



AGENDA REPORT

SAN CLEMENTE CITY COUNCIL MEETING
Meeting Date: May 20, 2014

Agenda Item 9C

Approvals:

City Manager [Signature]

Dept. Head [Signature]

Attorney [Signature]

Finance [Signature]

Department: Beaches, Parks, and Recreation
Prepared By: Pamela Passow, Recreation Manager

Subject: *PROPOSED AGREEMENT WITH FRIENDS OF SAN CLEMENTE BEACHES, PARKS AND RECREATION FOUNDATION.*

Fiscal Impact: Yes. Potential revenue increase of \$3,380; loss of revenue of \$17,620 from fee waivers and other services, increase expenditure of \$9,000, and increase in revenue of \$30,000 from donations.

Summary: The Friends of San Clemente Beaches, Parks and Recreation Foundation (Friends Foundation) supports the efforts of the San Clemente Beaches, Parks and Recreation Department through financial and volunteer contributions. The City has approved fee waivers and other support to assist in their efforts on a case by case basis. Most recently, fee waivers for the annual Carnival and a transfer of \$9,000 from the City Council Contingency to Police Services for police support during the event was approved in September 2013. Staff recommends approving a written agreement with the Friends Foundation in order to establish a more formal relationship, acknowledge the totality of their contributions rather than case by case, and clearly identify the roles and responsibilities of each.

Background: The Friends of San Clemente Beaches, Parks and Recreation Foundation (Friends Foundation) was formed in 2000 to support the City of San Clemente Beaches, Parks and Recreation Department's efforts in providing quality programs and services. They have made substantial financial contributions to San Clemente towards community facilities, programs, and events. At its September 3, 2013 meeting, the City Council approved a fee waiver for the Friends Foundation to host a carnival. At that time, the City Council requested a more formal relationship between the City and Friends.

On April 8, 2014, the Beaches, Parks and Recreation Commission recommended approval of the agreement with the Friends Foundation.

The Friends Foundation has been successful in the following areas:

- Raising over \$200,000 to help build an award-winning sports park and aquatics center;
- Founding the Cyber Café, an adult computer learning center with all volunteer instructors, dedicated to helping adults and seniors learn to use a computer for enjoyment, to simplify common tasks in their lives;
- Supporting community events and starting programs such as the surfing contest that has garnered national attention with celebrity surfers donating their

time for this free locals-only youth event. It has also started a skate contest, which continues to be a success;

- Supporting financially and with volunteer assistance City community events, including Springtacular, Santa’s Village by the Sea, and the Beach Concert Series. The support enables the City to continue to offer free events to the community and to keep the quality of events at a high standard in spite of shrinking budgets; and
- Offering other community events, including the annual carnival, which is the largest fundraising event for the Friends Foundation with the money raised at this four-day event given right back to the community in the form of community scholarships, events, and facilities.

The Friends Foundation is made up of an all-volunteer Board of Directors. Each member volunteers countless hours at events, programs, and fund raising to support the Beaches, Parks, and Recreation Department, as well as other community programs, events, and facilities in San Clemente. Without the Friends Foundation, children who cannot afford community classes would not be able to enjoy swimming, dancing, or one of the other fun community classes that the City offers. This year alone, the Friends Foundation has donated over \$7,000 to support the scholarship program.

The Friends Foundation has made it its mission to make a difference in San Clemente. They are innovative, supportive, and care about their community. The Friends of San Clemente Beaches, Parks, and Recreation Foundation is improving the lives for each and every citizen in the community one dollar and one volunteer hour at a time.

Discussion:

The Friends Foundation has committed to donating a minimum of \$25,000 per year to the City to support community events, programs, and scholarships. This is a 500% increase from 2010 when they donated less than \$5,000 to the City. In addition, they will donate \$5,000 per year for the San Clemente Sports Hall of Fame and all donations collected for any capital project campaigns. In 2014, they are also donating \$5,000 for Ole Hanson Beach Club improvements.

