

001431	REQUEST FOR COUNCIL ACTION CITY OF SAN DIEGO	1. CERTIFICATE NUMBER (FOR AUDITOR'S USE ONLY) <i>NA</i>					
TO: CITY ATTORNEY	2. FROM (ORIGINATING DEPARTMENT): PARK & RECREATION DEPARTMENT	3. DATE: July 5, 2007					
4. SUBJECT: "THE MAP" AT LA JOLLA KELLOGG PARK - DONATION AND REPAIRS AGREEMENT							
5. PRIMARY CONTACT (NAME, PHONE & MAIL STA.): Carol Wood, (619) 525-8217, MS 37C	6. SECONDARY CONTACT (NAME, PHONE & MAIL STA.): Ali Darvishi, (619) 533-6526 <i>AD</i>	7. CHECK BOX IF REPORT TO COUNCIL IS ATTACHED <input type="checkbox"/>					
8. COMPLETE FOR ACCOUNTING PURPOSES							
FUND 10367	DEPT.	9. ADDITIONAL INFORMATION / ESTIMATED COST: Maintenance can be performed with existing staff and supplies. There are no other funding consideration by City as the project proponents will design, construct and maintain the project.					
ORGANIZATION	OBJECT ACCOUNT						
JOB ORDER	C.I.P. NUMBER						
AMOUNT \$5,000.00							
10. ROUTING AND APPROVALS							
ROUTE (#)	APPROVING AUTHORITY	APPROVAL SIGNATURE	DATE SIGNED	ROUTE (#)	APPROVING AUTHORITY	APPROVAL SIGNATURE	DATE SIGNED
1	ORIGINATING DEPARTMENT	<i>[Signature]</i>	7-9-07	8	DEPUTY CHIEF	<i>[Signature]</i>	7/12/07
2	EAS	<i>[Signature]</i>	7-9-07	9	COO	<i>[Signature]</i>	7/12/07
3	LIAISON OFFICE	<i>[Signature]</i>	7/12/07	10	CITY ATTORNEY	<i>[Signature]</i>	7/17/07
4	FINANCIAL MANAGEMENT	<i>[Signature]</i>	7/12/07	11	ORIGINATING DEPARTMENT	<i>[Signature]</i>	7-17-07
5	AUDITOR	<i>[Signature]</i>	7/17/07	DOCKET COORD: <i>[Signature]</i> COUNCIL LIAISON: <i>[Signature]</i>			
6	EOC	<i>[Signature]</i>	7-17-07	COUNCIL PRESIDENT <input type="checkbox"/> SPOB <input type="checkbox"/> CONSENT <input checked="" type="checkbox"/> ADOPTION <input type="checkbox"/>		COUNCIL DATE: 7/31/07	
7				REFER TO: <i>[Signature]</i>			
11. PREPARATION OF: <input checked="" type="checkbox"/> RESOLUTION(S) <input type="checkbox"/> ORDINANCE(S) <input type="checkbox"/> AGREEMENT(S) <input type="checkbox"/> DEED(S)							
1- Accept the donation of a 2,300 square-foot Lithocrete Plaza ("The Map"); and							
2- Approve the Donation and Repairs Agreement with the Friends of "The Map."							
Continued on reverse							
11A. STAFF RECOMMENDATIONS: Approve the resolution.							
12. SPECIAL CONDITIONS:							
<u>COUNCIL DISTRICT(S):</u>		1 (PETERS)					
<u>COMMUNITY AREA(S):</u>		LA JOLLA					
<u>ENVIRONMENTAL IMPACT:</u>		This project is exempt under the California Environmental Quality Act (CEQA) pursuant to State CEQA Guidelines Section 15301 (Existing Facilities). This project will provide paving in an area of heavy pedestrian use which is unable to sustain turf due to the heavy foot traffic. It is in a previously developed area of the park, near the existing comfort station. There are no environmental impacts associated with this action.					
<u>HOUSING IMPACT:</u>		None.					
<u>OTHER ISSUES:</u>		None.					

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RESOLUTIONS – CONTINUED for
“The Map” at La Jolla Kellogg Park – DONATION AND REPAIRS AGREEMENT

3- Authorizing the Mayor or his designee to create an interest bearing Fund No. 10367 for the initial deposit of \$5,000.00 from Friends of the "Map" for the purpose of removal of the "Map" if necessary; and

4- Authorizing the Mayor or his designee for the expenditure of funds from Fund No. 10367 for the purpose of removal of the "Map" if necessary, contingent upon the Auditor's Office first certifying that funds are on deposit with the City Treasurer.

RECEIVED
07 JUL 19 AM 11:18
CITY CLERK'S OFFICE
SAN DIEGO, CA

CIVIL DIVISION

07 JUL 17 PM 4:28
CITY ATTORNEY

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EXECUTIVE SUMMARY SHEET
CITY OF SAN DIEGO

DATE ISSUED: _____ REPORT NO: _____
ATTENTION: Council President and City Council
ORIGINATING DEPARTMENT: Park & Recreation Department
SUBJECT: "The Map" at La Jolla Kellogg Park
COUNCIL DISTRICT(S): 1 (La Jolla)
CONTACT/PHONE NUMBER: Carol Wood, Acting Deputy Director, (619) 525-8217

REQUESTED ACTION:

Authorizing the Mayor, or his designee, to accept on behalf of the City, a donation from Friends of "The Map" (Friends) of a 2,300 square-foot Lithocrete Plaza ("The Map") depicting a map of the La Jolla Shores Underwater Park and Marine Reserve pursuant to the Agreement.

Authorizing the Mayor, or his designee, to execute a Donation and Repairs Agreement (Agreement) between the City and Friends.

