

RESOLUTION 2018 - 25

**A RESOLUTION OF THE CITY OF SUNNYSIDE,
WASHINGTON, AUTHORIZING THE MAYOR TO SIGN THE
SEPARATION AND RELEASE AGREEMENT BETWEEN THE
CITY OF SUNNYSIDE AND DONALD DAY**

WHEREAS, the current City Manager Donald Day did on May 31, 2018 deliver to the City of Sunnyside his Letter of Retirement; and

WHEREAS, City Manager Donald Day agreed to remain in position throughout the remainder of the 2018 calendar year until a replacement City Manager was located; and

WHEREAS, the City of Sunnyside has now located and hired a replacement City Manager, who has taken oath of office and will begin employment on January 7th, 2019; and

WHEREAS, the City Council now formally accepts City Manager Donald Day's Letter of Retirement effective December 1, 2018 and the City Council and Donald Day have reviewed and wish to enter into the Separation and Release Agreement attached hereto as Exhibit A.

NOW, THEREFORE, IT IS HEREBY RESOLVED BY THE CITY COUNCIL OF THE CITY OF SUNNYSIDE, WASHINGTON, as follows:

SECTION 1. That the Mayor of the City of Sunnyside, Washington, is hereby authorized and directed to sign the Separation and Release Agreement between the City of Sunnyside, Washington, and Donald Day, a copy of which is attached hereto and incorporated herein by this reference as Exhibit A; and to take all necessary steps required for the implementation of this Agreement.

SECTION 2. This Resolution shall be effective upon passage, approval and signatures hereon as required by law.

PASSED this 6th day of December, 2018.



JULIA HART, MAYOR

ATTEST:



JACQUELINE RENTERIA, CITY CLERK

APPROVED AS TO FORM:

KERR LAW GROUP
Attorneys for the City of Sunnyside

EXHIBIT A

SEPARATION AND MUTUAL RELEASE AGREEMENT

THIS SEPARATION AND MUTUAL RELEASE AGREEMENT ("Agreement") is made and effective as of December 1, 2018, by and between DONALD DAY, hereinafter referred to as "Day", and the CITY OF SUNNYSIDE, a Washington Municipal corporation, hereinafter referred to as "City". Together, Day and the City are referred to as "Parties."

RECITALS

WHEREAS, Day is a former employee of the City and served as the City's City Manager, and the Parties wish to resolve any claim by either Party against the other and all other existing differences completely and amicably, without litigation. The Parties acknowledge that the payment and benefits afforded under this Agreement is being made for the sole purpose of avoiding the uncertainties, vexations, and expense of litigation, and

WHEREAS, the Parties represent that they have had an opportunity to seek the advice of their own counsel, are competent to enter into it, fully understand its terms and consequences, and enter into it knowingly and voluntarily.

WHEREAS, Day and the City wish to amicably separate Day's employment with the City, effective December 1, 2018, upon the terms and conditions set forth herein; and

WHEREAS, the Parties wish to clearly set forth the terms and conditions of Day's separation; and

NOW, THEREFORE, in consideration of the above recitals and of the mutual promises, terms and conditions contained in this Agreement, the sufficiency of such consideration being expressly acknowledged by the parties hereto, the Parties do hereby agree as follows:

1. NO ADMISSION. Neither this Agreement nor any action or acts taken in connection with this Agreement or pursuant to it will constitute an admission by either Party or any other person or entity of any violation of law, nor will it constitute or be construed as an admission of any wrongdoing whatsoever. In fact, each Party, its officers, employees, agents, and representatives specifically deny committing any unlawful act against the other Party at any time.

2. DATE OF SEPARATION. Day's separation from employment with the City is effective as of December 1, 2018.

3. PAYMENT AND BENEFITS. In consideration of the promises and covenants contained herein, the City will cause to be delivered to Day, a payment in the amount of Twenty-

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Five Thousand Six Hundred Fifty-Seven Dollars and 85/100s (\$25,657.85), minus standard withholdings (Payment). The Parties agree that said amount constitutes the sum of an amount equal to Day's standard salary for the entire month of December 2018 and compensation for Day's three hundred (300) hours of accumulated vacation time. The City will contribute to Day's established deferred compensation account pursuant to Day's participation in the City's deferred compensation plan for the month of December 2018. Also, the City will provide and pay the cost of the medical, optical, and dental benefits under the City's health plan for Day so that Day shall be covered by these medical, optical, and dental benefits through February 4, 2019. The Payment and deferred compensation contribution described in this Section 3 shall be paid after January 1, 2019 and on or before January 31, 2019. Except for the Payment, the deferred compensation contribution, and the medical, optical, and dental benefits described in this Section 3, Day acknowledges and agrees that he is entitled to receive no other payments, benefits, or compensation from the City. Day represents that there are no outstanding advances or other sums due to Day from the City.

