

CITY COUNCIL ACTION REPORT

August 19, 2008

TO: Phillip L. Nelson, City Manager

FROM: John M. Lamerato, Assistant City Manager/Finance and Administration
Carol K. Anderson, Parks and Recreation Director *CKA*

SUBJECT: Troy Racquet Club Owner – Request To Delete Lease Provisions

Background:

- The City has a Tennis Ground Lease with Troy Racquet Club. This lease was originally approved by the Troy City Council on March 9, 1977, and constructed shortly afterwards. The lease was re-negotiated and approved by the Troy City Council on May 4, 1998, and it does not expire until 2018. An amendment to this lease was most recently approved in March 2007 by the Troy City Council.
- Don Pierce, owner of the Troy Racquet Club, is now requesting a mid-term amendment to this lease. Specifically, he requests the removal of Section 3 (d) from the lease. This provision provides the City with the option to terminate the lease without cause upon 90 days written notice at the end of any two year term.
- According to his attached letter, Mr. Pierce contends that Section 3 (d) “is discomforting and likely presents an impediment to significant loan or sale transactions.”
- In the attached letter, Mr. Pierce indicates that the mutual termination provision in Section 3 (c) “may be a negative from the City’s perspective.” As such, he has agreed to the elimination of this provision if the City agrees to his request to remove the City’s option to terminate the lease without cause.
- Under Section 3 (a) of the current lease, the City still retains the right to terminate the lease upon 180 days written notice upon the City’s declaration that the property (or a significant portion) is needed for civic center expansion and/or road improvements. If this occurs, then it is treated as a “condemnation.”

Financial Considerations:

- There are no financial considerations.

Legal Considerations:

- City Council would need to formally approve any amendments to the lease, including any deletions.

Policy Considerations:

- The current lease allows for the City to terminate without cause upon 90 days written notice, which can be exercised at each two year period. This provision provides the City with additional flexibility.
- The elimination of this provision would allow for termination only if there is a breach of the lease or if the property is “condemned.”
- The current lease also allows for the Troy Racquet Club to terminate without cause upon 90 days written notice. If the Troy Racquet Club were to exercise this contractual right to terminate, the City would have at least 90 days to secure a new operator for the facility, which is feasible.

Options:

- City Council can deny the request.
- City Council can direct City Administration to draft an amendment eliminating the provisions that allow for termination without cause.

Approved as to form and legality: _____

Lori Grigg Bluhm, Troy City Attorney



*c/o 801 W. Big Beaver Road, Suite 500
Troy, Michigan 48084
Telephone: (248) 362-1300
e-mail: dpierce@dflaw.com*

August 19, 2008

Ms. Carol Anderson, Director
Department of Parks & Recreation
City of Troy
500 W. Big Beaver
Troy, Michigan 48084

Re: Troy Racquet Club Lease Provision

Dear Ms. Anderson:

I have discovered a difficult provision in the Tennis Ground Lease between the City of Troy and the Troy Racquet Club and would appreciate your placing this request for a Lease change before the City Council.

1. Lease Provisions. Section 3 of the Lease is the pertinent portion, and a copy is attached. Specifically, Sections 3 c. and 3 d. provide that the Lessee and the Lessor, respectively, may terminate the Lease at any time by simply providing an election 90 days prior to the end of the then current term. From the Lessee's side, Section 3 d. is discomfoting and likely presents an impediment to significant loan or sale transactions. Section 3 c. may be a negative from the City's perspective.

Sections 3 a. and 3 b. addressed mutual concerns of a substantive nature which would be good grounds for terminating the Lease in accordance with their provisions. Their purposes and necessity would be totally obviated by the inclusions of Sections 3 c. and 3 d. Theoretically, 3 d. would permit the Lessor to arbitrarily terminate the Lease, although I do not believe that would happen.

Certainly, the parties are bound to act in accordance with the Lease, and a breach would be just cause for seeking a cure or termination of the Lease, as appropriate. All other enforcement provisions regarding Lessee obligations (see attached Summary), notice, and cure potentially lose their relevance.

