**REPORT TO MAYOR AND COUNCIL**

TO THE HONORABLE MAYOR AND COUNCIL:

DATE: January 26, 2010

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 City of Concord has an existing agreement originally executed on July 26, 1994, with MJL Enterprises, Inc., as the operator of the batting cages at Willow Pass Park. The President of MJL Enterprises and operator of the facilities, Mike Carzino, submitted a request on September 30, 2009, to exercise the five-year extension option of the present agreement. The option is for the period of January 1, 2010 to December 30, 2014.

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. MJL Enterprises has had a stellar track record over the last sixteen years, with few customer complaints and an outstanding safety record. Prior to this agreement, City staff requested that improvements be made to the facility, which included:

1. Remove blue canvas, and replace with green mesh, to achieve an attractive and uniform look.
2. Move all vending machines inside fence.
3. Eliminate rust areas and generally improve aesthetics throughout the facility.
4. Remove all video games, install additional seating along interior.

MJL Enterprises continues to be compliant on all of the items listed above.

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SERVICES AT WILLOW PASS PARK; AND AUTHORIZING THE CITY
MANAGER TO EXECUTE THE AGREEMENT**

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Discussion

This agreement will start the 16th year of MJL Enterprises providing batting cage services in Willow Pass Park. The City Attorney's office reviewed the agreement and provided customary updates and modifications. Mr. Carzino is aware of the potential development of the former Concord Naval Weapon Station and has expressed interest in continuing operations at Willow Pass Park until such time when a modern sports complex is constructed.

Fiscal Impact

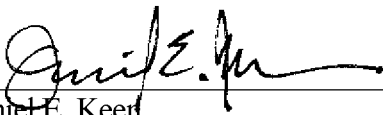
The annual rent for this contract will be \$12,048 for 2009-2010, with increases of 3% each year maxing out at \$13,560 in 2013-2014. Mr. Carzino re-pays the City for all PG&E costs used to operate the MJL Enterprise Batting Cages. This agreement secures a positive revenue source even in periods of economic downturn.

Public Contact

The City Council Agenda was properly posted and a copy of the agenda and report has 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.



Daniel E. Keen

City Manager

Dan.Keen@ci.concord.ca.us

Prepared by: Bruce Stanley
Recreation Program Manager
Bruce.Stanley@ci.concord.ca.us

Reviewed by: Joan Carrico
Dir. of Community & Recreation Services
Joan.Carrico@ci.concord.ca.us

1 **AGREEMENT**

2 **AN AGREEMENT** entered into on January 1st 2010, by and between the
3 City of Concord, a municipal corporation (hereinafter "CITY"), and MJL
4 ENTERPRISES, INC., a California corporation, (hereinafter "MJL").

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

8 **WHEREAS**, the CITY is desirous of having batting cages (as defined
9 herein) available to the public at said Park; and

10 **WHEREAS**, MJL currently operates batting cages at Willow Pass Park
11 and the CITY is pleased with the operator's performance and wishes to
12 continue the contractual relationship, as hereinafter provided.

13 **NOW, THEREFORE**, in consideration of the faithful performance of the
14 terns and conditions set forth in this agreement, the parties hereto **MUTUALLY**
15 **AGREE** as follows:

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

18 **A. Director.** The Director of Community and Recreation
19 Services or any employee designated in writing by the Director of
20 Community and Recreation Services to act on his/her behalf.

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

24 **2. Grant of Privilege.** The CITY hereby grants to MJL the exclusive
25 right and privilege to sell and operate batting cage services at Willow Pass
26 Park, East Olivera Road, Concord, California, at the locations designated by
27 the Director. This privilege shall be for the period commencing on January 1,
28 2010 and ending on December 31, 2014, unless sooner terminated in

1 accordance with this agreement.

2 **3. Fee.** Effective January 1st 2010, MJL shall pay to the CITY for the
3 privileges and authority granted under this agreement as follows:

4 **A.** Monthly fee of One Thousand & Four dollars (\$1,004). This
5 fee will be adjusted to increase three percent (3%) per year beginning on
6 the second calendar year of this five-year agreement.

7 **B.** All utility costs associated with batting cage operations paid in
8 full on a monthly basis.

9 **4. Date of Payment of Fees.** Payments of fees due from MJL to
10 CITY shall be paid within twenty (20) days after the end of each month
11 beginning on January 20th 2010.

