

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

THIS FOURTH AMENDMENT EXCLUSIVE FACILITY USE AGREEMENT is entered into by and between the City of Bryan, a municipal corporation of the County of Brazos, State of Texas ("City"), and Infinity Sports Entertainment, LLC, a Texas limited liability company ("Infinity"), for the use of the City's Travis Major Baseball Field located at the Travis Athletic Complex ("Facility").

RECITALS

WHEREAS, the City is the owner of the Facility which is comprised of a baseball field, partially covered stadium seating, concession booths, restrooms and maintenance facilities, parking facilities and other facilities, equipment and fixtures commonly related to municipal baseball field uses and activities; and

WHEREAS, Infinity seeks to host at the Facility (as herein defined) a collegiate baseball team to play in the Texas Collegiate League ("TCL"), a baseball league comprised of collegiate level and caliber players, and Infinity also seeks to host various other third parties for other entertainment related uses at the Facility; and

WHEREAS, Infinity sought approval to make improvements to, and to be responsible for maintenance of, the Facility if the City granted exclusive use of the Facility to Infinity; and

WHEREAS, the City determined that the proposed improvements and maintenance would be beneficial to the Facility, and moreover the intended activities to be conducted at the Facility would be conducive to its then current use and would foster economic development and other opportunities for the benefit of the residents of the City; and

WHEREAS, the parties entered into the original City of Bryan and Infinity Sports Entertainment Exclusive Facility Use Agreement ("Agreement") on August 23, 2006, and have subsequently agreed to three (3) previous amendments, the last being the Third Amendment which was effective June 30, 2016; and

WHEREAS, the parties have determined there is a need to amend the Agreement again to address additional improvements for the Facility and for the sake of clarity, adopt this Fourth Amendment which replaces the original Agreement as well as all prior amendments thereto.

AGREEMENT

In consideration of the mutual benefits, promises, covenants, terms and conditions in this Agreement, and other good and valuable consideration, the receipt and sufficiency of which is acknowledged by the parties, the parties hereto mutually agree as follows:

1. TERM OF AGREEMENT

The initial term of this Agreement shall begin on August 23, 2006, and shall terminate on December 31, 2025, unless sooner terminated or modified under the terms of this Agreement. Provided that this Agreement has not been terminated for any reason, Infinity shall have an exclusive option to renew this Agreement, if it is not in default, for an additional ten (10) year term upon terms and

conditions as shall be agreed upon by the parties. If Infinity intends to exercise its option to renew, it shall provide written notice thereof to the City at least twelve (12) months before the date of termination of the initial term of this Agreement.

During the term of the Agreement, the parties may review and consider amending the Agreement, including additional projects, which may require funding from one or both parties (see Section 23.D).

2. LEASED PREMISES

A. Leased Premises Defined

For and during the term of this Agreement, the City leases, demises and rents to Infinity the Facility. For purposes of this Agreement, "Facility" shall mean, Travis Major Baseball Field located at the Travis Athletic Complex, 525 Carson Street, Bryan, Texas 77801, and that area immediately surrounding Travis Major Baseball Field and parking lot as identified in the attached Exhibit "A", which is incorporated herein by reference and made a part hereof. In addition to the lease, demise, and rental of the Facility, Infinity shall have non-exclusive use, but no responsibility for maintenance, of all other parking lots at Travis Athletic Complex in connection with events and activities permitted under this Agreement.

B. Acceptance of Premises

Infinity acknowledges that it has inspected or been provided an opportunity to inspect the Facility for defects and to determine its suitability for its intended and anticipated uses and activities during the term of the Agreement. By entering into this Agreement, Infinity accepts the Facility "**AS-IS, WHERE IS, WITH ALL FAULTS**". The City has not made any representations, verbal, written, express or implied and makes no warranties, express or implied, as to the condition of the Facility or as to the Facility's suitability for Infinity's intended or anticipated uses and activities. It is expressly understood that Infinity assumes all liability and responsibility arising from and related to premises defects and conditions and that Infinity shall procure such liability insurance as it deems suitable for its protection in addition to the insurance required herein.

3. RENT

Infinity shall pay no rent for use of the Facility.

4. USE OF THE FACILITY

A. Primary Use

The Facility shall be used by Infinity as a sports and entertainment venue. The intended primary use of the Facility by Infinity shall be to host baseball games for teams in the TCL. In connection with such primary use, Infinity may place other baseball teams of a caliber, reputation or status comparable to that of TCL within the Facility only upon the written approval of the City, which approval shall not be unreasonably withheld. The use of the Facility for non-baseball events and activities shall be permitted only upon the written approval of the City, which approval shall not be unreasonably withheld.

B. Secondary Uses

Secondary to such intended primary use, Infinity shall be permitted to sponsor or conduct other sports related activities or entertainment activities for profit, subject to the written approval of the City, which approval shall not be unreasonably withheld.

C. Limitations on Use

All events and activities occurring at the Facility shall comply with all applicable laws and ordinances regarding nuisance, noise, or other health and safety laws and ordinances. All other uses not specifically authorized herein shall be subject to City's written approval, which approval shall not be unreasonably withheld.

