



Memorandum

TO: HONORABLE MAYOR AND
CITY COUNCIL

FROM: Albert Balagso

SUBJECT: RAGING WATERS AMENDMENT

DATE: 01-03-11

Approved

Date

1/11/11

COUNCIL DISTRICT: Citywide

RECOMMENDATION

Adopt a resolution authorizing the City Manager to negotiate and execute a Sixth Amendment to the agreement with Festival Fun Parks, LLC, dba Palace Entertainment (“Raging Waters”) for the lease at Lake Cunningham Regional Park to adjust Section 4.02 “Investment in Capital Improvements”, Section 4.03 “Maintenance”, Section 9.02 “Accounting and Operations Reports” and Exhibit E “Insurance Requirements” as follows:

1. Amend annual capital investment to allow banking for three years of capital funding, so that larger capital investments, such as new attractions, can be added to the facility.
2. Set the on-going capital repair amount to \$35,000 for each year.
3. Lessee shall increase the minimum maintenance allocation fund by 7.4% every three years. Ensure that the minimum maintenance allocation is not tied to the Consumer Price Index (CPI) for Urban Wage Earners and Clerical Workers.
4. Amend the contact information for the agreement from the Director of Conventions, Arts and Entertainment to the Director of Parks, Recreation and Neighborhood Services (PRNS) and amend all references to City Hall from the 801 North First Street to 200 East Santa Clara Street.
5. Amend Exhibit E (Insurance Requirements) to bring Raging Waters into compliance with the City’s current requirements.
6. Amend recipient of Annual Financial Report to include Director of Parks, Recreation and Neighborhood Services.
7. Lessee shall provide Director of PRNS an annual report certifying that the capital investment has been satisfied.

OUTCOME

Approval of this action will authorize the City Manager to negotiate and execute a Sixth Amendment to the Raging Waters Lease Agreement, allowing the addition of larger new

attractions which will increase attendance to the park, create marketing opportunities and ultimately generate more revenue for the Lake Cunningham Fund and for Raging Waters.

BACKGROUND

In June 1983, the City Council approved the revised master plan for Lake Cunningham Regional Park, which incorporated the concept of a water theme park. In March of 1985, the City Council approved a 20-year ground lease between the City and Raging Waters for the development and operation of a water theme park site.

The lease agreement was then amended on two occasions (1986 and 1991) to obtain financing from the Bank of British Columbia and a third time in 1993 to construct a new parking lot in Lake Cunningham Park.

The lease agreement was amended a fourth time in 1995 in order to increase the term of the agreement from 20 years to 40 years. Also at that time, the capital improvement fund was set up to have a "minimum maintenance allocation" amount, which is adjusted by the CPI.

The last amendment to the contract was done in March 1998 and added an inflation factor to the minimum maintenance allocation of \$130,000 per year for maintenance and repairs to the leased premises. The inflation factor can not exceed 5% in any one year, regardless of the CPI. Also, the annual audit report was substituted with an alternative financial reporting procedure. Raging Waters is now to retain a nationally recognized accounting firm, acceptable to the City, to apply financial procedures and report on findings in accordance with the standards of the American Institute of Certified Public Accountants.

ANALYSIS

City staff and the Lessee have agreed to the following changes to the existing Raging Waters lease:

- Lessee is required to accumulate \$170,000 annually (due to the inflation factor from the 1998 amendment) as a minimum maintenance allocation for a period up to three calendar years, at which time the combined minimum maintenance allocation funds of \$510,000 will be expended towards a large capital improvement as mutually agreed by the City and Lessee. If Lessee fails to spend up to the combined minimum maintenance allocation toward its Capital obligation, Lessee will be required to add the unspent funds to the minimum maintenance allocation for the next calendar year.
- Lessee shall increase the contribution to the minimum maintenance allocation fund by 7.4% tri-annually (once every three years) to allow for cost of living increases, and the minimum increase shall not be tied to the CPI.
- Lessee shall also expend at least \$35,000 annually towards on-going capital repairs to ensure the infrastructure remains in good working order. In addition, the Lessee shall

maintain all attractions to the satisfaction of the State Department's Occupational Safety Health Division and shall maintain the property in compliance with all other regulatory codes for water theme parks, at their own expense.