The Friends Foundation is requesting fee waivers to hold their special events and monthly meetings on City property. Expenditures listed below for the Carnival include \$9,000 in contracted police services provided by the Orange County Sheriff Department. This amount would need to be incorporated into future budgets for police services. Historically, the City Council Contingency fund has paid for these items. Other expenditures listed represent potential loss of revenue if facilities were rented at a resident non-profit rate or staff time which can be absorbed in existing budgets.

The amount of waivers requested (including space, staff time, and contracted services) totals:

Activity	Amount
SC Open Skate Tournament	\$2,000
“Stoke-a-Rama”	\$1,070
“Friendraiser”	\$885

Carnival	\$19,000
Beach Photos	\$40
Meeting Room Space	\$625
Golf Tournament	\$3,000
Total	\$26,620

Recommended

Action: STAFF AND THE BEACHES, PARKS AND RECREATION COMMISSION RECOMMEND THAT the City Council 1) approve and authorize the Mayor to execute the proposed agreement with the Friends of San Clemente Beaches, Parks, and Recreation Foundation; and 2) approve a supplemental appropriation of \$9,000 in account #001-218-43625 (Police Contract Services) for Sheriff support for the Carnival Colossal and Expo beginning in fiscal year 2015.

Attachments: Draft Agreement with Friends of San Clemente Beaches, Parks and Recreation Foundation

Notification: Friends of San Clemente, Beaches, Parks, and Recreation Foundation

ATTACHMENT

**FRIENDS OF SAN CLEMENTE BEACHES, PARKS, AND RECREATION
FOUNDATION AGREEMENT**

This Friendship AGREEMENT is entered into this ____ day of _____, 2014 (the “Effective Date”), by and between the CITY OF SAN CLEMENTE, a municipal corporation (“City”) and FRIENDS OF SAN CLEMENTE BEACHES, PARKS AND RECREATION FOUNDATION, a non-profit foundation (“FRIENDS”) for the period of five (5) years from and after the Effective Date.

RECITALS:

- A. The City provides recreational opportunities for the residents of San Clemente.
- B. The City’s Beaches, Parks, and Recreation Department operates at a deficit and requires additional funding in order to provide amenities and programming for the community.
- C. The FRIENDS’ primary purpose is to receive, invest, and distribute funds, property, and other resources to aid, sponsor, promote, advance, and assist in the provision of public parks, beaches, recreation, and culture in and for the City of San Clemente.
- D. The FRIENDS produce or assist in the production of community events and fundraisers that require City facilities, resources, and staff.
- E. The FRIENDS have donated almost a quarter million dollars to the City in support of facilities, programs, and events.
- E. City and FRIENDS wish to have agreement on sharing resources.

COVENANTS:

Based on the foregoing Recitals and for good and valuable consideration, the receipt and sufficiency of which is acknowledged by the parties, City and FRIENDS hereby agree as follows:

1. FRIENDS Program Requirements

1.1. As a material inducement to City’s entering into this Agreement with FRIENDS, FRIENDS agrees and covenants that, during the term of this Agreement, FRIENDS shall operate its program and provide donations in compliance with the following requirements, and agrees that any failure to strictly comply with any of the following requirements is a material breach of this Agreement:

- 1.1.1. FRIENDS is and shall remain currently registered and active with the State of California as a not-for-profit community organization under Section 501(c)(3) or (c)(4) of the Internal Revenue Code.

