



CITY COUNCIL STAFF REPORT

DATE: October 19, 2011

Consent Calendar

SUBJECT: APPROVAL OF AGREEMENT WITH ACTION PARK ALLIANCE FOR OPERATION AND MANAGEMENT OF THE PALM SPRINGS SKATE PARK

FROM: David H. Ready, City Manager

BY: Parks and Recreation

SUMMARY

At the direction of the City Council, staff has been working with Action Park Alliance (APA) on an agreement to operate and manage the Palm Springs Skate Park. This new management and operating program will take the skate park to an entirely new level of operation offering programs such as camps, clinics, skate contests and special events for local residents and tourists. Staff has secured a modular structure to be placed at the site for APA to effectively operate and manage the facility. Staff is recommending that City Council approve a five (5) year agreement with Action Park Alliances (APA) to operate and manage the Palm Springs Skate Park. The City shall pay APA a management fee in the not to exceed amount of \$160,000 per year in four equal quarterly payments of \$40,000. Anticipated date agreement would begin is January, 2012.

RECOMMENDATION:

1. That the City Council approve a five (5) year agreement.
2. Authorize the City Manager to execute all necessary documents.

STAFF ANALYSIS:

When the Skate Park opened in 2003 city staff collected entrance fees and monitored skate boarders entrance and exits. In addition, they performed minor maintenance in the park i.e. trash, graffiti, etc; however, active programming of lessons, clinics, and special skate events were never initiated.

In 2004, private security was hired to assist city staff with issues at the park such as behavior problems, vandalism, etc. The summer of 2009 the entrance fees were eliminated and the park remained open for free skating without any programming.

At the May 4, 2011 City Council meeting there was a presentation and discussion of a proposal from Action Park Alliance (APA) to operate and manage the Palm Springs

ITEM NO. 2m

Skate Park. The City Council voted 5 – 0 directing staff to work with APA on an agreement and potential structure for the Skate Park.

Staff has been working with APA on an agreement to operate and manage the park. APA's management team has over ten (10) years experience in skate park management and they currently operate and manage skate parks in Fontana, CA (2), Grand Prairie, TX, and Orlando, FL and they have been very successful at these sites. Their expertise will take the Palm Springs Skate Park to a new level of programming, offering camps, clinics, skate contests such as Skate or Rock and Concrete Showdown, and special events such as National Go Skate Day and Skate Jams. These types of activities have never been possible with city staff.

Staff has secured a modular structure to be located at the site adjacent to the skate park for APA to operate and manage the skate park. This will allow for better control of users entering/exiting the facility. In addition, APA will have an area for the rental and sale of skate equipment such as boards, pads, helmets, etc.

Anticipated date that operation and management of the Skate Park begins by APA is as soon as the modular can be installed, potentially in January 2012.

FISCAL IMPACT:

Pursuant to the agreement the annual operation and management fee will be \$160,000.

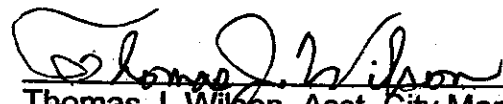
During the 2008-09 and 2009-10 fiscal years the City spent more than \$130,000 for operations and maintenance of the Skate Park;

Three Staff Members	\$ 92,019
Maintenance	\$ 15,000
Security	<u>\$ 33,230</u>
TOTAL	\$140,249

Funds are available in 001-2512-43200 (Skate Park, Contractual Services). Fiscal year 2011/2012 costs would be approximately \$80,000 due to only six (6) months of operation by APA.



VICKI OLTEAN
Director, Parks & Recreation



Thomas J. Wilson, Asst. City Manager



DAVID H. READY, City Manager

Attachments:

1. Agreement for Operation of Palm Springs Skate Park

**AGREEMENT
FOR
OPERATION OF PALM SPRINGS SKATE PARK
RETAIL/PRO SHOP AND CONCESSION**

This Agreement ("Agreement") is entered into and effective this ____ day of _____, 2011 ("Effective Date"), by and between the City of Palm Springs, a California Municipal Corporation ("City") and Action Park Alliance, Inc., a California Corporation ("APA"). City and APA are sometimes herein referred to individually as "Party" and collectively as the "Parties."

RECITALS

WHEREAS, the City is the owner of that certain real property located at 401 South Pavilion Way, which is more particularly described in Exhibit "A", attached hereto and incorporated herein by reference (the "Property"); and

WHEREAS, a portion of the Property is presently developed and operated as a skate park open to the public and common referred to as the Palm Springs Skate Park ("Skatepark"); and

WHEREAS, the City desires to engage the services of APA for operation and management of the Palm Springs Skate Park, including a retail/pro-shop and concessions, subject to the terms and conditions set forth below; and

WHEREAS, APA desires to operate and manage the Palm Springs Skate Park;

NOW, THEREFORE, in consideration of the mutual promises, covenants and agreements contained in this Agreement, the Parties agree as follows:

1. Term

1.1. **Initial Term.** The term of this Agreement shall commence on the Effective Date and shall continue for a term of five (5) years unless earlier terminated as provided herein ("Term").

