



SUPPLEMENTAL

COUNCIL AGENDA: 12-05-06
ITEM: 5.3

Memorandum

TO: HONORABLE MAYOR AND
CITY COUNCIL

FROM: Albert Balagso

SUBJECT: SEE BELOW

DATE: 11-30-06

Approved

Date

12/1/06

**SUBJECT: BOYS AND GIRLS CLUB OF SILICON VALLEY SPORTS FIELD
JOINT USE AGREEMENT**

REASON FOR SUPPLEMENTAL MEMORANDUM

To request City Council approval of the joint use agreement with Boys and Girls Club. The original memorandum sought authority for the City Manager to negotiate and execute the agreement. Since the original Council memo dated November 13, 2006, the joint use agreement with the Boys and Girls Club of Silicon Valley has been negotiated and agreed upon by both parties.

ANALYSIS

The joint use agreement sets forth the terms for use of the Sports Field negotiated between the City Manager's Office, Parks, Recreation and Neighborhood Services Department and the Boys and Girls Club of Silicon Valley. Steve Tedesco, Executive Director of the Boys and Girls Club of Silicon Valley has agreed to the terms and has signed the agreement. The joint use agreement includes the terms outlined in the original Council memo.

ALBERT BALAGSO
Director, Parks, Recreation and
Neighborhood Services

Attachment

For questions, please contact Joe Cardinalli, Acting Assistant Director, at 408-793-5553.

**AGREEMENT BETWEEN CITY OF SAN JOSÉ AND
BOYS AND GIRLS CLUB OF SILICON VALLEY FOR THE
JOINT USE OPERATION OF A SPORTS FIELD**

THIS AGREEMENT, made and entered into this _____ day of _____, 2006, by and between the CITY OF SAN JOSÉ, a municipal corporation of the State of California, ("CITY") and BOYS AND GIRLS CLUB OF SILICON VALLEY, a California non-profit organization ("AGENCY"), (here after collectively referred to as the "Parties").

RECITALS:

- A. CITY has entered into a purchase agreement with AGENCY for the artificial turf soccer playing field located at 2195 and 2293 Cunningham Avenue, San José, California ("Field")
- B. AGENCY desires to enter into a combined use agreement with the CITY for use of the Field.
- C. CITY's Director of Parks, Recreation and Neighborhood Services is charged with the responsibility of supervising the use of CITY's parks and recreational facilities ("Director", including Director's designated representatives).
- D. AGENCY understands that the CITY has agreed to assume the CDBG restrictions currently upon the Field resulting from AGENCY's use of a CDBG grant to refurbish the Field and other portions of AGENCY'S property.
- E. CITY desires to grant AGENCY priority use of the Field during certain specified times and for certain purposes.

In view of the above, the parties agree as follows:

1. **TERM OF AGREEMENT.** The term of this Agreement shall be for a period of three (3) years commencing on January 1, 2007 ("Commencement Date") and expiring at midnight on December 31, 2009, unless terminated earlier in accordance with the provisions herein. Upon expiration of any term, the parties may agree in writing to

extend the term of this Agreement upon the same terms and conditions for a period not to exceed 3 years at any one time, which extension shall be at each party's sole discretion.

2. USE OF PREMISES.

a. Starting on the Commencement Date and ending upon termination of this Agreement, CITY grants to AGENCY permission to use, in accordance with the provisions herein contained, that soccer playing field known as the Field for the purposes specified herein, and during the times specified below. There shall be no hourly fee imposed for use of the Field by AGENCY during such times and for such purpose, as specified in the CITY's Fees and Charges Resolution.

b. AGENCY'S free use of the Field pursuant to this Agreement, shall solely be for traditional AGENCY Programs - which are defined as programs provided by AGENCY to youth, which programs are open to the public at no higher cost than the AGENCY's standard low annual membership dues (currently \$5). AGENCY may not sublease the field for other purposes, nor may AGENCY use the free use periods for purposes of fundraising or revenue generating purposes. Any use beyond use for a Program, as defined herein, shall be subject to the CITY's standard reservation policy and also payment of the fees and charges established by resolution of City Council.

c. AGENCY is granted a revocable priority use of the Field, to operate its PROGRAM during the following hours:

School Year: September 1st to June 15th

Monday thru Friday: 2:00 p.m. to 5:00 p.m.: AGENCY has priority use during this period if requested by AGENCY during quarterly coordination meetings. Conditions: must stop play at 4:45 pm and all AGENCY participants must be off field by 5 pm. This includes all equipment, AGENCY is also responsible for general clean up of field (i.e. any items/trash that team or spectators brought on the field).

