

DONATION, ACCESS AND CONSTRUCTION AGREEMENT

THIS DONATION, ACCESS AND CONSTRUCTION AGREEMENT (the "Agreement") made as of this _____ day of _____, 2008, by and among the **Town of Colchester**, a Connecticut municipal corporation with an address of 127 Norwich Avenue, Colchester, Connecticut 06415 (the "Town"), the **Colchester Board of Education**, a local board of education pursuant to the Connecticut General Statutes with an address c/o Town Hall, 127 Norwich Avenue, Colchester, Connecticut 06415 (the "Board"), and **The Cody Camp Memorial Field Foundation, Inc.**, a Connecticut nonstock corporation with an address of 108 Norwich Avenue, Colchester, Connecticut 06415 (the "Foundation"),

W I T N E S S E T H:

WHEREAS, to honor and preserve the memory of Cody Camp, the Foundation has raised funds and desires to construct a baseball field (the "Field") (the "Project") on the campus of Jack Jackter Intermediate School (such school and its grounds, together, the "School"); and

WHEREAS, the School is owned by the Town; and

WHEREAS, the School is dedicated for school purposes and is under the control of the Board; and

WHEREAS, the Foundation desires to construct the Field and donate it to the Town and the Board, and the Town and the Board desire to accept such donation, all in accordance with the terms and conditions set forth herein; and

WHEREAS, the Project is not a "school building project" as defined in Conn. Gen. Stat. § 10-282.

NOW, THEREFORE, for good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties agree as follows:

1. PLANS.

(a) Plans. Prior to the commencement of any work on the School grounds, the Foundation shall submit first schematic and then final construction drawings, specifications and plans for the Field and a construction schedule (collectively, the "Plans"), which Plans shall be subject to the written approval of or modification by the Town and the Board in their sole discretion. In the event the Foundation disagrees with modifications to the Plans required by the Town or the Board, the Foundation shall have the right to terminate this Agreement upon written notice to the Town and the Board.

[The Plans shall be in compliance with the following specifications for school or league sports fields: (Board to check on whether there are applicable specifications).]

(b) Modifications. Material modifications to the Plans approved pursuant to Subsection (a) above shall be subject to the written approval of the Town and the Board in their sole discretion. Minor modifications to the Plans shall be subject to the written approval of the Colchester Director of Facilities and Operations (the “Director of Facilities”) as set forth in Section 5(c) herein. The Director of Facilities shall determine whether a proposed modification to the Plans is material or minor. The word “Plans” shall mean the approved Plans as modified in accordance with this section.

2. FINANCIAL MATTERS.

(a) All costs and expenses associated with the Project shall be borne by the Foundation.

(b) Notwithstanding anything in this Agreement to the contrary, the Foundation shall not have access to the School grounds for the construction of the Field until such time as the Foundation demonstrates to the satisfaction of the Town and the Board that it has one hundred percent (100%) of the money necessary to conduct the Project. Prior to the Foundation being granted access for the construction of the Field, fifty percent (50%) of the money necessary to conduct the Project shall be transferred to the Town to be held in escrow (the “Escrow Funds”) and to be requisitioned by the Foundation only after the Foundation has expended the remaining fifty percent (50%) still in its possession. Procedures for drawing down the Escrow Funds are set forth in Exhibit A attached hereto and made a part hereof.

(c) The Town and the Board shall have the right at any time during the construction of the Field to inspect the construction being performed on the Field and to ascertain whether the remaining unexpended funds are sufficient to complete the Project. If it is determined that additional funds are needed to complete the Project, the Town and the Board may require that the work cease until such time as such funds are raised by the Foundation.

3. CONSTRUCTION SCHEDULE.

(a) The construction of the Field is scheduled to commence approximately [_____] and shall be scheduled for completion by [_____] (the “Term”). The Term may be extended as necessary by written notice to the Town and the Board stating the new proposed completion date. In no event shall such Term be extended beyond [_____] without the written consent of the Town and the Board.

(b) Construction shall not commence until all of the following have occurred: (i) approval of the Plans as provided in Section 1; (ii) satisfaction of the financial conditions as provided in Section 2(b); (iii) obtaining the necessary permits and approvals

as provided in Section 4(b); (iv) providing copies of licenses and registrations as provided in Section 4(b); and (v) providing evidence of insurance as provided in Section 7.

