



## Town of Atherton

### **CITY COUNCIL STAFF REPORT – CONSENT CALENDAR**

**TO: HONORABLE MAYOR AND CITY COUNCIL**

**FROM: GEORGE RODERICKS, CITY MANAGER**

**DATE: NOVEMBER 20, 2013**

**SUBJECT: DISCUSSION AND ADOPTION OF AMENDMENT TO TENNIS CONTRACT TO CLARIFY THE FUNCTION OF THE TOWNS TENNIS PROFESSIONAL**

#### **RECOMMENDATION**

Clarify and approve contract amendment for services of Tennis Professional Alan Margot at Holbrook-Palmer Park.

#### **BACKGROUND**

Under contract, Alan Margot serves as the Tennis Professional at Holbrook-Palmer Park. The current contract was approved by the City Council on September 18, 2013 and was retroactive back to July 1, 2013.

The contract included minor amendments to address exclusive usage periods for Tennis Camps (black-out dates) and signs were to be posted on the courts identifying Mr. Margot as the Town's Authorized Tennis Instructor.

Per the contract, Mr. Margot was to provide the Town with a use fee of \$25 per hour of use, whether public or private. The Town would enforce Mr. Margot's exclusivity as the Town's Tennis Professional on the courts for lessons whether part of the Tennis Camps or outside of the context of Camps.

The contract as approved has yet to be signed by Mr. Margot pending some clarifications regarding tennis court exclusivity by him.

#### **FINDINGS**

Pursuant to the contract, under Exhibit B Compensation Schedule, the "vendor shall pay the Town \$25 per hour for each hour the facilities are being used by the vendor." Before executing

the contract, Mr. Margot would like the City Council's assistance to clarify the intent of this provision in the context of Tennis Camps and private lessons or use.

To assist with the success of Tennis Camps, staff has coordinated the posting of "black-out dates" at the court and on the Town's website to advise the public of the times when camps take priority on the tennis courts. The Town's revenue for court usage for these camps is estimated at \$1,600 per year (16 hours usage per camp). This has not been an issue for Mr. Margot and he is current on all required fee payments as of November 20. Mr. Margot has also provided a summary accounting of camp revenues and use.

However, under Exhibit B of the Compensation Schedule, any other time Mr. Margot is using the courts, he is expected to pay \$25 per hour. If Mr. Margot is using the courts with friends, relatives, or others and he is asked for guidance as a tennis professional, per the contract, he is required to pay the Town \$25 per hour. Mr. Margot believes this to be an unfair application of the intent of the contract.

In comparison, the cost of a non-resident tennis key is \$200 for the entire year for unlimited usage. Mr. Margot has asserted that he does not provide tennis lessons outside of those provided through the Tennis Camps. He asserts that he uses the Town equipment (ball machines, specialty equipment) only during the camps. In addition, he advises that there are others that use the courts as instructors to give lessons to players that are not under any obligation to pay a fee to the Town as they gained entry by using a resident or non-resident key.

As a venue, Mr. Margot feels that the courts at present do not lend themselves to exclusivity under a "for hire professional" system. The facilities do not have proper restroom facilities, view areas, storage, or waiting areas. Further, the courts themselves, although in better condition than in the past, are not of the quality necessary for a professional venue. As an example, the Menlo Circus Club or the Pacific Athletic Clubs are much more appropriate venues for this type of exclusive arrangement.

With respect to monitoring exclusivity for lessons, staff currently has no way to monitor the courts to determine who is providing private instruction at any given time. This makes it difficult to enforce a provision for exclusivity as a tennis professional for the Town. Mr. Margot would prefer the contract to contain the status quo for the Tennis Camp programs he has conducted for the past many years but to have removed from the contract any further request for payment for usage of the courts. For his personal use, Mr. Margot suggests that he could purchase a non-resident court key on an annual basis.

Mr. Margot also advises that hiring a tennis professional following the potential Little League improvements and offering them court exclusivity may be possible as the venue area may be much improved.