Monday thru Friday: 5:00 p.m. to 6:00 p.m.: AGENCY has priority reservation/booking for youth play on mutually agreed upon dates to be determined during quarterly coordination meetings. Conditions: must stop

play at 5:45 p.m. and be off field by 6 pm. This includes all equipment. AGENCY is also responsible for general clean up of field (i.e. any items/trash that team or spectators brought on the field).

Summer Season: June 16th to July 31st

Monday thru Friday 9:00 a.m. to 5:00 p.m.: AGENCY may reserve up to four (4) continuous hours per day at no cost. Reservations are to be made at quarterly coordination meeting. Conditions: must stop play 15 minutes before end of reservation and be off field by end of reservation time period. AGENCY is also responsible for general clean up of field (i.e. any items/trash that team or spectators brought on the field).

In exchange for field use, the CITY will have exclusive use of the Smythe Clubhouse Gymnasium for youth programming year-round during the following hours:

Weekends: CITY has priority reservation/booking up to 24 weekends per year for gym use, up to 12 hours per day to be requested at the quarterly coordination meetings. Conditions: On reservation day, CITY is responsible for general clean up of the gym and rest rooms (i.e. any items/trash that team or spectators brought into gym).

CITY will not pay any use fee for gym but will pay for associated additional actual cost incurred for gym use (i.e. additional staffing fees).

d. Reservation by AGENCY for these time periods is to be made with CITY in advance at the quarterly coordination meetings hosted by the CITY. AGENCY understands that the Field is a valuable asset to the CITY and that this Agreement is premised on AGENCY'S representations that it will use the Field during this time period. If AGENCY does not make reasonable use of the Field during these times for the purposes provided herein, CITY may reduce AGENCY's hours on the Field at the next quarterly meeting, to correspond with actual use of Field made by AGENCY, and CITY may book and use the Field during such periods. Without limitation of the foregoing, if

the Field is not actively used by AGENCY for at least 75% of these hours during good weather, then that shall constitute grounds for proportional reduction of AGENCY'S priority use hours hereunder. CITY shall notify AGENCY in writing of any reduction in hours of AGENCY priority use.

e. CITY shall be solely in control of and shall schedule the use of the Field at all other times.

f. AGENCY agrees to cooperate with CITY and to run its Program on the Field in a manner in compliance with the CDBG restrictions. In particular, AGENCY agrees to provide all reports and documentation necessary for CITY to provide reports required for CDBG purposes, to document that the use of the field is in compliance with the CDBG restrictions upon the Property. In particular, the CDBG restrictions require that 51% of the users of the field during daily use be residents of the area bounded by Highway 101, Tully Road, Capital Expressway, and Story Road and encompasses the KONA, West Evergreen and East Valley/680 Strong Neighborhood Initiative (SNI) areas.

g. CITY may reduce the hours of free use or the maximum number of games per week in the event that the turf shows signs of damage or disrepair, as determined by the CITY'S Parks Maintenance staff.

3. MAINTENANCE AND REPAIR.

a. CITY shall be responsible for general maintenance of the Field.

b. AGENCY shall pick up all trash or debris after each use of the Field which shall be completed prior to the time of the next use of the Field.

c. AGENCY shall be responsible for the cost to repair any damage or destruction caused by PROGRAM participants, spectators, or other persons permitted by AGENCY to enter the Field during times of AGENCY use of the Field.

d. AGENCY shall prohibit any and all vehicles from entering and parking on the Field.

e. AGENCY shall not make any modifications to the Field without the prior written approval of CITY'S Director.

4. AGENCY'S RIGHTS AND STATUS.

a. The rights herein given to the AGENCY are revocable contract rights only and in no respect shall the same constitute or be construed as granting a leasehold interest in any of the real or personal property described in this Agreement.

b. The parties hereto mutually agree that AGENCY and AGENCY's employees hired to perform AGENCY's covenants made hereunder are and shall be at all times independent contractors and not agents or employees of the CITY, and that AGENCY and AGENCY's employees shall not be entitled to any salary, fringe benefits, pension, Workers' Compensation, sick leave, insurance or any other benefit or right connected with employment by the City of San José, or any compensation other than as prescribed herein, and AGENCY and AGENCY's employees expressly waive any claim it/they may have to any such rights.

