

SETTLEMENT AGREEMENT AND RELEASE

THIS SETTLEMENT AGREEMENT (“Agreement”) is made and entered into as of this 15 day of March, 2011 (the “Effective Date”) by and between the City of Manhattan Beach and the Manhattan Beach City Council (collectively, the “City”) and Richard P. McKee (“McKee”) (collectively referred to herein as the “Settling Parties”).

RECITALS

A. In late 2009 Geoff Dolan left the employ of the City of Manhattan Beach as its City Manager pursuant to a release and resignation agreement and the City Council thereafter appointed Director of Community Development Richard Thompson as Interim City Manager.

B. In March, 2010, Richard McKee demanded in writing that the City cure certain Ralph M. Brown Act violations he alleged had been committed in connection with the actions identified in Recital A above.

C. Dissatisfied with the City Attorney’s response to his demand, McKee filed a lawsuit entitled *Richard P. McKee v. Manhattan Beach City Council and the City of Manhattan Beach*, Los Angeles County Superior Court Case No. BS126038 (the “Action”), seeking a writ of mandate and injunctive and declaratory relief for alleged violations of the Brown Act and the California Public Records Act.

D. In the interest of avoiding the time, expense and risk of litigation, the Settling Parties wish to resolve and settle the Action and all causes of action set forth therein on the terms set forth herein.

E. The Settling Parties intend for this Agreement to resolve and extinguish all claims arising from the Action.

NOW, THEREFORE, in consideration of the mutual covenants and agreements described below, and for good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Settling Parties hereby agree as follows:

1. Obligations of the Settling Parties. The Parties shall execute the stipulation attached to this Agreement as Exhibit B within 10 days of the execution of this Agreement. The parties agree, pursuant to Code of Civil Procedure section 664.6, that the court will retain jurisdiction over the parties to enforce this settlement until full performance of the terms of the settlement.

a. Obligations of City.

(i) Within ten (10) days of execution of this Agreement, City shall deliver a check made payable to Law Offices of Kelly Aviles in the amount of \$70,000 in reimbursement of and to resolve all claims for McKee’s attorneys fees and costs associated with this matter.

(ii) Concurrently with execution of this Agreement, City shall issue a

press release in the form attached hereto as Exhibit A. By its release, the City acknowledges the unintentional violations of Government Code sections 54957, 54954.5, and 54956.9(b) as described in the press release.

(iii) Within 90 days of execution of this Agreement, City shall conduct a training program for City staff that manage public records on the requirements of the California Public Records Act (California Government Code Section 6250 *et seq.*) ("Public Records Act"). City shall allow Californians Aware to participate in the preparation of the training program and materials and the training program shall not be conducted by City Attorney Robert Wadden. Within 180 days, the City shall conduct a Brown Act training for all members of city boards and commissions subject to the Brown Act, which training shall also not be conducted by Robert Wadden; City shall allow Californians Aware to participate in the preparation of the Brown Act training program and materials.

(iv) The City Manager shall develop and adopt a protocol for responding to requests for public records which complies with the Public Records Act.

(v) The City Manager shall place on an upcoming City Council agenda a recommendation to reduce the fee for copies of public records from the current \$0.40 per page to \$0.10 per page.

(vi) The City will produce all public records in its possession responsive to McKee's public record requests of the City pertaining to the subject matter of the Action within 30 days of the execution of this Agreement. The City further states that the offer of the Resignation and Release Agreement was approved unanimously on December 12, 2009 and accepted by Mr. Dolan on December 13, 2009.

b. Obligations of McKee.

(i) Within 5 days of receipt of the payment described in paragraph (a) (i) above, McKee shall file the stipulation for judgment and proposed judgment set forth in Exhibit B. The Settling Parties both agree to any further acts and to execute and deliver any further documents that may be required by the Court to conclude this action.

(ii) McKee hereby represents and warrants that he agrees with the statements contained in the press release attached hereto as Exhibit A and may express agreement with and shall not in any manner contradict the statements contained in the press release attached hereto as Exhibit A.

2. Release.

McKee hereby fully and forever releases and discharges the City, its officers, employees, agents, attorneys and consultants from any and all past, present or future claims, actions, losses, liabilities, causes of action, liens, demands, rights, damages, costs, attorneys' fees, interest, expenses, reimbursement and compensation of any nature whatsoever, whether known or unknown, disclosed or undisclosed, and whether or not anticipated, in any way related to the Action

(a) Except as otherwise provided in this Agreement, McKee waives any and all claims for the recovery of any costs, expenses or fees, including attorneys' fees, against the City associated with the matters and claims released herein.

(b) In connection with the release of the claims described in this Agreement, McKee waives any and all rights that he may have under the provisions of California Civil Code §1542, which provides:

“A general release does not extend to claims which the creditor does not know or suspect to exist in his or her favor at the time of executing the release, which if known by him or her must have materially affected his or her settlement with the debtor.”

