

**THIRD MODIFICATION TO LEASE AGREEMENT
SPORTPLEX FACILITY LEASE AGREEMENT
CONTRACT #2004-0053**

THIS THIRD LEASE MODIFICATION AGREEMENT (“**Agreement**”) is entered into this _____ day of _____, 2022, by and between WHATCOM SPORTS & RECREATION, a Washington non-profit corporation (“**WSR**”) and the CITY OF BELLINGHAM, a Washington municipal corporation (“**City**”). WSR and the City may be referred to individually as a “**Party**” and collectively as the “**Parties**”.

Prior to this Agreement, WSR and the City entered into the original lease agreement in February 2004 (City Contract # 2004-0053) and two modifications of the original lease agreement, the first modification in February 2007 (City Contract # 2014-0053A) and the second modification in April 2018 (City Contract # 2004-0053B). The original lease agreement and the two previous modifications to the original lease are incorporated by reference into this Agreement.

R E C I T A L S

A. In July 1996, the City granted Whitewater Ice Corporation, a Washington corporation (“**Whitewater Ice**”) a ground lease for the real property described in the attached Exhibit “A” (the “**Real Property**”).

B. As a condition of the ground lease, Whitewater Ice constructed, owned, and operated an ice rink on the Real Property (the “**Sports Facility**”).

C. Whatcom Soccer Commission, a Washington non-profit corporation and tax exempt under IRC 501(c)(3) (subsequently renamed “Whatcom Sports & Recreation” (“**WSR**”)), owned and operated a soccer field facility in Whatcom County, Washington.

D. In May 1998, Whitewater Ice entered into a sublease with WSR to operate an indoor soccer facility at the Sports Facility.

E. In 2003, Whitewater Ice was having financial problems and began urging the City to purchase the Sports Facility and terminate the City ground lease.

F. The City deemed the Sports Facility to be a valuable community asset and wanted it to continue operation; however, the City was not comfortable with operating sports programs in the Sports Facility.

G. WSR had a staff that ran sports programs, including soccer programs at the Sports Facility.

H. The City asked WSR to assist in negotiating an agreement with Whitewater Ice for purchase of the Sports Facility, with the understanding that if an agreement could be reached, the City would lease the Real Property and the Sports Facility to WSR.

I. In February 2004, the City purchased the Sports Facility from Whitewater Ice for \$4,200,000 and terminated its ground lease with them. On closing, the Real Property and the Sports Facility were consolidated and are herein together referred to as the “**Sportsplex**”.

J. On February 2, 2004, the Parties entered into the Bellingham Sportsplex Facility Lease Agreement (the “**Lease**”).

K. To ensure that the Sportsplex would continue to be a valuable community asset, the Lease contains restrictions on the use and operation of the Sportsplex “to maximize the public benefit” (Section 6.2).

L. The Sportsplex was not well constructed, and the ice equipment was obsolete.

M. In addition to rent, WSR was obligated to pay thirty thousand and 00/100 dollars (\$30,000.00) per year into a capital improvement / major maintenance fund (“**Maintenance Fund**”).

N. The City allowed WSR to use some of the Maintenance Fund to make repairs needed to continue operation of the Sportsplex.

O. In 2017, it became apparent that to continue operation of the Sportsplex, a major remodel was required.

P. The Parties reached tentative agreement on a plan whereby the City would sever the Sports Facility from the Real Property and sell the Sports Facility to WSR.

Q. On closing, WSR would be able to pledge the Sports Facility as collateral and borrow enough money to acquire the Sports Facility from the City and remodel the Sports Facility to correct defects and improve its operational efficiency.

R. The City and WSR tentatively negotiated a purchase price of \$3 million, which was the approximate outstanding balance of the bonds that City issued to purchase the Sports Facility in 2004 and slightly less than the appraised value of \$3.5 million.

S. Since then, the City has paid down the outstanding balance of the bonds and is preparing to make substantial improvements to the Sports Facility.

