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DATE: June 24, 2015

TO: Honorable Mayor and City Council Members

FROM: Property Management

SUBJECT: **ADOPTION OF A RESOLUTION ADOPTING A MITIGATED NEGATIVE DECLARATION AND ASSOCIATED MITIGATION MONITORING AND REPORTING PROGRAM AND APPROVAL OF A PROPERTY USE AGREEMENT WITH BGT MEDIA, LLC**

### **SYNOPSIS**

Staff recommends that the City Council adopt a resolution adopting a Mitigated Negative Declaration and associated Mitigation Monitoring and Reporting Program; adopt a resolution approving a 25-year Property Use Agreement with BGT Media, LLC, in the minimum annual amount of \$180,000 for a portion of City-controlled right-of-way at the terminus of Rancho Del Oro Drive at State Route 78 for the construction and use of a digital message board sign; and authorize the City Manager to execute the agreement.

### **BACKGROUND**

In May of 2012 the City Council amended Article 33 of the City Zoning Ordinance by adding Section 3318. This section provides for the placement of permanent signs such as digital message board signs on City-controlled property or City-controlled rights-of-way ("City Property"). Under Section 3318 the City may impose conditions on the approval through the terms of a property use agreement. Additionally, the City shall comply with the California Environmental Quality Act of 1970 ("CEQA") before approval of any such property use agreement.

Subsequently in June of 2012 the City issued a Request for Proposals ("RFP") to solicit qualified individuals, companies and/or entities to develop, construct and operate digital message board signs ("Sign or Signs") on City Property located along freeways and major traffic corridors. City Property included the City-controlled rights-of-way located at the terminus of Rancho Del Oro Drive and State Route 78 ("Property").

Upon a review of the proposals submitted in response to the RFP, the City Council authorized staff to negotiate four private party digital message board sign agreements on City Property with four separate entities. One of the entities selected was BGT Media, LLC, through its predecessor in interest Sunrey Media (collectively "BGT Media") for the Property. As required by Section 3318, BGT Media negotiated terms and

conditions of a Property Use Agreement (“Agreement”) and processed documents to comply with CEQA.

## **ANALYSIS**

The Sign proposed by BGT Media will utilize the City-controlled Rancho Del Oro Drive right-of-way that is not currently being used for its intended purpose. However, in the event the Rancho Del Oro Drive right-of-way is needed in the future for the construction of Rancho Del Oro Drive, the Agreement shall be terminated and the City shall not incur any liability for such early termination and BGT Media shall remove the Sign at its cost.

In addition to paying rent for the use of the Property, as set forth below, BGT Media will make the Sign available to the City, on a space available basis, but in no event less than one “rotational advertising display images” per sign face for two one-week periods per year for the promotion of City sponsored events. BGT Media will also make the Sign available to Caltrans for “Amber Alerts” and to Caltrans and the City for public safety and traffic messages, on a space available basis.

Set forth below, are some of the essential terms and conditions of the Agreement between the City and BGT Media:

1. Property: A portion of the Rancho Del Oro Drive right-of-way where it intersects with Highway 78, including a non-exclusive right of ingress and egress to the Property.
2. Term: 25 years with one (1) option to renew for 25 additional years.
3. Rent: The greater of a minimum annual amount of \$180,000 (subject to annual CPI increase) or 25% of gross revenue (less advertising fees not to exceed 15% of total gross revenue).
4. Use: Installation of a digital billboard defined as a two sided outdoor advertising sign consisting of a standard pole mounted sign structure and a message center using digital (LED) display measuring 14 feet high by 48 feet wide for the purpose general commercial advertising.
5. Restrictions: BGT Media shall not display any message that in the judgment of the City Manager is: false or misleading; promotes sale or use of tobacco, alcoholic beverages or any illegal controlled substance; depict any illegal activity; contain “obscene matter”; contain non-commercial messages; contain language that presents a danger to public safety.

6. Maintenance: BGT Media shall be solely responsible for the security, maintenance and repair of the Property and for all improvements placed thereon by BGT Media.
7. Utilities/Taxes: BGT Media shall provide and pay for all utility connections, etc., and the cost of utility services to the Property. BGT Media shall also be responsible for any possessory interest or similar tax.
8. Insurance: BGT Media shall provide for all insurance as required by the City.
9. Conditions: The Agreement and the use of the Property shall be subject to the following conditions:
  - a) Approval from Caltrans and the current underlying property owner for use of the Property for digital billboard sign purposes. Obtaining all regulatory approvals for the design, construction and use of the Property for digital billboard sign purposes (including, but not limited to changes to the City sign ordinances, etc.). City shall not be responsible for any costs associated with obtaining said regulatory approvals.
  - c) BGT Media shall indemnify, defend and hold harmless City in any litigation brought to challenge the validity of the Agreement, regulatory approvals, Caltrans approvals or the validity of any City ordinances, etc., that authorize the installation and operation of the digital billboard signs.

### Environmental Review

As required by Article 33 of the City Zoning Ordinance, BGT Media is required to comply with CEQA and has submitted all of the requisite environmental documents for review. As part of the CEQA compliance, the Development Services Department has processed and reviewed the environmental documents for the project. As part of the approval of the Agreement, staff is also requesting the City Council to adopt a resolution adopting the Mitigated Negative Declaration ("MND") and associated Mitigation Monitoring and Reporting Program ("MMRP") for the project.

Some of the pertinent terms of the MND are as follows:

Pursuant to CEQA and State Guidelines thereto; a MND has been prepared stating that if the mitigation measures identified in the MMRP are implemented, there will not be a significant adverse impact upon the environment. Under the provisions of CEQA, the City Council will consider the MND and MMRP during its hearing on the project.

A draft of the MND ("Draft MND") was originally circulated for public review for a 30-day period beginning on December 1, 2014 and was recirculated for public review beginning

December 19, 2014, and ending on January 20, 2015. During this period 226 comment letters were received. Comments from 16 public agencies and/or private organizations and 210 comment letters from individuals were received. The main issues commonly shared throughout the letters received included: Impacts to Aesthetics, Historical, Cultural, and Biological Resources, all resulting from lighting associated with the Sign and it's proposed location upon or adjacent to habitat.

All comments received on the Draft MND have been included in the final MND with appropriate responses to those comments being provided as well. CEQA does not require that Reponse to Comments be prepared, but by policy the Development Services Department has required that an MND contain all comments and adequate responses to comments as part of the environmental document.

The MND and MMRP have been determined to be accurate and adequate documents, which reflect the independent judgment and analysis of the City Council. On the basis of the entire record before it, the City Council should find that there is no substantial evidence that the project, with implementation of the mitigation measures proposed, will have a significant impact on the environment.

#### Public Notification

Although the approval of the Agreement and environmental review does not require that it be heard as a public hearing, the item has been scheduled as such. Additionally, property owner notification has been extended to comply with the 1,500 feet radius provision of revised City Council Policy 300-14 that was recently approved by the City Council.

#### **FISCAL IMPACT**

Rent under the Agreement is the greater of a minimum annual amount of \$180,000 (subject to annual CPI increase) or 25% of gross revenue (less advertising fees not to exceed 15% of total gross revenue). Over the 25 year initial term of the Agreement, the minimum annual revenue, without CPI adjustments, is \$4,500,000. The revenue to the City could exceed said amount should 25% of gross revenue exceed the minimum rent amount in any given year of the Agreement. The revenue under the Agreement will be booked into the General Fund, account no. 1101.4351.0005.

#### **INSURANCE REQUIREMENTS**

BGT Media will comply with the City's standard insurance requirement during the term of the Agreement.

## **COMMISSION OR COMMITTEE REPORT**

Does not apply.

## **CITY ATTORNEY'S ANALYSIS**

On April 18, 2012, the City Council approved the introduction of an ordinance amending the City's Sign Code. The City Council formally adopted the amendment to Article 33 of the Zoning Ordinance on June 6, 2012. Among other things, the ordinance included Section 3318 addressing the placement of private party Signs on City Property. That section authorizes the City Council to permit a private party Sign on City Property upon a finding that the proposed sign is in the City's best interest through the promotion of City-sponsored events and the dissemination of public safety and traffic messages.

The City is authorized to impose conditions on the approval through the terms of a lease, contract or license. Section 3318 requires the City to conduct a RFP to interested parties and prohibits more than four total private party Signs. Section 3318 also requires environmental review under CEQA before approval of any lease, contract or license. The City Attorney has previously addressed the potential legal issues associated with the creation of Section 3318. That analysis is included in the staff report dated April 18, 2012, attached hereto. The legal issues raised in the April 18, 2012 staff report remain today.

In an effort to reduce the risks and cost of potential litigation that may arise, the City Attorney has included a broad indemnity provision in the Agreement with BGT Media, obligating BGT Media to defend and indemnify the City from all claims arising from the construction and operation of the Sign. BGT Media's defense and indemnity obligation also applies to any challenge to the approval of the Agreement and/or adoption of the MND and MMRP. Moreover, BGT Media must also defend and indemnify the City from any claim challenging the legality of the sign code ordinance either facially or as-applied, including any claim asserting the City is compelled to approve off-site advertising on another public or private site in the City due in whole or party to the City's approval of the Agreement.

The City has complied with Section 3318 by conducting a RFP before negotiation of the Agreement. To address the environmental review requirement under CEQA, a MND has also been prepared by BGT Media for the City Council's consideration.

Under CEQA, a public agency must conduct a preliminary review of a project to determine whether CEQA applies to a proposed activity. At this initial stage, the agency must determine whether any of CEQA's exemptions apply. If the project is not exempt, the next step is to conduct an Initial Study to determine if there is substantial evidence that the project may have a significant impact on the environment. If there is no such

evidence, CEQA excuses preparation of an environmental impact review and allows for preparation of a Negative Declaration.

The lead agency must prepare an Environmental Impact Report ("EIR") "whenever substantial evidence supports a fair argument that a proposed project 'may have a significant effect on the environment.' " (*Laurel Heights Improvement Assn. v. Regents of University of California* (1993), 6 Cal.4th 1112, 1123). "The fair argument standard is a 'low threshold' test for requiring the preparation of an EIR." (*Pocket Protectors v. City of Sacramento* (2004), 124 Cal.App.4th 903, 928). Facts, reasonable assumptions predicated upon facts, and expert opinion supported by facts all constitute substantial evidence of a significant effect on the environment. However, "argument, speculation, unsubstantiated opinion or narrative, or evidence that is clearly inaccurate or erroneous, or evidence that is not credible" does not meet the fair argument standard (CEQA Guidelines, § 15064, subd. (f)(5)).

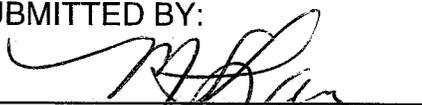
**RECOMMENDATION**

Staff recommends that the City Council adopt a resolution adopting a Mitigated Negative Declaration and associated Mitigation Monitoring and Reporting Program; adopt a resolution approving a 25-year Property Use Agreement with BGT Media, LLC, in the minimum annual amount of \$180,000 for a portion of City-controlled right-of-way at the terminus of Rancho Del Oro Drive at State Route 78 for the construction and use of a digital message board sign; and authorize the City Manager to execute the agreement.

PREPARED BY:

  
\_\_\_\_\_  
Douglas E. Eddow  
Real Estate Manager

SUBMITTED BY:

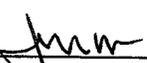
  
\_\_\_\_\_  
Michelle Skaggs Lawrence  
Interim City Manager

REVIEWED BY:

Peter Weiss, Assistant City Manager

  
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Jane McPherson, Interim Financial Services Director

  
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Rick Brown, Interim Development Services Director

  
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Jeff Hunt, City Planner

  
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- Attachments: A) Resolution adopting the MND and associated MMRP  
B) Resolution approving the Property Use Agreement  
C) Property Use Agreement  
D) Availability of the MND and MMRP for review

## RESOLUTION NO.

**A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF OCEANSIDE, CALIFORNIA ADOPTING A MITIGATED NEGATIVE DECLARATION AND ASSOCIATED MITIGATION MONITORING AND REPORTING PROGRAM FOR THE STATE ROUTE 78 AND RANCHO DEL ORO DIGITAL BILLBOARD SIGN PROJECT.****(City of Oceanside – Property Owner)****(BGT Media, LLC – Applicant)**

WHEREAS, pursuant to the California Environmental Quality Act of 1970, and State Guidelines thereto, an Initial Study and Mitigated Negative Declaration have been prepared for the SR78 and Rancho Del Oro Digital Billboard Sign project, stating that if the mitigation measures identified within the Initial Study are implemented there will not be an adverse impact upon the environment;

WHEREAS, a Final Mitigated Negative Declaration was prepared and circulated for public and agency review and proper notification was given in accordance with the California Environmental Quality Act; and

WHEREAS, the Mitigated Negative Declaration together with any comments received, and Mitigation and Monitoring and Reporting Program (MMRP) incorporated by reference and appended in the Final Mitigated Negative Declaration, were presented to the City Council, and the City Council reviewed and considered the information contained in these documents prior to making a decision on the project.

WHEREAS, the Mitigated Negative Declaration and Mitigation and Monitoring and Reporting Program (MMRP) have been determined to be accurate and adequate documents, which reflect the independent judgment and analysis of the City Council. On the basis of the entire record before it, the City Council finds that there is no substantial evidence that the project, with implementation of the mitigation measures proposed, will have a significant impact on the environment.

WHEREAS, the City Council, on the 24<sup>th</sup> day of June, 2015, did conduct a properly noticed public hearing to adopt the Final Mitigated Negative Declaration along with the Mitigation and Monitoring and Reporting Program; and

1           WHEREAS, studies and investigations made by this Council and in its behalf reveal the  
2 following facts:

3 For the Final Mitigated Negative Declaration:

- 4 1.       The Final Mitigated Negative Declaration and Mitigation and Monitoring and Reporting  
5 Program were completed in compliance with the provisions of the California  
6 Environmental Quality Act (CEQA).
- 7 2.       There are certain significant environmental effects detailed in the Mitigated Negative  
8 Declaration and Mitigation and Monitoring and Reporting Program which have been  
9 avoided or substantially lessened by the establishment of measures which are detailed in  
10 Exhibit "A" Mitigation and Monitoring and Reporting Program.
- 11 3.       The Final Mitigated Negative Declaration and Mitigation and Monitoring and  
12 Reporting Program were presented to the City Council, and the City Council reviewed  
13 and considered the information contained in these documents prior to making a decision  
14 on the project. The Final Mitigated Negative Declaration and Mitigation and  
15 Monitoring and Reporting Program have been determined to be accurate and adequate  
16 documents which reflect the independent judgment of the City Council.

17       NOW, THEREFORE, the City Council of the City of Oceanside does resolve as  
18 follows:

- 19 1.       The Final Mitigated Negative Declaration and Mitigation and Monitoring and  
20 Reporting Program for the SR78 and Rancho Del Oro Digital Billboard Sign project is  
21 adopted, effective as of this day.
- 22 2.       Pursuant to Public Resources Code Section 21081.6 the City Council adopts the  
23 Mitigation Monitoring and Reporting Program (MMRP) attached as Exhibit "A" and  
24 finds and determines that said program is designed to ensure compliance with the  
25 mitigation measures during project implementation.
- 26 3.       Notice is HEREBY GIVEN that the time within which judicial review must be sought  
27 on this decision is governed by the provisions of Public Resources Code section  
28 21167(b).

1 PASSED and ADOPTED by the City Council of the City of Oceanside, California this  
2 24<sup>th</sup> day of June, 2015, by the following vote:

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AYES:  
NAYES:  
ABSENT:  
ABSTAIN:

\_\_\_\_\_  
Mayor of the City of Oceanside

ATTEST:

APPROVED AS TO FORM:  
  
\_\_\_\_\_  
City Attorney

\_\_\_\_\_  
City Clerk

## State Route 78 Digital Sign

### MITIGATION, MONITORING AND REPORTING PROGRAM

Mitigation Measure	Monitoring Type	Monitoring Department	Schedule
<b>AESTHETICS</b>			
<b>AESTH MM 1.</b> The disturbed native vegetation area will be revegetated as specified in the Landscape Plan/Erosion Control Plan component of the Grading Plan approved by the City of Oceanside.	Project	Planning / Engineering	Post Construction
<b>BIOLOGICAL RESOURCES</b>			
<b>BIO MM 1.</b> The proposed project mitigation for direct impacts to gnatcatcher occupied Diegan coastal sage scrub would consist of the preservation/conservation of 0.3-acre (3:1 mitigation to impact ratio, as provided in the Oceanside Subarea Habitat Conservation Plan/Natural Community Conservation Plan (SAP) <sup>i</sup> occupied Diegan coastal sage scrub within an approved mitigation bank located in the City of Oceanside. In addition, an on-site biological open space/conservation easement would not be feasible as mitigation for direct impacts to Diegan coastal sage scrub since the project site is already located within a City right-of-way.	Project	Planning / Engineering	Prior to Construction
<b>BIO MM 2.</b> To avoid direct impacts to the gnatcatcher onsite, the proposed project should conduct proposed project grading and vegetation clearing activities outside of the gnatcatcher breeding season (February 15-August 30). If avoidance of the avian breeding season is not feasible, the Wildlife Agencies recommend that beginning 30 days prior to the initiation of project activities, a qualified biologist with experience in conducting breeding bird surveys conduct weekly bird surveys to detect protected native birds occurring in suitable nesting habitat that is to be disturbed and any other such habitat within 300 feet of the disturbance area (within 500 feet for raptors or listed species). The surveys should continue on a weekly basis with the last survey being conducted no more than 3 days prior to the initiation of project activities. If a protected native bird is found, the project proponent should delay all project activities within 300 feet of on- and off-site suitable nesting habitat (within 500 feet for listed species nesting habitat) until August 31. Alternatively, the qualified biologist could continue the surveys in order to locate any nests. If an active nest is located, project activities within 300 feet of the nest (within 500 feet for listed species nests) or as	Project	Planning / Engineering	Prior to and During Construction

Mitigation Measure	Monitoring Type	Monitoring Department	Schedule
<p>determined by a qualified biological monitor, must be postponed until the nest is vacated and juveniles have fledged and there is no evidence of a second attempt at nesting. Flagging, stakes, and/or construction fencing should be used to demarcate the inside boundary of the buffer of 300 feet (or 500 feet) between the project activities and the nest. If the biological monitor determines that a narrower buffer between the project activities and observed active nests is warranted, he/she should submit a written explanation as to why to the City (and, upon request, the Wildlife Agencies, if they so request) will determine whether to allow a narrower buffer. The biological monitor shall be present on site during all grubbing and clearing of vegetation to ensure that these activities remain within the project footprint and that the flagging/staking/fencing is being maintained, and to minimize the likelihood that active nests are abandoned or fail due to project activities. The biological monitor shall send weekly monitoring reports to the City and shall notify the City immediately if project activities damage active avian nests.</p>			
<p><b>BIO MM 3.</b> The proposed project sign design shall include raptor deterrent devices on the top surface of the proposed sign to deter raptors from perching on the sign that may increase raptor predation on the local wildlife including gnatcatcher.</p>	Project	Planning / Engineering	Prior to Construction
<p><b>BIO MM 4.</b> The qualified biologist shall conduct a training session for all project personnel prior to any grading/construction activities. At a minimum, the training shall include a description of the gnatcatcher, its habitat, the general provisions of the Endangered Species Act (Act) and the MHCP, the need to adhere to the provisions of the Act, the general measures that are being implemented to conserve the gnatcatcher as they relate to the project, any provisions for wildlife movement, and the access routes to and project site boundaries within which the project activities must be accomplished.</p>	Project	Planning / Engineering	Prior to Construction
<p><b>BIO MM 5.</b> To mitigate for potential night lighting indirect impacts to gnatcatcher occupied Diegan coastal sage scrub, the proposed project shall preserve/conserve 1.7-acre (1:1 mitigation to impact ratio) gnatcatcher occupied Diegan coastal sage scrub within an approved mitigation bank in the City of Oceanside.</p>	Project	Planning / Engineering	Prior to Construction
<p><b>BIO MM 6.</b> Construction employees shall strictly limit their activities, vehicles, equipment, and construction materials to the proposed footprint and designated staging areas and routes of travel. The construction area(s) shall be the minimal</p>	Project	Planning / Engineering	Prior to and During Construction