2. Request. Accordingly, the Troy Racquet Club, as Lessee, requests that 3 d. be deleted from the Lease, with the understanding that the Troy Racquet Club would agree to the deletion of Section 3 c.

3. Background. Since we have not come up with examples of what might trigger a 3-d. termination, it is fair to ask, "why is it in the lease in the first place?"

Apparently, at the time this Lease was written a Section 3 d.-type provision had become standard language in City contracts. Both sides sought to expedite the execution of this form of Lease. I was then in the 20th year of what has been a 30 year contractual relationship with the City to develop, own and operate the Troy Racquet Club. The Lease was the backdrop for our mutual commitment to the project.

4. Un-portability and Equity Investment. The Lease itself is fundamental to the value of the Club's business as it represents a developed tennis site, promoted for 30 years. The clubhouse has been expanded and enhanced over the years, and the tennis courts are the footprint for 2 deluxe, customized air supported structures and their support equipment.

Although built with private investment funds, the buildings, courts, parking lot and other real estate always remain the City's, whereas the air structures, lighting and other support equipment, furnishings and fixtures remain the business owner's, for whatever other value they have.

The watchword originally and since then has been that the facilities would be built without taxpayer dollars.

5. Consequences. Nevertheless, for a lender to advance funds to a business whose main asset is the Lease Agreement, Section 3 d. is a barrier, particularly as there are no examples of its implementation.

The Lease document contemplates loans and security interests, and it permits a sale only with the City's approval, not to be unreasonably withheld. See Lease Section 31 relevant portion on attached Summary. Section 3 d. is a virtual prohibition against a transfer of the Lease or the sale of the business. Having an investment in place and accepting the notion that 3 d. is standard operating procedure for the City is one thing, but for a new lender or buyer, Section 3 d. is problematic.

Substantial investments have been made over the period of years in the site and the Club, with an eye toward future longevity. Not being reminded of Section 3 d. has fostered proper development to build value. One could live with 3 d. given a low enough value, but that would not be reflective of the scope of the funding.

6. Site Review. For City Council or administrative officials, we would be pleased to arrange a tour (or 2) time through your office for a view of the complete facilities.

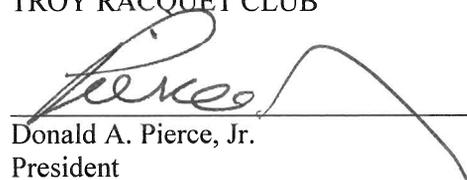
7. City Council Action. While recognizing that the City Administration cannot recommend the change, I would appreciate a chance to have the matter considered. Accordingly, I ask that you submit this request to delete 3 c. and 3 d. of the Lease to the City Council.

Thank you for your assistance.

Respectfully submitted

TROY RACQUET CLUB

By:


Donald A. Pierce, Jr.

Its:

President

*Res. #98-244
May 4, 1998*

TENNIS GROUND LEASE
between the
City of Troy as Lessor
and the
Troy Racquet Club as Lessee

April - 1998

3. TERMINATION

This Lease shall terminate upon the occurrence of any of the following events.

- a. In the event Lessor shall declare the existence of a need for the Leased Premises or a portion of the Leased Premises (such as would prevent Lessee, at its option, from operating its business) for expansion of the civic center or road improvements, provided that Lessor shall declare the necessity by resolution and serve upon Lessee a written notice of the resolution not less than 180 days prior to the time as Lessor shall desire to resume possession which possession shall be treated as a condemnation as provided in Section 25 of this Lease.
- b. Lessor may elect to terminate this Lease at any time in the event Lessee shall cease to use the Leased Premises for a Tennis facility by giving the Lessee notice of the election in writing not less than 60 days prior to Lessor's intended resumption of possession by Lessor because of Lessee's failure to use the Leased Premises for a Tennis Facility.

