

**THIRD AMENDMENT TO CITY OF BRYAN
AND INFINITY SPORTS ENTERTAINMENT EXCLUSIVE
FACILITY USE AGREEMENT**

THIS THIRD AMENDMENT TO EXCLUSIVE FACILITY USE AGREEMENT (the “Third Amendment”) is made and entered into by and between the City of Bryan, a home rule municipal corporation of the State of Texas (the “City”), and Infinity Sports Entertainment, L.L.C (“Infinity”), a Texas limited liability company, singularly referred to as a (“Party”) and collectively referred to as (the “Parties”).

RECITALS

WHEREAS, the City and Infinity entered into that certain Exclusive Facility Use Agreement effective on or about August 23, 2006, pursuant to which Infinity was granted the use of Travis Major Baseball Field located at the Travis Athletic Complex (the “Facility”), as amended on January 22, 2008, and May 14, 2010, by a First and Second Amendment respectively (the “Agreement”); and

WHEREAS, the Parties hereto wish to amend the Agreement as provided herein; and

NOW, THEREFORE, in consideration of the foregoing and the mutual benefits, promises, covenants, terms and conditions in this Third Amendment, and other good and valuable consideration, the receipt and sufficiency of which is acknowledged by the parties, the parties hereto mutually agree, and the Agreement is hereby amended as follows:

ARTICLE 1 – DEFINITIONS.

Section 1.1. **Definitions.** Unless otherwise defined herein, all capitalized terms shall have the meaning given thereto in the Agreement.

ARTICLE 2 – AMENDMENTS.

Section 2.1. Section 1. “Term of Agreement” shall be amended to read as follows:

1. Term of Agreement.

The initial term of this Agreement shall begin on the effective date of this Agreement, as indicated above the signatures of the representatives of the Parties below, and shall terminate on December 31, 2020, unless sooner terminated or modified under the terms of this Agreement.

Section 2.2. Section 6.A. “Existing Uses to Continue” shall be amended to read as follows:

- 6.A. Existing Uses to Continue.

Before the effective date of this Agreement, the City made the Facility available to third party users for purposes of playing baseball and softball games and tournaments. Such users include youth Little Leagues and other youth and adult baseball and softball league and team organizations. It is the intent of the parties that such users continue to conduct such activities (the “Community Baseball Activities”) during the term of this Agreement, under similar terms and fees as similar users of City baseball facilities during the same period, and provided such user organizations satisfy all Park and Recreation Department field rental agreement user requirements, including but not limited to liability insurance, hold harmless agreement and criminal background check verification.

It shall be the responsibility of Infinity to annually provide to the City a copy of such user organization's current rental application, rental agreement, proof of insurance, and hold harmless agreement prior to the user organization's use of the field.

Section 2.3. Section 15.E. "Annual Report" shall be amended to read as follows:

15.E. Annual Report

During the term of this Agreement, Infinity shall make a formal report annually to the City Manager, no later than March 1st of each year, regarding the use of the Facility, to include but not limited to, overview of season play; resolution of conflicts; planning issues which may have been recognized by Infinity; number and age of groups involved at the Facility; other items as deemed reasonable and appropriate by the City and Infinity. This report shall be a summary of the year's activities, and therefore, should include items possibly previously reported to the City.

Section 2.4. Section 16.B. "Infinity's Insurance" shall be amended to read as follows:

16.B. Infinity's Insurance.

Infinity agrees to maintain for the duration of this Agreement the insurance coverages and limits as described below. The Parties agree that Infinity's coverage will be primary in the event of a loss, regardless of the application of any other insurance or self-insurance. The requirements as to types and limits, as well as the City's review or acceptance of insurance coverage to be maintained by Infinity, is not intended to nor shall in any manner limit or qualify the liabilities and obligations assumed by Infinity under the Agreement.