## **FISCAL IMPACT**

The fees collected are recorded as special revenue funds, Tennis Fund. Fees are used to defer costs associated with the program. Mr. Margot has remitted any private lesson fees to the Town in the past few years, so nothing will change dramatically in revenues collected.

**ATTACHMENTS**

Draft Amendment to Agreement  
Current Agreement  
Financials from Alan Margot on Lessons and Camps

**AMENDMENT TO INSTRUCTOR/VENDOR SERVICES AGREEMENT BY AND  
BETWEEN THE TOWN OF ATHERTON AND ALAN MARGOT, USPTA TENNIS  
PROFESSIONAL—EXTENSION OF AGREEMENT**

This Amendment to the Instructor/Vendor Services Agreement by and between the Town of Atherton ("Town") and Alan Margot, USPTA Tennis Professional (Vendor) for services related to the Town's tennis facility in Holbrook-Palmer Park as set forth in the base Agreement dated June 26, 2012 is entered into the 30th day of June, 2013, by and between Town and Vendor.

**RECITALS**

**WHEREAS**, on June 26, 2012, Town and Vendor entered into an agreement to provide certain services related to Town's tennis facility in Holbrook-Palmer Court ("Agreement"); and

**WHEREAS**, Town and Consultant desire to amend the Agreement to extend it for an additional year and adjust minor provisions.

**NOW, THEREFORE**, in consideration of the faithful performance of the terms set forth herein, the parties hereby amend the agreement as follows:

1. Paragraph 2, Term, is amended to read as follows:

“2. Term. This Agreement shall commence upon execution and shall continue in full force and effect, as modified, until June 30, 2014, unless terminated as provided herein.”

2. A new Paragraph 25 relating to Exclusive Usage periods is added as follows:

“25. Exclusive Usage Periods. During the following times Vendor shall have exclusive use rights during Tennis Camps operated as part of Town's Tennis program, and shall have priority over all other users during such periods:

From September 24—October 17, 2013, every Tuesday and Thursday from 4 to 5 p.m.”

3. All other provisions shall remain in full force and effect.

IN WITNESS THEREOF, the parties have executed this Amendment as of the 18 of September, 2013.

**TOWN OF ATHERTON:**

**VENDOR:**

\_\_\_\_\_  
George Rodericks, City Manager

\_\_\_\_\_  
Alan Margot

**ATTEST:**

\_\_\_\_\_  
City Clerk

**APPROVED AS TO FORM:**

\_\_\_\_\_  
City Attorney

## **INSTRUCTOR/VENDOR SERVICES AGREEMENT**

THIS AGREEMENT is entered into as of the 26th day of June, 2012, by and between the TOWN OF ATHERTON, herein called "Town," and ALAN MARGOT, USPTA TENNIS PROFESSIONAL, herein called "Vendor."

### **RECITALS**

WHEREAS, Town desires to obtain skilled, top quality, and affordable tennis-related services to serve the members of the Atherton Tennis Club and Atherton residents;

WHEREAS, Vendor hereby warrants to Town that Vendor is skilled and able to provide such Services described in Section 4 of this Agreement; and

WHEREAS, Town desires to retain Vendor under the terms and conditions provided in this Agreement.

### **AGREEMENT**

NOW, THEREFORE, in consideration of their mutual covenants, the parties agree as follows:

1. **Incorporation of Recitals.** The recitals set forth above, and all defined terms set forth in such recitals and in the introductory paragraph preceding the recitals, are hereby incorporated into this Agreement as if fully set forth herein.
2. **Term.** This Agreement shall commence upon its execution and shall continue in full force and effect until June 30, 2013, unless terminated as provided herein.
3. **Standard of Quality.** Town relies upon the professional ability of Vendor as a material inducement to entering into this Agreement. All work performed by Vendor under this Agreement shall be in accordance with all applicable legal requirements and shall meet the standard of quality ordinarily to be expected of competent professionals in Vendor's field of expertise. City Manager may, at City Manager's sole discretion, give an annual evaluation of Vendor to review Vendor's performance under this Agreement. Vendor shall furnish City Manager, or his/her designee, with every reasonable opportunity for Town to ascertain that the Services of Vendor are being performed in accordance with the requirements and intentions of this Agreement. All equipment, including tennis courts, shall be subject City Manager's inspection and approval.
4. **Vendor's Services.** Vendor shall perform the services set forth in Exhibit A-1, attached hereto and incorporated herein by reference ("Services").
5. **Town's Services.** In consideration of Vendor's Services and compensation to be provided to Town, Town shall perform the services set forth in Exhibit A-2, attached hereto and incorporated herein by reference.