1.2. **Option to Extend.** The City may, at its sole discretion, renew the Term of this Agreement for an additional five (5) year period upon providing written notice to APA at least ninety (90) days prior to the expiration of the then-current Term.

2. Facilities

2.1. **Skate Park.** The City currently operates the Skate Park, which is an outdoor skate park consisting of approximately 30,000 square feet. The Skate Park shall be in a condition acceptable to APA on the date APA begins management operations pursuant to this Agreement. The Skate Park must meet or exceed all American Society for Testing and Materials ("ASTM") standards and guidelines. The Skate Park shall include adequate security and access controls including but not limited to sufficient fencing and video monitoring equipment to meet

or exceed APA's requirements and guidelines. The Skate Park shall include marquee signage that is easily viewable from South Pavilion Way.

2.2. Retail/Pro-Shop and Concession. The City shall cause to be built, and provide a pro-shop structure ("Pro Shop") of at least 2,400 square feet on the Property adjacent to the Skatepark. The Pro Shop shall be designed and built for the purpose of conducting a back office operation for the Skatepark and a concession operation. The Pro Shop shall include all necessary fixtures for the purpose of operation a concession stand, including but not limited to required sinks, appliances, air vents, employee restrooms, and any other items required by any applicable law, code, ordinance, or regulation.

2.3. Right of Acceptance. APA's obligations to operate and manage the Facilities are contingent upon APA's acceptance of the Facilities and shall not become operative until such acceptance is communicated to the City. In the event that the Facilities, or any part thereof, do not meet with APA's approval, APA shall have the right to suggest improvements in writing to the City and shall advise the City whether the suggested improvements are required to comply with the ASTM standards or applicable legal obligations. The City, within five (5) business days of receipt of the suggested improvements, shall notify APA whether it intends to make the suggested improvements. In the event that the City does not agree to make one or more improvements, APA shall have the right to terminate the Agreement upon written notice as provided in this Agreement. If APA does not provide such notice of termination within five (5) business days of City's determination, APA shall be deemed to have accepted the Facilities, and all of APA's obligations under this Agreement shall become immediately operative.

3. **Operating and Management Agreement.**

3.1. Operating Agreement.

3.1.1. This Agreement is for the operation, management, maintenance and supervision of the Facilities. No land, property, building, structure, improvement, equipment space of fixture is leased to APA, and APA is not a lessee. APA has the right to operate the Facility, including the right to operate the concession, charge entry fees, provide lessons, promote events and take other discretionary actions within the scope of this Agreement. The City hereby grants APA a license to conduct the activities that, in APA reasoned judgment, are reasonably necessary to perform APA's obligations hereunder, and that license shall continue in effect throughout the term of this Agreement.

3.1.2. APA is an independent contractor, and not an employee of City. No employee or agent of APA shall be considered an employee of the City. APA shall pay all wages, salaries, and other amounts due such personnel in connection with their performance of any services under this Agreement and as required by law. APA shall be responsible for all reports and obligations respecting such personnel, including, but not limited to: social security taxes, income tax withholding, unemployment insurance, and workers' compensation insurance.

3.2. Operator General Obligations. In addition to any other obligations set forth in this Agreement, APA shall be responsible for the following:

- (a) APA shall monitor the Facilities and operate the Skatepark in accordance with all rules, regulations and ordinances of the City.
- (b) APA shall take reasonable measures to create and maintain an orderly and safe environment at the Facilities, and shall provide a structured, supervised program at the Skatepark seven days a week, with the exception of holidays, as further detailed and defined in Exhibit "B", attached hereto and incorporated herein by reference.
- (c) APA shall regulate the registration and entry of all persons to the Skatepark excepting those persons acting on APA's or the City's behalf.
- (d) APA shall require and shall monitor, regulate and ensure the use of helmets, skate pads and skate gear in accordance with all City rules and regulations.
- (e) APA shall provide no less than two (2) trained staff members at the Facilities to monitor and regulate all skate activity at the Skatepark during all operating hours.
- (f) APA shall provide all of the special events/services and program activities as described in the attached exhibits.
- (g) APA shall provide the City with park usage reports on a quarterly basis.
- (h) APA shall pay all expenses related to the operation of the Facilities according to the applicable terms of trade.
- (i) APA shall engage in such advertising, solicitation and promotional activities as APA deems necessary or appropriate to advertise the services and programs provided by APA at the Facilities.

3.3. No Partnership/Joint Venture. APA and the City acknowledge that neither is the other's agent, partner or fiduciary and that this Agreement was drafted at arm's length and shall be performed as a matter of arm's length contract and not as a joint venture, partnership or other arrangement that might give rise to fiduciary or other extra-contractual duties or obligations not stated herein.

