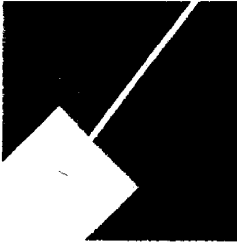


M-NCPPC



MONTGOMERY COUNTY DEPARTMENT OF PARK AND PLANNING

THE MARYLAND-NATIONAL CAPITAL
PARK AND PLANNING COMMISSION

8787 Georgia Avenue
Silver Spring, Maryland 20910-3760
301-495-4500, www.mncppc.org

September 27, 2005

TO: Montgomery County Planning Board

FR: Bill Mooney, Acting Deputy Director
301-495-4510

RE: Renegotiation of Lease Agreement between The Maryland-National Capital Park and Planning Commission and The Germantown Racquet & Fitness Center LLC ("Tenant") (Located in South Germantown Recreational Park)

Introduction

The Commission and Fitness Center entered into a lease agreement dated September 11, 2000, which was amended in early 2003 solely for the purpose of granting the Tenant additional time to obtain financing. The Tenant is close to finalizing financing plans, and in the intervening four years since the original lease was signed several elements of the project have changed, necessitating a second lease amendment. Staff has negotiated recommended terms of an amendment with the Tenant, and brings this amendment (Attachment One) to the Board for authorization to transmit the amendment to the Council for adoption in accordance with State law.

The scope of the project has changed substantially with respect to cost. The original estimated cost was approximately \$12,000,000. The current construction projection is \$22,000,000.

The existing lease provides for a base annual rent of \$75,000, plus beginning in year six, 4% of the gross (minus certain expenses), with a combined base and gross percentage rent not to exceed \$200,000 through year 20. The lease also provides that the combined base and gross rent is not to exceed \$225,000 in years 21 – 30; and not to exceed \$250,000 in years 31 – 40.

II. Lease Changes

The following bullets summarize the major changes to the lease:

1. Building Size. The size of the building has increased from 80,000 square feet to 110,000 square feet.

2. Indoor Courts. The number of indoor tennis courts has decreased from seven to four.
3. Outdoor Courts. Three outdoor courts that can be covered for fall, winter and spring play, are added. (The outdoor courts were contemplated at the time of the first lease, but not included at that time.)
4. Project Manager. The original lease requirement that the Tenant contract with Sumner Partners (the original project manager at the time SoccerPlex was under construction, and which contemplated that the tennis facility would be built) is no longer appropriate; instead the lease requires the project be managed by Heffner & Weber, the design/build contractor who has managed the project to date.
5. Mortgage Provisions. Revised mortgage provisions allow Tenant to borrow from an investment group (currently identified as the Dwoskin Group) instead of being limited to a bank.
6. Extraordinary Returns. The rental agreement has been renegotiated, based on the enlarged footprint and the higher projected participation.

In staff's analysis, subject to final pricing of the project, the Commission has approximately \$1,000,000 invested in this project, in land, infrastructure and "pad ready" costs. This is less than 5% of the project cost. Under the existing rent agreement, after the abatement period and when the project is at full performance, the Commission has the potential to receive between \$75,000 and \$200,000 per year in rent (through year 20). This is a return of 7.5% - 20%, based on the performance of the facility. Therefore, in reopening the rent discussion, staff focused on "extraordinary returns." Staff recommends the following formula as assessing a fair allocation between the Commission and Tenant, should the project do extraordinarily well, based on our minimal risk in this project. The extraordinary returns provision would provide as follows:

- a. No extraordinary returns will be paid until all original debt on the project (Bank and Equity Partners) is paid. Staff believes it is in the best interest of both parties to pay the debt off as soon as possible, which is the Tenant's intent.
- b. After normal distribution to equity partners and a contribution to a capital reserve fund, surplus revenues will be determined. "Surplus revenues" would be profit after all expenses defined under the lease is paid, the Commission receives its \$75,000 base rent, and its percentage of rent.

- c. If the remaining surplus revenue is less than \$500,000, the Commission will not receive any distribution.
- d. When the remaining surplus exceeds \$500,000, the Commission will receive 10% of the entire surplus.

