

AGENDA ITEM NO. 10
COUNCIL MEETING 6/24/08

APPROVED BY

DEPARTMENT DIRECTOR

CITY MANAGER

June 24, 2008

FROM: PATRICK N. WIEMILLER, Director
Public Works Department

RANDALL L. COOPER, Director
Parks, After School, Recreation and Community Services Department

BY: JERRY HAYNES, Assistant Director
Parks, After School, Recreation and Community Services Department

STEVEN SON, Capital Projects Manager
Public Works Department, Capital Management Division

ANDY VANDERFORD, Project Manager
Public Works Department, Capital Management Division

JOSÉ R. GARCÍA, Senior Engineering Technician
Public Works Department, Engineering Services

- SUBJECT: (1) APPROVE MUTUAL LICENSE AGREEMENT BETWEEN THE CITY OF FRESNO AND HORIZON ENTERPRISES
- (2) APPROVE THE ACCEPTANCE OF A DONATION OF PROPERTY LOCATED NEAR THE SOUTHWEST CORNER OF EAST HAMILTON AVENUE AND SOUTH SARAH STREET FOR DEVELOPMENT TO A SKATE PARK (PROPERTY LOCATED IN COUNCIL DISTRICT 3)

KEY RESULT AREA

One Fresno

Presented to City Council

Date: 6/24/08

Disposition: needs approval

RECOMMENDATION

Staff recommends that the City Council approve (1) the Mutual License Agreement between the City of Fresno and Horizon Enterprises, and (2) the transfer of ownership, by donation, of an 11,250 square foot vacant parcel from Horizon Enterprises to the City of Fresno, at no cost to the City. The parcel is located near the southwest corner of East Hamilton Avenue and South Sarah Street. Staff further recommends authorization for the Public Works Director to sign the necessary documents on behalf of the City.

EXECUTIVE SUMMARY

The purpose for the Mutual License Agreement is twofold. First of all, it is to establish ownership and usage of the Vagabond Pool Design Digital File. The City is desirous of using the Vagabond Pool Design to construct and install a component of a skate park to be built and operated by the City as a

City-owned municipal facility. Horizon is willing to grant the City a limited license to use the Digital File. The second purpose is to grant a limited license to Horizon for installation and operation of a video system. Horizon, at its sole expense and risk, will install and operate the video system and related equipment and facilities on and within public areas of the Vagabond Skate Park, consistent with controlling laws and subject to all required permits.

The Parks, After School, Recreation and Community Services (PARCS) Department has been approached by Horizon Enterprises to jointly develop a skate park and supporting facilities at the southwest corner of East Hamilton Avenue and South Sarah Street, in an area of light industrial development. The development will be called the Vagabond Pool Skate Park & Retail Center and would encompass the half-block bounded by East Hamilton, South Sarah and East Braly. Horizon Enterprises owns all of the half-block except for a 7,500 square foot parcel at the north end, which was recently acquired by the City. Horizon will donate a portion of their property to the City for the development of the Vagabond Pool Skate Park, and Horizon will develop the balance of the half-block to supporting commercial/retail facilities.

KEY OBJECTIVE BALANCE

Customer Satisfaction is achieved through the development of additional recreational facilities for the public. Employee Satisfaction results from the successful conclusion of negotiations with the property owners, and the goal of Financial Management is achieved by accepting the donated property.

BACKGROUND

The City Council previously received reports about the popularity of unauthorized skating activity at the abandoned swimming pool located at the vacant Vagabond Motel on Broadway, south of Divisadero. With the subsequent demolition of the motel and pool and development of the Vagabond Lofts, that facility was lost to impromptu skating activity. Steve Weil, of Horizon Enterprises, digitally captured the dimensions of the swimming pool prior to demolition. He subsequently approached the PARCS Department about the possibility of reproducing that facility in a new Skate Park on the half-block bounded by East Hamilton Avenue, South Sarah Street and East Braly Avenue; just east of South Van Ness Avenue and approximately two blocks south of East Butler Avenue.