In the event that any waiver of the provisions of Section 1542 of the California Civil Code provided for in this Agreement shall be judicially determined to be invalid, voidable or unenforceable, for any reason, such waiver to that extent shall be severable from the remaining provisions of this Agreement, and the invalidity, voidability or unenforceability of the waiver shall not affect the validity, effect, enforceability or interpretation of the remaining provisions of this Agreement.

(c) This Agreement shall constitute an absolute bar to any future action or proceeding of any kind in any venue by Settling Parties or any person or entity acting in cooperation or conjunction with them or on their behalf against City relating to the matters raised in the Action.

(d) The provisions of this Section 2 will survive the execution and delivery of this Agreement.

(e) The provisions of this Section 2 shall not apply to an action by McKee to challenge the amount of the City's per page charge for copies of public records only if the City fails to reduce the per page copy cost to no more than \$0.10 within 180 days of the execution of this Agreement.

3. Representations and Warranties.

a. McKee hereby represents and warrants, as of the Effective Date, as follows:

(i) He has not heretofore assigned or transferred, or purported to assign or transfer, to any party not named herein any released matter or claim, or any part or portion thereof.

(ii) To the best of his knowledge, McKee is not aware of any existing claims nor of any facts that might give rise to any claims of any type or nature against City pertaining to the Action, whether asserted or not, that has not been fully released and discharged by the release set forth in this Agreement.

(iii) McKee is fully authorized to commit and bind himself to each and all of the commitments, terms and conditions hereof, and to release the claims

described herein, and that all documents and instruments relating thereto are, or, upon execution and delivery will be, valid and binding obligations, enforceable against him in accordance with their respective terms.

(iv) McKee has freely entered into this Agreement and is not entering into this Agreement because of any duress, fear, or undue influence and this Agreement is being entered into in good faith.

(v) McKee has made such investigation of the facts pertaining to this Agreement as he deems necessary.

(vi) McKee has, prior to the execution of this Agreement, obtained the advice of independent legal counsel of his own selection regarding the substance of this Agreement, and the claims released herein.

b. In executing this Agreement, each of the Settling Parties acknowledges, represents, and warrants to each other that he/it has not relied upon any statement or representation of any other party nor of any officer, agent, employee, representative, or attorney for any other party regarding any facts not expressly set forth within this Agreement. In entering into this Agreement, he/it assumes the risk of any misrepresentations, concealment or mistake, whether or not it should subsequently discover or assert for any reason that any fact relied upon by him/it in entering into this Agreement was untrue, or that any fact was concealed from him/it, or that his/its understanding of the facts or of the law was incorrect or incomplete.

c. The representations and warranties of each of the Settling Parties set forth in this Section 3 and elsewhere in this Agreement will survive the execution and delivery of this Agreement and are a material part of the consideration to each of the other Settling Parties in entering into this Agreement.

4. Interpretation.

a. All Settling Parties have cooperated in the drafting and preparation of this Agreement and in any construction or interpretation to be made of this Agreement, the same shall not be construed against any such Settling Party. This Agreement is the product of bargained for and arms length negotiations between the Settling Parties and their counsel. This Agreement is the joint product of the Settling Parties.

b. This Agreement is an integrated contract and sets forth the entire agreement between the parties hereto with respect to the subject matter contained herein. All agreements, covenants, representations and warranties, express or implied, oral or written, of the parties hereto with regard to such subject matter are contained in this Agreement. No other agreements, covenants, representations or warranties, express or implied, oral or written, have been made or relied on by any party hereto.

c. This Agreement may not be changed, modified or amended except by written instrument specifying that it amends such agreement and signed by the party against whom the enforcement of any waiver, change, modification, extension or discharge is sought. No waiver of any provision of this Agreement shall be deemed or

shall constitute a waiver of any other provision whether or not similar, nor shall any waiver be deemed a continuing waiver; and no waiver shall be implied from delay or be binding unless executed in writing by the party making the waiver.

d. All of the covenants, releases and other provisions herein contained in favor of the persons and entities released are made for the express benefit of each and all of the said persons and entities, each of which has the right to enforce such provisions.

e. This Agreement shall be binding upon and inure to the benefit of each of the Settling Parties, and their respective representatives, officers, employees, agents, heirs, devisees, successors and assigns.

f. Each party acknowledges and agrees that this Agreement is a compromise and settlement of their disputes and differences, and except as is set forth in Exhibit A and paragraph 1(a)(ii), is not an admission of liability or wrongdoing by any party.

g. McKee recognizes and acknowledges that nothing in this Agreement constrains the City's exercise of the full measure of its police powers and that all such powers are hereby reserved.

5. Further Cooperation. Each party shall perform any further acts and to execute and deliver any further documents that may be reasonably necessary or appropriate to carry out the provisions and intent of this Agreement.

