

CONSTRUCTION AND USE AGREEMENT

THIS **CONSTRUCTION AND USE AGREEMENT** (this "Agreement") is made and entered into effective on the date of the last party to execute this Agreement (the "Effective Date") by and between **BOARD OF EDUCATION OF JEFFERSON COUNTY, KENTUCKY** operating as Jefferson County Public Schools ("JCPS"), an instrumentality of the Commonwealth of Kentucky and public body corporate and **ST. MATTHEWS BASEBALL/SOFTBALL, INC.**, a Kentucky non-profit corporation ("SMBS").

WITNESSETH:

WHEREAS, JCPS operates Seneca High School ("Seneca") at 3510 Goldsmith Lane, Louisville, Kentucky 40220 and 3410 Bon Air Ave., Louisville, Kentucky 40220 (collectively, the "Property"); and

WHEREAS, SMBS desires to construct, maintain, use and operate certain athletic fields, spectator seating, a concession building and other related amenities (collectively the "Facility") on a portion of the Property (the "Subject Property") which is located south-east of the school toward Beargrass Creek and Goldsmith Lane and which contains _____ acres, more or less; and

WHEREAS, JCPS and SMBS have reached certain agreements and understandings concerning the construction, maintenance, 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 ensure the successful construction, maintenance, use and operation of the Facility as an asset for St. Matthews and the Buechel neighbors. Seneca and SMBS have established a mutual relationship with the respect to the construction, maintenance, use and operation of a softball field and other related amenities on another portion of the Property, northeast of the Subject Property. This Agreement is not intended to interfere with the existing relationship between Seneca and SMBS but is intended to formalize the relationship between JCPS and SMBS with the respect to the construction, maintenance, use and operation of the Facility on the Subject Property.
2. **Construction of Facility:** Subject to the provisions of this Agreement, JCPS hereby grants SMBS, its employees, agents, invitees, guests, architects, engineers, consultants, and contractors (collectively, "Permitees") the right to enter upon the Subject Property to perform all necessary services and to provide all necessary materials related to the construction, maintenance, use and operation of the Facility. Prior to any new construction of the Facility or change to the Facility, SMBS shall submit a written request

for approval of such new construction and/or changes together with plans and specifications ("Plans") for such new construction and/or changes to the Principal and Athletic Director of Seneca (each individually referred to herein as a "Seneca Authorized Agent" and collectively referred to herein as the "Seneca Authorized Agents"), which approval shall not be unreasonably withheld.

During any new construction of the Facility and/or changes to the Facility, SMBS shall (and JCPS may at JCPS's discretion) perform such inspections of the construction project as it deems necessary to confirm that such new construction and/or changes is or are being constructed in accordance with the Plans and applicable laws, ordinances, regulations and codes. JCPS may require SMBS to replace any construction and/or changes not completed in accordance with the Plans and applicable laws, ordinances, regulations and codes.

3. **Use of Facility:** SMBS shall use and operate the Facility for the purpose of providing baseball and softball, on a non-discriminatory basis, for the children of the Jefferson County Public School District. All locks on the Facility will be keyed by JCPS, at the cost and expense of SMBS, and Seneca will be given a set of keys by SMBS.
4. **Access and Parking:** Access to the Subject Property shall be over the existing asphalt located in front of the school building at Seneca. Any changes to current parking lot must be approved by JCPS and the Seneca Authorized Representatives in advance.
5. **Compliance with Laws; No Interference:** SMBS shall observe, comply with and obey all laws, ordinances, regulations and codes applicable to the construction, maintenance, use and/or operation of the Facility. All Permittees shall use the due care in conducting their activities on the Subject Property and shall comply with all applicable laws, ordinances, regulations and codes and shall obtain and comply with all permits, orders or other directives in connection with same. All work performed on the Facility by SMBS and Permittees, or otherwise, shall be done in a safe and workmanlike manner and in no event shall SMBS or Permittees interfere with the operation of Seneca.
6. **Liens:** In the event the Property, or any part thereof (including the Subject Property), shall at any time during the term of this Agreement become subject to the filing of any mechanic's lien, laborer's lien, materialmen's lien or similar type of lien or encumbrance based upon furnishing of materials or labor in connection with the Facility, SMBS shall (and hereby does) hold JCPS, Seneca and the Property (including the Subject Property) harmless against such lien or other encumbrance of similar nature, and from any and all loss, cost, claim, damage and expense, including, but not limited to, reasonable attorney fees incurred by JCPS or Seneca as a result of any such lien or encumbrance. SMBS shall cause any such lien or encumbrance, at the sole cost and expense of SMBS, to be

released or discharged within sixty (60) days after any filing of same against any of the Property (including the Subject Property) by payment of the same or by substitution of a bond or by such other instrument or method as SMBS may elect. If SMBS fails to discharge such lien or encumbrance within such sixty (60) day period, JCPS may terminate this Agreement and pursue all remedies available at law and in equity.