T. If WSR decides to purchase the Sports Facility, the parties will need to negotiate a new purchase price based on a variety of factors including the appraised fair market value of the facility, the value of the building improvements made by the City, restrictions on use and the public benefit.

U. The City and WSR, on closing of the Sports Facility purchase, would enter into a ground lease for the Real Property for rent of one and 00/100 dollar (\$1.00) per year.

V. The ground lease would have use and operation restrictions similar to those set forth in the Lease to ensure WSR would maximize the public benefit.

W. Before the tentative agreements described in Recitals O through W were consummated, the coronavirus pandemic forced the Sportsplex to close.

X. WSR, for lack of revenue, ceased making rent payments and is therefore in default under the Lease.

Y. The agreements and relationship described in Recitals O through W shall be referred to as the “**Original Plan**”.

Z. The Parties have agreed to pursue a modified version of the Original Plan based on the change of circumstance caused by the coronavirus pandemic.

AA. There are too many unknown factors to enable the Parties to enter into a comprehensive, long-term agreement at this time for WSR’s acquiring of the Sports Facility and entering into a ground lease for the Real Property.

BB. The City has (i) entered into a contract with RMC Architects PLLC to study the Civic Field Complex; and (ii) is pursuing plans to repair the roof and other components of the Sports Facility and make energy efficiency upgrades to ensure longevity of this critical recreational asset.

CC. WSR will continue to (i) pursue a refund for leasehold taxes it believes it overpaid; (ii) update the architectural plans for remodel of the interior of the Sports Facility; and (iii) arrange financing for remodeling the Sports Facility.

DD. When adequate information is available, the Parties will attempt to negotiate WSR’s purchase of the Sports Facility and a ground lease for the Real Property.

EE. The purpose of this Agreement is to ensure the continued operation of the Sportsplex while the Parties work toward a long-term relationship that will maximize the public benefit, protect the asset, and minimize the need for public operational funds in the future.

FF. The Parties are now and will continue to engage in discussions on how to satisfy the increasing demand for ice skating facilities and other indoor recreational facilities.

GG. WSR currently believe the best solution is converting the Sportsplex into two ice rinks and building a new indoor soccer/multi-use facility or constructing a new ice rink elsewhere in the Civic Field Complex (“**Ice Plan**”).

HH. The Ice Plan is a work in progress that will not be consummated until (i) completion of the RMC study; (ii) decision by the City that there is sufficient land to accommodate an indoor soccer/multi-use facility or ice rink; and (iii) WSR’s determination that construction and operation of such a facility is financially viable.

II. The Parties have agreed that WSR will remain in possession of the Sportsplex based on the Lease, and the City will pursue necessary improvements to the building, subject to the modifications and agreements set forth in this Agreement.

JJ. WSR needs to make commitments in the future for league play and events. Any scheduling beyond the term of this Agreement must be approved by the City.

KK. WSR will receive approximately one hundred twenty-nine thousand dollars (\$129,000) from the federal Employee Retention Credit program (“**ERC Payment**”).

NOW, THEREFORE, in consideration of the mutual promises and agreements contained herein, the Parties agree as follows:

1. TERM. The term of this Agreement shall expire one (1) year from the date of this Agreement. This term replaces the term specified in the Lease.

2. DEFAULT. WSR acknowledges that the Lease is in default for failure to pay rent and applicable leasehold excise tax. WSR owes \$529,393.84 in past due rent and \$3,241.83 in leasehold excise tax through September 30, 2022. WSR will continue to owe rent and leasehold excise tax each month in accordance with the terms of the Lease until the date of this Agreement. Under the Lease, the current monthly rent amount is \$25,247.92, and leasehold excise tax is \$3,241.83.

3. TERMINATION. The City shall have the right to terminate the Lease and this Agreement if, in its sole discretion, it determines that an agreement similar to the Original Plan is not likely to be consummated or WSR fails to meet its obligations under this Agreement.

