

**USE AGREEMENT BETWEEN THE HARBOR SOARING SOCIETY AND THE CITY
OF COSTA MESA FOR THE USE OF A PORTION OF FAIRVIEW PARK
(2019-2020)**

This Use Agreement ("AGREEMENT") is entered into and made this 01 day of July month of 2019 by and between the City of Costa Mesa ("CITY"), a municipal corporation, and the Harbor Soaring Society ("HSS"), an unincorporated association pursuant to Code of Civil Procedure section 369.5 and a Chartered Club of the Academy of Model Aeronautics ("AMA").

RECITALS

WHEREAS, CITY is the owner of Fairview Park, a public park in the City of Costa Mesa; and

WHEREAS, HSS is committed to promoting and improving the enjoyment of model aircraft flying in Orange County, has determined that the use of Fairview Park would further this purpose, and desires for a portion of Fairview Park to be used for the flying of certain model aircraft; and

WHEREAS, the approved Fairview Park Master Plan allows for the flying of model aircraft and provides for model aircraft launching/landing sites at Fairview Park.

NOW, THEREFORE, for and in consideration of the mutual promises, covenants, and conditions herein contained, the parties hereto agree as follows:

1. As used in this AGREEMENT, the term "model aircraft" means all forms of radio controlled gliders, electric motor gliders, and electric powered model airplanes, electric helicopters and/or drones, but does NOT include internal combustion engine powered aircraft, rockets, or model aircraft exceeding ten pounds. No person shall be permitted to fly an internal combustion engine powered aircraft or rocket at Fairview Park. All model aircraft must comply with all applicable provisions of the AMA Safety Code and all other applicable AMA specifications and safety codes and as defined as a model aircraft (including drones) by the Federal Aviation Administration (FAA).
2. CITY shall allow the taking off and landing of model aircraft in the area of Fairview Park marked "Silent Flyer Launch/Land Site (Lawn)" (the "Site") on the City of Costa Mesa Fairview Park Master Plan attached hereto as Exhibit "A" and incorporated herein by this reference. Model aircraft may only take off from and land in the Site. Model aircraft may be flown during posted hours. Model aircraft may be flown over permitted areas as far as unaided visual contact will allow, which means distance-wise from the pilot, as opposed to altitude. Such use of the Site shall be non-exclusive. Membership in HSS shall not be required to fly model aircraft at Fairview Park.

HSS shall coordinate with CITY to install and maintain a Frequency Board at or near the Site and a system to post and monitor which potential frequencies may be used for remote control model aircraft operation and which

frequencies are currently in use. All persons flying model aircraft at Fairview Park ("flyers") shall use either "Spread Spectrum" transmissions or discrete frequencies that are not already being used as demonstrated by the Frequency Board. Pilots shall only use radio-controlled frequencies allowed for model aircraft by the Federal Communications Commission (FCC).

3. Flyers shall comply with 1) the Fairview Park rules posted; 2) the most recent version of HSS's "Fairview Park Flying Field Rules" ("HSS Flying Rules") (including the provision requiring an active AMA license for liability insurance purposes or proof of homeowner's or other type of liability insurance with a limit of no less than \$500,000 covering flying of model aircraft), which HSS shall keep posted at the kiosk next to the flying field launch area of the Site, and which are attached hereto as Exhibit "B" and incorporated herein by this reference; 3) all applicable sections of the AMA Safety Code and all other applicable AMA specifications and safety codes; 4) all applicable FAA regulations, guidelines, and advisory circulars; 5) all applicable sections of the Costa Mesa Municipal Code, and 6) this AGREEMENT. In particular, HSS acknowledges that FAA Advisory Circular 91-57B advises that model aircraft in Class C Airspace, such as John Wayne Airport, should have prior authorization from the Administrator or Designee before operating, and shall comply with all airspace restrictions and prohibitions. HSS affirms that its members shall not fly their model aircraft higher than 200 feet above ground level unless and until HSS has entered into a written Letter of Agreement with Air Traffic Control Facilities at John Wayne Airport which would allow flight at a higher level.
5. All flyers shall "pre-flight check" their model aircraft on the ground before they are flown in order to assure that all controls are working properly. Flyers shall not engage in combat flying at Fairview Park. Flyers shall take all actions necessary to avoid flying near other park users. Model aircraft may not be flown over residences, schools, parking areas, or designated trails. Model aircraft shall remain clear of other (model and full size) aircraft at all times, in a safe manner to the extent possible.
6. HSS shall mow, weed, and otherwise maintain the Site in a clean and safe manner. Any maintenance activities performed at the Site will require prior electronic mail notification to the City and biological clearance from same before work begins. HSS may submit to CITY for consideration any proposals to make any modification to the Site, such as plantings, irrigation or modifications to buildings or grounds or any construction or improvements. All such requests must be made in writing to the City of Costa Mesa's Parks and Community Services Department, Fairview Park Administrator. Such modifications may be undertaken by HSS only with prior written approval of CITY, shall be subject to all applicable laws and regulations, and shall comply with all applicable laws and regulations in using the Site, including but not limited to Chapter V of Title 12 of the Costa Mesa Municipal Code and the Fairview Park Master Plan.
7. CITY shall provide HSS with no less than fourteen (14) days' notice in the event that a third party obtains a permit for an event at or in the vicinity of Fairview Park which model aircraft flying might disrupt or which might cause danger to the participants thereof. In response, HSS will postpone and reschedule any flying activity that might disrupt the event or endanger participants thereof, as

determined by CITY. CITY may at any time and without advance notice close the SITE to all flying activities in the event of an emergency or other circumstance which may pose any immediate threat to health and public safety or environmentally sensitive areas of Fairview Park.