Mitigation Measure	Monitoring Type	Monitoring Department	Schedule
area necessary to complete the project and shall be specified in the construction plans. Construction limits shall be fenced with orange snow screen. Exclusion fencing shall be maintained until the completion of all construction activities. All employees shall be instructed that their activities are restricted to the construction areas.			
<b>BIO MM 7.</b> A qualified biologist shall monitor construction activities throughout the duration of the project vegetation clearing and brushing activities to ensure that all practicable measures are being employed to avoid incidental disturbance of habitat and any target species of concern outside the project footprint. Construction monitoring reports shall be completed and provided to the City of Oceanside summarizing how the project is in compliance with applicable conditions. The project biologist shall be empowered to halt work activity if necessary and to confer with staff from the City of Oceanside to ensure the proper implementation of species and habitat protection measures.	Project	Planning / Engineering	During Construction
<b>BIO MM 8.</b> Any habitat destroyed that is not in the identified project footprint shall be disclosed immediately to the City of Oceanside, FWS, and CDFW and shall be compensated at a minimum ratio of 5:1.	Project	Planning / Engineering	During Construction
<b>BIO MM 9.</b> Implementation of standard construction Best Management Practices (BMPs) such as straw wattles and silt fencing will be installed where applicable prior to construction. Similarly, these BMPs would be maintained or replaced post-construction in preparation of the revegetation effort within temporary impact areas to avoid inadvertent impacts (e.g., erosion, runoff) to adjacent sensitive habitats/resources.	Project	Planning / Engineering	Prior to and During and Post Construction
<b>BIO MM 10.</b> Temporary impacts shall be returned to pre-existing contours and revegetated with appropriate native species to avoid and/or minimize weedy non-native species from invading adjacent native habitat. All revegetation plans shall be prepared and implemented consistent with Appendix C (Revegetation Guidelines of the Final MHCP Plan – Volume II) and shall require written concurrence of the FWS and CDFW.	Project	Planning / Engineering	Post Construction
<b>CULTURAL RESOURCES</b>			
<b>CULT MM 1.</b> 1. A City of Oceanside (City) approved Principal Investigator (PI) known as the	Project	Planning / Engineering	During Construction

Mitigation Measure	Monitoring Type	Monitoring Department	Schedule
<p>"Project Archaeologist," shall be contracted by the project applicant to perform cultural resource grading monitoring and a potential data recovery program during all grading, clearing, grubbing, trenching, and construction activities. The following shall be completed:</p> <ul style="list-style-type: none"> <li>a. The Project Archaeologist shall perform the monitoring duties before, during and after construction.</li> <li>b. The Project Archeologist shall provide evidence that a Native American of the appropriate tribal affiliation has also been contracted to perform Native American Grading Monitoring for the project.</li> <li>c. The applicant shall provide a copy of the Grading Monitoring Contract to the City prior to approval of any grading and or improvement plans and issuance of any Grading or Construction Permits.</li> </ul> <p>2 A final Grading Monitoring and Data Recovery Report that documents the results, analysis, and conclusions of all phases of the Archaeological Monitoring Program shall be prepared. The report shall include the following items:</p> <ul style="list-style-type: none"> <li>a. Daily Monitoring Logs</li> <li>b. Evidence that all cultural resources collected during the grading monitoring program has been curated at a San Diego facility that meets federal standards per 36 CFR Part 79, and therefore would be professionally curated and made available to other archaeologists/researchers for further study. The collections and associated records, including title, shall be transferred to an appropriate curation facility in San Diego County, to be accompanied by payment of the fees necessary for permanent curation. Evidence shall be in the form of a letter from the curation facility identifying that archaeological materials have been received and that all fees have been paid.</li> <li>c. If no cultural resources are discovered, a Negative Monitoring Report must be submitted stating that the grading monitoring activities have been completed. Daily Monitoring Logs must be submitted with the negative monitoring report.</li> </ul>			
<b>CULT MM 2.</b>	Project	Planning / Engineering	During Construction

Mitigation Measure	Monitoring Type	Monitoring Department	Schedule
<ol style="list-style-type: none"> <li>1. If human remains are discovered, there shall be no further excavation or disturbance of the site or any nearby area reasonably suspected to overlie adjacent human remains until the coroner of the county in which the remains are discovered is contacted to determine that no investigation of the cause of death is required.</li> <li>2. If the coroner determines the remains to be Native American, the coroner shall contact the Native American Heritage Commission within 24 hours.</li> <li>3. The Native American Heritage Commission shall identify and contact the person or persons it believes to be the most likely descended from the deceased Native American.  The most likely descendent may make recommendations to the landowner or the person responsible for the excavation work, for means of treating or disposing of, with appropriate dignity, the human remains and any associated grave goods as provided in <i>Public Resources Code</i> § 5097.98</li> </ol>			
<b>GEOLOGY AND SOILS</b>			
<b>GEO MM 1.</b>  <ol style="list-style-type: none"> <li>1. The project applicant shall prepare an erosion and sediment control plan and submit it to the City of Oceanside for review and approval prior to issuance of a grading permit.</li> <li>2. The erosion and sediment control plan shall outline methods that shall be implemented to control erosion from graded or cleared portions of the site, including but not limited to straw bales, sandbags, soil binders, diversion fences, desilting basins, etc.</li> <li>3. The erosion and sediment control plan shall be prepared in accordance with the City of Oceanside <i>Grading Regulations Manual</i> (Ordinance 92-15), which included <i>Erosion Control NPDES Permit Requirements</i>, and the <i>Standard Urban Storm Water Mitigation Plan</i> (SUSMP) Requirements for Development and Redevelopment Projects to the satisfaction of the City Engineer.</li> </ol>	Project	Planning / Engineering	Prior to Construction

## RESOLUTION NO.

**A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF OCEANSIDE, CALIFORNIA APPROVING A PROPERTY USE AGREEMENT BETWEEN THE CITY OF OCEANSIDE AND BGT MEDIA, LLC. FOR A DIGITAL SIGN WITHIN DEDICATED RIGHT OF WAY AT THE SOUTHERN TERMINUS OF RANCHO DEL ORO ROAD AND STATE ROUTE 78**

WHEREAS, pursuant to Article 33B, section 3318 of the Oceanside Zoning Ordinance (“OZO”), the City Council is authorized to approve proposals for private party signs on city property or city right of way upon a finding that the proposed sign is in the best interests of City through the promotion of city sponsored events and the dissemination of public safety and traffic messages; and

WHEREAS, the City conducted a Request for Proposals (RFP) in accordance with section 3318 of the OZO, and selected Applicant BGT Media, LLC for negotiations for the project site located within dedicated right of way at the southern terminus of Rancho Del Oro Road and State Route 78; and

WHEREAS, the property use agreement attached to the staff report includes provisions requiring the promotion of city sponsored events as well as the dissemination of public safety and traffic safety messages; and

WHEREAS, a Final Mitigated Negative Declaration was prepared and circulated for public and agency review and proper notification was given in accordance with the California Environmental Quality Act; and

WHEREAS, the Mitigated Negative Declaration together with any comments received, and Mitigation and Monitoring and Reporting Program (MMRP) incorporated by reference and appended in the Final Mitigated Negative Declaration, were presented to the City Council, and the City Council reviewed and considered the information contained in these documents prior to making a decision on the project.

WHEREAS, the Mitigated Negative Declaration and Mitigation and Monitoring and Reporting Program (MMRP) have been determined to be accurate and adequate documents, which reflect the independent judgment and analysis of the City Council. On the basis of the entire record before it, the City Council determined that there is no substantial evidence that the

1 project, with implementation of the mitigation measures proposed, will have a significant  
2 impact on the environment.

3 WHEREAS, the City Council, on the 24<sup>th</sup> day of June, 2015, did conduct a properly  
4 noticed public hearing to adopt the Final Mitigated Negative Declaration along with the  
5 Mitigation and Monitoring and Reporting Program; and

6 NOW therefore, the City Council of the City of Oceanside resolves as follows:

- 7 1. The Property Use Agreement between the City of Oceanside and BGT Media LLC  
8 contains required provisions to promote city sponsored events and to disseminate public  
9 safety and traffic messages and the City Council finds that the Property Use Agreement  
10 is in the best interests of the City.
- 11 2. The Property Use Agreement is hereby approved and the Mayor is authorized to execute  
12 the document upon receipt of all supporting documentation.

13  
14 PASSED and ADOPTED by the City Council of the City of Oceanside,  
15 California this 24<sup>th</sup> day of June, 2015, by the following vote:

16  
17 AYES:

18 NAYES:

19 ABSENT:

20 ABSTAIN:

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23 \_\_\_\_\_  
24 Mayor of the City of Oceanside

25  
26 ATTEST:

27 APPROVED AS TO FORM:

28 \_\_\_\_\_  
City Clerk

\_\_\_\_\_  
City Attorney

**PROPERTY USE AGREEMENT**

**BY AND BETWEEN**

**THE CITY OF OCEANSIDE**

**AND**

**BGT MEDIA, LLC**

**FOR A RIGHT-OF-WAY INTEREST IN REAL PROPERTY**

**LOCATED AT**

**THE TERMINUS OF RANCHO DEL ORO DRIVE AND STATE ROUTE 78**

**FOR**

**DIGITAL MESSAGE BOARD SIGN**

**DATED**

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# PROPERTY USE AGREEMENT

THIS PROPERTY USE AGREEMENT, herein after called "Agreement", dated as of \_\_\_\_\_ is executed between the CITY OF OCEANSIDE, a municipal corporation, hereinafter called "City", and BGT MEDIA, LLC, a California limited liability company, hereinafter called "Permittee".

## RECITALS

WHEREAS, City is the owner of that certain right-of-way interest in real property commonly known as the terminus of the Rancho del Oro Drive right-of-way at State Route 78 located in the City of Oceanside, County of San Diego, State of California;

WHEREAS, Permittee is a duly authorized limited liability company in the State of California in the business of developing, operating, managing and maintaining digital message board signs and related facilities; and

WHEREAS, City and Permittee are desirous of entering into an agreement for the use of an interest in real property by Permittee to enable Permittee to develop, operate, manage and maintain a digital message board sign thereon together with related activities in accordance with the City's Municipal Code.

NOW THEREFORE, the parties in consideration of the terms, conditions, covenants and provisions contained herein do mutually agree as follows:

## AGREEMENT

### SECTION 1: DEFINITIONS

**1.01 Definitions.** This section defines the terms used in this Agreement as follows:

- a. "Caltrans" means the State of California Department of Transportation.
- b. "Caltrans Permit" means and approvals and/or permits required by Caltrans to install and operate a Digital Sign adjacent to a State of California Highway within the City of Oceanside.
- c. "Commencement Date" means the date that is the earlier of the date Permittee

substantially completes the Permittee Improvements to the Property as set forth in Exhibit "C", as evidenced by a Notice of Completion and the Digital Sign (as hereinafter defined) is operational or twelve (12) months from the Effective Date.

d. **"Digital Sign"** means the outdoor digital message board advertising sign that Permittee will install and operate on the Property in accordance with the plans and specifications set forth in Exhibit "C, and shall consist of a Message Center and Sign Structure.

e. **"Effective Date"** means the date the Oceanside City Council approves the Agreement.

f. **"Hazardous Substances"** means any substances or material kept, stored or used in or on the Property as further defined in Section 8.05 below.

g. **"Message Center"** means the portion of the Digital Sign that consists of the digital display areas used for general commercial advertising, as more particularly described on attached Exhibit "C".

h. **"Operational"** means the Digital Sign is capable, legally and functionally, of displaying advertising messages on the Message Center.

i. **"Sign Structure"** means the portion of the Digital Sign other than the Message Center above ground, and includes, but is not limited to all ancillary equipment and utilities installed on the Property. The Sign Structure is more particularly described on attached Exhibit "C".

j. **"Space-Available Basis"** means anytime when Permittee has not sold out the display time on the Message Center.

k. **"Term"** means the entire time this Agreement is in effect. As specified in Section 3, it consists of the Initial Term, the Extended Term, and any period of holding over.

## SECTION 2: USES

2.01 **Property.** City hereby grants permission to Permittee and Permittee hereby agrees, in accordance with the terms, conditions, covenants, and provisions of this Agreement, to use that certain real property situated in the City of Oceanside, County of San Diego, State of California, commonly known as that certain right-of-way interest in real property commonly known as the terminus of the Rancho del Oro Drive right-of-way at State Route 78 and more particularly described and depicted in Exhibits "A" and "B" attached hereto and by this reference made a part of this Agreement. Said real property is hereinafter called the "Property."

2.01 a. **City Right-of-Way.** As a condition to the use of the Property, Permittee must provide written permission from the underlying property owner that said property owner approves the use of the right-of-way granted to the City for other than right-of-way purposes, including the placing of a Digital Sign as contemplated by this Agreement. Further, in the event the City and/or Caltrans is in need of the Property for right-of-way purposes or if the City makes required findings to vacate the right-of-way, in its sole and absolute discretion, the City shall, if feasible, cooperate in good faith with Permittee in identifying an alternative location within a City right-of-way in which the Property is situated, to relocate the Digital Sign. If the parties identify an alternative location, then (i) the parties will enter into an amendment to this Agreement establishing the new location, (ii) Permittee will have no less than one hundred eighty (180) days after mutually agreeing on the new location to relocate the Digital Sign, and (iii) Permittee shall be solely responsible for all costs associated with relocating the Digital Sign. In the event that, despite good faith efforts, the parties do not agree to a new location, City shall provide no less than one hundred eighty (180) days prior written notice to Permittee that this Agreement shall be terminated and Permittee shall, at its sole cost and expense, remove the Digital Sign within ninety (90) days thereafter, at which time this Agreement shall no longer be of any force or effect.

2.02 **Uses.** It is expressly agreed that the Permittee is granted permission to use the Property solely and exclusively for the purpose of operating a Digital Sign for the display of outdoor advertising together with related activities, and for such other related or incidental purposes as may be first approved in writing by the City Manager of the City of Oceanside and for no other purpose whatsoever. Permittee's exclusive right to conduct outdoor advertising on the Property includes the following:

- a. Installing, operating, maintaining, repairing, improving, and removing the Digital Sign on or from the Property when this Agreement terminates.
- b. All rights of ingress and egress over the Property that Permittee needs to access the Digital Sign.
- c. Licensing the use of the Digital Sign, or any portion of it, for any lawful purpose related to outdoor advertising, except that Permittee may not install non-digital signs on the Digital Sign without the City's prior consent, which the City may withhold or condition in its sole discretion.

2.03 **Prohibited Uses.** Permittee's exclusive right to conduct outdoor advertising on the Property shall not include the following:

- a. **Hazardous Substances.** Permittee shall not use, handle, store, transport, generate, release or dispose of any Hazardous Substances on, under, or about the Property.
- b. **Unlawful Activities.** Permittee shall not use or permit the Property to be used in

any way that violates this Agreement or any valid and applicable statute, ordinance, regulation, rule, or order of any federal, state, or local governmental entity (including the City of Oceanside). Permittee shall not maintain or commit, or permit the maintenance or commission of, any public or private nuisance as defined by any law applicable to the Property on or after the Effective Date. Permittee hereby waives any rights to compensation it may have if a court finds that the Digital Sign constitutes a public or private nuisance under any valid and applicable federal, state, or local law and for that reason orders Permittee to remove or modify the Digital Sign or to limit the operation of the Digital Sign.

c. **Encumbrances.** Except as set forth under Section 6.06, Permittee shall not encumber the Property or any part of the Property for any purpose, without the City's prior written consent, which the City may withhold for any reason. Permittee shall keep the Property free of all liens and other encumbrances other than those, if any, to which the City consents.

Permittee covenants and agrees to actively and continuously use and operate the Property for the above specified, limited and particular exclusive use and to diligently pursue said purposes throughout the term of this Agreement, except for failure to so use caused by reasons or events beyond the reasonable control of Permittee, including acts of God. Said active and continuous use and operation enhances the value of the public's asset, provides needed public services, additional employment, taxes and other benefits to the general economy of the area. In the event that Permittee fails to continuously use the Property for said purposes, or uses the Property for purposes not expressly authorized herein, Permittee shall be deemed in default under this Agreement. Except as set forth above, Permittee shall not use the Property in any manner which disrupts the quiet enjoyment of surrounding property owners' use of their property.

#### **2.04 Property and Permittee Improvements.**

a. **Condition of Property.** City shall deliver the Property to Permittee in an "as is, where is" condition without any representation or warranties as to the suitability of the Property for Permittee's intended use. Permittee hereby accepts the Property in said "as is, where is" condition and shall construct improvements thereon which are necessary for Permittee to occupy the Property for its intended use.

b. **Permittee Improvement Obligations.** Permittee shall perform all of the work required to be performed by Permittee pursuant to the scope of work and schedule more specifically set forth in Exhibit "C" ("Permittee Improvements") attached hereto and incorporated herein by this reference. Permittee shall begin installation of the Digital Sign as soon as practical after the Effective Date and shall diligently pursue installation to completion without unnecessary interruption so that the Digital Sign is operational before twelve (12) months after the Effective Date (subject to extension due to delays caused by reasons or events beyond the reasonable control of Permittee, including acts of God). Failure by Permittee to

perform the work as described and/or as scheduled shall be deemed a default under this Agreement.

**2.05 Related Discretionary Actions.** By the approval of this Agreement, neither City nor the City Council is obligating itself to any other governmental agent, board, commission, or agency with regard to any other discretionary action relating to development or operation of the Property except as expressly set forth herein. Discretionary action includes, but is not limited to rezoning, variances, conditional use permits, development plans, environmental clearances or any other governmental agency approvals which may be required for the development and operation of the Property.

