
CITY OF KELOWNA

MEMORANDUM

Date: June 3, 2003
File No.: 0230-20
To: City Manager
From: Sports and Facilities Manager
Subject: Canadian Baseball League Lease Agreement

RECOMMENDATION:

THAT City Council approve the lease agreement with the Canadian Baseball League (Canada) Inc. as attached to the report dated June 3, 2003, from the Sports and Facilities Manager;

AND THAT the Mayor and City Clerk be authorized to execute the lease agreement.

BACKGROUND:

City Council approved the principles of a Memorandum of Understanding (MOU) on February 24, 2003 for the Canadian Baseball League Inc. to operate Elks Stadium and provide a home site for the Kelowna Heat Baseball Club. The development of the attached lease agreement is based on the principles of this MOU.

Key business terms of the lease agreement include:

- The term of the agreement is be from date of signing and expires on October 31, 2007. There is no obligation to renew the agreement however any renewal is based on a mutual agreement between the parties.
- Rent is based on mandatory capital improvements to a value of \$30,000 per year. Should capital improvements not be completed then rent is paid in cash in monthly installments from May to September. All capital improvements are the property of the City.
- The lease provides for incentives for the CBL to complete capital improvements to the stadium.
- The CBL will provide the City an unconditional letter of credit equal to \$30,000 at the time of signing the agreement for the duration of the agreement. Based on the value of capital improvements completed by the CBL the value of the letter of credit may be reduced but never below \$10,000.
- Prior to completing any capital improvements the CBL will increase the value of the letter of credit equal to the estimated value of the capital improvements (Improvement Security). Upon confirmation of all capital improvements being complete to the City's satisfaction the Improvement Security will be returned to the CBL.
- The CBL will manage and operate the stadium, providing guaranteed access to other community users.
- The CBL will be responsible for all maintenance and expenses in operating the stadium.

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- The City will prepare and approve the community use schedule for the stadium prior to the commencement of each season.
 - The City will honor the remaining year in the lease to our existing tenant, Mr. Dan Nonis and the Pacific International League, and the CBL will provide satisfactory access to the stadium for PIL future requirements.
 - The lease agreement contains provisions for termination and default.

The lease agreement follows the general terms and conditions of standard City agreements.

This agreement maintains the principle of minimizing risk to the City while encouraging the development of another exciting high profile sport opportunity in Kelowna.

Jim Gabriel
Sports and Facilities Manager

Attachment: CBL Lease Agreement

Cc: Director of Parks and Leisure Services
City Clerk

LEASE

THIS LEASE made the day of 2003.

BETWEEN:

CITY OF KELOWNA, a municipal corporation incorporated under the *Local Government Act* and having an address of 1435 Water Street Kelowna, B.C. V1Y 1J4, fax no. (250) 470-0697

(the "City")

AND:

CBL BASEBALL LEAGUE (CANADA) INC., a federal company duly incorporated under the *Canada Business Corporations Act* (Corporation No. 3958604) and having an address at 440 – 1140 W. Pender Street Vancouver, BC. V6E 4G1, fax no. (604) 689-1531

(the "Tenant")

GIVEN THAT:

- A. The Tenant intends to operate a professional baseball league to be known as the Canadian Baseball League (the "CBL") and to operate a professional baseball team based in Kelowna, B.C. to be known as the Kelowna Heat (the "Club"), which will play in the CBL;
- B. The City is the registered owner in fee simple of the lands in the City of Kelowna, British Columbia, located at 663 Recreation Avenue and legally described as:

Lot B, District Lot 139, O.D.Y.D., Plan 18028, and

Lot 2, District Lot 139, O.D.Y.D., Plan 19829;

(the "Land", as per Schedule A),
- C. The City has, by leasehold subdivision, subdivided the land;
- A. The Tenant, for the purposes of operating the Club, wishes to lease the portion of the Land shown as Lot B and Lot 2 on the Leasehold Subdivision Plan deposited in the Kamloops Land Title Office under No. ? and all improvements thereon, including the stadium on Lot B and Lot 2 known as Elks Stadium (the "Stadium"), (Lot B and Lot 2 and all improvements from time to time thereon being the "Premises");

- E. The City presently operates the Premises as a public stadium and makes the Premises available for use by the public and community based organizations;
- F. In exchange for such a lease the Tenant will, among other things, construct for the City certain improvements on and to the Premises and continue to make the Premises available for use by the public and community based organizations in accordance with the terms of this Lease;

THIS LEASE is evidence that in consideration of the mutual promises contained in this Lease and the payment of \$1.00 by the Tenant to the City (the receipt and sufficiency of which the City acknowledges), the parties covenant and agree as follows:

1. **Lease** – The City leases the Premises to the Tenant for the Term, on the terms and conditions of this Lease for the purposes of operating a baseball stadium in accordance with this Lease.
2. **Term** – The term of this Lease will begin on the date of signing and expire on October 31, 2007 subject to earlier termination pursuant to the terms of this Lease (“Term”).
3. **Renewal** – The parties may renew this Lease by agreement between the parties. If the parties do not renew this Lease beginning upon the expiry of the Term and the Tenant is in good standing under this Lease, including by having completed (as determined under section 6) all of the Mandatory Improvements, the City will pay before the expiry of the Term \$75,000.00 as additional compensation for the construction of the Mandatory Improvements plus the amount to be paid for Optional Improvements calculated under section 9. If the parties renew the Lease or enter into a new lease of the Premises beginning on expiry of the Term, no amounts will be payable at the expiry of the Term for Mandatory or Optional Improvements. Without affecting either party’s absolute discretion as to whether or not to renew this Lease or to enter into a new lease, the parties presently intend that compensation will be paid to Tenant at the end of the renewal or new term (if not further renewed or replaced) and in that regard, the amount of compensation for both Mandatory and Optional Improvements will be further depreciated in accordance with section 9.
4. **Rent** - The Tenant will pay the City rent of \$30,000 (which excludes all applicable taxes) each year during the Term (“Rent”), in equal monthly instalments on the first day of each of the months of May through and including October.
5. **Mandatory Improvements** – The Tenant will, during the Term, cause all of the Mandatory Improvements to be completed in accordance with the time-lines set out in Schedule B. In this Lease, “Mandatory Improvements” means the fixtures, improvements, installations, alterations and additions set out in Schedule B.
6. **Valuation of Mandatory Improvements** - Upon completion of a Mandatory Improvement in accordance with the plans and specifications approved by the City under section 9 and the Mandatory Improvement being ready for use for its intended purpose, all to the satisfaction of the City’s Director of Parks and Leisure Services or his designate (the “Director”), the value of the Mandatory Improvement will be credited in favour of the

