

File No. 100985

Committee Item No. 13

Board Item No. 9

### COMMITTEE/BOARD OF SUPERVISORS

#### AGENDA PACKET CONTENTS LIST

Committee: Rules

Date September 30, 2010

Board of Supervisors Meeting

Date October 19, 2010

#### Cmte Board

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| <input checked="" type="checkbox"/> | <input checked="" type="checkbox"/> | Resolution                                   |
| <input type="checkbox"/>            | <input type="checkbox"/>            | Ordinance                                    |
| <input type="checkbox"/>            | <input type="checkbox"/>            | Legislative Digest                           |
| <input type="checkbox"/>            | <input type="checkbox"/>            | Budget Analyst Report                        |
| <input type="checkbox"/>            | <input type="checkbox"/>            | Legislative Analyst Report                   |
| <input type="checkbox"/>            | <input type="checkbox"/>            | Youth Commission Report                      |
| <input type="checkbox"/>            | <input type="checkbox"/>            | Introduction Form (for hearings)             |
| <input type="checkbox"/>            | <input type="checkbox"/>            | Department/Agency Cover Letter and/or Report |
| <input type="checkbox"/>            | <input type="checkbox"/>            | MOU  |
| <input type="checkbox"/>            | <input type="checkbox"/>            | Grant Information Form                       |
| <input type="checkbox"/>            | <input type="checkbox"/>            | Grant Budget                                 |
| <input type="checkbox"/>            | <input type="checkbox"/>            | Subcontract Budget                           |
| <input checked="" type="checkbox"/> | <input checked="" type="checkbox"/> | Contract/Agreement                           |
| <input type="checkbox"/>            | <input type="checkbox"/>            | Award Letter                                 |
| <input type="checkbox"/>            | <input type="checkbox"/>            | Application                                  |
| <input type="checkbox"/>            | <input type="checkbox"/>            | Public Correspondence                        |

#### OTHER

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Completed by: Linda Wong

Date September 24, 2010

Completed by: L.W.

Date October 6, 2010

An asterisked item represents the cover sheet to a document that exceeds 25 pages. The complete document is in the file.

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1 [Settlement of Anticipated Litigation – Bonneville Non-exclusive Easement.]

2  
3 **Resolution authorizing settlement of anticipated litigation to be filed by Bonneville**  
4 **International Corporation against the City and County of San Francisco for a non-**  
5 **exclusive easement on Bayview Hill for access to the radio tower owned by Bonneville.**  
6

7 WHEREAS, The Bonneville International Corporation Bonneville owns property (the  
8 "Bonneville Property") that is bordered by Bayview Hill, an undeveloped natural area  
9 comprised of approximately 44 acres and under the jurisdiction of the City's Recreation and  
10 Park Department; and

11 WHEREAS, Bayview Hill was acquired by the City in piecemeal fashion over the past  
12 century. The City has owned one portion of Bayview Hill since 1915 (the "1915 Parcel") and  
13 acquired another portion of Bayview Hill in 1997 (the "Donnelly Parcel"). Even before the City  
14 owned the Donnelly Parcel, it had an easement over an unimproved road on the Donnelly  
15 Parcel that connected Key Avenue to the 1915 Parcel (the "Temporary Road"). Under the  
16 1963 document granting the City its easement over the Temporary Road (the "Original City  
17 Easement"), the Original City Easement was to automatically terminate if the City extended  
18 Key Avenue over adjacent City property (the "Proposed Key Avenue Extension"); and

19 WHEREAS, At the time the City acquired the Donnelly Parcel, the Bonneville Property  
20 was improved with radio transmission equipment and was not served by a public street. The  
21 then-owner of the Bonneville Property used the Temporary Road for access; and

22 WHEREAS, The Bonneville Property is still not served by a public street and Bonneville  
23 also accesses the Bonneville Property over the Temporary Road; and

24 WHEREAS, Bonneville believes it has an easement to use the Temporary Road (the  
25 "Original Bonneville Easement") under a 1983 document between the previous owners of the

1 Bonneville Property and the Donnelly Parcel. Under that document, the Original Bonneville  
2 Easement was to automatically terminate if the Original City Easement terminated or if  
3 alternative access was created between the Bonneville Property and a public street; and

4 WHEREAS, Although the Proposed Key Avenue Extension was never constructed, the  
5 Original City Easement automatically terminated by operation of law when City acquired the  
6 entire Donnelly Parcel. The City believes the Original Bonneville Easement automatically  
7 terminated at the same time, since it was to terminate when the Original City Easement  
8 terminated, but Bonneville believes the Original Bonneville Easement still exists under certain  
9 equitable legal principles; and

10 WHEREAS, Under established California case law, the principles cited by Bonneville  
11 cannot be asserted by private parties against governmental entities. However, the City  
12 acknowledges that there is a possibility that a judge could decide to waive established law to  
13 allow Bonneville to assert those claims if the matter were to be litigated because, in part,  
14 Bonneville would otherwise have no ready access to the Bonneville Property to maintain its  
15 radio transmission equipment; and

16 WHEREAS, When Bayview Land Company transferred the 1915 Property to the City, it  
17 was conditioned on the City using the majority of the 1915 Property as a public park and  
18 certain portions of the 1915 Property (possibly including the 1915 Roadway) as public streets  
19 (the "Proposed Streets"). Bayview Land Company inserted these conditions in anticipation  
20 that adjacent property would be eventually developed as housing. Those housing plans did  
21 not come to fruition, and the City never converted the Proposed Streets into public streets.  
22 The City does not want to comply with the Proposed Streets condition because the housing  
23 development never occurred and the City wishes to maintain Bayview Hill as an unimproved  
24 natural area; and  
25