8. HSS shall, upon City approval, have permission to hold scheduled events at Fairview Park, such as model aircraft competitions, which may occur over a period of not more than two days and which may include not more than 25 participants. HSS shall provide CITY with notice of such events at least forty-five (45) days prior to the event by electronic mail to the Fairview Park Administrator. Notice of these events will be advertised in the HSS monthly newsletter and on the HSS kiosk at Fairview Park at least thirty (30) days prior to the event. For events involving 25 or more participants, a Special Events Permit Application must be obtained, filled out, and approved by the CITY a minimum of forty-five (45) days prior to the start of the event. Applications may be obtained at City Hall.
9. The pre-existing on-site storage facility licensed by the License Agreement dated December 2, 1996 between the City and HSS (the "License Agreement") attached hereto as Exhibit "C" and incorporated herein by this reference, may remain in place for the duration of this AGREEMENT. The License Agreement shall terminate, and be of no further force and effect, upon the termination and/or expiration of this AGREEMENT, unless the License Agreement is separately renewed and/or extended by action of the City Council.
10. This AGREEMENT will commence on July 1, 2019 and will continue for a period of one (1) year, unless earlier terminated. Either party may terminate this AGREEMENT at any time, with or without cause, by providing 30 days' written notice of such termination to the other party. Upon or just prior to the expiration of the one-year term, this AGREEMENT may be considered for renewal by the Costa Mesa City Council, at the request of HSS, for an additional term, the length of which will be determined by the City Council.

Termination or expiration of the AGREEMENT will not relieve any individual member of the public from the insurance requirements referenced in Section 4 of this AGREEMENT when utilizing Fairview Park for model aircraft purposes, provided that CITY allows such model aircraft activity. CITY may terminate this AGREEMENT, effective immediately upon notice to HSS, at any time, if HSS breaches this AGREEMENT in any way and/or if CITY determines that HSS'S use of Fairview Park creates a safety or biological hazard. Upon termination of this AGREEMENT, HSS must remove all structures and improvements from the SITE under the supervision of the City within 45 days. The cost of removing said structures and improvements shall be the responsibility of HSS.

HSS may not assign or transfer any of its rights or duties hereunder, either in whole or in part, in any manner whatsoever.

- 11.1 Minimum Scope and Limits of Insurance. HSS shall obtain, maintain, and keep in full force and effect during the life of this Agreement all of the following minimum scope of insurance coverages with an insurance company admitted to do business

in California, rated "A," Class X, or better in the most recent Best's Key Insurance Rating Guide, and approved by City:

- 11.1.1 Commercial general liability, including premises-operations, products/completed operations, broad form property damage, blanket contractual liability, independent contractors, personal injury or bodily injury with a policy limit of not less than One Million Dollars (\$1,000,000.00), combined single limits, per occurrence. If such insurance contains a general aggregate limit, it shall apply separately to this Agreement or shall be twice the required occurrence limit.
- 11.2 Endorsements. The commercial general liability insurance policy and business automobile liability policy shall contain or be endorsed to contain the following provisions:
- 11.3 Additional insureds: "The City of Costa Mesa and its elected and appointed boards, officers, officials, agents, employees, and volunteers are additional insureds with respect to: liability arising out of activities performed by or on behalf of the HSS pursuant to its contract with the City; products and completed operations of the HSS; premises owned, occupied or used by the HSS.
 - 11.3.1 Notice: "Said policy shall not terminate, be suspended, or voided, nor shall it be cancelled, nor the coverage or limits reduced, until thirty (30) days after written notice is given to City."
 - 11.3.2 Other insurance: "The HSS's insurance coverage shall be primary insurance as respects the City of Costa Mesa, its officers, officials, agents, employees, and volunteers. Any other insurance maintained by the City of Costa Mesa shall be excess and not contributing with the insurance provided by this policy."
 - 11.3.3 Any failure to comply with the reporting provisions of the policies shall not affect coverage provided to the City of Costa Mesa, its officers, officials, agents, employees, and volunteers.
 - 11.3.4 The HSS's insurance shall apply separately to each insured against whom claim is made or suit is brought, except with respect to the limits of the insurer's liability.

Deductible or Self Insured Retention. If any of such policies provide for a deductible or self-insured retention to provide such coverage, the amount of such deductible or self-insured retention shall be approved in advance by City. No policy of insurance issued as to which the City is an additional insured shall contain a provision which requires that no insured except the named insured can satisfy any such deductible or self-insured retention.