**2.06 Advertising Rights.** During the term of this Agreement, Permittee will have the exclusive right to enter into agreements for advertising on the Digital Sign located on the Property, subject to the following:

**a. Operation of the Message Center.** In operating the Message Center, Permittee shall conform to all valid and applicable laws and regulations, including laws and regulations pertaining to outdoor advertising, and shall conform to the criteria set forth in Exhibit "D", attached hereto and incorporated herein by this reference. Further, Permittee shall not display any message that in the judgment of the City Manager or the City's Manager's designee that:

- (1) is false, misleading, or deceptive;
- (2) promote the sale or use of tobacco products, alcoholic beverages, or any illegal controlled substance, whether directly or indirectly, provided, however, an alcohol beverage company advertising an event as the sponsor (e.g., San Diego Padres baseball games, etc.) and not promoting an alcoholic beverage shall be not be prohibited under this subsection;
- (3) depict any illegal activity;
- (4) contains "obscene matter" as that term is defined in the California Penal Code Section 311, on the Effective Date, or promotes adult entertainment and/or any regulated use as that term is defined in Article 36 of the Oceanside Zoning Ordinance;
- (5) except as provided in Subsection b and c below, includes any non-commercial message, including any message promoting or opposing a candidate for elective office, a ballot measure or a political message;
- (6) holds a person or group of persons up to public ridicule, derision, or embarrassment, or defames a person or groups of persons; or

(7) contains language that is obscene, vulgar, profane, or scatological, or that presents a clear-and-present danger of causing a riot, disorder, or other imminent threat to public safety, peace, or order.

b. **Amber Alerts and Public-Service Messages.** Permittee shall make the Message Center available to Caltrans for the purpose of displaying "Amber Alert" messages in accordance with the Amber Alert Guidelines set forth in Exhibit "E" attached hereto and incorporated by this reference. In addition, Permittee shall make the message Center available to Caltrans, to the City, on a space-available basis and without cost, for the purpose of displaying public-service messages (e.g., reports of commute times, drunk-driving awareness messages, reports of serious accidents, emergency-disaster communications, etc).

c. **City Messages.** At the request of the City Manager or City Manager's designee, Permittee shall make the Message Center available to the City, on a space-available basis, but no event less than one (1) rotational "advertising display images" per sign face for two (2) one (1) week periods per year for the purpose of displaying the City's own commercial or non-commercial messages. The City's messages must meet Permittee's graphic-arts standards so that the messages are "camera ready", at no cost to Permittee. Permittee shall duplicate (e.g., digitalize), install, and display each City message for at least seven (7) consecutive days at no cost to the City.

d. **City Sign.** On each side of the Sign Structure, Permittee shall install, operate, maintain, and repair a City sign that faces the same direction as the display area on the Message Center. The size and design of the City Sign shall substantially comply with the criteria set forth in Exhibit "C".

**2.07 Quiet Possession.** Permittee, paying the rent and performing the covenants and agreements herein, shall at all times during the term hereof peaceably and quietly have, hold and enjoy the Property.

**2.08 Reservation of Rights.** City shall not unreasonably or substantially interfere with Permittee's use of the Property while Permittee is in possession of the Property; however the City specifically retains the following rights:

a. **Subsurface Rights.** City hereby reserves all rights, title and interest in any and all subsurface natural gas, oil, minerals and water on or within the Property.

b. **Easements.** City reserves the right to grant and use easements or to establish and use rights-of-way over, under, along and across the Property for utilities, thoroughfares, or access as it deems advisable for the public good.

c. **Right to Enter.** City has the right, but not the obligation, to enter the Property for the purpose of performing maintenance, inspections, repairs or improvements, or developing

municipal resources and services. City will pay the costs of the maintenance and repair of all City installations made pursuant to these reserved rights.

### **SECTION 3: TERM**

**3.01 Commencement.** The initial term of this Agreement shall be for a period of twenty-five (25) years (“Initial Term”) commencing on the earlier of the date Permittee substantially completes the Permittee Improvements to the Property as set forth in Exhibit “C”, as evidenced by a Notice of Completion and the Digital Sign is operational or twelve (12) months from the Effective Date (“Commencement Date”). Upon determination of the Commencement Date, Permittee shall execute a Commencement Date Memorandum confirming the actual date the Agreement commences and terminates. A copy of the Commencement Date Memorandum is shown in Exhibit “F” attached hereto and by this reference made a part of this Agreement.

**3.02 Renewal Options.** The Permittee shall have the option to extend the term of this Agreement for an additional twenty-five (25) years (“Extended Term”) under the same terms and conditions of this Agreement at the City’s calculated fair market rental rate, provided that the Permittee is not in default of this Agreement.

The Permittee may elect to extend the term of this Agreement provided that written notice from the Permittee is received by the City Manager no later than one hundred eight (180) days prior to the expiration of the Initial Term of this Agreement. No later than sixty (60) days from the receipt of the Permittee’s written election to extend the term of this Agreement the City Manager shall in writing provide the Permittee with the City’s calculated fair market rent (“FMR”) at which the City is willing to accept for the Property. No later than twenty (20) days after the City Manager provides the Permittee with the City’s determination of the FMR, the Permittee shall provide City with its agreement or disagreement of City’s FMR. If the City’s FMR is accepted by Permittee, the term of the Agreement shall be extended at such FMR.

If the Permittee gives notice of disagreement, the parties will use good faith effort to agree on FMR within the next fifteen (15) days. If the parties are unable to reach agreement during the fifteen (15) day period, then each party shall, by written notice to the other within five (5) business days after expiration of the fifteen (15) day period, select an appraiser. For a period of ten (10) days after designation of the second appraiser, the two appraisers so designated shall attempt to reach mutual agreement regarding FMR. If the two appraisers are unable to reach agreement, each of the two appraisers shall, not later than five (5) business days following the designation of the second appraiser, render separate written determination of FMR. The two appraisers shall also select a third appraiser prior to the end of the period when their separate appraisals must be rendered. Within five (5) business days after the appointment of the third appraiser, the third appraiser shall render a written determination of FMR. From the three appraisals, the appraisal which is farthest away from the median appraisal shall be disregarded

and the average of the remaining two (2) appraisals shall constitute the FMR. In no event shall the rental rate for the Extended Term be less than that required during the Initial Term.

If either the City or Permittee fails or refuses to select an appraiser, the other appraiser shall alone determine the FMR. Each party shall bear the fee and expenses of its own appraiser, and shall share equally the fee and expenses of the third appraiser, if any. Notwithstanding the foregoing or any provision of this Agreement to the contrary, within thirty (30) days following final determination of FMR by the appraisal process above, the Permittee shall have the right, in its sole and absolute discretion, to rescind any actual or alleged exercise of the option to extend for the Extended Term by delivering written non-renewal notice to the City.

**3.03 Conditions Precedent to Agreement.** As conditions precedent to the commencement of this Agreement, Permittee shall have completed, to its satisfaction, the following conditions with respect to the Property:

a. **Due Diligence.** Permittee shall have completed, to its satisfaction, the due diligence of the Property, to include but not be limited to, the determination of the condition of the Property, and the conditions of development and construction associated therewith, for Permittee's intended use of the Property. Further such Property due diligence included, but was not limited to, geotechnical analysis, availability of utilities and ingress and egress to the Property.

b. **Entitlements.** Permittee shall have completed all studies and analysis to obtain the required regulatory entitlements ("Regulatory Entitlements") needed by Permittee to conduct Permittee's business at the Property. Permittee agrees that it will use its best efforts and diligently pursue obtaining the required regulatory entitlements needed by Permittee. City agrees that its staff will cooperate with, and will not take actions that interfere with Permittee obtaining the Regulatory Entitlements.

c. **Other Regulatory Approvals.** Permittee shall have also obtained all other regulatory approvals, including but not limited to, a Caltrans Permits, needed for the placement of a Digital Sign adjacent to a State of California Highway. In the event that any of the foregoing conditions have not been completed to Permittee's satisfaction within twenty-four (24) months from the Effective Date, Permittee shall have the right, in its sole and absolute discretion to terminate this Agreement.

**3.04 Holdover.** Any holding over by Permittee after expiration or termination shall not be considered as a renewal or extension of this Agreement. The occupancy of the Property by Permittee or by Permittee's property after the expiration or termination of this Agreement constitutes a month-to-month tenancy, and all other terms and conditions of this Agreement, including rental adjustments, shall continue in full force and effect. In the event of any holding over, Permittee shall continue to, and pay monthly, the Rent as set forth in this Agreement or the fair market value for similar operations in the Southern California area, whichever is higher

during the holdover period.

**3.05 Abandonment by Permittee.** Even if Permittee breaches the Agreement and abandons the Property, this Agreement shall continue in effect for so long as City does not terminate this Agreement, and City may enforce all its rights and remedies hereunder, including but not limited to the right to recover any amounts owing under the Agreement as said amount becomes due, plus damages.

**3.06 Quitclaim of Permittee's Interest.** On termination of this Agreement for any reason, at City's sole discretion, City shall provide Permittee with and Permittee shall deliver to City a quitclaim deed in recordable form quitclaiming all its rights in and to the Property. Permittee or its successor in interest shall deliver the same within five (5) days after receiving written demand thereof. City may record such deed only on the expiration or earlier termination of this Agreement. If Permittee fails or refuses to deliver the required deed, the City may prepare and record a notice reciting Permittee's failure to execute this Agreement provision and the notice will be conclusive evidence of the termination of this Agreement and all Permittee's rights to the Property.

**3.07 Surrender of Property.** At the expiration or earlier termination of this Agreement, Permittee shall surrender the Property to City free and clear of all liens and encumbrances created by Permittee, except those liens and encumbrances which existed on the date of the execution of this Agreement by City. The Property, when surrendered by Permittee, shall be in a safe and sanitary condition and shall be in as good or better condition as the condition at commencement of this Agreement, absent normal wear and tear.

**3.08 Time is of Essence.** Time is of the essence of all of the terms, covenants, conditions and provisions of this Agreement.

#### **SECTION 4: CONSIDERATION**

**4.01 Time and Place of Payment.** Minimum Rent (as hereinafter defined) payments shall be due to City and payable by Permittee on the first (1<sup>st</sup>) day of the month.

Checks shall be made payable to the City of Oceanside and delivered to the City at the address set forth in Section 7 of this Agreement. The place and time of payment may be changed at any time by City upon thirty (30) days written notice to Permittee. Permittee assumes all risk of loss and responsibility for late payment charges. Permittee agrees to pay City an additional Twenty-Five and No/100 Dollars (\$25.00) for any returned check which is not honored by the financial institution from which the check is drawn.

#### **4.02 Rent.**

a. **General.** The total rent amount shall be equal to the Minimum Rent (as defined

by Subsection 4.02b through 4.02d) or the Percentage Rent (as defined by Subsection 4.02f), whichever is higher.

**b. Initial Minimum Rent Amount.** The Minimum Rent amount for the first (1st) year of this Agreement shall be One Hundred Eighty Thousand and No/100 Dollars (\$180,000) which shall be payable monthly in advance at the rate of Fifteen Thousand and No/100 Dollars (\$15,000) on or before the first (1st) day of each new month. Provided, however, for the first year of this Agreement the minimum monthly payments shall be as follows:

1 <sup>st</sup> – 3 <sup>rd</sup> months	\$0
4 <sup>th</sup> – 12 <sup>th</sup> months	\$15,000

The term "year" in this Agreement shall mean each twelve (12) month period beginning on the Commencement Date, if the Commencement Date is the first (1<sup>st</sup>) day of a calendar month, otherwise on the first day of calendar month immediately following the calendar month in which the Commencement Date occurs, and ending on the last day of the twelfth (12<sup>th</sup>) month thereafter; the first (1<sup>st</sup>) year of this Agreement shall include any partial month in which the Commencement Date occurs if the Commencement Date occurs on a day other than the first (1<sup>st</sup>) day of the month.

**c. Minimum Rent Adjustment Date.** The Minimum Rent Adjustment Date shall be the first (1<sup>st</sup>) day of the month of each year follow the first anniversary of the Commencement Date of this Agreement. The Minimum Rent amount, and the corresponding prorated monthly payments under this Agreement shall be adjusted on each Minimum Rent Adjustment Date as set forth below.

**d. Adjustment Index.** The index used will be the semi-annual Consumer Price Index for "All Urban Consumers" for San Diego, California. If this index is no longer published, the index for adjustment will be the U.S. Department of Labor's "Comprehensive Official Index" most comparable to the aforesaid index.

If the Department of Labor indices are no longer published, another index generally recognized as authoritative will be substituted by agreement of City and Permittee. If the parties cannot agree within sixty (60) days after demand by either party, a substitute index will be selected by the Chief Officer of the Regional Office of the Bureau of Labor Statistics or its successor. Any reference in this Agreement to "CPI" or "index" shall mean the index used in accordance with this Subsection 4.02d.

Regardless of the index publication dates, the Minimum Rent Adjustment Dates shall be the dates defined by Subsection 4.02c above. Until the Minimum Rent adjustment can be actually calculated in accordance with this Agreement, Permittee shall continue to make payments at the existing rental rate. When the adjustment is calculated, the balance of rents due at the adjusted rate, from the Minimum Rent Adjustment Date through the date of calculation,

will be paid to City within thirty (30) days of written notice by the City. In no event shall the adjusted rent as established by the CPI be less than the rent in existence immediately prior to the adjustment dates.

**e. Minimum Rent Adjustment Computation.** The annual Minimum Rent adjustment shall be computed in accordance with the following definitions and formulas:

Definitions:

**Initial Minimum Annual Rent:** The Minimum Annual Rent at the commencement of this Agreement as listed in Subsection 4.02.b above.

**Existing Minimum Annual Rent:** The existing Minimum Annual Rent shall be the Minimum Annual Rent amount in effect on the date preceding the Minimum Rent Adjustment Date.

**Percent change in the CPI:** The percent change in the CPI shall be the percent change in the San Diego All Consumer Index over the preceding twelve (12) month period covered by the most recent publication of the Index.

Rent Adjustment Formulas:

**First Adjustment:** Initial Minimum Annual Rent + (Initial Minimum Annual Rent times the percent change in the CPI) = New Minimum Annual Rent.

For example:  $\$100 + (\$100 \times 4\%) = \$104$

**Subsequent Adjustments:** Existing Minimum Annual Rent + (Existing Minimum Annual Rent times the percent change in the CPI) = New Minimum Annual Rent.

For example:  $\$104 + (\$104 \times 4\%) = \$108.16$

However, in no event shall the adjusted rent increase be less than two percent (2%) nor more than four percent (4%) per year.

**f. Percentage Rent.** The Percentage Rent shall be twenty-five percent (25%) of the gross income, (as defined in Subsection 4.02g), less the Minimum Rent paid by Permittee for the year during which the yearly gross income was calculated.

The Percentage Rent shall be payable to City in arrears not later than twenty (20) days following the end of each year of the term of this Agreement as required in Section 4.01 hereinabove.

**g. Gross Income.** Gross income as used herein shall mean all income received by Permittee from the sale of goods or services on or from the Property or any other income received by Permittee as a result of the use of the Property. Gross income shall include the amount of any manufacturer's or importer's excise tax included in the price of any property or material sold, even though the manufacturer or importer is also the retailer thereof, and it is immaterial whether the amount of such excise tax is stated as a separate charge. Provided, however, gross income shall not include advertising agency commissions that are standard in the industry (which total advertising agency commissions shall not exceed fifteen percent (15%) of the gross income calculated for any year of the Agreement). Further, gross income shall not include federal, state or municipal taxes collected from the consumer regardless of whether the amount thereof is stated to the consumer as a separate charge and paid over periodically by Permittee to a governmental agency accompanied by a tax return or statement as required by law. Possessory interest taxes or other property taxes shall not be deducted by Permittee in computing gross income. Gross income shall not include refunds for goods returned for resale on the Property or refunds of deposits. The amount of such taxes and refunds shall be clearly shown on the books and records of Permittee. Gross income shall include income received by Permittee or by any permittee or licensee, or their agents, and all gross income received by any permittee, licensee, or other party as a result of the use of said Property or the operation thereof. Gross income shall be calculated at the end of each year of the term of this Agreement. The first yearly gross income calculation shall be made one (1) year after the commencement date of this Agreement.

**h. Percentage Rent Related Reports.** The Percentage Rent shall be calculated at the end of each year of the term of this Agreement. The yearly percentage rent report ("Percentage Rent Report") shall be delivered to the City yearly in arrears not later than twenty (20) days following the end of each year of the term of this Agreement. Notwithstanding that the Percentage Rent Report is provided yearly, the Percentage Rent Report shall show gross income, advertising agency commissions, Percentage Rent, etc., calculated on monthly basis during the year just ended.

**4.03 Utilities.** Permittee agrees to order, obtain and pay for all utilities (e.g. electricity, water service) and telecommunication services for the Property in connection with the installation, operation, and maintenance of the Digital Sign and/or the Property.

**4.04 Inspection of Records.** Permittee shall maintain accurate financial books and records for the operation of its business provided at, or from, the Property. Said books and records shall be maintained in accordance with normal business standards and good accounting practice. Permittee agrees to make any and all records and accounts available to City for inspection at all reasonable times, so that City can determine Permittee's compliance with this Agreement. These records and accounts will be made available by Permittee at the Property or City's offices and will be complete and accurate showing all income and receipts from Permittee's use of the Property. Permittee's failure to keep and maintain such records and make them available for inspection by City is a default of this Agreement. These records include but

are not limited to generally accepted business books, documents, and records. Permittee shall maintain all such books, records and accounts for the term of this Agreement. This provision shall survive the expiration or sooner termination of this Agreement.

**4.05 Delinquent Payments.** If Permittee fails to pay any amount within five (5) days after City delivers notice that such payment is delinquent, then Permittee will pay in addition to the unpaid amount, five percent (5%) of the delinquent rent. If said amount is still unpaid at the end of fifteen (15) days after delivery of such notice, Permittee shall pay an additional five percent (5%) [being a total of ten percent (10%)] which is hereby mutually agreed by the parties to be appropriate to compensate City for loss resulting from delinquency, including lost interest, opportunities, legal costs, and the cost of servicing the delinquent account. Acceptance of late charges and any portion of the late payment by City shall in no event constitute a waiver by City of Permittee default with respect to late payment, nor prevent City from exercising any of the other rights and remedies granted in this Agreement.

## **SECTION 5: INSURANCE RISKS/SECURITY**

**5.01 Indemnity.** To the greatest extent allowed by law, Permittee shall defend, indemnify and hold harmless the City and its elected officials, officers, agents and employees (“Indemnified Parties”) against all lawsuits or actions for damages to persons or property arising out of the acts, errors, omissions, or conduct of the Permittee, or its employees, agents, subcontractors, or others in connection with the activities covered by this Agreement.

Permittee shall also defend, indemnify and hold the Indemnified Parties harmless from and against any suits or actions for damages or equitable relief that: 1) Challenge the validity or seek to set aside, void, or annul the City’s approval of this Agreement and/or related environmental review; and/or 2) Challenge facially or on an as-applied basis the legality of the ordinances authorizing the Digital Sign authorized by this Agreement, including but not limited to, any claim asserting the City is compelled to approve off-site advertising on another public or private site in the City due in whole or part to the City’s approval of this Agreement.

Permittee’s indemnification shall include any and all costs, expenses, attorneys’ fees, expert fees and liability assessed against or incurred by the Indemnified Parties in defending against such claims or lawsuits, whether the same proceed to judgment or not. Further, Permittee, at its own expense shall, upon written request by the City, defend any suit or action brought against the Indemnified Parties subject to this Section, including the appointment of counsel for the Indemnified Parties acceptable to the City Attorney.

Permittee’s indemnification of the Indemnified Parties shall not be limited by any prior or subsequent declaration by the Permittee and shall survive termination of this Agreement.