1           WHEREAS, City has customarily allowed Bonneville to use the Temporary Road  
2 Easement (and, City believes, the 1915 Road) to access the Bonneville Property. Such  
3 customary usage only became a point of discussion when Bonneville asked the City to  
4 confirm its easement rights in the Original Bonneville Easement as part of its planned sale of  
5 the Bonneville Property; and

6           WHEREAS, If City does not enter into this settlement agreement, Bonneville's only  
7 option would be to sue the City. Even if Bonneville did not sue the City, Bonneville's potential  
8 claims under the Original Bonneville Easement and to the Proposed Streets currently cloud  
9 the City's ownership interest in Bayview Hill, which could only be cleared by the City filing a  
10 lawsuit against Bonneville; and

11           WHEREAS, In order to litigate this case, the City would incur significant survey and  
12 other costs with no certainty of success; and

13           WHEREAS, Under the proposed settlement agreement, Bonneville will release all  
14 claims under the Original Bonneville Easement and to the Proposed Streets, as well as any  
15 claims that City is obligated to provide any public streets or highways on the City Property or  
16 to the Bonneville Property; and

17           WHEREAS, In exchange for that release, the City would enter into an Easement  
18 Agreement, on file with the Clerk of the Board of Supervisors in File No. <sup>100985</sup>, which is hereby  
19 declared to be a part of this motion as if set forth fully herein; that terminates the Original  
20 Bonneville Easement and provides Bonneville with access over the Temporary Road and the  
21 1915 Road (together, the "Easement Road"). The proposed easement will limit Bonneville's  
22 use of the Easement Road to the extent necessary to maintain, repair and replace the  
23 antenna and transmitter facilities currently located on the Bonneville Property and will  
24 expressly reserve the City's right to use and relocate the Easement Road. In addition, the  
25 proposed easement agreement clarifies other matters that benefit the City, such as requiring

1 Bonneville to bear the maintenance costs for the Easement Road (unless damaged by City's  
2 activities). Recreation and Park Department staff have determined that Bonneville's use of  
3 the Easement Road under the terms of the proposed easement would not harm the unique  
4 environmental characteristics of Bayview Hill at its current level of usage; now, therefore, be it

5           RESOLVED, That Board of Supervisors hereby authorizes the City Attorney to settle  
6 anticipated litigation by Bonneville International Corporation, et al., against the City and  
7 County of San Francisco, et al., pursuant to the terms of the proposed easement agreement.  
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**Free Recording Requested Pursuant to  
Government Code Section 27383**

Recording requested by and  
when recorded mail to:

City and County of San Francisco  
Real Estate Division  
25 Van Ness Avenue, Suite 400  
San Francisco, CA 94102  
Attn: Director of Property

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(Space above this line reserved for Recorder's use only)

**ACCESS EASEMENT AGREEMENT**

THIS ACCESS EASEMENT AGREEMENT (this "**Agreement**"), dated for reference purposes only as of \_\_\_\_\_, 2010, is made by and between the CITY AND COUNTY OF SAN FRANCISCO, a municipal corporation ("**City**"), and BONNEVILLE INTERNATIONAL CORPORATION, a Utah corporation ("**Bonneville**").

**RECITALS**

A. City owns that certain real property situated in San Francisco, California, which is commonly known as Bayview Hill and is described in the attached Exhibit A (the "**City Property**"). City acquired the portion of the City Property described in the attached Exhibit B (the "**Donnelly Parcel**") in 1997.

B. Bonneville owns that certain real property situated in San Francisco, California described on the attached Exhibit C (the "**Bonneville Property**"), which is surrounded by the City Property and other City-owned property and has no access to a public street. The Bonneville Property had been used as a radio transmitter site for many years prior to the acquisition of the Donnelly Parcel by City, and has been used continuously as a radio transmitter site since then.

C. Bonneville currently uses the portion of the City Property described on the attached Exhibit D (the "**Easement Area**") for vehicular and pedestrian access granted under an Agreement for Easement and License between King Radio Broadcasting Company, a California corporation, Bonneville's predecessor in interest, and Chet and Adele Smith, which was recorded in Book D615, Page 1620 of the Official Records of San Francisco County on December 13, 1983 (the "**1983 Easement Agreement**"). All references to the City Property in this Agreement shall include the Easement Area.

D. City and Bonneville wish to confirm Bonneville's non-exclusive access easement across, in, on and over the Easement Area on the terms and conditions set forth in this Agreement, and to additionally amend and restate the easement terms set forth in the 1983 Easement Agreement in their entirety.

**AGREEMENT**

For good and valuable consideration, the receipt and adequacy of which are hereby acknowledged, City and Bonneville agree as follows:

1. Easement.

(a) Permitted Uses. Subject to the terms and conditions specified in this Agreement, City hereby grants to Bonneville a non-exclusive easement (the "**Easement**") over, across, in, and on the Easement Area for the following purposes (collectively, the "**Permitted Activities**"): (i) for vehicular and pedestrian ingress and egress to the extent necessary for (A) use, maintenance, repair, and replacement of the antenna and transmitter facilities (the "**Facilities**") located on the Bonneville Property as of the Effective Date (as defined in Section 4 below), and (B) the installation, maintenance, repair and replacement of any and all equipment related to the Facilities or co-located radio services (broadcast or non-broadcast) on the Bonneville Property now and in the future including, but not limited to, any and all radio transmitter antennas, microwave dishes, HD antennas and WiFi antennas as permitted by the governmental authorities having jurisdiction thereover, including the Federal Communications Commission under the Communications Act of 1934, as amended (47 U.S.C. Sec 151, *et seq.*), and title 47 of the Code of Federal Regulations (collectively, "**Equipment**"); and (ii) the exercise of Bonneville's rights and obligations under this Agreement; provided, however, that the Permitted Activities that are not Road Repair Activities or Emergency Response Activities (defined as follows) shall be performed in a manner that limits vehicular use of the Easement Area to no more than ten (10) times per month, unless City provides its written consent to additional vehicular use. "**Road Repair Activities**" shall mean any repair or restoration activities to the Access Road performed by Bonneville pursuant to Section 5 below. "**Emergency Response Activities**" shall mean any actions immediately necessary to protect the Facilities and Equipment from material damage or destruction or to avoid or repair material signal interruptions.