- If the cost of Lessee's capital repair obligations exceeds the \$35,000, Lessee shall be required to expend the amount necessary to maintain the leased premises, including the capital improvements, in accordance with the terms of this amended agreement.
- In addition to Lessee's bonding obligations set forth elsewhere in this lease, Lessee shall be required to furnish a performance bond to secure Lessee's obligations under this article. The form of the bond shall be substantially in the form of Appendix 1 in the existing agreement. The legal form of the bond shall be satisfactory to the City Attorney, whose approval shall not be unreasonably withheld. The surety issuing the performance bond shall be an "Admitted /Surety," as defined in Section 7.01 in the existing agreement. City shall have the right to draw against the performance bond in the event of Lessee's failure to fully perform Lessee's maintenance obligations as set forth in this article or in the amended agreement. City will provide Lessee with the opportunity to cure Lessee's breach in accordance with the provisions of Article 17 of the existing agreement prior to drawing upon the performance bond. Upon City's withdrawal of all or any portion of the performance bond, Lessee shall renew or replace the performance bond in order to bring it back to full value. Failure to renew or replenish the performance bond within 10 days of receipt of City's notice to do so shall constitute a default of this Lease.
- Amend the responsible party for the administration of this Lease on the City's behalf from the City's Director of Conventions, Arts and Entertainment (CAE) to the City's Director of PRNS, or such other department head designated by the City Manager.
- Amend Section 9.02 "Accounting and Operations Reports" to include the Director of PRNS to receive the Annual Financial Report.
- A revised Exhibit E (Insurance Requirements) will be added to the contract to bring Raging Waters into compliance with City's current insurance requirements.
- Lessee shall provide the Director of PRNS a report from a certified public accountant certifying that the capital investment has been satisfied, confirm the total dollar value expended and list the capital items completed for the prior calendar year.

EVALUATION AND FOLLOW-UP

Upon approval, PRNS staff will coordinate with the City Manager's Office and the Office of the City Attorney to execute the Sixth Amendment to the "Investment in Capital Improvements" Section 4.02, "Maintenance" Section 4.03, "Accounting and Operations Reports" Section 9.02 and Exhibit E (Insurance Requirements) for the existing/current Raging Waters Lease Agreement.

POLICY ALTERNATIVES

Alternative #1: Do not authorize the City Manager to amend the Raging Waters Lease Agreement to change Section 4.02 "Investment in Capital Improvements" and Section 4.03 "Maintenance."

Pros: This alternative would leave the contract as is, requiring \$170,000 minimum maintenance allocation (plus inflationary increases) and no set amount towards on-going capital repairs.

Cons: This alternative would not allow Raging Waters to "bank" three years of capital investments for improvements. By not approving the Sixth Amendment, Raging Waters would be precluded from leveraging available funding from its parent company, so that new attractions can be added to the theme park.

Reason for not recommending: If the amendment were not approved, the theme park would continue to operate as usual. The minimum maintenance allocation would be \$170,000 (plus inflationary increases) and Raging Waters would not be able to bank three years of capital investments for improvements. In addition, Raging Waters would not be required to spend at least \$35,000 annually towards on-going capital repairs.

PUBLIC OUTREACH/INTEREST

- Criterion 1:** Requires Council action on the use of public funds equal to \$1 million or greater. **(Required: Website Posting)**
- Criterion 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)**
- Criterion 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 item does not meet any of the above criteria but will be posted on the City's website for the December 14, 2010 Council agenda.

COORDINATION

This memorandum has been coordinated with the City Manager's Budget Office and the City Attorney's Office.

HONORABLE MAYOR AND CITY COUNCIL

01-03-11

Subject: Raging Waters Amendment

Page 5

FISCAL/POLICY ALIGNMENT

This Council item is consistent with PRNS' cost recovery goals and pricing policy.

COST SUMMARY/IMPLICATIONS

No additional City costs are expected as a result of this amendment. The amendment is minimally expected to ensure revenues continue at the current levels and may lead to increased revenue levels in the future.

BUDGET REFERENCE

Not applicable

CEQA

Not a Project, File No. PP10-066 (f), Lease of equipment of existing space for the same use.

/s/

ALBERT BALAGSO

Director of Parks, Recreation and
Neighborhood Services

For questions please contact Cindy Rebhan, Parks Manager, at 794-6512.