

**PRE-CONSTRUCTION / FACILITY / USE AGREEMENT
(HOLBROOK-PALMER PARK LITTLE LEAGUE BASEBALL FIELD)**

THIS PRE-CONSTRUCTION / FACILITY / USE AGREEMENT (“Agreement”) is entered into as of the 25th day of September, 2014, by and between the Town of Atherton, a California municipal corporation (“Atherton”), and the Menlo-Atherton Little League, Inc., a 501(c)(3) tax exempt organization (“M-ALL”), collectively referenced herein as the “Parties”.

RECITALS

WHEREAS, in 2000, Atherton received a donation from M-ALL in the form of a new Little League baseball field and ancillary improvements on a portion of the public park commonly known as Holbrook-Palmer Park located in Atherton, California (“**Holbrook-Palmer Park**”);

WHEREAS, since 2000 Atherton has granted a facility agreement to M-ALL permitting M-ALL to operate and use the same Little League baseball field and ancillary improvements (the “HP Little League Field”);

WHEREAS, the Parties acknowledge and agree, without assignment of responsibility or blame, that the HP Little League Field has fallen into a state of disrepair unbecoming of the Town of Atherton;

WHEREAS, the Parties acknowledge and agree that it is in the best interest of M-ALL, Atherton, and the residents of Atherton that the HP Little League Field be substantially repaired, improved, and upgraded;

WHEREAS, pursuant to a successful ballot proposal in 2012, M-ALL has received overwhelming citizen support to once again make a donation to Atherton in the form of constructing repairs, improvements, and upgrades in Holbrook-Palmer Park, including but not limited to permanent covered spectator seating, new permanent covered dugouts and backstop, new permanent perimeter fencing extending along both base lines from the backstop to just beyond the bullpen areas, removable perimeter fencing from the bullpen areas to a removable left field foul pole, a permanent right field flag pole/foul pole, removable outfield fencing between the foul poles, a new permanent electronic scoreboard, restrooms, storage, grading, drainage and irrigation improvements to the existing field area, associated electrical and plumbing improvements, and modification of existing path and walkways;

WHEREAS, the intent of the parties is that the proposed project will become a permanent part of Holbrook-Palmer Park and will be used and enjoyed by M-ALL’s players, participants, coaches, spectators, the Town of Atherton and its residents, and others for many years; and

WHEREAS, in consideration for the Agreement granted herein, M-ALL has agreed to construct and donate certain improvements including, but not limited to, a Little League Baseball Park at Holbrook-Palmer Park.

NOW, THEREFORE, in consideration of the foregoing and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties hereby agree as follows:

ARTICLE I - PHYSICAL IMPROVEMENTS

1. Permission to Construct Physical Improvements

Atherton hereby grants to M-ALL, its contractors and agents approval to construct and install any and all of the grading, landscaping and physical improvements shown on the plans once approved by Atherton attached hereto as Exhibit "A" and incorporated herein by this reference (collectively, the "**Physical Improvements**") at, on and under the portion of Holbrook-Palmer Park on which the baseball field and planned physical improvements are located (the "**Project Area**"). The Project Area is as delineated on the map attached hereto, as Exhibit "B" and incorporated herein for all purposes. The foregoing described license shall be irrevocable unless this Agreement has been terminated pursuant to the terms of Article IX hereof. Upon completion of such construction and acceptance by Atherton, ownership of the Physical Improvements will be donated as a gift from M-ALL to Atherton and subsequently owned by Atherton. The Physical Improvements shall include, but not be limited to, the following:

a. Covered Spectator Seating Structure

Pursuant to an approved plan, not yet approved at the time this Agreement was executed, M-ALL shall construct a permanent covered seating area for up to 200 spectators with integrated storage, as shown on the plan approved by Atherton. The seating structure is as described and proposed on the approved plan.

b. Backstop and Dugouts

Pursuant to the plan once approved, M-ALL shall install permanent covered dugouts in approved areas adjacent to the first and third baselines of the baseball field, and an appropriate backstop including a hood constructed of suitable screen material to reduce the possibility of foul ball interaction with spectators and tennis court users.