5. EMPLOYEES.

a. Any and all personnel employed by the AGENCY in conducting the operations of AGENCY's program shall be qualified to perform the duties assigned to them by AGENCY. Said employees shall be neatly attired and shall conduct themselves at all times in a courteous and businesslike manner.

b. AGENCY shall not hire employees or volunteers for supervisory or disciplinary authority over minors who have been convicted of any offense identified in California Public Resources Code Sections 5164. AGENCY shall fully indemnify, defend and hold harmless CITY for any such hiring. AGENCY shall notify CITY in writing of any violation of this provision as soon as is reasonably practicable.

c. Subject to the good faith efforts of both parties, no later than February 1, 2007, AGENCY and CITY shall agree upon final terms of the employee/volunteer clearance verification and TB certification requirements and shall execute any necessary documents.

6. **ASSIGNMENT BY AGENCY.** The rights conferred upon the AGENCY by the terms of this Agreement shall not be assigned, in whole or in part, either by express assignment or by operation of law, without the written consent and approval of CITY first being obtained, which may be withheld in CITY's sole discretion. Any voluntary assignment by the AGENCY of all or any portion of the rights conferred upon the AGENCY by the terms hereof, without such prior written consent of CITY, shall constitute a breach of condition for which CITY may declare at its option. In addition, the appointment of a trustee under Federal or State law, or an assignment by AGENCY for benefit of creditors shall be considered assignments which shall constitute a breach of condition for which CITY, at its option, may consider this Agreement terminated.

7. **SUCCESSORS AND ASSIGNS.** The terms, covenants and conditions of this Agreement, subject to the provisions as to assignment, shall apply to and bind the successors and assigns of both parties hereto.

8. **WAIVER OF BREACH.** The waiver of any breach of any term, covenant or condition herein contained shall not be deemed to be a waiver of any subsequent breach of the same or any other term, condition or covenant contained herein.

9. **INDEMNIFICATION.** AGENCY shall and hereby agrees to defend, indemnify and hold harmless the CITY, its officers and employees, from any and all loss or damage and all suits, actions or claims brought or made by any person or persons, for or on account of or because of any bodily injury or property damage sustained by any person or persons, arising or resulting from any and all activities of the AGENCY, its agents, employees and contractors, in and about the Field, or arising out of the use of the Field by the AGENCY and its agents, employees and contractors, and for injury or damage to persons or property at or within the Field while AGENCY is occupying or using the Field.

10. INSURANCE AND LICENSE REQUIREMENTS.

a. AGENCY agrees to have and maintain the policies set forth in the attached Exhibit A, entitled "INSURANCE REQUIREMENTS." All policies, endorsements, certificates and/or binders shall be subject to approval by the Director of Finance or the Director's authorized designee ("Risk Manager") as to form and content. These requirements are subject to amendment or waiver if so approved in writing by the Risk Manager. AGENCY agrees to provide CITY with a copy of the required policies, certificates and/or endorsements before work commences under this Agreement.

b. AGENCY represents and warrants that it currently possesses all requisite licenses, including, but not limited to a City of San José business tax certificate or exemption, if qualified, with the CITY's Finance Department to operate in the CITY and will maintain all such licenses or exemptions for the term of this Agreement. AGENCY is responsible for contacting the appropriate offices and filing the necessary documents to comply with these requirements.

11. NOTICES. All notices and other communications required or permitted to be given under this Agreement shall be in writing and shall be personally served or mailed, postage prepaid and return receipt requested, addressed to the respective parties as set forth below or to such other address as the parties may by like notice indicate:

CITY

Director of Parks, Recreation and
Neighborhood Services
City of San José
200 E. Santa Clara St. 9TH Floor
San José, CA 95113

AGENCY

Steve Tedesco, President
Boys and Girls Club of Silicon Valley.
518 Valley Way
Milpitas, CA 95035

The parties may change their respective addresses for purposes of delivering notices by sending notice of such change pursuant to this paragraph.

12. COMPLIANCE WITH THE LAW.

a. AGENCY shall comply with CITY policies and all applicable state and federal laws, regulations and rules related to the use of the Field, including but not

limited to, laws, regulations and rules applicable to health, safety and equal opportunity employment.

b. AGENCY recognizes and understands that this Agreement may create a possessory interest subject to property taxation and that AGENCY may be subject to payment of property taxes levied on such interest, and that such tax payment shall be the liability of and be paid by AGENCY.