Bonneville shall use the Easement Area in a manner that does not unreasonably interfere with City's use of the City Property. As of the Effective Date, the Facilities on the Bonneville Property include Equipment for the operation of the following primary radio stations: KSF (AM), 1260 kHz, San Francisco, California, Federal Communications Commission ("FCC") Facility ID Number ("FIN") 6369; KRZZ (FM), 93.3 MHz, San Francisco, California, FCC FIN 1092; KOIT-FM, 96.5 MHz, San Francisco, California, FCC FIN 6380; and K269FB (FM), 101.7 MHz, a 13 watt FM translator. These stations also operate from time to time one or more non-broadcast radio stations which carry private communications. By "co-located", the parties mean one or more radio stations (broadcast or non-broadcast) that would diplex, top-mount or side-mount their antennas and transmission lines on the existing towers on the Bonneville Property and place their transmitting equipment inside existing buildings on the Bonneville Property.

(b) City's Use; Temporary Restrictions. City reserves and retains all uses, rights in and interest to the Easement Area that do not unreasonably restrict Bonneville's exercise of the Permitted Activities. Such uses, rights and interest shall include, but shall not be limited to, the right to install, maintain and repair utility lines, fences, landscaping and any other improvements related to City's use of the City Property, the right to use the Easement Area for public space, recreational purposes, and pedestrian and vehicular access by City's employees, contractors, agents, representatives and invitees, and the right to make the City Property available to the general public (to the extent that City elects to permit such public use).

Bonneville acknowledges that City, among other uses, currently permits public recreational uses of the City Property and City currently permits public pedestrian access in, to and over the Easement Area for such purposes. Bonneville acknowledges and agrees that City shall have no obligation to prevent or limit pedestrian or vehicular access to the Easement Area or to the Bonneville Property, provided that City shall not grant any other party the right for such pedestrian or vehicular access in any manner that would prevent or unreasonably restrict Bonneville's use of the Easement Area for the Permitted Purposes. Bonneville further



acknowledges and agrees that City shall have no obligation to continue using the City Property for public recreational purposes.

City shall have the right to restrict Bonneville's exercise of the Permitted Activities to the extent necessary for City's maintenance and repair of the City Property, including, but not limited to, any restriction or temporary closure of the unimproved access road currently located in the Easement Area (the "Access Road"); provided, however, that such restrictions shall be conducted in a manner that reasonably minimizes any interference with the Permitted Activities. City shall provide Bonneville with at least thirty (30) days' prior written notice of City's intent to conduct any activities on the City Property that will affect Bonneville's exercise of the Permitted Activities and shall use reasonable efforts to accommodate such exercise by Bonneville during such time.

(c) Relocation of Easement Area. City shall have the right, which may be exercised multiple times, to relocate the Easement Area to any location on the City Property or on any other City property abutting the Bonneville Property if such relocated area will provide access to the Bonneville Property from a public road and has a roadway that is of the same, or better, condition than the Access Road is in at the time of relocation. City shall provide Bonneville with no less than sixty (60) days' prior written notice of such proposed relocation, together with a legal description of the relocation area to Bonneville. If such conditions are met, City and Bonneville shall execute an amendment to this Agreement to replace the description of the Easement Area with the description of the relocated area, which shall be in a form reasonably acceptable to both parties and shall be recorded in the Official Records of San Francisco County.

2. Gate and Easement Area Security. The City currently maintains a gate (the "Gate") that limits vehicular access to the Easement Area from Key Avenue (the "Access Point") and has provided Bonneville with a key to open the Gate. Bonneville shall keep such key in a secure location and shall only provide use of such key to Bonneville's employees, agents, representatives, contractors and invitees (collectively, the "Bonneville Access Parties"). Bonneville shall cause the Bonneville Access Parties to immediately close and lock the Gate each time that any such party opens the Gate and to prevent any other party other than City from driving onto the Easement Area at such time. Bonneville shall not provide any party other than the City or any of the Bonneville Access Parties with a copy of the key to the Gate. Such prohibitions and obligations shall equally apply to any other security structures or measures installed by City at the Access Point or any other portion of the Easement Area. If City installs any other security measures to prevent access to the Easement Area from the Access Point or to otherwise secure the Easement Area, City shall provide Bonneville with reasonable means to facilitate access to and use of the Easement Area pursuant to the terms and conditions of this Agreement and Bonneville shall comply with such security measures.

3. Restrictions on Use. Bonneville agrees that, by way of example only and without limitation, the following uses of the Easement Area by Bonneville, or any of the Bonneville Access Parties or any other person claiming by or through Bonneville, are inconsistent with the Permitted Uses and are strictly prohibited as provided below:

(a) Improvements. Bonneville shall not construct or place any temporary or permanent structures or improvements in, on, under or about the Easement Area, nor shall Bonneville make any alterations or additions to any existing structures or improvements in, on, under or about the Easement Area unless Bonneville first obtains City's prior written consent, which may be given or withheld in City's sole and absolute discretion, or as may be otherwise permitted pursuant to Section 5.