D. Heads in Beds

As a condition of the use of Hotel Occupancy Tax (HOT) revenues to finance Improvements under this Agreement, as set forth in Section 22, Infinity will be responsible for hosting, sponsoring, or promoting tournaments, or similar events, at the Facility to promote tourism and the convention and hotel industry. Tournaments, or similar events, sponsored at the Facility pursuant to this Agreement must account for a corresponding number of rooms to account for the HOT funds attributable to HOT funded improvements as required by State law. For the purposes of this Agreement, each night a rentable unit is occupied at a hotel, motel, or other temporary lodging that pays Hotel Occupancy Tax.

Infinity is required to provide documentation of HOT compliance as a part of the annual report made under this Agreement. Documentation should follow the example as provided by Exhibit "C," and more specifically, documentation shall meet requirements of State statutes.

5. INSPECTIONS

Each year, at least thirty (30) calendar days prior to the commencement of TCL regular baseball season, the City shall be allowed to inspect the Facility for general conditions and maintenance issues. Each year, within thirty (30) calendar days after the completion of each TCL regular baseball season, the City shall be permitted to inspect the Facility, including, but not limited to such things as equipment, nets, fences, storage facilities, restrooms, etc. The findings during the City's inspection will be contained in a written report which inspection will become part of an annual report available to both parties. The City shall, upon reasonable notice to Infinity, have the right to make inspections at any reasonable time to insure compliance with this Agreement.

6. ACCOMMODATION OF EXISTING USERS AND ACTIVITIES

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 leagues, teams and organizations. In consideration of the City entering into this Agreement, Infinity agrees to continue to make available the Facility to such users to continue to conduct their activities (the "Community Baseball Activities") during the term of this Agreement under similar terms and

conditions and fees applicable to similar users of City baseball facilities during the same time period, and provided such user organizations satisfy all Parks 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.

B. Annual Scheduling Conference

In recognition of the obligation to accommodate such users and the Community Baseball Activities, the parties agree to meet annually during the month of February at a mutually agreed date, time and location for the purpose of coordinating the proposed schedules for such users' Community Baseball Activities and the proposed schedule of activities of Infinity. If the parties are unable to agree on a date, time and location for such meeting, then such meeting shall be held on the second Wednesday of the month of February at 2:00 p.m. at the main offices of the City's Parks and Recreation Department.

(1) Meeting Notice

Two (2) weeks prior to the scheduled dates for the above meetings, City shall contact the following:

- a. President of Infinity Sports Entertainment
- b. Director of City of Bryan Parks and Recreation Department

Meeting information will contain, at a minimum, the following: meeting date, meeting time, and meeting place.

(2) Meeting

At the meeting the parties shall reach agreement regarding the scheduling of the Community Baseball Activities and other events and activities sponsored by Infinity for profit. All conflicts in scheduling shall be resolved at such meeting or at such time as reasonably practical thereafter as agreed between the parties. In the event of a scheduling conflict that cannot be resolved, if an alternate venue for the Community Baseball Activities cannot be provided, the Community Baseball Activities shall have priority for use of the Facility only with regard to an Infinity sponsored non-baseball event or activity. For purposes of scheduling under this paragraph, any and all construction and renovation activities of Infinity shall be considered the same as any other event or activity sponsored by Infinity.

(3) Written Schedule

Upon coordinating and reconciling the needs of all users for the Community Baseball Activities and the needs of Infinity, a written schedule shall be prepared and approved by the parties. Such schedule shall be deemed a part of this Agreement, as amended from time to time, and a breach by Infinity of the expectations created by such schedule shall be deemed a breach of this Agreement, unless otherwise resolved by the

parties. Infinity shall be allowed to add or change the dates of events or activities sponsored by it after the date of approval of the annual written schedule provided reasonable notice is given to the City and the City is satisfied that the Community Baseball Activities have been accommodated.

7. UTILITIES

The City shall pay all utility expenses in an amount not to exceed \$25,000.00 per City fiscal year, associated with the Facility, to include all water, gas, electricity (including all playing field floodlights), and sanitation services, required in connection with the normal use of the Facility. Infinity shall use its best efforts to minimize electricity and other utility usage and expenses. The not-to-exceed amount provided in this paragraph is subject to annual adjustment reflecting increases in utility rates and agreed to in writing by City and Infinity (e.g. Infinity shall not be responsible for any utility expenses over \$25,000.00 that are incurred due to utility rate increases, as opposed to increased utility usage). In exchange for utility expense payments by the City, Infinity shall provide the City equal value via promotional consideration at the Facility (e.g. signage, tickets, branded events, etc.). Such promotional consideration shall be provided during the season immediately following the City fiscal year in which the utility expenses were paid by the City.

8. ALTERATIONS, ADDITIONS, IMPROVEMENTS

Infinity shall be allowed to make alterations, additions or improvements to the Facility as it deems necessary to accommodate its authorized intended uses and activities. Before Infinity commences making any such alterations, additions or improvements, it shall obtain the written consent of the City. The consent of the City shall not be unreasonably withheld, except that the City may withhold consent for any alteration, addition or improvement that City reasonably determines diminishes the integrity of the Facility for use as or is otherwise incompatible with its use as a municipal baseball field after termination of the Agreement. All alterations, additions or improvements shall result in a condition of the Facility that is superior to its condition on the effective date.