7. **Maintenance of Subject Property:** SMBS, at its sole cost and expense, shall cause the Subject Property, including the Facility to be maintained in a clean and orderly condition reasonably clear of paper, plastic container, debris and rubbish. Trash receptacles shall be provided by SMBS at appropriate places throughout the Subject Property and SMBS shall be responsible for trash pick-up. SMBS shall keep the Subject Property mowed (including fence lines) in a neat and presentable appearance at regular intervals, as needed during the growing season. JCPS shall have no maintenance obligations, whatsoever, with respect to the Subject Property or the Facility during the term of this Agreement.
8. **Utilities:** SMBS shall pay or cause to be paid all charges for gas, water, sewer, electricity or telephone furnished to the Subject Property. SMBS shall arrange, at its sole cost and expense, for the installation of separate meters, as necessary, to monitor its utility uses on the Subject Property.
9. **Management of the Facility:** SMBS shall be solely responsible for the management and operation of the Facility and the conduct of SMBS and the Permittees on the Subject Property. SMBS shall not allow any illegal activities to occur on the Subject Property. SMBS shall notify the Seneca Authorized Representatives of the name of any and all representatives of SMBS who is or are responsible for the management of the Facility when it is being used by SMBS. The Principal of Seneca has designated the Athletic Director of Seneca to act as liaison between Seneca and SMBS. The Athletic Director of Seneca shall be the person to whom SMBS provides the names of its representatives with respect to activities of SMBS conducted on the Facility. SMBS acknowledges and agrees that SMBS representatives must be on Subject Property at the Facility whenever SMBS is constructing on, maintaining, using and/or operating the Facility.
10. **Insurance:** During the term of this Agreement, SMBS, at SMBS's sole cost and expense, shall maintain and keep in force the following insurance with reputable, national insurers, with JCPS named as an additional insured:
 - a. Property Insurance 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, maintained, used and/or operated by SMBS 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 shall be delivered to JCPS not less than thirty (30) days after the Effective Date. All policies of insurance must require insurers to notify 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, SMBS shall indemnify and hold JCPS and Seneca harmless from and against any and all claims, actions, damages, liability and expenses arising from, out of, or in connection with the construction, maintenance, use or operation of the Facility or the Subject Property by SMBS unless such claims, actions, damages, liabilities and expenses are caused by the negligence of willful misconduct of JCPS, its employees or agents. The indemnification obligations provided in this Section 11 shall survive termination and/or expiration of this Agreement.

12. Environmental Matters:

- a. SMBS shall not bring to, transport across or dispose of any Hazardous Substances, as hereinafter defined, on the Subject Property, and SMBS, in addition to the indemnifications set forth in Section 11 hereof shall indemnify, defend and hold harmless JCPS and Seneca 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 and all contamination by Hazardous Substances, as hereinafter defined. The indemnification provided in this Section 12 shall include all legal costs and reasonable attorney fees incurred by JCPS and Seneca in connection with any such loss, damage, claim, liability and expense any action or proceeding occurring 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., 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 regulations or imposing liability (including strict liability) or standards of conduct regarding hazardous substances or materials.

- c. The indemnification obligations provided in this Section 12 shall survive termination and/or expiration of this Agreement.

13. **Term:** In accordance with established policy of JCPS, the initial term of this Agreement shall be one (1) year, commencing on the Effective Date. The term shall renew automatically for twenty (20) additional one (1) year renewal terms unless JCPS or SMBS provides written notice of nonrenewal to the other at least ninety (90) days before the end of the initial term or before the end of such renewal term as applicable.

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

15. **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:

If to JCPS:

To: The Jefferson County Public Schools
VanHoose Education Center
3332 Newburg Road
Louisville, KY 40218
Attn: Real Estate Manager

with a copy to: Seneca High School
3510 Goldsmith Lane
Louisville, KY 40220
Attention: Principal and Athletic Director

If to SMBS:

St. Matthews Baseball/Softball, Inc.
PO Box 6501
Louisville, KY 40206
Attn: League President

16. **Surrender of Subject Property.** Upon the expiration or termination of this Agreement for any cause, SMBS shall peacefully vacate the Subject Property in good order and

condition except for reasonable wear and tear. Any improvements constructed, made or changed to the Subject Property and/or Facility shall remain the property of JCPS. SMBS will repair any damage to the Subject Property and the Facility caused by SMBS's and/or Permittees use of the Subject Property and Facility (except for reasonable wear and tear).

17. Binding Effect. This Agreement shall be binding on and inure to the benefit of the respective parties and their successors and permitted assigns.

18. No Waiver. No provision of this Agreement shall be deemed to have been waived by either party unless the waiver is in writing and signed by the party against whom enforcement is attempted. No custom or practice which may develop between the parties in the administration of this Agreement shall waive or lessen any party's right to insist upon strict performance of the terms of this Agreement. The rights granted in this Agreement are cumulative of every other right or remedy that the enforcing party may otherwise have at law or in equity or by statute, and the exercise of one or more rights or remedies will not prejudice or impair the concurrent or subsequent exercise of other rights or remedies.

19. Governing Law. This Agreement is governed by the laws of Kentucky. Any action or claim arising from, under or pursuant to this Agreement shall be brought in the courts, state or federal, within Jefferson County, Kentucky, and each party expressly waives the right to bring any legal action or claims in any other courts.

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IN TESTIMONY WHEREOF, witness the signatures on behalf of each of the parties to this Construction and Use Agreement effective as of the Effective Date, as defined above.

JCPS:

BOARD OF EDUCATION OF JEFFERSON COUNTY, KENTUCKY

By: _____

Name: Dr. Martin A. Pollio, Ed.D.

Title: Acting Superintendent

Date: _____

SMBS:

ST. MATTHEWS BASEBALL/SOFTBALL, INC.,
a Kentucky non-profit corporation

By:  _____

Name: Doug Netherton

Title **Executive Director**

Date: Oct 20, 2017