

Resolution Relating to

RESOLUTION _____

Sponsor(s): _____

Introduced: Councilor Shannon

Referred to: _____

Action: _____

Date: _____

Signed by Mayor: _____

AUTHORIZATION TO ENTER INTO LICENSE AGREEMENT
RE: ROBERT CAMPBELL PHOTOGRAPHS

CITY OF BURLINGTON

In the year Two Thousand Thirteen.....

Resolved by the City Council of the City of Burlington, as follows:

That WHEREAS, the City owns all rights to certain photographs and negatives created by Robert Campbell; and

WHEREAS, these photographs and negatives are required by law to be managed by the City for the use of the schools; and

WHEREAS, Jessica Ferber has sought and obtained funds to publish a book about Robert Campbell and wishes to utilize certain of the photographs in the book; and

WHEREAS, the School Board at its meeting on October 8, 2013, has agreed to license these photographs and negatives to Jessica Ferber to publish in a book in return for certain royalties, all as described in the attached License Agreement;

NOW, THEREFORE, BE IT RESOLVED that the City Council authorizes the Mayor to execute the attached License Agreement, and any other documents as may be necessary to carry out the License, subject to prior review by the City Attorney.

LICENSE AGREEMENT

THIS AGREEMENT (the "Agreement") is effective as of October ____, 2013 (the "Effective Date") by and between the City of Burlington, a Vermont municipality with offices at Main Street, Burlington, VT 05401 ("Licensor"), and Soupy Photo, LLC, a Vermont limited liability company with offices at 2854 Southeast Clinton Street, Portland, Oregon 97202 ("Licensee").

WHEREAS, Licensor is the owner of all right, title and interest in and to the photographic images created by photographer Robert James Campbell (deceased) as embodied in certain physical photographic negatives now in the possession of the Licensor and/or Licensee as described on Exhibit A hereto (the "Images");

WHEREAS, Licensor is the owner of all right, title and interest in and to all copyrights related to the Images (the "Copyrights");

WHEREAS, Licensee desires to obtain from Licensor a license to use the Images and Copyrights (collectively, the "Licensed Property") under the terms and conditions of this Agreement; and

WHEREAS, Licensor wishes to enter into this Agreement with Licensee.

NOW, THEREFORE, for good and valuable consideration, the sufficiency of which is hereby acknowledged by the parties, the parties agree as follows:

1. License Grant; Use; Copyright Notice; Derivative Works; Progress Reports.

1.1 License Grant. Licensor grants to Licensee the exclusive right and license to use, during the term of this Agreement, the Licensed Property (including the right to create derivative works (any such derivative work shall remain the property of the Licensor)) based thereon, and the right to reproduce, display, publish, and distribute the Licensed Property or derivative works based thereon throughout world (the "Licensed Territory") and to use the Licensed Property in connection with the manufacture, importation, marketing, offer for sale, sale, distribution and other transfer of products and packaging and promotional materials related thereto (the "Merchandise").

1.2 Use. Licensee acknowledges and agrees that Licensor is a subdivision of a Vermont municipality and that the use of the Licensed Property must comport with the standards of such municipality. Accordingly, Licensee agrees to abide by reasonable standards of decency and morality promulgated by Licensor and designed to protect Licensor's image. Licensor shall have the right to terminate this Agreement in the event Licensee is notified in writing of a breach of such standards and Licensee fails to take all reasonable steps to cure or mitigate such breach.

1.3 Copyright Notice. Licensee agrees to include, on all products, packaging, derivative works, and promotional materials, notice of the Licensor's copyrights and any other right, title or interest as appropriate.

1.4 Derivative Works. Licensee agrees to provide Licensor with a copy or sample of all derivative works or Merchandise.

1.5 Progress Reports. Licensee agrees to provide Licensor with progress reports on the use of the Licensed Property, sale of Merchandise, and future plans for use of Licensed Property, such reports to be rendered no less often that quarter-annually.

