



Memorandum

TO: HONORABLE MAYOR AND
CITY COUNCIL

FROM: Albert Balagso
Mark Linder

SUBJECT: SEE BELOW

DATE: July 31, 2007

Approved

Date

8/8/07

COUNCIL DISTRICT: 8, CW
SNI AREA: KONA

SUBJECT: AUTHORIZATION FOR THE CITY MANAGER TO ENTER INTO AGREEMENTS WITH KaBOOM! WHILE WAIVING CERTAIN STANDARD CONTRACT CLAUSES

RECOMMENDATION

Authorization for the City Manager to enter into agreements with KaBOOM!, a nonprofit organization, for the planning, design, and oversight of volunteer installation of playground equipment in City parks, which will waive the City's standard contractual requirements for indemnification, insurance and record keeping.

OUTCOME

The requested authorization will permit the City and the Redevelopment Agency (Agency) to move forward with a community-based reconstruction of the youth playground at Welch Park and enter into similar contractual relationships with KaBOOM! for future playground projects.

BACKGROUND

KaBOOM! is a national nonprofit organization that, among other activities, works with communities to coordinate community-built playgrounds. This entails working with the owner of the proposed playground and the local community members during an approximately four month planning process and then rallying 150 local volunteers during a one day time period to build the playground with their own hands. To date, KaBOOM! has partnered with communities to construct over 1,200 playspaces throughout the nation, constructing over 200 playspaces in 2007 alone.

When a KaBOOM! project is constructed, there are typically three “partners” with the following roles and responsibilities:

- **KaBOOM!:** KaBOOM! serves as the project manager for the playground design and construction; recruits the funding partner for the project; purchases the playground equipment; provides tools for installation; trains the volunteers; and provides a certified playground inspector.
- **Community Partner:** This is typically the owner of the property on which the playground will be built (i.e., the City of San Jose). The Community Partner is responsible for preparing the site for the playground build (which entails conducting a soils and utility check and demolishing the existing equipment), ensuring volunteers are available on the build day, and operating and maintaining the playground following the build;
- **Funding Partner:** The funding partner is responsible for subsidizing the purchase of the play equipment and KaBOOM! project management costs, and typically provides volunteers for the build.

In 2002, KaBOOM! and the City entered into an agreement for the construction of a playground at Watson Park. While this playground is currently closed as a result of contamination found at the parksite, the build was viewed as successful by a majority of the participants. In 2006, with the assistance of community leaders, staff re-initiated discussions with KaBOOM! for another community playspace build.

As mentioned above, it is the role of the funding partner to provide the funding to subsidize the play equipment purchase and the KaBOOM! project management costs. This is typically a private funding partner. At this time, KaBOOM! has not been able to provide a private funding partner for the next playground build and therefore, the Agency will enter into a funding agreement with KaBOOM! in the amount of \$65,000 to provide that financial support to the project.

The next KaBOOM! build is tentatively planned for Welch Park. Since Agency funds will likely be used on the project, the build must occur within a Redevelopment Area. In January 2007, using information from the annual condition assessment performed by PRNS, staff toured playgrounds in SNI areas which could be eligible for replacement and determined that Welch Park was the best current candidate for playground reconstruction within an SNI area. Other sites which were investigated included Starbird Park, Alma Community Center and McLaughlin Park.

Staff began contract discussions with KaBOOM! in late 2006. The negotiations were lengthy as the City was required to restructure KaBOOM! and the City’s typical agreements as a result of purchasing, indemnification and bidding issues. One issue in particular involved how to justify entering into a contractual relationship with KaBOOM! given that KaBOOM! receives all of its playground equipment from one vendor, Playworld Systems. If City funds were used to sponsor

the build then this would be considered sole sourcing the project to Playworld Systems. Ultimately, it was determined that, if the equipment were purchased from the funding of a project sponsor, whether that sponsor is the Agency or a private funding partner, then there would be no restrictions regarding sole-sourcing of the playground equipment.

