



# CITY COUNCIL STAFF REPORT

DATE: December 1, 2010

CONSENT CALENDAR

SUBJECT: PALM SPRINGS POWER AGREEMENT

FROM: David H. Ready, City Manager

BY: Parks and Recreation

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## SUMMARY

Request for the City Council to approve an "Agreement to Use Facilities" with the Palm Springs Power (PSP) for the non-exclusive use of Palm Springs Stadium for a term of three (3) years with two (2), two-year extensions as allowed under the terms of the agreement.

## RECOMMENDATION:

1. Approve an agreement with the Palm Springs Power Baseball Team for a period of three (3) years with two (2) two-year extensions.
2. Authorize the City Manager to execute all necessary documents.

## STAFF ANALYSIS:

The Palm Springs Power Baseball Team has played in the City's Stadium since 2004. Under the terms of the proposed new Agreement, the PSP will pay the City a fixed annual rent of \$1.00 per year and assume full responsibility for paying the natural gas and electrical costs for the Stadium lights and office, locker rooms, and concessions. In 2010, PSP paid approximately \$20,300 in Stadium rental fees and Stadium lighting charges.

The City has installed four (4) meters to track electrical usage. In 2009, the natural gas cost for the Stadium was \$4,700, and the electricity cost was \$28,960. Pursuant to PSP's last Agreement, the City was responsible for all of the utility costs, except for Stadium lighting. Under the new Agreement, PSP's payment of all utilities will eliminate the City's responsibility of utility costs.

FISCAL IMPACT:

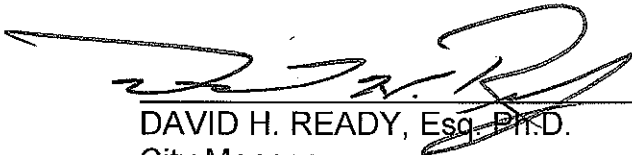
PSP's assumption of utilities will relieve the City of approximately \$20,000 per year of costs for utilities at the Stadium facility.



VICKI OLTEAN  
Director



THOMAS J. WILSON  
Assistant City Manager



DAVID H. READY, Esq., Ph.D.  
City Manager

Attachment:

1. PSP Agreement

## **AGREEMENT TO USE FACILITIES**

This Agreement to Use Facilities ("Agreement") is made and entered into this \_\_\_\_ day of \_\_\_\_\_, 2010, by and between the CITY OF PALM SPRINGS ("City"), a municipal corporation, and PALM SPRINGS POWER BASEBALL CLUB ("PSP"), a California corporation.

### **RECITALS**

**A. City and PSP are mutually interested in and concerned with providing quality recreational activities for the citizens of Palm Springs.**

**B. It is recognized that through a cooperative agreement between the City and PSP for the use of the Palm Springs Stadium ("Stadium"), the community and the residents of Palm Springs will enjoy additional recreational opportunities.**

NOW, THEREFORE, the City and PSP do hereby mutually agree as follows:

### **1A. INTENT OF AGREEMENT**

1A.1 It is the intent of this Agreement to describe the responsibilities of the City and PSP in their cooperative effort to effectively promote and provide an instructional league for Minor and Independent League professional players and competitive collegiate-level baseball entertainment for residents and visiting youth and adults at the Stadium.

1A.2 It is the intent of this Agreement to solidify a supportive and working relationship between PSP and the City.

1A.3 It is the intent of this Agreement that both the City and PSP acknowledge and direct their efforts toward the development of quality baseball programs at the Stadium.

### **1B. GRANT OF NON-EXCLUSIVE USE**

1B.1 The City grants PSP the nonexclusive use of the Stadium located at 1901 East Baristo Road, Palm Springs, California, subject to the terms and conditions more particularly set forth in this Agreement.

1B.2 PSP shall have the exclusive use of the offices, locker rooms and concession located at the Stadium subject to the terms and conditions more particularly set forth below.

1B.3 The parties agree that PSP may identify the Stadium as its "home" stadium for all baseball games held for or on behalf of PSP during the term of this agreement.

1B.4 Subject only to the City's Fourth of July Fireworks event, PSP shall have the exclusive use of the entire Stadium for the following: (a) approximately forty-five (45) home dates of the collegiate all-star baseball team owned by PSP, known as the Palm Springs Power ("Team"), during the baseball season for the Pacific Southwest League ("Season"); (b) approximately twenty-five (25) dates of the instructional league, for the California Winter League; and (c) a maximum of three (3) tournaments hosted by the Team. Exclusive use of the Stadium for these purposes shall commence at 6:00 a.m. on the date of such home game or tournament and end three (3) hours after the completion of each home game or, for a tournament, the last game of the day. PSP shall notify the City as soon as practicable of the dates of the home games for the Team and any tournaments to be hosted by the Team, but not later than November 30 of each year the Agreement is in effect. PSP may request additional use of the Stadium for events other than baseball; however, City does not guarantee availability of the Stadium for any additional use not already authorized under this Agreement. For any requests for additional use that are granted by City, PSP shall pay all fees in accordance with the City's comprehensive fee schedule in effect at the time the request is made.