2. Royalty Payments

2.1 Royalties. Licensee shall pay to Licensor, in the manner provided in Section 2.2 below, royalties ("Royalties") in an amount equal to five percent (5.0%) of the gross sales proceeds ("Sale Proceeds") received by Licensee from the: (a) reproduction, display, publishing, and/or distribution of the Licensed Property or derivative works, and (b) sale of Merchandise bearing or utilizing the Licensed Property. Licensor shall have the right to request, from time to time, an accounting of all gross revenues of the Licensee provided that such request shall be limited to three (3) in any calendar year.

2.2 Manner of Payment. Licensee shall pay the Royalties to Licensor within thirty (30) days after the end of each of calendar quarter from Sales Proceeds received by Licensee during such calendar quarter. All Royalties shall be paid in United States dollars.

2.3 Cost/Expenses. Licensee agrees that in no event will Licensor be responsible for any cost or expenses associated with the Licensee's use of the Licensed Property.

3. Goodwill. Licensee's use of the Licensed Property will inure to the benefit of Licensor. All rights in the Licensed Property other than those granted in this Agreement are reserved by Licensor for its own use and benefit.

4. Term and Termination

4.1 Term. Unless terminated pursuant to Section 4.2, this Agreement shall commence on the Effective Date and continue for an initial term expiring December 31, 2016 (the "Initial Term"). This Agreement shall be automatically renewed for successive subsequent terms of one year each (each such successive subsequent renewal term a "Renewal Term") unless terminated pursuant to Section 4.2.

4.2 Termination. The license and associated rights granted to Licensee under this Agreement are subject to achieving certain, future cumulative targets for Sales Proceeds. Accordingly, if the Licensee fails to reach any one or more of the cumulative Sales Proceeds targets set forth below, this Agreement shall terminate and, except as expressly provided herein, the Licensee shall have no further right to reproduce, display, publish, perform and distribute the Licensed Property or derivative works or to manufacture, import, market, offer for sale, sell, distribute or otherwise transfer Merchandise.

The Licensee has targeted July 1, 2014 as the publication date of a book dedicated to the work of Robert James Campbell. Sales Proceeds targets reflect this expected publication date.

The cumulative Sales Proceeds targets are as follows:

<u>Date</u>	<u>Cumulative Sales Proceeds (From Effective Date)</u>
December 31, 2014	\$ 25,000
December 31, 2015	\$100,000
December 31, 2016	\$175,000

For periods after December 31, the cumulative Sales Proceeds target for each succeeding December 31st shall be the gross sales target for the prior December 31st plus the sum of \$75,000.

4.3 Disposal of Merchandise. In the event of termination under Section 4.2 above, Licensee shall have nine (9) months from termination in which to use the Licensed Property to dispose of inventory of any Merchandise produced or ordered prior to the termination date (and the right to produce Merchandise ordered prior to the termination date). Any Merchandise not disposed of within such nine (9) month time period shall be destroyed or returned to the Licensor.

4.4 Return of Negatives/Photographs. Within fifteen (15) days of termination under Section 4.2 above, Licensee shall return to Licensor all physical photographic negatives (or any photographs she obtained from Licensor) in the possession of the Licensee as described on Exhibit A hereto. Upon such termination, Licensee shall have no further right to use the Licensed Property except as set forth in Section 4.3 above.

5. Representations and Warranties

5.1 Licensor represents and warrants that: (a) it owns all right, title and interest in and to the Licensed Property; (b) it has the right to grant the license and rights granted herein; (c) there is no action, suit, claim, investigation or proceeding, whether in law or in equity, pending or threatened, regarding any of the Licensed Property; (d) use of the Licensed Property will not infringe on any intellectual property or other proprietary right of any third party; and (e) the Licensed Property is not subject to any liens, collateral assignments or other encumbrances.

5.2 Each party represents and warrants to the other that (a) it has the full right, power and authority to enter into this Agreement and to perform all of its obligations hereunder, (b) this Agreement has been duly executed and delivered by such party and constitutes a valid and binding obligation of such party in accordance with its terms, and (c) the execution by such party of this Agreement and the performance of its obligations hereunder will not violate or result in a breach of or default under any contract, agreement, instrument, judgment, decree, order, ruling or statute or regulation to which such party is presently a party or by which it or its properties may be subject.

5.3 The parties understand and agree that Licensor is the owner of other images created by photographer Robert James Campbell (and certain personal property) that is not part of the Licensed Property and that Licensor's right to use, sell otherwise dispose of such property is not restricted or abrogated by this Agreement.