Consequently, if the Tenant earns \$1.1 million (which is over \$500,000), then the Commission would receive \$110,000 (over its base and percentage rent in the current lease).

7. Pad-ready site design and construction costs: In the original lease, the Commission agreed to provide a "pad ready"¹ site. Based upon common practice in the construction industry, the existing site does not meet "pad ready" standards. The parties have agreed to the following way to pay the \$310,326 required to provide a pad-ready site:

M-NCPPC will contribute \$132,000 in cash (available in the existing PDF). Tenant will front the balance of \$178,326, which will be reimbursed through rent abatement. The parties are exploring whether the \$132,000 can be credited against certain fees that the Tenant will owe to the Commission for infrastructure work that the Commission has performed, which would negate need for the Commission to actually providing a check in the amount of \$132,000 to the Tenant. As for the balance of \$178,326 that the Tenant will front, the Commission would allow that amount to be repaid and applied against rent due. The entire principal and interest would thus be repaid in approximately 3 ½ years into the Lease Agreement. This approach will avoid the need to seek a supplemental appropriation from the Council for the cost of the pad-ready preparations.

III. Conclusion

In the opinion of staff, the Tenant is about to finalize financing, and this project can move forward. Staff recommends the Board authorize staff to submit the amendment to the Council for approval.

Attachment

cc: Adrian R. Gardner, General Counsel
Patricia Colihan Barney, Secretary-Treasurer
Michele Rosenfeld, Associate General Counsel

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¹ This term refers primarily to the level of grading and the provision of utilities to within approximately 5 feet of the pad site.

SECOND AMENDMENT TO GROUND LEASE AGREEMENT

This Second Amendment to Ground Lease Agreement is made this ____ day of September 2005, by and between The Maryland-National Capital Park and Planning Commission ("Landlord") and the Germantown Recreational Park Racquet and Fitness Center, L.L.C. ("Tenant").

WHEREAS Landlord and Tenant entered into a certain Ground Lease dated September 11, 2000 ("Lease"), covering approximately six (6) acres ("Leased Premises") in the South Germantown Recreational Park ("Park"), in Germantown, Maryland and

WHEREAS the parties wish to amend the Lease to modify certain of its provisions.

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

1. Paragraph 1 is amended by deleting in its entirety Paragraph 1(c).
2. Paragraph 5 (Annual Base Rent) is amended by adding the following new Paragraphs 5(e) and 5(f):
 - (e) Tenant may elect to offset the base rent up to a total offset of ONE HUNDRED AND SEVENTY EIGHT THOUSAND, THREE HUNDRED AND TWENTY SIX DOLLARS (\$178,326.00) ("Rental Credit") in the following manner:
 - (i) SEVENTY-FIVE THOUSAND DOLLARS (\$75,000.00) in the first Lease Year;
 - (ii) SEVENTY-FIVE THOUSAND DOLLARS plus any additional sums assessed as base rent pursuant to paragraph 5(c) and (d) of the Lease in the second Lease Year; and
 - (iii) ANY RENTAL CREDIT BALANCE REMAINING in the third Lease Year, including any mutually-agreed upon additional scope of work to upgrade pump stations as needed to serve the Leased Premises and the Park.

Tenant shall not assess any interest on this credit.

- (f) The parties agree that this money shall go toward the total cost of Four Hundred Ninety-Five Thousand, Three Hundred and Twenty

Six Dollars (\$495,326.00) of additional work for site preparation and utilities for the facility. Tenant shall contract for and be responsible for the design, construction and delivery of all of this work.

3. Paragraph 6 is amended by adding the following new Paragraphs 6(j) and 6(k):

(j) This Paragraph 6(j) applies after Tenant has paid all original bank financed and equity debt assumed by Tenant in accordance with Paragraph 1(b) of the Lease ("Debt"). Tenant warrants that it will advise the Commission in writing within 30 days of making final payment on its Debt.