The area is developed into various uses, but is primarily devoted to light industrial activities. Horizon Enterprises owns a vacant parcel containing 45,000 square feet (1+ acre) on the subject half-block and will donate a portion of that parcel to the City for the development of the Skate Park facility on the north end. The balance of Horizon's property is proposed to be developed to a skate shop, sandwich shop, parking, and supporting retail activities by Horizon Enterprises. The construction of the Skate Park will be the responsibility of the City.

Horizon Enterprises has agreed to donate a portion of their property to the City and has signed the necessary documents to convey the property to the City. The City Attorney's Office has reviewed these documents and approved them as to form.

Report to the City Council
Approve Donation of Property at SW Corner
of Hamilton-Sarah Streets for Skate Park/
Mutual License Agreement
June 24, 2008
Page 3

On December 5, 2006, Council approved a PARCS Reimbursement Resolution to fund various capital projects which included the proposed Vagabond Pool Skate Park wherein a replica of the world renowned "Vagabond Pool" would be constructed. This Skate Park will attract youth and young adults to downtown Fresno. A Mitigated Negative Declaration, Environmental Assessment EA-PW-2007-01, dated February 21, 2007, has been issued for the proposed project.

FISCAL IMPACT

The cost to receive the donated property that is the subject of this report is zero dollar (\$0). Approximately \$3,000 has been expended in staff labor and incidentals related to administering this donation.

Current estimates for the construction of the proposed Skate Park are approximately \$1,857,000, but may be subject to modification. Funds for this project are derived from Citywide Park Impact Fees/Bond Proceeds.

PNW/RG/AV/JG/eam
Approv Transfer SW Cor Hamilton-Sarah Skate Stone Wall Vagabond Pk Rev 6-24-08
Revised 6-13-08 jk

Attachment: Mutual License Agreement
Agreement for Transfer of Real Property

FISCAL IMPACT STATEMENT

PROGRAM: PC00101 – VAGABOND POOL SKATE PARK

<u>RECOMMENDATION</u>	<u>TOTAL OR CURRENT</u>	<u>ANNUALIZED COST</u>
Direct Cost	<u>\$0</u>	<u> </u>
Indirect Costs: (Detailed below)	<u>\$3,000.00</u>	<u> </u>
TOTAL COST	<u>\$3,000.00</u>	<u> </u>
Additional Revenue or Savings Generated	<u>\$0</u>	<u> </u>
Net City Cost	<u>\$3,000.00</u>	<u> </u>
Amount Budgeted (If none budgeted, identify source):	<u>\$3,000.00*</u>	<u> </u>

*Funds for this project are derived from Citywide Park Impact fees / Bond Proceeds.

Indirect Costs include: Estimated Public Works, PARCS, and City Attorney staff labor and incidentals incurred in performing various project management activities related to administering this donation.

10
6/24/08

**MUTUAL LICENSE AGREEMENT
AND
DISCLAIMER, WAIVER AND ACKNOWLEDGMENT**

This Mutual License Agreement and Disclaimer, Waiver and Acknowledgment (the "Agreement") is entered into this 24 day of JUNE, 2008, by and Between Horizon Enterprises, a California general partnership, its nominee or designee (collectively "Horizon") and the City of Fresno, a municipal corporation ("City"), with regard to the following:

RECITALS

A. Horizon represents and warrants that it is the owner of that certain digital file of an engineering and topographical survey of that certain swimming pool which was located at the former site of the Vagabond Motel in Fresno, California (the swimming pool and motel have since been demolished), commonly referred to as the Vagabond Pool (the "Digital File").

B. The Digital File and any design, model, reproduction, representation or construction of the Digital File, whether digital or analog, are collectively referred to as the "Vagabond Pool Design."

C. The City is desirous of using the Vagabond Pool Design to construct and install a component of a skate park to be built and operated by the City, as a city owned municipal facility, located at the southwest corner of Hamilton Avenue and South Sarah Street in the City (the "Vagabond Skate Park").

D. Horizon is willing to grant the City a limited license to use the Digital File, to procure and construct the Vagabond Skate Park in exchange for a limited license from the City to install and operate digital video/audio cameras, together with related hardware, equipment, software, wiring, conduit and facilities (collectively the "Video System") on and within the Vagabond Skate Park, as approved by the City, subject to the terms and conditions set forth hereinbelow.

