

FIFTH AMENDED AND RESTATED EMPLOYMENT AGREEMENT

CITY OF NEWPORT BEACH CITY MANAGER

This FIFTH AMENDED AND RESTATED EMPLOYMENT AGREEMENT ("Agreement") is made effective as of April 25, 2017 ("Effective Date") and is entered into by and between the CITY OF NEWPORT BEACH, a California municipal corporation and Charter City ("Employer" or "City") and DAVID KIFF ("Employee") an individual (sometimes collectively referred to herein as "the Parties").

RECITALS

- A. City is a municipal corporation duly organized and validly existing under the laws of the State of California with the power to carry on its business as it is now being conducted under the statutes of the State of California and the Charter of City.
- B. Employee has been continuously employed by City as City Manager since September 12, 2009. Employee is currently employed under a Fourth Amended and Restated Employment Agreement dated February 23, 2016 ("Employment Agreement").
- C. The Parties mutually agree that they intend for this Agreement to supersede all prior Employment Agreements, and that upon execution of this Agreement, any prior Employment Agreements shall have no force or effect.
- D. The Parties also mutually agree that this form of Agreement reflects the terms and conditions under which the Parties intend and desire to continue Employee's employment, and that there are no other agreements between them; oral, written or implied.

NOW, THEREFORE, it is mutually agreed by and between the undersigned Parties as follows:

SECTION 1: Term and Notice of Non-Renewal

This Agreement shall become effective April 25, 2017 ("Effective Date"). Subject to City's right to terminate Employee's employment at any time, as provided for in this Agreement, the Term of this Agreement is two (2) years from the Effective Date, and shall automatically be extended for one additional twelve (12) month period on each annual anniversary of the Effective Date of the Agreement, unless City notifies Employee of its intent not to extend the Agreement at least six (6) months prior to expiration of the original Term or any subsequent automatic extension of the Term of this Agreement. City's election not to extend this Agreement shall not entitle Employee to severance pursuant to Section 7 of this Agreement.

SECTION 2: Duties and Authority

Employer agrees to employ Employee as City Manager to exercise the powers and authority and to perform the functions and duties specified in the Newport Beach City Charter, the Municipal Code and all relevant resolutions, rules, regulations, procedures, applicable job description(s) and state codes, as they currently or may in the future exist. Employee shall exercise such power and authority and perform such other functions and duties, not inconsistent with this Agreement, as Employer, by its City Council, may legally assign.

SECTION 3: Compensation and Performance Evaluation.

- A. Employer agrees to pay Employee an annual base salary of \$265,680 (Two hundred sixty five thousand and six hundred and eighty dollars) ("Base Salary"), subject to deductions and withholding of any and all sums required for federal or state income tax, pension contributions, and all other taxes, deductions or

withholdings required by then current state, federal or local law, prorated and paid on Employer's normal paydays for the City Manager, City Attorney, City Clerk, and any Department Directors not covered by collective bargaining agreements ("Executive Management Employees"). Employer shall also deduct sums Employee is obligated to pay because of participation in plans or programs described in Section 4 of this Agreement. The annual Base Salary of Employee is within the approved salary range adopted by resolution of the City Council. This Agreement shall be deemed amended whenever the City Council adopts a resolution changing the Base Salary of Executive Management Employees or the manner (but not the amount) by which Executive Management Employees are paid.

- B. Employer, by the City Council, and Employee may set mutually-agreed upon objectives for each year under this Agreement. Employer, by the City Council, may elect to conduct an evaluation of Employee's performance at any time or times during the period in which this Agreement remains in effect.
- C. Employee's compensation as discussed under this Section is not tied to the compensation of any other City employee or group of City employees, except as expressly provided in this Agreement. City and Employee agree to reexamine Employee's compensation after year one of the initial term of this Agreement.