Authorizing the Mayor or his designee to create an interest bearing Fund No. 10367 for the initial deposit of \$5,000.00 from Friends of the "Map" for the purpose of removal of the "Map" if necessary; and

Authorizing the Mayor or his designee for the expenditure of funds from Fund No. 10367 for the purpose of removal of the "Map" if necessary, contingent upon the Auditor's Office first certifying that funds are on deposit with the City Treasurer.

STAFF RECOMMENDATION:

Approve the resolutions.

EXECUTIVE SUMMARY:

This project will provide paving in an area of heavy pedestrian use which is unable to sustain turf due to the heavy foot traffic. It is in a previously developed area of the park, near the existing south comfort station at the La Jolla Shores Kellogg Park.

The Project will pave this area with Lithocrete, a cement product that can be seeded with colorful recycled glass and aggregate. "The Map" will provide an educational opportunity for the 2-3 million visitors to La Jolla Shores each year by depicting the offshore marine reserve, highlighting many of the area's features, and illustrating the bathymetry and points of interest. The "Map" will also feature the embed of approximately fifty bronze fish and marine invertebrates, which are indigenous to the La Jolla Shores area. A compass rose will orient visitors to the layout. This is a unique educational opportunity while promoting preservation of the off-shore Reserves.

"The Map" Project is supported by the La Jolla Shores Association. Friends, whose mission is to preserve and promote Kellogg Park's resources wish to design, build and donate "The Map" to the City. Friends have hired a consultant to prepare drawings for the project, and have raised funds for its construction. "The Map" will be donated to the City, with long-term repairs being performed by Friends.

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FISCAL CONSIDERATIONS:

Friends will be responsible for the cost of design, construction and long term repairs of "The Map". City agrees to maintain "The Map" on a routine basis similar to the types of maintenance generally provided for City sidewalks; City's maintenance will be limited to periodic clean-up efforts to remove dirt, sand, debris, gum and simple graffiti. There is no financial impact to the City for the routine maintenance of the project as this area is currently being maintained by the Park and Recreation Department. Friends agrees to remove the "Map" if in City's opinion it has not been adequately maintained. For this purpose, Friends agrees to deposit \$5,000.00 with the City to be held in an interest bearing account for the sole purpose of removing the "Map" in case Friends defaults on its agreement to remove the "Map". The interest bearing account is needed to assure adequate funds are available in the future for this purpose.

PREVIOUS COUNCIL and/or COMMITTEE ACTION:

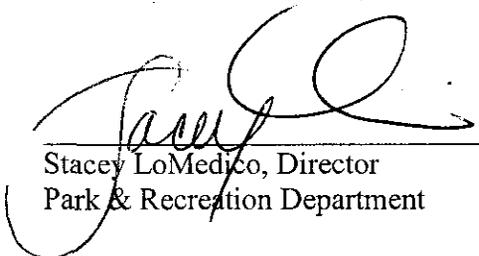
On January 12, 1998, City Council adopted the Kellogg Park South Comfort Station project which has been constructed and in use by public (Ordinance Number O-18459 (New Series)). A portion of the existing comfort station footprint which was permitted under the original design of the comfort station to receive pavement was abandoned due to a re-designed smaller project. This heavily used pedestrian route to and from the comfort station, children's playground, and premier dive site, which is unable to sustain turf, has been chosen to be the site for "The Map."

COMMUNITY PARTICIPATION AND PUBLIC OUTREACH EFFORTS:

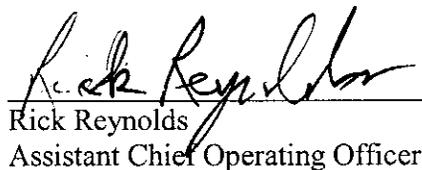
This project has been unanimously approved by the La Jolla Shores Association which has recommended approval of the design, location of "The Map" and the Donation and Repairs Agreement. The project has also been endorsed by Council President Scott Peters, District 1, the Sycuan Band of Kumeyaay Nation, Mr. Daniel Tucker, Chair, the Scripps Institution of Oceanography, Birch Aquarium at Scripps, County Supervisor Pam Slater-Price, La Jolla Community Planning Association and hundreds of community members who have generously donated their professional services, expertise and funding.

KEY STAKEHOLDERS AND PROJECTED IMPACTS:

Friends of "The Map"
La Jolla Shores Association
La Jolla Community Planning Association
Council President Scott Peters, District 1
Sycuan Band of Kumeyaay Nation
Scripps Institution of Oceanography
Birch Aquarium at Scripps
County Supervisor Pam Slater-Price
Educators and Community Members



Stacey LoMedico, Director
Park & Recreation Department



Rick Reynolds
Assistant Chief Operating Officer

RESOLUTION NUMBER R-_____

DATE OF FINAL PASSAGE _____

BE IT RESOLVED, by the Council of the City of San Diego as follows:

1. Authorizing the Mayor, or his designee, to accept on behalf of the City of San Diego, a donation from Friends of "The Map" (Friends) of a 2,300 square-foot Lithocrete Plaza ("The Map") depicting a map of the La Jolla Shores Underwater Park and Marine Reserve pursuant to the Agreement.
2. Authorizing the Mayor, or his designee, to execute a Donation and Repairs Agreement (Agreement) between the City and Friends.
3. Authorizing the Mayor or his designed representative to create a separate interest bearing Fund No. 10367 for the initial deposit of \$5,000.00 from Friends of the "Map" for the purpose of removal of the "Map" if necessary.
4. Authorizing the Mayor or his designed representative to expend the funds from Fund No. 10367 for the purpose of removal of the "Map" if necessary, contingent upon the Auditor's Office first certifying that funds are on deposit with the City Treasurer.]
5. That this project is exempt under the California Environmental Quality Act [CEQA] pursuant to State CEQA Guidelines Section 15301 (Existing Facilities). This project will provide paving in an area of heavy pedestrian use which is unable to sustain turf due to the heavy foot traffic. It is in a previously developed

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area of the park, near the existing comfort station. There are no environmental impacts associated with this action.

