

**FIRST AMENDED AND RESTATED MEMORANDUM OF UNDERSTANDING
BETWEEN THE CITY OF HUNTINGTON BEACH AND FRIENDS OF THE HB
CITY JUNIOR GUARDS**

THIS FIRST AMENDED AND RESTATED MEMORANDUM OF UNDERSTANDING ("MOU") is made and entered into by and between the CITY OF HUNTINGTON BEACH, a Charter City of the State of California ("CITY") and FRIENDS OF THE HB CITY JUNIOR GUARDS, a California non-profit public benefit corporation ("FJG").

WHEREAS, FJG was organized as an Internal Revenue Code Section 501(c)(3) charitable corporation for the sole purpose of supporting the Huntington Beach Junior Lifeguard Program, a summer youth program operated by the CITY for the benefit of the youth of Huntington Beach and surrounding communities designed to provide participants with the opportunity to learn ocean safety, surf lifesaving techniques, first aid, marine ecology, and oceanography in a context that is both physical and disciplined, fostering self-confidence and respect for others (the "PROGRAM"); and

Although the California Franchise Tax Board suspended FJG for failure to file tax returns, FJG recently filed its delinquent returns, and now is a corporation in good standing; and

On or about February 7, 2005, CITY and FJG entered into a "Memorandum of Understanding Between the City of Huntington Beach and Friends of the Junior Lifeguards" ("2005 MOU"), pursuant to which the FJG provided the furniture, fixtures and equipment for the newly constructed Marine Safety Educational Center ("Educational Center"), the Home of the PROGRAM; and

On March 21, 2011, CITY and FJG entered into a new Memorandum of Understanding (the "2011 MOU") pursuant to which FJG funded the design and construction of the Junior Guard Storage Building ("Storage Building") adjacent to the Educational Center. The 2011 MOU further provided that FJG may use the Educational Center for its Board meetings and other activities for the benefit of the PROGRAM, subject to the approval of the City Fire Chief. The 2011 MOU expires on March 20, 2026; and

The proceeds of FJG's fundraising activities serve multiple PROGRAM purposes, including but not limited to funding scholarships for youths to attend the PROGRAM, and offering financial assistance to youths attending the New Zealand exchange program every three years, or according to intervals as the Fire Chief establishes in writing; and

The Logo of the PROGRAM is the phrase "Huntington Beach Jr Lifeguard" circling a United States Shield (the "LOGO"). CITY owns the trademark to the LOGO; and

All youths enrolled in the PROGRAM ("Participants") are required to wear tee-shirts, and board shorts bearing the LOGO. Currently, CITY provides each Participant, as part of the PROGRAM enrollment fee, two shirts, men's or women's board shorts, and a backpack, all bearing the LOGO; and

Pursuant to the terms of this MOU, beginning Summer 2021, CITY will no longer provide Participants with shirts, board shorts, and backpacks as part of the PROGRAM enrollment fee. Instead, CITY will only require that Participants wear either new or used tee-shirts, and board shorts bearing the LOGO; and

Pursuant to the terms of this MOU, beginning Summer 2021, FJG shall sell all clothing, towels and other merchandise bearing the LOGO, including but not limited to men's and women's board shorts, backpacks, tee-shirts, sweatshirts, stickers, dog tags, license plate frames, and towels. FJG shall also retain an artist to prepare yearly novel beach-related art work to appear on clothing and merchandise; and

FJG and CITY desire to enter into this First Amended and Restated Memorandum of Understanding ("AMENDED MOU") to clarify the future respective obligations of the CITY and FJG,

NOW, THEREFORE, for and in consideration of the promises and covenants hereinafter contained and intending to be legally bound, the parties covenant and agree as follows:

1. OBLIGATIONS OF FJG

A. At all times, FJG shall operate as a volunteer operated entity, with no employees. As necessary, FJG may retain and pay independent contractors, including accountants and bookkeepers, to accomplish its objectives.