(b) Dumping. Bonneville shall not cause or permit the dumping or other disposal on, under or about the Easement Area of landfill, refuse, Hazardous Material (as defined below) or

any other materials that are unsightly or could pose a hazard to the human health or safety, native vegetation or wildlife, or the environment. Bonneville shall, and shall cause the Bonneville Access Parties to, use the Easement Area in a manner that does not unreasonably impact the City Property and Bonneville shall dispose of refuse resulting from its use, including waste material, garbage and rubbish of all kinds as required by City.

(c) Hazardous Material. Bonneville shall not cause, nor shall Bonneville allow any of the Bonneville Access Parties to cause, any Hazardous Material to be brought upon, kept, used, stored, generated or disposed of in, on or about the Easement Area, or transported to or from the Easement Area; provided, however, that Bonneville may transport such substances through the Easement Area if (i) such substances are necessary for the use, maintenance, repair and replacement of the Facilities or the Equipment and are in reasonably limited amounts as are customarily used for such purposes, and (ii) the transportation of such substances is conducted through the Easement Area in a continuous manner and complies with all applicable present or future federal, state, local or administrative law, rule, regulation, order or requirement relating to Hazardous Material (including, without limitation, its use, handling, transportation, production, disposal, discharge or storage), or to health and safety, industrial hygiene or the environment, including, without limitation, soil, air and groundwater conditions.

Bonneville shall immediately notify City when Bonneville learns of, or has reason to believe that, a release of Hazardous Material by Bonneville or any of the Bonneville Access Parties has occurred in, on or about the Easement Area. Bonneville shall further comply with all laws requiring notice of such releases or threatened releases to governmental agencies, and shall take all action necessary to mitigate the release or minimize the spread of contamination. If Bonneville or any of the Bonneville Access Parties cause a release of Hazardous Material in, on or about the Easement Area, Bonneville shall, without cost to City and in accordance with all laws and regulations, return such contaminated property to the condition immediately prior to the release unless City elects to perform such mitigation activities at Bonneville's sole cost. If City elects to so perform such mitigation activities, Bonneville shall reimburse City for the reasonable costs City incurs performing such mitigation activities within five (5) days immediately following City's demand therefore. If City elects to cause Bonneville to perform such mitigation activities, Bonneville shall afford City a full opportunity to participate in any discussion with governmental agencies regarding any settlement agreement, cleanup or abatement agreement, consent decree or other compromise proceeding involving Hazardous Material.

For purposes hereof, "**Hazardous Material**" means material that, because of its quantity, concentration or physical or chemical characteristics, is at any time now or hereafter deemed by any federal, state or local governmental authority to pose a present or potential hazard to public health, welfare or the environment. Hazardous Material includes, without limitation, any material or substance defined as a "hazardous substance, pollutant or contaminant" pursuant to the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended, 42 U.S.C. Sections 9601 *et seq.*, or pursuant to Section 25316 of the California Health & Safety Code; a "hazardous waste" listed pursuant to Section 25140 of the California Health & Safety Code; any asbestos and asbestos containing materials whether or not such materials are part of the Easement Area or are naturally occurring substances in the Easement Area, and any petroleum, including, without limitation, crude oil or any fraction thereof, natural gas or natural gas liquids. The term "release" or "threatened release" when used with respect to Hazardous Material shall include any actual or imminent spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing in, on, under or about the Easement Area.

(d) Nuisances. Bonneville shall not conduct any activities on or about the Easement Area that constitute waste, nuisance or unreasonable annoyance (including, without limitation, emission of objectionable odors, noises or lights) to City, to the owners or occupants of

neighboring property or to the public.

(e) Damage. Bonneville shall use, and shall cause the Bonneville Access Parties to use, due care at all times to avoid any damage to property of the City, the Easement Area or the City Property, and Bonneville shall not do anything about the Easement Area that could cause damage to the Easement Area, the City Property or any City property located thereon.

(f) Use of Adjoining Land. Bonneville acknowledges that its easement rights under this Agreement shall be limited strictly to the Easement Area. Bonneville shall not use the remainder of the City Property nor any adjoining lands of City.

(g) No Liens. Bonneville shall bear all costs or expenses of any kind or nature in connection with its use of the Easement Area, and shall keep the Easement Area free and clear of any liens or claims of lien arising out of or in any way connected with such use.

(h) No Blockage. Bonneville shall not prevent the City, or to the extent permitted by the City, the general public from using the Easement Area for access purposes.

4. Term; Termination of Easement. This Agreement shall be effective, and shall amend and restate the 1983 Easement Agreement in its entirety, as of the date it is recorded in the Official Records of San Francisco County (the "**Effective Date**"). Unless earlier terminated or extended pursuant to the terms of this Agreement or pursuant to law, this Agreement shall terminate if (i) Bonneville elects to permanently cease use of the Easement Area for the Permitted Activities, or (ii) Bonneville delivers at least forty-five (45) days' written notice of its election to terminate this Agreement. The Easement shall terminate as of the date, if any, that this Agreement is terminated. If this Agreement is terminated, Bonneville shall return to City all keys or other security devices that City had previously delivered to Bonneville to open the Gate or any other security structure installed in the Easement Area and Bonneville shall execute and deliver to City any commercially-reasonable written documentation to remove this Agreement from record title within ten (10) days of receiving such documentation from City. Bonneville's obligations under this Section shall survive the expiration or termination of this Agreement.