APPROVED: MICHAEL J. AGUIRRE, City Attorney

By Shannon Thomas
Shannon Thomas
Deputy City Attorney

ST:sc
07/17/07
Aud.Cert.:N/A
Or.Dept:Park & Rec
R-2008-87

I hereby certify that the foregoing Resolution was passed by the Council of the City of San Diego, at this meeting of _____.

ELIZABETH S. MALAND
City Clerk

By _____
Deputy City Clerk

Approved: _____
(date)

JERRY SANDERS, Mayor

Vetoed: _____
(date)

JERRY SANDERS, Mayor

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KELLOGG PARK DONATION AND REPAIRS AGREEMENT

THIS KELLOGG PARK DONATION AND REPAIRS AGREEMENT (“Agreement”) is entered into by and between THE CITY OF SAN DIEGO, a California municipal corporation (“CITY”), and FRIENDS OF THE MAP in sponsorship with LA JOLLA SHORES ASSOCIATION, a California public benefit corporation (“FRIENDS”), to be effective upon execution by CITY (the “Effective Date”) and approval by the San Diego City Attorney, as follows:

RECITALS

- A. Kellogg Park is a seven-acre, CITY-owned public Beachfront Park adjacent to the San Diego/La Jolla Underwater Park, a 600-acre marine ecological refuge. FRIENDS’ mission is to protect and enhance the unique characteristics of the La Jolla Shores area.
- B. FRIENDS wishes to serve the public by donating to CITY a 2,300 sq ft Lithocrete Plaza depicting a map of the La Jolla Shores Underwater Park and Marine Reserve (“The Map,” as described in EXHIBIT A: Project Description, attached hereto); FRIENDS intends to install “The Map” and provide of needed repairs for “The Map” in Kellogg Park.
- C. CITY wishes to receive “The Map” and the public benefit of its installation.
- D. CITY and FRIENDS intend that the donation and provision of ongoing repairs of “The Map” will be governed by the terms and conditions of this Agreement.

FOR VALUABLE CONSIDERATION, the sufficiency of which is acknowledged, the parties agree as follows:

1. DONATION

1.1. SCOPE OF DONATION AND REPAIRS OF “THE MAP”. FRIENDS shall design, develop, install, and provide ongoing repairs for “The Map” while maintaining an account with La Jolla Recreation Council that will cover the cost of removal of the project in the event of irreparable damage or inability to raise funds necessary to repair damage to “The Map.” “The Map” will be located between the Kellogg Park South Comfort Station and the Children’s Playground adjacent to the Boardwalk within Kellogg Park. “The Map” shall be developed as more completely described in EXHIBIT B: Improvements, attached hereto and incorporated herein. Upon installation of “The Map”, FRIENDS shall donate to CITY those improvements. Unless otherwise provided for in this Agreement, FRIENDS shall provide, at its sole cost and expense, repairs for damage to “The Map”, and/or removal of it, during the term of this Agreement. FRIENDS shall not subcontract or assign the performance of any of its obligations under this Agreement without CITY’S prior written consent thereto.

1.2. RIGHT OF ENTRY. Subject to the terms and conditions of this Agreement, CITY hereby grants permission to FRIENDS, its employees, agents, contractors, and

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subcontractors to enter upon Kellogg Park to install and maintain "The Map" solely in its performance of its Commitments hereunder.

2. FULFILLMENT OF DONATION COMMITMENTS.

- 2.1. FRIENDS recognizes and agrees that City's acceptance of "The Map" is contingent upon FRIENDS total fulfillment of its donation as provided in Section 1 above and that failure, or delay, in fulfilling the donation commitments renders this AGREEMENT unenforceable against CITY, and CITY possesses exclusive discretion in determining whether to terminate its involvement and revoke its permission for "The Map, or to defer initiation of "The Map" to a future time of CITY'S preference, or modify "The Map" from the original plan. CITY shall not be obligated for any loss, financial or otherwise, which may be incurred by FRIENDS as a result of such revocation or the termination of this Agreement. FRIENDS expressly waives any claim for expense or loss which FRIENDS might incur as a result of CITY'S termination of the Agreement.
- 2.2. CONTRACT ADMINISTRATOR. CITY'S Park and Recreation Department ("Park & Rec") shall be the contract administrator for this Agreement. FRIENDS shall coordinate its performance of this Agreement through a designated Park & Rec representative ("P&R Rep"). FRIENDS shall communicate with the P&R Rep on all matters related to the administration of this Agreement. When this Agreement refers to communications to or with CITY, those communications shall be to or with the P&R Rep, unless otherwise provided herein.
- 2.3. CITY'S CONSENT, DISCRETION. Whenever required by this Agreement, CITY'S consent or approval shall mean the written consent or approval of CITY Manager of San Diego, or his or her designee ("City Manager"), unless otherwise expressly provided. CITY'S discretionary acts hereunder shall be made in the City Manager's discretion, unless otherwise expressly provided. No change in the scope or definition of FRIENDS' obligations under this Agreement shall be valid without CITY'S prior written consent thereto.
- 2.4. SAN DIEGO'S STRONG MAYOR FORM OF GOVERNANCE. All references to "City Manager" in this Agreement shall be deemed to refer to "the Mayor or his/her designee." This section shall remain in effect for the duration CITY operates under the mayor-council (commonly referred to as "strong mayor") form of governance pursuant to Article XV of the San Diego City Charter.
- 2.5. RELATED COUNCIL ACTIONS. By entering into this Agreement, neither CITY nor the City Council is obligating itself to any other governmental agent, board, commission, or agency with regard to any other discretionary action relating to the design, development, installation, and repairs of "The Map". Discretionary action includes, but is not limited to, re-zonings, variances, environmental clearances or any other governmental agency approvals that may be required for FRIENDS' design, development, installation, and repairs of "The Map". FRIENDS shall diligently seek and obtain, at its sole cost, all entitlements and actions from both CITY and other governmental agencies with jurisdiction over "The Map" as may be necessary for FRIENDS to design, develop, install, and maintain "The Map".