(k) After all Debt is paid in full, Tenant shall pay as additional rent Ten Percent (10%) of Tenant's Surplus Revenues, as provided for in Paragraph 6(k)(ii), below:

(i) "Surplus Revenues" are Tenant's Adjusted Gross Income as defined in paragraph 6(d) minus: (i) all base and percentage rental payments under paragraphs 5 and 6 of the Lease; and (ii) Tenant's normal 46% distribution to equity partners. Tenant shall not pay to Landlord additional rent on Surplus Revenues unless Tenant's Surplus Revenues exceed \$500,000.00 (*i.e.*, \$500,000.01).

(ii) If Tenant earns Surplus Revenues, then it shall pay to Landlord Ten Percent (10%) of the entire Surplus Revenue EXCEPT Tenant shall not pay any percentage on any money from Surplus Revenue allocated to the Capital Reserve Fund in accordance with Paragraph 40, below (*e.g.*, assuming Tenant earns Surplus Revenue in the amount of \$600,000 and contributes \$50,000 to the Capital Reserve Fund, Tenant shall pay additional rent in the amount of Ten Percent (10%) of \$550,000*).

4. Paragraph 7 (Maximum Amount of Annual Base Rent and Percentage Rent) is amended by adding the following new Paragraph 7(d):

(d) The limitations of this Paragraph 7 do not include any rent that may be due and owing pursuant to the provisions of Paragraph 6(k).

5. Paragraph 11(b) is deleted in full and replaced in full with the following Paragraph 11(b):

(b) The sum of NINETY SIX THOUSAND, EIGHT HUNDRED AND EIGHTY DOLLARS (\$96,880.00) as reimbursement for the

Landlord providing pad preparation of the Leased Premises ready for construction.

6. Paragraph 11 (Tenant Reimbursements to Landlord) is amended by adding the following new Paragraph 11(c).

(c) Landlord shall fund \$132,000 toward pad preparation of the site. This sum shall be in the form of a direct payment to Tenant. This sum shall be final and absolute, with no further recourse against Landlord for any additional site preparation costs.

7. Paragraph 12 is amending by deleting Paragraph 12 in its entirety and the following text is inserted in its place:

12. Construction of Improvements.

- (a) Improvements. The Tenant, consistent with the Terms of Offering and the Proposal and subsequent negotiated changes to these original Terms, is to develop the Leased Premises by financing and having constructed on the Leased Premises a building not to exceed 110,000 square feet which will accommodate up to 5,000 memberships. The facility shall include at minimum four (4) indoor tennis courts and three outdoor courts which can be covered for year-round play, health fitness facilities, support services, future indoor gymnastics facilities, a members' basketball/volleyball court, internal roads and streets, sidewalks, gutters, curbs and parking, the use of which shall not be exclusive for the Leased Premises, but rather available for use by all visitors and/or users of the South Germantown Recreational Park that shall be minimally sufficient to support such a building facility. The Tenant has provided and offered to the Landlord in its Proposal the amenities that it shall provide within the building facility to be constructed by the Tenant on the Leased Premises, and for purposes of this Lease, the building facility and the amenities hereinabove described shall collectively be referred to in this Lease as the "Improvements."
- (b) Development Manager and Design-Builder. The Tenant shall execute a Design & Construction/Development Management Agreement (hereinafter referred to as "Design-Build Agreement" or "DBA") with Heffner & Weber, a Design-Build-Development firm located in Baltimore, Maryland, to serve as the Development Manager and Design-Builder of the Improvements and the Site Improvements. The services to be provided shall consist of "Development Management Services" and "Design-Build Services" which shall include but not be limited to the following:

- (i) Coordination with the Landlord relating to issues of design, permitting and construction of the Improvements and Site Improvements;
- (ii) Coordination with the County on issues of design, permitting and construction of the Improvements and Site Improvements as they relate to the design, permits and construction of the Aquatic Center being constructed by the Revenue Authority and Montgomery County, Maryland, within the Park;
- (iii) Coordinate the selection of, contract with and administer the design professional for the Improvements and Site Improvements including but not limited to an architect, design-build subcontractors and a civil engineer, subject to approval by the Tenant and the holder of the Leasehold First Mortgage, as hereinafter defined, such approval shall not be unreasonably withheld;
- (iv) Coordinate and oversee the planning and design of the Improvements and Site Improvements and ensure a reasonable amount of design compatibility with the Aquatic Center in the Park subject to the approval of the Tenant and the Landlord;
- (v) Coordinate, oversee and administer the permitting and entitlements processes required to obtain authorization to proceed with the construction of the Improvements and Site Improvements from the necessary local, county, and municipal authorities;
- (vi) Coordinate, oversee, manage the construction of the Improvements and Site Improvements and, at the Design-Builder's option, self-perform portions of the construction work.