13. NONDISCRIMINATION. AGENCY shall not discriminate, in any way, against any person on the basis of race, sex, color, age, religion, sexual orientation, actual or perceived gender identity, disability, ethnicity or national origin in connection with or related to the performance of this Agreement.

14. TIME OF ESSENCE -- BREACH.

a. Where performance of a provision is specified herein to be performed on or before a certain date, time shall be of the essence.

b. Performance of each and every provision of this Agreement is material, the breach of which shall constitute a material breach of this Agreement for which CITY, through the Director, may terminate this Agreement; provided, however, that any such termination by CITY shall not be effective until not less than ten (10) days after notice of termination by CITY to AGENCY. CITY may withdraw and cancel such termination if, in the sole discretion of CITY: (1) the breach is cured within the ten (10) day period; or, (2) in the event such breach by its nature cannot be corrected within such ten (10) day period, AGENCY promptly commences to correct such breach within said ten (10) day period and proceeds to correct the same as promptly as reasonably practicable.

15. AUTOMATIC TERMINATION.

a. The Director, on behalf of the CITY, may terminate this Agreement without notice to the AGENCY under the following conditions, in which event AGENCY shall forthwith and without demand by CITY surrender possession of the Field Premises without delay:

b. The appointment of a receiver to take possession of all or substantially all of the assets of AGENCY;

1. A general assignment by AGENCY for the benefit of creditors;
2. Any action taken or suffered by AGENCY under any insolvency or bankruptcy act;
3. Loss by AGENCY of its tax-exempt status.

16. SURRENDER ON TERMINATION. On the last day or the sooner termination of the term of this Agreement, AGENCY shall remove all of its personal property owned by AGENCY and shall quit and surrender the Field. All property not so removed shall be deemed at the option of the CITY to have been abandoned by AGENCY.

17. ELECTIVE TERMINATION. Either party may terminate this Agreement without cause during the term hereof upon giving not less than thirty (30) days advance written notice to the other party. The parties may mutually agree to terminate this Agreement without prior written notice. The Director is authorized to decide, on the part of the CITY, that this Agreement is to be terminated and furnish notice thereof to AGENCY.

18. CONFLICT OF INTEREST. AGENCY shall avoid all conflict of interest or appearance of conflict of interest in performance of this AGREEMENT. AGENCY is familiar with conflict of law provisions set forth in California Government Code Sections 87100 et seq. and Government Code Section 1090. AGENCY certifies that it does not know of any facts which constitute a violation of such section. AGENCY further certifies that it shall not assign any personnel to provide services under this Agreement which would be cause for a violation of any conflict of interest law.

19. GIFTS.

a. AGENCY is familiar with CITY's prohibition against the acceptance of any gift by a CITY officer or designated employee, which prohibition is found in Chapter 12.08 of the San José Municipal Code.

b. AGENCY agrees not to offer any CITY officer or designated employee any gift prohibited by said Chapter.

c. The offer or giving of any gift prohibited by Chapter 12.08 shall constitute a material breach of this AGREEMENT by AGENCY. In addition to any other remedies CITY may have in law or equity, CITY may terminate this AGREEMENT for such breach as provided in SECTION 14 of this AGREEMENT.

20. DISQUALIFICATION OF FORMER EMPLOYEES. AGENCY is familiar with the provisions relating to the disqualification of former officers and employees of CITY in matters which are connected with former duties or official responsibilities as set forth in Chapter 12.10 of the San José Municipal Code ("Revolving Door Ordinance"). AGENCY shall not utilize either directly or indirectly any officer, employee, or agent of AGENCY to perform services under this AGREEMENT, if in the performance of such services, the officer, employee, or agent would be in violation of the Revolving Door Ordinance.

21. SAN JOSE MUNICIPAL LOBBYING.

a. AGENCY is familiar with the Lobbying registration requirements and prohibitions set forth in Chapter 12.12 of the San José Municipal Code.

b. AGENCY agrees not to perform any services as prohibited by Section 12.12.510 of the San José Municipal Code.

c. The performance of any services prohibited by Section 12.12.510 of the San José Municipal Code shall constitute a material breach of this AGREEMENT by AGENCY. In addition to any other remedies CITY may have in law or equity, CITY may terminate this AGREEMENT for such breach as provided in SECTION 14 of this AGREEMENT

WITNESS THE EXECUTION HEREOF the day and year first hereinabove set forth.