2.6. SUPERIOR INTERESTS. This Agreement is subject to all liens, encumbrances, covenants, conditions, restrictions, reservations, contracts, agreements, licenses, easements, and rights of way pertaining to "The Map" site, whether or not of record. If FRIENDS' use of any such location is or becomes inconsistent or incompatible with a preexisting, superior interest, FRIENDS shall take such actions and pay all costs and expenses necessary to remove such inconsistency or incompatibility to the satisfaction of the holder of the superior interest.

2.7. LIENS. FRIENDS shall at all times protect, defend, indemnify, and hold CITY free and harmless from and against all claims for labor or materials in connection with improvements, alterations, or repairs of "The Map", and the costs of defending against such claims, including without limitation reasonable attorney fees. If improvements, alterations, or repairs are made to "The Map" by FRIENDS or by any party other than CITY, and a lien or notice of lien is filed thereon, FRIENDS shall, within five (5) days after the filing, either: (a) take all actions necessary to record a valid release of lien; or (b) file with CITY a bond, cash or other security acceptable to CITY sufficient to pay in full all claims of all persons seeking relief under the lien.

3. OWNERSHIP INTEREST. Nothing in this AGREEMENT is meant to confer to FRIENDS any ownership or legal interest in "The Map".

4. MAINTENANCE.

4.1. CITY agrees to maintain "The Map" on a routine basis similar to the types of maintenance generally provided for CITY sidewalks; CITY'S maintenance will be limited to periodic clean-up efforts to remove dirt, sand, debris, gum, simple graffiti.

4.2. FRIENDS shall be responsible for any and all repairs of "The Map", except as provided in this SECTION 4, item 1, and any and all repair of "The Map", as well as removal of graffiti if in the opinion of CITY such removal would result in damage to the integrity of the embedded material within the concrete.

4.3. In the event that CITY notifies FRIENDS that there is a need for repair(s), CITY's notification of such need shall be in writing and delivered to FRIENDS at the most current address known by CITY.

4.4. FRIENDS agrees to complete all specifications as indicated by CITY within ninety (90) calendar days from delivery of notification by CITY.

4.5. FRIENDS agrees and recognizes that in the event of FRIENDS failure to satisfy CITY'S specifications, CITY possesses the exclusive discretion to immediately commence removal of "The Map".

5. TERM OF AGREEMENT

5.1. TERM OF AGREEMENT. The term of this Agreement ("Term") shall be Twenty (20) years, commencing on the first day of the month following the Effective Date. In

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CITY'S sole discretion, upon FRIENDS' concurrence, the Term may be extended. Either party may request such an extension in writing during the last year of the Term, but no later than nine (9) months prior to the expiration of this Agreement. The parties acknowledge that the property comprising Kellogg Park is CITY-owned and held in trust for the benefit of CITY'S citizens. As a condition to its approval of any extension of this Agreement, CITY may require that this Agreement be amended to include then-standard contract language and other changes deemed necessary by CITY to protect CITY'S interest in Kellogg Park.

5.2. NOTIFICATION OF DELAY. FRIENDS shall immediately notify CITY in writing if FRIENDS encounters or anticipates a delay in performing any of its obligations under this Agreement.

5.3. CONSENT TO DELAY. FRIENDS shall not be excused from performing any of its obligations under this Agreement without CITY'S written waiver thereof or CITY'S written consent to an extension of time for such performance, either of which may not be unreasonably withheld.

5.4. BREACH AND OPPORTUNITY TO CURE. If FRIENDS fails to fully perform any of its obligations under this Agreement, and such failure continues for fifteen (15) days past due, with written notification by CITY, FRIENDS shall be in default of this Agreement.

5.5. WAIVER.

5.5.1. Strict Performance. CITY'S failure to insist upon the strict performance of any of FRIENDS' obligations under this Agreement, in one or more instance, shall not be construed as a waiver of any such obligation, and the same shall remain in full force and effect.

5.5.2. Failure to Discover. The property constituting Kellogg Park is CITY-owned and held in trust for the benefit of CITY'S citizens. CITY'S failure to discover FRIENDS' default of this Agreement or its breach of any obligation of this Agreement, or take prompt action to require the cure of any such breach shall not result in an equitable stopple, but CITY may at any and all times exercise its rights hereunder pertaining to such a default, or require the cure of any such breach.

5.5.3. No Continuing Waiver. CITY'S waiver of a breach or default shall not be a waiver of any other breach or default. Any waiver must be in writing and executed by CITY to constitute a valid and binding waiver. CITY'S delay or failure to exercise a remedy or right under this Agreement shall not be a waiver of that or any other remedy or right. The use of one remedy or right shall not prohibit the use of any other remedy or right for the same default or for another or later default. CITY'S acceptance of any rents shall not be a waiver of any default preceding the rent payment.

5.6. TERMINATION. Upon any default of this Agreement, CITY may terminate this Agreement at will upon written 15 day notice to FRIENDS.