Tenant in accordance with section 7. For such purposes, the value of any Mandatory Improvements will be determined as follows:

- (a) The Tenant will inform the City that a particular Mandatory Improvement is complete and advise of the Tenant's assessment of its value, and will provide proof that all costs or expenses in relation to that Mandatory Improvement have been paid;
- (b) If the City disagrees with the Tenant's assessment under (a),
 - (i) the City may prepare a valuation report and provide to CBL, and
 - (ii) if such valuation under subsection (i) above shows a valuation less than the valuation stated by CBL,

then the City may hire an appropriately qualified appraiser one (1) time per calendar year to determine that value and the appraiser's determination will be final and binding on the parties for the purposes of this Lease. The City will pay the costs of the appraiser, except that if the appraiser determines that the value is less than that assessed by the Tenant, the Tenant will pay such costs within 30 days of receipt of an invoice from the City.

- (c) Value will mean the replacement cost, including labour and materials, of the Mandatory Improvement (as constructed at the time of the appraisal). For clarification, if a Mandatory Improvement is constructed of used materials, replacement cost will be based on construction with similarly used materials.
7. **Rent Credit** – Once the value of a completed Mandatory Improvement is determined in accordance with section 6, the value of the Mandatory Improvement will be credited to the Tenant firstly towards any amount owing by the Tenant to the City under this Lease and, secondly, towards future Rent and future amounts owing by the Tenant to the City under this Lease, as those amounts become due.
 8. **Optional Improvements** – Except for a Mandatory Improvement, the Tenant must not install or erect any fixture, improvement, installation, alteration or addition on or to the Premises (any of which will be considered to be an "improvement" for the purposes of this Lease) without the prior consent of the City, which may be withheld without reason but which may not be unreasonably delayed.
 9. **Compensation for Optional Improvements** – If the City approves a request by the Tenant to install or erect an improvement other than a Mandatory Improvement (any such improvement will be an "Optional Improvement") and, if the Term expires and the parties do not renew this Lease, the City will compensate the Tenant prior to the expiry of the Term for the value of each completed Optional Improvement (with such compensation and value being determined in accordance with section 6), depreciated by 5% for each year or portion thereof from the date of completion of the improvement, with each subsequent year's depreciation being 5% of the depreciated value calculated for the previous year.

10. **Improvement Design** - In respect of any improvement, including a Mandatory Improvement, the Tenant must, before commencing any work, submit for written approval by the Director plans and specifications for the improvement prepared by an appropriately qualified professional engineer, registered architect or other professional, as appropriate given the nature of the improvement, registered and in good standing with the governing body applicable to their profession. The Tenant must cause its professional to make any changes to such plans and specifications as may be reasonably required by the Director, provided however, that such Director requirements shall not be based solely on aesthetic qualities.. All improvements will be constructed strictly in accordance with the plans and specifications approved under this section and no changes will be made to the plans and specifications without the Director's approval.
11. **Minimum Work Standards** – The Tenant must ensure that any repairs or work with respect to the Premises done by or on behalf of the Tenant
 - (a) do not, except where approved by the Director, affect any structural or foundation elements of the Premises;
 - (b) meet or exceed the standards of materials and construction employed in the original construction of the Premises and, without limiting the foregoing, will be done using only new materials unless otherwise approved by the Director; and
 - (c) comply with all applicable laws, statutes, enactments, regulations, bylaws and orders from time to time in force, including the applicable building code and bylaws of the City.
12. **Tenant's Covenants** – The Tenant covenants and agrees with the City:
 - (a) to promptly pay, when due, Rent and any other amounts required to be paid under this Lease;
 - (b) not to do, suffer or permit any thing that may be or become a nuisance or annoyance in, on or from the Premises to other users of the Premises or to the owners, occupiers or users of land adjoining the Premises or to the public, including the accumulation of rubbish or unused personal property of any kind;
 - (c) not to do, suffer or permit any act or neglect that may in any manner directly or indirectly cause injury to the Premises;
 - (d) not to use the Premises for any purpose other than for the operation of the Stadium and a professional baseball team in the CBL;
 - (e) to operate a baseball stadium on the Premises that will reflect positively on the image of the City;
 - (f) to provide all equipment, furnishings and supplies that the Tenant determines may be required to use the Premises for its purposes;
 - (g) to provide all equipment that the Director considers is reasonably necessary for public health and safety reasons;

- (h) to maintain and repair the Premises in a safe, clean and sanitary condition and to take all reasonable precautions to ensure the safety of all persons using the Premises;
 - (i) to keep the Premises free of any rubbish, litter and debris and keep the areas immediately adjacent to the Premises free of any rubbish, litter and debris originating from the Premises;
 - (j) without limiting the preceding paragraph, to place, on a daily basis, all garbage and garbage bags in the garbage bin provided on the Premises and re-line all garbage containers immediately after removing a bag;
 - (k) to pay all costs and expenses of any kind whatsoever associated with and payable in respect of the Premises, including without limitation, all taxes, levies, charges and assessments, permit and license fees, repair and maintenance costs, administration and service fees, telephone, electrical, gas, water, sewage disposal and other utility charges and payments for work and materials;
 - (l) to pay to the City all goods and services taxes payable in respect of this Lease;
 - (m) to carry on and conduct its activities and in, on and from the Premises in compliance with any and all laws, statutes, enactments, bylaws, regulations and orders from time to time in force (including all reasonable rules and regulations the City may from time to time impose specifically in respect of the Premises) and to obtain all required approvals and permits thereunder and not to do or omit to do anything in, on or from the Premises in contravention thereof; and
 - (n) to promptly discharge any builders' lien which may be filed against the title to the Premises or that might otherwise affect the Premises and to comply at all times with the *Builders Lien Act* (British Columbia) in respect of any improvements, work or other activities undertaken on or to the Premises.
13. **Net Lease** – Without limiting any other provisions in this Lease, the Tenant agrees that this Lease is absolutely net to the City and the Tenant must promptly pay when due on its own account and without any variation, set-off, or deduction all amounts, charges, costs, duties, expenses, fees, levies, rates, sums and taxes and increases in any way relating to the Premises, including all penalties and interest thereon, and that to the extent any such amounts remain unpaid after they come due, the City may pay such amounts on behalf of the Tenant and the amounts so paid by the City will be immediately due from the Tenant to the City.
14. **Performance Security** – As security for the performance of its obligations under this Lease, the Tenant will, upon execution of this Lease, provide the City with an unconditional letter of credit, irrevocable for the Term, in a form, and from a financial institution, satisfactory to the City, in amount equal to \$30,000.00 (the "General Security"). Upon approval by the City of the plans and specifications for an improvement under section 10 and before commencing any work in respect of the improvement, the Tenant will increase the amount of the security provided under this section by providing

