

**CITY OF COSTA MESA
LICENSE AGREEMENT
WITH
ORANGE COUNTY MODEL ENGINEERS**

THIS LICENSE AGREEMENT (“Agreement”) is made and entered into this 10th day of September, 2018 (“Effective Date”), by and between the CITY OF COSTA MESA, a municipal corporation (“City”), and ORANGE COUNTY MODEL ENGINEERS, a California nonprofit corporation (“OCME”).

WITNESSETH:

WHEREAS, City is the owner of real property located at 2501 Placentia Avenue, Costa Mesa, California and all appurtenances thereon known as Fairview Park (“Property”); and

WHEREAS, OCME desires to use a portion of the Property to operate and maintain a model railroad facility, as outlined herein, and City is agreeable to such use pursuant to certain terms and obligations; and

WHEREAS, City and OCME desire to execute this Agreement to set forth their rights, obligations, and liabilities relating to OCME’s use of the Property.

NOW, THEREFORE, for and in consideration of the mutual covenants and conditions contained herein, the parties hereby agree as follows:

1. GRANT OF LICENSE

City grants to OCME a license to utilize a portion of Fairview Park, as delineated in Exhibit “A,” attached hereto and incorporated herein by this reference (the “Premises”), to operate and maintain a model railroad facility.

OCME’s use of the Premises shall be for the purpose of OCME’s operation and maintenance of the model railroad facility only. OCME shall not use the Premises for any other purpose or business without first obtaining City’s written consent.

2. LICENSE FEE

In exchange for OCME’s operation and maintenance of the model railroad facility, City grants OCME this license for no fee.

3. TERM

This Agreement shall commence on the Effective Date and continue for a period of twenty (20) years, ending on September 9, 2038, unless previously terminated as provided herein. This Agreement may be extended by two (2) additional five (5) year periods upon mutual written agreement of the parties.

4. OCME’S DUTIES AND RESPONSIBILITIES

4.1 Condition of Premises. OCME accepts the Premises “as is”.

4.2 Railroad Operations.

a. Annual Schedule. OCME shall provide to City for City’s approval a proposed annual

schedule of days and hours of operation of the model railroad (“Schedule”) no later than January 2 of each year. If City does not approve the proposed Schedule, OCME and City shall cooperate to determine a mutually agreeable Schedule. City’s approval shall not be unreasonably withheld. OCME shall operate the model railroad in accordance with the Schedule, except in the event of inclement weather or emergencies. OCME shall post the Schedule on the Premises in a location that is protected from tampering and inclement weather and accessible for viewing by the public. OCME shall also provide the Schedule on its website, www.ocmetrains.org, and social media.

- b. Revisions to Schedule. If OCME desires to revise the approved Schedule or to close the Premises temporarily for construction or maintenance, OCME shall submit to City for approval a revised schedule at least fourteen (14) days prior to any desired changes. City’s approval shall not be unreasonably withheld. If City approves revisions to the Schedule, OCME shall post the revised Schedule in the publicly accessible and protected location set forth above and OCME shall also provide the Schedule on its website, www.ocmetrains.org, and social media outlining the revisions to the Schedule and/or temporary closures of the Premises.
- c. Ride Fees. OCME shall provide train rides to the public for free on the run days set forth in the Schedule. Notwithstanding the foregoing, OCME may accept donations from the public, provided that the donations are solicited in a manner approved by the City.
- d. Signs; Advertisements. OCME shall provide and install, at its sole cost and expense, all necessary warning signs and notices. OCME shall obtain City’s written approval prior to installation or posting of any signs, notices, or advertisements.
- e. Safety Equipment. OCME shall provide all necessary safety equipment and devices for users of the model railroad facility.
- f. Weight Limit. OCME shall post a notice indicating the maximum weight limit to ride on trains at the Premises.
- g. Level of Service. OCME shall provide a high level of customer service to the public that is consistent with that provided by other model railroad facilities.
- h. Operational Rules and Regulations. OCME shall:
 - i. Provide to its members and train operators the Orange County Model Engineers Mackerel Flats and Goat Hill Junction Railroad Operating Rules (“Operating Rules”), incorporated herein by this reference as if fully set forth herein. If OCME revises the Operating Rules, OCME shall provide the revised Operating Rules to City and OCME’s members and train operators.
 - ii. Ensure that the Operating Rules are strictly enforced at the Premises and that its members and train operators are complying with all applicable laws and regulations.