5. Use, Maintenance and Repair.

(a) Bonneville shall conduct, and shall cause the Bonneville Access Parties to conduct, all activities in the Easement Area in a safe and reasonable manner that avoids damage to the City Property and any improvements, fixtures, equipment or personal property located thereon, including the Access Road (other than normal wear and tear resulting from the Permitted Activities), and shall not take any actions that constitute waste, nuisance or unreasonable annoyance. If any of the Bonneville Access Parties damages the City Property or any improvements thereon, including the Access Road (other than normal wear and tear resulting from the Permitted Activities), Bonneville shall notify City of such damage in writing. At City's sole election, Bonneville shall restore at its sole cost, or reimburse City for its reasonable costs in restoring, the damaged City Property or other damaged property to substantially the same condition that City reasonably determines it was in immediately prior to such damage.

(b) City shall have no responsibility or liability of any kind with respect to any utilities that may be on, in or under the Easement Area. Bonneville has the sole responsibility to conduct the Permitted Activities in a manner that protects such utilities from any resulting damage. Bonneville shall be solely responsible for arranging and paying directly for any utilities or services necessary for its activities hereunder.

(c) If the Access Road or the Easement Area is damaged by the negligence or the acts of any of the Bonneville Access Parties (other than normal wear and tear resulting from the

Permitted Activities), Bonneville shall, at City's sole election, either restore at its sole cost or reimburse City for its reasonable costs in restoring the Access Road to substantially the same condition that City reasonably determines it was in immediately prior to such damage. City shall have no obligation to maintain, repair, or replace the Access Road or to keep the Access Road or the Easement Area in a good, operable condition, except to the extent that the Access Road is damaged by the negligence of any of the City's employees, agents, representatives, or contractors (collectively, the "City Access Parties"). In the event of such negligence, City shall, at its sole cost, restore the Access Road to the condition it was in immediately prior to such negligent act.

(d) If the Access Road becomes impassable due to ordinary wear and tear or casualty, Bonneville may deliver written notice (a "Repair Notice") to City if Bonneville reasonably believes the condition of the Access Road materially impairs the Permitted Activities. The Repair Notice shall include Bonneville's proposed repair activities and its estimate of the costs of such repairs. If, in good faith, City determines that the proposed repair activities and costs described in a Repair Notice are not reasonable, City shall notify Bonneville of such determination within fifteen (15) business days of receiving the applicable Repair Notice. If City so notifies Bonneville, Bonneville shall deliver a revised Repair Notice to City for City's review.

If City determines that the proposed repair activities and costs described in a Repair Notice are reasonable, City shall have the right to elect, at its sole election, to either repair, at Bonneville's sole reasonable cost, the Access Road to a condition sufficient to allow for the Permitted Activities or to permit Bonneville, at its sole cost, to make such repairs. City shall deliver written notice of any such election to Bonneville within fifteen (15) business days of receiving the applicable Repair Notice. If City elects to make such repairs, such written notice shall describe City's intended repair activities, City's estimate of its costs to perform such repair activities and the anticipated time that City will conduct such repair activities, which shall begin no later than thirty (30) days after the date of such notice. City shall further deliver to Bonneville notice of the actual commencement date of such repairs and the date such repairs are completed, each of which shall be delivered to Bonneville within five (5) business days of such respective commencement date or completion date. If City elects to permit Bonneville to make such repairs, City shall notify Bonneville within fifteen (15) business days of receiving the applicable Repair Notice and such repairs shall begin no later than thirty (30) days after the date of such notice. Bonneville shall provide City with at least five (5) business days' prior written notice of its intended commencement date of such repairs. Bonneville shall further deliver written notice to City of the actual commencement date of such repairs and the date such repairs are completed, each of which notice shall be delivered to City within five (5) business days of such respective commencement date or completion date.

(e) Bonneville shall bear all costs or expenses of any kind or nature in connection with its exercise of any of the Permitted Activities.

(f) Bonneville shall keep the Easement Area free from liens arising out of any work performed, material furnished or obligations incurred by or for Bonneville or any of the Bonneville Access Parties.

## 6. Insurance.

(a) Bonneville shall procure and keep in effect at all times during the term of this Agreement, at Bonneville's expense, insurance as follows:

(i) General Liability Insurance with limits not less than \$1,000,000 each occurrence Combined Single Limit for Bodily Injury and Property Damage, including coverages for Contractual Liability, Personal Injury, Independent Bonneville, Explosion, Collapse and Underground (XCU), Broadform Property Damage, Products Liability and Completed

Operations;

(ii) Automobile Liability Insurance with limits not less than One Million Dollars (\$1,000,000) each occurrence Combined Single Limit for Bodily Injury and Property Damage, including coverages for owned, non-owned and hired automobiles, as applicable; and

(iii) Workers' Compensation Insurance with Employer's Liability Coverage with limits of not less than One Million Dollars (\$1,000,000) each accident.

(b) All liability policies required hereunder shall provide for the following: (i) name as additional insureds the City and County of San Francisco and its officers, agents and employees; and (ii) specify that such policies are primary insurance to any other insurance available to the additional insureds, with respect to any claims arising out of this Agreement and that insurance applies separately to each insured against whom claim is made or suit is brought. Such policies shall also provide for severability of interests and that an act or omission of one of the named insureds which would void or otherwise reduce coverage shall not reduce or void the coverage as to any insured, and shall afford coverage for all claims based on acts, omissions, injury or damage which occurred or arose (or the onset of which occurred or arose) in whole or in part during the policy period.

(c) All policies shall be endorsed to provide thirty (30) days prior written notice of cancellation, non-renewal or reduction in coverage to City.

(d) Prior to the Effective Date, Bonneville shall deliver to City certificates of insurance in form and with insurers satisfactory to City, evidencing the coverages required hereunder, together with complete copies of the policies at City's request. If Bonneville fails to procure such insurance, or to deliver such policies or certificates, City may procure, at its option and upon giving Bonneville fifteen (15) days prior written notice, the same for the account of Bonneville, and the cost thereof shall be paid to City within five (5) days after delivery to Bonneville of bills therefor.