further security ("Improvement Security") in the same form to the amount of the estimated cost to construct the improvement, as approved by the Director, plus 10%. The City may draw upon such security and use such funds at its sole discretion for the purpose of remedying any default of the Tenant under this Lease or to complete an improvement or otherwise as the City may consider necessary to preserve or protect its rights to do so. The Director will return any Improvement Security provided for a specific improvement upon being satisfied that the City no longer requires such security. After October 1st during any year of the Term, if the Tenant is not in default under this Lease, the Tenant may reduce the General Security to \$10,000.00 provided that the Tenant must increase that security to \$30,000.00 on or before the following May 1st. If, at the commencement of the Term, or after the first baseball season on January 1st of any year, the value of Rent credited to the Tenant is greater than the following: \$30,000 multiplied by the number of baseball seasons already expired in the lease, then the difference shall be permitted to be deducted from the amount of General Security that will be required to be in place on or before May 1st of that year, except that the General Security shall never be reduced to less than \$10,000.

15. **MOU Refundable Deposit:** Upon execution of this Lease the City shall refund to the Tenant the \$10,000 MOU refundable deposit.
16. **Damage or Destruction** – If the Premises are, in the opinion of the City, completely or substantially destroyed, the City may, by providing notice to the Tenant within 90 days of the damage occurring, elect to either repair, restore or replace the Premises with structures comparable to those being replaced or require the Tenant to do so. If the City requires the Tenant to effect such repairs, restoration or replacement, the Tenant will promptly and diligently do so upon confirmation that the City has received any proceeds of insurance in accordance with section 32. Upon the Director being satisfied that the Tenant has completed repairs, restoration or replacement as the Tenant may be required to perform under this section, the City will pay to the Tenant any insurance proceeds it receives in respect of the damage or destruction. The Tenant will not be entitled to any abatement or reduction in Rent during the period before the Premises are repaired, restored or replaced or if the City exercises its right to terminate this Lease. Sections 10 and 11 will apply to any work the Tenant is required to do under this section.
17. **Lease Not In Registrable Form** – The Tenant acknowledges and agrees that the City is under no obligation to at any time deliver this Lease or any instrument creating this Lease to the Tenant in a form registrable under the *Land Title Act* (British Columbia).
18. **Repair and Maintenance** – Except as provided under section 19, the Tenant will maintain and repair the Premises and all equipment thereon or therein, in a good and working condition to generally accepted standards consistent with other comparable facilities in British Columbia and in accordance with manufacturers' specifications, including HVAC equipment, electrical systems, field lighting, plumbing fixtures, turf, infield, warning path, irrigation and fence maintenance and all janitorial requirements. Execution of this Lease shall indicate the Tenant's acceptance of the condition of the Premises. The Tenant shall maintain the Premises at the same or similar level of operation and condition as accepted by Tenant at the commencement of the Lease. Upon written notice from the City, the Tenant will make such repairs as are required by

the City in the notice and if the Tenant fails to promptly do so, the City may do so and the Tenant will pay the City's costs in that regard within 21 days of receipt of an invoice.

19. **City Maintenance** – The City will maintain the roof, foundation, bearing structure and outside building walls, water drains and sewers of the Stadium and the outfield irrigation in a good and reasonable state of repair.
20. **Annual Meeting** – Representatives of the Tenant and the City will meet at least once per year during the Term and tour the Premises to discuss the condition of the Premises and possible improvements.
21. **Stadium Advertising** - The Tenant will have exclusive rights to sell or place advertising on the Stadium outfield fences, except for advertising on days on which the Kelowna Falcons baseball club is scheduled to play, in which case that club will have the right to sell and place outfield fence advertisements. The Tenant will, at no charge to the Falcons, place, remove and store all Falcons advertisements and the Falcons will be responsible for all other aspects of such advertising. All advertising placed or sold by the Tenant must meet the following requirements:
 - (a) The Tenant will only use professionally fabricated signs, which have been approved by the City as to quality, content, and location, such approval not to be unreasonably withheld; and
 - (b) the Tenant will use its best efforts to operate an attractive and efficient baseball stadium on the Premises which will reflect positively upon the image of the City.
22. **Concession Operations for 2003** – Notwithstanding any other section in this Lease, for the Kelowna Falcons' 2003 season, the Kelowna Falcons baseball club shall continue to operate the existing food concession within the Premises according to the existing arrangements with the City and other Stadium users, but the Tenant shall be permitted to operate the concession, to its own account, during its own use permitted under Section 23.
23. **Alcohol Sales** – The Tenant may sell or permit to be sold any alcohol on the Premises only in accordance with a permit issued by the applicable government authority. The City shall assign the management of its existing Elks Stadium liquor license to the Tenant, and the City shall apply, if permitted by Provincial regulations, to have the license itself transferred to the Tenant. If for whatever reason such a transfer does not occur, the Tenant shall be responsible for making its own application for the applicable license or permit for the sale of liquor beyond the 2003 baseball season.
24. **Use of Premises** – The City will be entitled to use and permit the Kelowna Falcons and non-profit community organizations to use the Premises in accordance with this section and the Tenant will use reasonable efforts to accommodate that use. Before December 31st of each year during the Term, with the exception of the 2003 Season, the Tenant will submit to the Director, for the Director's approval, a schedule of dates and times for the Tenant's planned use of the Stadium for practices, regular season and playoff games and tournaments and the planned allocation for use by the Kelowna Falcons and non-profit community organizations. The Director's approval will be given within 15 days of receipt of the schedule unless the Director is in communication with the Tenant in an effort to resolve scheduling conflicts. The Tenant will be entitled to priority scheduling of