ATTACHMENT

- 1.1.2. FRIENDS is not and shall not be the subject of any investigation by any government or administrative agency whether at the City, County, State or Federal level and shall adhere to all relevant City rules, policies and allocations.
- 1.1.3. FRIENDS remains able to demonstrate financial hardship if the discounts provided for by this Agreement are denied and FRIENDS is required to pay regular rates for use of City amenities, fields, pools, beaches, golf course, and/or facilities. For purposes of this agreement "Financial Hardship" shall mean a demonstrated inability to pay generally applicable public rental rates then in effect. FRIENDS shall develop and maintain a strong financial and volunteer base with the citizens and businesses of San Clemente to support the City's Beaches, Parks, and Recreation.
- 1.1.4. FRIENDS shall develop and cultivate a wider public understanding of the benefits that recreation, beaches, parks, and cultural services and related leisure time activities contribute to the well-being of the community.
- 1.1.5. FRIENDS shall encourage innovation in the development and quality of programs and facilities that cannot ordinarily be supported by government and to foster the most effective means of delivering services.
- 1.1.6. FRIENDS shall maintain and enhance the quality of beaches, parks, and recreation services for the present and future residents of San Clemente.
- 1.1.7. FRIENDS has and shall continue to have a "no discrimination" policy.
- 1.1.8. FRIENDS supplies and shall continue to supply the City with budgets annually, outlining the donations to the City and other expenses and income with monthly updates of actuals.
- 1.1.9. FRIENDS shall support Community Outreach at each of their events that shall include promoting the programs and events of the City's Beaches, Parks, and Recreation Department; positively discussing the relationship between the FRIENDS and the CITY; and soliciting donations to support community events, scholarships, and programs in San Clemente.

2. **FRIENDS Representatives To City**

- 2.1. FRIENDS shall designate one official representative who shall be City's primary contact and who shall coordinate the programs, event spaces, and overall agreements with the City. The FRIENDS representative shall have authority to make decisions for FRIENDS, sign applications with City on behalf of FRIENDS for facility use, approve billing, and be responsible for resolving conflicts if/when they arise.
- 2.2. FRIENDS is responsible for notifying City in writing within thirty (30) days of any change in its designated FRIENDS representative referenced in Section 2.1.

ATTACHMENT

2.3. The Director of Beaches, Parks, and Recreation or designee will be the City liaison coordinating all City operations with FRIENDS as a non-voting member.

3. SC Open Skate Tournament

3.1 FRIENDS shall assist with the annual SC Open Skate Tournament (“SC Open Skate”) which shall occur in the month of September (or a mutually agreed-upon date) and shall generally consist of a one-day skate tournament for youth in San Clemente that shall include prizes, judges, music, and food.

3.2 FRIENDS shall provide volunteers to plan, coordinate, and run SC Open Skate.

3.3 FRIENDS shall design publicity for SC Open Skate and obtain City approval before printing, including flyers, posters, and multi-media.

3.4 FRIENDS shall obtain sponsors for event and retain sponsorship money for community outreach.

3.5 FRIENDS shall work with City to set up an annual date of the SC Open Skate that is mutually beneficial, which is typically in September of each year.

3.6 City shall provide use of and waive rental fees for use of Ralph’s Skate Court for day of SC Open Skate.

3.7 City shall process registrations for entrants and provide contact information for registrants to FRIENDS.

3.8 City shall advertise SC Open Skate in City quarterly brochure, City website, and social media outlets.

3.9 City shall provide staff support at a level which it deems appropriate in its sole and absolute discretion prior to and day of SC Open Skate.

4. SC Open Surf Contest

4.1. FRIENDS shall be responsible for the annual SC Open Surf Contest which shall occur in the month of September (or a mutually agreed-upon date) and shall generally consist of a one-day youth surf contest for youth in San Clemente that shall include judges, prizes, and entertainment.

4.2. FRIENDS shall provide volunteers for to plan, coordinate, and run Stoke-a-Rama.

4.3. FRIENDS shall design publicity for SC Open Surf Contest and obtain City approval before printing, including flyers, posters, and multi-media.