4. Fees.

4.1. Management Fee. The City shall compensate APA under this Agreement as follows:

4.1.1. Years One and Two. For the first two years of this Agreement, the City shall pay APA a management fee in the not to exceed amount of One Hundred Sixty Thousand Dollars (\$160,000) per year ("Management Fee") in four equal quarterly payments of Forty-Thousand Dollars (\$40,000). Payments shall be invoiced on or before the first day of the month for each quarter, and the City shall have thirty (30) days following its receipt of an invoice from APA to pay. Notwithstanding the foregoing, following the first quarter's payment, the City shall not be required to make a payment to APA until the City is in receipt of APA quarterly financial report, as described herein, for the prior quarter. In addition, during the first two years of this Agreement, APA shall retain all revenues collected through the operation of the Skatepark, including retail, concession, programming, and entry fees.

4.1.2. Years Three through Five. The fee arrangement for years three through five of this Agreement shall be negotiated between the Parties and agreed upon no later than ninety (90) days prior to the end of the preceding year. APA shall receive a management fee of no less than One Hundred Sixty Thousand dollars (\$160,000) per year, provided the revenue sharing remains the same as set forth in Section 4.1.1., above.

4.1.3. First Payment. Upon execution of this Agreement, the City shall pay APA the first quarter's payment.

4.1.4. Late Payment. In the event the City fails to make a timely payment, interest shall accrue at the rate of 10% per annum.

4.1.5. In the event that the City desires increased insurance coverage, the Management Fee shall be increased as negotiated; failure to agree on an increase shall relieve APA of any duty to adjust the required insurance.

5. Operations, Utilities, Permits and Taxes.

5.1. Utilities. APA shall pay and be liable for all utility charges related to the operation of the Facilities, including telephone, internet, and electrical charges for the Pro Shop. The City shall be solely responsible and liable for all other utilities related to the operation of the Skate Park such as the costs for the exterior lighting.

5.2. Taxes.

5.2.1. The City is solely liable for the property taxes and special assessment taxes for the Facilities.

5.2.2. APA shall collect and pay applicable sales taxes on sales of non-exempt items in the Pro-Shop. APA shall be responsible for applicable personal business property taxes for owned personal property held within the Pro-Shop (including inventory). APA shall pay all employment taxes directly arising out of its operation of the Facilities.

5.3. Operating Plan. Prior to the expiration of thirty (30) days from the Effective Date, APA shall develop an Operating Plan for the Pro Shop and concession operation of the Facilities ("Operating Plan"). APA shall submit the Operating Plan to the City for approval, which shall not be unreasonably withheld. Should the City require significant revisions to the Operating Plan, APA shall have a reasonable time to make such revisions and resubmit the Operating Plan for approval. The Operating Plan shall cover policies for such items as: days and hours of operation, guest services, proshop and concession management (including safety programs, security, maintenance schedule, and emergency procedures), guest management (fees, marketing and advertising), employment (including employee screening procedures and discipline policy), complaint review process, procedures for enforcing participation rules applicable to guests, and other appropriate areas of operational concern.

5.4. Employee Training. APA shall provide its employees an orientation regarding operation of the Facilities, including a review of all applicable regulations, policies, procedures and safety measures. The City may, in its discretion, provide an orientation on its policies and procedures for APA's employees, or may provide APA information reasonably sufficient to enable APA to conduct an orientation on the City's policies and procedures. All employees providing supervision or training at the Skatepark shall be experienced in providing such services, and shall have appropriate training in first aid, CPR, and other safety skills.

5.5. Photography. With the City's prior consent, which shall not be unreasonably withheld, APA shall have the right to grant authorization to persons or corporations associated with APA to engage in the production of still and motion pictures and related activities for the use of the Skatepark. APA shall, as a condition of any authorization for filming at the Facilities, require reimbursement to the City for any out-of-pocket costs incurred directly from such filming activity. No person shall be filmed or photographed without his or her prior written consent. In the case of minors, the written consent of a parent or guardian shall be required.

5.6. Additional Security. APA shall install and operate security cameras, which will enable APA to provide 24-7 monitoring of the Facilities.

5.7. Permits. APA shall at all times maintain the proper City and County Health Department permits and inspection rating required for its food and beverage sales. APA shall procure a business license from the City prior to beginning operations at the Facilities, and shall maintain a valid license at all times throughout the duration of this Agreement. The City shall cooperate in expediting any and all permits. The City shall provide all other permits, licenses, and permissions required by law or that APA deems necessary to perform the Agreement.

5.8. Inventory. APA shall maintain an inventory at the Pro Shop of necessity and replacement items, including wheels, trucks, skateboard decks and so forth, at the Pro Shop. APA shall also maintain a fully-stocked concession operation including fountain drinks, water, and snack foods at the Pro Shop.

6. Reporting, Books and Records.

6.1. APA to Provide Reporting. Upon written request, with no fewer than 21 days notice and no more than once per year, unless otherwise required by law, APA, at its sole discretion, shall make available for inspection or provide copies of its books and records to the City. Notwithstanding the foregoing, APA shall maintain the following records and make the records available to the City upon request:

6.1.1. APA shall maintain complete and accurate records with respect to all costs and expenses incurred under this Agreement.

