

**REPORT TO MAYOR AND COUNCIL**

**TO THE HONORABLE MAYOR AND COUNCIL:**

DATE: January 6, 2015

**SUBJECT: AGREEMENT WITH MJL ENTERPRISES TO PROVIDE BATTING CAGE SERVICES AT WILLOW PASS PARK; AND AUTHORIZING THE CITY MANAGER TO EXECUTE THE AGREEMENT**

**Report in Brief**

The current agreement with MJL Enterprises, Inc., the current operator of the Payless Batting Cages at Willow Pass Park, was entered into on January 26, 2010 and was for the period of January 1, 2010 to December 31, 2014. The President of MJL Enterprises and operator of the facilities, Mike Carzino, wishes to continue operations of the Payless Batting Cages and enter into a new agreement with the City of Concord.

Staff recommends that the City Council approve the agreement between the City and MJL Enterprises, Inc. to provide batting cage services at Willow Pass Park and authorize the City Manager to execute the agreement.

**Background**

On July 26, 1994, the City entered into an agreement with MJL Enterprises to operate batting cages at Willow Pass Park. The batting cages serve youth baseball and softball players and adult slow pitch softball participants. Youth use is primarily February through June and adult use peaks from March through November. The facility meets the needs of local athletes involved in organized sports programs by providing a convenient and accessible location to use batting cages.

**Discussion**

This agreement will start the 21<sup>st</sup> year of MJL Enterprises providing batting cage services in Willow Pass Park. MJL Enterprises has successfully operated the batting cage operation over the last twenty years with a stellar track record, few customer complaints and an outstanding safety record. The proposed new Contract and Lease Agreement is for a term of five (5) years effective January 1, 2015 and terminating on December 31, 2019. It also provides MJL Enterprises the right to exercise one five-year option to renew the Agreement on the existing terms and conditions. The initial annual rent under this agreement is \$13,920, representing a 3% increase from the current payment. The annual rent will increase 3% every other year, with

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a final increase of \$14,768 in 2018-2019. In addition, per the agreement, MJL Enterprises is to re-pay the City for all PG&E costs used to operate Batting Cages on a monthly basis.

**Fiscal Impact**

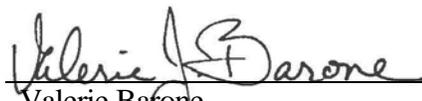
This agreement secures a positive revenue source even in periods of economic downturn.

**Public Contact**

The agenda was posted. Copies of the agenda and staff report have been sent to MJL Enterprises, Inc. president, Mike Carzino.

**Recommendation for Action**

Staff recommends that the City Council approve the agreement between the City and MJL Enterprises, Inc. to provide batting cage services at Willow Pass Park; and authorize the City Manager to execute the agreement (Attachment 1).

  
\_\_\_\_\_  
Valerie Barone  
City Manager

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Reviewed by: Joan Carrico  
Director of Parks & Recreation  
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Attachments:

Attachment 1 – Contract and Lease Agreement dated January 1, 2015

**AGREEMENT**

This AGREEMENT is entered into and effective on January 1, 2015, by and between the City of Concord, a municipal corporation (hereinafter "CITY"), and MJL ENTERPRISES, INC., a California corporation, (hereinafter "MJL"), upon the terms and conditions stated below.

**WHEREAS**, the CITY is the owner and operation of Willow Pass Park ("Park"), located east of Willow Pass Road in the City of Concord, California; and

**WHEREAS**, the CITY is desirous of having Batting Cage Facilities (as defined herein) available to the public at said Park; and

**WHEREAS**, MJL currently operates batting cages at Willow Pass Park and the CITY wishes to continue the contractual relationship, as hereinafter provided.

**NOW, THEREFORE**, in consideration of the faithful performance of the terms and conditions set forth in this Agreement, the parties hereto MUTUALLY AGREE as follows:

**1. Definitions.** Whenever used in this Agreement, the terms set forth in this section shall have the following meaning:

**A. Director.** The Director of Parks and Recreation or any employee designated in writing by the Director of Parks and Recreation to act on his/her behalf.

**B. Batting Cage Facilities.** Any and all equipment and facilities within area designated for batting cages, which includes pro shop, lesson area and five (5) batting cages.