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- 5.7. NO LIMITATION OF RIGHTS. CITY'S rights and remedies under this section are cumulative and shall not limit, waive, or deny any of CITY'S rights or remedies under this Agreement, at law or in equity now existing or as hereafter enacted or established.
- 5.8. BANKRUPTCY OR ASSIGNMENT FOR THE BENEFIT OF CREDITORS. FRIENDS shall be in default of this Agreement if it files a voluntary petition in bankruptcy, is adjudicated bankrupt, or makes a general assignment for the benefit of creditors.
- 5.9. FRIENDS' RIGHT TO TERMINATE. Once executed, this Agreement may not be terminated without CITY'S prior written consent.
- 5.10. RESTORATION. Upon expiration or earlier termination of this Agreement and at CITY'S sole option, FRIENDS shall remove "The Map" and restore, to CITY'S satisfaction, the site to its original condition, all at FRIENDS' sole cost and expense.
6. INSURANCE.
- 6.1 All-Risk Property Insurance. FRIENDS shall obtain and maintain, at its sole cost, All-Risk Property insurance on all insurable property on "The Map" in an amount to cover 100 percent (100%) of the replacement cost or removal of improvements. FRIENDS shall deliver to CITY a certificate of such insurance.
- 6.2 Additional Insureds. Pursuant to a separate endorsement [CG2010 (11/85) or equivalent form], "The City of San Diego, its elected officials, officers, employees, representatives, and agents" shall be named as additional insureds in all policies.
- 6.3 Primary & Non-Contributory. Insurance policies shall be endorsed such that the coverage is primary and non-contributory to any coverage carried or maintained by CITY. The policies shall be kept in force for the duration of the Term and any extended use. The certificate(s) of insurance shall be filed with CITY'S Park & Recreation Department.
- 6.4 Qualified Insurer(s) All insurance required by the terms of this Agreement must be provided by insurers licensed to do business in the State of California which are rated at least "A- VI" by the current AM Best Ratings Guide and which are acceptable to CITY. Non-admitted surplus lines insurers may be accepted provided they are included on the most recent list of California eligible surplus lines insurers (LESLI list) and otherwise meet CITY requirements.
- 6.5 Deductibles/Retentions. All deductibles and self-insured retentions on any insurance policy are the sole responsibility of FRIENDS and must be disclosed and acceptable to CITY at the time evidence of insurance is provided.
- 6.6 Continuity of Coverage. All policies shall be in effect on or before the first day of construction and for its duration. the Term, except "course of construction fire insurance" shall be in force on commencement of all authorized construction, and full applicable fire insurance coverage shall be effective upon completion of each insurable improvement. FRIENDS shall maintain all insurance required by this Agreement throughout the Term,

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without lapse. When a new insurance policy is obtained, or when an insurance policy is renewed or extended, FRIENDS shall deliver to CITY, within ten (10) days thereafter, a certificate(s) showing that a new or extended policy has been obtained which meets the requirements of this Agreement.

6.7 Modification. To assure protection from and against the kind and extent of risk existing on "The Map", CITY, at its discretion, may require the revision of amounts and coverage at any time during the Term by giving FRIENDS thirty (30) days prior written notice. FRIENDS shall also obtain any additional insurance required by CITY for new improvements, in order to meet the requirements of this Agreement.

6.8 Accident Reports. FRIENDS shall report to CITY any accident causing property damage or injury to persons related to "The Map". Such report shall contain the names and addresses of the involved parties, a statement of the circumstances, the date and hour of the accident, the names and addresses of any witnesses, and other pertinent information.

6.9 Failure to Comply. If FRIENDS fails or refuses to obtain and maintain the required insurance, or fails to provide proof of coverage, CITY may obtain the insurance. FRIENDS shall reimburse CITY for the premiums paid, with interest at the maximum allowable legal rate then in effect in California. CITY shall notify FRIENDS of such payment of premiums stating the amount paid, the name(s) of the insurer(s), and the rate of interest. FRIENDS shall pay such reimbursement and interest on the first (1st) day of the month following CITY'S notice. Notwithstanding any other provision of this Agreement, if FRIENDS fails or refuses to obtain or maintain insurance as required by this Agreement, or fails to provide proof of insurance, CITY may terminate this Agreement immediately upon such breach.

6.10 Subcontractors' Insurance. FRIENDS warrants that it will require each of its subcontractors, if any, to comply with each provision of this Agreement relating to obtaining and maintaining insurance.

7. **COMPLIANCE WITH LAW.** FRIENDS shall at all times in the design, development, installation, and repair of "The Map" comply with all applicable laws, statutes, ordinances, and regulations of CITY, county, state, and federal governments, at FRIENDS' sole expense. FRIENDS shall comply with any and all notices issued by CITY under the authority of all current or future laws, statutes, ordinances, or regulations.

7.1. **HAZARDOUS SUBSTANCES.** FRIENDS shall not allow the installation or release of hazardous substances in, on, under, or from "The Map". FRIENDS and FRIENDS' agents, contractors, and subcontractors shall not store or utilize any hazardous substance on "The Map" without CITY'S prior written consent. For the purposes of this provision, a release shall include but not be limited to any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leeching, dumping, or otherwise disposing of hazardous substances. "Hazardous substances" shall mean those hazardous substances listed by the Environmental Protection Agency in regularly released reports and any other substances incorporated into the State of California's list of hazardous substances. A copy of the presently effective EPA and the State lists is on file in the

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Office of the City Clerk as Document 769704 and by this reference is incorporated into this Agreement.