SECTION 4: Employee Benefits

- A. Benefit Balances Carried Over. Employee shall not have a break in his employment service between the prior Employment Agreement and this Agreement. All of Employee's accrued leave and other benefit balances shall carry over as agreed, and his leave and benefit balances shall continue to accrue under the terms of applicable City policies and this Agreement.
- B. Flex Leave. Employee shall accumulate Flex Leave as provided in the City's Key and Management Compensation Plan, Executive Management category

("Compensation Plan"), at the current rate of 9.69 hours per Pay Period. Employee's Maximum accrual for Flex Leave is limited to 400 (four hundred) hours. The right to sell back accumulated Flex Leave shall be consistent with the Compensation Plan.

- C. Administrative Leave. Employee shall be entitled to 80 (eighty) hours of paid Administrative Leave. Administrative Leave will not accrue from calendar year to calendar year and must be used or lost at the conclusion of each calendar year. Consistent with the Compensation Plan, there is no right to sell back or cash out any accumulated Administrative Leave.
- D. Additional Benefits. Except as expressly provided herein, Employee shall receive the same health insurance and retirement benefits, and be entitled to participate in plans and programs such as short term and long term disability plans, life insurance plans, and deferred compensation plans, as are available under the Compensation Plan. This Agreement shall be deemed amended as to these benefits, and these benefits only, whenever the City Council adopts a resolution or takes action changing these benefits under the Compensation Plan.
- E. Employee shall receive one percent (1%) of Employee's Base Salary in the form of an Employer paid deferred compensation contribution to Employer's approved deferred compensation plan.
- F. Annual Physical Exam. Employee may undergo an annual physical examination and City shall reimburse Employee for the actual cost of the examination up to a maximum of \$1,250 (One thousand two hundred fifty dollars).
- G. Automobile Allowance. Employee's duties require him to be available and respond to demands of City business at all times and outside of regular business hours, including weekends. Employer shall, therefore, pay to Employee \$500 (Five hundred dollars) per month as an automobile allowance so that Employee may respond to these demands of City business.

- H. Phone Allowance. Employee shall be entitled to the same phone allowance as provided to any Executive Management member.
- I. Amendment of Benefits. Employee's benefits provided under this Section 4 are not tied to the compensation of any other City employee or group of City employees except as expressly provided in this Section.
- J. PERS. Employee contributes thirteen percent (13%) of compensation earnable towards Employee's retirement benefit, which is designated as follows: 8% of Employee/Member's total PERSable salary as the Employee/Member Contribution; and 2.42% and 2.58% of the Employer Contribution Rate as cost sharing in accordance with Government Code sections 20516(a) and 20516(f) respectively.

The Parties agree that the City will not report as special compensation the value of any Employer Paid Member Contribution. In the event the City Council adopts a Compensation Plan in which retirement contributions for non-safety members of the Key & Management Group exceeds 13.00%, this Agreement shall be deemed amended and Employee will be subject to the same formula or percentage contribution as it is applied to the non-safety members of the Key & Management Group covered under the Compensation Plan and for the same duration. In no event shall the Employee's retirement contribution be less than 13.00%. Employee retirement contributions that are in addition to the normal PERS Member Contribution shall be calculated on Base Salary, special pays, and other pays normally reported as "PERSable" compensation, and will be made on a pre-tax basis through payroll deduction, to the extent allowable by the Government Code.

SECTION 5: General Business Expenses

- A. Employer recognizes that Employee may incur expenses of a non-personal, job related nature that are reasonably necessary to Employee's service to Employer.

Employer agrees to either pay such expenses in advance or to reimburse the expenses, so long as the expenses are incurred and submitted according to Employer's normal expense reimbursement procedures or such other procedure as may be designated by the City Council. To be eligible for reimbursement, all expenses must be supported by documentation meeting Employer's normal requirements and must be submitted within time limits established by Employer.