9. SIGNS

Infinity shall not install or erect any signs without the written approval of the City as to the technical specifications, which approval shall not be unreasonably withheld. The City shall also approve the location of any permanent signs outside the fenced area enclosing the field and visible from any public rights of way. All signs and banners shall comply with applicable sign ordinances. Temporary single event banners and signs may be erected or installed without approval of the City. The City shall not unreasonably withhold approval of any signs or banners that are otherwise in compliance with applicable sign ordinances.

10. REPAIRS AND MAINTENANCE

A. Infinity

Infinity shall be solely responsible for all repairs to and maintenance of the Facility, except to the extent the City is responsible for maintaining the field lighting at the Facility. Such maintenance shall include, but not be limited to:

- (1) Field maintenance, at a minimum, must be kept to the same or superior standard as other City athletic fields. Mowing during the growing season must be done weekly or

sooner. The grass is to be professionally maintained as is appropriate for the conduct of TCL games. This requirement also applies to any grass growing along the fence lines. **Manufactured fields shall be maintained to the manufacturer's specifications, including abiding by the manufacturer's scheduled maintenance recommendations.**

(2) Infinity will be responsible for all turf maintenance in the Facility and immediate surrounding area, and the City will maintain all turf outside the aforementioned areas. There should be no noticeable turf presentation difference on either side of the areas.

(3) Infinity will maintain the skinned clay areas in a weed and grass free condition, as well as remove any "lips" that develop on the grass edge with a height as professionally needed for baseball games.

(4) Infinity will be responsible for appropriate and safe watering, fertilizing, or application of pesticides or herbicides.

(5) Infinity will be solely responsibility for all Facility repairs and maintenance, including, but not limited to the repair and maintenance of fences, bleachers, irrigation, buildings, commodes, plumbing, canopies and roofs, walls, electric and gas lines, equipment, fixtures and appliances.

(6) Infinity will provide, store, and apply marble dust or paint as needed in the sole discretion of Infinity.

(7) Infinity shall, at all times, maintain the Facility in a clean and sanitary condition. After each event or activity, Infinity shall collect and discard into appropriate waste containers all litter, trash, garbage, debris and other waste within seventy-five (75) feet of the perimeter of the field and all parking lots.

B. The City

The City shall be responsible for maintaining all Facility field lighting existing on the date of this Agreement. Any upgrades shall be at Infinity's sole cost and expense unless otherwise agreed upon in writing.

11. LIENS AND ENCUMBRANCES

Infinity shall not permit any mechanic's or materialman's liens or any other liens or encumbrances to be placed on or against the Facility or any property owned by the City. Any contracts between Infinity and any third party for construction, the installation of fixtures or equipment or for any product or service for which liens against real or personal property are permitted by law shall contain a waiver by such third party of the right to place a lien or other encumbrance against the Facility or any property owned by the City.

12. FOOD AND BEVERAGE OPERATIONS

Infinity shall comply with all requirements of state and local law governing the sale or provision of food and beverages to the public. Infinity shall obtain and maintain all permits from all governmental agencies having jurisdiction for all food and beverage operations at the Facility. Infinity shall comply

with all health laws and regulations as existing or as may be established by the federal, state, county, and city governmental agencies.

13. BEER AND WINE CONCESSION

A. Grant of Concession for Beer and Wine Sales

During the term hereof, City grants to Infinity, or Infinity's City-approved designee, the exclusive right to sell beer and wine for on-premises consumption at the Facility.

B. Licenses and Permits

Infinity, or Infinity's City-approved designee, shall acquire all necessary licenses and permits to operate its beer and wine concession and shall comply with all laws and regulations pertaining to the sale of alcoholic beverages, including but not limited to those pertaining to the sale of beer and wine for on-premises consumption. No consumption or open containers of beer and wine or alcohol shall be permitted beyond any fenced seating or picnic areas enclosing the field. Consumption and open containers of beer and wine and alcohol shall be permitted between the locations from which beer and wine is sold and such enclosed seating or picnic areas. Infinity, or Infinity's City-approved designee, shall not operate its beer and wine concession such that consumption or open containers of alcohol would occur in any parking areas.

C. Personnel

Infinity, or Infinity's City-approved designee, shall recruit, hire, train, discharge, promote and supervise all personnel engaged in the operation of the beer and wine concession and shall be responsible for the compensation of such personnel. City shall have no control over or supervision of the personnel hired by Infinity, or Infinity's City-approved designee, to operate the beer and wine concession at the Facility.

D. Contracts and Agreements

All contracts and agreements relating to the operation and maintenance of the beer and wine concession shall be entered into by Infinity as the contracting party for its benefit and for its own account. All inventory of beer and wine purchased by Infinity, or Infinity's City-approved designee, shall be the property of Infinity and shall be resold for Infinity's own benefit and for its own account.

E. Liquor Liability Insurance

In addition to any other insurance required under this Agreement, Infinity, or Infinity's City-approved designee, shall, at all times, maintain liquor liability insurance in an amount of not less than \$5,000,000.00 per occurrence that covers the sale of beer and wine for on-premises consumption.

