

CONSTRUCTION AND USE AGREEMENT

THIS CONSTRUCTION AND USE AGREEMENT (the "Agreement") is made and entered into as of the 13 day of July, 1998 by and between the **JEFFERSON COUNTY BOARD OF EDUCATION** operating as the Jefferson County Public Schools ("JCPS"), an instrumentality of the Commonwealth of Kentucky and public body corporate, with a mailing address of P. O. Box 34020, Louisville, Kentucky 40232-4020 and **OKOLONA LITTLE LEAGUE, INC.**, a Kentucky non-profit, non-stock corporation ("OLL"), with a mailing address of P. O. Box 19010, Louisville, Kentucky 40259.

WITNESSETH:

WHEREAS, the JCPS operates Southern High School ("Southern") at 8620 Preston Highway, Louisville, Kentucky 40219; and

WHEREAS, the OLL desires to construct and use certain athletic fields, spectator seating, a Concession/Meeting Building and other amenities (collectively the "Facility") on a portion of the property of Southern (the "Subject Property") which is located west of the Southern football field and which contains 10 acres, more or less; and

WHEREAS, the JCPS and the OLL have reached certain agreements and understandings concerning the construction, use and operation of the Facility and desire to memorialize the same;

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

1. **Cooperation.** It is the express intention of the parties to cooperate with each other to insure the successful construction, use and operation of the Facility as an asset for Okolona and its residents. Southern and the OLL have established a mutual relationship with respect to the construction and operation of a softball field and other amenities on other real property of Southern southeast of the Subject Property. This Agreement is not intended to interfere with the existing relationship between Southern and the OLL but is intended to formalize the relationship between the JCPS and the OLL with respect to the construction, use and operation of the Facility on the Subject Property.

2. **Construction of Facility.** Subject to the provisions of this Agreement, the JCPS hereby grants permission to the OLL, its employees, agents, architects, engineers, consultants and contractors ("Permitees") to enter upon the Subject Property to perform all necessary services and to provide all necessary materials related to the construction of the Facility which shall be constructed in accordance with the construction plans and drawings as prepared for the OLL by Land Design & Development, under Job No. 9747 (the "Plans"), which are incorporated herein by reference. Any change to the existing facilities of Southern shall require the approval of Southern, which approval shall not be unreasonably withheld. This will include the moving of the fence around

the Southern football field and the replacing of the gate between the student parking lot and the drive. Full Builder's Risk Insurance shall be maintained by the OLL or its contractors during construction of the Facility with a reputable national insurer with the JCPS named as an additional insured. The Builder's Risk Insurance shall be maintained with the same limits as the JCPS would maintain if it were constructing the Facility. During construction of the Facility, the JCPS shall perform such inspections of the construction project as it deems necessary to confirm that the Facility is being constructed in accordance with the Plans. The JCPS may require replacement of any construction not in accordance with the Plans, but shall approve, in writing, its acceptance of such construction and the materials used within thirty (30) days of completion.

3. **Use of Facility.** The OLL shall use the Facility for the purpose of operating an athletic facility providing baseball and softball, on a non-discriminatory basis, for the children of Okolona. All locks for the Facility will be keyed by the JCPS, at the cost and expense of the OLL, and Southern will be given a set of keys by the OLL.

4. **Access and Parking.** Access to the Subject Property shall be over the existing asphalt roadway along the northern most portion of the Southern property, as shown on the Plans (the "Roadway") which traverses from the existing Southern Parking Lot in a westerly direction until it reaches the perimeter of the Southern football field and then runs parallel to the Southern football field to its south end. As part of the construction project, the Roadway shall be widened to a minimum of eighteen (18) feet at the sole cost and expense of the OLL. As part of the project, the OLL shall construct two (2) parking lots, denominated Parking Lot "A" and Parking Lot "B", respectively, on the Plans, at the sole cost and expense of the OLL at the north end and south end of the Southern football field. The final location of Parking Lots "A" and "B" shall be approved by Southern, which approval shall not be unreasonably withheld. The OLL shall, at its sole cost and expense, maintain the Roadway and Parking Lots "A" and "B", respectively, during the term of this Agreement. The OLL acknowledges that its use of the Roadway and Parking Lots "A" and "B", respectively, shall be on a nonexclusive basis; provided, however, Southern and the OLL shall use their respective best efforts to minimize overlapping schedules.

5. **Compliance with Laws.** The OLL shall observe and obey all laws, ordinances and regulations issued by any governmental body or administrative agency covering the construction, use, occupancy and operation of the Facility. All Permittees shall use due care in conducting their activities on the Subject Property and shall comply with all laws, ordinances and regulations issued by any governmental body or administrative agency and with all permits, orders or other directives of the same. All work performed on the Facility by the Permittees, or otherwise, shall be done in a safe and workmanlike manner.