E. Horizon and the City are referred to hereinafter individually as "Party" and collectively as "Parties."

NOW, THEREFORE, based upon the foregoing Recitals, and for good and valuable consideration, the receipt of which is hereby acknowledged, the parties agree as follows:

AGREEMENT

1. Incorporation of Recitals. The foregoing Recitals are true and correct and incorporated herein and made a part hereof.

2. License to Use Digital File. The City shall have the right to use the Vagabond Pool Design, subject to the following:

2.1 Grant of License. Horizon grants to the City a limited nonexclusive license, including copyright license, to use the Digital File for the sole and specific purpose of installing and constructing an in-ground pool component ("Pool Component") within the Vagabond Skate Park (the "Vagabond Pool Design License"). Nothing in this Agreement obligates the City to install and construct the Pool Component within the Vagabond Skate Park. The City shall not have the right to use the Vagabond Pool Design License, or the Vagabond Pool Design or any information or data contained therein to create or construct any model, image, reproduction, representation, picture, drawing, rendering, replication or animation, whether digital or analog, of the Pool Component or any portion thereof, except as in direct relationship to the design, procurement, marketing, advertising, construction and operation of the Pool Component within the Vagabond Skate Park.

2.2 License Non-Assignable. The Vagabond Pool Design License described in this Section 2 of this Agreement is personal to the City and shall not be assigned by the City to any person or entity for any reason whatsoever. No legal title, property right or proprietary interest in the Vagabond Pool Design is created or vested in the City, or any person or entity claiming under the City, by the grant of the Vagabond Pool Design License by Horizon to the City under this Agreement, except as expressly provided herein.

2.3 Disclaimer and Acknowledgment. The City acknowledges that the Pool Component, if constructed and installed in accordance with the Vagabond Pool Design, may have inherent risks associated with it, and the City expressly accepts such risks. It is understood and agreed by the parties hereto that it is Horizon's intention to license the Vagabond Pool Design to the City for use by the City only in designing the Pool Component within the Vagabond Skate Park, and that the City represents and warrants to Horizon that it will use the Vagabond Pool Design for that purpose, and that purpose only. The City acknowledges and understands that Horizon shall not have any involvement whatsoever in or responsibility for any physical result or manifestation of the Vagabond Pool Design, including but not limited to, the Pool Component. Horizon makes no representations, warranties or guarantees of any kind regarding and hereby expressly disclaims any responsibility or liability for the Pool Component and/or the installation, construction, use and/or operation thereof by the City within the Vagabond Skate Park.

Further, Horizon shall not be liable for any claims, damages, losses, injuries, whether physical or otherwise, arising out of or connected with the installation, construction, use and/or operation of the Pool Component based upon the Vagabond Pool Design within the Vagabond Skate Park, regardless of the cause thereof, and the City shall have no recourse against Horizon or its partners, employees, agents or representatives therefor. The installation, construction, use and/or operation of the Pool Component within the Vagabond Skate Park based upon the Vagabond Pool Design shall not be at Horizon's risk, and Horizon shall have no obligation to maintain, repair, replace, operate or insure the Pool Component within the Vagabond Skate Park.

2.4 Waiver and Release of Claims. The City hereby waives, and releases Horizon and its partners, employees, agents and representatives from any claims, actions, causes of action, demands, costs, damages, liabilities, losses, obligations, expenses and compensation of any kind and nature whatsoever, in law, in equity or by way of administrative claim or complaint (collectively the "Claims"), of and from any liability, duty or obligation related to, arising out of,

relating to or connected with the City's performance, construction, installation, implementation, use and/or operation of the Pool Component based upon the Vagabond Pool Design, and/or the operation of the Pool Component and/or the Vagabond Skate Park.

The City expressly waives any and all rights and benefits conferred upon it by the provisions of Section 1542 of the California Civil Code which reads as follows:

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

In waiving Civil Code Section 1542, the City acknowledges that it may hereafter discover facts in addition to or different from those which it now believes to be true with respect to the matters hereby waived and released, but agree that the Waiver and Release given herein shall remain in effect as a full and complete general release notwithstanding the discovery or existence of any such additional or different facts, the risk of which additional or different facts the City expressly assumes.