(e) Should any of the required insurance be provided under a form of coverage that includes a general annual aggregate limit or provides that claims investigation or legal defense costs are included in such general annual aggregate limit, such general aggregate limit shall double the occurrence or claims limits specified above.

(f) If any of the required insurance is provided under a claims made-form, Bonneville shall maintain such coverage continuously throughout the term of this Agreement and, without lapse, for a period of three (3) years beyond any expiration of this Agreement, to the effect that, should any occurrences during the term of this Agreement give rise to claims made after expiration or termination of this Agreement, such claims shall be covered by such claims-made policies. Bonneville's obligations under this Section shall survive the expiration or termination of this Agreement.

(g) Upon City's request, Bonneville and City shall periodically review the limits and types of insurance carried pursuant to this Section. If the general commercial practice in the City and County of San Francisco is to carry liability insurance in an amount or coverage materially greater than the amount or coverage then being carried by Bonneville for risks comparable to those associated with the Easement Area, then City in its sole discretion may require Bonneville to increase the amounts or coverage carried by Bonneville hereunder to conform to such general commercial practice.

(h) Bonneville's compliance with the provisions of this Section shall in no way relieve or decrease Bonneville's indemnification obligations under this Agreement or any of Bonneville's

other obligations hereunder. Notwithstanding anything to the contrary in this Agreement, the Easement shall terminate upon ten (10) business days prior written notice to Bonneville following the lapse of any required insurance coverage. Bonneville shall be responsible, at its expense, for separately insuring Bonneville's personal property.

7. Compliance with Laws. Bonneville shall, at its sole expense, conduct and cause the Bonneville Access Parties to conduct all activities on the Easement Area in a safe and reasonable manner and in compliance with all applicable laws, regulations, codes, ordinances and orders of any governmental or other regulatory entity whether presently in effect or subsequently adopted and whether or not in the contemplation of the parties. Bonneville shall, at its sole expense, procure and maintain in force at all times any and all licenses or other regulatory approvals necessary to conduct the activities allowed hereunder, including those that may be required by the City acting in its regulatory capacity. Bonneville understands and agrees that City is entering into this Agreement in its capacity as a property owner with a proprietary interest in the Easement Area and not as a regulatory agency with police powers. Bonneville further understands and agrees that no approval by City for purposes of this Agreement shall be deemed to constitute approval of any federal, state, City or other local regulatory authority with jurisdiction, and nothing herein shall limit Bonneville's obligation to obtain all such regulatory approvals at Bonneville's sole cost or limit in any way City's exercise of its police powers.

8. Surrender. Upon the expiration or termination of this Agreement, Bonneville shall surrender the Easement Area in the same condition as it was in on the Effective Date, normal wear and tear excepted, free from hazards and clear of all debris, and Bonneville shall return to City all keys or other security devices that City had previously delivered to Bonneville to open the Gate or any other structure installed in the Easement Area. Bonneville's obligations under this Section shall survive the expiration or termination of this Agreement.

9. Effect of Defaults by Bonneville. Bonneville shall cure any default by Bonneville under this Agreement within thirty (30) days following the date that City provides written notice to Bonneville of such failure; provided, however, that if such default is not reasonably susceptible to cure within such thirty (30) day period, such period shall be extended if Bonneville immediately commences to cure such default on receiving written notice from City and continues to diligently pursue such cure to completion. If Bonneville fails to timely cure any such default after receiving such written notice from City, City shall have the right, at its sole election, to (a) terminate this Agreement, or (b) remedy such failure for Bonneville's account and at Bonneville's expense by providing Bonneville with ten (10) days' prior written notice of City's intention to cure such default (except that no such prior notice shall be required in the event of an emergency as determined by City). Such action by City shall not be construed as a waiver of any rights or remedies of City under this Agreement, and nothing herein shall imply any duty of City to do any act that Bonneville is obligated to perform. Bonneville shall pay to City upon demand, all reasonable costs, damages, expenses or liabilities incurred by City, including, without limitation, reasonable attorneys' fees, in remedying or attempting to remedy such default. Bonneville's obligations under this Section shall survive the expiration or termination of this Agreement.

10. Indemnity. Bonneville shall indemnify, defend and hold harmless City, its officers, agents, employees and contractors, and each of them, from and against any and all demands, claims, legal or administrative proceedings, losses, costs, penalties, fines, liens, judgments, damages and liabilities of any kind ("**Claims**"), arising in any manner out of (a) any injury to or death of any person or damage to or destruction of any property occurring in, on or about the Easement Area, or any part thereof, whether the person or property be that of Bonneville or any of the Bonneville Access Parties, or any of their respective officers, employees, agents, contractors or subcontractors, or their employees (collectively, "**Agents**"), its invitees, guests or business visitors (collectively, "**Invitees**"), or third persons, relating to any use of or activity on the Easement Area by Bonneville or any of the Bonneville Access Parties, (b) any failure by

Bonneville to faithfully observe or perform any of the terms, covenants or conditions of this Agreement, or (c) any release or discharge, or threatened release or discharge, of any Hazardous Material caused or allowed by Bonneville or any of the Bonneville Access Parties, on, in, under or about the Easement Area, any improvements thereto, or into the environment; except solely to the extent of Claims resulting directly from the willful misconduct of City or City's authorized representatives. In addition to Bonneville's obligation to indemnify City, Bonneville specifically acknowledges and agrees that it has an immediate and independent obligation to defend the City from any claim that actually or potentially falls within this indemnity provision even if such allegation is or may be groundless, fraudulent or false, which obligation arises at the time such claim is tendered to Bonneville by City and continues at all times thereafter. The foregoing indemnity shall include, without limitation, reasonable attorneys' and consultants' fees, investigation and remediation costs and all other reasonable costs and expenses incurred by the indemnified parties, including, without limitation, damages for decrease in the value of the Easement Area and claims for damages or decreases in the value of adjoining property. Bonneville's obligations under this Section shall survive the expiration or termination of this Agreement.