1B.5 For the period commencing with the first home game of the Team and ending with the last home game of the Team or the last tournament to be hosted by the Team, whichever is later, PSP shall have the exclusive right to use the locker rooms located at the Stadium.

1B.6 During the term of this Agreement, PSP shall remain a member in good standing of the Southern California Collegiate League and the California Winter League, or such other leagues as approved by the City.

1B.7 Within five (5) days of the last home game of the Season (including any tournament hosted by the Team), PSP shall vacate and surrender all areas of the Stadium, except for the offices and interior storage rooms. PSP's schedule shall take precedence in all scheduling of the Stadium, with the exception of the Black History Festival the last Saturday in February. For Winter and Summer League, however, dates for tournaments must be requested on a City Facility Use Application. Nevertheless, the City shall have the right to grant third parties the right to use all or any part of the Stadium at such times that will not conflict with the terms of this Agreement, and PSP agrees to cooperate and coordinate with Contract Officer for use of the Stadium by community and youth organizations during the baseball season. Contract Officer shall give PSP notice of other events to be conducted at the Stadium within seventy-two (72) hours of booking such an event.

1B.8 City shall relinquish the Stadium to PSP one week prior to opening Day for the summer season. However, the field can still be rented out by the City for other baseball events if PSP is not using the field. PSP shall relinquish the Stadium back to the City on August 15. For the Winter season, the City shall relinquish the Stadium to PSP on January 20 and PSP shall relinquish the Stadium back to the City on March 1. City shall relinquish the Stadium to PSP on an as-scheduled basis for tournaments and special events approved by the City and PSP shall relinquish the Stadium back to the City within 48 hours of conclusion of any tournament or special event.

## **2. AREAS OF RESPONSIBILITY**

### **2.1 Use.**

2.1.1 City and PSP shall conduct a walk-thru of the Stadium to verify the condition prior to PSP taking possession. Upon PSP relinquishing Stadium to City, any damage or cleaning requirements, as determined at the sole discretion of City, shall be satisfied by PSP.

2.1.2 PSP shall exercise this Agreement solely for the management of the Team, the playing of home games by the Team, the hosting of tournaments by the Team, the sale of concessions during home games, and the promotion of City-approved events in addition to baseball. On the date of each home game or tournament game, PSP shall be responsible for turning on and off the field lights prior to and after the game. In addition, PSP shall be responsible for procuring parking attendants and adequate security personnel, as reasonably deemed necessary by the City, for each game. The City shall stock and clean all exterior restrooms prior to each game day, and PSP shall pay City \$50 per game day for this service. PS shall be responsible for any necessary restocking or cleaning of restrooms during an event. At the end of each day on which a game is played, PSP shall be responsible for ensuring that all trash cans at the Stadium are emptied and that all litter throughout the Stadium has been collected and properly disposed of.

2.1.3 PSP shall not use or permit to be used the Stadium or any part thereof for any purpose or purposes other than the express purpose or purposes for which the Stadium is hereby rented to PSP. In addition, this Agreement does allow PSP to use the Cerritos Field outfield grass when requested and granted by the City for stretching and warming up during tournaments and the CWL season. PSP shall not sell or permit to be kept, used, displayed or sold in or about the Stadium (a) any article that may be prohibited by standard forms of fire insurance policies or (b) any alcoholic beverages unless expressly approved in advance by the Contract Officer.

2.1.4 PSP shall have complete responsibility for the control and supervision of its staff members and invitees with respect to purchases from the concession stand, use of the Stadium, and use of the concession stand and concession stand equipment.

2.1.5 PSP shall be responsible for the control and safety of its staff, members and guests while PSP, its staff, members and guests use the Stadium.

2.1.6 PSP shall not engage in any activity on or about the Stadium that violates any environmental law and shall promptly, at PSP's sole cost and expense, take all investigatory and/or remedial action required or ordered by any governmental agency or environmental law for cleanup and removal of any contamination involving any hazardous material created or caused directly or indirectly by PSP. The term environmental law shall mean any federal, state or local law, statute, ordinance or regulation pertaining to health, industrial hygiene or the environmental conditions on, under or about the Stadium, as such laws are amended, and the regulations and administrative codes applicable thereto. The term hazardous material includes, without limitation, any material or substance that is (i) defined or listed as a hazardous waste, hazardous substance or considered a waste, condition of pollution or nuisance under the environmental laws; (ii) petroleum or petroleum products or fractions thereof; (iii) asbestos; and/or (iv) substances known by the State of California to cause cancer and/or reproductive toxicity. PSP shall provide prompt written notice to the City of the existence of hazardous substances at the Stadium and any notices of violation of environmental laws received by PSP.