**2. Grant of Privilege.** The CITY hereby grants to MJL the exclusive right and privilege to sell and operate batting cage services at Willow Pass Park, East Olivera Road, Concord, California, at the locations designated by the Director. This Lease shall be for a term of five (5) years commencing on January 1, 2015, and terminating on December 31, 2019, subject to prior termination by CITY as set forth herein.

**A. Renewal Option.** Provided MJL is not in default under or has not breached the Agreement, MJL shall have the right to exercise one five-year option to renew this Agreement on the existing terms and conditions for the period January 1,

2020 through December 31, 2024. MJL must exercise the option not less than ninety (90) days and not more than one hundred-eighty (180) days prior to December 31, 2019, and said options must be exercised by MJL in writing to the attention of the City of Concord Director of Parks and Recreation. The Director's consent shall be required for option to renew; however, if MJL is not in default under or has not breached the Agreement, the Director's consent will not be unreasonably withheld or delayed.

**3. Fee.** Effective January 1<sup>st</sup> 2015, MJL shall pay to the CITY for the privileges and authority granted under this Agreement as follows:

**A.** Monthly fee of One Thousand One Hundred & Sixty dollars (\$1,160). This fee shall be automatically adjusted to increase three percent (3%) on January 1<sup>st</sup> of every other calendar year for the entire term of the Agreement and all applicable extensions, with the first increase effective on January 1, 2017.

**B.** All utility costs associated with Batting Cage Facility operations paid in full on a monthly basis.

**4. Date of Payment of Fees.** Payments of fees due from MJL to CITY shall be paid on or before the 20<sup>th</sup> day of each month, beginning on January 20, 2015. If any payment is not received within 10 days after the due date, a late charge of five percent (5%) shall be added to the amount due. If any payment is not received within fifteen (15) days of its due date, MJL shall be considered in default of this Agreement, and CITY shall be entitled to the remedies set forth in Section 26 of this Agreement.

**5. Waiver.** The waiver by CITY of any breach of any term, covenant or condition of this Lease shall not be deemed to be a waiver of such term, covenant or condition of any subsequent breach of the same or any other term, covenant or condition herein contained. The subsequent acceptance of any sum due hereunder by CITY shall not be deemed to be a waiver of any prior breach by MJL of any term, covenant or condition of the Lease other than the failure of MJL to pay the particular sum so accepted regardless of CITY's knowledge of such prior existing breach at the time of acceptance of such sum.

**6. Facility Improvements.**

A. Eliminate all rusty areas, and replace torn or damaged netting as necessary.

7. **Use of Premises.** During the entire Agreement term, MJL shall use and occupy those locations at Willow Pass Park designated by the Director for the purpose of Batting Cage Facilities and for no other purpose or purposes without CITY's consent. MJL may operate or permit to be operated upon the demised premises coin or token operating food vending machines, or similar devices for the sale of food and beverages.

MJL shall promptly comply with all laws, ordinances, orders and regulations promulgated by any governmental agency and affecting the cleanliness, safety, occupation and use of the premises. MJL shall not perform any acts or carry on any practices that may damage the facilities and improvements used by it, or its employees, at the Park or that may be a nuisance or menace to customers.

At all times MJL shall maintain and operate the Batting Cage Facilities in accordance with the highest standards of cleanliness and shall keep them clean and free from rubbish. MJL shall store within an enclosure or enclosures all trash and garbage.

The Batting Cage Facilities shall be open at such times as are determined by the Director, after consulting with MJL in order to adequately serve the public.

8. **Quality and Price Control.** Services and merchandise shall be sold at prices comparable to those prevailing for similar services and facilities in the counties of Alameda and Contra Costa and without discrimination. The Director or designee shall have access to and the right to inspect, upon reasonable notice, all schedules of rates or prices for services established by MJL. If the Director, using reasonable discretion, determines that any rate or price charged for services or the quality of said items, is unreasonable or inappropriate for the service rendered, or the portion or quality is inadequate or deficient based on comparative batting cage operation, he/she shall forthwith advise MJL. MJL shall be given a reasonable opportunity to confer with the Director and justify any rate or price, the portions or quality of the services offered. However, the Director shall make the final decision regarding whether any rate or price charged for services or the quality of said items is unreasonable or inappropriate for the service rendered, or the portion or quality is inadequate or deficient

based on comparative batting cage operation. Upon written notice from the Director of his/her final decision, MJL shall modify its aforementioned prices or rates, portions or rates, portions or quality as directed by the Director within fourteen (14) calendar days of receipt of written notice. Failure by MJL to modify its aforementioned prices or rates, portions or rates, portions or quality as directed by the Director within fourteen (14) calendar days shall be cause for termination of this agreement pursuant to Section 26 herein.