6. **Liens.** In the event the Subject Property, or any part thereof, shall at any time during the term of this Agreement become subject to the filing of any mechanic's, laborer's, materialmen's or similar type of lien or encumbrance based upon the furnishing of materials or labor on the Subject Property, the OLL shall and hereby [A] does hold the JCPS and the Subject Property

harmless against any such liens or other encumbrances of a similar nature, from any and all loss, cost, claim, damage and expense, including, but not limited to, reasonable attorney fees incurred by the JCPS as a result of any such lien or encumbrance; and [B] will cause the same, at the sole cost and expense of the OLL, to be released or discharged within sixty (60) days after actual notice to the OLL of any filing of same against the Subject Property, or any part thereof, by payment of the same or by substitution of a release bond or by such other instrument or method as the OLL may elect. Failure of the OLL to discharge said lien or encumbrance, within said sixty (60) day period, shall cause this Agreement to be terminated at the end of such sixty (60) day period.

7. **Maintenance of Subject Property.** The OLL, at its sole cost and expense, shall cause the Subject Property, including the Facility, to be maintained in a clean and orderly condition reasonably free of dirt, paper, plastic containers, debris and rubbish. Trash receptacles shall be provided by the OLL at appropriate places throughout the Subject Property and the OLL shall be responsible for trash pick up. The OLL shall keep the Subject Property mowed in a neat and presentable appearance at regular intervals, as needed, during the growing season. The JCPS shall have no maintenance obligation, whatsoever, with respect to the Subject Property or the Facility during the term of this Agreement.

8. **Utilities.** The OLL shall pay or cause to be paid all charges for gas, water, sewer, electricity or telephone furnished to the Subject Property. The OLL shall arrange for the installation of separate meters, as necessary, to monitor its utility uses on the Subject Property.

9. **Management of the Facility.** The OLL shall be solely responsible for the management of the Facility and the conduct of operations of the OLL on the Subject Property. The OLL shall insure that no illegal activities are conducted upon the Subject Property and shall be responsible for the conduct of invitees to the Facility. The OLL shall notify Southern of the name of the representative(s) of the OLL who is responsible for the management of the Facility when it is being used by the OLL. The Principal of Southern has designated the Southern Athletic Director to act as liaison between Southern and the OLL. The Southern Athletic Director shall be the person to whom the OLL provides the name of its representative(s) with respect activities of the OLL conducted at the Facility. It is understood by the OLL that the OLL representative(s) must be on site at the Facility whenever the OLL is using the Facility.

10. **Insurance.** During the term of this Agreement, the OLL, at the OLL's cost and expense, shall maintain and keep in force the following insurance with reputable, national insurers and naming the JCPS as an additional insured:

A. Property Insurance coverage for fire, extended coverage, vandalism and malicious mischief for not less than 90% of the full replacement cost of the buildings and other insurable improvements constructed by the OLL on the Subject Property;

B. Commercial General Liability Insurance insuring against general liability, including, without limitation, bodily injury, death, property damage and contractor liability,

for not less than \$ 1,000,000 combined single limit per occurrence with property damage of \$ 100,000;

C. Worker's Compensation and Employer's Liability Insurance sufficient to meet the statutory requirements.

Certificates of Insurance will be delivered to the JCPS not less than thirty (30) days prior to occupancy of the Facility. All policies of insurance must require insurers to notify the JCPS in writing not less than thirty (30) days before any material change, reduction, cancellation or termination.

11. **Indemnification.** Notwithstanding the requirement of insurance as set forth in Section 10 of this Agreement, the OLL will indemnify and hold the JCPS from and against any and all claims, actions, damages, liability and expenses arising from or out of the construction, use or occupancy of the Facility or the Subject Property by the OLL caused by the act or omission of the OLL, its Permittees, invitees, concessionaires or vendors unless such claims, actions, damages or liabilities are caused by the negligence of willful misconduct of the JCPS, its employees or agents.

12. **Environmental Matters.**

A. The OLL will not bring to, transport across or dispose of any Hazardous Substances, as hereinafter defined, on the Subject Property, and the OLL, in addition to the indemnification set forth in Section 11 hereof, shall indemnify, defend and hold harmless the JCPS from and against all loss, damage, claims, liability and expense arising from or connected with the use of the Subject Property including, without limitation, any contamination by Hazardous Substances, as hereinafter defined. The indemnification provided by this subsection shall include all legal costs and reasonable attorney fees incurred by the JCPS in connection with any such loss, damage or claim and any action or proceeding had in conjunction therewith.