## 2.2 Concessions and Ticket Sales

2.2.1 The City hereby grants to PSP the exclusive right to operate all novelty, program, refreshment and concession facilities within the Stadium during home games and tournaments hosted by the Team. PSP shall serve and provide for the sale of such items of food, drink and goods as are normally served by concessionaires in baseball stadiums, including, without limitation, souvenirs, programs, seat cushions, baseball caps and batting helmets. The City reserves the right to retain concessions for City-sponsored events or any third party events.

2.2.2 All rates charged for admission to the Stadium for home games and tournament games and for the sale of concessions shall be uniform per event, except that PSP shall provide discounted admission prices for children under twelve (12), students and adults over sixty-five (65) years of age, and subject to the prior approval of the Contract Officer, which approval shall not be unreasonably withheld. The standard used by the Contract Officer to approve or disapprove rates and prices shall be the prevailing market rate for such items and services. The Contract Officer shall have access to and the right to inspect the schedule of prices and rates charged for admission to the Stadium and concessions and, in the event that after PSP has been advised and given a reasonable opportunity to confer with the Contract Officer and justify the prices then in effect, if the Contract Officer determines that any price or prices are unreasonable or inappropriate, the same shall be modified as directed by the Contract Officer. PSP shall display all prices at the point of sale for all admission and concessions conspicuously on signs approved by the Contract Officer.

All rates for the sale of tickets and concession items are to be submitted to the Contract Officer for approval prior to any promotion or publication of said rates.

## 2.3 Advertising

2.3.1 PSP shall have the exclusive right to place advertising signs on the outfield fence of the Stadium at locations approved in advance by the Contract Officer. All revenue received from such advertising shall be received by PSP. Outfield advertising shall remain in place from March 1 through December 31 of each year the agreement is in effect. Any damage caused by PSP through the installation or removal of advertising signs shall be immediately repaired by PSP at no cost to the City. Such advertising shall be subject to the approval of the Contract Officer, which approval shall not be

unreasonably withheld. The City reserves the right to temporarily cover or take down advertising signs during special events and/or rentals of the Stadium by third parties. PSP shall promote the Stadium and its Team in consultation with the City's Department of Tourism. The City shall be named in all advertising. For promotional purposes, PSP shall include reference to the City in all paid media (advertising), publications and signs. The City shall be identified on a credit line prominently presented on the PSP's website page. There shall be a hyperlink from the PSP's website to the City's website at [www.palmspringsca.gov](http://www.palmspringsca.gov). The parties agree that said link may be "framed" whereby material or pages from the linked website appear in a frame on the site which creates the link. The parties expressly recognize their individual obligations and responsibilities for the content, quality, accuracy or completeness of materials contained on their respective websites and agree to hold each other harmless from any special, indirect, incidental or consequential damages that may arise from the use of or the inability to use the respective sites and/or the materials contained on either site whether the materials contained on the site are provided by the City or PSP.

2.3.2 The City shall be positioned as "Presenting Sponsor" in all advertising. An example of advertising includes, but is not limited to, receiving space to place one (1) full-page four-color advertisement on the inside of the PSP's official program for marketing and promotion purposes.

## 2.4 Repairs and Maintenance

2.4.1 PSP shall, at its sole cost and expense and subject to the City's obligations more particularly set forth below, keep and maintain the Stadium, to include offices, locker rooms and concessions, and the adjacent parking facilities, sidewalks and landscaping in a good, neat, clean and orderly condition and state of repair, including, but not limited to, cleaning the Stadium and removing all debris and litter from the Stadium after each home game and tournament game. By entering into the Stadium, PSP shall be deemed to have accepted the Stadium as being in a good, neat, clean and orderly condition. PSP agrees that upon the surrender of any portion of the Stadium to the City, the Stadium shall be surrendered in the same condition as when received and in a good, clean and sanitary condition, reasonable use and wear thereof and damage by fire, act of God or by the elements excepted.

2.4.2 The City hereby agrees to mow, water, seed and otherwise maintain the playing field of the Stadium in a condition satisfactory to conduct independent league baseball games, provided that PSP be responsible for preparation of the infield for all home games and tournament games. The City shall also maintain the playing field lights in a good condition and repair, including, but not limited to, replacing bulbs and fixtures as needed, on a timely basis, to be operable at the time of all home games and tournament games. The City shall also maintain all electrical repairs, structural repairs, and overall maintenance of the Stadium. The City shall be responsible for cleaning the Stadium to a good, neat, clean and orderly condition after third-party events and prior to the start of each baseball season no later than three (3) days prior to relinquishing the Stadium to PSP of each year.

All landscape maintenance requests or issues shall be directed to the Contract Officer. PSP shall not contact the landscape maintenance contractor directly.