6.1.2. APA shall keep detailed injury reports, maintenance reports, liability waivers, and incident reports, both electronically and in hard copy. APA shall complete and submit any required annual reporting and documentation to the State of California to comply with recreational immunity provisions. The City shall provide APA with all information in its

possession or control that may assist APA in complying with this requirement. The City shall cooperate fully with APA to provide this information.

6.1.3. APA shall provide quarterly and annual park usage reports to the City as soon as is practicable after the closing of APA's books for such quarter or year.

6.1.4. APA shall maintain all records described in this Section 6 for a period according to APA's then existing document retention policy in effect at the time of expiration or termination of this Agreement.

7. Maintenance and Repairs.

7.1. Skatepark. APA shall conduct daily park inspections and report any material maintenance issues to the City for further action. The City shall be responsible for all material repairs and all structural and warranty work. APA shall be responsible for minor maintenance such as painting, trash and minor graffiti removal.

7.2. Pro Shop. The City shall be responsible for maintenance of the exterior of the Pro Shop building, including major appliances such as HVAC and electrical related items. APA will maintain the interior of the Pro Shop building, including all fixtures provided, and will be liable for any repair of such that costs less than five hundred dollars (\$500). APA shall also be responsible for coordinating the service and maintenance of all warranty related repairs to any appliances or parts of the building as well as coordinating and facilitating any required documentation.

7.3. Appearance. APA shall maintain at all times in a clean and orderly condition and appearance, the Pro Shop, and areas adjacent to the Pro Shop. APA shall be responsible for ensuring all trash is placed in the trash receptacles. The City shall be responsible for collection of trash from the trash receptacles and shall arrange for collection to occur as frequently as is necessary to maintain the Facilities in clean and working order.

7.4. Review. APA's on-site manager shall meet at least quarterly, and more frequently if necessary, with the City to review the condition of the facilities.

8. Hours of Operation; Staffing.

8.1. Unless otherwise agreed to in writing by the City, and except for closures, interruptions or delaying resulting from inclement weather, natural disasters, fires, water shortages, riot, war, the negligence or fault of the City, or its employees, agents or contractors, or other events or circumstances beyond APA's control, APA shall keep the Skatepark and Pro Shop open pursuant to the schedule provided in Exhibit "B". APA shall not change the operating schedule without the prior approval of the City, which shall not be unreasonably withheld. APA shall maintain staffing levels within the parameters set forth in Exhibit B.

9. Pricing.

Skatepark pricing levels shall be as set forth in Exhibit "B". APA shall not change pricing levels without the prior written approval of the City, which shall not be unreasonably withheld. APA shall have the right to set all prices charged to customers of the Pro Shop. APA shall not increase prices in the Pro Shop without first giving the City ten (10) days' written notice of such increases, but such increases shall not require the approval of the City.

10. Assignment.

This Operating Agreement is in the nature of a personal services contract not subject to assumption or assignment under 11 U.S.C. Section 365. APA shall not assign or sublease any of its interest under this Agreement without the prior written consent of the City, which consent shall not be unreasonably withheld or delayed.

11. Advertising; Special Events.

11.1. The City shall include APA in any promotional materials produced by the Parks and Recreation Department.

11.2. APA may install on the Property, subject to any applicable sign ordinance, signs identifying its business. APA shall have the right to conduct special events, which may incorporate activities that, in APA's reasonable judgment, relate to the mission and purpose of the Skatepark. During such special events APA may display signage of their sponsors or the event sponsors.

12. Termination.

12.1. City may terminate this Agreement at any time, with or without cause, upon ninety (90) days written notice to APA. Where termination is due to the fault of APA and constitutes an immediate danger to health, safety, and general welfare, the period of notice shall be such shorter time as may be determined by the City. Upon receipt of the notice of termination, APA shall immediately cease all services except such as may be specifically approved by the City.

12.2. APA shall be entitled to compensation for all services rendered prior to receipt of the notice of termination and for any services authorized by the City after such notice.

12.3. APA may terminate this Agreement at any time that it is not in default in its obligations by giving the City thirty (30) days' written notice after the occurrence of any of the following events:

12.3.1. The failure of the City to materially perform any of its obligations under this Agreement, if the City fails to cure its default within said 30-day notice period; or if a cure is not reasonably possible within 30 days and such default has not been caused by the City's gross

negligence or intentional misconduct, the failure of the City to initiate necessary action to cure the default and to diligently proceed with such action until the default is cured.

12.3.2. Issuance by a court of competent jurisdiction of an injunction in any way preventing or restraining APA's use of any substantial portion of the Facilities and the remaining in force of such injunction for a period of 30 consecutive days.

12.3.3. The inability of APA to use any substantial portion of the Facilities for a period of 30 consecutive days, due to the enactment or enforcement of any law or regulation or because of fire, earthquake or similar casualty, or Acts of God or the public enemy.

12.3.4. The material breach of any of the City's representations and warranties set forth in this Agreement.

13. Representations and Warranties. The City hereby warrants and represents (with the understanding that APA is relying on said warranties and representations) that:

13.1. The transactions contemplated by this Agreement and the execution and delivery of all documents required herein and their performance hereunder have been duly authorized. The execution and delivery of this Agreement and any other document required herein and the consummation of the transactions contemplated hereby and thereby will not result in any violations of or default under any term or provision of any agreement, instrument, mortgage, loan or similar documents to which the City is a party or by which it is bound.