Infinity must deliver to City of Bryan a certificate(s) of insurance evidencing such policies are in full force and effect within ten (10) business days of execution of this Third Amendment. Failure to meet the insurance requirements and provide the required certificate(s) and any necessary endorsements within ten (10) business days **may cause the Agreement to be terminated.**

The City of Bryan reserves the right to review these requirements and to modify insurance coverage and their limits when deemed necessary and prudent.

- (1) **Property Insurance.** Infinity shall purchase and maintain property insurance covering the Facility and contents in an amount not less than \$1,000,000.00.
- (2) **Commercial General Liability Insurance -** Infinity shall maintain Commercial General Liability (CGL) with a limit of not less than \$1,000,000 per occurrence and an annual aggregate of at least \$2,000,000. CGL shall be written on a standard ISO "occurrence" form (or a substitute form providing equivalent coverage) and shall cover liability arising from premises, operations, independent contractors, products-completed operations, personal and advertising injury, and liability assumed under an insured contract including the tort liability of another assumed in a business contract. No coverage shall be deleted from the standard policy without notification of individual exclusions and acceptance by the City of Bryan. The City of Bryan and its agents, officers, officials, and employee shall be listed as an additional insured.

(3) **Policy Limits** - Required limits may be satisfied by a combination of primary and umbrella or excess liability policies. Infinity agrees to endorse City of Bryan and its agents, officers, officials, and employees as an additional insured, unless the Certificate states the Umbrella or Excess Liability provides coverage on a pure “True Follow Form” basis.

(4) **Deductibles, Coinsurance Penalties & Self-Insured Retention** - Infinity may maintain reasonable and customary deductibles, subject to approval by the City of Bryan. Infinity shall agree to be fully and solely responsible for any costs or expenses as a result of a coverage deductible, coinsurance penalty, or self-insured retention.

(5) **Subcontractors** - If the Infinity’s insurance does not afford coverage on behalf of any Subcontractor(s) hired by the Infinity, the Subcontractor(s) shall maintain insurance coverage equal to that required of the Infinity. It is the responsibility of the Infinity to assure compliance with this provision. The City of Bryan accepts no responsibility arising from the conduct, or lack of conduct, of the Subcontractor.

(6) **Acceptability of Insurers** - Insurance coverage shall be provided by companies admitted to do business in Texas and rated A-:VI or better by AM Best Insurance Rating.

(7) **Evidence of Insurance** – A valid certificate of insurance verifying each of the coverages required shall be issued directly to the City of Bryan within 10 business days by the successful Infinity’s insurance agent or insurance company after agreement award. Endorsements must be submitted with the certificate. No agreement shall be effective until the required certificates have been received and approved by the City of Bryan. Renewal certificates shall be sent a minimum of 10 days prior to coverage expiration.

(8) Upon request, Infinity shall furnish the City of Bryan with certified copies of all insurance policies.

(9) The certificate of insurance and all notices shall be sent to:

City of Bryan
Risk Management
PO Box 1000
Bryan, TX 77805
Emailed to: mquirolga@bryantx.gov

(10) Failure of the City of Bryan to demand evidence of full compliance with these insurance requirements or failure of the City of Bryan to identify a deficiency shall not be construed as a waiver of Infinity’s obligation to maintain such insurance.

(11) **Notice of Cancellation, Non-renewal, Material Change, Exhaustion of limits**
Infinity must provide minimum 30 days prior written notice to the City of Bryan of policy cancellation, material change, exhaustion of aggregate limits, or intent not to renew insurance coverage. If City of Bryan is notified a required insurance coverage will cancel or non-renew during the agreement period, the Infinity shall agree to furnish prior to the expiration of such insurance, a new or revised certificate(s) as proof that equal and like coverage is in effect. The City of Bryan reserves the right to withhold payment to Infinity until coverage is reinstated.

(12) **Infinity's Failure to Maintain Insurance** – If the Infinity fails to maintain the required insurance, the City of Bryan shall have the right, but not the obligation, to withhold payment to Infinity until coverage is reinstated or to terminate the Agreement.

