

RESOLUTION NO. 10873

RESOLUTION OF THE CITY COUNCIL OF THE CITY OF
NEWARK APPOINTING DAVID J. BENOUN AS CITY
MANAGER EFFECTIVE DECEMBER, 29, 2018, AND
AUTHORIZING MAYOR NAGY TO EXECUTE A CITY
MANAGER EMPLOYMENT AGREEMENT

WHEREAS, on September 13, 2018, City Manager John Becker provided his resignation to the City of Newark, effective December 28, 2018; and

WHEREAS, the City Council met in closed session to consider the appointment of a new City Manager, including Mr. David J. Benoun, the current City Attorney. After an interview with Mr. Benoun, the City Council offered Mr. Benoun the position of City Manager, and he accepted; and

WHEREAS, the City Council appointed Mayor Nagy to meet with Mr. Benoun to negotiate an employment agreement. Mayor Nagy evaluated executive compensation within the City and compensation of city managers in Alameda County and comparable cities. Mayor Nagy also considered the City Council's opinion of Mr. Benoun's prior work and experience with the City. As a result of those factors and contract negotiations, Mayor Nagy recommended a City Manager Employment Agreement to the City Council; and

WHEREAS, the City Council desires to execute an employment agreement with Mr. Benoun that establishes the terms and conditions of his employment as City Manager.

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

1. The City Council hereby appoints David J. Benoun as City Manager of the City of Newark, effective December 29, 2018, pursuant to the Newark Municipal Code and the terms of the attached City Manager Employment Agreement.

2. The City Council hereby approves the City Manager Employment Agreement between the City of Newark and David J. Benoun, substantially in the form attached hereto as **Exhibit "1,"** and authorizes Mayor Nagy to execute the Agreement on behalf of the City, as approved by Special Counsel.

3083085.1

I HEREBY CERTIFY the foregoing resolution was introduced at a regular meeting of the City Council of the City of Newark held on December 13, 2018, by Council Member Bucci who moved its adoption and passage, which motion was carried after being duly seconded, and passed by the following vote:

AYES: Council Members Bucci, Collazo, Freitas, Vice Mayor Hannon, and Mayor Nagy

NOES: None

ABSENT: None

SECONDED: Vice Mayor Hannon

APPROVED:



s/ALAN L. NAGY

Mayor

ATTEST:



s/SHEILA HARRINGTON

City Clerk

APPROVED AS TO FORM:



s/KRISTOPHER KOKOTAYLO

Legal Counsel

EMPLOYMENT AGREEMENT

THIS AGREEMENT, effective this 29th day of December, 2018, by and between THE CITY OF NEWARK ("CITY") and DAVID J. BENOUN ("BENOUN") (collectively the "PARTIES").

RECITALS

Whereas, CITY currently employs BENOUN as City Attorney;

Whereas, City Council, as appointing authority, desires to employ BENOUN as City Manager, starting December 29, 2018; and BENOUN desires to serve in such capacity; and

Whereas, the City Council and BENOUN desire to agree in writing on the terms and conditions of employment.

NOW THEREFORE, in consideration of the mutual covenants, promises, and representations hereinafter set forth, the PARTIES hereto do now agree as follows:

SECTION I
DUTIES

(a) CITY hereby agrees to employ BENOUN, commencing December 29, 2018, as City Manager of the CITY to perform the functions and duties specified by the general laws of the State of California and by the Newark Municipal Code and other ordinances and resolutions of CITY, and to perform other legally permissible and proper duties and functions as Council may from time to time assign.

(b) CITY currently employs BENOUN as City Attorney. On December 29, 2018, BENOUN shall vacate the Office of City Attorney and shall immediately commence his duties as City Manager on that day.

(c) BENOUN agrees to devote his productive time, ability, and attention to the CITY's business during the term of this Agreement. BENOUN shall not hold secondary employment, and shall be employed exclusively by the CITY. However, the CITY recognizes that BENOUN may actively participate in community affairs and shall be permitted to volunteer time, energy and expertise, and from time-to-time, to serve and hold office in charitable, non-profit, public service, service club, religious, and/or community area organizations. In addition this Agreement shall not be construed to preclude incidental and occasional adjunct teaching, writing, or consulting performed by BENOUN.

