

**MEMORANDUM OF UNDERSTANDING
WITH
MERCED BUILDING HEALTHY COMMUNITIES AND
CALIFORNIA SKATEPARKS
REGARDING ALL WHEELS SKATE PARK FACILITY AT MCNAMARA PARK**

This Memorandum of Understanding ("MOU") is entered into this ____ day of _____, 20__, by and between the CITY OF MERCED, a municipal corporation, ("City"), and MERCED BUILDING HEALTHY COMMUNITIES, a community health equity initiative in Southwest Merced/East Merced County ("Merced BHC"), and CALIFORNIA SKATEPARKS, a California corporation ("California Skateparks").

WITNESS

WHEREAS, City owns McNamara Community Park ("Park") and Merced BHC intends to construct an all wheels park facility ("All Wheels Park facility"); and

WHEREAS, Merced BHC was established to foster and encourage thriving communities where all children and families can live healthy, safe, and productive lives; and

WHEREAS, Merced BHC desires to renovate and improve the Park and has secured funding to construct an All Wheels Park facility project; and has retained the expertise of California Skateparks to design and construct the All Wheels Park facility on their behalf; and

WHEREAS, California Skateparks was established with the goal of increasing global participation in skateboarding; and to create healthy, sustainable communities by promoting the inherent benefits of skateboarding; and

WHEREAS, California Skateparks assists municipalities, non-profit organizations, and private donors with the design, development, and construction of legal and safe skate plazas, as well as assisting with educational programs that both increase understanding and encourage skateboarding; and

WHEREAS, Merced BHC led a series of public workshops to develop a community-supported conceptual plan for the All Wheels Park facility and at a community workshop, California Skateparks presented a draft conceptual plan.

WHEREAS, the City, Merced BHC, and California Skateparks now wish to enter into this MOU to allow California Skateparks to construct the All Wheels Park facility at the Park.

NOW, THEREFORE, in consideration of the above recitals, which recitals are contractual in nature, the mutual covenants herein contained, and such other and further consideration as is hereby acknowledged, the parties agree as follows:

1. PARTICIPATING AGENCIES AND DESIGNATED CONTACT PERSONS

City Representative: Mike Conway, Assistant to the City Manager
Parks and Community Services Office
678 W. 18th Street.
Merced, CA 95340
Tel: (209) 385-6232

Merced BHC Representative: Sol Rivas, Hub Manager
United Way of Merced County
658 W. Main Street
Merced, CA 95340

California Skateparks
Representative: Zachary Wormhoudt-Principle Landscape Architect
California Skateparks
273 N Benson Ave
Upland, CA 91786

2. ROLES, CONTRIBUTIONS AND RESPONSIBILITIES

- A. The City will:
- (i) Designate a representative to work with Merced BHC and California Skateparks to ensure each stage of the project and the scope of work have been completed.
 - (ii) Review each project phase of the design and construction of the All Wheels Park facility, however, nothing in this MOU shall bind future City action which may be necessary to fund and approve future development of the Park.
 - (iii) Dedicate and name the All Wheels Park facility *Merced Building Healthy Communities All Wheels Park* and agrees that Merced BHC shall have the right to erect informational plaques or signs on the Park property, detailing proper use of the All Wheels Park Facility and acknowledging the contributions of Merced BHC, the grantors under any grant agreements, including but not limited to the Disney Foundation, and Contractor. Signage shall be installed by California Skateparks during construction of the All Wheels Park.
 - (iv) Make no public announcement concerning the existence of or the terms of this Agreement, either directly or indirectly, without the prior approval of Merced BHC with respect to the nature, text, and timing of such

announcement(s), except as may be legally required by applicable laws, regulations or judicial order. City shall not issue any press release, make any public announcement or hold any event regarding construction or completion of the All Wheels Park, without first obtaining the prior written approval of Merced BHC with respect to the nature, text and timing of such press release or announcement. Moreover, the City shall acknowledge the contributions of Merced BHC, the grantors under any grant agreements, and Contractor during any public or media event publishing the All Wheels Park facility.

B. Merced BHC will:

- (i) Encourage and incorporate community outreach efforts during the planning and construction phase of the All Wheels Park facility.
- (ii) Designate a representative to work with City and California Skateparks to ensure each stage of the project and the scope of work have been completed.
- (iii) Review each project phase of the design and construction of the All Wheels Park facility.
- (iv) Assume responsibility of working with contractor, California Skateparks, as the design/ build firm.