Tenant's agreement with the DBA shall state that the DBA's duties and obligations thereunder run to the benefit of Landlord as well as to the Tenant. The agreement to be executed by the DBA and Tenant shall be subject to the reasonable approval of the Landlord, and there shall be no material changes to the agreement without the prior written approval of the Landlord, which approval shall not be unreasonably withheld.

- (c) Commission's Project Manager. The Landlord shall designate in writing a Project Manager, who shall review all DBA services on behalf of Landlord.
- (d) Commencement of Design. Not later than ten (10) days following the date the Tenant closes on its financing as described in Paragraph 1(b) of this Lease, Tenant shall cause DBA to commence the preparation of and diligently pursue the completion of the plans for the construction of the Improvements upon the

Leased Premises (the "Plans"). The Plans shall be prepared to conform to the site conditions and to all applicable laws, statutes, ordinances, and codes (including without limitation building, health, environmental and fire codes) of all applicable governmental authorities as to the design and construction of the Improvements. Tenant understands and recognizes that before any Plans can be furnished and submitted to the Landlord for final approval, the Landlord may be required to hold a public hearing on the Plans. The DBA's contract shall be subject to the reasonable approval of Landlord and shall state that DBA's duties and obligations thereunder and in connection with the Improvements run to the benefit of Landlord as well as Tenant. The DBA contract shall provide that it shall not be materially changed without Landlord's prior written consent.

- (e) Plan Approval. Following DBA's completion of the Plans to the satisfaction of Tenant, they shall be submitted to Landlord for its approval. Thereafter, on behalf of Landlord and Tenant, and in the name of the Tenant, Tenant shall promptly file for, and thereafter diligently pursue, in good faith, the obtaining of all permits to enable the construction of the Improvements to commence (the "Permits"). Landlord shall promptly cooperate with Tenant in all reasonable ways, and use all best efforts but at no cost to Landlord, to aid Tenant in its efforts to obtain the Permits. Tenant shall pay for all governmental fees, charges and assessments of any kind whatsoever for the permits.
- (f) Construction. Following issuances of the Permits, Tenant shall cause DBA to begin constructing the Improvements. Tenant shall cause DBA to diligently pursue the construction of the Improvements and to continue such construction so that a final use and occupancy can be issued to the Tenant by the County and all other governmental authorities having jurisdiction over the Leased Premises within twenty-four (24) calendar months following the date upon which such construction shall have commenced plus the actual number of days during which construction cannot proceed due to acts of God or the elements, strikes, lockouts, governmental orders or decrees (including moratoria), or other causes beyond the control of Tenant.
- (g) Standard of Construction. The DBA shall require the Contractor to construct the Improvements in a good and workmanlike manner; in accordance with all applicable laws, statutes, ordinances and codes; and without deviation or change in the Plan in any material respect unless such material change in the Plans or in the Improvements is first approved in writing by Landlord. DBA shall be subject to the reasonable approval of Landlord, and the Improvements Contract shall state that the DBA's duties and obligations thereunder and in connection with the Improvements

run to the benefit of Landlord as well as Tenant. The Improvements Contract shall provide that it shall not be materially changed without Landlord's prior written consent.