(13) **No Representation of Coverage Adequacy** - The requirements as to types and limits, as well as the City of Bryan's review or acceptance of insurance coverage to be maintained by Infinity, is not intended to nor shall in any manner limit or qualify the liabilities and obligations assumed by the Infinity under the Agreement.

Section 2.5. Section 21.C. "Force Majeure Events" shall be amended to read as follows:

21.C. Force Majeure Events.

(1) Notwithstanding anything contained herein to the contrary, the performance of a Party's obligations under this Agreement and any deadlines or other specific dates shall be subject to being extended for the duration of a Force Majeure Event. For purposes of this Agreement, the term "Force Majeure Event" shall mean any delay, obstruction or interference with a party's ability to perform its work or obligations under this Agreement resulting from any act or event beyond the reasonable control of the party claiming delay as a result of a Force Majeure Event, and not separately or concurrently caused by any willful act or omission or negligent act or omission of such party, and which could not have been prevented by reasonable actions of the such party, including, but not limited to delay, obstruction or interference resulting from acts of God, accidents, fire, explosions, floods, lightning, earthquakes or similar occurrence; acts of a public enemy; acts of terrorism, extortion, or blockade or insurrection, riot or civil disturbance; acts or omissions of governmental agencies (except acts of governmental agencies including but not limited to the City taken in accordance with this Agreement), any unforeseeable condition at the site of the work which shall prevent, or require a change in, the scope of work, or adversely affect the completion schedule for said work; strikes, labor disputes, shortages of materials, or any other event not within the reasonable control of either party.

(2) The Party claiming delay of performance as a result of a Force Majeure Event shall deliver written notice of the commencement of such delay to the other Party as soon as reasonably practical after the claiming Party becomes aware of the same, and if the claiming Party fails to so notify the other Party of delay caused by a Force Majeure Event, the claiming Party shall not be entitled to extend the time for performance as provided herein.

(3) If as a result of the occurrence of a Force Majeure Event, the reasonable expectations of the parties under this Agreement are substantially changed, then the parties shall meet and discuss in good faith appropriate modifications or possible termination of this Agreement.

Section 2.6. The First Amendment Addendum effective January 22, 2008, containing Sections 1 and 2, "Facilities Improvements" and "Web-Based Promotional Services" respectively, shall be deleted in its entirety.

Section 2.7. The Agreement shall be amended by the addition of a new Section 22 entitled "Facilities Improvements" and the existing Section 22 "Miscellaneous" shall be renumbered as Section 23.

22. FACILITIES IMPROVEMENTS.

A. **Cost Sharing.** City and Infinity agree to share the costs to make certain improvements to the Facility, to be completed prior to the 15th day of May, 2017, in a total cost not to exceed Four Hundred Sixty-Three Thousand Nine Hundred Thirty-Five and No/100 Dollars (\$463,935.00), (hereinafter, the “Improvements”), subject to the following terms, conditions and obligations of the Parties. Attached hereto as Exhibit “A” is sampling of possible projects; actual projects may vary. The decision as to which Improvements will be made, whether included in Exhibit “A” or not, and the priority in which these Improvements will be completed shall be mutually agreeable in writing by both parties before work commences.

B. City Obligations.

- 1) The City shall be responsible for making the Improvements. The City agrees to complete the Improvements prior to the 15th day of May, 2017, subject to Force Majeure Events, as defined in Section 21 (C).
- 2) The City’s obligations to make the Improvements and other payments or expenditures under this Agreement are subject to annual appropriation of funds.
- 3) All Improvements are the property of the City.