C. California Skateparks will:

- (i) Assume financial responsibility for all costs associated with the design and construction of the All Wheels Park facility.
- (ii) Appoint a Project Director to oversee the project and work with Merced BHC and City.
- (i) Require any subcontractors to insure and indemnify Merced BHC and City as described in this MOU.

3. EFFECTIVENESS, DURATION AND TERMINATION

This MOU shall be effective through the completion of the All Wheels Park facility project. Upon completion and the City's acceptance of the All Wheels Park facility project, City will become responsible for the long-term maintenance of the All Wheels Park facility. The City shall maintain the All Wheels Park facility Park in good shape and provide timely repairs, as needed, for at least five (5) calendar years, after completion.

Either party may at any time terminate this MOU: (i) without cause at the party's convenience by giving not less than thirty (30) days' prior written notice to the other party, or (ii) with cause upon written notice to the other party following the other party's failure to reasonably cure an event of non-performance hereunder following thirty (30) days' written notice thereof. Termination shall be effective (the "Effective Date of Termination") as of the date specified in said notice of termination. Upon such termination, all rights and obligations of each party under this MOU shall cease as of the Effective Date of

Termination, except for those specific obligations that shall survive termination as set forth herein.

4. COMPLIANCE WITH GOVERNING LAW

Each party shall comply with all federal, state, and local laws, rules and regulations in its pursuit hereof. No party in its performance of this MOU shall employ discriminatory practices on the basis of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age, sexual orientation, ethnicity, gender identification, or status as a disabled veteran or veteran of the Vietnam era.

5. CAPACITY OF CITY, MERCED BHC AND CALIFORNIA SKATEPARKS

Each party is acting in an independent contractor capacity. Nothing in this MOU and nothing in the course of dealings between the parties hereunder shall be deemed to create any fiduciary relationship, trust, partnership, joint venture, agency, or employment relationship, jointly and severally.

In addition and without limitation, each party shall be solely responsible for all matters relating to payment of its employees, including, but not limited to, compliance with applicable social security withholding, workers' compensation insurance, benefits, and all other regulations governing such matters. Personnel supplied by City will not for any purpose be considered employees or agents of Merced BHC and/or California Skateparks. The City assumes full responsibility for the actions of such personnel while they are performing services pursuant to this MOU, and shall be solely responsible for their supervision, daily direction and control, payment of salary (including withholding of income taxes and social security), disability benefits and the like, as applicable. Conversely, personnel supplied by Merced BHC and/or California Skateparks or its subcontractors will not for any purpose be considered employees or agents of the City. Merced BHC and/or California Skateparks (or any subcontractor) assumes full responsibility for the actions of such personnel while they are performing services pursuant to this MOU, and shall be solely responsible for their supervision, daily direction and control, payment of salary (including withholding of income taxes and social security), disability benefits and the like, as applicable.

The City, Merced BHC and California Skateparks agree and acknowledge that their relationship is strictly and solely that of an independent contractor to each other. Merced BHC and California Skateparks agrees and acknowledges that their employees and/or agents are not entitled to any employee benefits or insurance, including without limitation any health care, worker's compensation, unemployment, or disability benefits, to be provided by the City.

The parties further agree and acknowledge that each party is solely responsible for determining the method and means by which it will fulfill its obligations hereunder. Each shall be solely responsible for payment of all sales, use, or other taxes assessed against or associated with the performance of each party's respective obligations, or on the exercise of their rights under this MOU, including without limitation income, payroll or employment-related taxes and payments.

Neither party shall engage any person or entity to serve in any capacity, or incur any expense or obligation on behalf of the other without the prior written consent of both parties.