11. Waiver of Claims. Neither City nor any of its commissions, departments, boards, officers, agents or employees shall be liable for any damage to the property of Bonneville, its officers, agents, invitees, employees, contractors or subcontractors, or their employees, or for any bodily injury or death to such persons, resulting or arising from the condition of the Easement Area or its use by Bonneville. Bonneville further acknowledges and agrees that it will not be a displaced person at the time this Agreement is terminated or expires by its own terms, and Bonneville fully RELEASES, WAIVES AND DISCHARGES forever any and all claims, demands, rights, and causes of action against, and covenants not to sue, City, its departments, commissions, officers, directors and employees, and all persons acting by, through or under each of them, under any present or future laws, statutes, or regulations, relating to relocation benefits or assistance from City under federal and state relocation assistance laws.

In connection with the foregoing releases, Bonneville acknowledges that it is familiar with Section 1542 of the California Civil Code, which reads:

A general release does not extend to claims which the creditor does not know or suspect to exist in his or her favor at the time of executing the release, which if known by him or her must have materially affected his or her settlement with the debtor.

Bonneville acknowledges that the releases contained herein include all known and unknown, disclosed and undisclosed, and anticipated and unanticipated claims. Bonneville realizes and acknowledges that it has agreed upon this Agreement in light of this realization and, being fully aware of this situation, it nevertheless intends to waive the benefit of Civil Code Section 1542, or any statute or other similar law now or later in effect. The releases contained herein shall survive the expiration or termination of this Agreement.

12. As Is Condition of Easement Area; Disclaimer of Representations. Bonneville acknowledges and agrees that neither City nor any of its agents has made, and City hereby disclaims, any representations or warranties, express or implied, concerning the condition of the Easement Area or the Access Road, or the suitability or safety of the Easement Area or the Access Road for the Permitted Activities. Bonneville accepts the Easement Area (including the Access Road) in its "AS IS" condition subject to all applicable laws, rules and ordinances and any interests to the Easement Area that may be held by any other party. Without limiting the foregoing, this Agreement is made subject to any and all covenants, conditions, restrictions, easements, encumbrances and other title matters affecting the Easement Area, whether foreseen or unforeseen, and whether such matters are of record or would be disclosed by an accurate

inspection or survey.

13. Run with the Land; Exclusive Benefit of Parties. The rights and obligations set forth herein shall run with the land and shall bind and inure to the benefit of the successors and assigns of the parties hereto. Without limiting the generality of the foregoing, transfer of fee title to the Bonneville Property and the easement rights and obligations under this Agreement to such transferee by Bonneville or any of its successors shall not require City Approval. Upon such transfer, the transferor shall be released from any obligation arising hereunder after such transfer and the transferee shall be subject to, and by acceptance of the fee ownership of the Bonneville Property shall be deemed to have assumed, all of the rights and obligations of Bonneville under this Agreement. This Agreement is for the exclusive benefit of Bonneville and City and their respective successors and assigns and not for the benefit of, nor does it give rise to any claim or cause of action by, any other party. This Agreement shall not be deemed a dedication of any portion of the Easement Area or the City Property to or for the benefit of the general public.

14. No Joint Venture or Partnership; No Authorization. This Agreement does not create a partnership or joint venture between City and Bonneville as to any activity conducted by Bonneville on, in or relating to the Easement Area. Bonneville is not a state actor with respect to any activity conducted by Bonneville on, in, or under the Easement Area. The giving of this Agreement by City does not constitute authorization or approval by City of any activity conducted by Bonneville on, in or relating to the Easement Area or the Bonneville Property.

15. MacBride Principles - Northern Ireland. The City urges companies doing business in Northern Ireland to move toward resolving employment inequities and encourages them to abide by the MacBride Principles as expressed in San Francisco Administrative Code Section 12F.1, *et seq.* The City also urges San Francisco companies to do business with corporations that abide by the MacBride Principles. Bonneville acknowledges that it has read and understands the above statement of the City concerning doing business in Northern Ireland.

16. Tropical Hardwoods. The City urges companies not to import, purchase, obtain or use for any purpose, any tropical hardwood, tropical hardwood wood product, virgin redwood or virgin redwood wood product, except as expressly permitted by the application of Sections 802(b) and 803(b) of the San Francisco Environment Code.

17. Taxes, Assessments, Licenses, and Liens. Bonneville recognizes and understands that this Agreement may create a possessory interest subject to property taxation and that Bonneville may be subject to the payment of property taxes levied on such interest. Bonneville agrees to pay taxes of any kind, including, but not limited to, possessory interest taxes, that may be lawfully assessed on the interest hereby created and to pay all other taxes, excises, licenses, easement charges and assessments based on Bonneville's usage of the Easement Area that may be imposed upon Bonneville by law, all of which shall be paid when the same become due and payable and before delinquency. Bonneville shall not allow or suffer a lien for any such taxes to be imposed upon the Easement Area or upon any equipment or property located thereon without promptly discharging the same, provided that Bonneville, if so desiring, may have reasonable opportunity to contest the validity of the same.