**9. Operation of Business.** MJL shall furnish good, prompt and efficient service to its customers and shall conduct its operations and business in an orderly and proper manner. The management, maintenance and operation of the facilities and service shall be under the supervision and direction of a responsible person directly employed by MJL. Employees of MJL who have contact with the public shall wear uniforms supplied by MJL, be clean, courteous and neat in appearance and demeanor at all times.

**10. Equipment & Supplies.** MJL shall provide at its own cost and expense and maintain all said equipment and fixtures in a state of good and efficient order and repair during the entire term of this Agreement and keep the facilities furnished and equipped with equipment and fixtures throughout the term of this Agreement which are acceptable to the Director. Said equipment and fixtures shall not become the property of the CITY by reason of their installation at the Park; and if MJL is not in default under this Agreement, it may remove any and all thereof upon the termination of this Agreement (or may remove the same during the term hereof); provided always that any damages resulting to the Park by reason of said removal shall be repaired by MJL at its own cost and expense and to the satisfaction of the CITY. Permanent improvements made at the Park by MJL (or the CITY) shall be and become the property of the CITY upon completion and shall be surrendered upon termination of this Agreement.

**11. Mechanics' Liens.** MJL shall pay all costs for construction and/or maintenance done by it or caused to be done by it on the premises as permitted by this lease. MJL shall keep premises, all buildings, other improvements, and land of which the premises are a part free and clear of all mechanics' lines resulting from construction and/or maintenance done by

or for MJL.

MJL shall have the right to contest the correctness or the validity of any such lien. Immediately on demand by City, MJL shall procure and record a lien release bond issued by a corporation authorized to issue any surety bonds in California in an amount equal to one and one-half times the amount of the claim of the lien. The bond shall meet the requirements of Civil Code 3134 and shall provide for the payment of any sum that the claimant may recover on the claim (together with the costs of suit, if it recovers in the action).

**12. Alterations, Repairs and Improvements.** MJL shall not make any alterations, repairs, or improvements to the Park area in order to accommodate its operations without obtaining the prior written consent of the Director. Request to make any alterations, repairs or improvements shall be in writing and such alterations, repairs or improvements shall be at the sole expense of MJL.

**13. Inspection of Facilities.** The Director shall have the right as often as he/she deems necessary to inspect the facilities of MJL with the right to direct such repairs as may be necessary.

**14. Removal of Property.** Upon termination of this Agreement by lapse of time or otherwise, MJL shall promptly remove from the specified area all of its display signs, counters and other equipment, furnishings and trade fixtures, as may exist on the premises, and shall promptly repair any damage to the Park premises caused thereby. MJL shall leave the said premises in a safe, sanitary and sightly condition. MJL's failure to remove such equipment, furnishings and trade fixtures shall not constitute a hold-over under this Agreement, except that all such property not removed within thirty (30) days after termination of this Agreement shall be deemed abandoned and such equipment, furnishings and trade fixtures shall thereupon become the sole property of the CITY unless CITY grants a further period in writing within which to remove such property from the premises.

**15. Purchase of Equipment by City.** Upon the termination of this Agreement by the lapse of time or otherwise, CITY may have the option by notice in writing to MJL of at least thirty (30) days prior to the expiration of the term herein, of purchasing from MJL, its

equipment, furnishings and fixtures relating to the operation of the concession. The purchase price shall be determined by mutual agreement of the parties hereto, or if they are unable to reach agreement, by a mutually agreed upon qualified appraiser of batting cage equipment to be selected by the parties. The cost of the appraiser shall be shared equally.

**16. Taxes.** MJL shall pay all lawful taxes, assessments or charges which at any time may be levied by any federal, state, county or any tax or assessment levying agency upon any interest in this Agreement or any possessory interest which MJL may have at the Park by reason of this use or occupancy thereof or otherwise, as well as all taxes, assessments and charges on goods, merchandise, fixtures, appliances, equipment and property owned by it in or about the Park. In the event MJL desires to contest any tax which it is obligated to pay hereunder, MJL shall have the right to do so provided that should MJL be unsuccessful in any such contest, such taxes, together with any and all interest and penalties thereon, shall be forthwith discharged by MJL.