- (h) Waste. Tenant shall not demolish or destroy the Improvements without the prior written consent of Landlord. Tenant shall not have the right to make any material changes, additions, or alterations, structural or otherwise, to the Improvements without the prior written consent of Landlord.
- (i) Liens and Encumbrances. Tenant shall have no authority, express or implied (except as otherwise provided herein) to create or place or permit to be created or placed any lien or encumbrance of any kind or nature whatsoever, upon or in any manner to bind the interest of Landlord in the Leased Premises or the Property. Tenant covenants and agrees to pay promptly all sums legally due and payable by Tenant on account of any labor performed, or on account of any material supplies, on or to the Leased Premises as to which lien is or legally can be asserted against Tenant's leasehold interest in the Lease Premises or the Improvements.
- (j) Discharge of Liens. If a mechanic's lien or claim is filed against Landlord's Property because of work, labor or services performed or materials furnished for Tenant or anyone authorized by Tenant, Tenant shall cause it to be either discharged or bonded to the satisfaction of Landlord or in the alternative the Tenant deposits into an escrow account a sum of money that will result in the holder of any such lien or claim to release the Landlord's Property or the Leased Premises from any such lien or claim; however, if Tenant shall fail to cause such lien or claim to be discharged, bonded or released to the satisfaction of Landlord, Landlord may, in addition to any other right or remedy, discharge it by paying the amount claimed to be due. Any amount paid by Landlord and all related costs and reasonable expenses (including reasonable attorneys' fees), shall be considered Additional Rent payable by Tenant with the first installment of rental thereafter becoming due and payable, and may be collected or enforced by law as provided for respective rentals. Tenant shall provide to Landlord upon completion of the Improvements a release of liens for any work on the Leased Premises which may be performed or authorized by Tenant.
- (k) Construction Materials and Debris. Tenant shall provide, at its own expense, for the removal of all waste, debris and excess materials resulting from its constructing the Improvements and from its moving in and occupying the Leased Premises. At no time shall Tenant or Tenant's contractors place temporarily or otherwise any of said waste or debris outside the Leased Premises.
- (l) Ownership of Improvements. All Improvements constructed by the Tenant on the Leased Premises, and all alterations, improvements, changes, additions, or replacements made to the Improvements or

on the Leased Premises, shall be the property of Tenant during the term of this Lease, subject, however, to the terms of this Lease.

8. Paragraph 13 is amended by deleting in full Paragraph 13(i) and replacing it in full with the following new Paragraph 13(i):

13(i) For purposes of this paragraph 13, the phrase "Leasehold Mortgage" shall also include Leasehold Deeds of Trust and any other security agreements, including (but not limited to) any investment group holding a security interest in the Lease.

9. Paragraph 14 is amended by inserting "and meeting rooms" after "administration office areas," and by inserting "or uses allowed under this Lease" after "economic terms."

10. Paragraph 16 is amended by deleting in full the last sentence of Paragraph 16 and replacing it with the following sentence:

If the Tenant is a corporation, partnership, limited liability company, limited liability partnership or any other entity, then within the meaning of Paragraph 16 of this Lease, an assignment includes, without limitation, one or more sales or transfers of any kind whatsoever, whether by operation of law or otherwise by which an aggregate of more than fifty-one percent (51%) of the controlling interest(s) in the entity shall be vested in a person, persons or entities who are not owners of the entity as of the date of settlement on the financing and made a part of the entity.

11. Paragraph 19(b) is amended by deleting "FIFTY THOUSAND DOLLARS (\$50,000.00)" and inserting in its place "NINETY-NINE THOUSAND, NINE HUNDRED AND NINETY NINE DOLLARS (\$99,999.00).

12. Paragraph 19(e) Except that all fixtures installed by the Tenant which are not permanently affixed to the facility shall be and remain the property of the Tenant. All athletic equipment, spa, cardiovascular, and all other equipment used in the various programs and services offered the members, which are not permanently affixed to the facility installed, and/or replaced by the Tenant from time to time during any term of this Lease, shall at all times be and shall remain the property of the Tenant, and Landlord by virtue of this Lease shall have no ownership rights in any such items.