6. Indemnification.

6.1 The Licensee shall defend, indemnify, and hold harmless Licensor and its directors, officers, employees, and agents, and their respective successors, heirs, and assigns, at the Licensee's expense, from and against all claims, suits, losses, damages, costs, fees, expenses (including reasonable attorneys' fees) arising out of (a) any claim that the Merchandise sold and/or manufactured by the Licensee is defective in material or workmanship or give rise to product liability, or (b) any breach of representation, warranty, or covenant or other provision of this Agreement by the Licensee.

6.2 The Licensor shall defend, indemnify, and hold harmless Licensee and its directors, officers, employees, and agents, and their respective successors, heirs, and assigns, at the Licensor's expense, from and against all claims, suits, losses, damages, costs, fees, expenses (including reasonable attorneys' fees) arising out of any breach of representation, warranty, or covenant or other provision of this Agreement by the Licensor.

6.3 Neither party shall have an obligation to defend, indemnify or hold harmless the other party pursuant to Section 6.1 or 6.2 unless (a) the indemnified party promptly notifies the indemnifying party in writing as soon as the indemnified party becomes aware of the claim or allegation (except to the extent the indemnifying party is not prejudiced by any delay), (b) permits, subject to the immediately following sentence, the indemnifying party to control the defense and all settlement discussions with respect to such claims and allegations, and (c) assists the indemnifying party at the indemnifying party's expense with the defense of any claims and allegations. Notwithstanding the immediately preceding sentence, Licensor shall not, without Licensee's consent (which consent shall not be unreasonably withheld), enter into any settlement that affects: a) the goodwill associated with the Licensed Property; b) Licensor's ownership of the Licensed Property; or c) Licensee's right to use the Licensed Property in accordance with the terms and conditions of this Agreement.

6.4 (A) EXCEPT AS EXPRESSLY OTHERWISE PROVIDED HEREIN, EACH PARTY ACKNOWLEDGES AND AGREES THAT THE OTHER PARTY HAS NOT MADE, DOES NOT MAKE, AND HEREBY DISCLAIMS, ANY REPRESENTATION, GUARANTY, CONDITION, OR WARRANTY OF ANY KIND WITH RESPECT TO THE LICENSED PROPERTY, OR ANY RIGHTS, LICENSES AND PRIVILEGES GRANTED BY SUCH OTHER PARTY HEREUNDER WITH RESPECT THERETO, WHETHER WRITTEN OR VERBAL, EXPRESS OR IMPLIED, IN FACT OR AT LAW, INCLUDING WITHOUT LIMITATION ANY IMPLIED WARRANTY OF MERCHANTABILITY AND/OR FITNESS FOR A PARTICULAR PURPOSE.

(B) NOTWITHSTANDING THE FOREGOING, (I) IN NO EVENT SHALL EITHER PARTY BE LIABLE HEREUNDER (WHETHER IN AN ACTION IN NEGLIGENCE, CONTRACT, OR TORT OR BASED ON A WARRANTY OR OTHERWISE) FOR ANY INDIRECT, INCIDENTAL, SPECIAL, OR CONSEQUENTIAL DAMAGES INCURRED BY THE OTHER PARTY OR ANY THIRD PARTY, EVEN IF THE PARTY HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES, WHICH MAY INCLUDE,

WITHOUT LIMITATION, LOSS OF PROFITS OR REVENUE, OR LOSS OR INACCURACY OF DATA, AND (II) EACH PARTY'S MAXIMUM LIABILITY TO THE OTHER PARTY FOR ANY CLAIM, LOSS OR DAMAGE, REGARDLESS OF THE FORM OF ACTION, SHALL BE LIMITED TO THE TOTAL ROYALTIES ACCRUED FOR THE TWO (2) YEAR PERIOD IMMEDIATELY PRIOR TO THE CLAIM, LOSS OR DAMAGE.