**17. No Liens.** MJL shall pay for all labor done or materials furnished in the repair, replacement, development or improvement of the Batting Cage Facilities referred to herein after acceptance by MJL and shall keep said premises and MJL possessor interest, if any, therein free and clear of any lien or encumbrance of any kind whatsoever created by MJL's acts or omissions. MJL shall not be in breach hereunder should MJL in good faith contest any lien or encumbrance which may be so created, and provided further that should MJL be unsuccessful in any such contest, MJL shall forthwith discharge same.

**18. License & Permits.** MJL shall obtain all permits and licenses required by any and all laws of any federal, state or other governmental agency to allow the MJL to meet its obligations under this Agreement and pay all fees therefore.

**19. Utilities.** MJL shall pay for all utilities required by MJL in its operation, including electricity, power, gas, water and heat. MJL shall also be responsible for hook-up and removal of said utilities. The CITY will provide hook-up for water and sewer. All garbage and other refuse resulting from the operation shall be disposed of by the CITY at its own cost and expense. MJL shall not be required to clean or maintain any part of Willow Pass Park,

except the Batting Cage Facilities, which MJL shall keep in a neat and clean condition at all times.

**20. Indemnification.** MJL shall indemnify, defend and hold harmless CITY, its officers, employees and agents and each and every one of them from any and all damages, injuries or liability, including reasonable attorney's fees, occurring as a result of or alleged to be a result of MJL's negligent actions or omissions (or those of its employees or agents) under this Agreement. CITY shall indemnify and hold MJL harmless from any and all damages, injuries or liability, including reasonable attorney's fees, occurring as a result of CITY's negligent actions or omissions under this Agreement.

**21. Insurance.** MJL shall hold CITY free, clear and harmless from all claims of third persons for damages arising out of negligent acts of MJL and his/her/its agents and in furtherance thereof, MJL shall, at his/her/its own expense, procure and maintain in full force at all times during the term of this Agreement the following insurance which shall be provide on an Occurrence basis:

A. **Commercial General Liability.** MJL shall maintain limits of no less than:

(1) General Liability: One Million Dollars (\$1,000,000) combined single limit per occurrence for bodily injury, personal injury, and property damage or two million (\$2,000,000) general aggregate limit for bodily injury, personal injury or property damage.

B. Other Insurance Provisions. The policies are to contain or be endorsed to contain, the following provisions:

(1) General Liability Coverages.

(a) CITY, its officers, officials, employees, and volunteers are to be covered as insured as respects: Liability arising out of activities performed by or on behalf of MJL and operations of MJL, premises owned, occupied or used by MJL, the coverage shall contain no special limitations on the scope or protection

afforded to the CITY, its officers, officials, employees, or volunteers excluding any negligence by the CITY.

(b) MJL's insurance coverage shall be primary insurance with respect to CITY, its officers, officials, employees and volunteers. Any insurance or self-insurance maintained by CITY, its officers, officials, employees or volunteers shall be in excess of MJL's insurance and shall not contribute with it.

(c) Any failure to comply with the reporting provisions of the policy shall not affect the coverage provided to the CITY, its officers, officials, employees or volunteers.

C. Compliance with State Workers' Compensation Requirements. MJL covenants that he/she/it will insure himself/herself/itself against liability for Workers' Compensation pursuant to the provisions of California Labor Code Section 3700, et seq. MJL shall, at all times, upon demand of the City Council and properly authorized agents, furnish proof that Workers' Compensation is being maintained by him/her/it in force and effect in accordance with the California Labor Code

The aforementioned policy(ies) shall be issued by an insurance carrier having a rating of Best A-VII or better which is satisfactory to the City Attorney and shall be delivered to CITY at the time of the execution of this Agreement or as provided below. In lieu of actual delivery of such policy(ies), a Certificate issued by the insurance carrier showing such policy to be in force for the period covered by the Agreement may be delivered to CITY. Such policy(ies) and certificate(s) shall be in a form approved by the City Attorney. Except for workers' compensation insurance, the policies mentioned in this subsection shall name CITY as an additional insured and provide for thirty (30) days notice of cancellation to CITY. Said policies shall not be cancelled earlier than, nor the amount of coverage reduced earlier than, thirty (30) days after CITY receives notice from the insured of the intent of cancellation or reduction.