**5.02 Insurance.** Permittee shall take out and maintain at all times during the term of this Agreement, commencing the Effective Date of the Agreement, the following insurance at its

sole expense:

- a. Permittee shall maintain the following minimum limits:

**General Liability**

Combined Single Limit Per Occurrence	\$2,000,000
General Aggregate	\$4,000,000

**All Risk**

Insurance covering all of the Permittee Improvements, trade fixtures, merchandise and personal property in the Property, alterations and additions made by Permittee, in an amount not less than 100% of their full replacement, providing protection against perils included in the standard state form of all-risk insurance policy, plus insurance against vandalism and malicious mischief.

b. All insurance companies affording coverage to the Permittee shall be required to add the City of Oceanside as "additional insured" under the insurance policy(s) required in accordance with this Agreement.

c. All insurance companies affording coverage to the Permittee shall be insurance organizations authorized by the Insurance Commissioner of the State Department of Insurance to transact business of insurance in the State of California.

d. All insurance companies affording coverage shall provide thirty (30) days written notice to the City should the policy be cancelled before the expiration date. For the purposes of this notice requirement, any material change in the policy prior to the expiration shall be considered a cancellation.

e. Permittee shall provide evidence of compliance with the insurance requirements listed above by providing a certificate of insurance, in a form satisfactory to the City Attorney, concurrently with the submittal of this Agreement.

f. Permittee shall provide a substitute certificate of insurance no later than thirty (30) days prior to the policy expiration date. Failure by the Permittee to provide such a substitution and extend the policy expiration date shall be considered a default by Permittee and may subject the Permittee to a termination of this Agreement.

g. Maintenance of insurance by the Permittee as specified in this Agreement shall in no way be interpreted as relieving the Permittee of any responsibility whatever and the Permittee

may carry, at its own expense, such additional insurance as it deems necessary.

h. If Permittee fails or refuses to take out and maintain the required insurance, or fails to provide the proof of coverage, City has the right to obtain the insurance. Permittee shall reimburse City for the premiums paid with interest at the maximum allowable legal rate then in effect in California. City shall give notice of the payment of premiums within thirty (30) days of payment stating the amount paid; the names of the insurer(s); and the rate of interest. Said reimbursement and interest shall be paid by Permittee on the first (1st) day of the month following the notice of payment by City.

Notwithstanding the preceding provisions of this Subsection, any failure or refusal by Permittee to take out or maintain insurance as required in this Agreement, or failure to provide the proof of insurance, shall be deemed a default under this Agreement.

i. **Modification.** City, at its discretion, may require the revision of amounts and coverage at any time during the term of this Agreement by giving Permittee sixty (60) days prior written notice. City's requirements shall be designed to assure protection from and against the kind and extent of risk existing on the Property. Permittee also agrees to obtain any additional insurance required by City for new improvements, in order to meet the requirements of this Agreement.

**5.03 Accident Reports.** Permittee shall, within seventy-two (72) hours after occurrence, report to City any accident causing property damage or any serious injury to persons on the Property. This report shall contain the names and addresses of the parties involved; a statement of the circumstances; the date and hour; the names and addresses of any witnesses; and other pertinent information.

## **SECTION 6: IMPROVEMENTS/ALTERATIONS/REPAIRS**

**6.01 Acceptance of Property.** Permittee represents and warrants that it has independently inspected the Property and made all tests, investigations, and observations necessary to satisfy itself of the condition of the Property, including but not limited to an environmental assessment and/or geotechnical analysis of the Property. Permittee acknowledges it is relying solely on such independent inspection, tests, investigations, and observations in making this Agreement. Permittee further acknowledges that Property is in the condition called for by this Agreement and that Permittee does not hold City responsible for any defects in the Property which were not directly caused by City.

**6.02 Waste, Damage, or Destruction.** Permittee shall give written notice to City of any fire or other damage that occurs on the Property within seventy-two (72) hours of such fire or damage. Permittee shall not commit or suffer to be committed any waste or injury or any public or private nuisance, agrees to keep the Property clean and clear of refuse and obstructions, and to

dispose of all garbage, trash, and rubbish in a manner satisfactory to City. If the Property shall be damaged by any cause which puts the Property into a condition which is not decent, safe, healthy and sanitary, Permittee agrees to make or cause to be made full repair of said damage and to restore the Property to the condition which existed prior to said damage; or, at City's option, and upon receipt of written demand thereof, Permittee agrees to clear and remove from the Property all debris resulting from said damage and rebuild the Property in accordance with plans and specifications previously submitted to City and approved in writing in order to replace in kind and scope the operation which existed prior to such damage. Permittee shall be responsible for all costs incurred in the repair and restoration, or rebuilding of the Property.

**6.03 Maintenance.** As part of the consideration for the Agreement, Permittee agrees to assume full responsibility and cost for the operation, maintenance and repair of the Property, including without limitation, any access road to the Property used by Permittee and the Permittee Improvements throughout the term of this Agreement and without expense to City. Provided, however, Permittee's responsibility and cost of said access road to the Property (provided said access road is used by others, including but not limited to, other third parties, and the general public and the City) shall be limited to Permittee's prorata share thereof, as determined by City, in its reasonable-discretion. Permittee will perform all maintenance, repairs and replacements necessary to maintain and preserve the Property in a decent, safe, healthy, and sanitary condition satisfactory to City and in compliance with all applicable laws. Permittee further agrees to provide approved containers for trash and garbage and to keep the Property free and clear of rubbish and litter, or any other fire hazards. Permittee waives all right to make repairs at the expense of City as provided in Section 1942 of the California Civil Code and all rights provided by Section 1941 of said code.

For the purpose of keeping the Property in a good, safe, healthy and sanitary condition, City shall always have the right, but not the duty, to enter, view, inspect, determine the condition of, and protect its interests in, the Property. In the event that City finds that the Property is not in a decent, safe, healthy, and sanitary condition, Permittee must perform the necessary maintenance, repair or replacement work within ten (10) days after written notice from City. In the event Permittee fails to perform such work, City shall have the right, upon written notice to Permittee, to have any necessary maintenance work done at the expense of Permittee, and Permittee shall promptly pay any and all costs incurred by City in having such necessary maintenance work done, in order to keep said Property in a decent, safe, healthy, and sanitary condition. Permittee shall make payment no later than ten (10) days after City's written demand. City shall not be required at any time to perform maintenance or to make any improvements or repairs whatsoever, on or for the benefit of the Property. The rights reserved in this section shall not create any obligations or increase obligations for City elsewhere in this Agreement.

**6.04 Improvements/Alterations.** Except as set forth in Exhibit "C", no improvements, structures, or installations shall be constructed on the Property, and the Property may not be altered by Permittee without prior written approval by the City Manager. Further, Permittee agrees that major structural or architectural design alterations to approved

improvements, structures, or installations may not be made on the Property without prior written approval by the City Manager and that such approval shall not be unreasonably withheld. This provision shall not relieve Permittee of any obligation under this Agreement to maintain the Property in a decent, safe, healthy, and sanitary condition, including structural repair and restoration of damaged or worn improvements. City shall not be obligated by this Agreement to make or assume any expense for any improvements or alterations.

**6.05 Liens.** Permittee shall not, directly or indirectly, create, incur, assume or suffer to exist any mortgage, pledge, lien, charge, and encumbrance or claim on or with respect to all or any portion of the Property without the prior written consent of the City Manager. Permittee shall promptly, at its own expense, take such action as may be necessary to duly discharge or remove any such mortgage, pledge, lien, charge, and encumbrance or claim on or with respect to all or any portion of the Property for which Permittee does not have the prior written consent of the City Manager.

**6.06 Encumbrance.** Upon receiving prior consent by the City Manager, which consent shall not be unreasonably withheld, Permittee may encumber this Agreement, its possession of the Property and its improvements thereon by deed of trust, mortgage, chattel mortgage or other security instrument to assure the payment of a promissory note or notes of Permittee, upon the express condition that the net proceeds of such loan or loans be devoted exclusively to the purpose of developing and/or improving the Property. However, a reasonable portion of the loan proceeds may be disbursed for payment of incidental costs of construction, including but not limited to the following: off-site improvements for service of the Property; on-site improvements; escrow charges; premiums for hazard insurance, or other insurance or bonds required by City; title insurance premiums; reasonable loan costs such as discounts, interest and commissions; and architectural, engineering and attorney's fees and such other normal expenses incidental to such construction.

Any subsequent encumbrances on the Property or on any permanent improvements thereon shall also have prior approval in writing of City Manager. Such subsequent encumbrances shall also be for the exclusive purpose of development of the Property or otherwise to the benefit of the City at the discretion of the City Manager. Any deed of trust, mortgage or other security instrument shall be subject to all of the terms, covenants and conditions of this Agreement and shall not amend or alter any of the terms, covenants or conditions of this Agreement.

**6.07 Taxes.** Permittee shall pay, before delinquency, all taxes, assessments, and fees assessed or levied upon Permittee or the Property, including the land, any buildings, structures, machines, equipment, appliances, or other improvements or property of any nature whatsoever erected, installed, or maintained by Permittee or levied by reason of the business or other Permittee activities related to the Property, including any licenses or permits.

Permittee recognizes and agrees that this Agreement may create a possessory interest

subject to property taxation, and that Permittee may be subject to the payment of taxes levied on such interest, and that Permittee shall pay all such possessory interest taxes.

**6.08 Signs.** With the exception of the Digital Sign, Permittee shall not erect or display any banners, pennants, flags, posters, other signs, decorations, marquees, awnings, or similar devices or advertising without the prior written consent of the City Manager and any such device(s) shall conform to all City of Oceanside ordinances and regulations. If any such unauthorized item is found on the Property, Permittee shall remove the item at its expense within twenty-four (24) hours of written notice thereof by City, or City may thereupon remove the item at Permittee's cost.

**6.09 Ownership of Improvements and Personal Property.**

**a.** Any and all improvements, trade fixtures, structures, and installations or additions to the Property constructed on the Property by Permittee, excepting such improvements and operating equipment placed on the Property by Permittee which may be removed without causing damage to the Property, shall at Agreement expiration or termination be deemed to be part of the Property and shall become, at City's option, City's property, free of all liens and claims except as otherwise provided in this Agreement. Notwithstanding anything herein to the contrary, in the event this Agreement is terminated for any reason, Permittee shall have the right to remove the Message Center and the center post section of the Sign Structure, and the parties acknowledge that such portions can be removed only without causing damage to the Property.

**b.** If City elects not to assume ownership of all or any improvements, trade fixtures, structures and installations, City shall so notify Permittee in writing thirty (30) days prior to expiration or termination of this Agreement, and Permittee shall remove all such improvements, structures and installations as directed by City at Permittee's sole cost and expense on or before Agreement expiration or termination. If Permittee fails to remove any improvements, structures, and installations as directed, Permittee agrees to pay City the full cost of any removal.

**c.** Permittee owned machines, appliances, equipment (other than trade fixtures), and other items of personal property, except as described as Permittee Improvements shall be removed by Permittee by the date of the expiration or termination of this Agreement. At City's election, any said items which Permittee fails to remove will be considered abandoned and become City's property free of all claims and liens, or City may, at its option, remove said items at Permittee's expense.

**d.** If any removal of such personal property by Permittee results in damage to the remaining improvements on the Property, Permittee shall repair all such damage.

**6.10 Eminent Domain.** If all or part of the Property is taken through condemnation proceedings or under threat of condemnation by any public authority with the power of eminent domain, the interests of City and Permittee (or beneficiary or mortgagee) will be as follows:

a. **Total Taking.** In the event the entire Property is taken, this Agreement shall terminate on the date of the transfer of title or possession to the condemning authority, whichever first occurs.

b. **Partial Taking.** In the event of a partial taking, if, in the opinion of Permittee, the remaining part of the Property is unsuitable for the use as set forth in this Agreement, this Agreement shall terminate on the date of the transfer of title or possession to the condemning authority, whichever first occurs.

In the event of a partial taking, if, in the opinion of Permittee, the remainder of the Property is suitable for continued Agreement operation, this Agreement shall terminate in regard to the portion taken on the date of the transfer of title or possession to the condemning authority, whichever first occurs, and the Digital Sign may be relocated to the portion of the Property not taken. The minimum rent shall be equitably reduced to reflect the portion of the Property taken.

c. **Award.** All monies awarded in any such taking of the Property shall belong to City, whether such taking results in diminution in value of Permittee's use of the Property or the fee or both; provided, however, Permittee shall be entitled to any award attributable to the taking of or damages to Permittee's then remaining use of the Property and/or interest in the installations or improvements of Permittee. City shall have no liability to Permittee for any award not provided by the condemning authority.

d. **Repayment of Permittee Improvements.** In the event of a total taking and the City is not awarded any monies by the condemning authority in connection therewith, the City shall not be responsible for any remaining unamortized portion cost of the Permittee Improvements as more specifically set forth in Exhibit "C" subject to Subsection 6.10c., above. In the event of a partial taking and the City is not awarded any monies by the condemning authority in connection therewith, the Permittee Improvements shall be allocated according to the remainder of the Property and Permittee shall be responsible for the unamortized portion of the cost of the Permittee Improvements applicable to the portion of the Property so taken.

e. **Transfer.** City has the right to transfer City's interests in the Property in lieu of condemnation to any authority entitled to exercise the power of eminent domain. If a transfer occurs, Permittee shall retain whatever interest it may have in the fair market value of any improvements placed by it on the Property in accordance with this Agreement.

f. **No Inverse Condemnation.** The exercise of any City right under this Agreement shall not be interpreted as an exercise of the power of eminent domain and shall not impose any liability upon City for inverse condemnation so long as such rights do not unreasonably or substantially interfere with Permittee's operations.

#### 6.11 Damage or Destruction to Improvements.

a. **Permittee Reconstruction.** If any item which Permittee is required to insure pursuant to the terms of this Agreement is damaged or destroyed by fire or other risks to be so insured, Permittee (subject to being able to obtain all necessary permits and approvals) shall, as soon as reasonably practical, commence to repair or reconstruct such items to substantially the same condition in which they were prior to such damage or destruction and prosecute the same diligently to completion.

b. In the event the Digital Sign is materially damaged by a casualty for which Permittee is not required to maintain insurance, Permittee may promptly repair and restore the Digital Sign or terminate this Agreement in lieu of repairing and restoring the Digital Sign. Provided Permittee is diligently performing work to repair and restore casualty damage to the Digital Sign, Minimum Rent shall be abated during the period commencing on the date of the casualty and continuing until the Digital Sign is again Operational, but in no event shall the period of abate exceed three hundred and sixty (360) days. If the Digital Sign is materially damaged by a casualty that occurs during the last two (2) years of the term of this Agreement (whether or not the casualty is insured), Permittee may terminate this Agreement in lieu of repairing and restoring the Digital Sign.

## **SECTION 7: GENERAL PROVISIONS**

**7.01 Notices.** All notices, demands, requests, consents or other communications which this Agreement contemplates or authorizes, or requires or permits either party to give to the other, shall be in writing and shall be personally delivered or mailed to the respective party as follows:

To City:

CITY OF OCEANSIDE  
Property Management Division  
300 North Coast Highway  
Oceanside, CA 92054

Attention: Real Estate Manager

To Permittee:

BGT Media, LLC  
Post Office Box 596  
Oceanside, CA 92049

Attention: Tom Missett

Either party may change its address by notice to the other party as provided herein.

Communications shall be deemed to have been given and received on the first to occur of: i) actual receipt at the offices of the party to whom the communication is to be sent, as designated above; or (ii) three (3) working days following the deposit in the United States Mail of registered or certified mail, postage prepaid, return receipt requested, addressed to the offices of the party to whom the communication is to be sent, as designated above.

**7.02 City Approval.** The City Manager shall be the City's authorized representative in the interpretation and enforcement of all work performed in connection with this Agreement. The City Manager may delegate authority in connection with this Agreement to the City Manager's designee(s).

**7.03 Nondiscrimination.** Permittee agrees not to discriminate in any manner against any person or persons on account of race, marital status, familial status, sex, religious creed, color, ancestry, national origin, age, disability, medical condition or sexual orientation in Permittee's use of the Property.

**7.04 Equal Opportunity.** Permittee shall take affirmative action to assure applicants are employed and that employees are treated during employment without regard to race, religious creed, color, religion, sex or national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age or sexual orientation. Permittee shall certify in writing to City that Permittee is in compliance and throughout the term of this Agreement will comply with Title VII of the Civil Rights Act of 1964, as amended, the California Fair Employment Practices Act, and any other applicable Federal, State and Local law, regulation and policy (including without limitation those adopted by City) related to equal employment opportunity and affirmative action programs, including any such law, regulation, and policy hereinafter enacted.

Compliance and performance by Permittee of the equal employment opportunity and affirmative action program provision of this Agreement is an express condition hereof and any failure by Permittee to so comply and perform shall be a default of this Agreement and City may exercise any right as provided herein and as otherwise provided by law.

**7.05 Entire Agreement.** This Agreement contains the entire understanding between the City and Permittee concerning the use and occupation of the Property and supersedes all prior negotiations, representations, or agreements. Each party has relied on its own examination of the Property, advice from its own attorneys, and the warranties, representations, and covenants of the Agreement itself.

**7.06 Interpretation.** The interpretation, validity and enforcement of the Agreement shall be governed by and construed under the laws of the State of California. The venue of any

judicial action brought to enforce any condition, covenant or provision of this Agreement shall be in San Diego County, California. The Agreement does not limit any other rights or remedies available to City.

The Permittee shall be responsible for complying with all Local, State, and Federal laws whether or not said laws are expressly stated or referred to herein. In addition, as a condition of this Agreement, Permittee shall comply with all environmental mitigation measures required by any environmental review process (e.g., mitigated negative declaration) as provided by the City Council.

Should any provision herein be found or deemed to be invalid, the Agreement shall be construed as not containing such provision, and all other provisions which are otherwise lawful shall remain in full force and effect, and to this end the provisions of this Agreement are severable.

This Agreement shall inure to the benefit of and be binding upon the parties hereto and their respective heirs, successors, and assigns.

**7.07 Agreement Modification.** This Agreement may not be modified orally or in any manner other than by an Agreement in writing signed by the parties hereto.

**7.08 Waiver.** Any City waiver of a default is not a waiver of any other default. Any waiver of a default must be in writing and be executed by the Redevelopment Manager in order to constitute a valid and binding waiver. City delay or failure to exercise a remedy or right is not a waiver of that or any other remedy or right under this Agreement. The use of one remedy or right for any default does not waive the use of another remedy or right for the same default or for another or later default. City's acceptance of any amounts associated with this Agreement is not a waiver of any default preceding the amount payment. City and Permittee specifically agree that the property constituting the Property is City owned and held in trust for the benefit of the citizens of the City of Oceanside and that the failure of the City Manager or City staff to discover a default or take prompt action to require the cure of any default shall not result in an equitable estoppel, but City shall at all times, subject to applicable statute of limitations, have the legal right to require the cure of any default when and as such defaults are discovered or when and as the City Council directs the City Manager to take action or require the cure of any default after such default is brought to the attention of the City Council by the City Manager or by any concerned citizen.