APPROVED AS TO FORM:

CITY OF SAN JOSE, a municipal
corporation

BARBARA K. JORDAN
Senior Deputy City Attorney

DEANNA SANTANA
Deputy City Manager

BOYS AND GIRLS CLUB OF SILICON
VALLEY , a California nonprofit
corporation

St J Tedesco
Signature

Steven J Tedesco
Print Name

Ex. Dir
Title

EXHIBIT A

INSURANCE

AGENCY, at AGENCY'S sole cost and expense, shall procure and maintain for the duration of this AGREEMENT insurance, self-insurance or a combination of insurance and self-insurance against claims for injuries to persons or damages to property which may arise from, or in connection with, the performance of the services or construction hereunder by AGENCY, its agents, representatives, employees, contractors or subcontractors.

A. Minimum Scope of Insurance

Coverage shall be at least as broad as:

1. The coverage described in Insurance Services Office Commercial General Liability coverage ("occurrence") Form Number CG 0001 including products and completed operations, and X, C, U where applicable; and (Ed. 01/96), including X, C, U (Explosion, Collapse and Underground), sex conduct and corporal punishment liability, coverages.
2. The coverage described in Insurance Services Office Form Number CA 0001 covering Automobile Liability, Code 1 "any auto", or Code 2 "owned autos" and Endorsement CA 0025. Coverage shall also include Code 8 "hired autos" and Code 9 "non-owned autos"; and
3. Workers' Compensation insurance as required by the California Labor Code and Employers Liability insurance.

B. Minimum Limits of Insurance

AGENCY shall maintain limits no less than:

1. Commercial General Liability: \$1,000,000 per occurrence for bodily injury, personal injury and property damage. If Commercial Liability Insurance or other form with a general aggregate limit is used, either the general aggregate limit shall apply separately to this project/location or the general aggregate limit shall be twice the required occurrence limit; and
2. Automobile Liability: \$1,000,000 combined single limit per accident for bodily injury and property damage; and
3. Workers' Compensation and Employers' Liability: Workers' Compensation limits as required by the California Labor and Employers Liability limits of \$1,000,000 per accident; and

C. Deductibles and Self-Insured Retentions

Any deductibles or self-insured retentions must be declared to, and approved by CITY's Risk Manager. At the option of CITY, either; the insurer shall reduce or eliminate such deductibles or self-insured retentions as respects CITY, its officer, employees, agents and contractors; or AGENCY shall procure a bond guaranteeing payment of losses and related investigations, claim administration and defense expenses in an amount specified by the CITY's Risk Manager.

D. Other Insurance Provisions

The policies are to contain, or be endorsed to contain, the following provisions:

1. **Commercial General Liability and Automobile Liability Coverages**

a. The City of San José, its officers, employees, agents and contractors are to be covered as additional insureds as respects: Liability arising out of activities performed by or on behalf of, AGENCY; products and completed operations of AGENCY; premises owned, leased or used by AGENCY; and automobiles owned, leased, hired or borrowed by AGENCY. The coverage shall contain no special limitations on the scope of protection afforded to CITY, its officers, employees, agents and contractors.

b. AGENCY's insurance coverage shall be primary insurance as respects CITY, its officers, employees, agents and contractors. Any insurance or self-insurance maintained by CITY, its officers, employees, agents or contractors shall be excess of AGENCY's insurance and shall not contribute with it.

c. Any failure to comply with reporting provisions of the policies by AGENCY shall not affect coverage provided CITY, its officers, employees, agents, or contractors.

d. Coverage shall state that AGENCY's insurance shall apply separately to each insured against whom claim is made or suit is brought, except with respect to the limits of the insurer's liability.

2. **All Coverages**

Each insurance policy required by this AGREEMENT shall be endorsed to state that coverage shall not be suspended, voided, canceled, or reduced in limits except after thirty (30) days' prior written notice has been given to CITY.

E. **Acceptability of Insurers**

Insurance is to be placed with insurers acceptable to CITY's Risk Manager.

F. **Verification of Coverage**

AGENCY shall furnish CITY with certificates of insurance and with original endorsements affecting coverage required by this AGREEMENT. The certificates and endorsements for each insurance policy are to be signed by a person authorized by that insurer to bind coverage on its behalf.

Proof of insurance shall be mailed to the following address or any subsequent address as may be directed in writing by the Risk Manager:

City of San Jose - Finance
Risk Management
200 East Santa Clara St. 4th Floor Tower
San José, CA 95113-1905

G. **Subcontractors**

AGENCY shall include all contractors &/or subcontractors as insured under its policies or shall obtain separate certificates and endorsements for each subcontractor.