(c) Notwithstanding anything in this Agreement to the contrary, the Board shall have the right in its sole discretion to approve the scheduling of the construction of the Field in order to accommodate the activities of the School.

4. RESPONSIBILITIES OF THE FOUNDATION.

The Foundation shall be responsible for each of the following:

(a) The Foundation shall perform the Project in a good and workmanlike manner consistent with the Plans and using good quality materials.

(b) The Foundation shall obtain, with the cooperation of the Town and the Board, any and all governmental land use or other permits and approvals necessary for the Project. Notwithstanding the foregoing, the Town shall, with the cooperation of the Board and the Foundation, make application to the Colchester Zoning and Planning Commission for a review pursuant to Conn. Gen. Stat. Section 8-24. Any and all necessary permits and/or approvals shall be obtained at the sole expense of the Foundation. The Foundation acknowledges and understands that the fact that the Town and the Board are parties to this Agreement does not substitute for, or constitute approval by the Town and the Board of, any application by the Foundation for necessary Project permits and approvals from any municipal official, agency, board, committee or commission.

(c) The Foundation shall be responsible for the performance of the Project in compliance with all applicable laws, rules, regulations, ordinances, codes, orders, policies and permits of all federal, state and local government bodies, agencies, authorities and courts having jurisdiction over the Project.

(d) As applicable to the work of the Project, the Foundation's volunteers, contractors, subcontractors and other workers or entities involved with the Project shall be currently licensed or registered by or with the State of Connecticut to perform their portion of the work of the Project. The Foundation shall provide copies of such licenses and/or registrations to the Director of Facilities prior to commencing work on the Project.

(e) The Foundation shall keep the construction site and surrounding area free from any accumulation of waste materials or rubbish and shall use its best efforts to prevent dust, debris and odor.

(f) The Foundation shall cause the Project's contractors, subcontractors and suppliers to provide standard warranties and guaranties, which warranties and guaranties shall be in favor of the Town and the Board or shall be assignable and, at completion of the Project, assigned to the Town and the Board.

(g) The Foundation shall keep the School free of mechanic's liens and, at completion of the Project, provide to the Director of Facilities full and final releases and waivers from all contractors, subcontractors and material suppliers.

(h) Upon completion of the construction of the Field, the Foundation shall promptly (i) remove waste and surplus materials, tools, equipment and machinery from the site and (ii) restore any and all damage to the School grounds caused by such construction. The term "Project" shall include such post-construction removal and restoration work.

5. PERFORMANCE.

(a) Volunteers. The parties to this Agreement hereby agree and understand that the Project shall be conducted by volunteers provided by the Foundation in addition to the Foundation's contractors and any subcontractors. **[Board to determine whether volunteers will be required to sign waivers/releases.]**

(b) Interaction with Students Prohibited. For safety reasons, no workers or others involved with the Project (whether volunteers, contractors, Foundation representatives or others) shall have any interaction with students or other children at the School. The Foundation shall provide notification of such prohibition to such workers and other persons. The Foundation shall provide a copy of the proposed notification to the Board for its prior review and approval. In the event the Board deems it necessary to implement additional policies with regard to such prohibition, the Foundation shall diligently implement such policies. **[Board to determine whether criminal background checks or other approval process is required for workers on the Project.]**

(c) Role of Director of Facilities. The Director of Facilities shall serve as the staff representative of the Town and the Board on general matters relating to the supervision of the Project. The role of the Director of Facilities shall include, but not be limited to, the following:

- i. The Foundation shall propose any modifications to the Plans to the Director of Facilities, who shall determine whether such modifications are material or minor, as provided in Section 1(a) hereof. The Director of Facilities shall have review and approval authority for minor modifications.
- ii. The Director of Facilities shall have the right to inspect the progress of the Project and the materials to be used for the Project at any time or determine that the Project is proceeding in accordance with the Plans.

- iii. Prior to entering into any contracts for work or materials, the Foundation shall provide copies of the proposed contracts to the Director of Facilities for review and approval.
- iv. The Foundation shall keep the Director of Facilities informed in advance of the day-to-day schedule of work, delivery of materials and other similar matters. On behalf of the Board, the Director of Facilities shall approve the scheduling of work, delivery of materials and other similar matters in furtherance of the Board's rights pursuant to Section 3(c) hereof.
- v. The Director of Facilities shall determine when the Project has been completed in accordance with the terms of this Agreement.
- vi. No act or omission of the Director of Facilities shall relieve the Foundation of its obligations under this Agreement.