4.3 Use of Premises.

- a. Compliance with All Laws. OCME shall comply with all applicable laws and regulations in using the Premises and operating the model railroad facility, including

but not limited to Chapter V of Title 12 of the Costa Mesa Municipal Code and the Fairview Park Master Plan.

- b. Other Use. OCME shall not use the Premises for any purpose outside of operating and maintaining the model railroad facility, including but not limited to private events and overnight camping, without City's prior written consent. If OCME desires to use the Premises for any purpose outside of operating and maintaining the model railroad as set forth herein, OCME shall, at least thirty (30) days prior to the desired use, submit a written request to City that includes a description of the desired use as well as the anticipated number of participants in connection with such use. City retains the sole discretion to approve or deny any such requests.
- c. Supervision of Premises. OCME shall supervise the Premises. If OCME cannot control a member of the public utilizing the Premises, OCME shall contact the Costa Mesa Police Department or a Costa Mesa Park Ranger for assistance.
- d. Incidents. OCME shall immediately notify the City in writing of any accidents, incidents, vandalism, or similar occurrences that occur on the Premises.
- e. Records. OCME shall maintain records of the number of passengers carried on each day of operation. OCME shall provide the City with such records on a quarterly basis.

4.4 Improvements.

- a. If OCME desires to install improvements at the Premises, OCME, prior to the commencement of any improvements, shall submit to the City for approval plans and specifications for the proposed improvements.
- b. Improvements must be compatible with future and existing park improvements and require approval from the Public Services Department, the Development Services Department, and the Parks and Community Services Department.
- c. Improvements must comply with all applicable City standards and specifications.
- d. Improvements, including plan check fees and permits required for such improvements, shall be at OCME's sole cost and expense.
- e. City shall have the sole discretion to approve or deny proposed improvements.

4.5 Maintenance and Repairs.

- a. OCME shall perform all maintenance on the Premises, except as set forth herein.
- b. OCME shall provide the City with a maintenance schedule and shall, in advance, make City aware of any non-routine maintenance activities. City shall have the sole discretion to approve or deny any maintenance activities or treatments.
- c. OCME shall maintain the Premises in a safe and clean condition.
- d. OCME shall keep the Premises and model railroad facility in good repair. If the Premises or facility are not kept in good repair, City may make any repairs deemed necessary by City, at OCME's cost. OCME shall reimburse the City for the costs of any

such repairs within thirty (30) days of written notification from City of such costs.

- e. OCME shall not store toxic materials on the Premises. OCME may store materials specifically related to train operations, including but not limited to gasoline and/or oil, provided that the location and manner of such storage is approved by the City.

4.6 Sale of Food and Drink.

- a. OCME may sell food and non-alcoholic drinks at the Premises with prior written approval from the City. OCME shall not permit alcoholic beverages within the Premises or at the Property.
- b. OCME shall obtain all necessary permits prior to selling food or drinks at the Premises.

5. CITY'S DUTIES AND RESPONSIBILITIES

- 5.1 City agrees to provide landscape maintenance on the Premises.
- 5.2 City agrees to provide entrance, roadway, and parking lot maintenance on the Premises.
- 5.3 City reserves the right to enter and inspect the Premises at any time.

6. RELOCATION

City may, upon written notice to OCME, require relocation of the model railroad facility and equipment located on the Premises to facilitate construction of City facilities. If the model railroad facility or other equipment on the Premises require relocation to facilitate construction of City facilities, OCME shall bear all costs of relocation. City may, in its discretion, provide relocation assistance to OCME. City will make reasonable efforts to design around existing improvements.