13.2. There is no existing, pending or anticipated condemnation or similar proceeding against or involving the Property.

13.3. The City has not entered into any leases, options, contracts or rights of first refusal, recorded or unrecorded, affecting the Pro Shop building which have not been disclosed to APA.

13.4. The individuals executing this Agreement on behalf of the City are authorized and empowered to enter into this Agreement.

13.5. The City is not prohibited from consummating the transaction contemplated in this Agreement by any law, regulation, agreement, instrument, restriction, order or judgment.

13.6. No work has been performed or is in progress at or on the Pro Shop and no materials have been furnished to the Property which might give rise to mechanic's, materialman's or other liens against the or any portion thereof.

14. Indemnification.

To the fullest extent permitted by law, APA shall defend (at APA's sole cost and expense), indemnify, protect, and hold harmless City, its elected officials, officers, employees, agents, and volunteers (collectively the "Indemnified Parties"), from and against any and all liabilities, actions, suits, claims, demands, losses, costs, judgments, arbitration awards, settlements, damages, demands, orders, penalties, and expenses including legal costs and attorney fees

(collectively "Claims"), including but not limited to Claims arising from injuries to or death of persons (APA's employees included), for damage to property, including property owned by City, from any violation of any federal, state, or local law or ordinance, and from errors and omissions committed by APA, its officers, employees, representatives, and agents, that arise out of or relate to APA's performance under this Agreement. This indemnification clause excludes Claims arising from the sole negligence or willful misconduct of the City, its elected officials, officers, employees, agents, and volunteers. Under no circumstances shall the insurance requirements and limits set forth in this Agreement be construed to limit APA's indemnification obligation or other liability under this Agreement. APA's indemnification obligation shall survive the expiration or earlier termination of this Agreement until all actions against the Indemnified Parties for such matters indemnified are fully and finally barred by the applicable statute of limitations or, if an action is timely filed, until such action is final. This provision is intended for the benefit of third party Indemnified Parties not otherwise a party to this Agreement.

15. Insurance.

APA shall procure and maintain insurance as provided for in Exhibit "C", attached hereto and incorporated herein by reference.

16. Risk Management.

APA shall require all participants to sign a liability waiver releasing APA and the City of liability. All participants under age 18 must have a parent or guardian, with valid identification, execute the release prior to use of the Skatepark. The City shall have the right to approve the final wording of the release. APA shall require all participants to use safety gear at all times, as provided above.

17. Surrender of Possession.

Upon the expiration or termination of this Agreement, APA's right to occupy the Facilities and exercise the privileges and rights herein granted shall cease, and APA shall surrender the same, and leave the building in good condition, normal wear and tear excepted. Unless otherwise provided herein, all trade fixtures, equipment and other personal property installed or placed by APA in the Pro Shop building shall remain the property of APA, and APA shall have the right at any time during the term of this Agreement, and for an additional period of twenty (20) days after its expiration, to remove the same from the Property; provided that APA is not in default of any of its obligations hereunder and that APA repairs at its sole cost any damage caused by such removal. Any property not removed by APA within said 20-day period shall become a part of the Property and ownership thereto shall vest in the City.

18. Notice.

All notices required or permitted to be given under this Agreement may be personally delivered or mailed by certified mail, return receipt requested, postage prepaid, to the following addresses:

City: City of Palm Springs
David Ready, City Manager
3200 E. Tahquitz Canyon Way
Palm Springs, CA 92262

APA: Action Park Alliance
Kirsten Bradford, CEO
15131 Clark Ave.
City of Industry, CA 91745

Any notice given by certified mail shall be deemed to be received on the next business day after the date of mailing. Either party may designate in writing a different address for notice purposes pursuant to this Section.

19. Severability.

Whenever possible, each provision of this Agreement shall be interpreted in such a manner as to be effective and valid under applicable law. In the event that any one or more of the phrases, sentences, clauses, paragraphs, or sections contained in this Agreement shall be declared invalid or unenforceable by valid judgment or decree of a court of competent jurisdiction, such invalidity or unenforceability shall not affect any of the remaining phrases, sentences, clauses, paragraphs, or sections of this Agreement, which shall be interpreted to carry out the intent of the parties.

20. Compliance with Laws.

APA shall at all times comply with all federal, state and local laws, rules and regulations which are applicable to its operations on the Property, including all laws, rules and regulations adopted after the Effective Date.

21. Covenant Against Discrimination.

Consultant covenants that, by and for itself, its heirs, executors, assigns, and all persons claiming under or through them, that there shall be no discrimination or segregation in the performance of or in connection with this Agreement regarding any person or group of persons on account of

race, color, creed, religion, sex, marital status, disability, sexual orientation, national origin, or ancestry.