4. TAX. Appropriate tax deductions shall be made by the City from the Payment made under Section 3.

5. RELEASE. Day and the City each agree that the foregoing consideration represents settlement in full of all outstanding obligations owed to Day by the City, with the exception of the Payment, contribution, and benefits described in Section 3 above. Day and the City, on behalf of themselves, and their respective heirs, executors, officers, directors, employees, predecessor and successor corporations, and assigns, hereby fully and forever release each other and their respective heirs, executors, officers, directors, employees, administrators, predecessor and successor corporations, and assigns, from, and agree not to sue concerning, any claim, duty, obligation or cause of action relating to any matters of any kind, whether presently known or unknown, suspected or unsuspected, that any of them may possess arising from any omissions, acts or facts that have occurred up until and including the date of execution of this Agreement, including, without limitation:

(a) Any and all claims relating to or arising from Day's employment relationship with the City, and the separation of the Parties from that relationship;

(b) Any and all claims for wrongful discharge of employment; termination in violation of public policy; discrimination; breach of contract, both express and implied; breach of a covenant of good faith and fair dealing, both express and implied; promissory estoppel; negligent or intentional infliction of emotional distress; negligent or intentional misrepresentation; negligent or intentional interference with contract or prospective economic advantage; unfair business practices; defamation; libel; slander; negligence; personal injury; assault; battery; invasion of privacy; and conversion;

(c) Any and all claims for violation of any federal, state or municipal statute, including, but not limited to, Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Age Discrimination in Employment Act of 1967, the Americans with Disabilities Act of 1990, the Fair Labor Standards Act, the Employee Retirement Income Security Act of 1974,

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The Worker Adjustment and Retraining Notification Act, Older Workers Benefit Protection Act; and Labor Code section 201, et seq. and section 970, et seq.;

(d) Any and all claims arising out of any other laws and regulations relating to employment or employment discrimination; and

(e) Any and all claims for attorneys' fees and costs.

The City and Day agree that the release set forth in this section shall be and remain in effect in all respects as a complete general release as to the matters released. Notwithstanding the provisions of this Paragraph 5, this release does not extend to (i) any obligations incurred under this Agreement, (ii) any rights to indemnification of Day against claims by third parties (a) to the extent that such claims are covered by the City's insurance, or (b) to the extent that Day is entitled to indemnification under Washington law.

6. NON-DISPARAGEMENT. Each Party agrees to refrain from any defamation, libel, or slander of the other, or tortious interference with the contracts and relationships of the other.

7. KNOWN OR UNKNOWN CLAIMS. The Parties understand and expressly agree that this Agreement extends to all claims of every nature and kind, known or unknown, past, present, or future, arising from or attributable to any conduct of either Party and its respective successors, subsidiaries, and affiliates, and all their employees, agents, officers, directors, predecessors, assigns, agents, representatives, and attorneys, whether known by the other Party, or whether or not the other Party believes it may have any claims, and that any and all rights granted to the other Party under federal law, state law, or regulations, are hereby expressly waived.

8. ACKNOWLEDGEMENT OF WAIVER OF CLAIMS. Day acknowledges that he is waiving and releasing any rights he may have under the Age Discrimination in Employment Act of 1967 ("ADEA"), and that this waiver and release is knowing and voluntary. Day and the City agree that this waiver and release does not apply to any rights or claims that may arise under ADEA after the effective date of this Agreement. Day acknowledges that the consideration given for this waiver and release Agreement is in addition to anything of value to which Day was already entitled. Day further acknowledges that he has been advised by this writing that (a) he should consult with an attorney prior to executing this Agreement; (b) he has at least twenty-one (21) days within which to consider this Agreement and if he takes fewer than the 21 days to review this Agreement he is thereby waiving any and all rights to the balance of the 21 day period; (c) pursuant to the ADEA he has at least seven (7) days following execution of this Agreement by the parties to revoke the Agreement by providing written notice of revocation to the City's City Clerk or the City Clerk's designee, and returning any and all consideration received under this Agreement, in which case the Agreement becomes null and void; and (d) this Agreement shall not be effective until the seven day revocation period has expired.