7. UTILITIES AND TAXES

7.1 Utilities.

- a. City shall provide power and water to the Premises and pay all fees and charges in connection therewith.
- b. City shall schedule regular pick-ups of trash generated from the Premises, on a weekly basis, and shall pay all fees and charges in connection therewith.
- c. OCME shall pay all fees and charges in connection with the telephone line on the Premises.

7.2 Taxes.

OCME shall pay all taxes which may be levied or assessed as a result of this Agreement or OCME's use of the Premises. OCME understands that a possessory interest may be created and vested in OCME as a result of this Agreement and that such interest may be subject to property taxation. OCME understands that OCME may be subject to the payment of property taxes levied on such possessory interest. If property taxes are levied due to a possessory interest, OCME shall pay such taxes.

8. INSURANCE

8.1 Minimum Scope and Limits of Insurance. OCME shall obtain, maintain, and keep in full force and effect during the life of this Agreement all of the following minimum scope of insurance coverages with an insurance company admitted to do business in California, rated "A," Class X, or better in the most recent Best's Key Insurance Rating Guide, and approved by City:

- a. Commercial general liability, including premises-operations, products/completed operations, broad form property damage, blanket contractual liability, independent contractors, personal injury or bodily injury with a policy limit of not less than One Million Dollars (\$1,000,000.00), combined single limits, per occurrence. If such insurance contains a general aggregate limit, it shall apply separately to this Agreement or shall be twice the required occurrence limit.

8.2 Endorsements. The commercial general liability insurance policy shall contain or be endorsed to contain the following provisions:

- a. Additional insureds: "The City of Costa Mesa and its elected and appointed boards, officers, officials, agents, employees, and volunteers are additional insureds with respect to: liability arising out of activities performed by or on behalf of OCME pursuant to its contract with the City; products and completed operations of OCME; premises owned, occupied or used by OCME."
- b. Notice: "Said policy shall not terminate, be suspended, or voided, nor shall it be cancelled, nor the coverage or limits reduced, until thirty (30) days after written notice is given to City."
- c. Other insurance: "OCME's insurance coverage shall be primary insurance as respects the City of Costa Mesa, its officers, officials, agents, employees, and volunteers. Any other insurance maintained by the City of Costa Mesa shall be excess and not contributing with the insurance provided by this policy."
- d. Any failure to comply with the reporting provisions of the policies shall not affect coverage provided to the City of Costa Mesa, its officers, officials, agents, employees, and volunteers.
- e. OCME's insurance shall apply separately to each insured against whom claim is made or suit is brought, except with respect to the limits of the insurer's liability.

8.3 Deductible or Self-Insured Retention. If any of such policies provide for a deductible or self-insured retention to provide such coverage, the amount of such deductible or self-insured retention shall be approved in advance by City. No policy of insurance issued as to which the City is an additional insured shall contain a provision which requires that no insured except the named insured can satisfy any such deductible or self-insured retention.

8.4 Certificates of Insurance. OCME shall provide to City certificates of insurance showing the insurance coverages and required endorsements described above, in a form and content approved by City, prior to using the Premises. The certificates of insurance shall be attached hereto as Exhibit "B" and incorporated herein by this reference.

9. INDEMNIFICATION AND RELEASE

9.1 OCME agrees to defend, indemnify, hold free and harmless City, its elected officials, officers, agents, volunteers and employees (“Indemnitees”), at OCME’s sole expense, from and against any and all claims, demands, suits, actions or proceedings of any kind or nature arising out of this Agreement or the use or occupancy of the Premises and Property by, or the acts, errors or omissions of, OCME, its officers, agents, members volunteers, employees, occupants, invitees, visitors, guests, or other users, and/or authorized subcontractors. Notwithstanding the foregoing, OCME shall not be responsible for claims, actions, complaints, or suits arising out of the sole active negligence or willful misconduct of the Indemnitees.