22. California Law.

This Agreement shall be construed and interpreted both as to validity and to performance of the parties in accordance with the laws of the State of California. Legal actions concerning any dispute, claim, or matter arising out of or in relation to this Agreement shall be instituted in the Superior Court of the County of Riverside, State of California, or any other appropriate court in such county, and APA covenants and agrees to submit to the personal jurisdiction of such court in the event of such action.

23. Interpretation.

This Agreement shall be construed as a whole according to its fair language and common meaning to achieve the objectives and purposes of the Parties. The terms of this Agreement are contractual and the result of negotiation between the Parties. Accordingly, any rule of construction of contracts (including, without limitation, California Civil Code Section 1654) that ambiguities are to be construed against the drafting party, shall not be employed in the interpretation of this Agreement. The caption headings of the various sections and paragraphs of this Agreement are for convenience and identification purposes only and shall not be deemed to limit, expand, or define the contents of the respective sections or paragraphs.

24. Waiver.

No delay or omission in the exercise of any right or remedy of a non-defaulting party on any default shall impair such right or remedy or be construed as a waiver. No consent or approval of City shall be deemed to waive or render unnecessary City's consent to or approval of any subsequent act of APA. Any waiver by either party of any default must be in writing. No such waiver shall be a waiver of any other default concerning the same or any other provision of this Agreement.

25. Rights and Remedies are Cumulative.

Except with respect to rights and remedies expressly declared to be exclusive in this Agreement, the rights and remedies of the parties are cumulative. The exercise by either party of one or more of such rights or remedies shall not preclude the exercise by it, at the same or different times, of any other rights or remedies for the same default or any other default by the other party.

26. Arbitration.

Any dispute, claim or controversy arising out of or relating to this Agreement or the breach, termination, enforcement, interpretation or validity thereof, including the determination of the scope or applicability of this agreement to arbitrate, shall be determined by arbitration in Los Angeles, California, before one arbitrator, who shall be a retired judge. At the option of the first to commence an arbitration, the arbitration shall be administered either by the American Arbitration Association (AAA) pursuant to its Commercial Rules or by JAMS pursuant to its Comprehensive Arbitration Rules and Procedures. Judgment on the Award may be entered in

any court having jurisdiction. This clause shall not preclude parties from seeking provisional remedies in aid of arbitration from a court of appropriate jurisdiction. The arbitrator shall, in the Award, allocate costs, reasonable attorney's fees, expert-witness fees, other litigation fees and expenses including the costs of arbitration to the prevailing party in accordance with the Attorneys' Fees provision, below.

27. Attorneys' Fees.

In the event of any action, suit, arbitration, or other proceeding of any nature is brought in connection with the payment terms of this Agreement, the prevailing party shall be entitled to recover its reasonable attorney's fees, expert-witness fees, other litigation costs and fees (e.g., deposition costs, trial preparation costs, etc.), and other costs and expenses of suit.

28. Non-Liability of City Officers and Employees.

No officer or employee of City shall be personally liable to APA, or any successor-in-interest, in the event of any default or breach by City or for any amount which may become due to APA or its successor, or for breach of any obligation of the terms of this Agreement.

29. Integrated Agreement.

This Agreement contains all of the agreements of the parties and supersedes all other written agreements.

30. Amendment.

No amendments or other modifications of this Agreement shall be binding unless through written agreement by all Parties.

31. Successors in Interest.

This Agreement shall be binding upon and inure to the benefit of the Parties' successors and assignees.

32. Recitals.

The above-referenced Recitals are hereby incorporated into the Agreement as though fully set forth in this Agreement and each Party acknowledges and agrees that such Party is bound, for purposes of this Agreement, by the same.

33. Authority.

The persons executing this Agreement on behalf of the Parties warrant that they are duly authorized to execute this Agreement on behalf of Parties and that by so executing this Agreement the Parties are formally bound to the provisions of this Agreement.

34. Future Acts and Cooperation

The City recognizes and acknowledges that APA will require the assistance and cooperation of the City in order to properly perform and fulfill APA's covenants and obligations under this Agreement including the execution of certain documents. The City agrees it shall designate a specific officer or agent having appropriate experience and authority whose responsibility it is to work with APA in assuring that APA obtains the cooperation and assistance of the City, subject to the terms of this Agreement and all applicable laws.

IN WITNESS WHEREOF, the Parties have executed this Agreement as of the dates stated below.

CITY OF PALM SPRINGS

Date: _____

By: _____

David H. Ready
City Manager

APPROVED AS TO FORM:

ATTEST

By: _____

Douglas C. Holland,
City Attorney

By: _____

James Thompson,
City Clerk

ACTION PARK ALLIANCE, INC.

Date: _____

By : _____

Printed Name: _____

Title: _____

EXHIBIT A

The Skate Park is approximately 30,000 s.f. and is located in Sunrise Plaza next to the Palm Springs Swim Center.

EXHIBIT "B"

Hours of Operation; Pricing; Staffing

Action Alliance Skate Park of Palm Springs Hours of Operation

- Weekdays - 12:00 p.m. to 10:00 p.m.
- Weekends - 9:00 a.m. to 10:00 p.m.
- Holidays - 9:00 a.m. to 10:00 p.m.