6. INDEMNIFICATION

To the furthest extent allowed by law, Merced BHC and California Skateparks shall indemnify, hold harmless, and defend City and each of its officers, officials, employees, agents, and volunteers from any and all loss, liability, fines, penalties, forfeitures, costs, and damages (whether in contract, tort, or strict liability, including but not limited to personal injury, death at any time, and property damage) incurred by City, Merced BHC and/or California Skateparks, or any other person, and from any and all claims, demands and actions in law or equity (including attorney's fees and litigation expenses), arising or alleged to have arisen directly or indirectly out of performance of this Agreement. Merced BHC's and California Skateparks' obligations under the preceding sentence shall apply regardless of whether CITY or any of its officers, officials, employees, agents, or volunteers are negligent, but shall not apply to any loss, liability, fines, penalties, forfeitures, costs or damages caused solely by the gross negligence, or caused by the willful misconduct, of CITY or any of its officers, officials, employees, agents, or volunteers.

If California Skateparks should subcontract all or any portion of the work to be performed under this Agreement, California Skateparks shall require each subcontractor to indemnify, hold harmless and defend CITY and each of its officers, officials, employees, agents and volunteers in accordance with the terms of the preceding paragraph.

This section shall survive termination or expiration of this Agreement.

7. INSURANCE

Throughout the life of this MOU, Merced BHC and California Skateparks or its subcontractors shall pay for and maintain in full force and effect all policy(ies) of insurance required hereunder with (an) insurance company(ies) either (1) admitted by the California Insurance Commissioner to do business in the State of California and rated not less than "A-VII" in Best's Insurance Rating Guide, or (2) as may be authorized in writing by the City's Risk Manager or his/her designee at any time in his/her sole discretion. The required policies of insurance shall maintain limits of liability of not less than those amounts stated therein. However, the insurance limits available to City, its officers, officials, employees, agents and volunteers as additional insured, shall be the greater of the minimum limits specified therein or the full limit of any insurance proceeds to be the named insured.

Coverage shall be at least as broad as:

- A. **COMMERCIAL GENERAL LIABILITY (CGL):** Insurance Services Office (ISO) form CG 00 01 covering CGL on an "occurrence" basis and shall include insurance for "bodily injury", "property damage" and "personal and advertising injury", including premises and operation, products and completed operations and contractual liability with limits of liability of not less than \$1,000,000 per occurrence for bodily injury and property damage, \$1,000,000 per occurrence for personal and advertising injury, \$2,000,000

aggregate for products and completed operations, and \$2,000,000 general aggregate.

- B. COMMERCIAL AUTOMOBILE LIABILITY: Insurance Services Office (ISO) form CA 00 01 covering Code 1, and shall include coverage for "any auto" with limits of liability of not less than \$1,000,000 per accident for bodily and property damage. C. WORKERS' COMPENSATION insurance as required by the State of California Labor, with statutory limits, and EMPLOYERS' LIABILITY insurance with minimum limits of no less than \$1,000,000 per accident for bodily injury or disease.
- C. COMMERCIAL CRIME insurance which shall be at least as broad as the most current version of Insurance Service Office (ISO) Crime and Fidelity Form CR 00 20 with limits of insurance of not less than \$200,000.

Umbrella or Excess Insurance: In the event Merced BHC and/or California Skateparks or its subcontractor purchases an Umbrella or Excess insurance policy(ies) to meet the minimum limits of insurance set forth above, this insurance policy(ies) shall "follow form" and afford no less coverage than the primary insurance policy(ies). In addition, such umbrella or excess insurance policy(ies) shall also apply on a primary and noncontributory basis for the benefit of City, its officers, officials, employees, agents and volunteers.

Deductibles & Self-Insured Retentions: Merced BHC and/or California Skateparks or its subcontractors shall be responsible for payment of any deductibles contained in any insurance policies required hereunder and California Skateparks shall also be responsible for payment of any self-insured retentions. Any deductibles or self-insured retentions must be declared to, and approved by, the City's Risk Manager or his/her designee. At the option of the City's Risk Manager or his/her designee, either (i) the insurer shall reduce or eliminate such deductibles or self-insured retentions as respects City, its officers, officials, employees, agents and volunteers; or (ii) Merced BHC and/or California Skateparks or its subcontractors shall provide a financial guarantee, satisfactory to City's Risk Manager or his/her designee, guaranteeing payment of losses and related investigations, claim administration and defense expenses. At no time shall City be responsible for the payment of any deductibles or self-insured retentions.