C. Infinity Obligations.

- 1) Infinity will contribute a total amount of One Hundred Thirty-Nine Thousand One Hundred Eighty-One and No/100 Dollars (\$139,181.00), to be paid to City in five (5) annual payments of Twenty-Seven Thousand Eight Hundred Thirty-Six and No/100 Dollars (\$27,836.00) each. The first \$27,836.00 payment shall be due to the City on the 15th day of September, 2016, and each 15th day of September thereafter through September, 2020.
- 2) If the estimated total cost of the Improvements is greater than Four Hundred Sixty-Three Thousand Nine Hundred Thirty-Five and No/100 Dollars (\$463,935.00), the City, at its discretion, may delete any item from Exhibit “A”, to bring the total costs of the Improvements below the not to exceed amount of \$463,935.00. Infinity will not be required to contribute any funds in excess of \$139,181.00 for the Improvements, unless otherwise agreed to in writing. Total costs shall include design services, purchase, installation, construction, labor, and other procurement costs.
- 3) If the total cost of the Improvements is less than Four Hundred Sixty-Three Thousand Nine Hundred Thirty-Five and No/100 Dollars (\$463,935.00), the City and Infinity upon completion of the Improvements will reduce each party’s respective contributions to the Improvements in accordance with their contribution percentages as follows: City shall pay seventy percent (70%) of total costs of Improvements and Infinity shall pay thirty percent (30%) of the total costs of Improvements. Any reduction in Infinity’s total contribution amount shall be applied to Infinity’s final installment payment.

ARTICLE 3 – MISCELLANEOUS.

Section 3.1. No Further Amendments. This Third Amendment hereby modifies, amends, and supplements the Agreement. All terms and conditions of the Agreement remain unchanged except as altered by this Third Amendment.

Section 3.1. Conflict. In the event of any conflict of inconsistencies between the terms of this Third Amendment and the terms of the Agreement, the terms of this Third Amendment shall govern.

Section 3.2 Applicable Law. This Third Amendment and all the rights and obligations of the parties hereto with respect thereto will be construed in accordance with, and governed by, the laws of the State of Texas.

EXECUTED to be effective (the “effective date”) this _____ day of _____, 2016.

Approved as to Form:

City of Bryan, Texas

Janis K. Hampton, City Attorney

Jason P. Bienski, Mayor

Attest:

Mary Lynne Stratta, City Secretary

Infinity Sports Entertainment, L.L.C.

Uri Geva, President

Date: _____

Exhibit "A"

Fence Project	Sheet Metal Outfield Fence Materials	\$5,190
Fence Project	Fence Labor & other materials	\$11,200
Fence Project	New Mesh Coverage of Ballpark Fence	\$1,820
Field Project	Full Field New Irrigation	\$20,500
Field Project	Infield Replacement Project	\$48,000
Field Project	Field Leveling Project	\$41,000
Field Project	New Grass Installation	\$45,200
Field Project	Warning Track Installation	\$29,000
Field Project	Bullpens & Base Layering	\$33,000
Grandstand Project	Installation of new aluminum foot plank, aisle plank and intermediate steps	\$43,008
Grandstand Project	Installation of new aluminum riser	\$18,240
Grandstand Project	Demo and removal of old wood - foot plank & intermediate steps	\$9,648
Grandstand Project	Demo and removal of old riser	\$2,894
Grandstand Project	Press Box Structure Wood Replacement & Painting	\$7,900
Grandstand Project	Grandstand Overhead Painting	\$9,200
Lights Project	LED Lights Installation	\$90,000
Parking Lot Project	Mill & Replace with 3" hot mix asphalt material. Approx. 230 SY	\$6,850
Parking Lot Project	Clean & seal all major cracks - excludes gator'd areas	\$1,200
Parking Lot Project	Clean all asphalt areas & apply 2 coats of asphalt sealer.	\$6,550
Parking Lot Project	Restripe all existing markings including parking, ADA parking, X-hatch areas & Fire Lane markings	\$1,535
Scoreboard	28 Foot Baseball Line Scoreboard & Structure	\$32,000
	Total Project	\$463,935
	Bombers Portion - 30% of project costs	\$139,181
	Bombers Annual Payment for 5 Season	\$27,836