- c. Lessee may elect to terminate this Lease at the end of the initial term or any renewal term by giving the Lessor notice of the election in writing not less than 90 days prior to the expiration date of the term, in which event this Lease shall terminate.
- d. Lessor may elect to terminate this Lease at the end of the 2001-2002 term or any subsequent term(or sooner as provided in 3a or 3b above) by giving the Lessee notice of the election in writing not less than 90 days prior to the expiration date of the term, in which event this Lease shall terminate.

Summary of Lessee Obligations
from

TENNIS GROUND LEASE
between the
City of Troy as Lessor
and the
Troy Racquet Club as Lessee

April – 1998
(May 4, 1998 Resolution)

Prepared by:
Don Pierce
8/19/08

The following are excerpts from the Tennis Ground Lease between the City of Troy and the Troy Racquet Club, dated April 1, 1998. This is (other than amendments) the only Lease subsequent to the original Lease between the parties dated March 17, 1988.

1. Lease.

...the Leased Premises will be used and occupied for the purpose of maintaining a Tennis Facility and for no other purpose.

3. Termination.

This Lease shall terminate upon the occurrence of any of the following events.

a. In the event Lessor shall declare the existence of a need for the Leased Premises or a portion of the Lease Premises (such as would prevent Lessee, at its option, from operating its business) for expansion of the civic center or road improvements,... and serve upon Lessee a written notice of the resolution not less than 180 days prior to the time as Lessor shall desire to resume possession which possession shall be treated as a condemnation as provided in Section 25 of this Lease.

b. Lessor may elect to terminate this Lease at any time in the event Lessee shall cease to use the Leased Premises for a Tennis Facility by giving the Lessee notice of the election in writing not less than 60 days prior to Lessor's intended resumption of possession by Lessor because of Lessee's failure to use the Leased Premises for a Tennis Facility.

c. Lessee may elect to terminate this Lease at the end of... any renewal term by giving the Lessor notice of the election in writing not less than 90 days prior to the expiration date of the term, in which event this Lease shall...

d. Lessor may elect to terminate this Lease at the end of the 2001-2002 term or any subsequent term... by giving the Lessor notice of the election in writing not less than 90 days prior to the expiration date of the term, in which event this Lease shall terminate.

4. Rental.

... Lessee shall pay to the City Treasurer, as compensation...
[ed. rent has been subsequently adjusted]

5. Schedule of Operations and Hourly Rates.

Lessee shall keep the Tennis Facility open to club members and available for membership 32 consecutive weeks in each lease year... Minimum hours of operation and the hourly rates to be charged members shall be as follows:...

6. Court Reservations.

[ed. various arrangements e.g., permanent court time, random time, and others are permitted]

7. Changes in Rates and Fees.

... Any changes in court time rates or membership dues must be approved 90 days in advance of implementation by the City Council or City Manager.

8. Teaching Programs.

... Lessee may allot, set aside and reserve such time, up to fifty percent (50%) of available time during the hours of operation as may be required for instructional purposes...

9. Other Employees.

Lessee may employ such other persons as may be required in the operation, management and maintenance of the indoor Tennis Facility and its appurtenances. Lessee shall, where applicable, comply with the requirements of all Federal, State and local laws and ordinances and regulations relating to minimum wages, social security, unemployment insurance and worker's compensation and shall not discriminate against any employee or applicant because of race, sex, age, creed, color or national origin.... Lessee shall require all employees to exercise courtesy and consideration in their relations with the public and shall require all employees to wear a uniform or badge to show that such persons are employees of the Lessee.

10. Pro Shop.

A Pro Shop shall be operated in the Tennis Facility in order to make available to the public that merchandise of a type customarily found in other tennis pro shop of like circumstance and size, subject to member demand. ...

13. Lessee's Obligations for Repairs.

Lessee, at its own cost and expense, shall maintain the Leased Premises and all improvements, fixtures and equipment in good order and repair, making all necessary repairs and replacements.

14. Conformity to Law.

The Lessee shall promptly observe, perform, execute and comply with all applicable and valid laws, ordinances and regulations of every duly constituted governmental authority or agency relating to the Leased Premises. The Lessee, upon notice of any violation, shall have the right to correct it within the time allowed for correction or compliance and/or to contest in good faith, by appropriate action, the validity of any such law, rule, requirement, order, directive,

ordinance or regulation, provided that title of the Lessor to the Leased Premises and the rights of the parties to this Lease are not jeopardized or impaired...