## 2.5 Utilities

2.5.1 The City shall provide and maintain water for the Stadium at the City's sole expense.

2.5.2 PSP will be responsible for all electrical costs incurred for the Stadium offices, locker rooms and concessions. The City will install four (4) meters at the Stadium to track PSP's electrical usage. One (1) meter will be for the air conditioning (A/C); one meter for the interior lights and outlets for the Stadium; one for the outfield lights; and the fourth meter for the concession stand. Should the Stadium be used for events not affiliated with PSP, PSP will not be responsible for the electrical costs for such events.

2.5.3 PSP will be responsible for the gas costs for the Stadium, which is also metered.

2.5.4 PSP hereby waives, discharges, and holds harmless the City, its elected and appointed officers, employees and agents, for any and all claims it may now or in the future have against the City for any losses or damages sustained by PSP by reason of any defect, deficiency or impairment in the provision of utilities to the Stadium.

2.5.5 Payment for electrical and gas costs shall be made directly to the City and will be due within ten (10) days of the date billed. If payment is not received within ten (10) days of its due date, a late charge will be applied pursuant to Section 3.6 of this Agreement.

2.5.6 If a PSP game must be cancelled due to a Stadium malfunction, such as the lights not working or the sprinklers not turning off, and the City is unable to provide PSP with notice at least 24 hours prior to a scheduled game, PSP will receive a one thousand dollar (\$1,000) electrical credit from the City.

## 2.6 Alterations and Fixtures

PSP shall not make or suffer to be made any alterations to the Stadium, or any part thereof, or change the appearance of the Stadium without the prior written consent of the City, and any alterations to the Stadium, except for movable furniture and trade fixtures, shall become at once a part of the realty and shall, at the expiration or earlier termination of this Agreement, belong to the City. Any such alteration shall be in conformance with the requirements of all municipal, state, federal and other governmental authorities and in conformance with the reasonable rules and regulations of the City. The City may require that any such alterations be removed prior to the expiration of the term hereof. Any removal of alterations or fixtures shall be at PSP's sole cost and expense and accomplished in a good and workmanlike manner. Any damage caused by such removal shall be repaired at PSP's sole cost and expense so that the Stadium can be surrendered in a good, clean and sanitary condition as required by Section 2.4 above. In installing and removing any such alterations or fixtures, PSP shall pay the prevailing wage rate. PSP shall keep the Stadium and the property on which the Stadium is situated free from any liens arising out of any work performed, material furnished or obligation incurred or alleged to have been incurred by PSP.

## 2.7 Damage and Destruction

In the event of (a) a partial or total destruction of the Stadium that requires repairs to the Stadium or (b) the Stadium being declared unsafe or unfit for occupancy by any authorized public authority for any reason other than PSP's act, use or occupation, which declaration requires repairs throughout the Stadium, the City shall have the right to either terminate this Agreement or repair the Stadium. If the City elects to make said repairs, and provided the City uses due diligence in making said repairs, this Agreement shall continue in full force and effect. If the City elects to terminate this Agreement, all rentals shall be prorated between the City and PSP as of the date of such destruction.

## 2.8 Compliance with Law

PSP shall use the Stadium and conduct its operations thereon in accordance with all ordinances, resolutions, statutes, rules and regulations of the City and any federal, state or local governmental agency having jurisdiction in effect.

## 2.9 Licenses, Permits, Fees and Assessments

PSP shall obtain, at its sole cost and expense, such licenses, permits and approvals as may be required by law for the use of the Stadium and conduct of its operations thereon, and shall indemnify, defend and hold harmless City against any such fees, assessments, taxes, penalties or interest levied, assessed or imposed against City hereunder.

## 2.10 Further Responsibilities of Parties

The parties agree to use reasonable care and diligence to perform their respective obligations under this Agreement. Both parties agree to act in good faith to execute all instruments, prepare all documents and take all actions as may be reasonably necessary to carry out the purposes of this Agreement. Unless hereafter specified, neither party shall be responsible for the services of the other.

## 2.11 Prohibited Activities

2.11.1 The City reserves the right to prohibit the sale of any item at the concession stand. Such determination shall be made by the Contract Officer.

2.11.2 Vending machines are prohibited.

2.11.3 The sale of tobacco, gum and all other items that create safety or litter problems, as determined by the Contract Officer, is prohibited.

2.11.4 The sale of any item which is contained in glass or a metal container is prohibited.

2.11.5 All other activities when specified by the Contract Officer in writing and delivered to PSP are prohibited.

## 2.12 Security and Access

Contract Officer and the lawful representative of any other public agency, as necessary, shall have the right to enter any portion of the Stadium for the purposes of verifying PSP's compliance with the terms of this Agreement and all applicable laws. Such entry shall be made upon oral notice to PSP, except that in cases of emergency, no notice shall be required.