- 7.2. Remediation. If FRIENDS' development, installation, or repair of "The Map" results in a release of a hazardous substance, FRIENDS shall pay all costs of remediation and removal of the hazardous substance in accordance with all applicable laws, rules and regulations of governmental authorities.
- 7.3. Indemnity. FRIENDS shall protect, defend, indemnify, and hold CITY harmless from any and all claims, costs, and expenses related to environmental liabilities resulting from FRIENDS' design, development, installation or repair of "The Map", including but not limited to costs of environmental assessments, costs of remediation and removal, any necessary response costs, damages for injury to natural resources or the public, and costs of any health assessment or health effect studies.
- 7.4. Notice of Release. If FRIENDS knows or has reasonable cause to believe that a hazardous substance has been released on or beneath "The Map", FRIENDS shall immediately notify CITY and deliver a written report thereof to CITY within three (3) days of receipt of the knowledge or cause for belief. If FRIENDS knows or has reasonable cause to believe that such substance is an imminent and substantial danger to public health and safety, FRIENDS shall take all actions necessary to alleviate the danger. FRIENDS shall notify CITY immediately of any notice of violation received or initiation of environmental actions or private suits related to "The Map".
- 7.5. Environmental Assessment. Upon reasonable cause to believe that FRIENDS' design, development, installation or repairs of "The Map" resulted in any hazardous substance being released on or beneath "The Map", CITY may cause an environmental assessment of that site to be performed by a professional environmental consultant registered with the State of California as a Professional Engineer, Certified Engineering Geologist, or Registered Civil Engineer. The environmental assessment shall be obtained at FRIENDS' sole cost and expense, and shall establish what, if any, hazardous substances have more likely than not been caused by FRIENDS' on, in, or under "The Map", and in what quantities. If any such hazardous substances exist in quantities greater than allowed by CITY, county, state, or federal laws, statutes, ordinances, or regulations, then the environmental assessment shall include a discussion of such substances with recommendations for remediation and removal necessary to effect compliance with those laws or statutes, and estimates of the cost of such remediation or removal. FRIENDS shall cause, or if FRIENDS fails to do so within a reasonable period of time, CITY may cause, the remediation and/or removal recommended in the environmental assessment such that compliance with environmental law is achieved, and FRIENDS shall pay all costs and expenses therefore.
- 7.6. NONDISCRIMINATION. FRIENDS shall not discriminate in any manner against any person or persons on account of race, color, religion, gender, sexual orientation, medical status, national origin, age, marital status or physical disability in FRIENDS' design, development, installation, or repairs of "The Map", including without limitation the providing of goods, services, facilities, privileges, advantages, and accommodations, and

the obtaining and holding of employment. FRIENDS warrants that it will require each of its subcontractors, if any, to comply with this provision.

- 7.7. EQUAL OPPORTUNITY CONTRACTING PROGRAM. FRIENDS shall comply with City Council Ordinance No. 18173 (San Diego Municipal Code Sections 22.2701 through 22.2708, as amended), *EQUAL EMPLOYMENT OPPORTUNITY OUTREACH PROGRAM* ("EEOOP"), a copy of which is on file in the Office of the City Clerk and incorporated herein. FRIENDS and all of its contractors and subcontractors shall be individually responsible to abide by the EEOOP. FRIENDS shall comply with Title VII of the Civil Rights Act of 1964, as amended; Executive Orders 11246, 11375, and 12086, as well as the California Fair Employment Practices Act; and any other applicable federal and state laws and regulations hereafter enacted. FRIENDS shall not discriminate against any employee or applicant for employment on any basis prohibited by law. On or before the Effective Date, FRIENDS shall submit a current "Work Force Report" or a current Equal Employment Opportunity (EEO) Plan as required by Section 22.2705 of the San Diego Municipal Code, which sets forth the actions that FRIENDS will take to achieve CITY'S commitment to equal employment opportunities.
- 7.8. Contracts/Subcontracts. FRIENDS, its contractors and subcontractors shall insert the foregoing provisions in all contracts and subcontracts for any work covered by this Agreement so that the provisions will be binding upon each contractor and subcontractor.
- 7.9. EEO Compliance. Compliance with EEO provisions will be implemented, monitored, and reviewed by CITY'S Equal Opportunity Contracting Program staff. FRIENDS' failure to comply with the above requirements and/or submitting false information in response to such requirements may result in termination of this Agreement and debarment from participating in CITY agreements and/or contracts for a period of not less than one (1) year.
- 7.10. DRUG-FREE WORKPLACE. FRIENDS shall abide by the omnibus drug legislation passed by Congress on November 18, 1988, by adopting and enforcing a policy to maintain a drug-free workplace by including in each subcontract language which indicates the subcontractor's agreement to abide by these provisions of a drug-free workplace. FRIENDS and its subcontractors shall be individually responsible for their own drug-free workplace.
- 7.11. DISABLED ACCESS COMPLIANCE.
- 7.12. FRIENDS shall at all times in the design, development, installation, and repairs of "The Map" comply with the 1990 Americans with Disabilities Act and Title 24 of the California Code of Regulations (i.e., building codes) as defined in Section 18910 of the California Health and Safety Code and any other applicable federal, state or local regulations hereafter enacted protecting the rights of persons with disabilities. In the case of conflicting provisions of any of such requirements, the most restrictive requirement shall control.
- 7.13. FRIENDS shall be solely responsible for designing, developing, installing and repairing "The Map" in compliance with the foregoing disabled access provisions. However, CITY may be exposed to liability for non-compliance. Therefore, CITY may evaluate the design of "The Map" to ensure such compliance.
8. INDEMNIFICATION. FRIENDS shall protect, defend, indemnify, and hold CITY, its elected officials, officers, representatives, agents and employees, harmless from and against

any and all claims asserted or liability established which arise out of or are in any manner directly or indirectly connected with this Agreement or FRIENDS' design, development, installation, or repairs of "The Map", and all costs and expenses of investigating and defending against same, including without limitation reasonable attorney fees and costs; provided, however, that FRIENDS' duty to indemnify and hold harmless shall not include any claims or liability arising from the established active negligence, sole negligence, or sole willful misconduct of CITY, its elected officials, officers, representatives, agents, and employees. CITY may, at its election, conduct the defense or participate in the defense of any claim related in any way to this indemnification. If CITY chooses at its own election to conduct its own defense, participate in its own defense, or obtain independent legal counsel in defense of any claim related to this indemnification, FRIENDS shall pay all of the costs related thereto, including without limitation reasonable attorney fees and costs.