SECTION II
TERM

The term of this Agreement shall be from the date approved by the City Council until terminated by either party in accordance with the provisions of Section III. BENOUN shall serve at the pleasure of the City Council.

The PARTIES recognize and affirm that: 1) BENOUN is an "at will" employee whose employment may be terminated by the CITY with or without cause; 2) there is no express or implied promise made to BENOUN for any form of continued employment; and 3) this Agreement is the sole and exclusive basis for an employment relationship between BENOUN and CITY.

SECTION III
TERMINATION OF EMPLOYMENT AND SEVERANCE

City Manager is an at-will employee serving at the pleasure of the City Council as provided in Government Code Section 36506. The position of City Manager is a Fair Labor Standards Act ("FLSA")-exempt position. BENOUN's employment as City Manager may be terminated by one of the following means:

- (a) Voluntary Resignation: BENOUN may voluntarily resign by delivering a letter of resignation to the City Council not less than 60 days prior to the effective date of resignation.
- (b) Termination or Forced Resignation by City Council: The City Council may terminate the employment of BENOUN in accordance with the Newark Municipal Code and State law, by giving written notice not less than 60 days prior to the effective date of termination, or by causing BENOUN's resignation by a majority of the City Council requesting BENOUN to resign and BENOUN then volunteering to resign after such action by the City Council. If BENOUN is terminated from employment or caused to resign, he shall be entitled to the benefits of subparagraph (c).
- (c) Severance: In the event BENOUN is terminated from employment by the City Council or is caused to resign by the City Council pursuant to subsection (b) above, and contingent upon BENOUN's execution of a comprehensive general release and waiver of all claims of any nature, known or unknown, by BENOUN against CITY, BENOUN shall be entitled to six (6) month's severance pay of his annual total compensation, including salary and the value of his benefits. In no event will BENOUN be entitled to a severance agreement absent execution of a comprehensive general release and waiver of claims. Such severance shall be paid in full upon the effective date of his termination. BENOUN may elect to receive continued medical/health insurance benefits, in lieu of cash payment for equivalent value thereof.
- (d) Abuse of Office: Pursuant to Government Code section 53243.2, any cash settlement related to the termination of this Agreement received by BENOUN from CITY shall be fully reimbursed to CITY if BENOUN is convicted of a crime involving an abuse of his office or position as defined in California Government Code section 53243.4.

SECTION IV
DISABILITIES

If BENOUN is permanently disabled or is otherwise unable to perform his duties because of sickness, accident, injury, mental incapacity or health for a period of four (4) successive weeks beyond any accrued sick leave, CITY shall have the option to terminate this Agreement, subject to the severance pay requirements of Section III, Paragraph (b).

SECTION V
COMPENSATION

- (a) Commencing December 29, 2018, the base salary for BENOUN shall be the sum of \$20,341 per month (\$244,092 per year), which sum shall be payable in installments at the same time as other employees of the CITY are paid and subject to customary withholdings.
- (b) BENOUN is a salaried employee and is exempt from the FLSA.
- (c) BENOUN, as City Manager, shall participate in the Compensation and Benefit Plan for City Officials and the Management, Supervisory, and Professional Employee Group (hereinafter "The Plan"). BENOUN shall receive salary increases as the CITY may from time to time confer pursuant to The Plan.
- (d) The City Council may also from time to time, at its sole discretion, grant merit increases to BENOUN following each evaluation of BENOUN' s performance as described in Section VII.
- (e) BENOUN shall receive the benefits of a "Classic" employee as that term is defined in Section VI of The Plan.