**7.09 Attorney's Fees.** In the event of a dispute between the parties arising of this Agreement the prevailing party shall be entitled to recover its reasonable attorney's fees and other costs and expenses incurred, including attorney's fees on appeal, and all other reasonable costs and expenses for investigation of such action, including the conducting of discovery, in addition to whatever other relief to which may be entitled.

**7.10 Assignment, Transfer, Disposition or Delegation.** A major consideration for this Agreement is the unique expertise of Permittee in the operation and management of a Digital Sign on the Property. Accordingly, notwithstanding anything herein to the contrary, Permittee shall not assign, transfer, dispose of, delegate to, contract for and/or allow (individually or collectively referred to as a "Disposition") another individual or entity to operate and/or manage the Digital Sign at the Property. Further, there shall not be a Disposition of this Agreement or any portion thereof, nor shall any of the Permittee's duties be delegated, without the express written consent of City, which consent shall not unreasonably be withheld. Any attempt of a Disposition of this Agreement without the express written consent of City shall be void and of no force or effect. Consent by City to one Disposition shall not be deemed to be consent to any subsequent Disposition.

**a. Consideration for Approved Disposition.** In the event a Disposition of all or any portion of this Agreement is approved by the City pursuant to Section 7.10 above, in addition to any other terms and conditions for the approval of a Disposition as set forth by City, Permittee agrees to pay City, prior to the effectuation of, and as a condition to such Disposition, a "Disposition Premium" as follows:

- 1) in the event of a Disposition whereby Permittee is receiving an amount in excess of the Rent, Additional Rent or other consideration that Permittee is paying to the City under the terms of this Agreement (collectively or individually "Consideration"), Permittee shall pay City ten percent (10%) of any and all amounts received by Permittee in excess of such Consideration paid by Permittee to City under this Agreement; and/or
- 2) in the event such Disposition is in connection with a conveyance of Permittee's rights and obligations pursuant to this Agreement (e.g., a "buy-out", "sale" or other similar arrangement of Permittee's interests), Permittee shall pay City ten percent (10%) of the consideration received by Permittee in connection with such a transaction.

**b. Consideration Exclusion.** Notwithstanding Section 7.10(a) above, any Disposition of all or any portion of this Agreement between BGT Media, LLC to an entity with a proven track record in the business of operating Digital Signs, subject to the approval of the City, in its absolute discretion, that occurs no later than twenty four (24) months after this Agreement is executed by the parties hereto, shall be exempt from the Disposition Premium otherwise required by the terms of Section 7.10(a) above.

**7.11 Defaults and Termination.** It is mutually understood and agreed that if any default be made in the payment of amounts as herein provided or in the performance of the covenants, conditions, or agreements herein, including any terms and conditions of this Agreement (any covenant or agreement shall be construed and considered as a condition); or should Permittee fail to fulfill in any manner the uses and purposes for which the Property are used as stated in this Agreement, and such default is not cured within ten (10) days after written notice thereof if default is in the submittal of amounts due as required in this Agreement; or

fifteen (15) days after written notice thereof if default is in the performance of the failure to use provisions pursuant to Section 2.02 of this Agreement; or thirty (30) days after written notice thereof if default is in the performance of any other covenant, condition and agreements (any covenant or agreement shall be construed and considered as a condition), City shall have the right to immediately terminate this Agreement; however, if the default is a non-monetary default and more than fifteen (15) days is reasonably required to cure the default, this Agreement shall not terminate if Permittee commences to cure in the fifteen (15) day period after notice and thereafter diligently pursues the cure to completion. In the event of such termination, Permittee shall have no further rights hereunder and Permittee shall thereupon forthwith remove from the Property and shall have no further right to claim thereto, and City shall immediately thereupon, without recourse to the courts, have the right to reenter and take possession of the Property. City shall further have all other rights and remedies as provided by law, including without limitation the right to recover damages from Permittee in the amount necessary to compensate City for all the detriment proximately caused by the Permittee's failure to perform its obligations under the Agreement or which in the ordinary course of things would be likely to result there from.

In the event City consents to an encumbrance of the Agreement for security purposes in accordance with Section 6.06 of this Agreement, it is understood and agreed that City shall furnish copies of all notices of defaults to the beneficiary or mortgagee under said encumbrance by certified mail contemporaneously with the furnishing of such notices to Permittee, and in the event Permittee shall fail to cure such default or defaults within the time allowed above, said beneficiary or mortgagee shall be afforded the right to cure such default at any time within five (5) days, if the default is for the failure to submit rent as required, or within fifteen (15) days following the expiration of the period within which Permittee may cure such default, provided, however, City shall not be required to furnish any further notice of default to said beneficiary or mortgagee.

In the event of the termination of this Agreement pursuant to the provisions of this section, City shall have any rights to which it would be entitled in the event of the expiration or sooner termination of this Agreement under the provisions of Sections 6.10 and 6.11 of this Agreement.

**7.12 Bankruptcy.** In the event Permittee becomes insolvent, makes an assignment for the benefit of creditors, becomes the subject of a bankruptcy proceeding, reorganization, arrangement, insolvency, receivership, liquidation, or dissolution proceedings, or in the event of any judicial sale of Permittee's interest under this Agreement, City shall have the right to declare this Agreement in default.

The conditions of this section shall not be applicable or binding on Permittee or the beneficiary in any deed of trust, mortgage, or other security instrument on the demised Property which is of record with City and has been consented to by resolution of the City Council, or to said beneficiary's successors in interest consented to by resolution of the City Council, as long as there remains monies to be paid by Permittee to such beneficiary under the terms of such deed of

trust; provided that such beneficiary or its successors in interest, continuously pay to City all rent due or coming due under the provisions of this Agreement and the Property are continuously and actively used in accordance with Section 2.02 of this Agreement.

**7.13 Section Headings.** The Table of Contents and the section headings contained herein are for convenience in reference and are not intended to define or limit the scope of any provision thereof.

**7.14 Gender/Singular/Plural.** The neuter gender includes the feminine and masculine, the masculine includes the feminine and neuter, and the feminine includes the masculine and neuter, and each includes corporation, partnership, or other legal entity when the context so requires. The singular number includes the plural whenever the context so requires.

## **SECTION 8: SPECIAL PROVISIONS**

**8.01 Standards of Operation.** Permittee agrees that it shall operate and manage the services and facilities offered upon or from the Property in a first class manner.

**8.02 Hours of Operation.** Permittee shall be entitled to operate the Digital Sign seven (7) days per week subject to the Oceanside Code of Ordinances, Chapter 39, Section 39.8 Prohibitions, and all other applicable provisions thereof.

**8.03 Manner of Providing Service.** Permittee shall provide an experienced and well qualified individual to oversee all operations conducted by Permittee on the Property. Said supervisor shall be empowered with authority to act on behalf of Permittee in response to reasonable requests from City to perform maintenance, repairs, and replacements on the Property to insure the public's health, safety, and welfare. Permittee shall ensure that its employees shall at all times conduct themselves in a creditable and dignified manner, and they shall conform to all laws, rules, regulations and requirements, as well as all rules and regulations as hereafter may be promulgated, or put into operation by the City.

**8.04 Continued Occupancy.** Permittee covenants and agrees to, and it is the intent of this Agreement that the Permittee shall, continuously and uninterrupted during the term of the Agreement, occupy and use the Property for the purposes hereinabove specified, except while Property is untenable by reason of fire, flood, or other unavoidable casualty, and, in that event, City shall be promptly notified by Permittee.

**8.05 Hazardous Substances.** No goods, merchandise or material shall be kept, stored or sold in or on the Property which are in any way explosive or hazardous; and no offensive or dangerous trade, business or occupation shall be carried on therein or thereon, and nothing shall be done on said Property, which will cause an increase in the rate of or cause a suspension or cancellation of the insurance upon said or other Property and the improvements thereon.

No machinery or apparatus shall be used or operated on or about the Property which will in any way injure the Property or improvements thereon, or adjacent or other Property, or improvements thereon, or to persons; provided, however, that nothing contained in this section shall preclude Permittee from bringing, keeping or using on or about the Property such materials, supplies, equipment and machinery as are appropriate or customary in carrying on its said business, or from carrying on its business in all usual respects.

Open flame burning, gasoline, or other fuel storage is expressly prohibited without prior written consent of the City.

**8.06 Memorandum of Agreement.** City and Permittee agree the Agreement shall not be recorded and that the parties shall execute a Memorandum of Agreement to be recorded. The form of this Memorandum of Agreement is as shown on Exhibit "G" attached hereto and is incorporated herein by this reference, and shall be recorded in the Official Records of the County of San Diego.

**THE REMAINDER OF THIS PAGE IS INTENTIONALLY LEFT BLANK**

**SECTION 9: SIGNATURES**

**9.01 Signature Page.** The individuals executing this Agreement represent and warrant that they have the right, power, legal capacity and authority to enter into and to execute this Agreement on behalf of the respective legal entities of the Permittee and the City.

IN WITNESS WHEREOF the parties hereto for themselves, their heirs, executors, administrators, successors, and assigns do hereby agree to the full performance of the covenants herein contained and have caused this Property Use Agreement to be executed by setting hereunto their signatures on the day and year respectively written herein below.

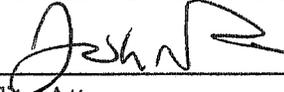
**CITY**

THE CITY OF OCEANSIDE  
a municipal corporation

Date \_\_\_\_\_

By: \_\_\_\_\_  
City Manager

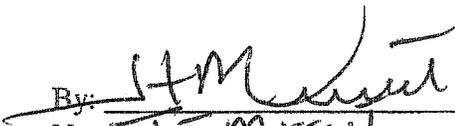
APPROVED AS TO FORM:

By:   
City Attorney

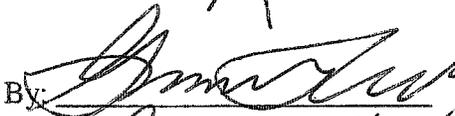
**PERMITTEE**

BGT MEDIA, LLC  
a California limited liability company

Date 4/25/15

By:   
Name: L.F. Missell  
Title: MANAGING MEMBER

Date 4/25/15

By:   
Name: Gregory Skull  
Title: Vice President

NOTARY ACKNOWLEDGMENTS OF PERMITTEE'S SIGNATURE(S) MUST BE ATTACHED

# ALL PURPOSE ACKNOWLEDGMENT

A notary public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not the truthfulness, accuracy or validity of that document

State of California }SS

County of San Diego }SS

On 4-25-15 before me, Shelley Wells  
(here insert name and title of the officer)  
personally appeared, T.F. Missell + Gregory Shull

who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing is true and correct.

WITNESS my hand and official seal

Signature 



(SEAL)

## EXHIBIT "A"

### PROPERTY DESCRIPTION

#### RANCHO DEL ORO ROAD LEGAL DESCRIPTION

RANCHO DEL ORO ROAD IN THE CITY OF OCEANSIDE, COUNTY OF SAN DIEGO, STATE OF CALIFORNIA AS DEDICATED ON PARCEL MAP 14502 FILED IN THE OFFICE OF THE COUNTY RECORDER OF SAN DIEGO COUNTY OCTOBER 9, 1986

#### SIGN LEGAL DESCRIPTION

THAT PORTION OF RANCHO DEL ORO ROAD IN THE CITY OF OCEANSIDE, COUNTY OF SAN DIEGO, STATE OF CALIFORNIA AS DEDICATED ON PARCEL MAP 14502 FILED IN THE OFFICE OF THE COUNTY RECORDER OF SAN DIEGO COUNTY OCTOBER 9, 1986 MORE PARTICULARLY DESCRIBED AS FOLLOWS:

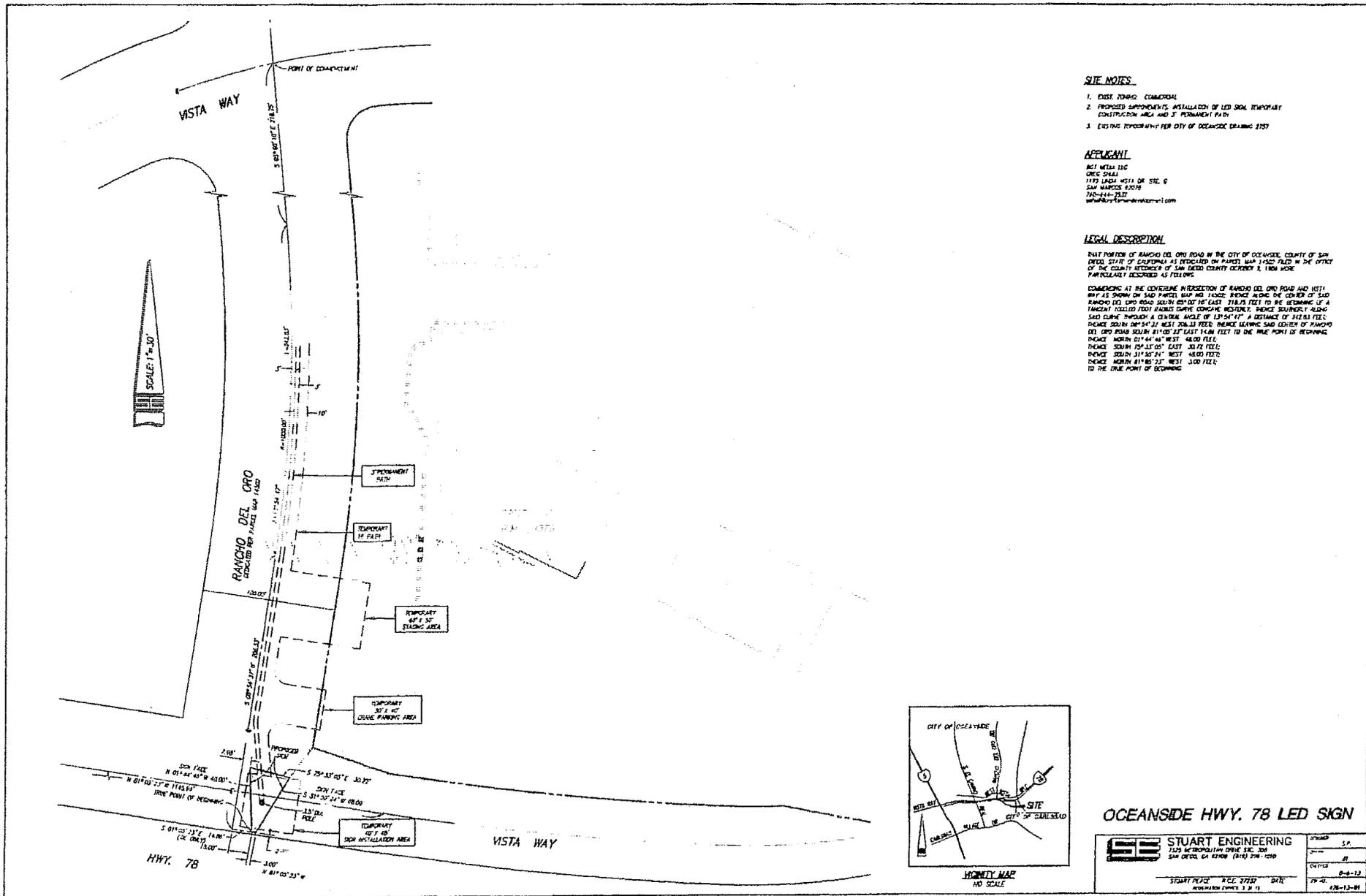
COMMENCING AT THE CENTERLINE INTERSECTION OF RANCHO DEL ORO ROAD AND VISTA WAY AS SHOWN ON SAID PARCEL MAP NO. 14502; THENCE ALONG THE CENTER OF SAID RANCHO DEL ORO ROAD SOUTH 05°00'10"EAST 218.75 FEET TO THE BEGINNING OF A TANGENT 1000.00 FOOT RADIUS CURVE CONCAVE WESTERLY; THENCE SOUTHERLY ALONG SAID CURVE THROUGH A CENTRAL ANGLE OF 13°54'47" A DISTANCE OF 242.83 FEET; THENCE SOUTH 08°54'37" WEST 206.33 FEET; THENCE LEAVING SAID CENTER OF RANCHO DEL ORO ROAD SOUTH 81°05'23"EAST 14.86 FEET TO THE TRUE POINT OF BEGINNING; THENCE NORTH 01°44'46" WEST 48.00 FEET;

THENCE SOUTH 75°33'05" EAST 30.72 FEET;

THENCE SOUTH 31°50'24" WEST 48.00 FEET;

THENCE NORTH 81°05'23" WEST 3.00 FEET;

TO THE TRUE POINT OF BEGINNING.