9. GENERAL PROVISIONS

- 9.1. PARTIAL INVALIDITY. If any term, covenant, condition or provision of this Agreement is found invalid, void or unenforceable by a court of competent jurisdiction, the remaining provisions shall remain in full force and effect.
- 9.2. LEGAL FEES. If there is any litigation regarding this Agreement, the prevailing party shall be entitled to an award of reasonable legal costs, including without limitation court costs and attorney fees.
- 9.3. NUMBER AND GENDER. Words of any gender used in this Agreement shall include any other gender and words in the singular number shall include the plural, and *vice versa*, as appropriate to the context.
- 9.4. CAPTIONS. The section headings and captions used in this Agreement shall not be held to define, limit, augment, or describe the scope, content, or intent of any or all parts of this Agreement. The numbers of the paragraphs and pages of this Agreement may not be consecutive. The lack of consecutive numbers shall have no effect on the enforceability of this Agreement.
- 9.5. UNAVOIDABLE DELAY. If the performance of any act required of CITY or FRIENDS is directly prevented or delayed by reason of strikes, lockouts, labor disputes, unusual governmental delays, acts of God, fire, floods, epidemics, freight embargoes or other causes beyond the reasonable control of the party required to perform an act, the party shall be excused from performing that act for the period equal to the period of the prevention or delay. If FRIENDS or CITY claims the existence of such a delay, the party claiming the delay shall notify the other party in writing of that fact within ten (10) days after the beginning of any such claimed delay. This provision shall not apply to obligations to pay rent under this Agreement.
- 9.6. NOTICES. Any notice required or permitted to be given under this Agreement shall be in writing and may be served personally or by United States mail, postage prepaid, addressed to the parties as follows, or to any mortgagee, trustee, or beneficiary, as applicable, at the appropriate address designated in writing by the respective party:

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If to FRIENDS:

FRIENDS OF THE MAP
c/o Mary Coakley
2120 Vallecitos #203
La Jolla, CA 92037
(619) 840-0250

cc: La Jolla Shores Association
Post Office Box 64
La Jolla, CA 92038

If to CITY:

CITY OF SAN DIEGO PARK AND RECREATION DEPARTMENT
Balboa Park Administration Building
Attention: Deputy Director, Developed Regional Parks Division
202 "C" Street, MS 35
San Diego, CA 92101

With a copy to:

CITY OF SAN DIEGO REAL ESTATE ASSETS DEPARTMENT
Attention: Real Estate Assets Director
1200 Third Avenue, Suite 1700, MS 51A
San Diego, CA 92101-4155

9.6.1. Address Changes. Any party entitled or required to receive notice under this Agreement may by like notice designate a different address to which notices shall be sent.

9.6.2. When Effective. Notice shall be effective on personal service or five (5) days after deposit in U.S. Mail.

9.7. NO ASSIGNMENT FRIENDS shall not assign its rights or obligations under this Agreement without CITY'S prior written approval. Any attempted assignment in violation of this section shall be a default of this Agreement. Any attempted assignment in violation of this section shall be void *ab initio* and incapable of creating any contractual relationship between CITY and a putative assignee.

9.8. INDEPENDENT CONTRACTORS. FRIENDS, its employees, agents, contractors and subcontractors shall not be employees or agents of CITY. Any provision of this Agreement that may appear to give CITY any right to direct FRIENDS concerning the details of performing the services, or to exercise any control over such performance, shall mean only that FRIENDS shall follow the direction of CITY concerning the end results of the performance.

- 9.9. TIME OF THE ESSENCE; BINDING EFFECT. Time is of the essence for each and every term, covenant, and condition of this Agreement. Except as otherwise provided in this Agreement, all of the terms, covenants, and conditions of this Agreement shall apply to, benefit, and bind the successors and assigns of the respective parties, jointly and individually.
- 9.10. COUNTERPARTS. This Agreement may be executed in any number of counterparts, each of which when executed shall be deemed an original, but all of which together shall constitute one and the same instrument.
- 9.11. CONSENTS. Unless otherwise expressly provided herein, no consent to be granted by either party pursuant to this Agreement may be unreasonably withheld or delayed.
- 9.12. SURVIVAL. Any obligation that accrues under this Agreement prior to its expiration or termination shall survive such expiration or termination.
- 9.13. GOVERNING LAW. This Agreement shall be governed, construed, and enforced in accordance with the laws of the State of California.
- 9.14. COST RECOVERY. FRIENDS shall deposit in CITY'S account a sum of Five Thousand Dollars (\$5,000.00) to offset administrative costs incurred for CITY staff services that are of benefit to FRIENDS. FRIENDS shall deposit additional funds to replenish CITY'S account if needed within 15 days of CITY'S notice for same.
- 9.15. ENTIRE UNDERSTANDING. This Agreement contains the entire understanding of the parties. CITY and FRIENDS agree that there is no other written or oral understanding between them with respect to FRIENDS' design, development, installation, or repairs of "The Map". Each party shall rely on its own examination of "The Map" sites, advice from its own attorneys, and the warranties, representations, and covenants within the Agreement itself. Each party agrees that no other party, agent, or attorney of any other party has made any promise, representation, or warranty whatsoever which is not contained in this Agreement. The failure or refusal of any party to read this Agreement or other documents, inspect the "The Map" site, and obtain legal or other advice relevant to this transaction shall constitute a waiver of any objection, contention, or claim that might have been based on such actions.
- 9.16. AUTHORITY. Each individual executing this Agreement on behalf of another person or legal entity represents and warrants that they are authorized to execute and deliver this Agreement on behalf of such person or entity in accordance with duly adopted resolutions or other authorizing actions which are necessary and proper and under such legal entity's articles, charter, bylaws, or other written rules of conduct or governing agreement, and that this Agreement is binding upon such person or entity in accordance with its terms. Each person executing this Agreement on behalf of another person or legal entity shall provide CITY with evidence, satisfactory to the City Mayor's office, that such authority is valid and that such entity is a valid, qualified corporation, limited liability company, partnership, or other unincorporated association in good standing in its home state and that such entity is qualified to do business in California.