SECTION VI
HEALTH INSURANCE, DEFERRED COMPENSATION, AUTOMOBILE ALLOWANCE,
HOLIDAYS, LEAVE, AND OTHER BENEFITS

- (a) For the purposes of general leave and management leave allocations and receiving deferred compensation, health insurance benefits, life insurance payments, automobile allowance, and such other similar benefits, BENOUN shall be considered a member of the Executive Management Team as identified in Section II of the Plan and shall receive existing benefits under The Plan, as may be adjusted from time to time, including, but not limited to:
 - i. A contribution from CITY of 6% of earnings towards a 401(A) plan pursuant to Section V of The Plan (or any successor thereto);
 - ii. A monthly contribution of \$100 towards a Retirement Health Savings Plan pursuant to Section V of the Plan (or any successor thereto)
 - iii. Health and Welfare Benefits under Section VII of The Plan (or any successor thereto);
 - iv. CITY-paid life insurance coverage of \$20,000 pursuant to Section VIII of The Plan (or any successor thereto);
 - v. Automobile allowance of \$400 per month pursuant to Section XI of The Plan (or any successor thereto);
 - vi. Holidays, General Leave, Bereavement Leave, Birthday Leave, and Recreation Benefits awarded under The Plan.
- (b) Any benefits BENOUN earned or accrued as a CITY employee prior to entering into this Agreement, including General Leave and Management Leave, shall not be affected by this Agreement.

- (c) In recognition of extra hours of work required in the performance of his duties in which no form of overtime pay is provided, BENOUN shall receive an annual allotment of 56 hours per year of Management Leave during the Term of this Agreement as provided to participants of The Plan; unless otherwise agreed to by the Parties.
- (d) For Fiscal Year 2018-2019 and in recognition of the number of extra hours of work performed in connection with the transition from City Attorney to City Manager, BENOUN shall receive a one-time additional allocation of 45 hours of Management Leave, thereby increasing Management Leave for FY 2018-2019 to 101 hours.

SECTION VII
EVALUATION OF PERFORMANCE

The City Council shall review and evaluate the performance of BENOUN at least annually or at other times chosen by the Council in its sole discretion. Said review and evaluation shall be in accordance with specific criteria developed by the Council with consultation from BENOUN. Said criteria may be added to or deleted from as the Council may from time to time determine, in consultation with BENOUN. Further, the Council shall provide BENOUN with a summary written statement of the findings of the Council and provide an adequate opportunity for BENOUN to discuss his evaluation with the Council.

The City Council and BENOUN shall, no later than March 31, 2019, meet to define such goals and performance objectives which they determine necessary for the proper operations of the CITY and in the attainment of the Council's policy objectives, and shall further establish a relative priority among those various goals and objectives, said goals and objectives to be reduced to writing. They shall generally be reasonably attainable within the time limitations as specified in the annual operating and capital budgets and appropriations provided. They shall be reviewed within 90 days of defining such goals and performance objectives. Annually thereafter (or at any time agreed to by the PARTIES), Council and BENOUN shall meet to engage in the same discussion.

SECTION VIII
PHYSICAL EXAMINATION

It is recognized to be in the best interest of both PARTIES that BENOUN maintain good health and the physical ability to fulfill his duties as City Manager. To this end, the City will pay the cost of one complete physical examination conducted annually by the physician of BENOUN's choice.

SECTION IV
PROFESSIONAL DEVELOPMENT

CITY acknowledges its interest in the continuing professional development of BENOUN and agrees to pay reasonable expenses associated with attendance at professional conferences, continuing education, professional memberships, books and dues. This includes, but is not limited to, the League of California Cities, the International City Management Association, and the California City Managers Association. CITY acknowledges BENOUN's right to engage in other professional activities so long as they do not interfere or conflict with BENOUN's duties as City Manager and are done during time in which BENOUN is on leave or during normal nonworking hours.

SECTION X
HOLD HARMLESS AND INDEMNIFICATION

City shall defend, hold harmless, and indemnify BENOUN against any tort, professional liability claim or demand, or other legal action, whether groundless or otherwise, arising out of an alleged act or omission of BENOUN made in the course of his performance of duties as City Manager. CITY shall pay the amount of any settlement or judgment rendered therefrom, to the extent specified in the California Government Code.