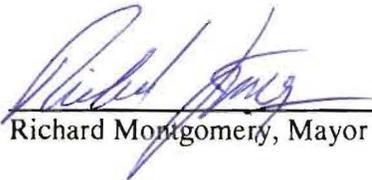
6. Attorneys' Fees. In the event of any litigation or arbitration claim concerning any controversy, claim or dispute between the parties arising out of or relating to this Agreement or the interpretation or enforcement thereof, other than as provided in Section 2(e), the prevailing party shall be entitled to recover from the other party its expenses and costs, including reasonable attorneys fees, incurred in conjunction therewith or in the enforcement or collection of any judgment or award rendered therein. The "prevailing party" means the party determined by the court to have prevailed, even if such party did not prevail in all matters, not necessarily the one in whose favor a judgment or award is rendered. Except as provided elsewhere in this Agreement, each party to this Agreement shall bear its own costs, attorneys' fees and other expenses incurred in association with negotiation and execution of this Agreement.

7. Governing Law; Venue. This agreement shall be governed by, and construed in accordance with, the laws of the State of California, without regard to any otherwise applicable principles of conflicts of laws. Any action arising out of this agreement must be commenced in the state courts of the State of California, County of Los Angeles, and each party hereby consents to the jurisdiction of the above court in any such action and to the laying of venue in the State of California, County of Los Angeles, and agrees that such courts have personal jurisdiction over each of them.

8. Counterparts. This Agreement may be executed in any number of counterparts, each of which when so executed shall be deemed to be an original, but such counterparts together shall constitute one and the same instrument.

IN WITNESS WHEREOF, the Settling Parties hereto have caused this Agreement to be duly executed as of the Effective Date.

CITY OF MANHATTAN BEACH and
MANHATTAN BEACH CITY COUNCIL


Richard Montgomery, Mayor

ATTEST:

 for Liza Tamura
~~Liza Tamura, City Clerk~~
Terri Aliabadi, Sr. Deputy City Clerk



RICHARD P. MCKEE


Richard McKee

APPROVED AS TO FORM:

Christi Hogin
Jenkins & Hogin LLP
Attorneys for City of Manhattan Beach
and Manhattan Beach City Council


Christi Hogin

Kelly A. Aviles
Law Offices of Kelly A. Aviles
Attorney for Richard P. McKee



Kelly A. Aviles

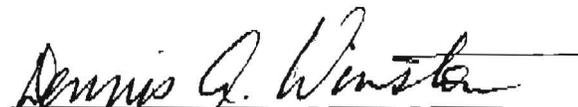
Dennis A. Winston
A Professional Law Corporation
Attorney for Richard P. McKee

Dennis A. Winston

Kelly A. Aviles
Law Offices of Kelly A. Aviles
Attorney for Richard P. McKee

Kelly A. Aviles

Dennis A. Winston
A Professional Law Corporation
Attorney for Richard P. McKee


Dennis A. Winston

DRAFT Press Release

The Manhattan Beach City Council has entered into a settlement with Richard McKee of the lawsuit he filed last year questioning the City's compliance with the Brown Act and the Public Records Act concerning the separation of former City Manager Geoff Dolan from the City.

Relying on the advice of the City Attorney in late 2009, the City Council met in closed session to discuss what it believed to be anticipated litigation and, in the course of those discussions, entered into a Resignation and Release Agreement with Geoff Dolan and took action to appoint an interim city manager to fill the management gap created by the Agreement with Dolan. Although the Agreement included a release of liability relating to potential litigation, the Agreement also served as Mr. Dolan's resignation, thus addressing a personnel matter.

After seeking outside legal advice from a law firm specializing in public law and consulting with Mr. McKee of Californians Aware, the City Council realizes that the agenda descriptions for the closed sessions involving these matters were unintentionally inadequate to meet the requirements of the Brown Act.

What began as closed session discussions to consider potential litigation, later included discussions that should have been agendized as personnel matters pursuant to the Brown Act. To the extent that the closed session discussions related to specific threats of litigation pursuant Government Code 54956.9(b), it is now clear that the City Attorney would have been required to publicly release the facts and circumstances behind this threat of litigation. This Brown Act requirement is meant to give the public the information it needs to be involved in the discussion of whether to seek a settlement or to move forward to oppose the threat.

Because this information was not released, the City Council understands some residents felt surprised and left in the dark when the City announced Mr. Dolan's abrupt resignation and the severance payment. The City Council will not make this mistake in the future.

At the same time, the City was also advised that the Resignation and Release Agreement with Mr. Dolan was a confidential personnel document not to be released. Again, upon consultation with outside legal counsel, the City Council now understands the Agreement and other documents associated with this matter are public records. These are now available to the public upon request.

The Council regrets these unintentional violations and the confusion they may have caused. The City Council was acting in good faith and in reliance on the City Attorney's advice to address a sensitive matter; however, the Council is dissatisfied with anything short of full compliance with both the spirit and the letter of the open meeting and public records laws. For this, Californians Aware has expressed its understanding and has pledged its support.

The Council believes that the City would be well served by conducting a mandatory training in the Public Records Act for all members of staff responsible for handling public records. The new City Manager will also be reviewing the City's protocol for responding to public records requests to ensure full compliance with the spirit and the letter of the law. Finally, to facilitate access to public records, the City Manager has indicated that he will recommend the City Council reduce the fee for copies of public records to from 40¢ per page to 10¢ per page. That recommendation will appear on an upcoming City Council agenda.

These actions and the payment of \$70,000 in attorneys fees has resulted in the settlement of the litigation.

###