Endorsements: The above described policies of insurance shall be endorsed to provide an unrestricted thirty (30) day written notice in favor of the City, of policy cancellation, change or reduction of coverage, except for the Workers' Compensation policy which shall provide a ten (10) day written notice of such cancellation, change or reduction of coverage. In the event any policies are due to expire during the term of this MOU, a new certificate evidencing renewal of such policy shall be provided not less than fifteen (15) days prior to the expiration date of the expiring policy(ies). Upon issuance by the insurer, broker, or agent of a notice of cancellation, change or reduction in coverage, Merced BHC and California Skateparks shall file with the City a certified copy of the new or renewal policy and certificates for such policy.

The General Liability and Automobile Liability insurance policies are to contain, or be endorsed to contain, the following provisions:

1. City, its officers, officials, agents, employees, and volunteers are to be covered as an additional insured. Merced BHC and/or California Skateparks or its subcontractors shall establish additional insured status for the City and for all ongoing and completed operations by use of ISO Form CG 20 10 11 85, or both CG 20 10 10 01 and CG 20 37 10 01, or by an executed manuscript insurance company endorsement providing additional insured status as broad as that contained in ISO Form CG 20 10 11 85.
2. The coverage shall contain no special limitations on the scope of protection afforded to City, its officers, officials, employees, agents, and volunteers. Any available insurance proceeds in excess of the specified minimum limits and coverage shall be available to the Additional Insured.
3. For any claims related to this MOU, Merced BHC's and/or California Skateparks' or its subcontractor's insurance coverage shall be primary insurance with respect to the City, its officers, officials, employees, agents, and volunteers. Any insurance or self-insurance maintained by the City, its officers, officials, employees, agents, and volunteers shall be excess of Merced BHC's and/or California Skateparks' or its subcontractor's insurance and shall not contribute with it. Merced BHC and/or California Skateparks or its subcontractors shall establish primary and noncontributory status by using ISO Form CG 20 01 04 13 or by an executed manuscript insurance company endorsement that provides primary and noncontributory status as broad as that contained in ISO Form CG 20 01 014 13.

The Crime insurance policy shall name the City as a joint loss payee.

The Workers' Compensation insurance policy is to contain or be endorsed to contain, the following provision: Merced BHC and/or California Skateparks and its insurer shall waive any right of subrogation against City and each of its officers, officials, employees, agents, and volunteers.

Merced BHC and/or California Skateparks or its subcontractors shall furnish the City with the certificate(s) and applicable endorsements for ALL required insurance prior to the City's execution of this MOU.

Maintenance of Insurance: If at any time during the life of this MOU or any extension, Merced BHC and/or California Skateparks (or its subcontractors) fails to maintain any required insurance in full force and effect, all of Foundation's activities under this MOU shall be discontinued immediately, until notice is received by City that the required insurance has been restored to full force and effect and that the premiums therefore have been paid for a period satisfactory to City. Any failure to maintain the required insurance shall be sufficient cause for City to terminate this MOU. No action taken by City pursuant to this section shall in any way relieve Merced BHC and/or California Skateparks or its subcontractors of their responsibilities under this MOU.

Verification of Coverage: Upon request of City, Merced BHC and/or California Skateparks or its subcontractors shall immediately furnish City with a complete copy of any insurance policy required under this MOU, including all endorsements, with said copy certified by the underwriter to be a true and correct copy of the original policy. This requirement shall survive expiration or termination of this MOU.

Duty to Indemnify: The fact that insurance is obtained by Merced BHC and/or California Skateparks or its subcontractors shall not be deemed to release or diminish the liability of Merced BHC and/or California Skateparks or its subcontractors, including, without limitation, liability under the indemnification provisions of this MOU. The duty to indemnify City and its officials, officers, employees, agents, and volunteers shall apply to all claims and liability regardless of whether any insurance policies are applicable. The policy limits do not act as a limitation upon the amount of indemnification to be provided by Merced BHC and/or California Skateparks or its subcontractors. Approval or purchase of any insurance contracts or policies shall in no way relieve from liability nor limit the liability of Merced BHC and/or California Skateparks or its subcontractors, or any of their officers, board members, employees, agents, volunteers, invitees, caterers, concessionaires, suppliers, vendors, consultants, or other contractors.