Staff had targeted a date of September 29, 2007 for the Welch Park build. However, after lengthy contractual negotiations, this date was determined to be unachievable because KaBOOM! was not willing to accept certain contractual clauses that they had accepted previously during the playground build at Watson Park. These include the following:

- **Indemnification:** Anytime the City enters into a contract to construct a capital improvement project, the contractor, designer and the construction manager, if there is one, are all required to indemnify the City for third party claims (usually injuries to people using the facility) arising out of the work performed by the contractor or consultant. Although KaBOOM! agreed to indemnify the City for the Watson Park project, due to a subsequent change in policy of the organization they are unwilling to indemnify anyone for their projects now except for injuries that occur on the actual day of the build. They are instead requiring the City to indemnify them for all claims except to the extent of the willful misconduct of KaBOOM! and/or the Funding Partner. This means that if a volunteer is injured on the day of the event and files a claim against the City, KaBOOM! may pay that claim on behalf of the City, but only if the injury is due to the willful misconduct of KaBOOM! and/or the Fund Partner. If the injury is determined to be the result of KaBOOM! and/or the Funding Partner's negligence, KaBOOM! will not indemnify the City. This also means that, if a child is injured on the playground equipment a few months after the build and brings a claim against KaBOOM!, the City may be liable for the injury even if it is determined that it was KaBOOM!'s negligence of willful misconduct that caused the injury.
- **Insurance:** The City typically requires the contractor or consultant to carry general liability policy and each design consultant a professional errors & omissions policy for each project and that they name the City as an "Additional Insured". KaBOOM! will not provide such insurance. Instead they will provide for general liability coverage for the day of the event only.

In addition to the above, KaBOOM! would like to remove the City's standard "Books and Records" clause from the contract. The City's standard Books and Records clause requires City contractors and consultants to maintain all documents and records which demonstrate performance under the contract for three years after the termination of the contract, and to allow the City to inspect the records upon reasonable notice. This provision ensures that the City has the ability to review the contractor/consultant's books and records for compliance with the contract terms and to determine that any City funding provided for under the contract is being used in accordance with the terms of the contract.

KaBOOM! acknowledges the importance of retaining books and records in relation to the performance of the contract, but they do not want to take on the burden of being available to provide these items to the City upon request.

ANALYSIS

As with any decision, there are costs, benefits and risks to proceeding with this project while waiving the standard indemnity, insurance, and records keeping clauses.

Benefits

- Up front Capital project savings of \$200,000-\$300,000: Typical playground replacement projects can cost from \$300,000 to \$400,000. The City and Agency combined are investing approximately \$115,000 in direct contractual costs to the Welch Park project. This includes \$50,000 to demolish and prepare the site for the build and \$65,000 for KaBOOM! to purchase equipment and oversee the project. This is anticipated to save \$200,000 to \$300,000 over standard playground replacement projects. In addition, if the City engages with KaBOOM! on future projects there would be similar Capital savings involved in those projects. The savings would be even more substantial if a private funding partner is brought on to help subsidize the project as opposed to the Agency.
- **Community Empowerment:** There are few things that can bring a community together and empower them to take ownership in their parks and playgrounds than actually having them build the structure themselves from the ground up. The community empowerment gained from up to 150 neighbors working side-by-side to construct a playground with their own hands is an un-measurable benefit that underlies the very notion of the Strong Neighborhoods Initiative.

Costs

- **Indemnification Clause:** The City has had approximately 17 claims related to injuries on playgrounds over the last 10 years. With a total amount paid to injured parties of less than \$350.00. If the City enters into the proposed contract there would be no recourse against KaBOOM! in the event an injury occurred on the playground. The City could end up being solely responsible for damages from an injury that was caused by faulty playground design, construction, or inspection, even if KaBOOM! was responsible for performing these activities under the contract. The exact financial risk the City would be taking on is unknown. However, given the relatively small number of claims related to playgrounds in the past decade, the potential exposure of the City for this KaBOOM! play space is low.
- **Insurance Clause:** KaBOOM! is willing to provide some insurance for the day of the event, but that insurance will not be primary to the City, as is typically required. The City of San Jose has elected to be self-insured for its liability claims. As such, should the decision be made to move forward with this agreement, the City could be responsible for

liability claims (bodily injury or property damage to third parties) depending on the circumstances.