F. Legal Relationship

Infinity, or Infinity's City-approved designee, shall be the owner of the beer and wine concession business at the Facility at all times during the term of this Agreement. City is the owner of the Facility and by this Agreement agrees to Infinity's, or Infinity's City-approved

designee's, use of the Facility as a location for the operation of a beer and wine concession. Nothing contained in this Agreement shall be construed to be, or create, a partnership or joint venture between City, and its successors and assigns, and Infinity and its successors and assigns.

G. Indemnity Related to Beer and Wine Sales

Infinity and/or Infinity's City-approved designee, agrees to indemnify and hold harmless City and City's officers, officials, members, employees, agents, representatives, and volunteers from and against any and all claims, demands, actions, lawsuits, proceedings, damages, liabilities, judgments, penalties, fines, expert witness fees, attorney's fees, costs and expenses, which result from any act or omission by Infinity, Infinity's City-approved designee, or by any officer, agent, contractor or employee of the foregoing, in connection with the operation of a beer and wine concession at the Facility.

H. Security

Infinity, or Infinity's City-approved designee, shall be solely responsible for providing any security personnel as may be required by the laws of the State of Texas governing the sale of alcoholic beverages.

14. INDEMNIFICATION

INFINITY SHALL SO CONDUCT ITS ACTIVITIES UPON THE FACILITY SO AS NOT TO ENDANGER ANY PERSON LAWFULLY THEREON; AND SHALL INDEMNIFY, SAVE AND HOLD HARMLESS THE CITY AND ALL OF ITS OFFICERS, AGENTS, AND EMPLOYEES AGAINST AND FROM ANY AND ALL CLAIMS, DEMANDS, CAUSES OF ACTION AND SUITS FOR LOSSES, INJURIES, DAMAGES AND LIABILITIES TO PERSONS OR PROPERTY OCCASIONED WHOLLY OR IN PART BY THE NEGLIGENT ACTS OR OMISSIONS OF INFINITY, ITS SUBCONTRACTORS, ASSIGNEES, AGENTS, OFFICERS, EMPLOYEES, GUESTS, PATRONS, OR ANY PERSON OR PERSONS ADMITTED TO THE FACILITY, OR RESULTING FROM ANY PREMISES DEFECTS OR OTHER CONDITIONS EXISTING AT THE FACILITY WHILE THE FACILITY IS USED BY OR UNDER THE CONTROL OF INFINITY, BUT ONLY IN PROPORTION TO THE PERCENTAGE OF INFINITY'S CONTRIBUTION THERETO. ANY CONTRACTS BETWEEN INFINITY AND ANY THIRD PARTY PURSUANT TO WHICH SUCH THIRD PARTY IS PERFORMING AN ACTIVITY OR OBLIGATION OF INFINITY UNDER THIS AGREEMENT SHALL CONTAIN THIS INDEMNITY PROVISION IN FAVOR OF THE CITY.

15. GENERAL REQUIREMENTS AND TERMS

A. City Licenses and Permits

Infinity shall obtain, and the City shall provide such City licenses and/or permits as may be required by Infinity, subject to the requirements of applicable City ordinances, codes and policies.

B. Public Safety

Other than for meeting infinity's requirements as a vendor of beer and wine, the City will provide such traffic control and public safety personnel as may be necessary or advisable during

events and activities in accordance with City policies and ordinances and subject to any fees applicable to similar private functions in the City.

C. Exclusive Use

Subject to the requirements of Section 6, Infinity shall have the exclusive right to use and operate the Facility, including, without limitation, the right to rent out the Facility to third parties and to retain all revenues generated thereby, except as otherwise provided for the payment of rent and subject to the types of uses authorized by this Agreement.

D. Revenues

Infinity shall have the exclusive right to generate, sell and retain all revenues from sources including, without limitation, signage, parking, concessions (including beer and wine), field naming rights, advertising, broadcasting, merchandising, ticketing.

E. Annual Report

During the term of this Agreement, Infinity shall annually make a formal written report 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.

F. Personnel

Infinity, or Infinity's City-approved designee, shall be responsible for hiring and payment of all Facility-related personnel.

G. Team Name

The name of the TCL or other team to be hosted at the Facility under Section 4.A shall be the Brazos Valley Bombers. If Infinity shall desire to use any other name, any such name change shall be approved by the Bryan City Council

H. Publicity

Any commercial advertisements, press releases, articles, or other written media information generated by Infinity using the City's trademarks or logos shall be subject to the prior written approval of the City Manager, or his/her designee, which approval shall not unreasonably be withheld.

I. ADA Compliance

All improvements, additions or alterations to the Facility by Infinity shall comply with the accessibility requirements of the Americans with Disabilities Act. Infinity shall otherwise make reasonable accommodations for accessibility by disabled persons at all events and activities at the Facility.

16. INSURANCE

A. City's Insurance

The City of Bryan shall purchase and maintain property insurance covering the Facility. The City shall furnish Infinity with a certificate of insurance, executed by a duly authorized representative of each insurer, showing compliance with this insurance requirement. The certificate shall contain a provision that coverage under such policy shall not be cancelled or non-renewed until at least thirty (30) calendar days' prior written notice, or ten (10) business days' notice for cancellation due to non-payment of premiums, is given to Infinity.