SECTION XI
MISCELLANEOUS

- (a) Binding Agreement: This Agreement shall be binding on the heirs, successors and assigns of the PARTIES.
- (b) The Rights of PARTIES: Unless expressly set forth in this Agreement, nothing in this Agreement shall abrogate any rights, responsibilities, benefits, or privileges to which either party would otherwise be entitled.
- (c) Amendment: This Agreement may be amended only in writing by mutual agreement of the PARTIES.
- (d) State Law: The rights and obligations of the PARTIES shall be governed by the laws of the State of California.
- (e) Abuse of Office: Government Code sections 53243, 53243.1, 53243.2, and 53243.3 are incorporated by this reference as if fully set forth herein.
- (f) Recitals: Recitals are incorporated by reference into this Agreement.
- (g) Failure to Act: Failure to exercise any right or remedy shall not act as a waiver to exercise that right.
- (h) Entire Agreement: This Agreement contains the entire agreement between the PARTIES and supersedes any prior agreement.
- (i) Severability: Should any paragraph, subparagraph, sentence clause or word included in this Agreement be found invalid by a court of competent jurisdiction, the balance of this Agreement shall remain in full force and effect.
- (j) Attorneys' Fees: The prevailing party of any dispute over the terms and conditions of this Agreement is entitled to attorney fees.
- (k) Assignment: This Agreement is not assignable by either CITY or BENOUN.

IN WITNESS WHEREOF, the PARTIES hereto have hereunto affixed their signatures as of the date and year first above written.

CITY OF NEWARK

By: Alan L. Nagy
ALAN L. NAGY
Mayor

ATTEST:

Sheila Harrington
SHEILA HARRINGTON
City Clerk

APPROVED AS TO FORM:

K Kokotaylo
KRISTOPHER J. KOKOTAYLO, Esq.
Special Counsel

David J. Benoun
DAVID J. BENOUN
City Manager

3083084.2

RESOLUTION NO. 11,557

RESOLUTION OF THE CITY COUNCIL OF THE CITY OF NEWARK APPROVING AN AMENDMENT TO THE CITY MANAGER EMPLOYMENT AGREEMENT WITH DAVID J. BENOUN; APPROVING AN AMENDMENT TO THE CITY'S SALARY SCHEDULE IN CONFORMANCE WITH CALIFORNIA CODE OF REGULATIONS, TITLE 2, SECTION 570.5; AND APPROVING AN AMENDMENT TO THE 2022-2024 BIENNIAL BUDGET AND CAPITAL IMPROVEMENT PLAN FOR FISCAL YEAR 2024

WHEREAS, the City Council appointed David J. Benoun ("Benoun") to serve as the City Manager of Newark effective as of December 29, 2018; and

WHEREAS, the City and Benoun entered into an employment agreement (the "Employment Agreement"); and

WHEREAS, under the terms of the Employment Agreement, Benoun's initial annual base salary was set at \$244,092 per year; and

WHEREAS, the City Council previously approved an amendment to the Employment Agreement authorizing a merit increase to Benoun's base salary effective July 1, 2022 (the "First Amendment"); and

WHEREAS, the City Council has conducted annual performance evaluations of Benoun since his initial appointment as City Manager; and

WHEREAS, following the conclusion of Benoun's most recent performance evaluation, the City Council designated Mayor Hannon as labor negotiator to discuss a merit increase for Benoun; and

WHEREAS, the City Council has had an opportunity to consider a potential merit increase for Benoun; and

WHEREAS, the City Council desires to provide Benoun with a five percent (5%) merit increase in annual base salary, effective as of July 1, 2023; and

WHEREAS, Benoun has and will continue to receive cost of living general salary increases equal to the amounts provided to classifications that participate in the Compensation and Benefit Plan for the Management, Supervisory, and Professional Employee Group, as provided for by the Employment Agreement.