If services provided to Vendor listed on Exhibit A-2 include the right to store personal property on Town premises, the risk of loss or damage to the property shall be borne entirely by Vendor. No bailment is created, and Town makes no representation that storage areas are secure. Vendor shall indemnify the Town and hold it harmless from any claims by third parties arising in connection with Vendor's storage of property on Town premises.

6. Compensation. The compensation to be paid for the services to be rendered hereunder shall be in accordance with Exhibit B, attached hereto and incorporated herein by reference.

7. Vendor's Books and Records.

A. Vendor shall maintain any and all ledgers, books of account, invoices, vouchers, canceled checks, and other records or documents evidencing or relating to charges for Services, or expenditures and disbursements to Town and all documents and records which demonstrate performance under this Agreement for a minimum period of three (3) years from the date of termination or completion of this Agreement, or for any longer period required by law

B. Any records or documents required to be maintained pursuant to this Agreement shall be made available for inspection or audit, at any time during regular business hours, upon written request by the City Attorney, City Auditor, City Manager, or a designated representative of any of these officers. During any such audit, if any monthly or annual statement of gross revenues is found to be more than ten percent (10%) less than the amount of Vendor's actual gross revenue for the same period, Vendor shall immediately pay Town the cost of the audit plus ten percent (10%) of the difference, together with interest computed at a rate of ten percent (10%) per annum. If no such discrepancy is found, Town shall pay the cost of the audit.

8. Additional Services. Town shall make no payment to Vendor for any extra, further, or additional services unless such services and payment have been mutually agreed to and this Agreement has been formally amended in writing. Vendor shall not commence any services exceeding the Scope of Services in Section 4 without prior written approval from Town.

9. Independent Contractor. Vendor, its officers, employees and agents shall not have any power to bind or commit Town to any decision. It is expressly agreed that at all times during the term of this Agreement, Vendor and its employees and agents, in the performance of the services agreed to be performed by Vendor, shall act as and be independent contractors and not agents or employees of Town. As independent contractors, neither Vendor nor any employees or agents of Vendor shall obtain any rights to retirement benefits or other benefits which accrue to Town's employees. Vendor hereby expressly waives any claim it may have to any such rights.

10. Compliance with Laws. Vendor shall use the standard of care in its profession to comply with all applicable federal, state, and local laws, codes, ordinances, and regulations. Vendor represents and warrants to Town that Vendor has and shall, at its sole cost and expense, keep in effect or obtain at all times during the term of this Agreement any licenses, permits,

11. insurance and approvals which are legally required for Vendor to practice its profession. Vendor shall maintain a Town business license. Town is not responsible or liable for Vendor's failure to comply with any and all of its requirements under this Section.

12. Taxes. Vendor shall pay all taxes, assessments and premiums under the federal Social Security Act, any applicable unemployment insurance contributions, Workers' compensations insurance premiums, sales taxes, use taxes, personal property taxes, or other taxes or assessments now or hereafter in effect and payable by reason of or in connection with the Services to be performed by Vendor.

13. Assignment. Vendor shall not assign, delegate, transfer, or convey its duties, responsibilities, or interests in this Agreement or any right, title, obligation, or interest in or to the same or any part thereof without Town's prior written consent.

14. Subcontractors; Employees. Vendor shall be responsible for employing or engaging all persons necessary to perform the services of Vendor hereunder. No subcontractor of Vendor shall be recognized by Town as such; rather, all subcontractors are deemed to be employees of Vendor, and Vendor agrees to be responsible for their performance. Vendor shall give personal attention to the fulfillment of the provisions of this Agreement by all employees and subcontractors, if any, and shall keep the work under its control.