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 a certificate(s) of insurance evidencing such policies are in full force and effect within ten (10) business days of execution of this Fourth 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 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.
- (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. The City and its agents, officers, officials, and employee shall be listed as an additional insured.
- (3) **Business Automobile Liability Insurance.** If a vehicle is used by Infinity to conduct business, then Infinity shall maintain Business Automobile Liability insurance with a limit of not less than \$1,000,000 each accident. Business Auto Liability shall be written on a standard ISO version Business Automobile Liability, or its equivalent, providing coverage for all owned, non-owned and hired automobiles. Infinity shall provide Waiver of Subrogation in favor of the City and its agents, officers, officials, and employees.

(4) **Policy Limits.** Required limits may be satisfied by a combination of primary and umbrella or excess liability policies. Infinity agrees to endorse City 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.

(5) **Deductibles, Coinsurance Penalties & Self-Insured Retention.** Infinity may maintain reasonable and customary deductibles, subject to written approval by the City. 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.

(6) **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 accepts no responsibility arising from the conduct, or lack of conduct, of the Subcontractor.

(7) **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.

(8) **Evidence of Insurance.** A valid certificate of insurance verifying each of the coverages required shall be issued directly to the City within ten (10) business days by the successful Infinity’s insurance agent or insurance company after this Fourth Amendment is effective. Endorsements must be submitted with the certificate. The Agreement may be terminated if the required certificates are not received and approved by the City. Renewal certificates shall be sent a minimum of ten (10) business days prior to coverage expiration.

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

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

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

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

(12) **Notice of Cancellation, Non-renewal, Material Change, Exhaustion of limits.** Infinity must provide minimum thirty (30) calendar day’s prior written notice to the City of policy cancellation, material change, exhaustion of aggregate limits, or intent not to renew insurance coverage. If the City is notified a required insurance coverage will cancel or non-renew during the contract 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 reserves the right to terminate this Agreement if

coverage is not reinstated.

(13) **Infinity's Failure to Maintain Insurance.** If the Infinity fails to maintain the required insurance, the City shall have the right, but not the obligation, to terminate this Agreement.

(14) **No Representation of Coverage Adequacy.** 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 the Infinity under the Agreement.

17. TAXES

Infinity shall be solely responsible for the payment before delinquency of any real property or personal property taxes assessed as a result of the activities of Infinity at the Facility or resulting from the rights granted to Infinity under this Agreement. Any invoices for taxes due received by the City shall be immediately forwarded to Infinity for payment. Infinity shall have the right in good faith, at its sole cost and expense, to contest the amount or legality of any taxes assessed as a result of its activities at the Facility, including the right to seek a reduction thereof. The City shall cooperate fully with Infinity in connection with any such contest or request for reduction. Infinity, however, shall, upon the conclusion of any proceedings, promptly pay all taxes, interest, penalties, and other charges assessed as a result of its activities at the Facility.

18. ENVIRONMENTAL MATTERS

Infinity shall comply with all federal, state, and local laws and regulations pertaining to the storage, use, and disposal of "hazardous or toxic wastes, substances, or materials" as defined by applicable law.

19. ASSIGNMENT

Infinity shall neither directly or indirectly assign this Agreement to any third party without the prior written consent of the City Council. Except as provided below, the majority ownership of Infinity, as it exists as of the date of execution of this Agreement, shall not be changed, amended, or modified without the prior written consent of the City Council, which approval shall not unreasonably be withheld. Any otherwise lawful assignment by Infinity shall not be effective unless and until Infinity and such assignee execute an assignment and assumption in a form mutually-acceptable to the City Attorney and Infinity. It is understood and agreed that any consent granted by the City Council to any such assignment by Infinity shall not be deemed a waiver of any consent required under this paragraph as to any future assignment. In addition to any other remedies available to the parties, the provisions of this Section shall be enforceable by injunctive proceeding or by suit for specific performance.

20. TERMINATION

A. Termination by the City

In the event of any breach of any terms or conditions of this Agreement by Infinity which remains uncured for a period of ninety (90) calendar days after written notice thereof, the City shall have the right to terminate this Agreement, to enter and obtain possession of the Facility, to remove and exclude any and all persons from the premises, and to remove and exclude all

property of Infinity therefrom. In addition to any other rights of City to terminate this Agreement that are set forth above, City shall also have the right to terminate this Agreement after twenty-one (21) calendar days' written notice to Infinity, upon the occurrence of any of the following events:

- (1) Failure of Infinity to regularly and actively operate the Facility for its primary use under Section 4 of this Agreement.
- (2) Infinity applies for or consents to the appointment of a receiver, trustee or liquidator of Infinity or of all or a substantial part of its assets;
- (3) Infinity or its files a voluntary petition in bankruptcy or commences a proceeding seeking reorganization, liquidation, or an arrangement with creditors;
- (4) Infinity files an answer admitting the material allegations of a bankruptcy petition reorganization proceeding, or insolvency proceeding filed against Infinity;
- (5) Infinity admits in writing its ongoing inability to pay its debts as they come due;
- (6) Infinity makes a general assignment for the benefit of creditors; or
- (7) An order, judgment or decree is entered by a court of competent jurisdiction, on the application of a creditor, adjudicating Infinity a bankrupt or insolvent or approving a petition seeking reorganization of Infinity or appointing a receiver, trustee or liquidator of Infinity or of all or a substantial part of its assets, and such order, judgment or decree continues unstayed and in effect for any period of sixty (60) consecutive calendar days.