ATTACHMENT

- 4.4. FRIENDS shall obtain sponsors for SC Open Surf Contest event and retain sponsorship money for community outreach.
 - 4.5. FRIENDS shall work with City to set up an annual date of the SC Open Surf Contest that is mutually beneficial. In addition, FRIENDS shall have permission to operate their event at T-Street in September.
 - 4.6. FRIENDS shall process all registrations for entrants and have all participants sign a waiver approved by the City.
 - 4.7. City shall allow access to T-Street Beach area and waive rental fees for a one-day SC Open Surf Contest
 - 4.8. City shall provide staff support at a level which it deems appropriate in its sole and absolute discretion prior to and day of SC Open Surf Contest without fees, including lifeguard support.
5. **Golf Tournament**
- 5.1. FRIENDS shall be responsible for the annual SC Golf Tournament (the "Golf Tournament") which shall occur at the San Clemente Municipal Golf Course in the month of June (or a mutually agreed upon date) and shall generally consist of a golf tournament with a shotgun start that includes a putting contest, dinner, and awards ceremony.
 - 5.2. FRIENDS shall provide volunteers to plan, coordinate, and run the Golf Tournament.
 - 5.3. FRIENDS shall design publicity for the Golf Tournament and be responsible for all printing costs.
 - 5.4. FRIENDS shall obtain sponsors for the Golf Tournament and retain sponsorship money for community outreach.
 - 5.5. FRIENDS shall work with City to set up an annual date of the event that is mutually beneficial.
 - 5.6. FRIENDS shall process all registrations for entrants.
 - 5.7. FRIENDS shall be responsible for food and space rental for the Golf Tournament and shall coordinate with golf course concessionaire, who shall be the sole provider of food and beverage at the Golf Tournament.
 - 5.8. City shall provide use of the San Clemente Municipal Golf Course and waive all rental fees for a one-day shot-gun golf tournament.

ATTACHMENT

6. Friendraiser

- 6.1. FRIENDS shall be responsible for the annual Friendraiser (the "Friendraiser") which shall occur in the month of May or a mutually agreed upon date and shall generally consist of a cocktail party with food and entertainment.
- 6.2. FRIENDS shall provide volunteers for event to plan, coordinate, and run the Friendraiser.
- 6.3. FRIENDS shall design publicity for the Friendraiser and be responsible for all printing costs.
- 6.4. FRIENDS shall obtain sponsors for the Friendraiser and retain sponsorship money for community outreach.
- 6.5. FRIENDS shall work with City to set up an annual date of the Friendraiser that is mutually beneficial.
- 6.6. FRIENDS shall process all registrations to the Friendraiser.
- 6.7. FRIENDS is permitted to serve alcohol with current ABC license and certified bartender at the Friendraiser. Security guards will need to be present during the delivery and serving of alcoholic beverages.
- 6.8. City shall provide use of the San Clemente Aquatics Center for the Friendraiser, and waive all rental fees for one night.
- 6.9. City shall provide staff support at a level which it deems appropriate in its sole and absolute discretion prior to and day of event without fees, including lifeguard support.

7. Carnival

- 7.1. FRIENDS shall be responsible for the annual Carnival (the "Carnival") which shall occur in the month of October or a mutually agreed upon date and shall generally consist of rides, entertainment, food, and community booths.
- 7.2. FRIENDS shall provide volunteers to plan, coordinate, and run the Carnival.
- 7.3. FRIENDS shall design publicity for the Carnival and be responsible for all printing costs.
- 7.4. FRIENDS shall obtain sponsors for the Carnival and retain sponsorship money for community outreach.
- 7.5. FRIENDS shall work with City to set up an annual date of the Carnival that is mutually beneficial, typically four days of carnival and three days of food vendor fair in October.
- 7.6. City shall provide a space mutually agreed upon for the Carnival, and waive all rental fees for a four day event.

ATTACHMENT

7.7. City shall provide staff support at a level which it deems appropriate in its sole and absolute discretion prior to and day of event without fees, including site reviews, inspections, site mapping, field preparation, police services, and trash services.