- B. Employer agrees to budget and pay for professional dues, membership and subscriptions of Employee necessary for continuation and participation in the International City/County Management Association (ICMA), Cal-ICMA, the California City Manager's Foundation (CCMF), and state and national League of Cities and such other organizations as Employer and Employee may agree from time to time. Employer also agrees to pay the cost of a corporate surety bond as contemplated by section 503 of the City Charter.
- C. Employer agrees to budget and to reimburse or pay for reasonable costs for attendance and participation in meetings, institutes, training programs, conferences, conventions and similar gatherings that support leadership development and the advancement of Employer and Employee's mutually agreed upon goals, and which are related to Employee's duties or Employer's operations and held in the continental United States. For purposes of this paragraph, reasonable expenses are limited to the reasonable and actual cost of registration, coach-class airfare (where applicable), ground transportation and meals. Reasonable expenses will also include the reasonable and actual cost of lodging for meetings outside of Orange County.
- D. The expenses to be budgeted and paid in the Section 5, Paragraphs A, B, and C above, are exclusive of reasonable expenses related to events, participation in organizations, or attendance at events or meetings on behalf of the City as required by the City Council. Employer will separately budget and pay for membership and participation in community, civic or other organizations or events in which Employer requires Employee to participate.

SECTION 6: At-Will Employment Relationship

- A. Consistent with Article VI of the City Charter, Section 600, Employee is appointed by, and serves at the pleasure of, the City Council. Nothing in this Agreement shall prevent, limit or otherwise interfere with the right of Employer to terminate this Agreement and the employment of Employee at any time, with or without Cause (as defined below), and with or without notice. Employer shall pay Employee for all services through the Effective Date of termination and Employee shall have no right to any additional compensation or payment, except as provided in Section 7, Severance and Benefit Payoff at Termination, and General Release Agreement, below.

- B. Nothing in this Agreement shall prevent, limit or otherwise interfere with the right of Employee to resign from his employment with Employer, subject only to Employee providing forty-five (45) calendar days prior written notice to Employer of the effective date of his resignation. Upon the effective date of resignation, Employee forfeits all compensation and benefits owing for the remainder of the term of this Agreement, as well as any potential severance pay.

SECTION 7: Severance and Benefit Payoff at Termination, and General Release Agreement

- A. If Employer terminates this Agreement (thereby terminating Employee's Employment) without Cause, as determined by the affirmative votes of a majority of the members of the City Council at a meeting of the City Council, and if Employee signs, delivers to the City Council, and does not revoke, the General Release Agreement in the form attached hereto as Exhibit A, Employer shall pay Employee beginning on the effective date of termination a lump sum benefit equal to six (6) months of his then applicable Base Salary, and shall provide six (6) months of medical coverage as provided under the Compensation Plan as long as employee is already enrolled and receiving medical coverage through the City medical benefits plan at time of termination (collectively, "Severance").

B. If Employer terminates this Agreement (thereby terminating Employee's Employment) with Cause, as determined by the affirmative votes of a majority of the members of the City Council at a meeting of the City Council, Employee shall not be entitled to any additional compensation or payment, including Severance. If the City Council intends to terminate with Cause, based on a reason or reasons set forth in subpart 5 or 6, immediately below, the Council shall first deliver to Employee a written Notice of Intent to Terminate, stating the reason or reasons for the proposed termination, and providing a thirty (30) day period for Employee to cure. If, in the City Council's independent judgment, Employee cures the identified reason or reasons for Cause termination, Employee shall not be terminated therefor. As used in this Agreement, Cause shall mean any of the following:

1. Conviction of a felony;
2. Conviction of a misdemeanor arising out of Employee's duties under this Agreement and involving a willful or intentional violation of law;
3. Conviction of any crime involving an "abuse of office or position," as that term is defined in Government Code section 53243.4;
4. Willful abandonment of duties;
5. Repeated failure to carry out a directive or directives of the City Council made by the City Council as a body; and
6. Any grossly negligent action or inaction by Employee that materially and adversely: (a) impedes or disrupts the operations of Employer or its organizational units; (b) is detrimental to employees or public safety; or (c) violates properly established rules or procedures of Employer.

C. In no event may Employee be terminated within ninety (90) days after any municipal election for the selection or recall of one or more of the members of the City Council.