12 **5. Facility Improvements.**

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

15 **6. Use of Premises.** During the entire agreement term, MJL shall use
16 and occupy those locations at Willow Pass Park designated by the Director for
17 the purpose of batting cage services and for no other purpose or purposes
18 without CITY's consent. MJL may operate or permit to be operated upon the
19 demised premises coin or token operating food vending machines, or similar
20 devices for the sale or leasing of food and beverages.

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

27 At all times MJL shall maintain and operate the batting cages in
28 accordance with the highest standards of cleanliness and shall keep them

1 clean and free from rubbish. MJL shall store within an enclosure or enclosures
2 all trash and garbage.

3 The batting cage facilities shall be open at such times as are determined
4 by the Director, after consulting with MJL in order to adequately serve the
5 public.

6 **7. Quality and Price Control.** Services and merchandise shall be
7 sold at prices comparable to those prevailing for similar services and facilities in
8 the counties of Alameda and Contra Costa and without discrimination. The
9 Director or designee shall have access to and the right to inspect, upon
10 reasonable notice, all schedules of rates or prices for services established by
11 MJL. If the Director, using reasonable discretion, determines that any rate or
12 price charged for services or the quality of said items, is unreasonable or
13 inappropriate for the service rendered, or the portion or quality is inadequate or
14 deficient based on comparative batting cage operation, he/she shall forthwith
15 advise MJL. MJL shall be given a reasonable opportunity to confer with the
16 Director and justify any rate or price, the portions or quality of the services
17 offered. However, MJL shall modify its aforementioned prices or rates, portions
18 or rates, portions or quality as directed by the Director within fourteen (14)
19 calendar days of receipt of written notice shall be cause for cancellation of this
20 agreement pursuant to Paragraph 22 hereon.

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

28 **9. Equipment & Supplies.** MJL shall provide at its own cost and

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

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

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

23 **12. Removal of Property.** Upon termination of this agreement by
24 lapse of time or otherwise, MJL shall promptly remove from the specified area
25 all of its display signs, counters and other equipment, furnishings and trade
26 fixtures, as may exist on the premises, and shall promptly repair any damage to
27 the Park premises caused thereby. MJL shall leave the said premises in a
28 safe, sanitary and sightly condition. MJL's failure to remove such equipment,

1 furnishings and trade fixtures shall not constitute a hold-over under this
2 agreement, except that all such property not removed within thirty (30) days
3 after termination of this agreement shall be deemed abandoned and such
4 equipment, furnishings and trade fixtures shall thereupon become the sole
5 property of the CITY unless CITY grants a further period in writing within which
6 to remove such property from the premises.

7 **13. Purchase of Equipment by City.** Upon the termination of this
8 agreement by the lapse of time or otherwise, CITY may have the option by
9 notice in writing to MJL of at least thirty (30) days prior to the expiration of the
10 term herein, of purchasing from MJL, its equipment, furnishings and fixtures
11 relating to the operation of the concession. The purchase price shall be
12 determined by mutual agreement of the parties hereto, or if they are unable to
13 reach agreement, by a mutually agreed upon qualified appraiser of batting cage
14 equipment to be selected by the parties. The cost of the appraiser shall be
15 shared equally.

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

26 **15. No Liens.** MJL shall pay for all labor done or materials furnished in
27 the repair, replacement, development or improvement of the batting cage
28 facilities referred to herein after acceptance by MJL and shall keep said

1 premises and MJL possessor interest, if any, therein free and clear of any lien
2 or encumbrance of any kind whatsoever created by MJL's acts or omissions.
3 MJL shall not be in breach hereunder should MJL in good faith contest any lien
4 or encumbrance which may be so created, and provided further that should
5 MJL be unsuccessful in any such contest, MJL shall forthwith discharge same.

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

10 **17. Utilities.** MJL shall pay for all utilities required by MJL in its
11 operation, including electricity, power, gas, water and heat. MJL shall also be
12 responsible for hook-up and removal of said utilities. The CITY will provide
13 hook-up for water and sewer. All garbage and other refuse resulting from the
14 operation shall be disposed of by the CITY at its own cost and expense. MJL
15 shall not be required to clean or maintain any part of the Park, except the
16 batting cage area which shall be kept in a neat and clean condition at all times.

17 **18. Indemnification.** MJL shall indemnify, defend and hold CITY
18 harmless from any and all damages, injuries or liability, including reasonable
19 attorney's fees, occurring as a result of MJL's negligent actions or omissions
20 (or those of its employees or agents) under this agreement. CITY shall
21 indemnify and hold MJL harmless from any and all damages, injuries or liability,
22 including reasonable attorney's fees, occurring as a result of CITY's negligent
23 actions or omissions under this agreement.