c. Restroom facilities

Pursuant to the plan once approved, M-ALL shall construct and provide suitable and approved restroom facilities to be available for use by M-ALL, its players, participants, coaches, spectators and invitees, as well as the general public at all times Holbrook-Palmer Park is open.

d. Fencing

Pursuant to the plan once approved, M-ALL shall install permanent perimeter fencing of the field along the first and third base sides of the field from the backstop/seating structure to just beyond the bullpen area, and removable outfield fencing around the outfield area from the end of the permanent fencing to the left and right foul poles as shown on the approved plans. M-ALL also may install removable outfield fencing between the foul poles. The outfield fencing will be removed by M-ALL at the end of each Season (as defined in Article III.2 below). The outfield fencing shall be the property of M-ALL and for the exclusive use of M-ALL and may be stored in the integrated storage component of the seating area when not in use.

e. Flag/Foul Poles

Pursuant to the plan once approved, M-ALL shall install foul poles of a suitable and approved height in the right and left field corners. The right field foul pole shall be permanent and will double as a flagpole. The left field foul pole shall be removable, unless Atherton chooses at its own discretion and expense to make it permanent. Atherton will be responsible for installation and removal of the temporary foul pole at the beginning and end of each Season. Atherton will be responsible for storage of the temporary foul pole when not in use, and will be responsible for the repair of any damage incurred in the course of such removal and storage.

f. Electronic Scoreboard

Pursuant to the plan once approved, M-ALL shall install a permanent electronic scoreboard along the left field line at the end of the permanent fencing just beyond the bullpen.

g. Field Improvements

Pursuant to the plan once approved, M-ALL shall make grading, drainage and irrigation improvements to the existing field area, subject to the maintenance agreement below. At its own discretion, M-ALL may choose to re-surface the existing field or, alternatively, may elect to make spot repairs to improve the field surface.

h. Existing Paths and Walkways in Project Area

Pursuant to the plan once approved, M-ALL shall modify the existing paths and walkways in the Project Area.

i. Trash and Recycling Receptacles

M-ALL shall provide new trash and recycling receptacles in a type, number and size as mutually agreed upon with Atherton. Atherton will be responsible for all trash collection and disposal.

ARTICLE II - CONSTRUCTION

1. Permits

M-ALL shall go through the normal building permit process, including plan review and inspection. Tree removal shall be identified and included in the landscaping plan for the project. Design and construction of Project Improvements shall comply with all Atherton standards, building code requirements, and relevant State and Federal requirements.

Atherton hereby acknowledges that M-ALL has applied for and Atherton has or expects to have under consideration required land use, building, grading, landscaping, and any other necessary permits and approvals required to build and/or operate the Physical Improvements. Atherton hereby further acknowledges that the project complies with the California Environmental Quality Act (hereinafter "CEQA") regarding the project improvements contemplated herein.

2. Improvement Plans

M-ALL is responsible for preparation of all construction plans and specifications. All improvement plans shall be reviewed and approved by Atherton prior to the start of construction.

3. Costs

M-ALL will be responsible for all building and planning expenses related to construction of the Physical Improvements pursuant to the submitted plans. Atherton will not be required to contribute any funds for the building and planning project review and/or construction of the Physical Improvements. M-ALL agrees to reimburse Atherton for the costs of staff time including planning, design review, inspection, legal, and administrative costs associated with review of the design and construction improvements.