## 3. COMPENSATION

In consideration for this Agreement, PSP agrees to pay to the City the following:

### 3.1 Fixed Rental

3.1.1 **RENT:** PSP agrees to pay to the City as rental for said premises the sum of One Dollar (\$1.00) per year, first payment payable on the date of execution of this lease agreement, and thereafter on the 15<sup>th</sup> day of January of each succeeding year.

3.1.2 **UTILITIES:** PSP will be responsible for the electrical and gas costs for the Stadium in accordance with Section 2.5 of this Agreement.

### 3.2 Security Deposit

PSP has provided City with a security deposit in the sum of One Thousand Dollars (\$1,000) City may draw upon the security deposit to correct any default or breach of this Agreement by PSP, its successors or assigns, or for payment of expenses incurred by City as a result of the failure of PSP, its successors or assigns, to faithfully perform all terms, covenants, and conditions of this Agreement, including, but not limited to, nonpayment of Rent or utilities due pursuant to Section 3.1. In the event City withdraws any or all of the security deposit during the term of this Agreement, PSP shall, within ten (10) days of any withdrawal by City, replenish the security deposit to maintain it at amounts as herein required throughout the lease term. Failure to do so shall be deemed a default and shall be grounds for immediate termination of this Agreement. Nothing contained in this Section 3.2 shall in any way diminish or be construed as waiving any of the City's other remedies as provided in this Agreement or by law or in equity.

The security deposit shall be returned by City to PSP at the end of the term of this Agreement, as defined in Section 4.2, provided PSP has fully and faithfully performed each and every term, covenant, and condition of this Agreement. The authorized refund of any security deposit by City, after deduction of all amounts due City under this Agreement, shall be made after sixty (60) days have elapsed following the effective date of said termination.

### 3.3 Concession Fee

PSP will pay City a concession fee in accordance with the following schedule:

February 1, 2011 - \$500.00  
February 1, 2012 - \$750.00  
February 1, 2013 - \$1,000.00

The concession fee will be spent by City on improvements to the concession stand at the Stadium. Improvements will be mutually agreed upon by City and PSP in advance of any expenditures.

### 3.4 Real and Personal Property Taxes

In addition to all other payments herein reserved, PSP shall pay directly to the taxing authority any possessory interest taxes imposed upon PSP for the use of the Stadium and all taxes assessed against and levied upon any fixtures, furnishings, equipment and all other personal property of PSP located in the Stadium.

### 3.5 Late Payment

PSP hereby acknowledges that late payment by PSP to the City of amounts due hereunder will cause the City to incur costs not contemplated by this Agreement, the exact amount of which is extremely difficult to ascertain. Such costs include, but are not limited to, processing and accounting charges. Accordingly, any payment of any sums to be paid by PSP not paid within ten (10) days of its due date shall be subject to a five percent (5%) late charge. PSP and the City agree that this late charge represents a reasonable estimate of such costs and expenses and is fair compensation to the City for its loss suffered by such late payment by PSP.

### 3.6 Interest

Any sum to be paid pursuant to the terms of this Agreement not paid when due shall bear interest from and after the due date until paid at a rate equal to three percent (3%) over the reference rate being charged by Bank of America, N.A. from time to time during such period so long as the rate does not exceed the maximum non-usurious rate permitted by law, in which case interest shall be the maximum non-usurious rate allowed by law at the time the sum became due.

## 4. PERFORMANCE SCHEDULE

### 4.1 Time of Essence

Time is of the essence in the performance of this Agreement.

### 4.2 Term

Unless earlier terminated in accordance with Section 8.6 of this Agreement, this Agreement shall commence on December 1, 2010 and terminate on November 30, 2013. At the discretion of the City Manager, this Agreement may be extended for two (2) two-year terms upon the expiration of the original term.

## 5. COORDINATION OF WORK

### 5.1 Representative of PSP

The following principal of PSP is hereby designated as being the principal and representative of PSP, authorized to act on its behalf with respect to this Agreement and make all decisions in connection therewith:

Andrew Starke  
2140 E. Rochelle  
Palm Springs, CA 92262

It is expressly understood that the experience, knowledge, capability and reputation of the foregoing principal was a substantial inducement for City to enter into this Agreement. For purposes of this Agreement, the foregoing principal may not be replaced without the express written approval of City.

### 5.2 Contract Officer

The Contract Officer shall be the City's Department of Parks and Recreation Director or the designee or designees of the Director. It shall be the PSP's responsibility to assure that the Contract Officer is kept informed of the progress of the performance of the services and the PSP shall refer any decisions that must be made by City to the Contract Officer. Unless otherwise specified herein, any approval of City required hereunder shall mean the approval of the Contract Officer. The Contract Officer shall have authority to sign all documents on behalf of the City required hereunder to carry out the terms of this Agreement.