2.5 Ownership of Vagabond Pool Design. The Vagabond Pool Design is and shall remain the exclusive property of Horizon.

2.6 Confidentiality of Vagabond Pool Design. The City agrees that the Vagabond Pool Design is and shall remain confidential. The City shall not in any way disclose, provide, convey, lease, license, transfer, loan, pledge, assign, communicate or disseminate the Vagabond Pool Design or any portion thereof or any alteration or modification thereto, to any person or entities, including without limitation any representatives, agents, contractors, employees or consultants, except for use solely in connection with procurement and construction of the Pool Component within the Vagabond Skate Park. The City acknowledges and agrees that the ability to maintain the confidentiality of the Vagabond Pool Design and any alterations or modifications thereto, is an essential part of Horizon's business plans and operation, and any unauthorized use or disclosure of the Vagabond Pool Design, including any alterations or modifications thereto, will cause substantial damage to Horizon and Horizon's business.

The City covenants and agrees to (i) advise its consultants, representatives, agents, contractors and design professionals of the confidential nature of this License, and the Vagabond Pool Design, and (ii) cause their consultants, representatives, agents, contractors and design professionals to acknowledge and agree, in writing, as a condition to being given use of or access to the Vagabond Pool Design, that they have been made aware of this Agreement and that they are subject to and will comply with the provisions of this Section 2.6. The parties acknowledge and agree that the City is subject to public records disclosure requirements and court orders.

2.7 Survival upon Termination. The provisions of Section 2 of this Agreement shall survive termination of this Agreement pursuant to Sections 4 and 5 below.

3. Grant of Limited License to Install and Operate Video System. Horizon, at its sole expense and risk, shall have the right, but not the obligation, to install and operate the

Video System and related equipment and facilities on and within public areas of the Vagabond Skate Park, consistent with controlling law and subject to the following:

3.1 Grant of License. In consideration of the grant of the license by Horizon as described in Section 2 above, and subject to the limitations set forth in Section 3.5 below, the City grants Horizon a limited license to locate, install and operate the Video System and all appurtenances thereto, including without limitation, power and telecommunications supply and networking to and from the Video System, within the Vagabond Skate Park, including without limitation, on light poles and perimeter fences, as well as the right to all signals, both video and audio, produced by the Video System (the "Video Camera License") provided that:

(a) Horizon shall comply with all governmental and permitting requirements including any necessary non-interference studies.

(b) Horizon is solely responsible and liable as to all costs, causes, claims and liabilities of whichever nature arising out of or relating to its use of the Video System, except for the negligent and/or willful misconduct of the City, its employees, invitees, vendors and contractors.

3.2 No Representation by City, Release by Horizon.

(a) The City makes no representation as to Horizon's use of the Video System, except for the negligent and/or willful misconduct of the City, its employees, invitees, vendors and contractors.

(b) Horizon hereby releases the City as to Subsection (a) above, except as provided otherwise therein and in Section 3.1(b) above, and waives the provisions of California Civil Code Section 1542 set forth in Section 2.4 above.

3.3 Location of Video System. The exact placement and location of the Video System and all related appurtenances, including without limitation, power and telecommunications supply and networking to and from the Video System within the Vagabond Skate Park, shall be determined by Horizon with prior approval by the City. Once the exact placement of the Video System has been agreed to by the parties, the City agrees not to intentionally block, obscure or interfere with the lines of sight and/or audibility of the Video System.

3.4 Assignment. Horizon shall have the right to assign the Video Camera License described in this Section 3.1 above with the prior consent of the City.

3.5 Ownership of Video System. The Video System shall be the exclusive property of Horizon, subject to the following provisions:

(a) The images, signals, feed and recordings, both video and audio, produced by the Video System (collectively the "Video Images"), together with any and all recordings thereof, shall be made available to the Fresno Police Department (the "FPD"), for reproduction by the FPD, at its sole cost and expense, upon request by the FPD, for law enforcement purposes only. The FPD represents and warrants that it will use the Video Images for legitimate,

authorized and lawful law enforcement purposes . Except as provided in subsection (c) below, Horizon shall not charge the FPD or the City any royalty, concession fee or other fee or expense in connection with the use of the Video Images by the FPD for the purposes set forth in this subsection (a). Horizon and the City acknowledge and agree that as part of the consideration for this Agreement, Horizon shall be deemed to have satisfied all City fees related to the operation, installation and use of the Video System.