(C) THE LIMITATIONS SET FORTH IN SECTION 6.4(B) ABOVE SHALL NOT APPLY TO (I) ANY THIRD PARTY CLAIM FOR WHICH A PARTY IS ENTITLED TO INDEMNIFICATION UNDER SECTION 6.1 OR 6.2, AS APPLICABLE; (II) CLAIMS ARISING OUT OF A BREACH OF ANY REPRESENTATION MADE IN SECTION 5.1 OR 5.2; (III) CLAIMS FOR THE PAYMENT OF ANY AMOUNTS DUE FROM ONE PARTY TO THE OTHER HEREUNDER.

7. Maintenance and Enforcement

7.1 Licensee agrees to inform Licensor by written notice of any infringement, possible infringement or unauthorized use of any of the Licensed Property by others of which Licensee becomes aware, and will make available to Licensor any information and items in its possession that are relevant to the infringement, as is reasonably necessary to support an infringement action. An action for infringement or unauthorized use of the Licensed Property against a third party will be brought, subject to Section 7.2 below, only by Licensor in its reasonable discretion, with counsel selected by Licensor. Licensee shall cooperate with Licensor, as Licensor may reasonably request and at Licensor's expense, in connection with any such action brought by Licensor. Licensor shall not settle any claim or take any action in any manner that would have a material adverse effect upon Licensee's rights under this Agreement without Licensee's express written approval for such settlement or action, which written approval shall not be unreasonably withheld. Licensor shall notify Licensee in writing no later than thirty (30) days after Licensor's receipt of the written notice from Licensee of Licensor's election to bring an infringement action or not to bring an infringement action.

7.2 If Licensor declines to pursue any infringement action against a third party or fails to provide the written notice required by Section 7.1, and Licensee, in its sole opinion, determines that such activity by the third party affects Licensee's continued use of the Licensed Property or enjoyment of its rights under this Agreement, Licensee may, at its sole expense, pursue such claims at its discretion. Licensee shall have the right to collect and retain for its own use and benefit all damages, profits and awards of whatever nature recoverable (including but not limited to all settlement amounts) for such infringement, in which case, Licensor's reasonable out-of-pocket expenses (other than attorneys' fees) will be reimbursed by Licensee in the event that Licensor joined as a party to such suit as required by this Section. Notwithstanding the foregoing, Licensee shall not settle any claims or take any action in any manner that would affect Licensor's rights in the Licensed Property or adversely affect the Licensed Property without Licensor's express written approval for such settlement or action, which written approval shall not be unreasonably withheld.

8. Taxes/Expenses. Licensee agrees that it is responsible for the payment of all taxes, fees, tariffs, expenses or other costs associated with the use of the License as set forth in Section 1 above.

9. Miscellaneous

9.1 Successors and Assigns. This Agreement may only be assigned with the prior written consent of the other party. This Agreement shall be binding upon and shall inure to the benefit of all successors and permitted assigns of Licensee and Licensor.

9.2 Entire Agreement. This Agreement constitutes the entire agreement between the parties regarding the subject matter hereof, and supersedes any and all prior agreements and/or understandings, written or oral, between the parties relating to the subject matter hereof. To the extent that any provision of this Agreement is held by a court of law having jurisdiction over the parties to be invalid or unenforceable, such provision shall be deemed to be deleted and the remaining provisions of this Agreement given full force and effect.

9.3 Waiver. No provision of this Agreement may be waived or modified except expressly in a writing signed by both Licensor and Licensee. Any waiver shall constitute a waiver only with respect to the specific matter described in such writing and shall in no way impair the rights of the party granting such waiver in any other respect or at any other time.

9.4. Notice. All notices required by this Agreement shall be made in writing. Any notice, consent, report or other communication by one party to the other pursuant to this Agreement shall be deemed to have been sufficiently made or given for all purposes hereof three (3) business days after the date of mailing if sent by air mail, certified mail/return receipt requested or first class mail, postage prepaid, addressed to the other party at the Notification Addresses set forth below or at such other address as it shall designate by written notice in accordance with this Agreement along with a copy to counsel as such other party designates by written notice in accordance with this Agreement.

Notification Addresses:

If to Licensor:

City of Burlington
C/o City Attorney's Office
149 Church St., Suite 11
Burlington, VT 05401
(802) 865-7121

If to Licensee:

Soupy LLC
2854 Southeast Clinton Street
Portland, OR 97202

9.5. License Agreement Only. The rights hereby granted to Licensee are those of a licensee only. Nothing herein shall be construed to place the parties in the relationship of partners or joint venturers.