8. Photo Fundraiser

8.1. FRIENDS shall be responsible for the Photo fundraiser which shall occur in the month of November or a mutually agreed upon date and shall generally consist of photos on the beach.

8.2. FRIENDS shall provide volunteers to plan, coordinate, and run the Photo fundraiser.

8.3. FRIENDS shall design publicity for the Photo fundraiser and be responsible for all printing costs.

8.4. FRIENDS shall obtain sponsors for the Photo fundraiser and retain sponsorship money for community outreach.

8.5. FRIENDS shall work with City to set up an annual date of the Photo fundraiser that is mutually beneficial, typically two weekends in November.

8.6. City shall provide a space mutually agreed upon, typically on the City beach by the pier, for the Photo fundraiser, and waive all rental fees for a four day event.

8.7. City shall provide staff support at a level which it deems appropriate in its sole and absolute discretion prior to and day of event without fees, including site reviews, inspections, and site mapping.

9. General Conditions for Special Events –comply with all requirements, rules, and ordinances, including, but not limited to:

9.1. FRIENDS shall ensure that neither its members nor its invitees consume alcoholic beverages at any of the special events listed above with the exception of the Friendraiser and Golf Tournament.

9.2. FRIENDS shall comply with the City's Noise Ordinance. Sound permits are required for all amplified sound, including but not limited to PA systems, DJ and live entertainment, such as bands that include amplification for instruments, drums, horns, etc. Applications for sound permits must be filed at least ten (10) working days prior to the proposed event and are reviewed by City's Beaches, Parks and Recreation Department.

9.3. Per Orange County Fire Authority Guidelines (OCFA Guideline F-05), an OCFA permit is required to erect or operate a tent or air-supported temporary membrane structure having an area in excess of 200 square feet, or a canopy in excess of 400 square feet, except for structures used exclusively for camping. (UFC 105.8t.1.) The regulations of the State Fire Marshal for large and small tents, awnings and other fabric enclosures shall also apply. (UFC 320.)

ATTACHMENT

9.4. Clean Up

- 9.4.1. FRIENDS shall be responsible for cleaning any and all City facilities after each use by FRIENDS. This includes, but is not limited to, the removal of litter left behind from FRIENDS members or patrons at events. City will provide adequate trash containers.
- 9.4.2. FRIENDS shall follow all applicable City policies and codes, including ensuring that materials or wastewater from cleaning up after an event do not enter the storm drain system (i.e., street gutters or catch basins).

9.5. Concessions

- 9.5.1. FRIENDS may only sell food products to the program participants and patrons during the scheduled events with City approval.
- 9.5.2. FRIENDS shall adhere to Orange County Health Department standards for storage, preparation, and service of food items. FRIENDS shall obtain the appropriate permits from the Orange County Health Department prior to any food service.
- 9.5.3. FRIENDS will not permit persons under age 18 to operate a barbeque and other appliances or flammable liquids or materials. City retains the discretion to approve the use and location of a barbeque.
- 9.5.4. In accordance with San Clemente Resolution No. 04-27, there will be no use of Styrofoam products at any location within the City limits. FRIENDS shall prevent the utilization and/or distribution of expandable polystyrene food service products, commonly referred to by the trade name "Styrofoam," by any FRIENDS attendee or vendor (caterer) during the term of this Agreement. Failure to abide by this resolution will result in the automatic denial of future pool rentals.

9.6. Crowd Control

- 9.6.1. FRIENDS shall keep registered participants and all attending FRIENDS events from engaging in un-sportsmanlike conduct, such as fighting or rude and abusive verbal confrontations. If FRIENDS cannot control the situation, FRIENDS shall contact City staff and/or the Orange County Sheriff's Department for assistance.

10. FRIENDS Promotions

- 10.1. Magazine/Web Space: City will list FRIENDS each quarter in the Recreation Magazine and City website. Space will be limited to information pertaining to event dates, phone numbers, contacts, and community support. FRIENDS is responsible for

ATTACHMENT

submitting accurate information to the City Designee in a timely fashion in accordance with the publishing schedule. Additional space in the Recreation Magazine may be available and will be included in the Recreation section of the magazine.