(b) Horizon expressly disclaims any responsibility for (i) the quality of the Video Images generated or produced by the Video System, (ii) any defects or deficiencies in the Video System, (iii) the accuracy, content or synchronization of the Video Images, (iv) the quality of the Video Images or (v) the erroneous designation of video/audio cameras. The FPD acknowledges and agrees that it shall have no expectation, and Horizon makes no representations or warranties, as to the quality of the Video Images, the Video System and related equipment and systems, or the maintenance of the Video System, or that any components of said system comply or conform with any applicable standards for use of the Video Images by the FPD or other law enforcement agencies.

(c) Horizon acknowledges that the City may intermittently authorize special events at the Vagabond Skate Park involving sponsors, and that a sponsor of a sponsored event, as a condition of sponsorship, may require exclusive video rights for a sponsored event ("Exclusive Sponsored Event"). Horizon agrees that upon receipt of written notice from the City stating that the sponsor of an Exclusive Sponsored Event ("Sponsor") requires exclusive video rights for such Exclusive Sponsored Event, Horizon shall be obligated to turn off the Video System for the duration of the Exclusive Sponsored Event. Notwithstanding the immediately preceding sentence, Horizon and the Sponsor may, at each's sole discretion, enter into an agreement whereby Horizon would allow the Sponsor to utilize the Video System during the Exclusive Sponsored Event under such terms and conditions agreed upon by Horizon and Sponsor.

(d) The number of Exclusive Sponsored Events authorized by the City at the Vagabond Skate Park shall not exceed twelve (12) in any given calendar year, without the prior written consent of Horizon. Further, notwithstanding subsection (c) above, Horizon shall have the absolute right to receive and utilize Video Images and the digital content of the Video System anywhere on or within its commercial project located immediately adjacent to and south of the Vagabond Skate Park.

(e) The City understands and agrees that, except for the Video Images provided to the FPD, the Video Images may be edited by Horizon, in advance, in order to preserve the privacy rights of individuals entering onto and/or using the Vagabond Skate Park ("Users") pursuant to all applicable state and federal laws, including without limitation obscuring, blacking out and/or pixellating (collectively "Obscuring") faces and other distinguishing features of such Users, as well as Obscuring logos and/or brand names on items of clothing worn, as well as skate boards and other equipment used, by such Users.

(f) The City shall post legible signs in multiple, conspicuous locations on or about the Vagabond Skate Park advising all Users that they are being videotaped and that video and audio recordings will be made of them, by the Video System owned and operated by Horizon. The number, size, location and content of said signs shall be determined by the City, subject to approval by Horizon, which approval shall not be unreasonably withheld. In addition, the signs posted by the City pursuant to this subsection (f) shall include a disclaimer, release and/or waiver of liability for the benefit of the City and Horizon. The City may also require users of the Vagabond Skate Park to sign a written release and consent acknowledging that they are being videotaped. If City decides to require such written release and consent, it shall include Horizon as a releasee.

(g) If Horizon elects, in its sole and absolute discretion, to install the Video System in the Vagabond Skate Park, Horizon shall at all times during which the Video System is turned on and being operated by Horizon, provide digital storage for the Video System with a capacity of not less than seven (7) days, or such other time period as may be required by state or local statutes, codes and/or ordinances.

3.6 Maintenance, Repair, and Replacement of Video System. Horizon shall be solely responsible for maintaining, repairing and replacing the Video System at its sole cost and expense. In the event of removal of the Video System by Horizon, or termination of this Agreement by either party, Horizon shall restore the premises at its sole cost and expense.

3.7 Incidental Rights. The license granted to Horizon pursuant to this Section 3 shall include the incidental right of Horizon, its partners, employees, agents, representatives and contractors to enter onto the Vagabond Skate Park for the purpose of maintaining, repairing, replacing, and/or removing the Video System. In exercising this incidental right, Horizon, its partners, employees, representatives, agents and contractors must use reasonable care. Any damages to the Vagabond Skate Park or any portion thereof caused by Horizon or its partners, employees, representatives, agents or contractors shall be promptly repaired by Horizon at its sole cost and expense. Horizon shall exercise this right of entry upon reasonable notice to the City, except in the event of an emergency.