Atherton recognizes that M-ALL plans to add to the project certain features that exceed the scope of the Physical Improvements as defined in this Agreement at the request of and/or approval by Atherton. These additional improvements include, but are not limited to, more than seven thousand (7,000) square feet of new asphalt pavement, ADA compliant parking, a new tennis court gate, new landscape and plant establishment (i.e., planting of trees, bushes, shrubs, and building a retaining wall and a new stepped path for better access to the tennis courts), a new eight inch (8") drain line to an existing low area and a new catch basin, and a two hundred (200) Amp panel and larger bore to accommodate additional electrical service for potential future needs unrelated to M-ALL. These additional features outside the scope of the Physical Improvements, which are estimated to exceed \$100,000 in value, shall constitute an in kind

contribution by M-ALL to Atherton and shall offset M-ALL's obligation to reimburse Atherton pursuant to this provision, with the exception of permitting fees. Notwithstanding the in kind contribution described herein, M-ALL shall continue to be responsible for permitting costs associated with the project.

Atherton will be responsible for any and all expenses relative to any Physical Improvements added by Atherton not within the scope of the approved plan once approved.

4. Contractor

M-ALL is responsible for construction and will select and secure all contractors and sub-contractors. The contractor making the improvements shall possess a valid Town business license during any period of construction, and shall comply with all Town Municipal Codes, ordinances, resolutions and regulations relating to and governing construction within the Town limits.

ARTICLE III - USE

1. Use of Project Area

Atherton hereby grants to M-ALL, its players, participants, coaches, spectators and invitees permission to operate, use the Project Area for the purpose of conducting M-ALL baseball games, practices and related events, subject to the terms and conditions set forth in this Agreement. The foregoing described Agreement shall be irrevocable during the prescribed term unless terminated due to uncured breach. Atherton will not grant a license or permit or give permission to any other person or group to use the Project Area for organized events during the Season (as defined below). Furthermore, Atherton hereby grants to M-ALL and its agents exclusive use of the storage areas constructed as part of the Physical Improvements (as defined below) on a year-round basis. The shed previously used by M-ALL for storage purposes at the HP Little League Field shall be made available to other groups, including but not limited to lacrosse, soccer, tennis, and/or the Atherton Dames, as needed.

2. M-ALL Use During "Season"

M-ALL will have the exclusive right to use the Project Area during the months of February, March, April, May and June (the "Season") of each year during the term of this Agreement for baseball practices and games. M-ALL's use of the Project Area for games during the Season shall be limited as follows:

Monday through Friday: M-ALL may commence baseball games on weekdays during the Season no earlier than 4:30 p.m. M-ALL will not start an inning of a game after 7:00 p.m. or sunset, whichever comes first and all games must be concluded by 7:30 p.m.

Saturday: M-ALL may play baseball games on each Saturday during the Season. Games will be scheduled to commence no earlier than 8:45 a.m. and must be concluded by 4:30 p.m.

3. Fees

As consideration for exclusive use by M-ALL of the Project Area as described herein, and any and all maintenance and operations responsibilities of Atherton relative to the new improvements and pursuant to this Agreement, Atherton shall charge M-ALL an annual fee in the amount of five hundred dollars (\$500) per year. This fee will remain in effect and will not be increased for the duration of the ten (10) year term described in Article VIII below, subject to the possibility of fluctuation to accommodate unanticipated maintenance pursuant to Exhibit C, paragraph F of this Agreement.

If and when M-ALL elects to exercise its option(s) to extend the term of this Agreement by five (5) years pursuant to Article VIII below, Atherton may reconsider the amount of the annual fee and impose a reasonable increase. If Atherton intends to increase the annual fee pursuant to this provision, it shall give M-ALL notice of the increased fee in writing at least thirty (30) days in advance of the new term.

ARTICLE IV - OWNERSHIP AND NAMING RIGHTS

1. Physical Improvements

Upon completion of construction, M-ALL will **donate as a gift** to Atherton all Physical Improvements to Atherton, and upon acceptance, Atherton will own the Physical Improvements.

2. Little League Equipment

M-ALL or its participants will own, operate and maintain all of the equipment, bases and other items used by M-ALL or its participants in connection with practice sessions and baseball games at Holbrook-Palmer Park.