B. Termination by the City for Convenience

The City may terminate this Agreement for convenience after providing written notice to Infinity at least thirty (30) calendar days prior to September 1st of any year during the term of this Agreement. In such event, the City shall reimburse Infinity for the costs of improvements made to the Facility by Infinity, if any, less depreciation. All capital improvements, facilities or fixtures that were approved in writing by the City prior to installation that were made by Infinity and whose costs were over \$500.00 at time of original placement, will have a depreciation scale developed over the term of this Agreement at the time of placement. The City and Infinity will approve the depreciation scale in writing. The depreciation scale will be become a part of this Agreement, whether or not attached. If this Agreement is terminated by the City under this paragraph, the City will be obligated to pay the current depreciation value of the improvement; provided, however, that no costs shall be paid which are recoverable in the normal course of doing business in which Infinity is engaged.

C. Termination by Infinity

Infinity shall have the right to terminate this agreement in the event of a breach by the City which remains uncured for a period of sixty (60) calendar days after written notice thereof. Further, Infinity shall have the right, but not any obligation, to terminate this agreement without any further obligation to the City if the TCL and /or Infinity's TCL team (or other comparable league or organization or team) should cease operations.

D. Effect of Termination

The termination of this Agreement shall not affect the rights of the terminating party with respect to any damages it has suffered as a result of any breach of this Agreement, nor shall it affect the rights of either party with respect to any liability or claims accrued, or arising out of events occurring, prior to the date of termination.

E. Remedies Cumulative

Neither the right of termination, nor the right to sue for damages, nor any other remedy available to a party under this Agreement shall be exclusive of any other remedy given under this Agreement or now or hereafter existing at law or in equity.

F. Surrender of Premises

Upon the termination of this Agreement, whether for cause, by mutual agreement or by expiration of the term of the Agreement, Infinity shall peaceably surrender and deliver up the possession to the City of the Facility, including all permanent fixtures, improvements or additions thereto, in good order and condition, reasonable wear and tear excepted. Upon termination, infinity shall be responsible for payment of the completion of or shall complete any incomplete, unfinished or defective alterations, additions or improvements initiated by Infinity before the date of termination. Infinity shall leave the Facility in a clean and sanitary condition free of litter, debris, trash, waste and graffiti.

21. DAMAGE OR DESTRUCTION; EMINENT DOMAIN; FORCE MAJEURE EVENTS

A. Damage or Destruction

Should the Facility be destroyed or substantially damaged by fire, flood, acts of God, or other casualty, either party, by written notice to the other given within sixty (60) calendar days following the occurrence of such event, shall have the right to terminate this Agreement, and in such event neither party shall have any further obligation to the other party under this Agreement, except with respect to liabilities accruing, or based upon events occurring, prior to the effective date of such termination. For the purpose of this Section, the Facility shall be deemed to have been substantially damaged if the estimated length of time required to restore the Facility substantially to its condition and character just prior to the occurrence of such casualty shall be in excess of six months, as indicated by an architect's certificate or other evidence reasonably satisfactory to both parties. If this Agreement is not terminated in the event of damage to the Facility either because

- (1) the damage does not amount to substantial damage as described above, or
- (2) notwithstanding destruction of or substantial damage to the Facility, City elects to restore the facility and Infinity agrees to continue with this Agreement,

then City shall proceed, at City's own expense, with all due diligence to commence and complete restoration of the Facility to a condition at least equivalent to the condition existing on the date of this Agreement. Any improvements meeting specifications desired by Infinity above the City's

minimum specifications shall be completed by and paid for by Infinity unless otherwise negotiated between the parties.

B. Eminent Domain

If all of the Facility (or such a substantial portion of the Facility so to make it unfeasible, in the reasonable opinion of City, to restore and continue to operate the remaining portion of the Facility for the purposes contemplated in this Agreement) shall be taken through the exercise (or by agreement in lieu of the exercise) of the power of eminent domain, then upon the earlier of:

- (1) the date that City shall be required to surrender possession of the Facility or of that substantial portion of the Facility, or
- (2) the date when the Facility is no longer open,

this Agreement shall terminate and neither party shall have any further obligation to the other party under this Agreement except with respect to liabilities accruing, or based upon events occurring, prior to the effective date of such termination. If such taking of a portion of the Facility shall not make it unfeasible to restore and continue to operate the remaining portion of the Facility for the purposes contemplated in this Agreement, then this Agreement shall not terminate.

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.