### 5.3 Subcontracting or Assignment Prohibited

The experience, knowledge, capability and reputation of PSP, its principals and employees were a substantial inducement for City to enter into this Agreement. Therefore, neither this Agreement nor any interest herein may be transferred, assigned, conveyed, sublet, hypothecated or otherwise transferred voluntarily or by operation of law, whether for the benefit of creditors or otherwise, without the prior written approval of Contract Officer. However, PSP may subcontract or assign the concession sales to a licensed vendor upon prior written approval by the Contractor Officer. Transfers restricted hereunder shall include the transfer to any person or group of persons acting in concert of more than fifty percent (50%) of the present ownership and/or control of PSP, taking all transfers into account on a cumulative basis. In the event of any such unapproved transfer, including any bankruptcy proceeding, this Agreement shall be void. No approved transfer shall release PSP of any liability hereunder without the express consent of Contract Officer.

### 5.4 Independent Contractor

Neither City nor any of its employees shall have any control over the manner, mode or means by which PSP, its agents or employees perform the services required herein, except as otherwise set forth herein. City shall have no voice in the selection, discharge, supervision or control of PSP's employees, servants, representatives or agents, or in fixing their number, compensation or hours of service. PSP shall perform all services required herein as an independent contractor of City and shall remain at all times as to City a wholly independent contractor with only such obligations as are consistent with that role. PSP shall not at any time or in any manner represent that it or any of its agents or employees are agents or employees of City. City shall not in any way or for any purpose become or be deemed to be a partner of PSP in its business or otherwise or a joint venturer or a member of any joint enterprise with PSP.

## 6. INSURANCE, INDEMNIFICATION AND BONDS

### 6.1 Insurance

PSP shall procure and maintain, at its sole costs and expense, in a form and content satisfactory to Contract Officer, during the entire term of this Agreement, including any extension thereof, the following policies of insurance:

a. Comprehensive General Liability Insurance. A policy of comprehensive general liability insurance written on a per-occurrence basis in an amount not less than either (i) a combined single limit of One Million Dollars (\$1,000,000) for bodily injury, death and property damage or (ii) bodily injury limits of Five Hundred Thousand Dollars (\$500,000) per person, One Million Dollars (\$1,000,000) per occurrence and One Million Dollars (\$1,000,000) products and completed operations and property damage limits of Five Hundred Thousand Dollars (\$500,000) per occurrence and Five Hundred Thousand Dollars (\$500,000) in the aggregate.

b. Worker's Compensation Insurance. A policy of worker's compensation insurance in such amount as will fully comply with the laws of the State of California and that shall indemnify, insure and provide legal defense for both PSP and the City against any loss, claim or damage arising from any injuries or occupational diseases occurring to any worker employed by or any persons retained by PSP in the course of carrying out the work or services contemplated in this Agreement.

c. Automotive Insurance. A policy of comprehensive automobile liability insurance written on a per-occurrence basis in an amount not less than either (i) bodily injury liability limits of Two Hundred Fifty Thousand Dollars (\$250,000) per person and Five Hundred Thousand Dollars (\$500,000) per occurrence and property damage liability limits of One Hundred Thousand Dollars (\$100,000) per occurrence and Two Hundred Fifty Thousand Dollars (\$250,000) in the aggregate or (ii) combined single limit liability of Five Hundred Thousand Dollars (\$500,000). Said policy shall include coverage for owned, non-owned, leased and hired cars.

All of the above policies of insurance shall be primary insurance and shall name the City, its officers, employees and agents as additional insureds. The insurer shall waive all rights of subrogation and contribution it may have against City, its officers, employees and agents and their respective insurers. All of said policies of insurance shall provide that said insurance may not be amended or canceled without providing thirty (30) days' prior written notice by registered mail to the City. In the event any of said policies of insurance are canceled, PSP shall, prior to the cancellation date, submit new evidence of insurance in conformance with this Section 6.1 to the Contract Officer. No work or services under this Agreement shall commence until PSP has provided City with certificates of insurance or appropriate insurance binders evidencing the above insurance coverage and said certificates of insurance or binders are approved by City.

PSP agrees that the provisions of this Section 6.1 shall not be construed as limiting in any way the extent to which PSP may be held responsible for the payment of damages to any persons or property resulting from PSP's activities or the activities of any person or persons for which PSP is otherwise responsible.

In the event PSP subcontracts any portion of the work in compliance with Section 5.3 of this Agreement, the contract between PSP and such subcontractor shall require the subcontractor to maintain the same policies of insurance that PSP is required to maintain pursuant to this Section 6.1.