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IN WITNESS WHEREOF, this Agreement is executed to be effective as of the Effective Date.

Date: _____

THE CITY OF SAN DIEGO, a California municipal corporation

By: _____
Name: _____
Title: _____

Date: _____

FRIENDS OF THE MAP a California public benefit corporation

By: _____
Name: _____
Title: _____

By: _____
Name: _____
Title: _____

APPROVED AS TO FORM AND LEGALITY:

Date: _____

MICHAEL J. AGUIRRE, City Attorney

By: _____
Name: _____
Title: _____

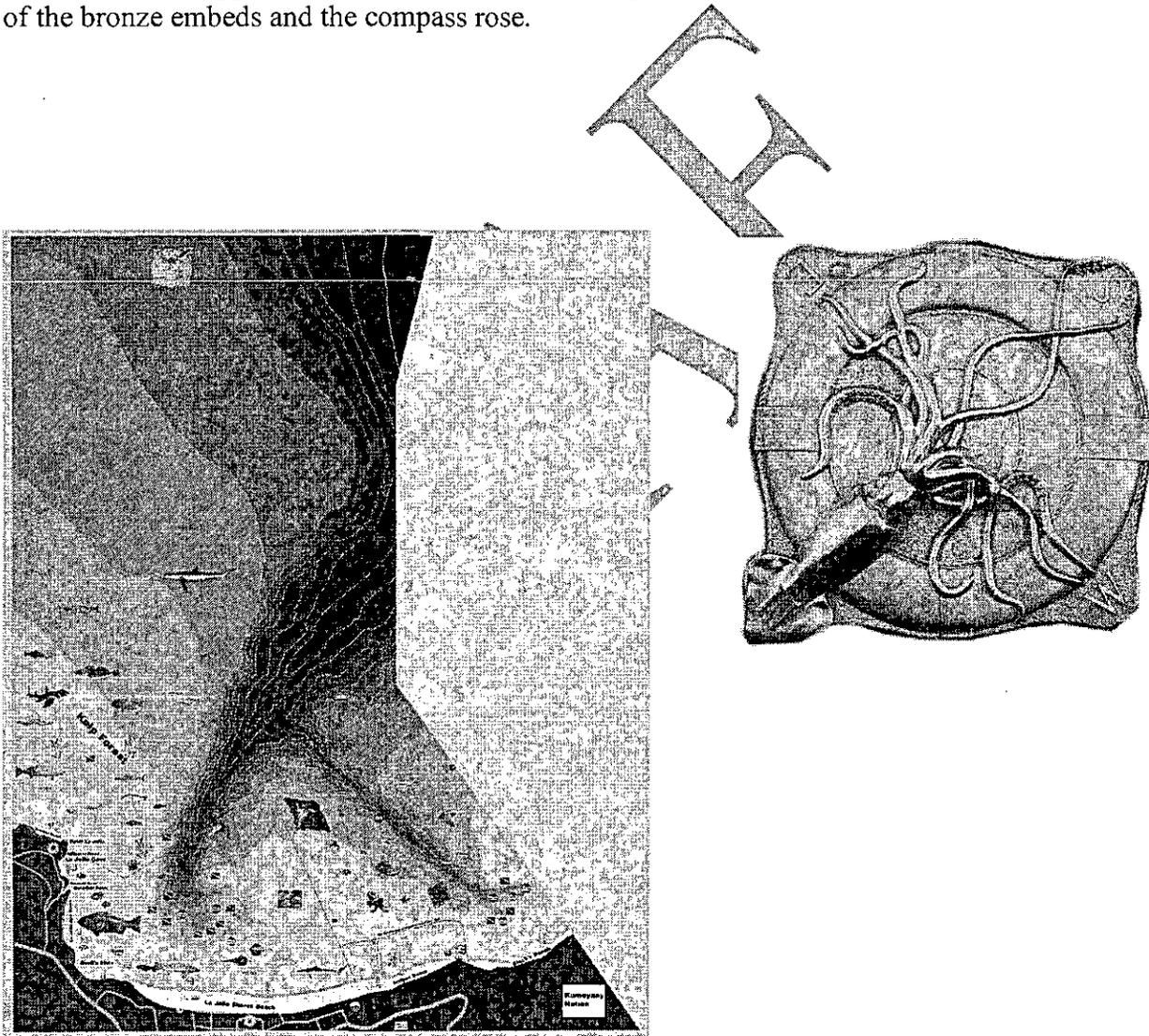
A large, stylized, handwritten signature in the shape of the letter 'R' is stamped over the signature line for Michael J. Aguirre.

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EXHIBIT "A" Project Description

The project extends the public sidewalk onto a previously developed area of the park which is subject to heavy foot traffic and therefore unable to sustain turf that otherwise defines the area.

The Project will pave this area with Lithocrete, a cement product that can be seeded with colorful recycled glass aggregate. The Lithocrete plaza will depict the offshore marine reserve and highlight many of the area features, both topography and sites of interest. The "Map" will also feature the embed of approximately fifty bronze fish and marine invertebrates, which are indigenous to the La Jolla area. A compass rose will orient visitors to the layout. The pictures below show the approximate color pallet of the art glass to be seeded. Also shown are a sample of the bronze embeds and the compass rose.



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EXHIBIT "B"

Improvements

See attached Drawings

DRAFT