## **22. Staff Conduct/ Required Background Checks.**

**A.** Cognizant that the Subject Premises are utilized as Batting Cage Facilities open to the public, including children, MJL's entire staff shall meet all requirements for services in a good and workmanlike manner, including dress and appearance, and shall conduct themselves in such matters as to sobriety and moral character that they shall, at all times, be able to deal effectively and properly with the public, at all times exhibiting a wholesome, virtuous, and welcoming demeanor.

**B.** MJL shall conduct a criminal background check through the database of the California Department of Justice, and an FBI criminal database or equivalent national database on each of its employees and volunteers who have contact with or access to minors. MJL shall not, at any time, allow its officers, employees or volunteers to be in any position that allows for contact with or access to minors, if they have been convicted of any offense identified in the California Public Resources Code Section 5164, subject to the exceptions stated in Section 5164. CITY and MJL understand that the results of background checks on minors may be confidential under state law. MJL shall ensure that no person paid or unpaid by Contractor shall be permitted to provide services to minors unless appropriate background checks have been performed prior to the beginning of services under this Agreement, and the person meets the standards set forth above.

**C.** MJL shall specifically name a Manager on Duty and provide CITY with name(s) of those qualified for this position. One of the so-named persons shall be capable of handling the effective management of the facilities and on duty at all times of operation.

**D.** MJL shall provide annual training in Mandated Reporter requirements pursuant to the "Child Abuse and Neglect Reporting Act" (Penal Code §§11164 *et seq.*). Such training shall be provided to all MJL owners, officers, employees and agents who have direct contact with or supervision of minors in the course of their employment or duties, and shall be administered by the Child Abuse Prevention

Council of Contra Costa County. The training shall be administered to all current MJL owners, officers, employees and/or agents who have direct contact with or supervision of minors within 90 days of the execution of this 2014 Agreement. MJL owners, officers, employees and/or agents who have direct contact with or supervision of minors and who are hired/retained after the execution of this 2014 Agreement shall receive such training within 60 days after they are hired/retained, and thereafter such training shall be re-administered to each MJL owner, officer, employee and/or agent on an annual basis. Commencing on May 1, 2015 and continuing on the same date during each year in which this 2014 Agreement is in effect, MJL shall provide to City a list of all MJL's owners, officers, employees and/or agents employed/retained during any portion of the preceding 12 months whose job or position requires direct contact with or supervision of minors, indicating whether they have received the training required pursuant to this paragraph, and when they completed such training. It is acknowledged that MJL's failure to meet the aforesaid requirements will pose the threat of harm which is impossible to compute and ascertain with certainty as a basis for recovery by CITY, and that liquidated damages represent a fair, reasonable and appropriate estimate thereof. Accordingly, in lieu of actual damages for such failure, MJL agrees that MJL shall be liable to CITY for payment of liquidated damages in the amount of Two Hundred and Fifty Dollars (\$250) for MJL owner, officer, employee or agent who has direct contact with or supervision of minors, and who does not receive mandated reporter training complying with the requirements and time limits set forth above.

**23. Equal Opportunity Assurance.** During the performance of this Agreement, MJL agrees as follows:

A. MJL will not discriminate against any employee or applicant for employment and will take affirmative action to ensure that employees and employment applicants are treated equally without regard to race, sex, creed, physical handicap, color, sexual orientation, national origin, or any other actual or perceived

characteristic or trait set forth in the Fair Employment and Housing Act (Cal. Gov't Code Section 12940 *et seq*). Such action shall include but not be limited to the following: employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; layoffs and terminations, rates of pay or other forms of compensation; and selection for training, including apprenticeship. MJL agrees to post, in conspicuous places, available to employees and applicants for employment, notices setting forth the provisions of this nondiscrimination clause.

B. In the event of MJL's noncompliance with the nondiscrimination clause of this Agreement, this Agreement may be canceled, terminated, or suspended in whole or in part.