B. FJG agrees to continue its operations as a tax-exempt, non-profit charitable corporation pursuant to IRC 501(c)(3).

C. FJG shall organize and participate in fundraising activities for the benefit of the PROGRAM.

2. SALE OF LOGO AND PROGRAM RELATED MERCHANDISE

A. Effective upon the execution of this Amended MOU by FJG and its approval by the City Council, FJG shall assume the obligation to manufacture, procure and sell all clothing, towels and other merchandise bearing the LOGO, including but not limited to men's and women's board shorts, backpacks, tee-shirts, sweatshirts, stickers, dog tags, license plate frames, and towels. FJG may sell additional merchandise bearing the LOGO with the approval of the Fire Chief, or his or her designee.

B. FJG shall use its own funds to purchase the PROGRAM related clothing and merchandise it sells.

C. FJG shall retain an artist to prepare yearly novel beach-related art work to appear on clothing and merchandise. FJG shall sell such clothing and merchandise to the general public.

D. FJG shall only sell tee-shirts, and men's and women's board shorts bearing the LOGO to persons the CITY has certified are Participants in the PROGRAM.

E. FJG shall sell all clothing and merchandise exclusively through its electronic portal, and receive payment via credit or debit card. FJG shall not accept cash payment, except that currency purchases may be permitted according to written procedures approved by the City Chief Finance Officer or his or her designee. Delivery will be by mail, at PROGRAM enrollment, at the beach, and at other events related to the PROGRAM.

F. FJG shall sell required clothing for the PROGRAM at its cost, plus Two Dollars, or at a higher mark-up as approved by the Fire Chief.

G. FJG shall be responsible for collecting and paying all sales tax on merchandise sales.

3. USE OF THE PROCEEDS FROM MERCHANDISE SALES AND FUND RAISING

A. The primary charitable purpose for the funds FJG obtains through the sale of clothing and merchandise and its other fund-raising events is to provide scholarships to the annual PROGRAM, assistance to youth participating in the New Zealand Junior Lifeguard Exchange Program, and providing financial support to the objectives of the PROGRAM.

B. FJG shall provide its Annual Financial Statement and Tax Return to the City Fire Chief each year, by no later than April 15.

C. Beginning March 1, 2021, and each year thereafter, the President of FJG shall provide the Fire Chief a budget providing the estimated charitable proceeds anticipated to be available for expenditure during the calendar year, along with the charitable amounts anticipated to be used for Participant and New Zealand scholarships, as well as other expenditures for the benefit of the PROGRAM.

D. Prior to April 1 each year, the Fire Chief shall provide the Board of Directors of FJG with the City's recommended budget for the expenditure of FJG's charitable funds.

E. The Board of Directors of FJG shall consider the City's recommended budget, but retains its own discretion to adopt its own budget for expenditure of FJL charitable funds.

4. USE OF MARINE EDUCATIONAL CENTER AND STORAGE BUILDING

CITY agrees for the term of this Amended MOU that:

a. FJG may use the Educational Center for its monthly board meetings and such other uses as deemed appropriate by CITY's Fire Chief or his or her designee.

b. The furniture, fixtures and equipment FJG donated to CITY pursuant to the 2005 MOU shall continue to be used at the Educational Center for PROGRAM related purposes for the term of this Amended MOU.

c. CITY shall use the Storage Building exclusively for storage of PROGRAM related equipment.

d. CITY grants FJG no title or interest of any kind to the Educational Center, Storage Building or the furnishing thereof, and FJG disclaims any interest in the same. FJG's right under this Amended MOU to use the Educational Center or Storage Center is non-exclusive.

5. TERM

This Amended MOU will become effective on the date it is approved by the City Council of the CITY and shall terminate August 31, 2026. Upon mutual written consent of the parties, this AMENDED MOU may be extended for one additional ten (10) year term. Either party may terminate this MOU upon six (6) months advance written notice to the other party, provided that: (1) no early termination of this Agreement shall relieve CITY of its obligation to use the STORAGE BUILDING exclusively for storage of PROGRAM related equipment through August 31, 2026; and (2) City will be obligated to purchase any and all of FJG's unsold inventory of new uniforms, clothing and merchandise at FJG's original purchase price. FJG's equitable interest in the CENTER and STORAGE BUILDING shall terminate at the end of the term of this Amended MOU.