3. Naming Rights

Consistent with past practices in the Town of Atherton, and in gratitude for the generous donation of the Physical Improvements, M-ALL shall have a one-time option to suggest a name for the HP Little League Field, provided that the name selected is reasonable, connected to Atherton, and not offensive or insulting. The name selected by M-ALL is subject to the approval of the City Council of Atherton. The City Council of Atherton may grant naming authority to the Mayor of Atherton, a Subcommittee of the Council, and/or M-ALL at any time. Approval of a name for the HP Little League Field, or the grant of authority to name the HP Little League Field, shall be at the sole discretion of the City Council. Once a name is authorized, at its discretion, M-ALL shall have the right to place the approved name of the field on the seating structure, permanent scoreboard, a plaque located at or near the Project Area, and/or other Physical Improvements to be constructed pursuant to the approved plans.

ARTICLE V - MAINTENANCE OF PHYSICAL IMPROVEMENTS

1. Maintenance Obligations

Upon acceptance of the Physical Improvements by Atherton, Atherton will assume primary responsibility for the maintenance obligations as described on Exhibit "C" attached hereto and incorporated herein for all purposes. M-ALL may, at its own discretion, supplement Atherton's maintenance activities in order to enhance the playing conditions. Any such supplemental maintenance shall be in a manner and to a level suitable to Atherton in at least the same level as has been maintained by Atherton under the previous Agreement.

2. Third Party Damages

In the event that a third-party damages the Physical Improvements (excepting normal and reasonable wear and tear), Atherton will use its best efforts to identify the person or persons responsible for such damage and seek payment from them of monetary damages in an amount sufficient such that the damaged Physical Improvements may be restored or replaced. In the event that any portion of the Physical Improvements is damaged or destroyed by an act of nature or unidentifiable third-party, Atherton and M-ALL will discuss and agree upon how best to address, and possibly share if appropriate under the circumstances, the cost, repair or replacement of such damaged Physical Improvements; provided that in the event such Physical Improvements were covered by insurance, the insured will contribute any proceeds from such insurance to the cost of such repair or replacement.

ARTICLE VI - INSURANCE

M-ALL shall maintain public liability insurance covering M-ALL's use of the Project Area consistent with its past practices of insurance coverage.

Each party understands, however, and agrees that the insurance coverage provided by M-ALL will provide coverage only for M-ALL-authorized activities and events, and will not provide coverage for third-parties or third-party events. Use of the Project Area by third-parties or for non-M-ALL events shall not be covered by M-ALL's insurance policy nor shall Atherton make a claim for coverage arising from such third-party usage against the M-ALL policy.

ARTICLE VII - ADDITIONAL CONTRIBUTIONS

M-ALL shall contribute funds in the amount of twenty-seven thousand five hundred dollars (\$27,500) to Atherton to be used for repair and refurbishment of the tennis courts. M-ALL shall contribute funds to Atherton for park beautification in an amount equal to five percent (5%) of the final construction costs up to a maximum of fifty thousand dollars (\$50,000). Both of these contributions shall be made prior to final approval and acceptance of Project Improvements by Atherton.

With respect to the five (5%) of the final construction up to a maximum of fifty thousand dollars (\$50,000), Atherton recognizes that M-ALL plans to add to the project certain features, articulated more specifically in Article II.3 herein, that exceed the scope of the Physical Improvements as defined in this Agreement. These additional features outside the scope of the Physical Improvements shall constitute an in kind contribution by M-ALL to Atherton and shall offset M-ALL's obligation to contribute funds to Atherton for park beautification pursuant to this provision.

ARTICLE VIII - TERM

The term of this Agreement shall be for a period of ten (10) years from the date the completed Project Improvements are accepted by Atherton, unless terminated earlier for cause pursuant to Article IX hereof. At the end of the first period, M-ALL may elect to extend the term by five (5) years. At the end of the second period, M-ALL may elect to extend the term by another five (5) years, for a full potential term of twenty (20) years. M-ALL must make any such election in writing by the end of the then current term. The term of this Agreement may be further extended, if desired, upon mutual agreement of the parties.