15. Indemnity. Vendor hereby agrees to defend (by counsel reasonably satisfactory to Town), indemnify, and hold harmless Town, its officers, agents, employees, volunteers, and servants, from and against any and all claims, demands, damages, costs, liabilities, or obligations brought on account of or arising out of any acts, errors, or omissions of Vendor, its officers, employees, agents, and subcontractors undertaken pursuant to this Agreement excepting liabilities due to the sole negligence or willful misconduct of Town. Town has no liability or responsibility for any accident, loss, or damage to any services performed under this Agreement. Vendor's duty to indemnify and hold harmless, as set forth herein, shall include the duty to defend as set forth in California Civil Code § 2778. This indemnification obligation is not limited in any way by any limitation on the amount or type of damages or compensation payable by or for Vendor under Worker's Compensation, disability or other employee benefit acts or the terms, applicability or limitations of any insurance held or provided by Vendor and shall continue to bind the parties after termination/completion of this Agreement.

16. Litigation Support. Vendor agrees to testify at Town's request if litigation is brought against Town in connection with Vendor's Services.

17. Liability of Members and Employees of Town. No member of Town and no other officer, employee or agent of Town shall be personally liable to Vendor or otherwise in the event of any default or breach of Town, or for any amount which may become due to Vendor or any successor in interest, or for any obligations directly or indirectly incurred under the terms of this Agreement.

18. Insurance. Vendor agrees to have and maintain, for the duration of the term of this Agreement, the following insurance coverage with insurers with a Best's rating of no less than A:VII.

A. General Liability. A general liability insurance policy in an amount not less than \$2,000,000 combined single limit per occurrence and in the aggregate for bodily injury, personal injury, and property damage. This policy shall name Town and its officers, agents, employees, and representatives as additional insureds. Vendor shall furnish Town with a certificate of insurance evidencing the required insurance coverage and a duly executed endorsement evidencing such additional insured status. The certificate shall contain a statement of obligation on the part of the carrier to notify Town of any material change, cancellation or termination at least thirty (30) days in advance of the effective date of such material change, cancellation or termination. Coverage provided hereunder by Vendor will be primary insurance and will not be contributing with any insurance, self-insurance or joint-self insurance maintained by Town. The required certification and endorsements will be furnished by Vendor to Town prior to commencement of Vendor's Services.

B. Automobile Liability. An automobile liability insurance policy in an amount not less than \$1,000,000 combined single limit per accident for bodily injury and property damage. Vendor shall furnish Town with a certificate of insurance evidencing the required insurance coverage.

C. Workers' Compensation. If applicable, a Workers' Compensation and Employers' Liability policy written in accordance with the laws of the State of California and providing coverage for any and all employees of Vendor. This policy shall provide coverage for Workers' Compensation (Coverage A) and Employers' Liability (Coverage B).

19. Termination; Suspension. This Agreement and all obligations hereunder may be terminated by either party, with or without cause, upon 60-days' written notice to the non-terminating party. If Vendor fails to perform any of its obligations under this Agreement within the time and in the manner herein provided or otherwise violates any of the terms of this Agreement or is convicted of a felony, in addition to all other remedies provided by law, Town may, at its sole option, suspend or terminate this Agreement immediately upon written notice. Town shall be entitled to any compensation owing to it under this Agreement up to the time of such suspension or termination.

20. Written Notification. Any notice, demand, request, consent, approval or communication ("Notice") shall be in writing and either served personally or sent by prepaid, first class mail. Notice shall be addressed to the other party at the address set forth below. Either party may change its address by notifying the other party of the change of address. Notice shall be deemed communicated within 72 hours from the time of mailing.

If to Town:

City Manager  
Town of Atherton - Town Hall  
91 Ashfield Road  
Atherton, CA 94027

If to Vendor:

Alan Margot  
325 M Sharon Park Drive-#721  
Menlo Park, CA 94025

21. Equal Employment Opportunity. Vendor is an equal opportunity employer and agrees to comply with all applicable state and federal regulations governing equal employment opportunity.