the Stadium for its pre-season, regular season and playoff games and tournaments of the CBL and a reasonable amount of practice time consistent with a professional sports team and, in light of that entitlement, the Director will not unreasonably refuse or delay its consent to the proposed schedule or subsequently necessary amendments (for instance, for additional games, make-up games or playoff games). The schedule may not be amended without the Director's approval. The Tenant may permit the Premises to be used for other public purposes at times not scheduled for use by the Club, the Kelowna Falcons or non-profit community organization upon approval by the City, not to be unreasonably withheld, provided however that such approval is not required for events with an anticipated attendance of less than 1000 people. The parties will each use their best efforts to coordinate the use of the Stadium by the Club, the Kelowna Falcons and non-profit community organizations. The Director will determine the amount of any rental charge for the stadium, if any, that may be imposed by the Tenant on the public, the Kelowna Falcons or any non-profit community organizations. The Kelowna Falcons and non-profit community organizations will retain all gate revenues associated with their use. With respect to concessions, liquor sales and other revenue, non profit community organizations or other users and the Tenant may negotiate the sharing of any such revenues provided that the non-profit community organizations will determine whether there will be any concessions, liquor or other sales, except that the Kelowna Falcons baseball club shall be permitted to use the Stadium liquor license and retain the revenue from alcohol sales during the Kelowna Falcons use of the Premises. The Tenant may retain all revenue associated with the use of the Stadium by the CBL Club, including with respect to concessions, liquor sales or ticket sales. The Tenant will require non-profit community organizations and the Kelowna Falcons to provide insurance on terms in such amounts as are consistent with City requirements for use of public facilities by similar groups.

25. **Naming Rights** – The Tenant may select the name for the Stadium and may enter into an agreement with a third party for the use of a particular name, which name will be subject to City approval, not to be unreasonably withheld or delayed. Upon the expiry or earlier termination of this Lease, the City will have no further obligation whatsoever to continue to use the name selected by the Tenant and the Tenant will inform any party entering into a naming agreement of this provision and include such a provision in the naming agreement and provide confirmation to the City that this has occurred. The Tenant will meet with the Elks Club of Kelowna to discuss ideas for maintaining an association of the Elks Club identity with the Stadium.
26. **Property Tax Exemption** – The City will, upon the request of the Tenant, promptly consider granting an exemption from municipal property taxes arising from this Lease and in respect of the Premises. Despite the foregoing, the City is not obligated to grant such an exemption and makes no representations or warranties whatsoever as to:
 - (a) whether or not it has the powers to do so;
 - (b) whether or not the legal arrangements between the City and the Tenant with respect to the Premises or the Tenant's use of the Premises qualify the Premises or this Lease for any such exemption; or

- (c) in the event the City purports to grant such an exemption, whether or not the exemption will be successfully challenged by anyone.

In no event will the Tenant be entitled to compensation from the City if the City does not grant a property tax exemption, if the assessment office disagrees with a purported exemption, or a purported exemption is held to be invalid or illegal.

27. **Tenant's Representations and Warranties** – The Tenant represents and warrants that the Tenant:

- (a) is a corporation validly incorporated and in good standing under the laws of Canada;
- (b) has the power and capacity to enter into and carry out the obligations under this Lease; and
- (c) has completed all necessary resolutions and other preconditions to the validity of this Lease.

28. **Acknowledgment and Agreements of the Tenant** – The Tenant acknowledges and agrees that:

- (a) the City has given no representations or warranties with respect to the Premises including, without limitation, with respect to the suitability of the Premises for the Tenant's intended use of the Premises;
- (b) the Tenant leases the Premises on an as-is basis and the City has not made any representations, warranties or agreements as to the environmental condition of the Premises;
- (c) it is the sole responsibility of the Tenant to satisfy itself with respect to the environmental conditions of the Premises, including, without limitation, by conducting any reports, tests, investigations, studies, audits and other inquiries as the Tenant, in its sole discretion, considers necessary in order to satisfy itself as to the environmental condition of the Premises; and
- (d) the City may register a *Builders Lien Act* "notice of interest" against title to the Premises in the land title office.

29. **Environmental Matters** – In this section, the following definitions apply:

- (a) "Contaminants" means any pollutants, contaminants, deleterious substances, underground or above-ground tanks, asbestos containing materials, hazardous, corrosive or toxic substances, special waste (as defined in the *Waste Management Act* (British Columbia)) or waste of any kind or any other substance which is now or hereafter prohibited, controlled or regulated under Environmental Laws;
- (b) "Environmental Laws" means any statutes, laws, regulations, orders, bylaws, standards, guidelines, permits or other lawful requirements of any government authority having jurisdiction over the Premises now or hereafter in force relating

in any way to the environment, environmental assessment, health, occupational health and safety or transportation of dangerous goods, including principles of common law and equity;

The Tenant will, at all times during the Term:

- (c) use the Premises in compliance with all Environmental Laws;
- (d) not permit the storage, use, handling, manufacture, unloading, loading, treatment, disposal or introduction into the environment of any Contaminants in, on or under the Premises, except in compliance with all Environmental Laws;
- (e) without limiting the obligations under section 29(d), immediately notify the City of the occurrence of any of the following and provide the City with copies of all relevant documentation in connection therewith:
 - (i) a release of Contaminants in, on or about the Premises or any adjacent land; or
 - (ii) the receipt of any citation, directive, order, claim, litigation, investigation, proceeding, judgment, letter or other communication from any person that is related to Environmental Laws;
- (f) promptly provide to the City a copy of any environmental site assessment, audit, report, or test results relating to the Premises conducted at any time by or for the Tenant;
- (g) at such other time as the City may reasonably request, obtain from an independent environmental consultant approved by the City an environmental site assessment, audit, report or testing of the Premises and conduct or cause to be conducted any additional investigations that the environmental consultant may recommend all in order to determine compliance of the Premises with Environmental Laws. (The costs related to the assessment or other investigations or testing are the responsibility of the Tenant unless contamination is not caused by the Tenant.); and
- (h) promptly remove any Contaminants from the Premises or any adjacent land arising from the Tenant's use, occupation or activities on the Premises, if such removal is required by a governmental agency, in a manner that conforms to Environmental Laws governing their removal.