ARTICLE IX - BREACH

Atherton and M-ALL will notify each other in writing of any perceived or actual breach of this agreement. The party receiving notice will be given forty-five (45) days to cure the breach (or such longer period of time as is reasonable under the circumstances if, in the notifying party's opinion, the breach is not capable of being cured in such 45-day period and the party potentially in breach is working diligently to cure the breach. In the event that the party potentially in breach is unable or unwilling to cure or remedy the breach to the satisfaction of the notifying party, then the parties may submit the issues to binding arbitration in accordance with applicable laws, the resolution of which could include the termination of this Agreement.

ARTICLE X - ANNUAL REVIEW

The City Manager of Atherton and the President of M-ALL will jointly conduct an annual review of use and operation of the Project Area to ensure that M-ALL has used the Project Area in accordance with the measures adopted for the project, and that Atherton is maintaining the donated Physical Improvements on a basis consistent with its obligations, in accordance with the terms and provisions of this Agreement (the "**Annual Review**"). Prior to this meeting, the City Manager will seek input from the City Council and the Parks & Recreation Committee regarding M-ALL's compliance with this Agreement and its provisions, and the President of M-ALL will seek input from coaches, citizens of Atherton, and/or landscaping/maintenance experts regarding Atherton's compliance with its obligations pursuant to this Agreement.

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ARTICLE XI - HOLD HARMLESS

During the term of this Agreement, M-ALL shall indemnify, defend, and hold harmless Atherton from and against any and all damages, losses, liabilities, actions, suits, claims, proceedings, investigations, audits, demands, assessments, fines, judgments, settlements, costs and other expenses (including, without limitation, reasonable attorney's fees and expenses, and costs of investigation incurred in defending against or settling any of the foregoing and any amounts paid in settlement thereof) incurred or resulting from M-ALL's activities on the Project Area ("Claims") excluding, however, any such Claims arising from the gross negligence, fraud or willful misconduct of Atherton.

ARTICLE XII - NOTICES

All written notices and demands of any kind which either party may be required or may desire to serve upon the other party in connection with this Agreement may be served (as an alternative to personal service) by registered or certified mail (postage pre-paid) or sent by facsimile transmission or email (followed by next day overnight delivery service), or by next day overnight delivery service. Any such notice or demand shall be addressed to the parties as listed below. Service of any such notice or demand shall be deemed complete upon receipt in the event of personal service, on the third business day after deposit in the U.S. mail if sent via registered or certified mail, upon transmission with a receipt in the event sent via facsimile transmission or email, and on the next business day if sent via an overnight delivery service, if sent to each party at the address set forth below with the required proper postage:

To Atherton: Town of Atherton
 91 Ashfield
 Atherton, CA 94027
 Attn: City Manager
 Facsimile: (650) 614-1212
 Email: grodericks@ci.atherton.ca.us

To M-ALL: Menlo-Atherton Little League, Inc.
 c/o President
 P.O. Box 602
 Menlo Park, CA 94026
 Facsimile:
 Email: President@m-all.org

Any party, by written notice to the others in the manner herein provided, may designate an address different from that set forth above.

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ARTICLE XIII - MISCELLANEOUS

1. Assignment/Successors and Assigns

This Agreement shall not be assigned or transferred by any party hereto by operation of law or otherwise without the prior written consent of the other parties hereto. Subject to the foregoing, this Agreement shall be binding upon and shall inure to the benefit of the parties hereto and their respective heirs, legal representatives, successors and assigns.

2. Entire Agreement

This Agreement supersedes any and all other agreements, whether oral or written, between the parties hereto with respect to the matters contained herein and this Agreement contains all of the covenants and agreements between the parties hereto with respect to such matters.

3. Modification and Waiver

No supplement, modification or waiver of this Agreement or any provisions hereof shall be binding unless executed in writing by each of the parties. No waiver of any of the provisions of this Agreement shall constitute a waiver of any other provision (whether or not similar), nor shall such waiver constitute a continuing waiver unless otherwise expressly provided.