6. HOLD HARMLESS

FJG shall protect, defend, indemnify and hold harmless CITY, its officers, officials, employees, and agents from and against any and all liability, loss, damage, expenses, costs (including without limitation, costs and fees of litigation of every nature) arising out of or in connection with performance of this MOU or its failure to comply with any of its obligations contained in this MOU except such loss or damage which was caused by the sole negligence or willful misconduct of City.

7. WORKERS' COMPENSATION INSURANCE

Pursuant to California Labor Code Section 1861, FJG acknowledges awareness of Section 3700 *et seq.* of said Code, which requires every employer to be insured against liability for workers' compensation. FJG covenants that it will comply with such provisions prior to commencing performance of the work hereunder.

If FJG is required by California law to maintain workers' compensation insurance, FJG shall maintain workers' compensation insurance in an amount of not less than One Hundred Thousand Dollars (\$100,000) bodily injury by accident, each occurrence, One Hundred Thousand Dollars (\$100,000) bodily injury by disease, each employee, Two Hundred Fifty Thousand Dollars (\$250,000) bodily injury by disease, policy limit.

FJG shall require all subcontractors to provide workers' compensation insurance for all of the subcontractors' employees. FJG shall furnish to City a certificate of waiver of subrogation under the terms of the workers' compensation insurance.

8. GENERAL LIABILITY INSURANCE

In addition to the workers' compensation insurance and FJG's covenant to indemnify City, FJG shall obtain and furnish to City, a policy of general public liability insurance, including motor vehicle coverage. Said policy shall indemnify FJG, its officers, agents and employees, while acting within the scope of their duties, against any and all claims arising out of or in connection with this Agreement, and shall provide coverage in not less than the following amount: combined single limit bodily injury and property damage, including products/completed operations liability and blanket contractual liability, of \$1,000,000 per occurrence. If coverage is provided under a form which includes a designated general aggregate limit, the aggregate limit must be no less than \$1,000,000. Said policy shall name City, its agents, its officers, employees and volunteers as Additional Insureds, and shall specifically provide that any other insurance coverage which may be applicable shall be deemed excess coverage and that FJG's insurance shall be primary.

Under no circumstances shall the above-mentioned insurance contain a self-insured retention, or a "deductible" or any other similar form of limitation on the required coverage.

9. ASSIGNING AS BREACH

Neither Party shall encumber, assign, or otherwise transfer this Amended MOU, or any right or interest in this Amended MOU, without the express written consent of the other party. A consent by a party to one assignment or transfer to another person shall not be deemed to be a consent to any subsequent assignment or transfer to another person. Any encumbrance, assignment or transfer, without the prior written consent of the other party, whether it be voluntary or involuntary, by operation of law or otherwise, is void and shall, at the option of the other party, terminate this Amended MOU.

10. CONFLICT OF INTEREST

FJG shall employ no CITY official nor any regular CITY employee in the work performed pursuant to this Amended MOU. No officer or employee of CITY shall have any financial interest in this MOU in violation of the applicable provisions of the California Government Code.

11. PHOTOGRAPHY

CITY may grant permits to persons engaged in the production of still and motion pictures, television programs, advertising and related activities, to take photographs and/or motion pictures of the PROGRAM.

12. CUMULATIVE REMEDIES

The remedies given to the parties in this Amended MOU shall not be exclusive but shall be cumulative and in addition to all remedies now or hereafter allowed by law or elsewhere provided in this MOU.

13. WAIVER OF BREACH

The waiver by CITY of any breach by FJG of any of the provisions of this Amended MOU, irrespective of the length of time for which such failure continues, shall not constitute a waiver of such breach or a waiver of any subsequent breach by FJG either of the same or another provision of this Amended MOU.