9.6. Governing Law. This Agreement shall be governed, to the extent applicable, by the laws of Vermont. The parties hereby irrevocably consent to the exclusive jurisdiction of the federal and state courts located in Vermont in connection with any action or proceeding arising out of or relating to this Agreement or any document or instrument delivered pursuant to, in connection with, or simultaneously with this Agreement.

9.7. Compliance. Licensee agree to abide by all federal, state and local laws, rules and regulations applicable to the use of the License as set forth in Section 1 above.

9.8. Construction. The parties acknowledge and agree that each party participated in the drafting of this Agreement. Accordingly, the parties agree that any ambiguity is not to be resolved against the drafting party and that no inference in favor of, or against, any party will be drawn from the fact that one party has drafted any portion of this Agreement.

9.9. Counterparts. This Agreement may be executed in counterparts.

9.10. Amendments. This Agreement may only be amended by a writing executed by a duly authorized representative of the party against whom any amendment is sought to be enforced.

IN WITNESS WHEREOF, the parties have executed this Agreement effective as of the date set forth hereinabove.

SOUPY PHOTO, LLC

City of Burlington

By: _____
Name:
Title:

By: _____
Name:
Title:

Exhibit A

Images

The "Images" as defined in the License Agreement by and between the City of Burlington, as Licensor and Soupy Photo, LLC as Licensee are identified as follows:

See attached 2 pages.

Name	Sheet ID	Format
Birdland	contact sheet A	negatives
Birdland	contact sheet B	negatives
Birdland	contact sheet C	negatives
Birdland	contact sheet D	negatives
Bud Powell	contact sheet A	negatives
Bud Powell	contact sheet B	negatives
Bud Powell	contact sheet C	negatives
Chuck B	contact sheet A	negatives
Chuck B	contact sheet B	negatives
New Hampshire Jazz	contact sheet A	negatives
Johnny Richards Orch	contact sheet A	negatives
Johnny Richards Orch	contact sheet B	negatives
Johnny Richards Orch	contact sheet C	negatives
Roy Wayne Cecil	contact sheet A	negatives
Billy Higgins	contact sheet A	negatives
CB Orchestra / Joe W	contact sheet A	negatives
Myrlie Evers	contact sheet A	negatives
Mississippi John Hurt	contact sheet A	negatives
Newport Jazz Misc	contact sheet A	negatives
Miriam Makeeba	contact sheet A	negatives
Bob Campbell Self	contact sheet A	negatives
Bob Campbell Self	contact sheet B	negatives
Bob Campbell Self	contact sheet C	negatives
Bob Campbell Self	misc child prints	prints
Richie Havens	contact sheet A	negatives
Richie Havens	contact sheet B	negatives
Richie Havens	contact sheet C	negatives
Fred Neil	contact sheet A	negatives
Fred Neil	contact sheet B	negatives
Dick Gregory	contact sheet A	negatives
Dick Gregory	contact sheet B	negatives
David Steinberg	prints	prints
Son House John Hammond	print	print
Flip W	contact sheet A	negatives
Flip W	contact sheet B	negatives
Flip W	contact sheet C	negatives
Paul Sorvino and Fam	contact sheet A	negatives
Bill Monroe	contact sheet A	negatives
Misc Folk TBD	contact sheet A	negatives
Misc Folk TBD	contact sheet B	negatives
Misc Folk TBD	contact sheet C	negatives
Misc Folk TBD	contact sheet D	negatives

Misc Folk TBD	contact sheet E	negatives
Misc Jazz TBD	contact sheet A	negatives
Misc Jazz TBD	contact sheet B	negatives
Misc Jazz TBD	contact sheet C	negatives
Misc Jazz TBD	contact sheet D	negatives
Street Shots	contact sheet A	negatives
Street Shots	contact sheet B	negatives
Street Shots	contact sheet C	negatives
Street Shots	contact sheet D	negatives
Misc Celebrity TBD	contact sheet A	negatives
Misc Celebrity TBD	contact sheet B	negatives
Misc Celebrity TBD	contact sheet C	negatives