- D. If Employee terminates this Agreement (thereby terminating Employee's employment), Employee shall not be entitled to any additional compensation or payment, including Severance.
- E. Upon termination (regardless of reason), Employee shall be compensated for all accrued but unused Flex Leave. No compensation shall be paid for any accrued but unused Administrative Leave.

SECTION 8: Employee's Obligations and Hours of Work

Employee shall devote his full energies, interest, abilities and productive time to the performance of this Agreement and utilize his best efforts to promote Employer's interests. Employee's duties may involve expenditures of time in excess of the regularly established workday or in excess of a forty (40) hour workweek and may also include time outside normal office hours (including attendance at City Council meetings). Employee's base salary includes compensation for all hours worked and Employee shall be classified as an exempt employee for purposes of overtime and shall not be entitled to any form of compensation for overtime. In recognition of the significant time Employee will need to devote outside normal office hours to business activities of Employer and the exempt, salaried nature of the employment, employee is permitted to exercise a flexible work schedule. However, consistent with this flexibility and Employee's participation in activities out of the office, Employee will generally be expected to keep office hours at City Hall, Monday through Friday during normal business hours.

SECTION 9: Confidentiality and Non-Disparagement

- A. Employee acknowledges that in the course of his employment contemplated herein, Employee will be given or will have access to confidential and proprietary documents and information, relating to the City, its residents, businesses, employees, and customers ("Confidential Information"). Such Confidential Information may include, but is not limited to, all information given to or otherwise

accessible to Employee that is not public information or would be exempt from public disclosure as confidential, protected, exempt or privileged information. Employee shall hold the Confidential Information in trust for City's benefit, and shall not disclose the Confidential Information to others without the express written consent of City.

- B. Except as otherwise required by law, in the event the City terminates Employee with or without Cause, the City and Employee agree that no member of the City Council, the city management staff, nor the Employee shall make any written, oral, or electronic statement to any member of the public, the press, or any City employee concerning the Employee's termination except in the form of a joint press release or statement, which is mutually agreeable to City and Employee. The joint press release or statement shall not contain any text or information that is disparaging to either Party. Either Party may verbally repeat the substance of the joint press release or statement in response to any inquiry.
- C. The obligations of Employer and Employee under this Section 9 shall survive the termination of this Agreement.

SECTION 10: Outside Activities

Employee shall not engage in any activity, consulting service or enterprise, for compensation or otherwise, which is actually or potentially in conflict with, incompatible with or inimical to, or which materially interferes with his duties and responsibilities to Employer. (Cal. Govt. Code §§ 1125, et. seq.)

SECTION 11: Indemnification

Consistent with the California Government Code, Employer shall defend and indemnify Employee, using legal counsel of Employer's choosing, against expense or legal liability for acts or omissions by Employee occurring within the course and scope of Employee's employment under this Agreement. In the event Employer determines there is a conflict of interest between Employer and Employee and independent counsel is required for

Employee, Employer may select the independent counsel after having considered the input of Employee and shall pay the reasonable fees of such independent counsel consistent with City litigation guidelines and standard rates received by City from its chosen special counsel. (Cal. Govt. Code §§ 995, et. seq.)

Notwithstanding the foregoing, and consistent with Sections 53243 through 53243.3 of the Government Code, Employee shall be required, if convicted of a crime involving an abuse of his office or position, to fully reimburse the City for: (1) any paid leave salary offered by the City to the Employee; (2) any funds provided for the legal criminal defense of the Employee; (3) any cash settlement related to the termination that Employee may receive; and (4) any other payments received by Employee from City that in any way relate to the foregoing.

SECTION 12: Other Terms and Conditions of Employment

Employer may fix other terms and conditions of employment, as it may determine from time to time, relating to the performance of the Employee, provided such terms and conditions are not inconsistent with or in conflict with the provisions of this Agreement or applicable law.