B. As used herein, "Hazardous Substances" means and includes all hazardous, toxic, ignitable, reactive or corrosive substances, wastes, materials, compounds, pollutants and contaminants (including, without limitation, asbestos, polychlorinated biphenyls and petroleum products) which are included under or regulated by the Comprehensive Environmental Response, Compensation and Liability Act, as amended, 42 U.S.C. §9601, et seq., the Toxic Substances Control Act, 15 U.S.C. §2601, et seq., the Resource Conservation and Recovery Act, 42 U.S.C. §6901, et seq., the Clean Air Act, 42 U.S.C. §7401 et seq., The Clean Water Act, 33 U.S.C. §1254, et seq., Oil Pollution Act of 1990, 33 U.S.C. §2701, et seq., or any other federal, state or local statute, ordinance, law, code, rule, regulation or order regulation or imposing liability (including strict liability) or standards of conduct regarding hazardous substances or materials.

C. The indemnification provided in this Section shall survive termination of this Agreement.

13. **Term.** In accordance with established policy of the JCPS, this Agreement shall be for a one (1) year term, effective as of March 1, 1998, but shall be renewable annually thereafter, with the approval of Southern, for a total of up to twenty (20) years. In the event that Southern shall not approve any annual renewal of this Agreement, it shall provide written notice of its intention not to renew this Agreement along with the specific reasons therefor to the OLL prior to September 1 during each year of this Agreement (the "Notice Period"). During the first ninety (90) days of the Notice Period (the months of September, October and November), the OLL shall be afforded the opportunity to cure or remedy any reasons for non-renewal set forth by Southern which are within the control of the OLL (the "Cure Period"). Within thirty (30) days following the end of the Cure Period (the month of December), Southern shall review the actions or steps taken by the OLL to remedy or cure the reasons for non-renewal, and the Principal of Southern shall provide the OLL with Southern's final written decision as to renewal of this Agreement by January 1. During the last sixty (60) days of the Notice Period, the OLL shall have the right to request that the JCPS review the non-renewal of this Agreement and make a final determination with respect to non-renewal.

14. **Termination.** This Agreement may be terminated by the JCPS, at any time subject to the provisions in Section 13 above, in the event that the JCPS needs to use the Subject Property for school purposes and such use by the JCPS cannot be shared with use by the OLL.

15. **Coordination and Priority.** In March of each year, representatives of the OLL and Southern will create a master schedule for the Facility field usage. Southern teams will have priority for use of the Facility until 5:30 P.M. each day.

16. **State Approval.** The JCPS will prepare the necessary documents for submittal to the Kentucky Department of Education for the approval of a BG-1 Construction Application and any other necessary approvals as may be required for the construction of the Facility.

17. **Title to Facility.** Upon completion of construction, the Facility shall become the property of the JCPS without payment of any consideration, but subject to the terms and provisions of this Agreement.

18. **Miscellaneous.**

A. **Governing Law.** This Agreement and the terms and provisions hereof shall be construed and enforced in accordance with the laws of the Commonwealth of Kentucky.

B. **Waiver.** The failure of any of the parties to enforce any provisions of this Agreement shall not be construed to be a waiver of such provisions or the right thereafter to enforce the same, and no waiver of any breach shall be construed as an agreement to waive any subsequent breach of the same or any other provision.

C. Entire Agreement. This Agreement contains the entire agreement between the parties hereto with respect to the subject matter hereof, and no prior or collateral promises or conditions in connection with or with respect to the subject matter hereof not incorporated herein shall be binding upon the parties hereto.

D. Amendment. No modification, extension, renewal, recission, termination or waiver of any of the provisions contained herein or any future representation, promise or condition in connection with the subject matter hereof shall be binding upon any of the parties unless made in writing and duly executed by the parties or their authorized representatives.

E. Successors. This Agreement shall bind and inure to the benefit of the parties hereto and their respective successors and assigns.

F. Counterparts. This Agreement may be executed in separate counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same instrument.

G. Captions. The section and paragraph headings contained in this Agreement are for reference purposes only and shall not affect in any way the meaning or interpretation of this Agreement.

H. Notices. In the event any written notice, required by this Agreement, is sent through the mail, the posting of such notice by certified mail, return receipt requested, to the following addresses shall constitute the giving of written notice for all purposes hereof:

TO: The Jefferson County Public Schools
P. O. Box 34020
Louisville, Kentucky 40232-4020
Attention: Superintendent

WITH COPY TO: Southern High School
8620 Preston Highway
Louisville, Kentucky 40219
Attention: Principal

TO: The Okolona Little League, Inc.
P. O. Box 19010
Louisville, Kentucky 40259

IN WITNESS WHEREOF, the parties have executed this Agreement as of the date hereinabove first written but actually upon the date appearing below each signature.

JEFFERSON COUNTY BOARD OF EDUCATION

By: Stephen Paerchne
Title: Superintendent

Date: July 13, 1998

OKOLONA LITTLE LEAGUE, INC.

By: Robert Meyer
Title: President

Date: July 13, 1998