- 11.4 Certificates of Insurance. HSS shall provide to City certificates of insurance showing the insurance coverages and required endorsements described above, in a form and content approved by City, prior to performing any services under this

Agreement. The certificates of insurance shall be attached hereto as Exhibit "E" and incorporated herein by this reference.

- 11.5 Non-Limiting. Nothing in this Section shall be construed as limiting in any way, the indemnification provision contained in this Agreement, or the extent to which HSS may be held responsible for payments of damages to persons or property.
12. Indemnification and Hold Harmless. HSS agrees to defend, indemnify, hold free and harmless the City, its elected officials, officers, agents and employees, at HSS's sole expense, from and against any and all claims, actions, suits or other legal proceedings (collectively, "Claims") brought against the City, its elected officials, officers, agents and employees arising out of the actions or inactions of HSS, its members, volunteers, employees, and/or contractors, including, but not limited to, the operation of model aircraft pursuant to this AGREEMENT. The defense obligation provided for hereunder shall apply without any advance showing of negligence or wrongdoing by HSS, its volunteers, employees, and/or contractors, but shall be required whenever any claim, action, complaint, or suit asserts as its basis the negligence, errors, omissions or misconduct of HSS, its volunteers, employees, and/or contractors, and/or whenever any claim, action, complaint or suit asserts liability against the City, its elected officials, officers, agents and employees based upon or in any way related to HSS, its volunteers, employees, and/or contractors actions and/or inactions pursuant to this AGREEMENT, whether or not HSS, its volunteers, employees, and/or contractors are specifically named or otherwise asserted to be liable. Notwithstanding the foregoing, HSS shall not be liable for the defense or indemnification of the City for claims, actions, complaints or suits arising out of the sole active negligence or willful misconduct of the City.
13. Whenever possible, each provision of this AGREEMENT will be interpreted in such a manner as to be effective and valid under applicable law, but if any provision of this AGREEMENT is held by a court to be invalid under the applicable law, such provision will be ineffective to the extent of such prohibition or invalidity, without invalidating the remainder of such provision, or the remaining provisions of this AGREEMENT. This AGREEMENT, and all documents attached hereto or made reference to and incorporated herein, constitutes the entire agreement between CITY and HSS to the subject matter of this AGREEMENT. No addition to, or alteration of, the terms of this AGREEMENT shall be valid unless made in writing and executed by both parties. This AGREEMENT is made and entered into in the State of California and the laws of said State will govern the validity and interpretation hereof and the performance hereunder by the parties herein. In the event of any legal action to enforce or interpret this AGREEMENT, the parties hereto agree that the sole and exclusive venue shall be a court of competent jurisdiction located in Orange County, California.
14. All notices, statements, demands, requests, consents, approvals, authorizations, appointments, or designations hereunder by either party to the other will be in writing and will be deemed given and served upon the other party, if delivered personally or three (3) days after depositing in the

United States mail, postage prepaid, addressed to:

CITY:
Parks and Community Services Director
City of Costa Mesa, California
77 Fair Drive
P.O. Box 1200
Costa Mesa, CA 92628-1200

HSS:
President, Harbor Soaring Society
P.O. Box 1673
Cost Mesa, CA 92626

- 15. This Agreement is entered into for the sole benefit of CITY and HSS and no other parties are intended to be direct or incidental beneficiaries of this AGREEMENT and no third party shall have any right in, under or to this AGREEMENT.
- 16. This AGREEMENT may be executed in one or more counterparts, each of which shall be deemed an original. All counterparts shall be construed together and shall constitute one agreement.
- 17. The persons executing this AGREEMENT on behalf of the parties hereto warrant that they are duly authorized to execute this AGREEMENT on behalf of said parties and that by doing so the parties hereto are formally bound to the provisions of this AGREEMENT.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed by and through their respective authorized officers.

Harbor Soaring Society

Henry A. Smith III
Signature

Date: July 1, 2019

Henry A. Smith III Vice Pres.
Name and Title

CITY OF COSTA MESA

Lori Ann Farrell Harrison
Tammy Letourneau *Lori Ann Farrell Harrison*
Acting City Manager

Date: 7/15/19

ATTEST:

Brenda Green
Brenda Green
City Clerk



APPROVED AS TO FORM:

Kimberly Hall Barlow
Kimberly Hall Barlow
City Attorney

Date: 7/9/19

APPROVED AS TO INSURANCE:

Ruth Wang
Ruth Wang
Risk Management

Date: 7/2/19

APPROVED AS TO CONTENT:

Cynthia D'Agosta
Cynthia D'Agosta
Fairview Park Administrator

Date: July 2, 2019

DEPARTMENTAL APPROVAL:

Justin Martin
Justin Martin
Parks and Community Services Director

Date: 7/1/19

APPROVED AS TO PURCHASING:

Kelly Telford
Kelly Telford
Finance Director

Date: 7/8/19