SECTION 13: Notices

Notice pursuant to this Agreement shall be given by depositing written notification in the custody of the United States Postal Service, postage prepaid, addressed as follows:

- (1) EMPLOYER:
City of Newport Beach
c/o City Clerk
100 Civic Center Drive
Newport Beach, California 92660
- (2) EMPLOYEE: David Kiff
at the home address then shown in Employer's files

Alternatively, notice required pursuant to this Agreement may be personally served in the same manner as is applicable in civil judicial practice. Notice shall be deemed given as of the date of personal service or five days after the date of mailing.

SECTION 14: General Provisions

- A. **Integration:** This Agreement sets forth the final, complete and exclusive agreement between Employer and Employee relating to the employment of Employee by Employer. Any prior discussions or representations by or between the parties are merged into this Agreement or are otherwise rendered null and void. The Parties by mutual written agreement may amend any provision of this Agreement. Such amendments shall be incorporated and made a part of this Agreement. The foregoing notwithstanding, Employee acknowledges that, except as expressly provided in this Agreement, his employment is subject to Employer's generally applicable rules and policies pertaining to employment matters, such as those addressing equal employment opportunity, sexual harassment and violence in the workplace, as they currently or may in the future exist, and his employment is, and will continue to be, at the will of the City Council.
- B. **Binding Effect:** This Agreement shall be binding on the Employer and the Employee as well as their heirs, assigns, executors, personal representatives and successors in interest.
- C. **Choice of Law:** This Agreement shall be interpreted and construed pursuant to and in accordance with the laws of the State of California and all applicable City Charter provisions, Codes, Ordinances, Policies and Resolutions.
- D. **Severability:** If any provision of this Agreement is held invalid or unenforceable, the remainder of this Agreement shall nevertheless remain in full force and effect. If any provision is held invalid or unenforceable with respect to particular

circumstances, it shall nevertheless remain in full force and effect in all other circumstances.

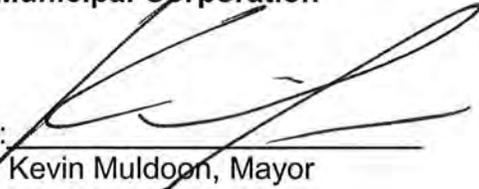
- E. Conflict with City Charter or Municipal Code. The City personnel ordinances, resolutions, rules and policies shall apply to Employee in the same manner as applied to other management employees, provided, however, in the event of a conflict between the provisions of this Agreement and the City Charter, or this Agreement and the Municipal Code, the City Charter or the Municipal Code shall prevail over this Agreement.

- F. Employee's Independent Review: Employee acknowledges that he has had the opportunity and has conducted an independent review of the financial and legal effects of this Agreement. Employee acknowledges that he has made an independent judgment upon the financial and legal effects of this Agreement and has not relied upon any representation of Employer, its officers, agents or employees other than those expressly set forth in this Agreement. Employee acknowledges that he has been advised to obtain, and has availed himself of, legal advice with respect to the terms and provisions of this Agreement.

(Signatures on Following Page)

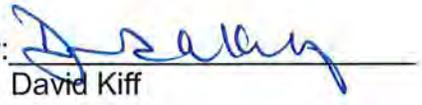
IN WITNESS WHEREOF, the parties have caused this Agreement to be executed on the dates reflected below each signature.

EMPLOYER
CITY OF NEWPORT BEACH,
A Municipal Corporation

By: 
Kevin Muldoon, Mayor

Date: 5/1/17

EMPLOYEE,
An Individual

By: 
David Kiff

Date: 5/8/17

APPROVED AS TO FORM:

By: 
Edward P. Zappia
THE ZAPPIA LAW FIRM
A Professional Corporation

Date: 5/3/17

ATTEST:

By: 
Leilani Brown,
City Clerk

Date: 5.8.17



[End of Signatures]

GENERAL RELEASE AGREEMENT

This General Release Agreement ("Agreement") is entered into by and between DAVID KIFF ("Employee") and CITY OF NEWPORT BEACH ("Employer"), in light of the following facts:

A. Employee's employment with Employer concluded on _____.

B. Certain disputes have arisen between Employer and Employee.

C. Employer and Employee each deny any liability whatsoever to the other.

D. Employer and Employee wish to fully and finally resolve any and all disputes they may have with each other.

E. Employee is hereby informed that he has twenty-one (21) days from receipt of this Agreement to consider it. Employer hereby advises Employee to consult with his legal counsel before signing this Agreement.