14. FORCE MAJEURE - UNAVOIDABLE DELAYS

Should the performance of any act required by this Amended MOU to be performed by either CITY or FJG be prevented or delayed by reason of an act of God, strike, lockout, labor troubles, inability to secure materials, restrictive governmental laws or regulations, or any other cause (except financial inability) not the fault of the party required to perform the act, the time for performance of the act will be extended for a period equivalent to the period of delay and performance of the act during the period of delay will be excused.

15. NOTICE

Any written notice, given under the terms of this MOU, shall be either delivered personally or mailed, certified mail, postage prepaid, addressed to the party concerned, as follows:

CITY:

Fire Chief
City of Huntington Beach
2000 Main Street
P.O. Box 190
Huntington Beach, CA 92648

FJG:

Friends of the HB Junior Guards
2000 Main Street
PO Box 190
Huntington Beach, , CA 92648

If a party desires to change the address for notices set forth herein, said party will provide 30 days advance written notice to the other party of any such change.

16. ATTORNEY'S FEES

In the event of any litigation to enforce the terms and provisions of this Amended MOU, each party shall bear its own costs and attorney's fees. The prevailing party shall not be entitled to recover its attorneys' fees from the non-prevailing party.

17. CONTROLLING LAW AND VENUE

The rights and liabilities of the parties, and the interpretation and construction of this MOU, shall be determined in accordance with the laws of the State of California. Any controversy arising out of or under this Amended MOU, if litigated, shall be adjudicated in a court of competent jurisdiction in Orange County, California.

18. SECTION TITLES

Section titles in this Amended MOU are inserted only as a matter of convenience and for reference, and in no way define, limit or describe the scope of intent of this Amended MOU or in any way affect this Amended MOU.

19. TIME OF ESSENCE

Time is of the essence with respect to all provisions of this Amended MOU in which a definite time for performance is specified including, but not limited to, the expiration of this Amended MOU.

20. SURVIVAL OF INDEMNITIES

Termination of this Amended MOU shall not affect the right of CITY to enforce any and all indemnities given or made by FJG under this Amended MOU, nor shall it affect any provision of this Amended MOU that expressly states that the provision shall survive termination thereof.

21. NONLIABILITY OF CITY OFFICIALS, EMPLOYEES OR AGENTS

No elective or appointed CITY or CITY affiliated board, commission or member thereof, or officer, official, employee or agent of CITY shall be personally liable to FJG, its successors and assigns, of any default or breach by CITY under this Amended MOU or for any amount which may become due to FJG, its successors and assigns, under this Amended MOU or for any obligation of CITY under this Amended MOU.

22. INTEGRATION

This Amended MOU contains and embraces the entire agreement between the parties hereto and neither it nor any part of it may be changed, altered, modified, limited or extended orally or by any other agreement between the parties unless such agreement be expressed in writing, signed and acknowledged by CITY and FJG, or their successors in interest.

23. PARTIAL INVALIDITY

Should any provision of this Amended MOU be held by a court of competent jurisdiction to be either invalid, void, or unenforceable, the remaining provisions of this Amended MOU shall remain in full force and effect unimpaired by the holding, so long as the reasonable expectations of the parties hereto are not materially impaired.

24. AMENDED MOU IN COUNTERPARTS

This Amended MOU may be executed in counterparts, each of which shall be deemed an original, but all of which taken together shall constitute one and the same document.

25. ENTIRETY

The foregoing sets forth the entire agreement between the parties.

IN WITNESS WHEREOF, the parties hereto have caused this Amended MOU to be executed by and through their authorized officers on _____, 2021.

FRIENDS OF THE HB JUNIOR GUARDS, a California non-profit public benefit corporation

By: 

print name

ITS: (circle one) Chairman/President/Vice President

AND

By: 

print name

ITS: (circle one) Secretary/Chief Financial Officer/Asst. Secretary - Treasurer

CITY OF HUNTINGTON BEACH, a municipal corporation of the State of California

Mayor

City Clerk

INITIATED AND APPROVED:


Fire Chief

REVIEWED AND APPROVED:

City Manager

APPROVED AS TO FORM:

 City Attorney