15. Licenses.

The Lessee, at its own expense, shall obtain and keep in effect all licenses or permits which may be required by law to operate the Tennis Facility...

18. Liens.

The Lessee shall not permit any recorded liens to stand against the Leased Premises for any labor or material furnished to the Lessee in connection with any work performed by Lessee or at the Lessee's direction. ...

21. Insurance.

...the Lessee shall obtain and keep in force the following insurance coverage:

- A. Fire and extended coverage insurance on the building constructed on...
- B. Public liability insurance in favor of Lessee and Lessor, ...
- C. Worker's Compensation insurance covering all of Lessee's employees to the extent and amount required by law.

22. Restoration.

...Lessee, at its expense, whether or not the proceeds of insurance shall be sufficient, shall promptly restore or rebuild the improvements as nearly as possible to the condition existing just prior to the destruction or damage. ...

24. Indemnity.

The Lessee shall indemnify and forever hold the Lessor harmless from and against all liability, actions, claims, demands, costs, damages or expense of any kind which may be brought or made against Lessor or which the Lessor may pay or incur, by reason of the Lessee's performance of or failure to perform any of its obligations under this Lease or...

26. Taxes.

The Lessee shall pay all charges for fuel, water, sewers, gas, electricity or other public utilities used by it on the Leased Premises. Lessee shall pay all personal property taxes levied on its interest in the property...

27. Set-Up and Take-Down of Air-Supported Structure.

Lessee shall, at its own expense, set up and take down the air-supported structure...

Lessee shall provide, after take-down of the air supported structure, posts for support of tennis nets, but not the nets themselves. ...

28. Lessee's Default.

The Lessee is in default, if it fails to fulfill any provision of this agreement and, provided, that Lessee shall have sixty (60) days after written notice by Lessor of the act or default to remedy the act or default and, should Lessee commence but be unable to cure the default by the expiration of the period, such time as is reasonably required to remedy the default through diligent action on its part. ...

In addition, the Lessee is in default if the Lessee shall make any assignment for the benefit of creditors or file a voluntary petition in bankruptcy or be adjudicated a bankrupt to take the benefit of any insolvency act or be dissolved,... Lessee shall notify Lessor of any security interest in any property located in or on the Leased Premises which it shall grant to anyone.

31. Sale of Interest in Lessee.

... If Donald A. Pierce, Jr., should, without the prior consent of the Lessor (which shall not be unreasonably withheld) divest himself of his entire interest in the Lessee, and/or cease to participate in the management of Lessee's business operations, except by reason of death or disability, the Lessor reserves the right to cancel this Lease. ...Any other sale or assignment of this Lease by Lessee... shall require the prior written approval of Lessor... which approval shall not be unreasonably withheld. ...

34. Interference with Other Uses.

...Lessee shall not unreasonably interfere with the general use of the surrounding public land and recreational property.

39. Inconsistencies.

This Lease has been drafted as an integrated description of the various rights and obligations of the parties and as an expansion upon that original proposal made on behalf of Lessee to Lessor for the construction and operation of the Tennis Facility. Where specific inconsistencies exist between that document and this, this Lease shall control as the final statement. Where matters are not covered, or where coverage is not exhausted or inconsistent with this Lease, the provisions of the original proposal shall supplement and control, as the case may be.

[ed. Particularly relevant related to Leasehold Mortgages]

43. Successors and Assigns.

All of the covenants, provisions, terms, agreements and conditions of this Lease shall inure to the benefit and be binding upon Lessor, Lessee and their respective successors and assigns.

45. Relationship Between Parties.

...nothing contained in this Lease and Agreement is intended, or shall be construed, as creating or establishing the relationship of co-partners or joint venturers between the parties or as constituting the Lessee as the agent or representative of the Lessor for any purpose or in any manner.

A handwritten signature in black ink, appearing to be 'DAP', located on the right side of the page.