4. Legal Construction/Severability

In case any one or more of the provisions contained in this Agreement shall for any reason be held to be invalid, illegal or unenforceable in any respect, such invalidity, illegality, or unenforceability shall not affect any other provision hereof and this Agreement shall be construed as if such invalid, illegal or unenforceable provision had never been contained herein.

5. Attorney's Fees

In the event of any controversy, claim, dispute, arbitration or litigation between the parties hereto (whether sounding in contract, tort or both) to enforce or interpret any of the provisions of this Agreement or any right of any party hereto, the non-prevailing party to such action agrees to pay to the prevailing party all costs and expenses, including reasonable attorney's fees, incurred therein by the prevailing party, including, without limitation, fees incurred during a hearing of any action, claim or dispute and any fees incurred regarding any petition to confirm, correct, modify or vacate any award, as a result of any appeal from a judgment entered in connection with such litigation, or to enforce said judgment. To so recover, it shall not be necessary that the prevailing party prevail in each and every one of its claims. Rather, the amount of the award of attorney's fees shall, in the court's discretion, reflect the degree to which the prevailing party or parties have prevailed in some of their claims.

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6. Limitation on Recourse

The obligations of M-ALL set forth in this Agreement are those of Menlo-Atherton Little League, Inc. only and under no circumstances shall Atherton have any recourse for satisfaction of such obligations from any officer, director, board member, commissioner or other representative of M-ALL, or any participant, player, coach, parent or affiliated entity that is related to M-ALL.

7. Authority

Each party to this Agreement hereby represents to the other that it has the appropriate authority to enter into and perform this Agreement and that no consents which have not previously been obtained are required for such party to enter into this Agreement.

8. Applicable Laws

This Agreement shall be governed by and construed in accordance with the internal laws, and not the laws pertaining to choice or conflict of laws, of the State of California, and is entered into in Atherton, California.

9. Counterparts

This Agreement may be executed in several counterparts, each of which shall be deemed an original, and said counterparts shall constitute but one and the same instrument which may be sufficiently evidenced by one counterpart.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement to be effective as of the date first set forth above.

ATHERTON:

TOWN OF ATHERTON,
a California municipal corporation

By: _____
Name: George Rodericks
Title: City Manager

Dated: 09-25-14

Attest: _____
Name: Theresa DellaSanta
Title: City Clerk

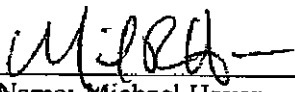
Approved as to Form:



William B. Connors
City Attorney

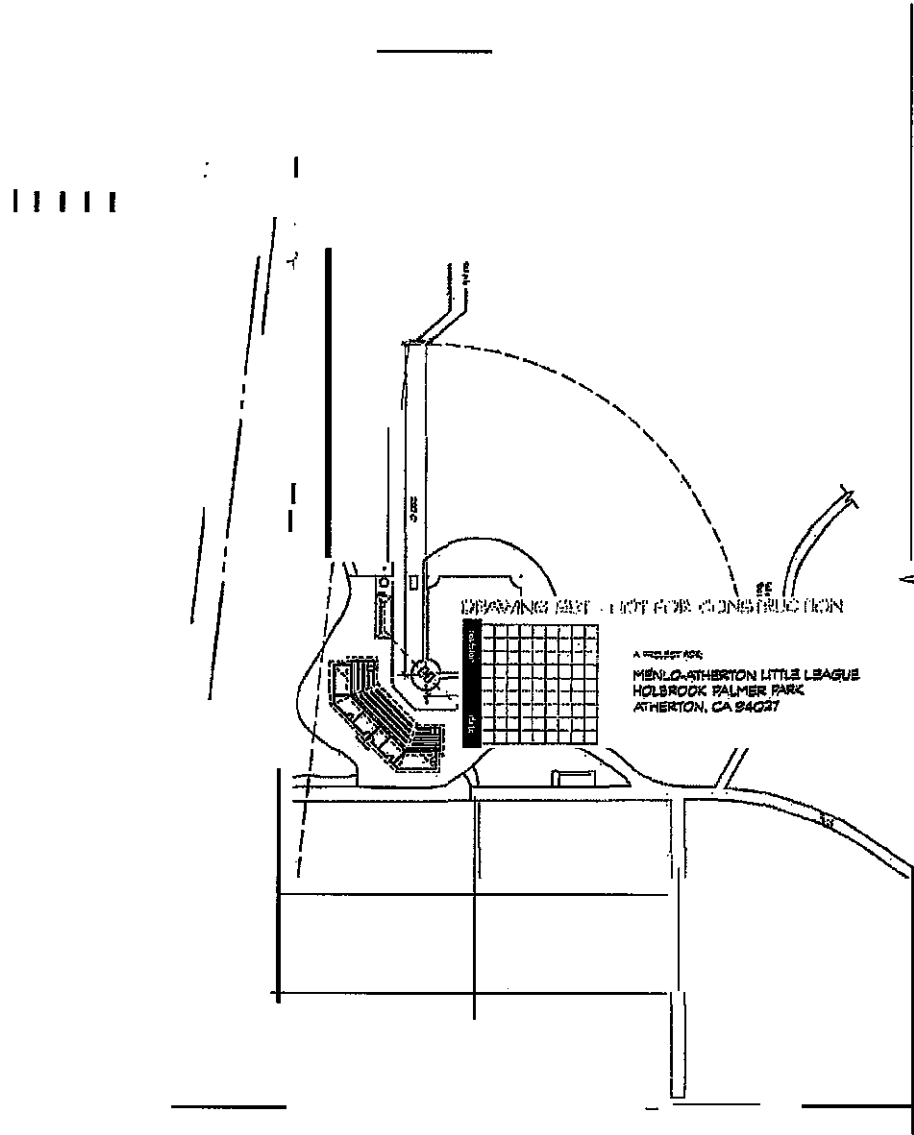
LITTLE LEAGUE:

MENLO-ATHERTON LITTLE LEAGUE, INC.,
a 501(c)(3) tax exempt organization

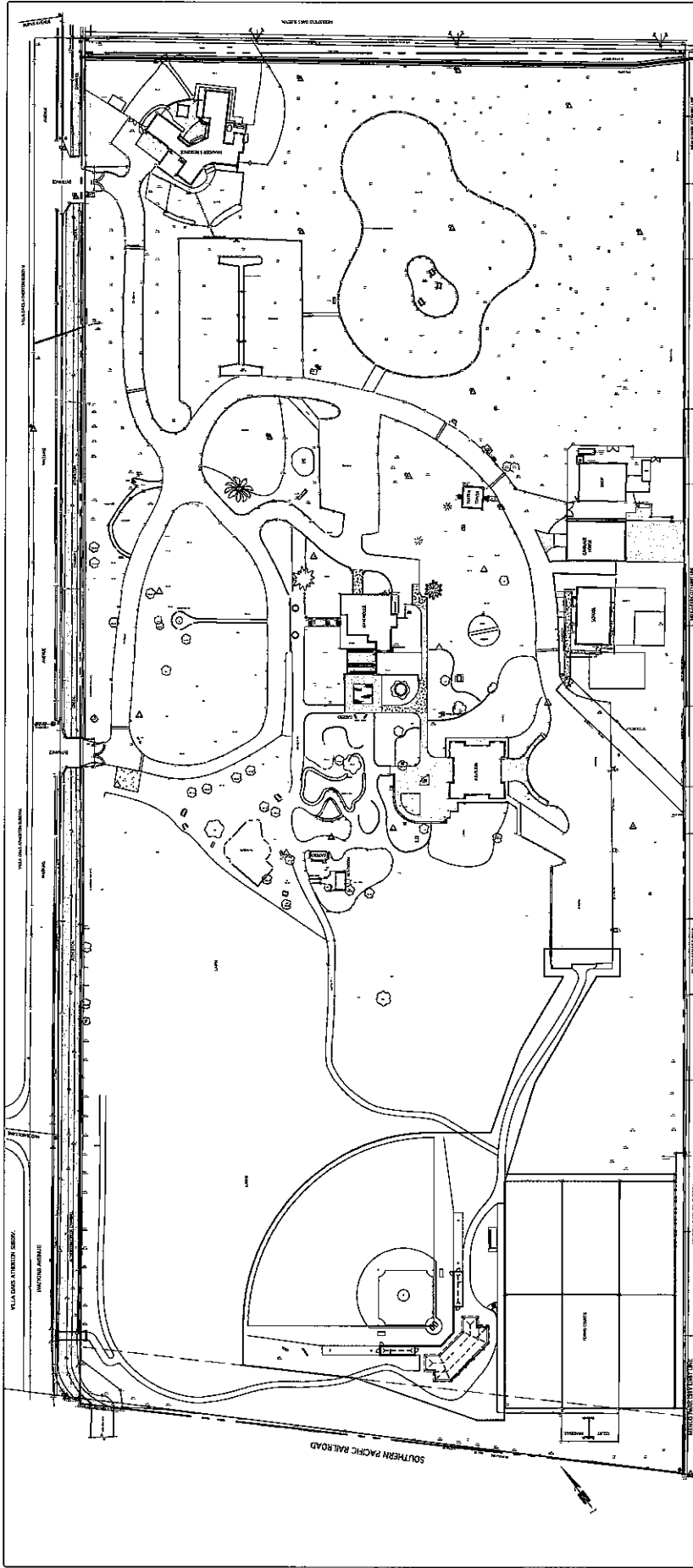
By: 
Name: Michael Haven
Title: Vice President