30. **Insurance Requirements** – The Tenant must, at its sole expense, obtain and maintain during the Term:

- (a) comprehensive general liability insurance providing coverage for death, bodily injury, property loss and damage, and all other losses, arising out of or in connection with the operations, use and occupation of the Premises in an amount of not less than \$5,000,000.00 per occurrence;

- (b) “all risks” insurance, for replacement cost, on all improvements from time to time making up part of the Premises and all of the Tenant’s fixtures and personal property on the Premises;
 - (c) in its own name or through its contractor, during the course of construction of any improvement on the Premises:
 - (i) insurance protecting both the Tenant and the City against claims for personal injury, death or property damage arising from any accident or occurrence upon, in or about the Premises and from any causes, including the risks associated with the construction of the improvement, and to the amount reasonably satisfactory to the Director;
 - (ii) “all risks” insurance protecting the Tenant and the City from loss or damage to the Premises and any building materials on the Premises from time to time during construction in respect of fire, earthquake and all other perils customarily included in the usual all risks builders’ risk form of policy applicable to similar properties during construction and effected in B.C. by prudent owners, to the full insurable value thereof at all times and in any event in an amount sufficient to prevent the City and the Tenant from being deemed co-insurer; and
 - (d) any other form or forms of insurance that the City may reasonably require from time to time in amounts and for perils against which a prudent tenant acting reasonably would protect itself in similar circumstances.
31. **Insurance Policies** – All policies of insurance required to be taken out by the Tenant must be with companies satisfactory to the City and must:
- (a) name the City as an additional named insured;
 - (b) include that the City is protected notwithstanding any act, neglect or misrepresentation by the Tenant which might otherwise result in the avoidance of a claim and that such policies are not affected or invalidated by any act, omission or negligence of any third party which is not within the knowledge or control of the insureds;
 - (c) be issued by an insurance company entitled to carry on the business of insurance under the laws of British Columbia;
 - (d) be primary and non-contributing with respect to any policies carried by the Landlord and that any coverage carried by the Landlord is in excess coverage;
 - (e) not be cancelled without the insurer providing the City with 30 clear days written notice stating when such cancellation is to be effective;
 - (f) be maintained for a period of 12 months per occurrence;
 - (g) not include a deductible greater than \$5,000.00 per occurrence;

- (h) include a cross liability clause; and
 - (i) be on other terms acceptable to the City, acting reasonably.
- 32. **Insurance Certificates** – The Tenant must obtain all required insurance at its sole expense and must, at least 14 days before the commencement of the Term and promptly upon the Director's request at such other times during the Term, provide the City with certificates of insurance confirming the placement and maintenance of the insurance. The Tenant will provide a certificate of the insurance required under section (c) to the City before commencing to construct or place certificates of improvement on or to the Premises. Certificates of insurance shall be provided generally in the form of the attached Schedule C to this Lease.
- 33. **City May Insure** – If the Tenant fails to insure as required, the City may, after 30 days notice to the Tenant, effect the insurance in the name and at the expense of the Tenant and the Tenant must repay the City all costs reasonably incurred by the City within 30 days of receipt of an invoice. For clarity, the City has no obligation to insure the Premises during the Term.
- 34. **Insurance Proceeds** – The insurance monies payable under the policies of insurance referred to in sections (b) and (c) will, notwithstanding the terms of the policy or policies, be paid to the City and applied in accordance with section 16, *provided however*, the payment of insurance proceeds to the City shall not exceed the City's actual costs to reconstruct or replace the Premises that have been completely or substantially destroyed as evidenced by written confirmation of payment for such costs.
- 35. **Quiet Possession** – The City covenants and agrees with the Tenant to permit the Tenant, so long as the Tenant is not in default of the Tenant's obligations under this Lease, to peaceably possess and enjoy the Premises for the Term, without interference or disturbance from the City or those claiming by, from or under the City except for the City's express rights under this Lease to enter upon the Premises.
- 36. **Payments Generally** – All payments, including interest under section 37, by the Tenant to the City of whatsoever nature required or contemplated by this Lease will be:
 - (a) made when due hereunder, without prior demand and without any set-off, abatement or deduction;
 - (b) applied towards amounts outstanding in such manner as the City sees fit; and
 - (c) deemed to be rent, in partial consideration for which this Lease is entered into, and will be payable and recoverable as rent, and that the City will have all of the rights and remedies against the Tenant for default in making any such payment which may not be expressly designated as rent, as the City has for a default in payment of rent.
- 37. **Interest** – All payments due by the Tenant to the City under this Lease will bear interest at the rate of interest established from time to time by the Royal Bank of Canada, Main Branch, Vancouver, B.C. as the base rate used to determine interest rates charged by it

for Canadian dollar loans to customers in Canada designated by them as the “prime rate” plus 6% per annum calculated monthly not in advance from the date due until paid.