- **Books & Records:** KaBOOM! is willing to provide the City with certain records, receipts, and design materials immediately following the completion of the project. However, KaBOOM! does not want to maintain the records or make them available for the three year period provided for under the City's standard agreement. KaBOOM! is a non-profit organization with limited staffing resources so they are concerned about responding to a future records request. With the Council's approval of the waiving of this standard clause, City staff will work out a mutually agreeable alternative with KaBOOM!
- **Resilient Surfacing:** KaBOOM! typically does not install resilient or "rubberized" surfacing underneath their playground structures, instead wood chips are used. When KaBOOM! does use resilient surfacing, their standard installation is to place asphalt underneath the resilient surfacing. This is different from the City's Department of Public Works Standard Specifications which require a concrete base. For this reason, the City will not be able to proceed with the installation of resilient surfacing at this location. If the community requests resilient surfacing during the design process, then staff will evaluate the possibility of incorporating the surfacing as part of a separate City project following KaBOOM!'s installation of the playground.
- **Indirect Costs:** While there is a capital savings associated with the KaBOOM! build, a number of City staff in PRNS, Public Works, General Services, and the Agency will be investing substantial time, resources and energy into this project. The majority of these staff do not directly bill to projects so the exact costs is unknown.

If Council approves waiving the above contractual requirements then staff will work with KaBOOM! on a contract for the Welch Park playground project and engage in discussions with KaBOOM! for future community build projects. Staff will also investigate the KaBOOM! project delivery model to determine if any lessons can be learned for future City capital projects.

In summary, the City will likely be saving capital dollars by engaging in this community-built playground project with KaBOOM! and will be taking on an unknown liability in relation to potential future claims and lawsuits related to the construction of the playground. However, due to the overwhelming benefit of a community-built playground, it is the staff recommendation that Council allow staff to proceed with entering into a contract with KaBOOM! for the construction of a playground at Welch Park, as well as future projects.

EVALUATION AND FOLLOW-UP

Following the completion of the Welch Park build, staff, along with the projects' community partners, will evaluate the costs and benefits using actual data and report back to the Mayor and City Council through an informational memorandum. This evaluation will allow City staff as

well as the Mayor and Council, to determine the viability of investing in future KaBOOM! build projects.

POLICY ALTERNATIVES

Alternative #1: Do nothing

Pros: The City will not be accepting additional liability by waiving the indemnification and insurance clauses.

Cons: The City will not be able to enter into a community-built playground project with KaBOOM! at Welch Park

Reason for not recommending: The positive effects of a community-built playground project outweigh the potential/unknown costs of the added liability.

PUBLIC OUTREACH/INTEREST

- Criteria 1:** Requires Council action on the use of public funds equal to \$1 million or greater. **(Required: Website Posting)**
- Criteria 2:** Adoption of a new or revised policy that may have implications for public health, safety, quality of life, or financial/economic vitality of the City. **(Required: E-mail and Website Posting)**
- Criteria 3:** Consideration of proposed changes to service delivery, programs, staffing that may have impacts to community services and have been identified by staff, Council or a Community group that requires special outreach. **(Required: E-mail, Website Posting, Community Meetings, Notice in appropriate newspapers)**

This project does not meet any of the above criteria. However an email posting will be sent to the Neighborhood Development Center email distribution list to ensure that community members interested in participating in a KaBOOM! project build are aware of the meeting.

COORDINATION

This memorandum has been coordinated with the Redevelopment Agency, Office of Risk Management and the City Attorney's Office.

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07-31-07

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COST SUMMARY/IMPLICATIONS

A cost/benefit analysis for this project is provided in the analysis portion of this memorandum. This project will have a net benefit on maintenance costs as it will be leading to the replacement of an older playground structure.

CEQA

Exempt: PP07-116


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