13. Paragraph 28 is deleted in full and replaced with the following new Paragraph 28:

28. Signs. Tenant shall not erect, place or install nor maintain any sign or signs on or about the exterior of the Leased Premises without first submitting to the Landlord a sketch or drawing thereof, and indicating its context and proposed location. Landlord shall indicate in writing upon the plans so submitted whether the plan is approved or denied; Landlord's approval shall not be unreasonably withheld.
14. Paragraph 39 is amended by renumbering the existing paragraph as paragraph 39(a), and by adding the following new paragraph 39(b):

39(b). Notwithstanding the provisions of Paragraph 39(a), Tenant shall provide to Landlord for review and comment, annually on or before the sixtieth (60th) day after the end of each such Lease Year during any term of this Lease, financial statement prepared by a certified public accountant prepared in accordance with generally accepted accounting principles with respect to the Tenant's operation of the Tennis Center uses at the Leased Premises during the preceding calendar year beginning the first Lease Year after Tenant has paid all Debt and is subject to additional rent under Paragraph 6(k), above. The financial statement shall include (1) the full amount of any contribution to the Capital Reserve Fund established in accordance with Paragraph 40, below; and (2) an itemization of all improvements to the Leased Premises and the cost thereof paid for out of the Capital Reserve Fund. If Tenant fails to provide said financial statement, then Tenant thereafter will be required to file an audited financial statement.

15. A new Paragraph 40 is added as follows:

40. Capital Reserve. (a) In year four of the Lease, Tenant shall establish a Capital Reserve Account. The minimum annual contribution to the Capital Reserve Account shall be FIFTY THOUSAND DOLLARS (\$50,000.00), and Tenant may elect to contribute annually up to ONE HUNDRED AND FIFTY THOUSAND DOLLARS (\$150,000.00) to the Capital Reserve Account.

(b) In Lease Year 38, Landlord shall inspect the Leased Premises and provide Tenant with: (1) a list of all work required to correct any outstanding code violations; and (2) any systems, fixture or structural items (not Trade Fixtures as defined in Section 19(e)) that has fewer than three years remaining on its life-cycle. Tenant shall pay to correct all code violations, and shall replace any systems, fixtures or structural items that have fewer than three years remaining on their life-cycle out of the Capital Reserve account. All monies in the Capital Reserve Account remaining after these

repairs and/or replacements shall become the sole property of Tenant.

16. Ratification of Lease. All terms, covenants and conditions of the Lease and Amendment to Ground Lease Agreement not expressly modified and amended hereby shall remain in full force and effect and are hereby ratified and affirmed in all respects.

[SIGNATURE PAGES TO FOLLOW]

IN WITNESS WHEREOF, the parties hereto have duly executed this Second Amendment to Ground Lease Agreement on the day and year first written above.

- LANDLORD -

ATTEST:

THE MARYLAND-NATIONAL
CAPITAL PARK AND PLANNING
COMMISSION

_____(SEAL)
Secretary-Treasurer

By: _____
Trudye Morgan Johnson
Executive Director

DATE

STATE OF MARYLAND, CITY (COUNTY) OF _____, to wit:

I hereby certify, THAT ON THIS _____ day of _____, 2003, before me, a Notary Public of the State of Maryland, personally appeared TRUDYE MORGAN JOHNSON, who acknowledged herself to be the Executive Director of the Landlord and that she, as such Executive Director, being authorized to do so, executed the foregoing instrument for the purposes therein contained by signing the name of the Landlord by herself as Executive Director.

WITNESS my hand and Notarial Seal

Notary Public

My Commission Expires: _____

[TENANT'S SIGNATURE PAGE TO FOLLOW]

- TENANT -

THE GERMANTOWN RECREATIONAL PARK
RACQUET & FITNESS CENTER, L.L.C.

By: TOTALLY TENNIS, INC.
Authorized Member

By: _____ DATE _____
Kevin P. Tighe
President

DISTRICT OF COLUMBIA _____, to wit:

I HEREBY CERTIFY, that on this ____ day of _____, 2003, before me, a Notary Public of the District of Columbia, personally appeared KEVIN P. TIGHE, who acknowledged himself to be the President of Totally Tennis, Inc., the authorized member of the Tenant (the "Member") and that he, as the President of the Member, being authorized to do so, executed the foregoing instrument for the purposes therein contained by signing the name of the Tenant by himself as President of the Member.

WITNESS my hand and Notarial Seal.

Notary Public

My Commission Expires: _____