Pricing

Annual Memberships-

- Resident Memberships \$15.00
- Non-Resident Memberships \$25.00

Programming-

- Camps - 5 weeks during the summer. TBD
 - Lessons & Clinics – scheduled throughout the year TBD
 - Contests – such as Concrete Showdown, Valentines
Game of skate, Nude Bowl contest, etc. TBD
 - Special Events - Go Skate Day, Skate or Rock, etc. TBD
- No more than 12 per calendar year

Staffing

- APA shall provide no less than two (2) trained staff members at the Facilities to monitor and regulate all skate activity at the Skate Park during all operating hours. At least one (1) management level staff member shall be present during all operating hours.



EXHIBIT C

INSURANCE REQUIREMENTS FOR CITY CONTRACTS

Instructions to Contractors/Vendors/Service Providers:

Prior to commencing any work, all contractors, vendors and service providers shall procure and maintain, at their own cost and expense for the duration of their contract with the City, appropriate insurance against claims for injuries to persons or damages to property which may arise from or in connection with the performance of the work or services. The types of insurance required and the coverage amounts are specified below:

A. Minimum Scope of Insurance Required

1. **General Liability Insurance** is required whenever the City is at risk of third-party claims which may arise out of work or presence of a contractor, vendor and service provider on City premises. At a minimum this policy shall:
 - be written on a per occurrence basis; and
 - include products and completed operations liability, independent contractors liability, broad form contractual liability, and cross liability protection.

2. **Automobile Liability Insurance** is required only when vehicles are used by a contractor, vendor or service provider in their scope of work or when they are driven off-road on City property. Compliance with California law requiring auto liability insurance is mandatory and cannot be waived. At a minimum this policy shall:
 - be written on a per occurrence basis;
 - include coverage for Bodily Injury and Property Damage, Owned, Non-owned and Hired Vehicles; and
 - include coverage for owned, non-owned, leased and hired vehicles.

If an automobile is not used in connection with the services provided by the contractor, vendor or service provider, a written request to waive this requirement should be made to the City's Risk Manager.

3. **Workers' Compensation and Employer's Liability Insurances** is required for any contractor, vendor or service provider that has any employees at any time during the period of this contract. Contractors with no employees must complete a Request for Waiver of Workers' Compensation Insurance Requirement form available from the City's Risk Manager. At a minimum, this policy shall:
 - provide statutory requirements of the State of California; and

- include \$1,000,000 Employer's Liability.
4. **Errors and Omissions (if applicable)** coverage is required for licensed or other professional contractors doing design, architectural, engineering or other services that warrant such insurance. At a minimum this policy shall:
- cover liability for malpractice or errors and omissions made in the course of rendering professional services.

B. Minimum Limits of Insurance Coverage Required

\$1 Million per Occurrence/\$2 Million Aggregate

Umbrella excess liability may be used to reach the limits stated above.

Additional insurance requirements may be imposed by the City for services or products that have a higher risk. Refer to the City's Risk Manager for information of the insurance requirements for the following types of services or products:

1. Construction contracts which are awarded or administered through City departments other than the Public Works Department;
2. Medical, excavation, drilling, trenching or shoring services, or services involving explosives or pyrotechnics;
3. Environmental consulting, engineering or related services or operations;
4. Custom manufactured products;
5. Products or services involving firearms, tobacco, alcohol, or controlled substances;
6. Any unusual or high-risk activities, operations or products.

C. General Standards for Insurance Policies:

All insurance policies shall meet the following general standards:

1. Insurance carrier is to be placed with duly licensed or approved non-admitted insurers in the State of California.
2. Insurers must have a Best's rating of B+, Class VII or higher (this rating includes those insurers with a minimum policyholder's surplus of \$50 to \$100 million). Exceptions to the Best's rating may be considered when an insurance carrier meets all other standards and can satisfy surplus amounts equivalent to a B+, Class VII rating.
3. Certificate must include evidence of the amount of any deductible or self-insured retention under the policy.

D. Verification of Insurance Coverage:

All individuals, contractors, agencies, and organizations conducting business for the City shall provide proof of insurance by submitting one of the following: (1) an approved

General and/or Auto Liability Endorsement Form for the City of Palm Springs; or (2) an acceptable Certificate of Liability Insurance Coverage with an approved Additional Insured Endorsement (see attached) with the following endorsements stated on the certificate:

1. "The City of Palm Springs, its officials, employees and agents are named as an additional insured" ("as it relates to a specific contract" or "for any and all work performed with the City" may be included in this statement).
2. "This insurance is primary and non-contributory over any insurance or self-insurance the City may have" ("as it relates to a specific contract" or "for any and all work performed with the City" may be included in this statement). **See Example A below.**

~~As an alternative to the non-contributory endorsement, the City will accept a waiver of subrogation endorsement on the General Liability policy. At a minimum, this endorsement shall include the following language:~~

~~"This insurance company agrees to waive all rights of subrogation against the City of Palm Springs, its officers, officials and employees for losses paid under the terms of this policy which arise from the work performed by the named insured for the City."~~

3. ~~"The insurance afforded by this policy shall not be cancelled except after thirty days prior written notice by certified mail return receipt requested has been given to the City."~~ Language such as, "endeavor to" mail and "but failure to mail such notice shall impose no obligation or liability of any kind upon the company, its agents or representative" is not acceptable and must be crossed out. **See Example B below.**

The Workers' Compensation and Employers' Liability policies shall contain waiver of subrogation clause in favor of City, its elected officials, officers, employees, agents and volunteers. **See Example C below.**

In addition to the endorsements listed above, the City of Palm Springs shall be named the certificate holder on the policy.