### 6.2 Indemnification

PSP, as a material part of the consideration to be rendered to the City under this Agreement, hereby waives claims against the City for damage to equipment or other personal property, trade fixtures, improvements, goods, wares, inventory and merchandise in, upon or about the Stadium and

for injuries to persons in or about the Stadium from any cause arising at any time. PSP agrees to indemnify the City, its officers, agents and employees against and shall hold and save them and each of them harmless from any and all actions, suits, claims, damages to persons or property, losses, costs, penalties, obligations, errors, omissions or liabilities (herein "claims or liabilities") that may be asserted or claimed by any persons, firm or entity arising out of or in connection with the negligent performance of the work, operations or activities of PSP, its agents, employees, subcontractors or invitees provided for herein, or arising from the negligent acts or omissions of PSP hereunder, or arising from PSP's negligent performance of or failure to perform any term, provision, covenant or condition of this Agreement, but excluding such claims or liabilities arising from the sole negligence or willful misconduct of the City, its officers, agents or employees, who are directly responsible to the City, and in connection therewith:

a. PSP shall defend any action or actions filed in connection with any of said claims or liabilities and shall pay all costs and expenses, including legal costs and attorneys' fees incurred in connection therewith;

b. PSP shall promptly pay any judgment rendered against the City, its officers, agents or employees for any claims or liabilities arising out of or in connection with the negligent performance of or failure to perform such work, operations or activities of PSP hereunder; and PSP agrees to save and hold the City, its officers, agents and employees harmless therefrom;

c. In the event the City, its officers, agents or employees is made a party to any action or proceeding filed or prosecuted against PSP for such damages or other claims arising out of or in connection with the negligent performance of or failure to perform the work, operation or activities of PSP hereunder, PSP agrees to pay City, its officers, agents or employees and or employees in such action or proceeding, including, but not limited to, legal costs and attorneys' fees.

### 6.3 Sufficiency of Insurer or Surety

The insurance required by this Agreement shall be satisfactory only if issued by companies qualified to do business in California, rated "A" or better in the most recent edition of *Best Rating Guide*, *The Key Rating Guide* or in the *Federal Register*, and only if they are of a financial category Class VII or better, unless such requirements are waived by the Risk Manager of the City (Risk Manager) due to unique circumstances. In the event the Risk Manager determines that the work or services to be performed under this Agreement creates an increased or decreased risk of loss to the City, PSP agrees that the minimum limits of the insurance policies and the performance bond required by this Section 6 may be changed accordingly upon receipt of written notice from the Risk Manager, provided that PSP shall have the right to appeal a determination of increased coverage by the Risk Manager to the City Council of City within ten (10) days of receipt of notice from the Risk Manager.

## 7. RECORDS AND REPORTS

### 7.1 Reports

PSP shall periodically prepare and submit to the Contract Officer such reports concerning the performance of the services required by this Agreement as the Contract Officer shall require.

### 7.2 Records

PSP shall keep, and require subcontractors to keep, such books and records as shall be necessary to perform the services required by this Agreement and enable the Contract Officer to evaluate the performance of such services. The Contract Officer shall have full and free access to such books and records at all times during normal business hours of City, including the right to inspect, copy, audit and make records and transcripts from such records. Such records shall be maintained for

a period of three (3) years following completion of the services hereunder, and the City shall have access to such records in the event any audit is required.

## 8. ENFORCEMENT OF AGREEMENT

### 8.1 California Law

This Agreement shall be construed and interpreted both as to validity and 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 PSP covenants and agrees to submit to the personal jurisdiction of such court in the event of such action.

### 8.2 Disputes

In the event of any dispute arising under this Agreement, the injured party shall notify the injuring party in writing of its contentions by submitting a claim therefore. The injured party shall continue performing its obligations hereunder so long as the injuring party commences to cure such default within ten (10) days of service of such notice and completes the cure of such default within forty-five (45) days after service of the notice, or such longer period as may be permitted by the injured party; provided that if the default is an immediate danger to the health, safety and general welfare, such immediate action may be necessary. Compliance with the provisions of this section shall be a condition precedent to termination of this Agreement for cause and to any legal action, and such compliance shall not be a waiver of any party's right to take legal action in the event that the dispute is not cured.

### 8.3 Waiver

No delay or omission in the exercise of any right or remedy by a non-defaulting party on any default shall impair such right or remedy or be construed as a waiver. A party's consent to or approval of any act by the other party requiring the party's consent or approval shall not be deemed to waive or render unnecessary the other party's consent to or approval of any subsequent act. Any waiver by either party of any default must be in writing and shall not be a waiver of any other default concerning the same or any other provision of this Agreement.

### 8.4 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 and 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.

### 8.5 Legal Action

In addition to any other rights or remedies, either party may take legal action, in law or in equity, to cure, correct or remedy any default, to recover damages for any default, to compel specific performance of this Agreement, to obtain declaratory or injunctive relief, or to obtain any other remedy consistent with the purposes of this Agreement.

### 8.6 Termination for Default of PSP

If PSP fails to cure a default within the time periods set forth in Section 8.2 above, then the City, in addition to any other rights or remedies it may have in law or equity, shall have the immediate right to remove all persons and property from the Stadium and such property may be removed and stored in a public warehouse or elsewhere at the cost of and for the account of PSP, all without

services of notice or resort to legal process without being deemed guilty of trespass, or becoming liable for any loss or damage which may be occasioned thereby and may unilaterally terminate this Agreement by written notice effective three (3) calendar days after said notice.