- 10.2. Printed Materials: Except as provided above, FRIENDS will be responsible for all printed promotional materials. City does not provide for copying of flyers, posters, registration packets or any other printed materials. FRIENDS is encouraged to use the designated City brochure racks located at the Community Center and San Clemente Aquatics Center.
- 10.3. Banners at City facilities: FRIENDS may place temporary sponsor banners to be located on the event sites during the events depending on availability and with permission from Beaches, Parks, and Recreation.
- 10.4. Overhead Banner Reservation: City has an overhead banner program that is offered to community partners for promotional space. Regular Banner fees apply for the banner hanging. Space in the calendar is based on date availability in conjunction with other City programs and partners. Applications are available in November of each calendar year and are processed by January.
- 10.5. City's logo is not to be used on any promotional materials or merchandise without prior City approval, which approval may be withheld in City's sole and absolute discretion.

11. FRIENDS Meeting Space

- 11.1. City will waive rental fees for FRIENDS at the San Clemente Aquatics Center in the Friends Meeting Room for board meetings or other uses as approved by the City.

12. FRIENDS Annual Charitable Contribution to Beaches, Parks, and Recreation

As proposed by FRIENDS, FRIENDS shall make an annual contribution as follows:

- 12.1. Annual donation to scholarships, events, and programs at a minimum of \$25,000.
- 12.2. Annual donation to San Clemente Sports Hall of Fame at a minimum of \$5,000.
- 12.3. One time donation to Ole Hanson Beach Club improvements in 2014 in the amount of \$5,000.
- 12.4. Annual donations to City of any monies received for Capital project campaigns.

13. Indemnification and Insurance

To the fullest extent permitted by law (including, without limitation, California Civil Code Sections 2782 and 2782.6), FRIENDS shall defend (with legal counsel reasonably acceptable to City), indemnify, and hold free and harmless City and City's agents, officers, and employees, (collectively, the "Indemnitees") from and against any and all claims, loss, cost, damage, injury

ATTACHMENT

(including, without limitation, injury to or death of any FRIENDS participants, invitees officers, agents, employees, representatives, or subcontractors of FRIENDS [collectively, the "FRIENDS ENTITIES"]), expense and liability of every kind, nature and description (including, without limitation, incidental and consequential damages, court costs, attorney's fees, litigation expenses and fees of expert Contractors or expert witnesses incurred in connection therewith and costs of investigation) that arise out of, pertain to, or relate to, directly or indirectly, in whole or in part, the negligence, recklessness, or willful misconduct of any or all FRIENDS's ENTITIES use of the City facilities, by any of the FRIENDS ENTITIES anyone directly or indirectly employed by any of them, or anyone that they control (collectively, the "Liabilities"). Such obligation to defend, hold harmless and indemnify any Indemnitee shall not apply to the extent that such Liabilities are caused by the sole and active negligence or willful misconduct of such Indemnitee.

Prior to the City's execution of this Agreement, and as a condition to the effectiveness hereof, FRIENDS shall submit certificates and endorsements to City indicating compliance with the following minimum insurance requirements, and FRIENDS shall maintain such insurance in effect during the entire term of this Agreement: Commercial General Liability, personal injury and property damage liability, contractual liability, independent contractor's liability, and automobile liability insurance, with minimum combined liability limits of One Million Dollars (\$1,000,000) per occurrence for all covered losses, and Two Million Dollars (\$2,000,000) in the aggregate. Any deductible or self-insured retention in excess of Five Thousand Dollars (\$5,000) shall be declared to the City and requires the prior approval of the City's Risk Manager. Each such policy of insurance shall:

- (i) be issued by companies that hold a current policy holder's alphabetic and financial size category rating of not less than A-VII, according to the current Best's Key Rating Guide or a company of equal financial stability that is approved by City's Risk Manager for all coverage's except surety.
- (ii) name and list as additional insured City and City's officers, employees, and agents. An endorsement shall accompany the insurance certificate naming such additional insured. Additional Insured Endorsement is subject to approval by the city's risk manager, at their sole discretion.
- (iii) specify it acts as primary insurance and that no insurance held or owned by City shall be called upon to cover a loss under said policy;
- (iv) contain a clause substantially in the following words: "it is hereby understood and agreed that this policy may not be canceled or materially changed except upon thirty (30) days prior written notice to City of such cancellation or material change as evidenced by a return receipt for a registered letter;"
- (v) cover the operations of FRIENDS pursuant to the terms of this Agreement; and
- (vi) be written on an occurrence and not a claims made basis.

ATTACHMENT

Original documents sent to:
City of San Clemente
Risk Management Office
100 Presidio, San Clemente, CA 92672

One additional copy sent to:
Beaches, Parks and Recreation Department
Beaches, Parks, and Recreation Director
100 N. Calle Seville, San Clemente, CA 92672

14. Termination:

- 14.1. City and/or Friends can terminate the Agreement without cause on sixty (60) days notice.

15. Term and Cooperation

- 15.1. The term of this agreement shall be FIVE (5) years from the Effective Date the Mayor executes this Agreement. The provision of section 12 shall survive termination.
- 15.2. FRIENDS shall adhere to all the policies and procedures of City and cooperate with the Department and City staff to ensure that the purpose of this Agreement is met. FRIENDS shall not discriminate against those in its employ, volunteers or participants on account of race, religion, national origin, ethnicity, sexual orientation or gender (except where gender is a bona fide issue for the sports program.).

16. Miscellaneous

- 16.1. Entire Agreement. This Agreement sets forth and contains the entire understanding and agreement of the parties with respect to the subject matter set forth herein, and there are no oral or written representations, understandings or ancillary covenants, undertakings or agreements which are not contained or expressly referred to herein. No testimony or evidence of any such representations, understandings or covenants shall be admissible in any proceeding of any kind or nature to interpret or determine the terms or conditions of this Agreement.
- 16.2. Severability. If any term, provision, covenant or condition of this Agreement shall be determined invalid, void or unenforceable, then this Agreement shall terminate in its entirety, unless the parties otherwise agree in writing, which agreement shall not be unreasonably withheld.
- 16.3. Interpretation and Governing Law. This Agreement and any dispute arising hereunder shall be governed and interpreted in accordance with the laws of the State of California. This Agreement shall be construed as a whole according to its fair language

ATTACHMENT

and common meaning to achieve the objectives and purposes of the parties hereto, and the rule of construction to the effect that ambiguities are to be resolved against the drafting party or in favor of City shall not be employed in interpreting this Agreement, all parties having been represented by counsel in the negotiation and preparation hereof.