6. OWNERSHIP AND USE.

(a) Ownership. The parties to this Agreement hereby agree and understand that the construction of the Field constitutes an in-kind donation to the Town, and that when the Project is complete in accordance with the terms of this Agreement, the parties intend that the Field shall be owned by the Town and shall, so long as the Field is dedicated to school purposes, be under the control of the Board. Upon satisfaction of the terms of this Agreement, the Foundation shall (i) convey by deed to the Town the Field improvements that constitute real property, and (ii) convey by bill of sale to the Board the Field improvements that constitute personal property. Such conveyances shall be free of all liens and charges. Upon delivery of the properly authorized and executed deed and bill of sale and the affirmative vote of the Town and the Board to accept such conveyances, the Foundation shall have no further responsibilities related to the Field, except as set forth herein. The Board shall be responsible for the post-conveyance maintenance of the Field so long as the Field is dedicated to school purposes.

(b) Use. While the Field continues to be dedicated to school purposes, the Board shall have the right to decide in its sole discretion when and under what circumstances and conditions the Field may be used by the public.

7. INSURANCE. **[This section subject to review by Town and Board insurance consultants]**

(a) Insurance of the Foundation. During the Term, the Foundation shall maintain at its own cost and expense such insurance coverages with such companies, in such amounts and on such forms as are reasonably required by the Town and the Board. All such insurance shall be issued by insurers approved by the Town and the Board and authorized to do business in the State of Connecticut, shall name the Town and the Board as additional insureds, shall provide for a deductible reasonably satisfactory to the Town

and the Board and shall contain a provision whereby each insurer agrees not to cancel such insurance without thirty (30) days' prior written notice to the Town and the Board. To the extent reasonably obtainable, all such insurance shall also contain appropriate endorsements denying the Foundation's insurers the right to subrogation against the Town and the Board and waivers by all such insurers of all rights of recovery against the Town and the Board in connection with any loss or damage by peril included within such insurance coverage. Prior to the commencement of construction of the Field, the Foundation shall furnish the Town and the Board with a policy evidencing the aforesaid insurance coverage, and renewal policies shall be furnished to the Town and the Board at least thirty (30) days prior to the expiration date of such insurance. The Foundation shall have no right of access to the School for construction of the Field at any time when either required insurance is not in effect or the Town and the Board are not in receipt of a required policy of insurance.

(b) Insurance of Contractors/Subcontractors. In addition to the foregoing, the Foundation shall cause all contractors and subcontractors that perform work on the Project to carry the following insurance: (i) commercial general liability with a limit not less than \$_____ combined single limit for bodily injury and property damage per occurrence and \$_____ total aggregate liability; (ii) worker's compensation with statutory limits; (iii) motor vehicle liability coverage with a limit not less than \$_____ for each occurrence and \$_____ total aggregate liability; and (iv) umbrella insurance with a limit not less than \$_____ for each occurrence and \$_____ total aggregate liability. The Town, the Board and the Foundation shall be named additional insureds on such liability policies. The Foundation shall cause such contractors and subcontractors to provide certificates evidencing such insurance to the Town and the Board. Such certificates shall be provided prior to work being performed by the applicable contractor or subcontractor.

8. INDEMNIFICATION.

To the maximum extent this section may be made effective according to law, and except to the extent caused by the negligence or willful misconduct of the indemnified party, the Foundation hereby agrees to indemnify and save harmless the Town and the Board from and against all claims of whatever nature arising from or claimed to have arisen from (i) any breach of this Agreement by the Foundation or (ii) any accident, injury or damage whatsoever caused to any person, or to the property of any person, occurring in or about the School in connection with the Project including but not limited to acts or omissions of the Foundation's invitees, contractors, licensees, agents, servants, independent contractors, volunteers or employees. This indemnity and hold harmless provision shall include indemnity against all costs, attorneys' fees, expenses and liabilities incurred in or in connection with any such claim or proceeding brought thereon, and the defense thereof.

9. DEFAULT; REMEDIES UPON DEFAULT.

(a) A “Default” as to any party shall mean the failure by such party to perform any of its obligations under this Agreement if such failure continues uncorrected for fifteen (15) days after written notice from another party, or, if such failure is not susceptible of cure within such fifteen (15) day period, the cure of such failure is not commenced during such period and diligently prosecuted thereafter.