18. Notices. Except as otherwise expressly provided herein, any notices given under this Agreement shall be effective only if in writing and given by delivering the notice in person, by sending it first class mail or certified mail with a return receipt requested or overnight courier, return receipt requested, with postage prepaid, addressed as follows, or to such other address that a party may specify to the other party in a writing that conforms to the requirements of this Section:



If to City: City and County of San Francisco  
Real Estate Division  
25 Van Ness Avenue, Suite 400  
San Francisco, CA 94102  
Attn: Director of Property

and San Francisco Recreation and Park Commission  
McLaren Lodge, Golden Gate Park  
501 Stanyan Street  
San Francisco, CA 94117-1898  
Attn: General Manager

If to Bonneville: Bonneville International Corporation  
55 North Third West, 8<sup>th</sup> Floor  
Salt Lake City, UT 84180  
Attn: General Counsel

Notices herein shall be deemed given two (2) days after the date when they shall have been mailed if sent by first class, certified or overnight courier, or upon the date personal delivery is made.

18. No Tobacco Advertising. Bonneville acknowledges and agrees that no advertising of cigarettes or tobacco products is allowed on any real property owned by or under the control of the City or the remainder of the City Property. This prohibition includes the placement of the name of a company producing, selling or distributing cigarettes or tobacco products or the name of any cigarette or tobacco product in any promotion of any event or product. This prohibition does not apply to any advertisement sponsored by a state, local or nonprofit entity designed to communicate the health hazards of cigarettes and tobacco products or to encourage people not to smoke or to stop smoking.

19. Notification of Limitations on Contributions. Through its execution of this Agreement, Bonneville acknowledges that it is familiar with Section 1.126 of the San Francisco Campaign and Governmental Conduct Code, which prohibits any person who contracts with the City for the selling or leasing any land or building to or from the City whenever such transaction would require approval by a City elective officer or the board on which that City elective officer serves, from making any campaign contribution to the officer at any time from the commencement of negotiations for such contract until the termination of negotiations for such contract or three (3) months has elapsed from the date the contract is approved by the City elective officer, or the board on which that City elective officer serves.

20. Pesticide Prohibition. Bonneville shall not apply any pesticides in the Easement Area or the remainder of the City Property. If City otherwise provides Bonneville with written permission to apply such pesticides, Bonneville shall comply with the provisions of Section 308 of Chapter 3 of the San Francisco Environment Code (the "**Pesticide Ordinance**") which (i) prohibit the use of certain pesticides on City property, (ii) require the posting of certain notices and the maintenance of certain records regarding pesticide usage and (iii) require Bonneville to submit to the Real Property Division of the City's Administrative Services Department an integrated pest management ("**IPM**") plan that (a) lists, to the extent reasonably possible, the types and estimated quantities of pesticides that Bonneville may need to apply to the Easement Area during the term of this Agreement, (b) describes the steps Bonneville will take to meet the City's IPM Policy described in Section 300 of the Pesticide Ordinance, and (c) identifies, by name, title, address and telephone number, an individual to act as the Bonneville's primary IPM contact person with the City. In addition, Bonneville shall comply with the requirements of Sections 303(a) and 303(b) of the Pesticide Ordinance.

21. Conflicts of Interest. Through its execution of this Agreement, Bonneville acknowledges that it is familiar with the provisions of Section 15.103 of the San Francisco Charter, Article III, Chapter 2 of City's Campaign and Governmental Conduct Code, and Sections 87100 *et seq.* and Sections 1090 *et seq.* of the Government Code of the State of California, and certifies that it does not know of any facts which would constitute a violation of said provision, and agrees that if Bonneville becomes aware of any such fact during the term of this Agreement, Bonneville shall immediately notify the City.

22. General Provisions. (a) This Agreement may be amended or modified only by a writing signed by City and Bonneville. (b) No waiver by any party of any of the provisions of this Agreement shall be effective unless in writing and signed by an officer or other authorized representative, and only to the extent expressly provided in such written waiver. (c) Unless expressly provided to the contrary elsewhere herein, all approvals and determinations of City or Bonneville requested, required or permitted hereunder shall not be unreasonably withheld. (d) This Agreement (including the exhibits hereto) contains the entire agreement between the parties and all prior written or oral negotiations, discussions, understandings and agreements are merged herein. (e) The section and other headings of this Agreement are for convenience of reference only and shall be disregarded in the interpretation of this Agreement. (f) Time is of the essence. (g) This Agreement shall be governed by California law and City's Charter. (h) If either party commences an action against the other or a dispute arises under this Agreement, the prevailing party shall be entitled to recover from the other reasonable attorneys' fees and costs. For purposes hereof, reasonable attorneys' fees of City shall be based on the fees regularly charged by private attorneys in San Francisco with comparable experience. (i) If Bonneville consists of more than one person then the obligations of each person shall be joint and several. (j) This Agreement shall be binding upon and inure to the benefit of the parties and their respective heirs, representatives, successors and assigns. (k) This Agreement may be executed in two (2) or more counterparts, each of which shall be deemed an original, but all of which taken together shall constitute one and the same instrument.

IN WITNESS WHEREOF, the parties have executed this Agreement as of the Effective Date.

**BONNEVILLE:**

**BONNEVILLE INTERNATIONAL CORPORATION,**  
a Utah corporation

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Its: \_\_\_\_\_  
Date: \_\_\_\_\_

**[CITY'S SIGNATURE ON FOLLOWING PAGE]**

**CITY:** CITY AND COUNTY OF SAN FRANCISCO,  
a municipal corporation

By: \_\_\_\_\_  
Amy L. Brown, Director of Property

**RECOMMENDED BY:**

City and County of San Francisco  
Recreation and Park Department

By: \_\_\_\_\_  
Phil Ginsburg, General Manager

**APPROVED AS TO FORM:**

DENNIS J. HERRERA,  
City Attorney

By: \_\_\_\_\_  
Carol Wong, Deputy City Attorney