Dated: 9/25/2014

Exhibit A
Physical Improvements



**Exhibit B
Project Area**



HOLBROOK PALMER PARK - PROJECT AREA MAP

Exhibit C
Regular Maintenance Obligations

A. Maintenance of the turf area within the project area to be performed by Atherton as part of the annual usage fee as follows:

1. Atherton will mow and edge the turf weekly during the exclusive use period.
2. Atherton will mow the turf weekly and edge the turf monthly during the offseason (the months of July through January).
3. Atherton will maintain and repair the turf sprinkler/irrigation system including oversight of the programming of the sprinkler timers.

B. Atherton will empty trash cans as needed throughout the calendar year.

C. Atherton will clean and maintain the new restrooms regularly and as needed throughout the calendar year.

D. Atherton will provide set up of all removable fencing and foul pole at the beginning of the exclusive use period (February 1) and remove removable fencing and foul pole at the end of the exclusive use period (July 1). It is understood that due to need, the Town may remove any of the fencing or pole during the exclusive use period that does not interfere with the leagues games or practices (by mutual consent), provided that Atherton replace such removed fencing or pole immediately upon the conclusion of the event for which removal of such fencing or pole was requested.

E. M-ALL shall be permitted, at its own discretion, to perform the following supplemental duties as needed:

1. Importing of infield mix and its incorporation into the existing material to provide the optimum playing surface for their needs. This includes addition of materials to the pitching mound area and batter's box as required;
2. Upgrading of field appurtenances as necessary (base pegs, pitching mound, home plate);
3. Supplemental mowing;
4. Supplemental care of permanent field equipment, playing areas and surfaces.
5. Marking of base lines and foul lines using paint on turf areas and chalk on base paths and batter's box.

F. The following extra work may need to be performed following the addition of the improvements M-ALL and may cause a price fluctuation up to an additional five hundred dollars (\$500) in the annual user fee for the field, not to exceed an total annual fee of one thousand dollars (\$1,000) for the ten (10) year term of this Agreement:

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1. Grandstand maintenance - regularly scheduled cleaning of the grandstands to remove debris left behind at games (cups, shells, gum, spill clean-up, etc).
2. Graffiti abatement- should the new structure or restrooms become a target for vandals.
3. Associated cost of repairs for any damage to the grandstand associated landscaping or field appurtenances caused during an M-ALL function.