4. Termination of Agreement by City and Payment of Compensation to Horizon. The City may terminate this Agreement only after complying with the following procedures:

4.1 Notice by City of Intent to Terminate Agreement. The City shall first give written notice to Horizon of its intent to terminate the Agreement (the "Notice of Intent"). The Notice of Intent shall include the City's reason(s) for seeking to terminate the Agreement. Upon receipt by Horizon of the Notice of Intent, Horizon shall have the right to object to the Notice of Intent by giving the City written notice of such objection(s) within ten (10) business days following receipt of the Notice of Intent (the "Notice of Objection"). Upon receipt of the Notice of Objection, the City shall schedule a public hearing on the Notice of Objection before the Fresno City Council (the "Council"). The public hearing on the Notice of Objection shall take place not more than sixty (60) days following the City's receipt of the Notice of Objection, with written notice of the public hearing to Horizon. Horizon shall have the right to appear at the public hearing and present testimony in regard to the matter.

4.2 Termination of Agreement by City. If, following the hearing on the Notice of Objection pursuant to subsection (a) above, the Council decides, pursuant to a duly adopted resolution, to terminate the Agreement (the "Termination"), Horizon shall be entitled to receive compensation from the City. The amount of compensation shall be equal to the value of the prospective economic loss to Horizon from the loss of ownership and use of the digital content of the Video System and the Video Images resulting from the Termination, including without limitation, the impact of such loss of ownership and use on Horizon's adjoining commercial development (the "Value"), as determined pursuant to subsection (c) below. The City shall pay the Value to Horizon within thirty (30) days of determination of the Value pursuant to subsection (c) below.

4.3 Determination of Value as of Termination Date.

(a) By Agreement. The Value, as of the date of Termination, shall be determined by agreement by Horizon and the City. The parties shall use their best efforts to agree upon the Value within thirty (30) days of the date of Termination.

(b) By Appraisal. If the parties are unable to agree to the Value within thirty (30) days after the date of Termination, then the Value shall be determined as of the date of Termination by independent appraisal, undertaken by an appraiser, with expertise in appraising the value of future economic loss related to the loss of use of digital files and content, mutually agreed upon by Horizon and the City within forty-five (45) days after the date of Termination. If the parties fail to agree on an appraiser, then Horizon shall appoint one (1) appraiser and the City shall appoint one (1) appraiser within sixty (60) days of the date of Termination, and such two (2) appraisers shall appoint a third appraiser, within sixty (60) days of the date of Termination. The three (3) appraisers shall, within sixty (60) days after the third appraiser's appointment, determine the Value in writing, and submit their reports to the parties. The Value shall be determined by disregarding the appraiser's valuation that diverges the greatest from each of the other two (2) appraisers' valuations and the arithmetic mean of the remaining two (2) appraisers' valuation shall be the Value. Horizon and the City shall each pay one-half (½) of the cost of the appraiser they mutually agree upon. In the alternative, Horizon and the City shall each pay for the services of the appraiser selected by it, plus one-half (½) of the fee charged by the third appraiser (or the appraiser they mutually agree upon).

5. Termination of Agreement by Horizon. This Agreement may be terminated at any time by Horizon upon sixty (60) days prior written notice to the City, subject to reasonable resolution by the Parties of any existing contracts for any Exclusive Sponsored Events between the City and the sponsor(s) of such Exclusive Sponsored Event.

6. Survival of License to Use Digital File. Notwithstanding termination of this Agreement pursuant to Sections 4 and 5 hereinabove, the provisions of Section 2 of this Agreement shall survive termination.