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9. CONTINUING OBLIGATIONS. This Agreement is not intended to, nor does it supersede or invalidate in any way, any non-disclosure, confidentiality, non-solicitation and/or non-competition agreement(s) previously signed and/or binding upon Day which remains in full force and effect, notwithstanding any provision in this Agreement.

10. NO ADMISSION OF WRONGDOING. This agreement shall not in any way be construed as an admission by the released Parties of any acts of wrongdoing whatsoever against the other Party or any other person.

11. FURTHER DOCUMENTS. Each Party agrees to execute or cause their legal counsel to execute any additional documents and take any further action, which may reasonably be required in order to consummate this Agreement or otherwise fulfill the obligations of the Parties thereunder.

12. DISPUTE. In the event of any dispute arising between the parties concerning the enforcement, breach, interpretation of this Agreement, the parties shall first meet in a good faith attempt to resolve the dispute. In the event the dispute remains, it shall be resolved pursuant to RCW 7.04A, as amended. Both parties waive trial by jury in the event of a De Novo appeal. Venue for such arbitration shall be placed in Yakima County, Washington, and the prevailing party shall be entitled to recover its costs, expenses, including reasonable attorneys' fees against the other.

13. MODIFICATION AND WAIVER. Any modifications to this Agreement must be in writing and signed by duly authorized representatives of each of the Parties and must be expressly state that it is the intention of each of the Parties hereto to amend the Agreement. No breach of any provision of this Agreement shall be deemed waived unless the waiver is in writing signed by a duly authorized representative of the waiving party. Waiver of any one breach shall not be deemed a waiver of any other breach of the same or any other provision of this Agreement.

14. CONSTRUCTION. This Agreement shall be construed and enforced in accordance with the laws of the State of Washington.

15. INTEGRATION. This Agreement constitutes an integration of the entire understanding and agreement of the Parties with respect to the matters referred to in this Agreement. Any representation, warranty, promise or condition, whether written or oral, between the Parties with respect to the matters referred to in this Agreement which is not specifically incorporated in this Agreement shall not be binding upon any of the Parties hereto, and the Parties acknowledge that they have not relied upon any representations, warranties, promises or conditions not specifically set forth in this Agreement. No prior or contemporaneous oral or written understanding, covenant, or agreement between the Parties, with respect to the matters referred to in this Agreement, shall survive the execution of this Agreement.

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16. BINDING AGREEMENT. The Parties understand and expressly agree that this Agreement shall bind and benefit (as applicable) the heirs, employees, officers, directors, subsidiaries, spouses, affiliates, successors, predecessors, agents, witnesses, attorneys, representatives, and assigns of the City and Day. The City represents and warrants that the undersigned has the authority to act on behalf of the City and to bind the City and all who may claim through it pursuant to the terms and conditions of this Agreement. Day represents and warrants that he has the capacity to act on his own behalf and on behalf of all who might claim through him to bind them to the terms and conditions of this Agreement. Each Party warrants and represents that except as provided herein, there are no liens or claims of lien or assignments in law or equity or otherwise of or against any of the claims or causes of action released herein.

17. COUNTERPARTS. This Agreement may be executed in counterparts and when each party has signed and delivered at least one such counterpart, each counterpart shall be deemed an original and all counterparts taken together shall constitute one and the same Agreement, which shall be binding and effective as to all Parties.

18. HEADINGS. Headings in this Agreement are for convenience of reference only and are not a part of the substance hereof.

19. SEVERABILITY. If any provision of this Agreement is held to be invalid, void or unenforceable, the remaining provisions shall remain in full force and effect, except that, should Sections five (5) or seven (7) be held invalid, void or unenforceable, either jointly or separately, as a result of any action by Day, the City shall be entitled to rescind the Agreement and/or recover from Day any benefits provided to him under paragraph three (3) above.

IN WITNESS WHEREOF, the parties hereto have caused this Separation and Release Agreement to be duly executed as of the day and year first above written.

CITY:

DAY:

Julia Hart
Mayor of the City of Sunnyside

Donald Day