22. Force Majeure. If, in the opinion of City Manager, the facilities at Holbrook-Palmer Park are damaged or made unusable due to a natural disaster or causes beyond the control of Town, Town and Vendor will be relieved of their respective duties and obligations under this Agreement until the facilities are deemed usable by City Manager.

23. Execution; Authority. This Agreement may be executed in several counterparts, each of which shall constitute one and the same instrument and shall become binding upon the parties when at least one copy hereof shall have been signed by both parties hereto. Each individual executing this Agreement on behalf of one of the parties represents that he or she is duly authorized to sign and deliver the Agreement on behalf of such party and that this Agreement is binding on such party in accordance with its terms.

24. Miscellaneous Provisions. This Agreement constitutes the complete and exclusive statement of agreement between Town and Vendor and shall supersede all prior negotiations, representations, or agreements, either written or oral. This document may be amended only by written instrument, signed by both Town and Vendor. This Agreement shall be interpreted as though it was a product of a joint drafting effort. If any one or more of the provisions contained herein shall for any reason be held to be invalid, illegal or unenforceable in any respect, then such provision or provisions shall be deemed severable from the remaining provisions hereof, and such invalidity, illegality, or unenforceability shall not affect any other provision hereof. No failure on the part of either party to exercise any right or remedy hereunder shall operate as a waiver of any other right or remedy that party may have hereunder. This Agreement shall be construed and interpreted according to California law. In the event that suit shall be brought by either party hereunder, trial of such action shall be held exclusively in a state court in the County of San Mateo, California. If either party commences any legal action against the other party arising out of this Agreement or the performance hereof, the prevailing party in such action may recover its reasonable costs and expenses, including attorneys' fees.

IN WITNESS WHEREOF, Town and Vendor have executed this Agreement as of the date first above written.

TOWN OF ATHERTON

VENDOR

By: \_\_\_\_\_  
City Manager

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

Date: \_\_\_\_\_

Date: \_\_\_\_\_

APPROVED AS TO FORM:

By: \_\_\_\_\_  
City Attorney

ATTEST:

By: \_\_\_\_\_  
City Clerk

**EXHIBIT A-1**  
**SCOPE OF SERVICES – VENDOR**

Subject to such policy direction and approvals as the Town through its staff may determine from time to time, Vendor shall perform the following services:

(1) Manage the Town's tennis instruction program, including employment and supervision of all necessary personnel as employees of Vendor, maintenance of proper records and payment of personnel, including any fringe benefits or other compensation required by law;

(2) Conduct a minimum of one summer tennis clinic, one tennis camp in the spring or summer for adults, and one tennis camp in the spring or summer for children under the age of 18 for the following hours:

(a) Summer Camps – 2 camps – 20 hours per week = 40 hours

(b) Fall Classes – 2 hours/week – 4 hours = 8 hours

(c) Spring Classes – 2 hours/week – 8 weeks = 16 hours

(d) Total hours – 64 x \$25 = \$1600 each fiscal year

(3) Provide the necessary equipment, at Vendor's own expense, to conduct high-quality tennis instruction program;

(4) Conduct and be solely responsible for registration for group lessons or clinics, private lessons, camps and tournaments;

(5) Maintain all correspondence between clients and Vendor by using a Post Office Box or home mailing address for all tennis camp information, including registrations or payments;

(6) Vendor may cancel a class if necessary;

(a) If courts are un-useable due to re-surfacing or other Town projects, vendor will receive a refund for those classes that are not held.

(7) Vendor shall not allow any person to participate in any tennis activity unless that person has registered with the Vendor and signed a Town indemnification/hold harmless agreement provided by the Town.

