. The 2015 Employment Agreement, as amended by this Third Amendment, is in all respects ratified and confirmed, and the 2015 Employment Agreement, as amended shall be read, taken and construed as one and the same instrument.

IN WITNESS WHEREOF, each of the parties hereto has caused this Third Amendment to the 2015 Employment Agreement, as amended, to be executed and to take effect as of the date above written.

Dated this 19th day of September, 2017.

State of Oklahoma)
) SS:
County of Tulsa)

Michael L. Spurgeon

Subscribed and acknowledged by Michael L. Spurgeon before me on this _____ day of _____, 2017, as his free and voluntary act and deed.

NOTARY PUBLIC
My Commission No:
My Commission Expires:

ATTEST:

THE CITY OF BROKEN ARROW,
A municipal corporation

By: _____
City Clerk

By: _____
Mayor

Reviewed as to form and legality:

City Attorney