**SITE NOTES**

1. EXIST. ROAD. CONCRETE
2. PROPOSED IMPROVEMENTS: INSTALLATION OF LED SIGN, TEMPORARY CONSTRUCTION AREA AND 3' PERMANENT PAVE.
3. EXISTING TEMPORARY PER CITY OF OCEANSIDE DRAWING 0157

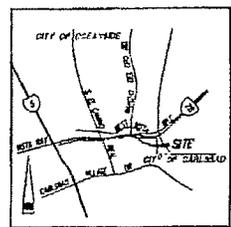
**APPLICANT**

3631 WILSON DR  
 OCEAN FALLS  
 92037  
 760-444-7512  
 www.stuart-engineering.com

**LEGAL DESCRIPTION**

PART PORTION OF RANCHO DEL ORO ROAD IN THE CITY OF OCEANSIDE, COUNTY OF SAN DIEGO, STATE OF CALIFORNIA AS INDICATED ON PARCEL MAP 115622 FILED IN THE OFFICE OF THE COUNTY RECORDER OF SAN DIEGO COUNTY, OCTOBER 3, 1988, MORE PARTICULARLY DESCRIBED AS FOLLOWS:

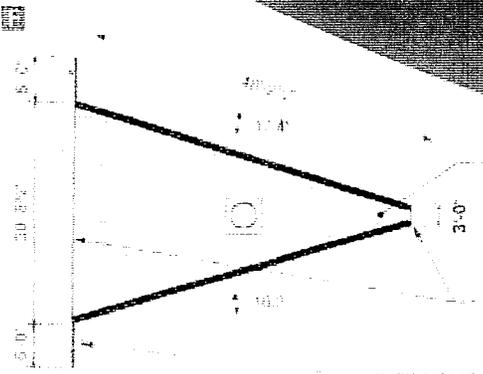
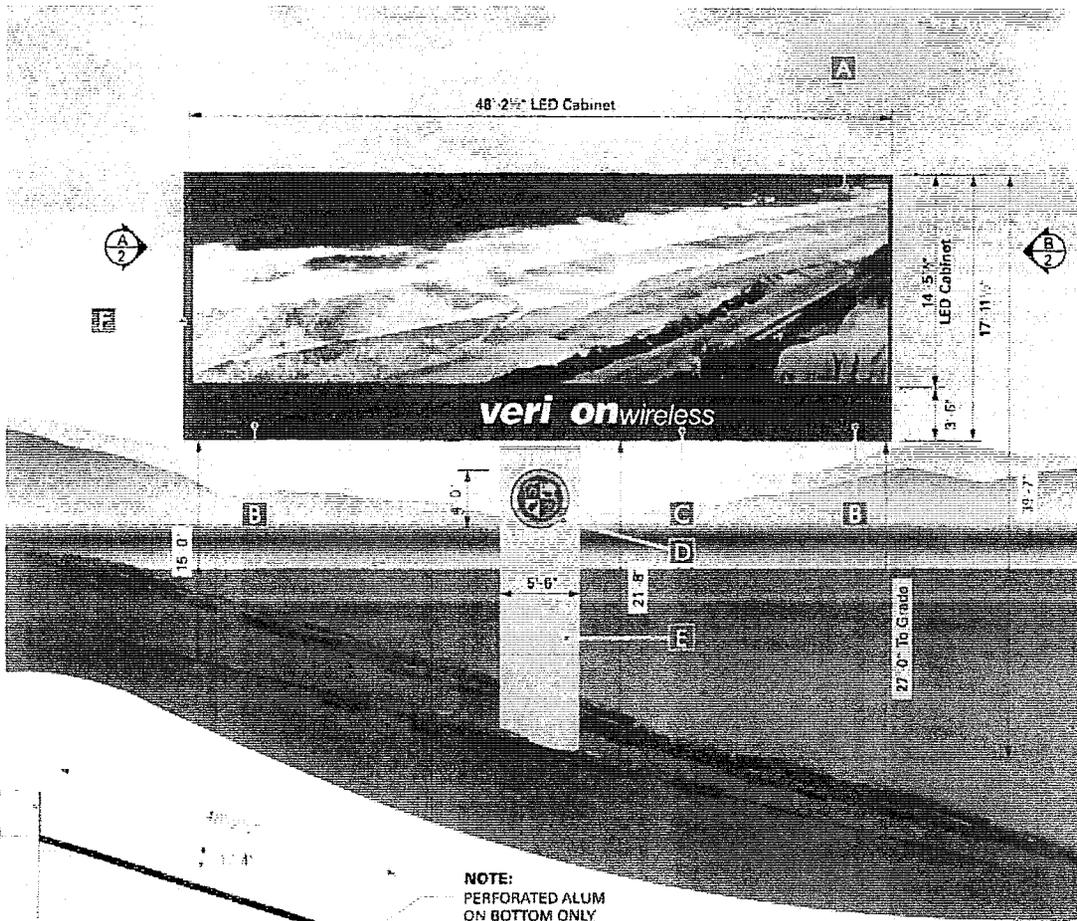
COMMENCING AT THE CENTERLINE INTERSECTION OF RANCHO DEL ORO ROAD AND WEST 10TH ST. SHOWN ON SAID PARCEL MAP AND THENCE THENCE ALONG THE CENTERLINE OF SAID RANCHO DEL ORO ROAD SOUTH 89°07'45" EAST 218.75 FEET TO THE BEGINNING OF A PARALLEL TO THE RIGHT HAND CURVE (CONVEX) THENCE SOUTHWEST ALONG SAID CURVE THROUGH A CENTER ANGLE OF 125°54'17" A DISTANCE OF 722.81 FEET THENCE SOUTH 08°54'22" WEST 200.00 FEET THENCE LEAVING SAID CENTER OF RANCHO DEL ORO ROAD SOUTH 21°05'17" EAST 14.84 FEET TO THE TRUE POINT OF BEGINNING THENCE NORTH 02°44'45" WEST 48.00 FEET THENCE SOUTH 75°15'05" EAST 30.72 FEET THENCE SOUTH 31°30'31" WEST 48.00 FEET THENCE NORTH 81°48'22" WEST 11.00 FEET TO THE TRUE POINT OF BEGINNING



**OCEANSIDE HWY. 78 LED SIGN**

<b>STUART ENGINEERING</b> 1720 METROPOLITAN DRIVE, SUITE 201 SAN DIEGO, CA 92108 (619) 794-1210	DRAWN BY: S.P. CHECKED BY: J.E. DATE: 08-11-12 PROJECT NO: 078-12-01
	STUART PROJECT NO: 078-12-01 DATE: 08/11/12

**EXHIBIT "B"**



Plan View

Scale: 1/16" = 1'-0"

**NOTE:**  
PERFORATED ALUM  
ON BOTTOM ONLY  
PAINTED BLACK

**NOTE:**  
SOLID ALUMINUM FLASHING  
ON BOTH ENDS, PAINTED BLACK,  
SATIN FINISH

**NOTE:**  
SOLID ALUMINUM "ENVIRONMENTAL  
SHIELDS" (BOTH SIDES) 14'-6"  
high x 6'-0" wide  
PAINTED BLACK, SATIN FINISH

**SIGN SPECS**

<b>A EMC</b>	PIXEL SPACING: 16mm (2 SINGLE FACE UNITS); 256 x 256 MATRIX SIZE: 256 x 256 LED COLOR: FULL COLOR CABINET SIZE: 14' 5/4" X 49' 2 3/4" ACTIVE AREA: 12' 10 4/4" X 47' 8"
<b>B TIME/TEMP</b>	CABINET SIZE: 3' 0" X 6'-0" NUMERICAL HT: 36" LED COLOR: 4 SINGLE FACE UNITS (TOTAL)
<b>C CABINET</b>	TYPE: 57 ILLUMINATED RETAINERS: 2" PAINT COLOR: BLACK TEXTURE: SMOOTH SATIN FINISH
<b>D FACE</b>	TYPE: WHITE POLYCARBONATE BACKER: VINYL EXACT GRAPHICS T & D
<b>E LIGHTING</b>	TYPE: FLUORESCENT LAMPS FIXTURE: 800 MA
<b>F MOUNTING</b>	MATERIAL: 2" DEEP ALUMINUM PANEL FACE: VINYL RETURN COLOR: PAINTED BLACK
<b>G POLE COVER</b>	MATERIAL: PAN-BREAK ALUMINUM PAINT COLOR: TAN EXACT COLOR T & D TEXTURE: TEXCOATE FINISH
<b>H SHIELDS</b>	MATERIAL: ALUMINUM PAINT COLOR: BLACK SIZE: 17' 11 1/2" high X 6' 0" wide

**ELECTRICAL:**

TOTAL CONNECTED LOAD OF 428 AMPS (w/ safety factors)  
250 amp single phase  
120-208 panel  
4-0 thhn wire  
2" to 2 1/2" schedule 40 pipe to run power to sign

**Manufacture and Install One (1) "V"-Shaped  
Billboard Sign with Full Color LED Display**  
Scale: 1/8" = 1'-0"

**EMI**  
ELECTRA-MEDIA, INC.  
LAWRENCE - CALIFORNIA  
Phone Number: (916) 725-0816

**YESCO.**

**LOS ANGELES DIVISION**  
1825 Redondo Avenue, Inglewood, CA 90732  
Telephone: (661) 827-7885, Fax: (661) 827-5815  
www.yesco.com

**CLIENT INFORMATION**

Name: City of Los Angeles  
Address: Culver City, CA

Same as: [unclear]

DATE: 07/13/13 BY: KERRY

**REVISIONS**

Date: 4/15/13	By: KERRY
* Added details, callouts	
Date: 5/20/13	By: KERRY
* Replaced (through) drawings with	
Date: 7/1/13	By: KERRY
* Replaced (both) side panels from 4' x 6' to 6' x 6'	
Date: 8/1/13	By: KERRY
* Replaced (both) side panels	
* Added phase sums	
Date: 8/1/13	By: KERRY
* Replaced (both) side panels	
Date: 8/1/13	By: KERRY
* Added numbers on panels back side	
Date: 8/1/13	By: KERRY
* Replaced (both) side panels	

**CUSTOMER APPROVAL**

ACCEPTED WITH NO CHANGES  
 ACCEPTED WITH CHANGES AS NOTED  
 REVISIONS NOTED AND RE-REQUEST

Customer Signature: \_\_\_\_\_ Date: \_\_\_\_\_

**PRODUCTION APPROVAL**

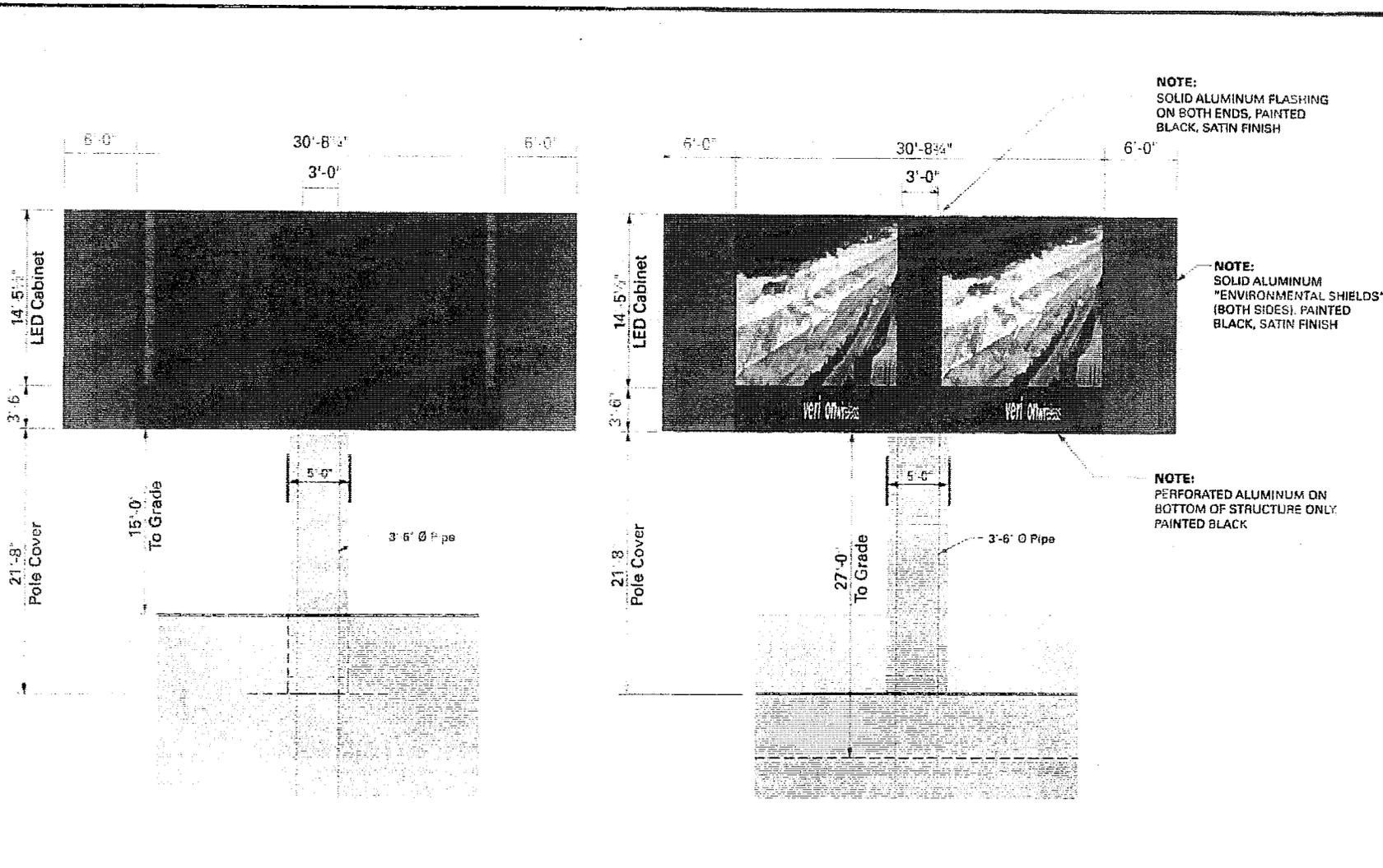
Date Exec. Approved: \_\_\_\_\_ Client: \_\_\_\_\_  
Production Mgr. Consented: \_\_\_\_\_ Date: \_\_\_\_\_

Design: 10-9349-20

Sheet: 1 of 11

This sign is intended to be installed in accordance with the requirements of Ordinance 168.100 of the City of Los Angeles and to meet applicable local codes. This includes proper permitting and flagging of the sign.

This drawing was prepared by EMI and YESCO for the City of Los Angeles. The original design was prepared by YESCO MEDIA LLC. Permission to copy or reuse this drawing can only be obtained through a written agreement with YESCO. Any use of this information without the written consent of YESCO is prohibited. YESCO and EMI are not responsible for any errors or omissions in this drawing. YESCO and EMI are not responsible for any damage or injury resulting from the use of this drawing. YESCO and EMI are not responsible for any damage or injury resulting from the use of this drawing.



**(A) End View - NORTH END**  
Scale: 1/8" = 1'-0"

**(B) End View - SOUTH END**  
Scale: 1/8" = 1'-0"

**EMI**  
ELECTRA-MEDIA, INC.  
LAWDALE - CALIFORNIA  
Phone Number: (310) 776-0816

**YESCO**

**LOS ANGELES DIVISION**  
18234 Bellgreen Avenue, Torrance Valley, CA 91768  
Telephone: (909) 923-7846, Fax: (909) 923-5815  
www.yesco.com

**CLIENT INFORMATION**  
Name: City of Oxnard  
Address: Oxnard, CA  
Sales Eng. David Jones

REV	DATE	BY	DESCRIPTION
NOTED	07/23/10	Kerry	
<b>REVISIONS</b>			
1	08/11/10	By: MERRY	Added details callouts
2	08/11/10	By: MERRY	Adjusted height dimensions
3	08/11/10	By: MERRY	Removed "PERFORATED" entry from LED shield
4	08/11/10	By: MERRY	Removed "ENVIRONMENTAL SHIELDS" entry
5	08/11/10	By: MERRY	Added details callouts
6	08/11/10	By: MERRY	Added details callouts
7	08/11/10	By: MERRY	Added details callouts
8	08/11/10	By: MERRY	Added details callouts
9	08/11/10	By: MERRY	Added details callouts

**CUSTOMER APPROVAL**  
 ACCEPTED WITH NO CHANGES  
 ACCEPTED WITH CHANGES AS NOTED  
 REVISE AS NOTED AND RESUBMIT

**PRODUCTION APPROVAL**

Design: 10-9349-20  
Sheet: 2 of 11

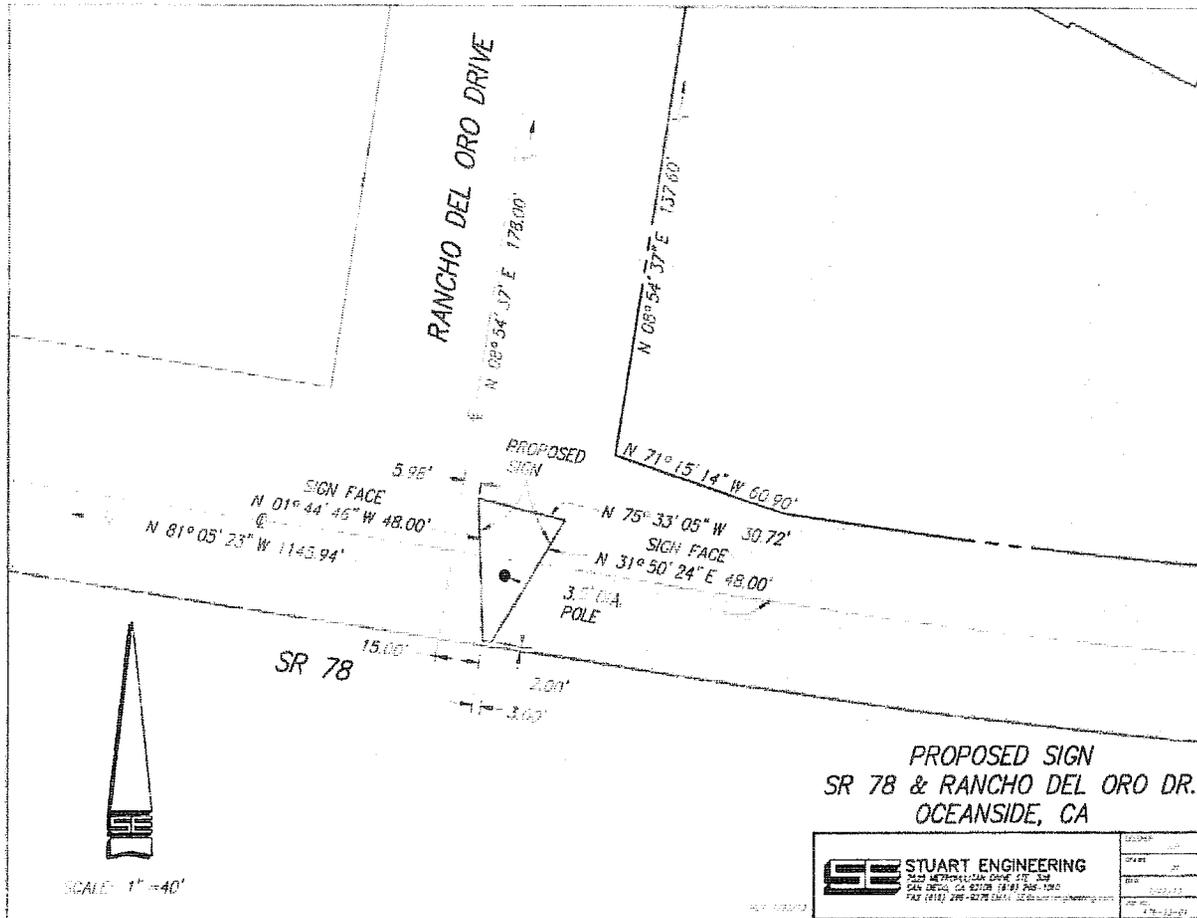
This sheet is intended to be studied in connection with the requirements of Article 605 of the National Electrical Code and all other applicable regulations. The customer assumes responsibility and liability for the design.

The drawing was created in solid form in accordance with the original design and is the property of YESCO MEDIA, LLC. Permission to copy or reuse this drawing is granted by alternate through a written agreement with YESCO. For your files, representatives of all the manufacturers of YESCO.

Unauthorized use of this drawing by any person without the express written consent of YESCO is strictly prohibited. YESCO assumes no responsibility for errors or omissions in this drawing.