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

1. The above recitals are true and correct and are incorporated herein.

2. The City Council approves an amendment to the Employment Agreement substantially in the form attached hereto as **Exhibit "1,"** and authorizes Mayor Hannon to execute the amendment on behalf of the City, in a form approved by the City Attorney.

3. The City Council hereby approves an amendment to the City's Salary Schedule to reflect the revisions in compensation provided pursuant to the MOU, effective July 1, 2023.

BE IT FURTHER RESOLVED that the City Council hereby authorizes an amendment to the 2022-2024 Biennial Budget and Capital Improvement Plan for Fiscal Year 2024 as follows:

TO:	110.20.020.200.5110	City Manager's Office Salaries	\$34,000
FR:	110.3000	Unallocated Fund Balance	\$34,000

I HEREBY CERTIFY the foregoing resolution was introduced at a regular meeting of the City Council of the City of Newark held on July 27, 2023, by Council Member Bucci who moved its adoption and passage, which motion was carried after being duly seconded, and passed by the following vote:

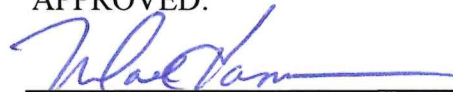
AYES: Council Members Bucci, Freitas, Jorgens, Vice Mayor Collazo and Mayor Hannon

NOES: None

ABSENT: None

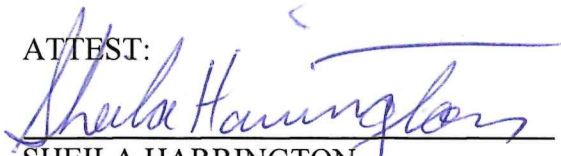
SECONDED: Vice Mayor Collazo

APPROVED:



MICHAEL K. HANNON
Mayor

ATTEST:



SHEILA HARRINGTON
City Clerk

APPROVED AS TO FORM:



KRISTOPHER J. KOKOTAYLO
City Attorney

**AMENDMENT NO. 2 TO CITY OF NEWARK
CITY MANAGER EMPLOYMENT AGREEMENT**

THIS AMENDMENT to the Employment Agreement (“Amendment”) is made by and between THE CITY OF NEWARK (“CITY”) and DAVID J. BENOUN (“BENOUN”) (collectively the “PARTIES”) as of July 1, 2023.

RECITALS

1. The PARTIES entered into an Employment Agreement (“Agreement”), effective December 29, 2018, under which BENOUN would serve as the City Manager of the CITY; and
2. The PARTIES entered into Amendment No. 1 to the Agreement, effective July 1, 2022 (the “First Amendment”); and
3. The purpose of this Amendment is to provide for a merit increase to BENOUN’s salary effective as of July 1, 2023.

AGREEMENT

Section 1 **General Provisions.**

The foregoing Recitals are true and correct and incorporated herein by reference.

Section 2 **Increase of Compensation Pursuant to Section V(d) and Amendment of Section V(a).**

Pursuant to Section V(d) of the Agreement, BENOUN shall receive a 5% merit increase in base salary and Section V (a) of the Agreement shall be amended as follows:

Commencing July 1, 2023, the base salary for BENOUN shall be the sum of \$27,036.10 per month (\$324,433.20 per year), which sum shall be payable in installments at the same time as other employees of the CITY are paid and subject to customary withholdings and shall reflect a 5% merit increase and a 3% general salary increase provided to employees in the Compensation and Benefit Plan for City Officials and the Management, Supervisory, and Professional Employee Group which are in addition to prior merit and general salary increases.

Section 3 **Effect of this Second Amendment**

Except as the Agreement, as previously modified by the First Amendment, has been expressly modified by the Amendment, the Agreement shall continue in full force and effect according to its terms.

IN WITNESS WHEREOF, the PARTIES hereto have hereunto affixed their signatures as of the date and year first above written.

CITY OF NEWARK

By: 
MICHAEL K. HANNON
Mayor

ATTEST:


SHEILA HARRINGTON
City Clerk

APPROVED AS TO FORM:


KRISTOPHER J. KOKOTAYLO
City Attorney


DAVID J. BENOUN
City Manager