- 16.4. Section Headings. All section headings and subheadings are inserted for convenience only and shall not affect any construction or interpretation of this Agreement.
- 16.5. Singular and Plural. As used herein, the singular of any word includes the plural.
- 16.6. Time of Essence. Time is of the essence in the performance of the provisions of this Agreement as to which time is an element.
- 16.7. Waiver. Failure of a party to insist upon the strict performance of any of the provisions of this Agreement by the other party, or the failure by a party to exercise its rights upon the default of the other party, shall not constitute a waiver of such party's right to insist and demand strict compliance by the other party with the terms of this Agreement thereafter.
- 16.8. No Third Party Beneficiaries. This Agreement is made and entered into for the sole protection and benefit for the parties and their successors and assigns. No other person shall have any right of action based upon any provision of this Agreement.
- 16.9. Force Majeure. Neither party shall be deemed to be in default where failure or delay in performance of any of its obligations under this Agreement is caused by earthquakes, other acts of God, fires, wars, riots or similar hostilities, strikes and other labor difficulties beyond the party's control (including the party's employment force), government regulations, court actions (such as restraining orders or injunctions), or other causes beyond the party's reasonable control. If any such events shall occur, the term of this Agreement and the time for performance shall be extended for the duration of each such event, provided that the term of this Agreement shall not be extended under any circumstances for more than five (5) years.
- 16.10. Mutual Covenants. The covenants contained herein are mutual covenants and also constitute conditions to the concurrent or subsequent performance by the party benefited thereby of the covenants to be performed hereunder by such benefited party.
- 16.11. Counterparts. This Agreement may be executed by the parties in counterparts, which counterparts shall be construed together and have the same effect as if all of the parties had executed the same instrument.
- 16.12. Litigation. Any action at law or in equity arising under this Agreement or brought by any party hereto for the purpose of enforcing, construing or determining the validity of any provision of this Agreement shall be filed and tried in the Superior Court of the County of Orange, State of California, or such other appropriate court in said county, and the parties hereto waive all provisions of law providing for the filing, removal or change of venue to any other court. Service of process on City shall be made in accordance with California law. Service of process shall be made in any manner permitted by California

ATTACHMENT

law and shall be effective whether served inside or outside California. In the event of any action between the Parties seeking enforcement of any of the terms and conditions to this Agreement, the prevailing party in such action shall be awarded, in addition to such relief to which such party entitled under this Agreement, its reasonable litigation costs and expenses, including without limitation its expert witness fees and reasonable attorney's fees.

16.13. **Amendments in Writing/Cooperation.** This Agreement may be amended only by written consent of both parties. The parties shall cooperate in good faith with respect to any amendment proposed in order to clarify the intent and application of this Agreement, and shall treat any such proposal on its own merits, and not as a basis for the introduction of unrelated matters. Minor, non-material modifications may be approved by the City Manager upon the recommendation of the Beaches, Parks, and Recreation Director, and approval of the City Attorney.

16.14. **Corporate Authority.** The person(s) executing this Agreement on behalf of each of the parties hereto represent and warrant that (i) such party is duly organized and existing, (ii) they are duly authorized to execute and deliver this Agreement on behalf of said party, (iii) by so executing this Agreement such party is formally bound to the provisions of this Agreement, and (iv) the entering into this Agreement does not violate any provision of any other agreement to which such party is bound.

16.15. **Notices.** All notices under this Agreement shall be effective upon personal delivery, via facsimile so long as the sender receives confirmation of successful transmission from the sending machine, or three (3) business days after deposit in the United States mail, registered, certified, postage fully prepaid and addressed to the respective parties as set forth below or as to such other address as the parties may from time to time designate in writing:

If to City: City of San Clemente
 100 Avenida Presidio
 San Clemente, CA 92672
 Attention: City Manager

With a copy to: Rutan & Tucker, LLP
 611 Anton Blvd., Suite 1400
 Costa Mesa, CA 92626
 Attention: Jeffrey A. Goldfarb, City Attorney

If to FRIENDS: Friends of the San Clemente Beaches, Parks, and
 Recreation Foundation
 910 Calle Negocio
 San Clemente, CA 92673
 Attention: Foundation President

ATTACHMENT

With a copy to:

Attention: _____

[End – signature page follows]

DRAFT

ATTACHMENT

IN WITNESS WHEREOF, City and FRIENDS have caused this Agreement to be executed on their behalf by their respective officers or agents herein duly authorized as of the date first written above.

“CITY”

CITY OF SAN CLEMENTE,
a municipal corporation

By: _____

Its: _____

ATTEST:

City Clerk of the City of
San Clemente, California

APPROVED AS TO FORM:
RUTAN & TUCKER, LLP

City Attorney

“FRIENDS”

FRIENDS OF SAN CLEMENTE BEACHES,
PARKS, AND RECREATION
FOUNDATION
a non-profit foundation

By: _____

Its: _____