**24. Partnership Not Created.** The parties acknowledge that the relationship is contractual only and does not create, and shall not be construed to create, either a partnership or a joint venture, and neither party shall represent otherwise to third parties. Neither party shall have the right to obligate the other party to third parties in any manner.

**25. Notice.** All notices, accounting statements and payments required herein shall be sent by registered mail, return receipt requested or by personal delivery. The addresses are as follows:

To CITY:	City of Concord 1950 Parkside Drive. Concord, CA 94519
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To MJL ENTERPRISES, INC.	MJL Enterprises, Inc. 1976 Carzino Court Concord, CA 94521
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**26. Termination.**

A. The CITY reserves the right to terminate this Agreement at any time when the method of operation of said privilege granted herein or the service rendered

by MJL are not up to the standards generally found in competent and proper concession management and is not in accordance with the requirements of this Agreement, or in case MJL violates any of the terms of this Agreement. The procedure shall be to demand in writing that the method of operation or service or violation be corrected within thirty (30) days of the mailing of the notice. If said method of operation or service or violation(s) is not corrected within said thirty (30) day period, then the CITY may terminate this Agreement after giving thirty (30) days notice in writing of its intention to do so. If the payments to be made by MJL under this Agreement shall at any time during the term of this Agreement become fifteen (15) days past due, CITY, at its option, shall have the right to terminate this Agreement unless MJL brings its account current within five (5) days after written notice is given.

B. CITY shall have the right to terminate this Agreement in its entirety upon the occurrence of one or more of the following circumstances:

(1) The filing by MJL of any voluntary petition in bankruptcy, or a petition seeking to reorganize, or the readjustment of its indebtedness under the Federal Bankruptcy Laws, or under any similar State laws, or if MJL shall make a general assignment for the benefit of creditors.

(2) The filing of an involuntary petition in bankruptcy against MJL in which the appointment of a receiver, trustee or liquidator of property of MJL is ordered by a court of competent jurisdiction and such appointment is not vacated within ninety (90) days.

**27. Sale of Merchandise.** MJL in the conduct of its operations hereunder, shall not interfere with activities being conducted at or on the Park. The sale or offering to sell or hawk among the users of the park shall be prohibited unless prior approval from the CITY is procured for each activity at the Park, e.g. baseball games, tennis tournaments and similar events.

**28. Independent Contractor.** MJL is an independent contractor under this

Agreement and no relationship of principal agent or employer-employee is created herein.

**29. Non-Assignment.** MJL shall not assign this Agreement, nor assign or sublet any rights thereunder, without the prior written consent of the Director and any such assignment without such consent shall be null and void, and if the CITY so elects, it may cancel the Agreement upon such unauthorized assignment or subletting.

**30. Binding on Successors.** This Agreement is binding on the heirs, successors and assigns of the parties hereto.

**31. Amendment.** This Agreement may be amended, modified, or changed by the parties provided that said amendment, modification or change is in writing and approved by both parties.

**32. Miscellaneous.** This Agreement sets forth the entire agreement between the parties with respect to the subject matter hereof, and no modification, amendment, waiver, termination or discharge of this Agreement, or any provisions thereof shall be binding or effective unless confirmed by a written instrument signed by both parties. The validity, effect and construction of this Agreement and all subsequent modifications or amendments, shall be construed in accordance with California law applicable to agreements to be performed entirely in California. In the event that any provision of this Agreement is found to be void or unenforceable by a court of competent jurisdiction, the balance of the Agreement shall remain in full force and effect as written.

**33. Venue.** Any lawsuit between CITY and MJL arising out of or relating to this Agreement shall be filed in the Contra Costa County Superior Court or the United States District Court for the Northern District of California.

**34. Time of Essence.** Time is expressly declared to be of the essence in the performance of this Agreement.

**IN WITNESS WHEREOF**, the parties have executed this Agreement the day and year set forth below.

Dated: \_\_\_\_\_

MJL ENTERPRISES, INC.  
a California corporation

By \_\_\_\_\_

Dated: \_\_\_\_\_

CITY OF CONCORD  
a municipal corporation

\_\_\_\_\_  
Valerie J Barone  
City Manager

ATTEST:

\_\_\_\_\_  
Joelle Fockler, CMC  
City Clerk

APPROVED AS TO FORM:

\_\_\_\_\_  
Mark S Coon  
City Attorney