9.2 The defense obligation provided for hereunder shall apply without any advance showing of negligence or wrongdoing by OCME, its officers, agents, volunteers, employees, occupants, invitees, visitors, guests, or other users and/or authorized subcontractors, but shall be required whenever any claim, action, complaint, or suit asserts as its basis the negligence, errors, omissions, or misconduct of OCME, its officers, agents, volunteers, employees, invitees, visitors, guests, and/or authorized subcontractors, and/or whenever any claim, action, complaint or suit asserts liability against the Indemnitees based upon OCME’s use or occupancy of the Premises pursuant to this Agreement, whether or not OCME, its officers, agents, volunteers, employees, invitees, visitors, guests, and/or authorized subcontractors are asserted to be liable.

9.3 OCME hereby releases Indemnitees from any claims, demands, obligations, liabilities, damages, injuries, breaches of duty, causes of action, losses, costs and expenses, including, without limitation, attorneys’ fees, whether known or unknown, which arise out of or are incurred in connection with the use of the Premises and Property by OCME, including, without limitation, any damage or injury to OCME or to its property arising out of or in connection with this Agreement.

10. ASSIGNMENT AND SUBLETTING

OCME shall not assign this Agreement or license or sublet the Premises or any part thereof without the prior written consent of City.

11. TERMINATION; REMOVAL OF MATERIALS AND EQUIPMENT

11.1 Termination. Either party may terminate this Agreement by providing ninety (90) days’ written notice to the other party, either by certified mail or personal delivery.

11.2 Removal of Materials and Equipment. Upon termination of the Agreement as set forth herein, OCME shall remove its materials and equipment from the Premises within twelve (12) months. Any materials and equipment remaining on the Premises after that period will be considered abandoned and may be removed and disposed of at City’s discretion and at OCME’s expense. OCME shall reimburse the City for any costs of removal within thirty (30) days of written notification from City of such costs.

12. GENERAL PROVISIONS

12.1 Entire Agreement. This Agreement constitutes the entire agreement between the parties with respect to any matter referenced herein and supersedes any and all other prior writings and oral negotiations. This Agreement may be modified only in writing and signed by the parties in interest at the time of such modification. The terms of this Agreement shall prevail over any inconsistent provision in any other contract document appurtenant hereto, including exhibits to this Agreement.

12.2 Notices. Any notices, documents, correspondence or other communications concerning this Agreement may be provided by personal delivery or mail and shall be addressed as set forth below. Such communication shall be deemed served or delivered: (a) at the time of delivery if such communication is sent

by personal delivery, and (b) 48 hours after deposit in the U.S. Mail as reflected by the official U.S. postmark if such communication is sent through regular United States mail. Either party may change its address by giving notice in writing to the other party.

IF TO OCME:

OCME
P.O. Box 3216
Costa Mesa, CA 92628
Attn: President

IF TO CITY:

City of Costa Mesa
Parks and Community Services Department
77 Fair Drive
Costa Mesa, CA 92626
Attn: Justin Martin

12.3 Governing Law. This Agreement shall be governed by and construed under the laws of the State of California without giving effect to that body of laws pertaining to conflict of laws. In the event of any legal action to enforce or interpret this Agreement, the parties hereto agree that the sole and exclusive venue shall be a court of competent jurisdiction located in Orange County, California.

12.4 Attorneys' Fees. In the event that litigation is brought by any party in connection with this Agreement, the prevailing party shall be entitled to recover from the opposing party all costs and expenses, including reasonable attorneys' fees, incurred by the prevailing party in the exercise of any of its rights or remedies hereunder or the enforcement of any of the terms, conditions, or provisions hereof.

12.5 Public Records Act Disclosure. OCME has been advised and is aware that this Agreement and all reports, documents, information and data furnished or prepared by OCME pursuant to this Agreement and provided to City may be subject to public disclosure as required by the California Public Records Act (California Government Code section 6250 et seq.). Exceptions to public disclosure may be those documents or information that qualify as trade secrets, as that term is defined in California Government Code section 6254.7, and of which OCME informs City of such trade secret. The City will endeavor to maintain as confidential all information obtained by it that is designated as a trade secret. The City shall not, in any way, be liable or responsible for the disclosure of any trade secret including, without limitation, those records so marked if disclosure is deemed to be required by law or by order of the Court.