**EXHIBIT A-2**  
**SCOPE OF SERVICES – TOWN**

Town shall perform the following services:

- (8) Permit Vendor to store tennis-related equipment in a facility at the Holbrook Palmer Park tennis courts at no cost to Vendor;
- (9) Publication of the Town sponsored Tennis program on the Town website;
- (10) Maintenance of tennis courts, fencing, nets, wind screens, water fountains, shelters, benches, pathway landscaping, trees, tennis ball machines and electrical service affecting the tennis courts;
- (11) Provide tennis ball machines, rollers and/or squeegees;
- (12) Installation, maintenance and monthly fees associated with a telephone voice mail;
- (13) Permit Vendor to use the southeast tennis courts (Courts No.4, 5 and 6, at Holbrook Palmer Park for the purpose of giving individual and group tennis lessons and instruction, and Courts No. 4, 5, and 6 for tennis camps, during the hours of 7:30 am through sundown, Monday through Friday, Saturdays and Sundays from 8:00 am through 5:00 pm;
- (14) Town may grant use of additional tennis courts for tennis-related activities upon request of Vendor.

EXHIBIT B  
COMPENSATION SCHEDULE

Town Compensation. Vendor shall pay the Town \$25 per hour for each hour the facilities are being used by the vendor.

(15) Vendor shall submit to the Town, located at 91 Ashfield Road, Atherton, CA, the following information (upon request by the Town) –

(a) A record of all lessons, clinics, tournaments, and any other tennis-related services should the Town request that information;

(b) The name of each person participating in the tennis-related services, together with the date and duration of such services should the Town request that information;

(c) The Town will not reimburse any fees due to rain or inclement weather; vendor must re-schedule lessons or camps.

**Atherton Tennis Camps  
Summer/Fall  
Profit Loss 2013**

<b>Programs</b>	<b>Income</b>	<b>Expenses</b>	
		<b>Advertising</b>	
<b>Summer Camp 2013</b>	\$10,950.00	Almanac	2,655.00
<b>Fall Camp 2013</b>	\$1,993.00	Authorize.net	1,104.00
<b>Spring 2014 N/A</b>	\$0.00	Activity Hero	125.00
<b>Camp Income</b>	\$12,943.00	T-shirts	205.00
		Banner	44.00
		<b>Supplies</b>	
		Drinks	46.00
		Ice	52.00
		Snacks	38.00
		Prizes	62.00
		Name Tags	15.00
		First Aid Kit	20.00
		Fliers	40.00
		<b>Court Supplies</b>	
		ball tubes, targets	94.00
		Balls	684.00
		<b>Pay Roll</b>	
		Summer	1,770.00
		Fall	640.00
		Spring 2014	N/A
		<b>Insurance</b>	284.00
		<b>Town Fees</b>	1,400.00
		<b>Total Expense</b>	9,278.00
<b>Gross Income</b>	\$12,943.00		
<b>Expenses</b>	\$9,278.00		
<b>Net Income</b>	\$3,665.00		

**Atherton Tennis Camps  
Profit Loss 2012**

<b>Programs</b>	<b>Income</b>	<b>Expenses</b>	
		<b>Advertising</b>	
		Almanac	6,372.00
<b>Summer Camp 2012</b>	\$10,387.00	Activity Hero	125.00
		T-shirts	255.00
<b>Fall Camp 2012</b>	\$1,254.00		
		<b>Supplies</b>	
<b>Spring 2013</b>	\$2,794.00	Drinks	\$65.00
		Ice	\$72.00
<b>Camp Income</b>	\$14,435.00	Snacks	\$55.00
		Prizes	\$60.00
		Name Tags	\$20.00
		First Aid Kit	\$20.00
		Fliers	\$60.00
		<b>Court Supplies</b>	
		ball tubes, targets	\$60.00
		Balls	\$862.00
		<b>Pay Roll</b>	
		Summer	1,800.00
		Fall	240.00
		Spring 2013	480.00
		<b>Insurance</b>	329.00
		<b>Town Fees</b>	1,600.00
		<b>Total Expense</b>	12,475.00
<b>Gross Income</b>	\$14,435.00		
<b>Expenses</b>	\$12,475.00		
<b>Net Income</b>	\$1,960.00		