#### 8.7 Attorneys' Fees

If either party to this Agreement is required to initiate or defend or made a party to any action or proceeding in any way connected with this Agreement, the prevailing party in such action or proceeding, in addition to any other relief that may be granted, whether legal or equitable, shall be entitled to reasonable attorneys' fees. Attorneys' fees shall include attorneys' fees on any appeal, and, in addition, a party entitled to attorneys' fees shall be entitled to all other reasonable costs for investigating such action, taking depositions and discovery, and all other necessary costs the court allows that are incurred in such litigation. All such fees shall be deemed to have accrued on commencement of such action and shall be enforceable whether or not such action is prosecuted to judgment.

### 9. CITY OFFICERS AND EMPLOYEES: NON-DISCRIMINATION

#### 9.1 Non-Liability of City Officers and Employees

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

#### 9.2 Conflict of Interest

No officer or employee of the City shall have any financial interest, direct or indirect, in this Agreement nor shall any such officer or employee participate in any decision relating to the Agreement that affects his financial interest or the financial interest of any corporation, partnership or association in which he is, directly or indirectly, interested in violation of any state statute or regulation. PSP warrants that it has not paid or given and shall not pay or give any third party any money or other consideration for obtaining this Agreement.

#### 9.3 Covenant Against Discrimination

PSP covenants that, by and for itself, its heirs, executors, assigns and all persons claiming under or through them, there shall be no discrimination against or segregation of any person or group of persons on account of race, color, creed, religion, sex, marital status, national origin or ancestry in the performance of this Agreement. PSP shall take affirmative action to ensure that applicants are employed and that employees are treated during employment without regard to their race, color, creed, religion, sex, marital status, national origin or ancestry.

### 10. MISCELLANEOUS PROVISIONS

#### 10.1 Notice

Any notice, demand, request, document, consent, approval or communication either party desires or is required to give to the other party or any other person shall be in writing and either served personally or sent by prepaid, first-class mail, in the case of the City, to the City Manager and to the attention of the Contract Officer, CITY OF PALM SPRINGS, P.O. Box 2743, Palm Springs, California 92263-2743, and, in the case of PSP, to Andrew Starke, 2140 E. Rochelle, Palm Springs, California 92262. Either party may change its address by notifying the other party of the change of address in writing. Notice shall be deemed communicated at the time personally delivered or in seventy-two (72) hours from the time of mailing if mailed as provided in this section.

## 10.2 Interpretation

The terms of this Agreement shall be construed in accordance with the meaning of the language used and shall not be construed for or against either party by reason of the authorship of this Agreement or any other rule of construction that might otherwise apply.

## 10.3 Integration; Amendment

It is understood that there are no oral agreements between the parties hereto affecting this Agreement, and this Agreement supersedes and cancels any and all previous negotiations, arrangements, agreements and understandings, if any, between the parties and none shall be used to interpret this Agreement. This Agreement may be amended at any time by the mutual consent of the parties by an instrument in writing.

## 10.4 Severability

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 a 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 hereby declared as severable and shall be interpreted to carry out the intent of the parties hereunder unless the invalid provision is so material that this invalidity deprives either party of the basic benefit of their bargain or renders this Agreement meaningless.

## 10.5 Corporate Authority

The persons executing this Agreement on behalf of the parties hereto 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 provision of this Agreement, and (iv) the entering into this Agreement does not violate any provision of any other agreement to which said party is bound.

## 10.6 Release

PSP hereby releases and forever discharges City from and against any and all claims, demands, actions and causes of action whatsoever which PSP may have or may hereafter have specifically arising in any way out of the exercise by PSP of the rights afforded by this Agreement. This is a complete and final release and shall be binding upon PSP and covers claims arising out of or connected with PSP's presence and/or the use of all or any portion of the Stadium by PSP.

## 10.7 Assignment

PSP may not assign this Agreement, or any right under it, whether voluntarily or by operation by law, to an affiliate or any third party without the prior written consent of City, which consent may be withheld in City's sole and absolute discretion. As a condition precedent to any assignment, the assignee must execute an assumption agreement assuming all of the obligations under this Agreement. PSP shall not be relieved of its obligations under this Agreement in the event of an assignment.

IN WITNESS WHEREOF, the parties have executed and entered into this Agreement as of the date first written above.

“CITY”

CITY OF PALM SPRINGS

DATED: \_\_\_\_\_

By: \_\_\_\_\_  
City Manager

By: \_\_\_\_\_  
Director of Parks and Recreation

ATTEST:

\_\_\_\_\_  
City Clerk

APPROVED AS TO FORM:

\_\_\_\_\_  
City Attorney

“PSP”

PALM SPRINGS POWER BASEBALL CLUB

DATED: \_\_\_\_\_

By: \_\_\_\_\_  
Chief Executive Officer