12.6 Force Majeure. In the event of damage or destruction of the Premises by any act of God, fire, national or local calamity, strike, labor dispute, civil disturbance, accident, epidemic, act or regulation of any public authority, interruption in or delay of transportation services, or any event of any other kind or character whatsoever, whether similar or dissimilar to the foregoing events, which shall render the practicable fulfillment by City of its obligations under this Agreement impossible, this Agreement shall be null and void and City shall be released of all responsibility hereunder and shall not be held responsible by OCME for any resulting damage. In the event of any such occurrence or threat thereof, City shall have the right in its discretion to suspend or terminate any use by OCME of the Premises, to cause the Premises to be vacated, or to take such action for such duration as City in its sole discretion deems necessary or appropriate.

12.7 No Third-Party Beneficiary Rights. This Agreement is entered into for the sole benefit of City and OCME and no other parties are intended to be direct or incidental beneficiaries of this Agreement and no third party shall have any right in, under or to this Agreement.

12.8 Headings. Paragraphs and subparagraph headings contained in this Agreement are included solely for convenience and are not intended to modify, explain or to be a full or accurate description of the content thereof and shall not in any way affect the meaning or interpretation of this Agreement.

12.9 Construction. The parties have participated jointly in the negotiation and drafting of this

Agreement. In the event an ambiguity or question of intent or interpretation arises with respect to this Agreement, this Agreement shall be construed as if drafted jointly by the parties and in accordance with its fair meaning. There shall be no presumption or burden of proof favoring or disfavoring any party by virtue of the authorship of any of the provisions of this Agreement.

12.10 Amendments. Only a writing executed by the parties hereto or their respective successors and assigns may amend this Agreement.

12.11 Waiver. The delay or failure of either party at any time to require performance or compliance by the other of any of its obligations or agreements shall in no way be deemed a waiver of those rights to require such performance or compliance. No waiver of any provision of this Agreement shall be effective unless in writing and signed by a duly authorized representative of the party against whom enforcement of a waiver is sought. The waiver of any right or remedy in respect to any occurrence or event shall not be deemed a waiver of any right or remedy in respect to any other occurrence or event, nor shall any waiver constitute a continuing waiver.

12.12 Severability. If any provision of this Agreement is determined by a court of competent jurisdiction to be unenforceable in any circumstance, such determination shall not affect the validity or enforceability of the remaining terms and provisions hereof or of the offending provision in any other circumstance. Notwithstanding the foregoing, if the value of this Agreement, based upon the substantial benefit of the bargain for any party, is materially impaired, which determination made by the presiding court or arbitrator of competent jurisdiction shall be binding, then both parties agree to substitute such provision(s) through good faith negotiations.

12.13 Counterparts. This Agreement may be executed in one or more counterparts, each of which shall be deemed an original. All counterparts shall be construed together and shall constitute one agreement.

12.14 Corporate Authority. The persons executing this Agreement on behalf of the parties hereto warrant that they are duly authorized to execute this Agreement on behalf of said parties and that by doing so the parties hereto are formally bound to the provisions of this Agreement.

[Signatures appear on following page.]

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed by and through their respective authorized officers, as of the date first above written.

OCME

[Signature]
Signature

Date: 9-12-18

GEORGE SHEARER, PRESIDENT OCME
Name and Title

CITY OF COSTA MESA

[Signature]
for Thomas Hatch
City Manager

Date: 9/6/18



ATTEST:

[Signature]
Brenda Green
City Clerk

Date: 1-9-19

APPROVED AS TO FORM:

[Signature]
Thomas Duarte
City Attorney

Date: 09/06/18

DEPARTMENTAL APPROVAL:

[Signature]
Justin Martin
Parks and Community Services Director

Date: 9/5/18

[Signature]
Cynthia D'Agosta
Project Manager

Date: 9/5/18

EXHIBIT A

LOCATION OF MODEL RAILROAD FACILITY

EXHIBIT B
CERTIFICATES OF INSURANCE