F. Employee acknowledges that for a period of seven (7) days following the signing of this Agreement ("Revocation Period"), he may revoke the Agreement. This Agreement shall not become effective or enforceable until the day the Revocation Period has expired.

G. Employee acknowledges that the Salary Payment referenced in paragraph 1 of this Agreement represents all compensation, including salary, accrued benefit balances and reimbursed expenses, due and payable to him through the date of employment termination. Employee also acknowledges that Employer has made this Salary Payment without regard to whether he signs this Agreement. The Salary Payment does not constitute consideration for this Agreement. Employee acknowledges that the Severance referenced in paragraph 2 of this Agreement is in excess of all amounts that are due and owing to him as a result of his employment by Employer.

1. Receipt of Salary Payment. Employee hereby acknowledges receipt of a check or checks for all compensation owing to him, including salary, accrued benefit balances and reimbursed expenses ("Salary Payment") from Employer.

2. Severance. Within ten (10) days following Employee's signing, delivering to the City Council, and not revoking this Agreement, City shall pay Employee the gross amount provided for in Section 7 of the Fifth Amended and Restated Employment Agreement effective April 25, 2017, less applicable deductions, and shall provide the

months of medical benefits as provided in that same Section 7 ("Severance"). Employee acknowledges that the Severance is in excess of all amounts due and owing him as a result of his employment by Employer.

3. General Release. In consideration of the Severance to be paid and provided to Employee, and other good and valuable consideration, Employee hereby releases and discharges Employer and its past and present City Council Members, employees, representatives and agents, from all rights, claims, causes of action, and damages, both known and unknown, in law or in equity, concerning and/or arising out of his employment with Employer which he now has, or ever had, including but not limited to any rights, claims, causes of action or damages arising under Title VII of the Civil Rights Act of 1964, the Vocational Rehabilitation Act of 1973, the Employee Retirement Income Security Act, the Americans with Disabilities Act, the Age Discrimination in Employment Act, the Older Workers Benefits Protection Act, the Family and Medical Leave Act of 1993, the Domestic Partners Act of 2003, the California Labor Code, the Private Attorneys General Act of 2004, the California Moore-Brown-Roberti Family Rights Act, the California Unruh Civil Rights Act, the California Fair Employment and Housing Act, any other federal, state, or local employment practice legislation, or any federal or state common law, including wrongful discharge, breach of express or implied contract, or breach of public policy.

Employee hereby waives and relinquishes all rights and benefits afforded by Section 1542 of the Civil Code of California. Employee understands and acknowledges the significance and consequences of this specific waiver of Section 1542. Section 1542 of the Civil Code of California states as follows:

"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."

Notwithstanding the provisions of Section 1542, and for the purpose of implementing a full and complete release and discharge of Employer and its past and present City Council Members, employees, representatives and agents, Employee expressly acknowledges that this General Release is intended to include in its effect, without limitation, all claims which he does not know or suspect to exist in his favor.

Employee further acknowledges that he has read this General Release and that he understands that this is a general release, and that he intends to be legally bound by the same.

4. Fees. Employee and Employer agree that in the event of litigation relating to this General Release Agreement, the prevailing party shall not be entitled to recover his/its reasonable attorneys' fees.

CITY OF NEWPORT BEACH

Dated _____, 20__

By: _____

Dated: _____, 20__

DAVID KIFF

**APPROVED AS TO FORM:
CITY ATTORNEY'S OFFICE**

By: _____
Aaron C. Harp, City Attorney

Date: _____

ATTEST:

By: _____
Leilani Brown,
City Clerk

Date: _____