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, 2018, at a total cost not to exceed One Million Eight Hundred Sixty-Three Thousand Nine Hundred Thirty-Five and No/100 Dollars (\$1,863,935.00), (hereinafter, the "Improvements"), subject to the following terms, conditions and obligations of the Parties. Attached hereto as Exhibit "B" is a sampling of possible projects; actual projects may vary. The decision as to which Improvements will be made, whether included in Exhibit "B" 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, 2018, 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.
- 4) The City may, at its sole discretion, use Hotel Occupancy Tax funds ("HOT funds") to finance some or all of the Improvements.

C. Infinity Obligations.

- 1) Per the Third Amendment to this Agreement, Infinity will contribute a total amount of Two Hundred Seventy-Eight Thousand Three Hundred Sixty and No/100 Dollars (\$278,360.00), to be paid to City in ten (10) annual payments of Twenty-Seven Thousand Eight Hundred Thirty-Six and No/100 Dollars (\$27,836.00) each, due on the 15th day of September through the year 2025. (Note: City received the first payment, in the amount of \$27,836.00, from Infinity on September 15, 2016.)
- 2) If the estimated total cost of the Improvements is greater than \$1,863,935.00, the City, at its discretion, may delete any item from Exhibit "B", to bring the total costs of the Improvements below the not to exceed amount. Infinity will not be required to contribute any funds in excess of \$278,360.00 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 not at least \$1,478,685.00, 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 eighty-one (81%) of total costs of Improvements and Infinity shall

pay nineteen percent (19%) of the total costs of Improvements. Any reduction in Infinity's total contribution amount shall be applied to Infinity's final installment payment. (Note: \$1,478,685.00 represents project cost amounts estimated by Infinity. The City estimated project costs to be approximately \$1,863,935.00. See Section 22.A. Cost Sharing.)

4) If HOT funds are used to finance the Improvements, Infinity is responsible for satisfying the Heads in Beds requirement in Section 4(D) of this Agreement. If the HOT funding requirement is not met and the City becomes legally obligated to refund the HOT funds out of the General Fund, Infinity shall reimburse the City forty percent (40%) of the amount the City has to repay. Infinity shall have ninety (90) calendar days after the end of the City's preceding fiscal year to provide payment or by December 31 following the end of the previous fiscal year.

23. MISCELLANEOUS

A. Notices

Except as otherwise provided in this Agreement, all notices, demands, requests, consents, approvals, replies and other communications ("Notices") required or permitted by this Agreement shall be in writing and may be delivered by any one of the following methods:

- (1) by personal delivery;
- (2) by deposit with the United States Postal Service ("USPS") as certified or registered mail return receipt requested, postage prepaid to the addresses stated below (Notices deposited with the USPS shall be actually deposited with a branch of the USPS Office located in either the county of City's address as provided in this Section or the county of Infinity's address as provided in this Section); or
- (3) by deposit with a same-day or overnight express delivery service that provides a receipt showing date and time of delivery. Notice deposited with the USPS in the manner described above shall be deemed effective three (3) business days after deposit with the USPS. Notice by same-day or overnight express delivery service shall be deemed effective upon receipt. Notice by personal delivery shall be deemed effective at the time of personal delivery.

Except as otherwise provided in this Agreement, for purposes of notices hereunder, the address of City shall be:

City of Bryan
Post Office Box 1000
Bryan, Texas 77805
Attention: City Manager

Except as otherwise provided in this Agreement, for purposes of notices hereunder, the address of Infinity shall be:

Infinity Sports Entertainment, LLC
405 Mitchell

Bryan, Texas 77801
Attention: General Manager

Each party shall have the right to designate a different address by the giving of notice in conformity with this Section.

B. Independent Contractor

Infinity shall, at all times, be considered an independent contractor under this Agreement. Nothing contained in this Agreement shall be construed to be or create a partnership or joint venture between City and Infinity.

C. Compliance with Law; Licenses

Infinity shall comply with all applicable laws of governmental bodies having jurisdiction with respect to its activities at the Facility. Infinity shall, at its expense, procure and maintain all licenses, permits, and approvals required to be obtained by it to conduct any activity or to perform any work under this Agreement.

D. Modification and Changes

This Agreement may be amended or modified only by a written amendment signed by both parties.

E. Entire Understanding and Agreement

This Agreement constitutes the entire understanding and agreement between the parties with respect to the subject matter hereof. Any verbal or prior representations are either incorporated herein or are of no force or effect.

F. Headings

The headings contained in this Agreement are for convenience and reference only and are not intended to define, limit or describe the scope or intent of any provision of this Agreement.

G. Survival of Covenants

Any covenant, term, or provision of this Agreement which in order to be effective must survive the termination of this Agreement shall survive any such termination.

H. No Third Party Beneficiaries

None of the obligations under this Agreement of either party shall run to or be enforceable by any party other than a party to this Agreement or by party deriving rights under this Agreement as a result of an assignment permitted pursuant to the terms of this Agreement.

I. Waivers

No failure by Infinity or City to insist upon the strict performance of any covenant, agreement, term or condition of this Agreement or to exercise any right or remedy consequent

upon the breach of this Agreement shall constitute a waiver of any such breach or any subsequent breach of the same covenant, agreement, term or condition. No covenant, agreement, term or condition of this Agreement and no breach of this Agreement shall be waived, altered or modified except by a written instrument. A waiver of any breach of this Agreement shall only affect this Agreement to the extent of the specific waiver, and all covenants, agreements, terms and conditions of this Agreement shall continue in full force and effect.