4. DEPOSITS. WSR agrees to deposit \$160,000 in a savings account at SaviBank (the “**Remodel Account**”) by no later than ten (10) days after the date of this Agreement. The

bank account shall provide that the monies in the account, including accrued interest, can only be withdrawn with the written approval of both Parties; provided, if this Agreement is terminated pursuant to Section 3, then the monies in the SaviBank account shall be paid to the City. WSR shall pay additional monies into the Remodel Account as follows:

a. On November 15, 2022, and on the 15th day of each month thereafter, WSR shall pay \$20,000 into the Remodel Account, which is the rent due each month under this Agreement.

b. WSR shall pay any profits generated from Sportsplex operations during the term of this Agreement, payable on March 15, 2023, for the fiscal year ending February 28, 2023, and on a date that is 45 days after termination of this Agreement, for the period from March 1, 2023 until the date of termination of this Agreement.

c. Seventy-seven percent of each ERC Payment received by WSR shall be allocated to the Sportsplex. WSR shall pay the portion of the ERC Payment allocated to the Sportsplex into the Remodel Account within 10 days of receipt by WSR.

5. REMODEL ACCOUNT. The City agrees to authorize payment of monies held in the SaviBank account to WSR for the purpose of repair, replacement, maintenance, reconstruction and/or remodeling of the Sportsplex as approved by the City. WSR shall ensure that SaviBank provides the City a monthly statement of activity in the Remodel Account.

6. SECURITY DEPOSIT. In December 2020, per Sections 4.3 and 8.1 of the Lease, the City withdrew \$85,676.76 from WSR's security deposit of \$121,600 for unpaid Base Rent. The current balance of the security deposit is now \$35,923.24. These monies may be used at the City's discretion for improvements to the Sportsplex or to make bond payments related to the Sportsplex. Sections 4.3 and 8.1 shall not have any further force or effect.

7. RENT. Payments made by WSR pursuant to Section 4 are in lieu of rent or additional rent and Capital Improvement / Major Maintenance Fund payments described in Section 4 of the Lease.

8. LEASEHOLD EXCISE TAX. WSR has paid the City the outstanding leasehold excise tax of \$86,942.07 owed through August 31, 2022. WSR shall continue to owe leasehold excise tax of \$3,241.83 a month until the date of this Agreement. If WSR declines to pay the monthly leasehold excise tax, the City will file a timely notice of nonpayment with the Department of Revenue (DOR). WSR will continue to owe the monthly leasehold excise tax amount of \$3,241.83 until the date of this Agreement and then \$2,568 during the term of this Agreement (calculated as 12.84% of \$20,000 a month rent), unless a lesser amount is approved by DOR. The City will cooperate with WSR in its effort to have the DOR accept a lower monthly leasehold excise tax amount and to refund a portion of leasehold excise taxes previously paid.

9. **MUTUAL PLANNING AND COORDINATION.** During the term of this Agreement, WSR and City representatives will meet on a monthly basis to plan and coordinate repairs and improvements to the Sports Facility and to discuss the Parties' long-term relationship. During this time, WSR shall add a City representative to its Board of Directors and provide the City WSR's monthly financial statements.

10. **REMAINING TERMS.** Except as modified by this Agreement, all other terms and conditions of the Lease shall remain in full force and effect.

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IN WITNESS WHEREOF, the Parties have signed this Agreement the date above-first written.

WHATCOM SPORTS & RECREATION

By _____
CHESTER T. LACKEY, President

CITY OF BELLINGHAM

By _____
SETH FLEETWOOD, Mayor

ATTEST:

Finance Director

APPROVED AS TO FORM:

OFFICE OF THE CITY ATTORNEY

By _____
ALAN MARRINER, City Attorney

DEPARTMENTAL APPROVAL:

By _____
NICOLE OLIVER, Parks and Recreation Director

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EXHIBIT "A"
REAL PROPERTY