All certificates and endorsements are to be received and approved by the City before work commences. All certificates of insurance must be authorized by a person with authority to bind coverage, whether that is the authorized agent/broker or insurance underwriter. Failure to obtain the required documents prior to the commencement of work shall not waive the contractor's obligation to provide them.

E. Acceptable Alternatives to Insurance Industry Certificates of Insurance:

The City will accept either a CG 20 10 10 01 or a CG 20 33 10 01 (or some form specific to a particular insurance company that has similar wording) as long as the form is accompanied by a CG 20 37 10 01. In addition, the City will accept the following:

- A copy of the full insurance policy which contains a thirty (30) days' cancellation notice provision (ten (10) days for non-payment of premium) and additional insured and/or loss-payee status, when appropriate, for the City.

- Binders and Cover Notes are also acceptable as interim evidence for up to 90 days from date of approval

F. Endorsement Language for Insurance Certificates

Example A:

THE INSURANCE SHALL BE PRIMARY WITH RESPECT TO THE INSURED SHOWN IN THE SCHEDULE ABOVE, OR IF EXCESS, SHALL STAND IN AN UNBROKEN CHAIN OF COVERAGE EXCESS OF THE NAMED INSURED'S SCHEDULED UNDERLYING PRIMARY COVERAGE. IN EITHER EVENT, ANY OTHER INSURANCE MAINTAINED BY THE INSURED SCHEDULED ABOVE SHALL BE IN EXCESS OF THIS INSURANCE AND SHALL NOT BE CALLED UPON TO CONTRIBUTE WITH IT.

Example B:

SHOULD ANY OF THE ABOVE-REFERENCED POLICIES BE CANCELLED BEFORE THE EXPIRATION DATE THEREOF, THE ISSUING INSURER WILL ENDEAVOR TO MAIL 30 DAYS* WRITTEN NOTICE TO THE CERTIFICATE HOLDER NAMED HEREIN BUT FAILURE TO MAIL SUCH NOTICE SHALL IMPOSE NO OBLIGATION OR LIABILITY OF ANY KIND UPON THE INSURER, ITS AGENTS OR REPRESENTATIVES.

**The broker/agent can include a qualifier stating "10 days notice for nonpayment of premium."*

Example C:

IT IS UNDERSTOOD AND AGREED THAT THE COMPANY WAIVES THE RIGHT OF SUBROGATION AGAINST THE ABOVE ADDITIONAL INSURED (S), BUT ONLY WITH RESPECT TO THE JOB OR PREMISES DESCRIBED IN THE CERTIFICATE ATTACHED HERETO.

- G. Alternative Programs/Self-Insurance.** Under certain circumstances, the City may accept risk financing mechanisms such as Risk Retention Groups, Risk Purchasing Groups, off-shore carriers, captive insurance programs and self-insurance programs as verification of insurance coverage. These programs are subject to separate approval once the City has reviewed the relevant audited financial statements and made a determination that the program provides sufficient coverage to meet the City's requirements.

The City has recently joined SPARTA (Service Providers & Artisans Trade Activities Program) to accommodate smaller contractors and service providers who have difficulty in meeting the City's insurance requirements. The SPARTA Program offers a general liability program that provides the \$1 million limit and, upon request, will also provide auto insurance with the \$1 million limit (only in conjunction with the purchase of general liability

insurance). SPARTA is only available during the time your company is under contract with the City.

Insurance is provided on a per project basis and is overseen by the Municipality Insurance Services, Inc. Essex Insurance Company provides coverage and is an A++ rated company. There is a 24-hour response time and coverage is immediate.

A quote may be obtained by calling 1-800-420-0555 or online at www.2sparta.com.

Type of work covered:

- A. Personal services contracts;
- B. General contractors and their subcontractors (certain specialty trades excluded);
- C. Consultants; and
- D. Providers of goods.

H. Waiver or Modification of the Insurance Requirements.

Any waiver or modification of the insurance requirements can only be made by the City's Risk Manager or designee at City's discretion. If you do not believe that the insurance requirements apply to you (e.g., you do not have employees and therefore are not subject to the State's workers' compensation insurance requirements; you do not drive an automobile in connection with the services you provide to the City; professional liability or errors and omissions liability insurance is not available for the type of services you are performing, etc.), please submit a written request for waiver or modification of the insurance requirements and the reasons underlying your request to the Risk Manager. All requests for a waiver or modification will be reviewed and a final determination rendered by the Risk Manager.