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**EXHIBIT "C"**



**EMI**  
 ELECTRA-MEDIA, INC.  
 LAWRENCE - CALIFORNIA  
 Phone Number: (310) 725-0816



**LOS ANGELES DIVISION**  
 18256 De La Cruz Avenue, Torrance Valley, CA 91752  
 Telephone: (909) 923-1663, Fax: (909) 923-6816  
 www.yesco.com

**CLIENT INFORMATION**

Name: City of Oceanside  
 Address: Oceanside, CA

Drawn By: Dave Jones

DATE	BY	IT
NOTED	07/27/10	Karry

**REVISIONS**

DATE	BY	DESCRIPTION
Date: 4/16/10	By: HERRY	• Adjust details, call-hour
Date: 5/20/10	By: HERRY	• Adjust height dimensions
Date: 7/20/10	By: HERRY	• Revises CIP/ASPH/CONC. entry from LED display
Date: 8/11/10	By: HERRY	• Hammered design and update • Added photo notes
Date: 8/27/10	By: HERRY	• Revises to photo sign
Date: 8/27/10	By: HERRY	• Adjust location to 8' height from 6'0"
Date: 02/11/11	By: HERRY	• Revised photo sign

**CUSTOMER APPROVAL**

- ACCEPTED WITH NO CHANGES
- ACCEPTED WITH CHANGES AS NOTED
- REVISE AS NOTED AND RESUBMIT

(Customer Signature) \_\_\_\_\_ (Date) \_\_\_\_\_

**PRODUCTION APPROVAL**

(Sales Exec. Signature) \_\_\_\_\_ (Date) \_\_\_\_\_

(Production Mgr. Signature) \_\_\_\_\_ (Date) \_\_\_\_\_

Design: 10-9349-20

Sheet: 3 of 11

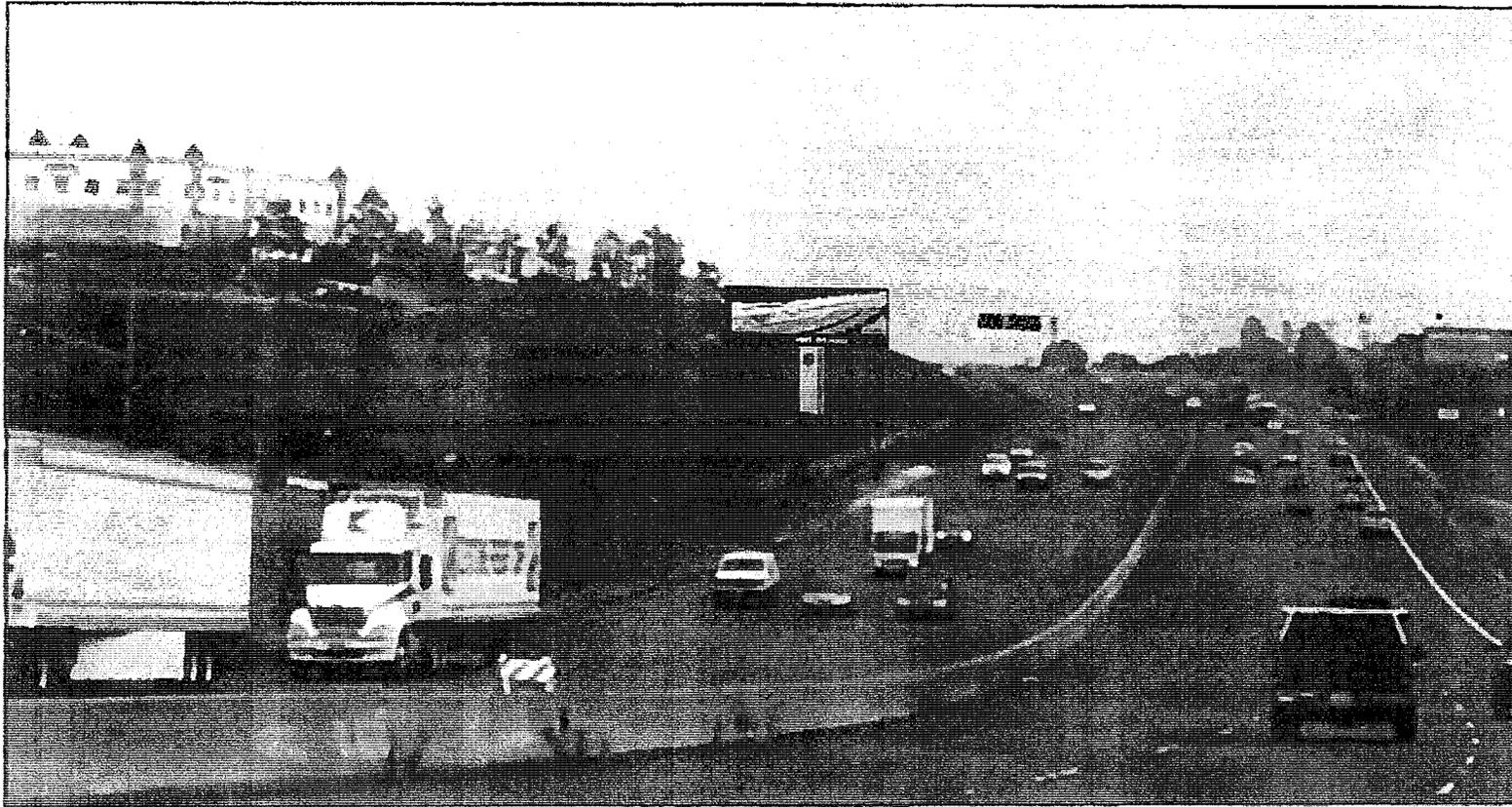
This sign is intended to be installed in accordance with the requirements of Article 15.02 of the Municipal Code of the City of Oceanside, California. The sign is subject to the approval of the City of Oceanside.

This drawing was prepared by Stuart Engineering and is the property of YESCO Media, LLC. Permission to copy, or reuse this drawing can only be obtained through a written agreement with YESCO. This sign is not to be reproduced or sold for any other purpose without the written consent of YESCO.

Scale: 1"=40'

**EXHIBIT "C"**





EASTBOUND 78

**EMI**  
**ELECTRA-MEDIA, INC.**  
 LAWYDALE - CALIFORNIA  
 Phone Number: (310) 725-0816

**YESCO**

**LOS ANGELES DIVISION**  
 18275 Bellflower Avenue, Torrance Valley, CA 91332  
 Telephone: (310) 672-1444, Fax: (310) 672-5815  
 www.yesco.com

**CLIENT INFORMATION**

Name: City of Oceanside  
 Address: Oceanside, CA

Sales Exec: [Name]

DATE	BY	REVISIONS
NOTED	07/23/10	Kerry

DATE	BY	REVISIONS
07/23/10	By: RST/RY	* Add the details, call notes
07/27/10	By: RST/RY	* Adjust the height dimensions
7/28/10	By: RST/RY	* Develop OCEANSIDE issues from L&D study
8/10/10	By: RST/RY	* Respond to Oceanside comments
8/10/10	By: RST/RY	* Add the photo notes
8/10/10	By: RST/RY	* Revise the section notes
8/10/10	By: RST/RY	* Add the bottom and grade sheet notes
8/10/10	By: RST/RY	* Revised the notes

**CUSTOMER APPROVAL**

- ACCEPTED WITH NO CHANGES
- ACCEPTED WITH CHANGES AS NOTED
- REVISE AS NOTED AND RE-QUOTE

Customer Signature: \_\_\_\_\_ Date: \_\_\_\_\_

**PRODUCTION APPROVAL**

Production Approval: \_\_\_\_\_ Date: \_\_\_\_\_

Design: 10-9349-20

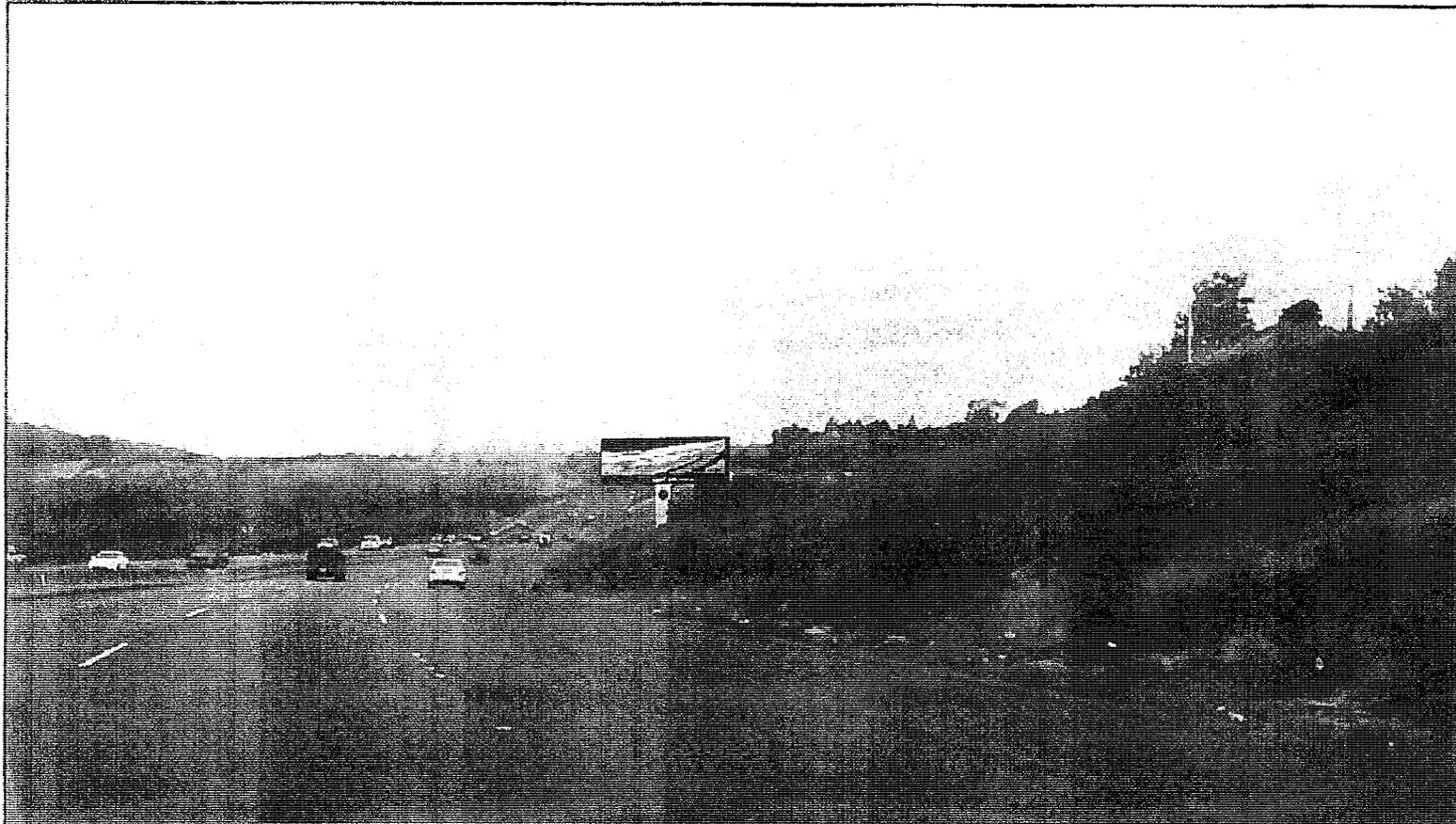
Sheet: 10 of 11

This sheet is a portion of a contract or agreement with the customer and is not to be used for any other purpose without the written consent of YESCO. The customer is responsible for all errors and omissions on this sheet. The customer is responsible for all errors and omissions on this sheet. The customer is responsible for all errors and omissions on this sheet.

The drawings were created in accordance with the requirements of the City of Oceanside. The drawings are the property of YESCO ELECTRA-MEDIA, INC. and shall remain the property of YESCO ELECTRA-MEDIA, INC. until such time as the drawings are returned to YESCO ELECTRA-MEDIA, INC. in accordance with the terms of the contract. The drawings are not to be used for any other purpose without the written consent of YESCO ELECTRA-MEDIA, INC.

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EXHIBIT "C"



WESTBOUND 78

**EMI**  
**ELECTRA-MEDIA, INC.**  
 LAWDALE - CALIFORNIA  
 Phone Number: (310) 725-0816

**YESCO.**

**LOS ANGELES DIVISION**  
 10225 Parkview Avenue, Downey Valley, CA 91204  
 Telephone: (310) 923-7844, Fax: (310) 923-6015  
 WWW.YESCO.COM

**CLIENT INFORMATION**

Name: City of Oceanside  
 Address: Oceanside, CA  
 Sales Exec: Dave Jones

DATE	BY	BY
NOTED	07/23/10	Kerry

**REVISIONS**

DATE	BY	REVISIONS
04/16/12	By: JG/RTY	* Added initials, callouts
02/21/12	By: JG/RTY	* Adjusted height dimensions
02/01/12	By: JG/RTY	* Removed OPERATIONS entry from L&D sheet for
01/14/12	By: JG/RTY	* Narrowed columns and panels * Added photo areas
01/02/12	By: JG/RTY	* Revisions to sheet notes
02/01/12	By: JG/RTY	* Added bottom to manual back on
02/01/12	By: JG/RTY	* Revised sheet notes

**CUSTOMER APPROVAL**

ACCEPTED WITH NO CHANGES  
 ACCEPTED WITH CHANGES AS NOTED  
 REVISE AS NOTED AND RE-SUBMIT

Customer Signature: \_\_\_\_\_ Date: \_\_\_\_\_  
 (Title)

**PRODUCTION APPROVAL**

Client Exec Signature: \_\_\_\_\_ Date: \_\_\_\_\_  
 Production Mgr. Signature: \_\_\_\_\_ Date: \_\_\_\_\_

Design: 10-9349-20

Sheet: 11 of 11

The user is released to the extent of the contract with the advertiser and the advertiser is responsible for the accuracy of the information provided. The advertiser is responsible for the accuracy of the information provided. The advertiser is responsible for the accuracy of the information provided.

The printing was checked to ensure you are receiving the product. The original design artwork is the property of YESCO MEDIA, LLC. Permission is given to create one (1) copy for use only by the advertiser through a written agreement with YESCO. See your sales representative for all the details of this agreement.  
 All reproduction of this artwork is the property of YESCO MEDIA, LLC. All reproduction of this artwork is the property of YESCO MEDIA, LLC. All reproduction of this artwork is the property of YESCO MEDIA, LLC.

EXHIBIT "C"

## **EXHIBIT “C”**

### **DIGITAL MESSAGE BOARD SIGN**

#### **CONSTRUCTION SCHEDULE (subject to the provisions of Section 3.03)**

1. Effective Date of Property Use Agreement – Digital Sign to be operational within 12 months of said date
2. Submission of Construction Drawings – within 180 days of the Effective Date
3. Issuance of Building Permit – within 60 days of submission of construction drawings
4. Grading of site to include digging footings, pour footings, and setting of pole – approximately 2 weeks
5. Installation of primary electrical conduit with primary wire and installation of data line, and conduit with phone line/Cat5 - approximately 2 weeks
6. Installation of pole cover and installation of advertising panel steel “V”d framework (including time and temperature LED electrical) – approximately 2 weeks
7. Installation of LED faces – approximately 1 week
8. Complete final wiring, testing and inspection – approximately 1 week
9. Digital Sign becomes operational – approximately 120 days after issuance of building permit

## **EXHIBIT "D"**

### **OPERATION OF MESSAGE CENTER CRITERIA**

THE FINAL LANGUAGE FOR THIS EXHIBIT CANNOT BE DETERMINED AT THIS TIME. THE LANGUAGE FOR THIS EXHIBIT WILL SET FORTH THE CONDITIONS AND MITIGATIONS MEASURES, IF ANY, WHICH ARE REQUIRED TO OPERATE THE MESSAGE CENTER PURSUANT TO THE DISCRETIONARY APPLICATION PERMIT PROCESS AND THE COMPLETION THEREOF.

## **EXHIBIT “E”**

### **GUIDELINE FOR ISSUING “AMBER” ALERTS**

Every successful AMBER plan contains clearly defined activation criteria. The following guideline is designed to achieve a uniform, interoperable network of plans across the country, and to minimize potentially deadly delays because of confusion among varying jurisdictions. The following are criteria recommendations:

#### **Law Enforcement Confirms and Abduction**

AMBER plans require law enforcement to confirm abduction prior to issuing an alert. This is essential when determining the level of risk to the child. Clearly, stranger abductions are most dangerous for children and thus are primary to the mission of an AMBER alert. To allow activations in the absence of significant information that abduction has occurred could lead to abuse of the system and ultimately weaken its effectiveness. At the same time, each case must be appraised on its own merits and a judgment call made quickly. Law enforcement must understand that a “best judgment” approach based on the evidence is appropriate and necessary.

#### **Risk of Serious Bodily Injury or Death**

Plans require a child be at risk for serious bodily harm or death before an alert can be issued. This element is clearly related to law enforcement’s recognition that stranger abductions represent the greatest danger to children. The need for timely, accurate information based on strict and clearly understood criteria is critical, again keeping in mind the “best judgment” approach.

#### **Sufficient Descriptive Information**

For an AMBER Alert to be effective in recovering a missing child, the law enforcement agency must have enough information to believe that an immediate broadcast to the public will enhance the efforts of law enforcement to locate the child and apprehend the suspect. This element requires as much descriptive information as possible about the abducted child and the abduction, as well as descriptive information about the suspect and the suspect’s vehicle. Issuing alerts in the absence of significant information that abduction has occurred could lead to abuse of the system and ultimately weaken its effectiveness.

#### **Age of Child**

Every state adopts the “17 years or age or younger” standard; or, at minimum, agree to honor the request of any other state to issue an AMBER Alert, even if the case does not meet the responding state’s age criterion, as long as it meets the age criterion of the requesting state. Most AMBER plans call for activation of the alert for children under a certain age. The problem is that age can vary – some plans specify 10, some 12, some 14, 15, and 16. Differences in age

requirements create confusion when activation requires multiple alerts across the states and jurisdictions. Overuse of the AMBER Alert system will undermine its effectiveness as a tool for recovering abducted children.

#### National Crime Information Center Data Entry

Immediately enter AMBER Alert data into the National Crime Information Center (“NCIC”) system. Text information describing the circumstances surrounding the abduction of the child should be entered, and the case flagged as a “Child Abduction”. Many plans do not mandate entry of the data into NCIC, but this omission undermines the entire mission of the AMBER Alert initiative. The notation on the entry should be sufficient to explain the circumstances of the disappearance of the child. Entry of the alert data into NCIC expands the search of an abducted child from the local, state or regional level to the national level. This is a critical element of any effective AMBER Alert plan.

#### Summary of Department of Justice Recommended Criteria

- There is reasonable belief by law enforcement that abduction has occurred.
- The law enforcement agency believes that the child is in imminent danger of serious bodily injury or death.
- There is enough descriptive information about the victim and the abduction for law enforcement to issue an AMBER Alert to assist in the recovery of the child.
- The abduction is of a child aged 17 years or younger.
- The child’s name and other critical data elements, including the Child Abduction flag, have been entered into the National Crime Information Center system.

# EXHIBIT "F"

## COMMENCEMENT DATE MEMORANDUM

This Commencement Date Memorandum, dated as of \_\_\_\_\_, \_\_\_\_ is executed between the City of Oceanside, a municipal corporation ("City") and BGT Media, LLC, a California limited liability company ("Permittee").

### RECITALS

WHEREAS, City and Permittee have entered into that certain Property Use Agreement ("Agreement") dated \_\_\_\_\_, \_\_\_\_ for premises within the Rancho del Oro Drive right-of-way at the terminus of State Route 78 in the City of Oceanside, County of San Diego, State of California as more particularly set forth on Exhibit "A", attached hereto and incorporated herein by this reference; and

WHEREAS, pursuant to the terms of the Agreement the parties are to execute a memorandum to confirm the commencement date of the Agreement.

NOW, THEREFORE, in consideration of the conditions and covenants contained herein, the parties hereto mutually agree as follows:

1. The City and Permittee agree that the commencement date of the Agreement is \_\_\_\_\_, \_\_\_\_ and the termination date is \_\_\_\_\_, \_\_\_\_.

IN WITNESS WHEREOF, the parties hereto for themselves, their heirs, executors, administrators, successors and assigns do hereby agree to the above, as of the day and year first written above.