Subcontractors: If Merced BHC and/or California Skateparks should subcontract all or any portion of the services to be performed under this MOU, **Merced BHC and/or California Skateparks shall require each subcontractor to provide insurance protection in favor of City and each of its officers, officials, employees, agents, and authorized volunteers in accordance with the terms of this section. All required certificates and applicable endorsements shall be on file with Merced BHC and/or California Skateparks and City prior to the commencement of any services by the subcontractor.**

8. ATTORNEY'S FEES

If a party is required to commence any proceeding or legal action to enforce or interpret any term, covenant or condition of this MOU, the prevailing party in such proceeding or action shall be entitled to recover from the other party its/their reasonable attorney's fees and legal expenses.

9. NOTICES

Any notice required or intended to be given to a party under the terms of this MOU shall be in writing and shall be deemed to be duly delivered the earlier of (a) actual receipt by personal delivery to the representative (as defined herein), as the case may be, or in lieu of such personal service, by way of Federal Express, DHL, or other similar courier addressed to such party at the appropriate address set forth herein, (b) the date of receipt by facsimile to the City Representative or the Merced BHC and/or California Skateparks Representative, or (c) three (3) business days after the date of mailing (postage pre-paid return receipt requested). Either party may change its address for the purpose of this paragraph by giving written notice of such change to the other.

10. BINDING

Once this MOU is signed by all the parties, it shall be binding upon, and shall inure to the benefit of, the parties, and each party's respective heirs, successors, assigns, transferees, agents, servants, employees, and representatives. The terms and conditions of this MOU, express or implied, exist only for the benefit of the parties to this MOU and their respective successors and assigns. No other person or entity will be deemed to be a third party beneficiary of this MOU.

11. ASSIGNMENT

There shall be no assignment by any party of its rights or obligations under this MOU without the prior written approval of the other party. Any attempted assignment by a party, its successors or assigns, shall be null and void unless approved in writing by the other party.

12. WAIVER

The waiver by any party of a breach by the other of any provision of this MOU shall not constitute a continuing waiver or a waiver of any subsequent breach of either the same or a different provision of this MOU. No provisions of this MOU may be waived unless in writing and approved by and signed by all parties to this MOU. Waiver of any one provision herein shall not be deemed to be a waiver of any other provision herein.

No action or omission by either party shall constitute a breach of this MOU unless the injured party first notifies the other party of the purported breach in writing setting forth the alleged breach or default and said party does not cure the same within thirty (30) days after receipt of the written notice. The payment of any fee or compensation or performance of any obligation hereunder by either party shall not constitute a waiver of any breach by the other party or of any of the rights and remedies which either party may have as a result of such breach. No waiver by either party of breach of the MOU shall be implied from any failure by the other party to take action on account of such breach if such breach persists or is repeated. Waivers by either party of any covenant, term or condition contained herein shall not be construed as a waiver of any subsequent breach of the same covenant, term or condition.

13. GOVERNING LAW AND VENUE

This MOU shall be governed by, and construed and enforced in accordance with, the laws of the State of California. Venue for purposes of the filing of any action regarding the enforcement or interpretation of this MOU and any rights and duties hereunder shall be in the Merced County Superior Court located in Merced, California.

14. HEADINGS

The section headings in this MOU are for convenience and reference only and shall not be construed or held in any way to explain, modify, or add to the interpretation or meaning of the provisions of this MOU.

15. SEVERABILITY

The provisions of this MOU are severable. The invalidity or unenforceability of any one provision in this MOU shall not affect the other provisions.

16. INTERPRETATION

The parties acknowledge that this MOU in its final form is the result of the combined efforts of the parties and that, should any provision of this MOU be found to be ambiguous in any way, such ambiguity shall not be resolved by construing this MOU in favor or against any party, but rather by construing the terms in accordance with their generally accepted meaning.

IN WITNESS THEREOF, the parties have caused their authorized agents to execute this MOU as of the date first set forth above:

CITY OF MERCED, a municipal corporation

Merced Building Healthy Communities, a community health equity initiative

By: _____

Steve Carrigan,
City Manager

By: _____

Name: _____

Title: _____
(if corporation or LLC, Board
Chair, Pres. or Vice Pres.)

ATTEST

City Clerk

California Skateparks, a California corporation

By: _____
Deputy

By: _____

Name: _____

APPROVED AS TO FORM:
CITY ATTORNEY'S OFFICE

Title: _____
(if corporation or LLC, CFO, Treasurer,
Secretary or Assistant Secretary)

By:  9-20-2017
Date