7. Notice. All notices and deliveries hereunder shall be given in writing by personal service or certified mail, return receipt requested, to the addresses following each parties' signature to this Agreement as set forth hereinbelow, or by facsimile transmission to:

To City:

Fresno City Hall
2600 Fresno Street
Fresno, CA 93721-3602

Copy to: Katherine E. Bradley, Deputy City Attorney

Fresno City Hall
2600 Fresno Street
Fresno, CA 93721-3602

To Horizon:
586 West Barstow
Fresno, CA 93704

Copy To: Thomas W. Isaac
Dietrich, Glasrud, Mallek & Aune
5250 N. Palm #402
Fresno, CA 93704
Fax: (559) 435-8776

8. Insurance. During installation of the Video System, and so long as, during the life of this Agreement, the Video System is in place within the Vagabond Skate Park, Horizon shall pay for and maintain in full force and effect all policy (ies) of insurance required hereunder with (an) insurance company (ies) either (1) admitted by the California Insurance Commissioner to do business in the State of California and rated not less than "A-VII" in Best's Insurance Rating Guide, or (2) authorized by the City's Risk Manager. The following policies of insurance are required:

- A. COMMERCIAL GENERAL LIABILITY insurance which shall be at least as broad as Insurance Services Office (ISO) form CG 00 01 and shall include insurance for "bodily injury", "property damage" and "personal and advertising injury", including premises and operation, products and completed operations and contractual liability (including, without limitation, indemnity obligations under the Agreement) with limits of liability of not less than \$1,000,000 per occurrence and \$2,000,000 general aggregate for bodily injury and property damage, and \$1,000,000 per occurrence for personal and advertising injury.
- B. WORKERS' COMPENSATION insurance as required under the California Labor Code (Only required during the installation of the Video System and in the event it is necessary for an employee or subcontractor

of Horizon to enter the Vagabond Skate Park to maintain, repair or replace the Video System).

The above described policies of insurance shall be endorsed to provide an unrestricted thirty (30) day written notice in favor of the City, of policy cancellation, change or reduction of coverage, except for the Workers' Compensation policy which shall provide a ten (10) day written notice of such cancellation, change or reduction of coverage. In the event any policies are due to expire during the term of this Agreement, a new certificate evidencing renewal of such policy shall be provided not less than fifteen (15) days prior to the expiration date of the expiring policy(ies). Upon issuance by the insurer, broker, or agent of a notice of cancellation, change or reduction in coverage, Horizon shall file with the City a certified copy of the new or renewal policy and certificates for such policy.

The General Liability insurance policy shall be written on an occurrence form and shall name the City, its officers, officials, agents, employees and volunteers as an additional insured. Such policy of insurance shall be endorsed so Horizon's insurance shall be primary and no contribution shall be required of the City. Any Workers' Compensation insurance policy shall contain a waiver of subrogation as to CITY, its officers, officials, agents, employees and volunteers (Only required if Workers' Compensation insurance is required pursuant to subsection B above). Horizon shall furnish the City with the certificate(s) and applicable endorsements for ALL required insurance prior to the City's execution of this Agreement. Horizon shall furnish the City with copies of the actual policies upon the request of the City and this requirement shall survive expiration or termination of this Agreement.

Any failure by Horizon to maintain insurance pursuant to the requirements set forth in this Section 8 shall be sufficient cause for the City to terminate this Agreement, subject to the provisions of Section 4 above. However, the insurance requirements of this Section 8 shall terminate upon removal of the Video System from the Vagabond Skate Park.

If Horizon should subcontract all or any portion of the work to be performed under this Agreement, Horizon shall require each contractor or subcontractor to provide insurance protection in favor of the City, its officers, officials, employees, agents and volunteers in accordance with the terms of each of the preceding paragraphs, except that the subcontractor's certificates and endorsements shall be on file with Horizon and the City prior to the commencement of any work by the respective contractor or subcontractor.

It is understood and agreed that the City maintains self-insurance programs to fund its liabilities in amounts not less than those required of Horizon in the preceding paragraphs.