**"City"**

City of Oceanside, a municipal corporation

By: \_\_\_\_\_

Title: City Manager

**"Permittee"**

BGT Media, LLC  
a California limited liability company

By: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

By: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

EXHIBIT "G"

Recording Requested by:  
When Recorded Return to:

CITY CLERK, CITY OF OCEANSIDE  
300 North Coast Highway  
Oceanside, CA 92054

(For Recorder's Use)

MEMORANDUM OF AGREEMENT

THIS MEMORANDUM OF AGREEMENT ("Memorandum"), dated \_\_\_\_\_, 201\_, by and between the CITY OF OCEANSIDE, a municipal corporation ("City") and BGT MEDIA, LLC, a California limited liability company ("Permittee").

City and Permittee have entered into that certain Property Use Agreement dated \_\_\_\_\_, 201\_, (the "Agreement"), for the use of that certain property located in the City of Oceanside, County of San Diego, State of California and more particularly described in Exhibit "A", which is attached and incorporated by this reference, all subject to the terms and covenants set forth in the Agreement. The purpose of this Memorandum is to give notice of the existence of the Agreement and the provisions thereof, including without limitation provisions providing for an initial term of 25 years, and providing for one (1) successive twenty-five (25) year option to renew. To the extent that any provision of this Memorandum conflicts with any provision of the Agreement, the Agreement shall control.

This Memorandum may be executed in counterparts, each of which shall be an original, but all of which, together, shall constitute one and the same instrument.

IN WITNESS WHEREOF, the parties have executed this Memorandum as of the date first written above.

"CITY"

THE CITY OF OCEANSIDE,  
a municipal corporation

By: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

"PERMITTEE"

BGT MEDIA, LLC  
a California limited liability company

By: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

By: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

## ATTACHMENT D

The Mitigated Negative Declaration and associated Mitigation Monitoring and Reporting Program may be viewed on the City's web site at:

**<http://www.ci.oceanside.ca.us/gov/dev/planning/agendas.asp>**

Scroll down to Active Search section

Check Negative Declaration box and click on Search

Scroll Down

Two Parts:

Final MND- SR 78 Digital Sign  
PART1

Intro - Response to Comments

6/16/2015

Final MND- SR 78 Digital Sign  
PART2

Final MND

6/16/2015

# STAFF REPORT



ITEM NO. **16**  
CITY OF OCEANSIDE

DATE: April 18, 2012

TO: Honorable Mayor and City Councilmembers

FROM: Development Services Department/Planning Division

SUBJECT: **CONSIDERATION OF ZONE AMENDMENT (ZA11-00004) AND LOCAL COASTAL PLAN AMENDMENT (LCPA11-00002) AMENDING ARTICLE 33 OF THE 1992 ZONING ORDINANCE, REPEALING ARTICLE 33 OF THE 1986 ZONING ORDINANCE AND ESTABLISHING THE AMENDED TEXT AS PART OF THE IMPLEMENTING DOCUMENT OF THE LOCAL COASTAL PROGRAM – SIGN ORDINANCE – APPLICANT: CITY OF OCEANSIDE**

## SYNOPSIS

Staff recommends that the City Council: (1) Introduce an ordinance approving amendments to Article 33 of the 1992 Zoning Ordinance, repealing Article 33 of the 1986 Zoning Ordinance and establishing Article 33A and 33B as the new sign ordinance text Citywide; and (2) adopt a resolution approving a Local Coastal Program Amendment (LCPA11-00002) establishing Article 33A and 33B as zoning regulations within the Coastal Zone.

The subject zoning text amendment incorporates:

- Sign ordinance revisions to address constitutionality issues and establish a legally defensible ordinance;
- Provisions for digital display billboards on City property as part of a trade/exchange of existing billboards with digital display boards at a greater than one-to-one ratio;
- Provisions for digital signage on private property, subject to specific regulations;
- Provisions for a sign reduction program;
- Provisions for placement of digital signage at select locations within the public right-of-way to promote community events and commerce; and
- Prohibition of feather signs.

Introduction of the aforementioned draft ordinance would be followed by formal adoption at the next regular Council meeting and consideration of a fee schedule amendment to add a new fee category for digital signage on private property on May 2, 2012.

## **BACKGROUND**

On-site signage for properties within the Coastal Zone area (except for the downtown "D" district) are subject to compliance with the 1986 sign ordinance regulations, while all other areas of the City (including the downtown "D" district) are subject to the 1992 sign ordinance. Neither sign ordinance has been comprehensively updated since adoption. Revisions to both are necessary to bring them up-to-date with recent court rulings that have defined legal parameters of signage regulation. Formatting and minor revisions to definitions and regulations will add clarity to the existing documents. Addition of new parameters for emerging and advanced sign technology such as digital display signs could allow for their consideration as part of future signage proposals on private and City-owned properties.

## **ANALYSIS**

Existing sign ordinance provisions are proposed to be modified in order to: 1) ensure regulation of signs in a constitutional manner, in accordance with case law that has developed since the approval of the currently applicable sign ordinances; 2) distinguish regulatory (private property sign requirements) from proprietary (City property sign requirements) sign standards and update or clarify existing definitions, regulations, etc.; and 3) establish parameters for emerging sign technologies, including digital display signs on private and City-owned properties.

The process of developing revisions to the sign ordinance has been a multi-departmental effort led by the Development Services Department and the City Attorney's Office. Randal R. Morrison of Sabine and Morrison was retained to provide expert legal advice and ensure enforceability of proposed regulations. Sign regulations from multiple jurisdictions were reviewed by staff to establish a basis for comparison, and technical reports were evaluated extensively to identify issues, challenges and solutions.

The Planning Commission considered the sign ordinance amendment during a public workshop and a public hearing held on January 23, 2012, and February 13, 2012, respectively. After evaluating the staff report (Attachment 6), presentations by City staff and consultant, and input from the public, the Commission recommended against sign provisions for billboards on City-owned property and endorsed the balance of the proposed sign ordinance with a few modifications. More specifically the Commission recommended approval of:

- Sign ordinance revisions to address constitutionality issues and establish a legally defensible ordinance;
- Provisions for digital signage on private property, subject to specific regulations;
- Provisions for a sign reduction program;
- Provisions for placement of digital signage at select locations within the public-right-of-way to promote community events and commerce; and
- Ban on feather signs.

The Planning Commission recommended the following modifications to the proposed ordinance:

- 1) Article 33A - Section 3305 - Prohibited Signs
  - a. Delete Commercial Mascot signage from prohibited signage list
- 2) Article 33A - Section 3307 A.2 – Comprehensive Sign Package
  - a. Include 1,000 ft. separation between digital display signage
  - b. Remove digital signage hours of operation limits
  - c. Reduce digital message dwell time from 8 sec. to 4 sec.
- 3) Article 33B - Recommend against billboard signage on City-owned property

The 1986 and 1992 sign ordinance legislative draft (Attachments 1 and 2) identify in detail the extent of the proposed modifications and set forth a common regulatory framework for signage Citywide. These draft ordinances do not include the three aforementioned Planning Commission text changes based on the following:

1) Prohibited Signs - Commercial mascots

***Commercial mascot signage is defined as “A person or animal attired or decorated with commercial insignia, images, costumes, masks or symbols, and/or holding signs displaying commercial messages, when a principal purpose is to draw attention to or advertise a commercial enterprise. This definition includes “sign twirlers”, “sign spinners”, “sign clowns”, “sign walkers”, “human directional”, and Human “sandwich boards” signs.***

Based on existing sign ordinance standards, off-premises signage on City-owned property is not allowed. In addition, commercial mascot signage has historically been considered animated signage, and is currently prohibited on private and public property.

A new definition for “commercial mascot” signage was added to the draft sign ordinance for clarification purposes, and the new term was incorporated under the list of prohibited signs. As defined, a commercial mascot is commonly seen as a roadside sign spinner.

The Planning Commission considered public testimony in favor of commercial mascot signage and recommended in favor of allowing commercial mascot signage on private property. Staff finds that limiting “commercial mascot” signage on private property would be extremely difficult to enforce, while the alternative of also allowing such signage on public property may negatively impact public access/safety, and could contribute to an undesirable City image. Therefore, staff recommends that the existing sign standards prohibiting commercial mascots on private and City-controlled property be upheld.

## 2) Comprehensive Sign Package – Digital Sign Standards on private property

The Planning Commission recommended three modifications to the proposed provisions for digital display standards on private property: addition of a 1,000 ft. minimum separation distance between digital signs; removal of digital display signage hours of operation limitations; and decrease of the digital message dwell time from 8 seconds to 4 seconds. The draft sign ordinance under consideration does not include the aforementioned modifications based on the following:

- a. A 1,000 ft. separation between digital display signage would provide an advantage to a limited number of businesses that are willing and able to obtain digital display sign permits upon approval of the ordinance, to the exclusion and disadvantage of those businesses located within 1,000 ft. of the first sign permit(s) issued. Staff does not find this “first-come first-served” approach to be equitable to other businesses or to address project-specific contextual and land use compatibility planning concerns/impacts. Rather, review of sign placement in relationship to other existing signage is a matter that should be examined on a case-by-case basis and after careful consideration of specific land use and context adjacency issues as part of the required Comprehensive Sign Package entitlement review.
- b. Digital Display signage hours of operation between 6:30 a.m. and 11:30 p.m. would promote services and advertise businesses during typical hours of operation and beyond, and will eliminate potential light/glare impacts during late night and early morning hours.
- c. Digital message dwell time is the minimum amount of time that a message is displayed. The Federal Highway Administration recommends a digital message dwell time of 8 seconds. This recommendation is also supported by and consistent with the result (8.4 sec) obtained when utilizing the expert(\*) recommended formula for establishing the minimum acceptable dwell time.

***Sight distance to Digital Board (ft.) / Speed limit (ft. /sec) = Minimum display duration (sec)*** - an 800-ft. sight distance to the billboard and freeway/highway speed of 65 mi/hr.

(\*) *The Dudek (2008) report - “Changeable Message Sign Displays During Non-incident, Non-Roadwork Periods: A Synthesis of Highway Practice” - indicates that 85% of drivers can begin reading a message about 800 feet upstream of the sign if the sign uses characters heights of 18 inches.*

### 3) Billboard signage on City-controlled property

The proposed sign ordinance includes provisions that could potentially allow billboards on City-controlled property, subject to conditions imposed on the approval of such signage as part of a lease, contract or license. Digital display billboards may only be permitted as part of a legally enforceable agreement to replace existing static billboards on at least 1:2 basis. The City would be required to comply with the California Environmental Quality Act (CEQA) before approval of any such lease, contract or license.

The Planning Commission recommended against billboard signage for several reasons, including but not limited to concerns over digital billboard aesthetics and safety impacts. Staff finds that existing Federal and State billboard regulatory provisions (please refer to Planning Commission staff report dated February 13, 2012 – Attachment 6) coupled with additional billboard design technical expertise would ensure appropriate levels of illumination and traffic safety for digital sign advertising and recommends that additional parameters based on location, design and operation should be applied on a case-by-case basis to ensure high-quality design solutions, roadway safety, and land use compatibility with adjacent uses. Staff also recommends that interactive media (including Bluetooth, Wi-Fi and SMS/MMS) message delivery not be allowed until such time that studies on the safety of employing such technology is available. Finally, it is recommended that since placement of billboards on City-controlled property provides the City with an opportunity to restrict sign message content, that this issue should be given due consideration at the time of lease/contract negotiation with sign operators.

In summary, staff concludes that the combination of existing Federal/State billboard regulations and proposed local controls will address any potential signage land use issues, will reduce the number of existing static billboards and will prevent digital display billboard proliferation. Therefore, staff recommends approval of signage on City-controlled property.

### Environmental Determination

Staff has completed a preliminary review of this project in accordance with the City of Oceanside's Environmental Review Guidelines and the California Environmental Quality Act (CEQA), 1970. Based on that review, it has been determined that the proposed project involves regulatory changes and would not, in and of itself, occasion land development or any other material change to the environment. Projects seeking to implement the amended provisions would be subject to separate CEQA review. More specifically, subsequent CEQA review will be required for signage proposals involving billboards on City-owned property. Digital display signage on private property will be subject to discretionary entitlement review (Comprehensive Sign Package) and any required CEQA review will be completed in conjunction with specific project submittals. Therefore, in accordance with the provisions of the California Environmental Quality Act

(CEQA) Guidelines Section 15061 (b) (3), the proposed zoning text amendment does not have the potential for causing a significant effect on the environment and therefore is not subject to CEQA review.

### **COMMISSION/COMMITTEE REVIEW**

On February 13, 2012, the Planning Commission considered this proposal and recommended approval with modifications (5-1 vote, Commissioner Neal - abstaining). The Commission voted against recommending approval of digital display billboard signage provisions on City-owned property (5-1 vote, Balma - yes).

During the discussion portion of the public hearing, some Commissioners expressed a desire to vet billboard issues if additional time and information was made available. Ultimately, the Commission referred the matter to the City Council for consideration advising that should billboard signage on City-owned property be permitted, it should only be allowed as a trade/exchange of existing billboards at a ratio greater than 1 to 1.

### **CITY ATTORNEY'S ANALYSIS**

Pursuant to Zoning Ordinance, the City Council is authorized to hold a public hearing on the proposed Zone Amendment and Local Coastal Program Amendment. Consideration of the zoning code amendments should be based on the recommendation of the Planning Commission, the record of the Planning Commission public hearing, public input, and any other evidence introduced at the public hearing on this matter. Consideration of the Local Coastal Program Amendment should be based on evidence introduced at the public hearing including public input.

After conducting the public hearing, the Council shall affirm, modify, or reject the Planning Commission's recommendation with regard to the Zone Amendment and approve, modify, or reject the proposed Local Coastal Program Amendment. A modification not previously considered by the Commission shall be referred to the Commission for review and report prior to adoption of the proposed Zone Amendment.

Many of the proposed amendments have been drafted to ensure the City's sign ordinance complies with evolving case law. The City Attorney's Office has worked with Randal Morrison, a sign law expert, in updating the ordinance to ensure it is legally defensible. However, the proposed amendment to potentially allow digital offsite advertising signs on City property following a request for proposals is a major change to the City's zoning ordinance and has the potential to lead to constitutional challenges.

Oceanside currently bans billboards, although five existing signs have been permitted to exist pursuant to a settlement agreement approved by the City Council in 1999. Under controlling precedent from the United States Supreme Court, cities have the legal authority to ban billboards based upon traffic safety and aesthetic impacts. That issue was settled in *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981). If the City Council wishes to continue this policy, the best legal approach would be to reject the proposed amendment, in particular the addition of Article 33B, section 3318.

Amending the sign ordinance to permit new digital billboards only on City property could lead to future litigation, including challenges to the general prohibition on off-site advertising. While it is difficult to predict how the courts would resolve a potential claim, there have been two fairly recent federal court cases on this issue. In *Metro Lights L.L.C. v. City of Los Angeles*, 551 F.3d 898 (9<sup>th</sup> Cir. 2009), the City of Los Angeles entered into a contract (“Street Furniture Agreement”) with CBS-Decaux L.L.C. (“CBS”) under which CBS installed public facilities (transit stops, bus shelters, trash receptacles, news racks, etc.) at thousands of city owned transit stops in exchange for exclusive advertising rights on those facilities. The City was paid a fee and had the right to place public service messages at the transit stops. A few months later the City enacted a ban on all new offsite advertising citywide but excluded transit stops from the prohibition. The end result was that the City itself occupied the entire market for “small format billboards” attached to street furniture. A competing sign company filed a lawsuit alleging violations of the First Amendment on the grounds that the agreement with CBS undermined the purposes served by the ban on new billboards, and was unconstitutional for that reason.

The Ninth Circuit rejected the plaintiff’s constitutional challenge for several reasons. First, the Court found that a bus bench advertising exception had previously been approved by the United States Supreme Court in the *Metromedia* case. Second, the Court found that the City’s interests in promoting aesthetics and traffic safety were not undermined by the street furniture advertising agreements. The agreements with CBS allowed the City to have a single vendor for a controlled series of advertisements on City property over which the City had contractual supervision. According to the Court, this prevented a proliferation of offsite advertising by numerous private parties which would create more “distracting ugliness.” The Court also rejected the notion that the City had essentially auctioned off the First Amendment. As stated by the Court, “[c]ertainly, the government cannot silence one speaker but not another because the latter has paid a tax, even though it could constitutionally silence both. But that doesn’t mean the City cannot silence speakers in general but permit them to bid for the right to speak on City-owned land, assuming that the speakers on City-owned land do not undermine the goal of the City’s general prohibition.”

While the *Metro Lights* decision provides legal support to the proposed Section 3318, two distinguishing factors should be noted. First, the City itself was the owner of almost all places where street furniture with advertising could be located. Second, the Street Furniture Agreement provided benefits to the public in addition to revenue to the City. At least one federal court has concluded that a city cannot allow billboards on its own land while prohibiting them on private land. In *Lamar Advertising of Michigan Inc. v City of Utica*, the City entered into an agreement with CBS Outdoor to allow the construction of a billboard on City property. The billboards were not consistent with City zoning, however, the City amended its Code to allow the Planning Commission to waive development requirements for billboards on City property. After unsuccessfully attempting to permit two billboards on private land, Lamar (one of the nation’s largest billboard companies) sued the City in federal court alleging violations of the First Amendment. Lamar claimed the City’s decision to exempt signs on City-owned

property from its own zoning requirements undermined the City's interests in health, safety, and traffic.

The federal district court granted Lamar's motion for summary judgment in part, concluding the City's sign ordinance, with its exemption for signs on City property, was not narrowly tailored to achieve its significant interests. The court noted that the City exemption could result in additional blight or traffic concerns since there were no guidelines for the Planning Commission to follow when deciding whether to waive the zoning requirements for signs on City property.

To conclude, the federal courts have reached inconsistent conclusions in this area. The proposed section 3318 is distinguishable from the ordinance at issue in Utica as at least two existing billboards must be removed before a new billboard on City property can be constructed. This ensures a net reduction in the total number of billboards advancing the City's interests in traffic safety and aesthetics. Sacramento followed a somewhat similar approach recently by allowing four new digital billboards (three of them double-sided) on City property. However, seventeen existing billboards had to be removed to permit the new digital billboards. We have been advised that Sacramento's ordinance allows new billboards only on City-owned land, and that no litigation has been filed in Sacramento to date.

**RECOMMENDATION**

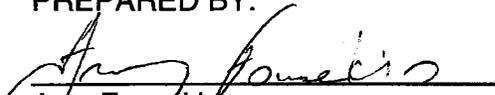
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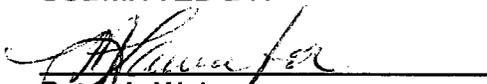
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PREPARED BY:

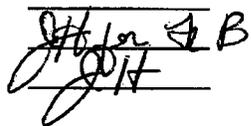
  
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ATTACHMENTS:

1. 1986 Zoning Ordinance Legislative Draft
2. 1992 Zoning Ordinance Legislative Draft
3. Ordinance Introducing Article 33A & 33B to the 1986 and 1992 Zoning Ordinance
4. City Council Resolution Amending the Local Coastal Program
5. Planning Commission Resolution No. 2012-P06
6. Planning Commission Staff Report dated February 13, 2012
7. Written Communications Received to Date