38. **Additional Rights of the City** – The City reserves the right to, from time to time, grant rights of way, easements and other rights and privileges to third parties for the purpose of above ground or in ground utilities on, over, under, through, above or across the Premises provided that such privileges do not unreasonably impair the Tenant’s rights under this Lease, and the Tenant agrees to execute such further instruments as may be necessary to give such privileges priority over this Lease.
39. **Indemnity** – The Tenant will indemnify and save harmless the City and its elected and appointed officials, officers, employees, agents, successors and assigns, from any and all liabilities, actions, damages, claims, losses, costs and expenses whatsoever (including without limitation, the full amount of all legal fees, costs, charges and expenses whatsoever) in any way directly or indirectly arising from the occupation, activities or actions of the Tenant or any of its officers, employees, contractors, agents, licensees and invitees in, on or from the Premises or anything done or not done or maintained by the Tenant or any of its officers, employees, contractors, agents, licensees and invitees in respect of the Premises, or from any breach by the Tenant of its obligations under this Lease.
40. **Workers Compensation** – The Tenant must, in its use of and activities on the Premises, comply with the *Workers Compensation Act* (British Columbia) and all regulations and orders from time to time in force thereunder, including the Occupational Health and Safety Regulations, and, upon request from the City, provide evidence of any required registration under that Act and evidence of compliance with any requirement under that Act to make any payments or pay assessments. In addition, the Tenant will be the “prime contractor” for the Premises under the *Workers Compensation Act* (British Columbia) and fulfill all of the “prime contractor’s” obligations under that Act, including by ensuring that the activities of any employers, workers and other persons on the Premises relating to occupational health and safety are coordinated and by doing everything that is reasonably possible to establish and maintain a process that will ensure compliance with that Act and regulations thereunder, including the Occupational Health and Safety Regulations.
41. **Survival** – The obligations of the Tenant under section 39 survive the expiry or earlier termination of this Lease.
42. **Permission to Enter** – The City or its authorized representative may enter the Premises at all reasonable times for the purposes of inspection of the Premises and the Tenant’s compliance with this Lease.
43. **Ownership of Improvements at Termination** – At the expiration of the Term or earlier termination of this Lease, any improvements, extensions, installations, alterations, renovations or additions to the Premises, whether done by or on behalf of the Tenant or not, are forfeited to and become the permanent property of the City.
44. **State of Premises at Termination** – Except in case of termination under section (f), upon the expiry or earlier termination of this Lease, the Tenant will leave the Premises in a good, neat and tidy condition and otherwise in the condition they were required to be

kept by the Tenant under the provisions of this Lease. If the Tenant does not do so, the City may do so on behalf of the Tenant and the Tenant must pay all of the City's costs in that regard within 21 days of receipt of an invoice, which obligation survives expiry or earlier termination of this Lease.

45. **No Assignment or Sublease** – The Tenant may not assign this Lease or the benefit of this Lease or sublet the Premises or any part of the Premises without the prior written consent of the City, nor may the Tenant charge, mortgage or encumber or purport to charge, mortgage or encumber the Tenant's interest in the Premises or this Lease without the prior written consent of the City. The City may withhold such consents without reason.

46. **Termination Due to Default** – If and whenever

- (a) the Term or any of the goods or chattels on the Premises are at any time seized or taken in execution or attachment by any creditor of the Tenant or under bill of sale or chattel mortgage;
- (b) a writ of execution issues against the goods and chattels of the Tenant;
- (c) the Tenant makes any assignment for the benefit of creditors or becomes insolvent or bankrupt;
- (d) proceedings are begun to wind up the Tenant;
- (e) the Tenant is in default in the payment of Rent or any other amount payable under this Lease and the default continues for 30 days after notice by the City to the Tenant;
- (f) the Premises are, in the opinion of the City, completely or substantially destroyed or damaged by any cause, except where the City has elected to reconstruct, replace or restore the Premises or to require the Tenant to do so under section 7;
- (g) the Tenant permits a builder's lien arise and remain in respect of the Premises for more than 60 days;
- (h) The Tenant does not provide services to the public and community organizations under section 24 consistent with standards for public use of community sports facilities in British Columbia and does not remedy the inadequate service provision within 30 days notice from the City;
- (i) the Tenant does not fully observe, perform and keep each and every term, covenant, agreement, stipulation, obligation, condition and provision of this Lease to be observed, performed and kept by the Tenant, and persists in such default for 30 days after written notice by the City; or
- (j) the Tenant vacates or abandons the Premises or uses or permits or suffers the use of the Premises for any purpose other than the purposes permitted by this Lease, and such default persists for 5 days after written notice by the City,

then the City may, at its option, terminate this Lease and the Term then becomes

immediately forfeited and void and the Tenant must immediately cease all use and occupation of the Premises and must vacate and deliver up possession of the Premises and the City may without notice or any form of legal process and without any adherence to public law duties or procedural fairness or the principles of natural justice, forthwith re-enter the Premises and repossess and enjoy the same without prejudiced to the City's rights with respect to any amounts thus owing by the Tenant to the City or with respect to the obligations to be performed by the Tenant up to the date of such re-entry and repossession.. Upon the termination of this Lease under this section, the City will have no obligation whatsoever to pay to the Tenant any amounts remaining to be credited to the Tenant for Mandatory or Optional Improvements or to compensate the Tenant for any completed or uncompleted Mandatory or Optional Improvements.

47. **Tenant Termination** – The Tenant may terminate this Lease before November 1 during any year of the Term, effective upon November 1 of the following year of the Term.
48. **Holding Over** – If the Tenant continues to occupy the Premises with the written consent of the City after the expiration of the Term or earlier termination of this Lease, then, without any further written agreement, the Tenant shall be a monthly lessee paying monthly rent in an amount determined by the City and stipulated in its written consent and both parties will be subject to the other provisions in this Lease insofar as the same are applicable to a month-to-month tenancy and nothing shall preclude the City from taking action for recovery of possession of the Premises.
49. **Distress** – If and whenever the Tenant is in default of the payment of any money, including Rent, whether expressly reserved by this Lease or deemed as Rent, the City shall first execute against any secured letter of credit provided pursuant to this agreement. Thereafter the City may without notice or any form of legal process whatsoever, enter the Premises and seize and remove and sell the Tenant's goods, chattels, and equipment and seize, remove, and sell any goods, chattels and equipment at any place to which the Tenant or any other person may have removed them from the Premises in the same manner as if they had remained and been distrained in the Premises, notwithstanding any rule of law or equity to the contrary and the Tenant hereby waives and renounces the benefit of any present or future statute or law limiting or eliminating the City's right of distress.
50. **Remedies Cumulative** – No reference to or exercise of any specific right or remedy by the parties, and each of them prejudices or precludes the parties from any other remedy, whether allowed at law or in equity or expressly provided for in this Lease. No such remedy is exclusive or dependent upon any other such remedy, but the the parties, and each of them, may from time to time exercise any one or more of such remedies independently or in combination. Without limiting the generality of the foregoing, the City is entitled to commence and maintain an action against the Tenant to collect any Rent not paid when due, without exercising the option to terminate this Lease.
51. **No Joint Venture** – Nothing contained in this Lease creates the relationship of principal and agent or of partnership, joint venture or business enterprise or entity between the parties or gives the Tenant any power or authority to bind the City in any way.
52. **Interpretation** – In this Lease:

- (a) reference to the singular includes a reference to the plural and vice versa, unless the context requires otherwise;
 - (b) a particular numbered section or lettered Schedule is a reference to the correspondingly numbered section or lettered Schedule of this Lease;
 - (c) an "enactment" is a reference to an enactment as that term is defined in the *Interpretation Act* (British Columbia) of the day this Lease is made;
 - (d) any enactment is a reference to that enactment as amended, revised, consolidated or replaced;
 - (e) section headings are inserted for ease of reference and are not to be used in interpreting this Lease;
 - (f) a party is a reference to a party to this Lease;
 - (g) time is of the essence;
 - (h) where the word "including" is followed by a list, the contents of the list shall not circumscribe the generality of the expression immediately preceding the word "including"; and
 - (i) a reference to a party is deemed to include the heirs, executors, administrators, successors, assigns, servants, employees, agents, contractors, elected and appointed officials, officers, directors, licensees and invitees of such party where the context so requires and allows.
53. **Notices** – Where any notice, request, direction or other communication (any of which is a "Notice") must be given or made by a party under the Lease, it must be in writing and is effective if delivered in person, sent by express mail or faxed to the address or fax number above. A Notice is deemed given if delivered in person, when delivered; if by express mail, 5 days following deposit with Canada Post when the postal receipt is acknowledged by the other party; and, if by fax, when transmitted. A party may change its address or fax number by giving notice to the other party under this section.
54. **No Effect on Laws or Powers** – Nothing contained or implied herein prejudices or affects the City's rights and powers in the exercise of its functions pursuant to the *Local Government Act* (British Columbia) or its rights and powers under any enactment to the extent the same are applicable to the Premises, all of which may be fully and effectively exercised in relation to the Premises as if this Lease had not been fully executed and delivered.
55. **City Discretion** – Wherever in this Lease the approval or consent of the City or the Director is required, some act or thing is to be done to the City's or Director's satisfaction, the City or the Director is entitled to form an opinion, or the City or the Director is given the sole discretion:

- (a) the relevant provision is not deemed to have been fulfilled or waived unless the approval, consent, opinion or expression of satisfaction is in writing signed by the City or its authorized representative or the Director, as applicable;
 - (b) the approval, consent, opinion or satisfaction is in the reasonable discretion of the City or the Director, as applicable,
 - (c) sole discretion is deemed to be the sole, absolute and unfettered discretion of the City or the Director, as applicable.
- 56. Severance – If any portion of this Lease is held invalid by a court of competent jurisdiction, the invalid portion shall be severed and the decision that it is invalid will not affect the validity of the remainder of the Lease.
- 57. No Public Law Duty – Whenever in this Lease the City or the Director is required or entitled at its discretion to consider granting any consent or approval, or is entitled to exercise any option to determine any matter, or to take any action or remedy including, without limiting the generality of the foregoing, the termination of this Lease and the re-entry of the Premises, the City or the Director, as applicable, may do so in accordance with the contractual provisions of this Lease and no public law duty of procedural fairness or principle of natural justice shall have any application.
- 58. Binding on Successors – This Lease enures to the benefit of and is binding upon the parties and their respective successors and assigns, notwithstanding any rule of law or equity to the contrary.
- 59. Law of British Columbia – This Lease will be construed according to the laws of the Province of British Columbia.
- 60. Entire Agreement – The provisions in this Lease constitute the entire agreement between the parties and supersede all previous communications, representations, warranties, covenants and agreements, whether verbal or written, between the parties with respect to the subject matter of the Lease.
- 61. Waiver or Non-Action – Waiver by the City of any breach by the Tenant of any term, covenant or condition of this Lease will not be considered to be a waiver of any subsequent default or continuing default by the Tenant. Failure by the City to take any action in respect of any breach of any term, covenant or condition of this Lease by the Tenant will not be considered to be a waiver of such term, covenant or condition.

As evidence of their agreement to be bound by the above terms, the City and the Tenant have each executed this Lease below on the respective dates written below:

CITY OF KELOWNA

by its authorized signatories:

Mayor:

Clerk:

Date: _____

CBL BASEBALL LEAGUE (CANADA) INC.

by its authorized signatories:

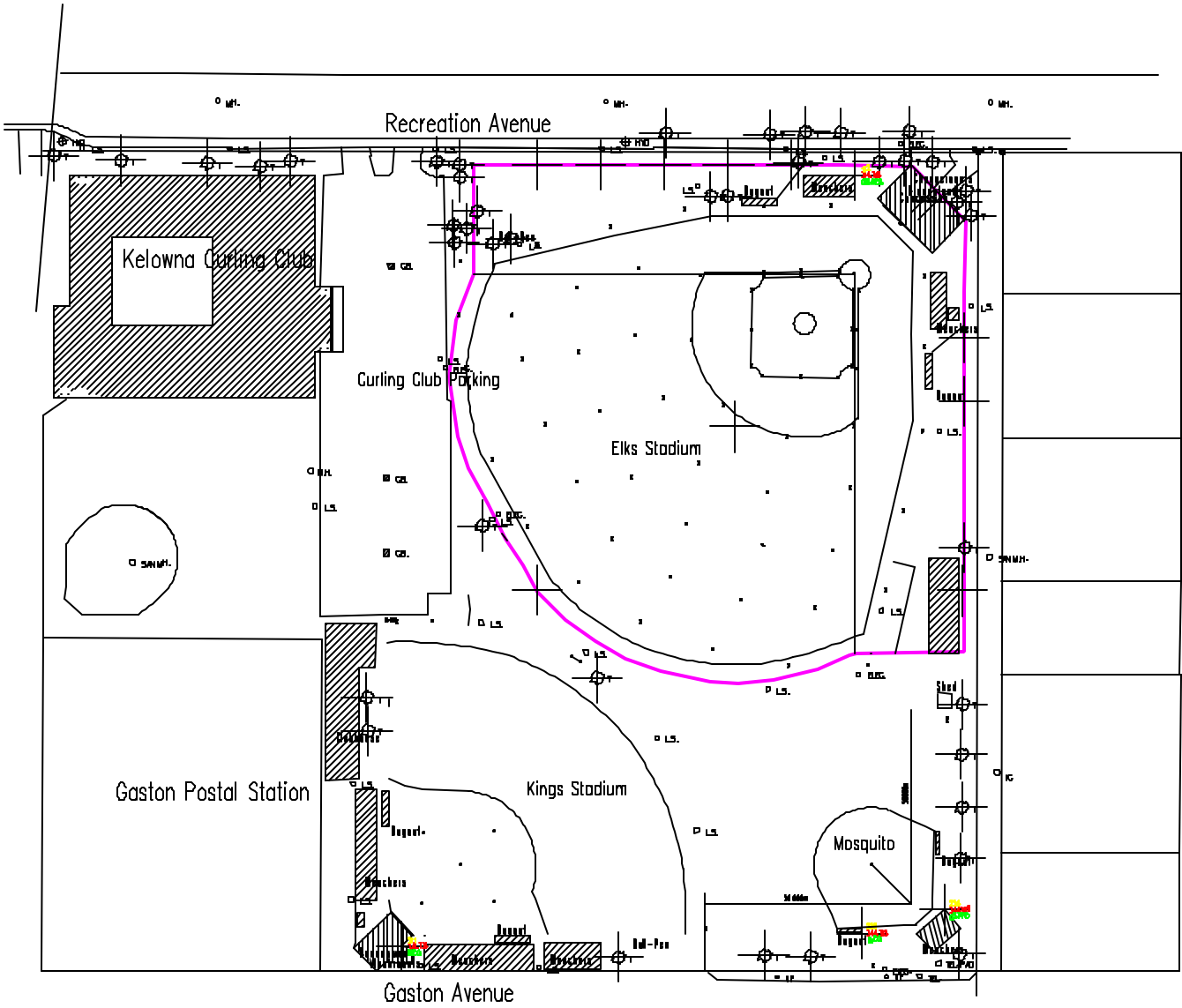
Name:

Name:

Date: _____

Schedule A

Site Plan



Schedule B

Proposed Improvements and Completion Schedule

Seating: (Spring 2003-Spring 2007)

- Install special individual stadium seating on main grandstand section behind home plate
- Add bench style bleacher seating down left and right field

Roof: (Spring 2003)

- Install special design Sun Protection Roof over main grandstand seating area.

Dressing Rooms: (Spring 2003)

- Upgrade electrical lighting system
- Construct individual player lockers in both Home and Visitors Dressing Rooms

Scoreboard: (Spring/Summer 2004-Spring 2006)

- Install new unit which displays inning by inning score, balls/strikes/outs etc.
- Approx. size: 8' x 26'

Field Upgrade: (Spring 2003 – Spring 2007)

- Re-build main mound.
- Re-build home plate area.
- Build new double mound bullpens in foul territory down left & right field.
- Install heavyweight nylon mesh netting on backstop.

Concessions/Washrooms: (Spring 2003 – Summer 2007)

- Project details to be determined.
- 2003 – additional cooking, grilling, cooling facilities to be installed to service crowds of 1500 – 2000.
- 2004 - 2007 – Construct permanent cooking centres in form of concrete block building with full services.
- Construct permanent ladies' washroom facility.
- Construct permanent men's washroom facility.

Budget/Expense/year

Item	2003	2004	2005	2006	2007
Seating	\$10,000	\$10,000	\$10,000	\$10,000	
Grand Stand Roof	\$15,000				
Dressing Rooms	\$2,000	\$2,000	\$3,000	\$3,000	\$1,000
Scoreboard		\$5,000	\$10,000	\$5,000	
Field Up-Grade	\$2,000	\$3,000	\$2,000	\$3,000	\$4,000
Concessions/Washrooms	\$2,000	\$10,000	\$5,000	\$9,000	\$25,000
Total	\$31,000	\$30,000	\$30,000	\$30,000	\$30,000



CERTIFICATE OF INSURANCE

This Certificate is issued to:

The City of Kelowna
1435 Water Street
Kelowna, BC V1Y 1J4

Insured

Name:

Address

Broker

Name:

Address:

Location and nature of operation or contract to which this Certificate applies:

Lease and operation of Baseball Stadium located at 663 Recreation Avenue, Kelowna, B.C. located on part of Lot B, D.L. 139, O.D.Y.D., Plan 18028, and part of Lot 2, D.L. 139, O.D.Y.D., Plan 19829.

Type of Insurance	Company & Policy Number	Policy Dates		Limits of Liability/Amounts
		Effective	Expiry	
Section 1 Comprehensive General Liability including: <ul style="list-style-type: none">• Premises/Operations Liability;• Blanket Contractual;• Contractor's Protective;• Personal Injury;• Contingent Employer's Liability;• Broad Form Property Damage;• Non-Owned Automobile;• Cross Liability Clause.				Bodily Injury and Property Damage \$ <u>5,000,000</u> Inclusive \$ _____ Aggregate \$ _____ Deductible
Section 2 Automobile Liability				Bodily Injury and Property Damage \$ <u>5,000,000</u> Inclusive

It is understood and agreed that the policy/policies noted above shall contain amendments to reflect the following:

1. **Any Deductible or Reimbursement Clause contained in the policy shall not apply to the City of Kelowna and shall be the sole responsibility of the Insured named above.**
2. **The City of Kelowna is named as an Additional Insured.**
3. **30 days prior written notice of material change and/or cancellation will be given to the City of Kelowna.**

Print Name

Authorized Signatory

Date