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

1 basis:

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

4 (1) General Liability: One Million Dollars (\$1,000,000)
5 combined single limit per occurrence for bodily injury,
6 personal injury, and property damage or two million
7 (\$2,000,000) general aggregate limit for bodily injury,
8 personal injury or property damage.

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

11 (1) General Liability Coverages.

12 (a) CITY, its officers, officials, employees, and
13 volunteers are to be covered as insured as respects:
14 Liability arising out of activities performed by or on
15 behalf of MJL and operations of MJL, premises owned,
16 occupied or used by MJL, the coverage shall contain no
17 special limitations on the scope or protection afforded to
18 the CITY, its officers, officials, employees, or volunteers
19 excluding any negligence by the CITY.

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

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

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

8 The aforementioned policy(ies) shall be issued by an insurance carrier
9 having a rating of Best A-7 or better which is satisfactory to the City Attorney
10 and shall be delivered to CITY at the time of the execution of this Agreement
11 or as provided below. In lieu of actual delivery of such policy(ies), a Certificate
12 issued by the insurance carrier showing such policy to be in force for the period
13 covered by the Agreement may be delivered to CITY. Such policy(ies) and
14 certificate(s) shall be in a form approved by the City Attorney. Except for
15 workers' compensation insurance, the policies mentioned in this subsection
16 shall name CITY as an additional insured and provide for thirty (30) days notice
17 of cancellation to CITY. Said policies shall not be cancelled earlier than, nor
18 the amount of coverage reduced earlier than, thirty (30) days after CITY
19 receives notice from the insured of the intent of cancellation or reduction.

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

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

28 To CITY:

City of Concord

1 1950 Parkside Drive.
2 Concord, CA 94519

3 To MJL ENTERPRISES, INC. MJL Enterprises, Inc.
4 1976 Carzino Court
5 Concord, CA 94521

6 **22. Termination.**

7 A. The CITY reserves the right to terminate this agreement at any time
8 when the method of operation of said privilege granted herein or the
9 service rendered by MJL are not up to the standards generally found in
10 competent and proper concession management and is not in accordance
11 with the requirements of this agreement, or in case MJL violates any of
12 the terms of this agreement. The procedure shall be to demand in writing
13 that the method of operation or service or violation be corrected within
14 thirty (30) days of the mailing of the notice. If said method of operation or
15 service or violation(s) is not corrected within said thirty (30) day period,
16 then the CITY may terminate this agreement after giving thirty (30) days
17 notice in writing of its intention to do so. If the payments to be made by
18 MJL under this agreement shall at any time during the term of this
19 agreement become fifteen (15) days past due, CITY, at its option, shall
20 have the right to terminate this agreement unless MJL brings its account
21 current within five (5) days after written notice is given.

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

24 (1) The filing by MJL of any voluntary petition in bankruptcy, or a
25 petition seeking to reorganize, or the readjustment of its
26 indebtedness under the Federal Bankruptcy Laws, or under any
27 similar State laws, or if MJL shall make a general assignment for
28

1 the benefit of creditors.

2 (2) The filing of an involuntary petition in bankruptcy against MJL
3 in which the appointment of a receiver, trustee or liquidator of
4 property of MJL is ordered by a court of competent jurisdiction and
5 such appointment is not vacated within ninety (90) days.
6

7 **23. Attorney's Fees.** In the event that it becomes necessary for either
8 party to bring a lawsuit to enforce any of the provisions of this contract and the
9 dispute is not settled through an arbitrator, the parties agree that a court of
10 competent jurisdiction may determine and fix a reasonable attorney's fee to be
11 paid to the prevailing party.

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

17 **25. Independent Contractor.** MJL is an independent contractor under
18 this agreement and no relationship of principal agent or employer-employee is
19 created herein.

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

25 **27. Binding on Successors.** This agreement is binding on the heirs,
26 successors and assigns of the parties hereto.

27 **28. Amendment.** This agreement may be amended, modified, or
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1 changed by the parties provided that said amendment, modification or change
2 is in writing and approved by both parties.

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

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

16
17 Dated: _____

MJL ENTERPRISES, INC.
a California corporation

18
19 By _____

20
21 Dated: _____

CITY OF CONCORD
a municipal corporation

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23 _____
Daniel E Keen City Manager

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25
26 ATTEST:

27 _____
Mary Rae Lehman
City Clerk

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APPROVED AS TO FORM:

City Attorney