(b) In the event of a Default, if the Town is still in possession of any of the Escrow Funds, the Town and the Board may use such funds for the completion of the construction of the Field. In addition, upon a Default each party may exercise any and all remedies available to it pursuant to law and equity.

10. APPROVAL.

This Agreement shall not be effective unless and until written approval is received from both the Colchester Board of Selectmen and the Colchester Board of Education.

11. GENERAL PROVISIONS.

(a) Naming.

(i) The Board, which has the right to name facilities that are dedicated to school use, hereby agrees to name the Field after Cody Camp. The Board acknowledges the desire of the Foundation to have the Field named after Cody Camp in perpetuity.

(ii) The Town, which has the right to name Town facilities that are not dedicated to school use, hereby acknowledges that in the event the Field was no longer to be dedicated to school use, the Foundation desires that the Town name the Field, or, as appropriate, another sports field located in the Town, after Cody Camp.

(b) Other Improvements. Without limiting the other provisions of this Agreement, the Foundation acknowledges that (i) there shall be no concession stands built in connection with the Project, and (ii) there shall be no additional parking constructed in connection with the Project. All rights of the Foundation to make improvements to the School property are set forth herein. If the Foundation desires to make further improvements to the School grounds which are not contemplated by this Agreement, the Foundation shall present a written request to the Town and the Board, and such request shall be accepted or rejected in the Town’s and the Board’s sole discretion.

(c) Waivers. Failure on the part of any party to complain of any action or non-action on the part of the other, no matter how long the same may continue, shall never be a waiver by such party of any of the rights hereunder. Further, no waiver at any time of any of the provisions hereof by any party shall be construed as a waiver of any of

the other provisions hereof, and a waiver at any time of any of the provisions hereof shall not be construed as a waiver at any subsequent time of the same provisions.

(d) Counterparts and Originals. This Agreement may be executed in counterparts, each of which when so executed and delivered shall be deemed an original and all of which taken together shall constitute but one and the same instrument.

(e) Amendments. This Agreement may be amended or otherwise modified only by an instrument in writing executed by each of the parties.

(f) Notices. Notices given pursuant to this Agreement shall be in writing, and shall be sent by (a) registered or certified mail, return receipt requested, with postage prepaid, (b) express mail or courier (next day delivery), or (c) personal delivery (receipt acknowledged in writing), addressed as follows:

(i) if to the Town:

Town of Colchester
127 Norwich Avenue
Colchester, Connecticut 06415
Attn: Linda Hodge, First Selectman

with a copy to the Director of Facilities

(ii) if to the Board:

Colchester Board of Education
c/o Town Hall
127 Norwich Avenue
Colchester, Connecticut 06415
Attn: _____

with a copy to the Director of Facilities

(iii) if to the Director of Facilities:

Town of Colchester
127 Norwich Avenue
Colchester, Connecticut 06415
Attn: Greg Plunkett, Director of Facilities and Operations

(iv) if to the Foundation:

The Cody Camp Memorial Foundation, Inc.
108 Norwich Avenue
Colchester, Connecticut 06415

Attn: _____

(g) Governing Law; Severability. This Agreement shall be governed by and construed in accordance with the laws of the State of Connecticut. If any provision of this Agreement, or portions thereof, or the application thereof to any person or circumstance shall to any extent, be deemed invalid or unenforceable, the remainder of this Agreement shall not be affected thereby, and each provision of this Agreement shall be valid and enforceable to the fullest extent permitted by law.

(h) Headings. All titles and headings in this Agreement are intended solely for convenience of reference and shall in no way limit or otherwise affect the interpretation of any of the provisions hereof.

(i) Merger. This Agreement sets forth the entire understanding among the parties with respect to the matters set forth herein.

[Remainder of Page Intentionally Left Blank; Signature Page Follows]

505083 v.05 S1

IN WITNESS WHEREOF, the parties have hereunto executed this document as of the day and year first above mentioned.

Town of Colchester

By: _____
Name:
Title:
Date:

Colchester Board of Education

By: _____
Name:
Title:
Date:

**The Cody Camp Memorial Field
Foundation, Inc.**

By: _____
Name:
Title:
Date:

EXHIBIT A

Requisition Procedures

505083 v.05 S3