9. Indemnities.

9.1 Indemnity by the City. Except to the extent of California statutory tort immunities afforded City as a governmental agency, the City shall indemnify, hold harmless and defend Horizon and its officers, partners, employees, agents, and volunteers, from any and all loss, liability, fines, penalties, forfeitures, costs and damages (whether in contract, tort or strict liability, including but not limited to personal injury, infringement/copyright infringement, death at any time and property damage) incurred by Horizon, City or any other person and from any

and all claims, demands and actions in law or equity (including attorney's fees and litigation expenses), arising or alleged to have arisen directly or indirectly from the negligence, negligent acts, omissions and/or willful and/or intentional misconduct of the City and/or its officers, officials, employees, agents and volunteers, in the performance of this Agreement. Horizon agrees that this Agreement shall in no way act to abrogate or waive any immunity of City available under the Tort Claims Act of the State of California.

9.2 Indemnity by Horizon. Except as otherwise provided for in this Agreement, Horizon shall indemnify, hold harmless and defend the City and its officers, officials, employees, agents and volunteers, from any and all loss, liability, fines, penalties, forfeitures, costs and damages (whether in contract, tort or strict liability, including but not limited to personal injury, infringement/copyright infringement, death at any time and property damage) incurred by City, Horizon or any other person and from any and all claims, demands and actions in law or equity (including attorney's fees and litigation expenses), arising or alleged to have arisen directly or indirectly from the negligence, negligent acts, omissions and/or willful and/or intentional misconduct of Horizon and/or its officers, partners, employees, agents and volunteers in the performance of this Agreement.

9.3 Survivability of Indemnities. The indemnity contained in this Section 9 shall survive for a period of one (1) year following termination of this Agreement.

10. Independent Capacity. In pursuit of this Agreement the parties shall act in an independent capacity and not as an officer, agent, servant, employee, joint venturer, partner, or associate of the other party. Each party shall retain the right to administer this Agreement so as to verify that the other party (ies) is/are performing respective obligations in accordance with the terms and conditions hereof. Each party shall comply with all applicable provisions of law and the rules and regulations, if any, of governmental authorities having jurisdiction over the subject matters herein.

11. Controlling Law/Venue. This Agreement shall be governed by, and construed and enforced in accordance with, the laws of the State of California. Venue for purposes of the filing any action regarding the enforcement or interpretation of this Agreement and any rights and duties hereunder shall only be in the Superior Court of the County of Fresno.

12. Waiver. The waiver by Horizon or the City of a breach or failure of condition of any provisions of this Agreement shall not be deemed a continuing waiver or a waiver of any subsequent breach or failure of condition of the same or of another provision hereof.

13. Entire Agreement. This Agreement constitutes the entire agreement between the parties relating to the granting of a license to the City for use of the Digital File and to Horizon for installation and use of the Video System pursuant to this Agreement. Any prior agreements, promises, negotiations, or representations not expressly set forth in this Agreement are of no force and effect. Any amendment to this Agreement shall be of no force and effect unless it is in writing signed by the parties hereof.

14. Binding on Heirs. This Agreement shall inure to the benefit of and be binding upon the successors and assigns of the parties hereto.

15. Counterparts. This Agreement may be executed in one or more counterparts and transmitted by facsimile copy (with original to follow), each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.

16. Memorandum of Agreement. The City shall, at Horizon's request, execute a Memorandum of Mutual License Agreement and Disclaimer, Waiver and Acknowledgment in a form acceptable to Horizon and suitable for recording in the official records of the Fresno County Recorder.

IN WITNESS WHEREOF, the undersigned have executed this Agreement on the date first written hereinabove, at Fresno, California.

City of Fresno

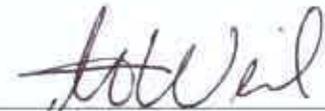
By: 
Title: PUBLIC WORKS DIRECTOR

Date: June 24, 2008

Horizon Enterprises,
a California general partnership

By: 
Martin Weil, General Partner

Date: 6/16/, 2008

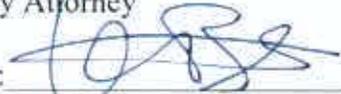
By: 
Steven Weil, General Partner

Date: 6/16, 2008

APPROVED AS TO FORM:

James C. Sanchez

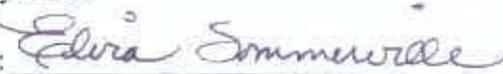
City Attorney

By: 
Deputy Katherine E. Bradley

ATTEST:

Rebecca K. Klisch

City Clerk

By: 
6/24/08