J. Applicable Law; Venue; Service of Process

This Agreement shall be construed and interpreted in accordance with, and shall be governed by, the laws of the State of Texas. The parties agree that the District Court of Brazos County, Texas, shall have jurisdiction of any litigation between the parties relating to this Agreement. Service of process on the City shall be affected in such manner as required by Texas law for service on public entities. Service of process on Infinity shall be made in any manner permitted by Texas law and shall be effective whether served inside or outside of Texas.

K. No Presumption Regarding Drafter

City and Infinity acknowledge and agree that the terms and provisions of this Agreement have been negotiated and discussed between them, and that this Agreement reflects their mutual agreement regarding the subject matter of this Agreement. Because of the nature of such negotiations and discussions, it would be inappropriate to deem either City or Infinity to be the drafter of this Agreement, and therefore no presumption for or against the drafter shall be applicable in interpreting or enforcing this Agreement.

L. Enforceability of Any Provision

If any term, condition, covenant or obligation of this Agreement shall be determined to be unenforceable, invalid, or void, such determination shall not affect, impair, invalidate, or render unenforceable any other term, condition, covenant, or obligation of this Agreement.

M. United States Currency

All amounts payable pursuant to this Agreement shall be paid in lawful money of the United States of America.

N. Counterparts

This Agreement and any amendment may be executed in counterparts, and upon all counterparts being so executed each such counterpart shall be considered as an original of this Agreement or any amendment and all counterparts shall be considered together as one agreement.

O. Attorneys' Fees

In the event of a dispute involving the nonperformance by a party hereto of its obligations under this Agreement, the prevailing party in a suit brought hereunder shall be entitled to reasonable attorneys' fees and court costs as allowed by law.

P. Covenants Against Discrimination

Infinity agrees that in connection with its activities under this Agreement, there shall be no discrimination by Infinity against any person on account of race, color, creed, religion, sex, marital status, national origin or ancestry. Infinity agrees to include a provision similar to this paragraph in all subcontracts entered into by Infinity in connection with work being performed under this Agreement.

Q. Non-liability of City Officers and Employees

No officer, official, employee, agent, representative, or volunteer of the City shall be personally liable to Infinity, or any successor in interest, in the event of any default or breach by the City, or for breach of any obligation of the terms of this Agreement.

R. Time of the Essence

Time is of the essence of this Agreement. The parties understand that the time for performance of each obligation has been the subject of negotiation by the parties.

S. Attachments Incorporated

All attachments to this Agreement not otherwise specifically referenced are incorporated herein and made a part hereof.

T. Authority

The parties represent for themselves that (1) such party is duly organized and validly existing, (2) the person or persons executing this Agreement on behalf of such party is/are duly authorized to execute and deliver this Agreement on behalf of such party, (3) by so executing this Agreement, such party is formally bound to the terms and provisions of this Agreement, and (4) the execution of this Agreement does not violate any provision of any other agreement to which such party is bound.

U. Authorization to City Manager

In addition to such other authorizations granted the City Manager, or his/her designee, of City in this Agreement to act on behalf of City, the City Manager, or his/her designee, shall have the authority, in the event of a dispute involving the interpretation of the terms and provisions of this Agreement, to reasonably interpret the terms and provisions of this Agreement on behalf of City.

24. FUNDING AVAILABILITY

The obligations of the City herein are subject to approval of funding from currently available municipal funds during each city fiscal year occurring within the term of this Agreement.

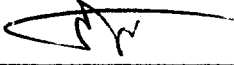
EXECUTED to be effective (the "effective date") the ____ day of _____, 2017.

CITY OF BRYAN

By: 
Andrew Nelson, Mayor

Date: Jan. 10, 2017

INFINITY SPORTS ENTERTAINMENT, LLC

By: 
Uri Geva, President

Date: Dec. 23, 2016

ATTEST:


Mary Lynne Stratta, City Secretary

APPROVED AS TO FORM:


Janis K. Hampton, City Attorney

EXHIBIT "A"
Facility

Exhibit "A"



DISCLAIMER: This is a product of the City of Bixby GIS Department. The data depicted here have been downloaded from either city departments, as well as, other federal, state, and local government agencies. The City of Bixby expressly disclaims responsibility for damages or liability that may arise from the use of this map.

PROPRIETARY INFORMATION: Any results of this information is withheld, except in accordance with a licensing agreement.



EXHIBIT "B"
Improvements

EXHIBIT “B”
Possible Improvements
(Note: Not an exhaustive list)

1. Sheet metal outfield fence
2. New irrigation system
3. Infield replacement
4. Field leveling
5. New turf installation
6. Warning track installation
7. Grandstand repairs and painting
8. Press box repairs
9. New field lighting
10. Parking lot improvements
11. New scoreboard
12. Synthetic turf (infield or entire field)
13. New portable bleachers

EXHIBIT "C"
EXAMPLE OF HOTEL OCCUPANCY TAX (HOT) DOCUMENTATION

