

**MEMORANDUM OF CHANGES
BETWEEN EXISTING AND AMENDED
CITY OF PENSACOLA/SEVILLE HARBOUR LEASE**

“Whereas” provisions and Section I:

EXISTING: Identifies the parties, the property being leased (Exhibit “A”), and the purpose of the Lease (i.e. “constructing (at tenant expense) and operating a marina and docking facility, harbor master office, ships store and related parking”).

AMENDED: Identifies the parties (Seville, as Assignee, having replaced the original tenant, whose business venture ended in bankruptcy), and modifies the description of the land being leased (as described in the same Exhibit “A”) as “excluding, however, any portion of such real property that is part of the uplands portion of Bartram Park.”

ADVANTAGE TO THE CITY: The current lease, which has 27 years left to run, includes a portion of Bartram Park. The Amended Lease excludes any portion of Bartram Park from the Lease, and guarantees public access to the water for swimming, launching kayaks, canoes, etc. This provision, as all others, would go into effect immediately upon the entry of the Amended Lease.

Section II. Lease Terms

EXISTING LEASE: Term ends 2045 (30 yr renewable for 30 years, and renewal has occurred).

AMENDED LEASE: Term ends 2118 (73 yr extension) (See paragraph 5).

ADVANTAGES TO THE CITY: City’s goal since acquiring this property in or around 1979 has been to have a private developer build and operate a public Marina. It was leased in 1985, but the private developer was not able to make a go of it, and filed for bankruptcy.

Rebuilding the Marina, and protecting the Marina and City’s property from future storms, requires the construction of a breakwater. The City has sought funds to build this breakwater for more than a decade – to no avail. Extending the lease by 73 years is needed to justify the private expenditure of more than \$2 million (guaranteed in the Amended Lease). The property generates a \$5 million a year

payroll, provides waterfront access to its citizens, enhances the property tax roll, and generates hundreds of thousands of dollars in sales taxes. Prior to the private-public partnership on this property, it sat empty, collecting old tires and beer bottles, generating no money for the City.

Section III. Lease Payments.

EXISTING LEASE: Provides for a base lease of 10 cents per square foot equaling \$46,161 a year, or percentages of gross sales, whichever is higher. For the 34 years the lease been in effect, the base lease has *always* been the greater of those two figures. The City attempted to argue that “gross sales” included the sales of the Fish House and Atlas, businesses not operated by Seville. That claim was rejected by both the trial and appellate court.

AMENDED LEASE: Given the fact that the base lease rate has been the greater of the rates for the past 34 years, the Amended Lease carries that base rate forward for the remaining term (27 years), and then increases it by 108 percent (to \$96,016 per year beginning the first year of the extended period, and subjecting that \$96,016 to adjustments for inflation every five years thereafter based on an agreed-upon CPI. (See paragraph 6).

ADVANTAGE TO THE CITY: The City receives the same rent provided for in the existing lease through the term of the existing lease, and 108 percent “base year” increase thereafter with CPI index increases every five years thereafter.

NOTE: Escambia County recently extended the Beach Club lease to 99 years with no increase in rent, and no CPI-index adjustments.

Section IV. Authority to Lease Property: (Deals with fact that in 1985, a section of the leased premises did not belong to the City, but was leased to the City by the State for a nominal sum, and thus had to include a “flow-through” sublease from the City. This issue was made moot by subsequent conveyance of that parcel to the City.

Section V and VI. Use of Leased Premises, and Construction of Improvements and Construction Plans. These Sections are repeated (as to use) in paragraphs 3 & 4 of the Amended Lease to account for the fact that original improvements were completed decades ago, and the new improvement contemplated (i.e., the breakwater) is addressed in these new sections.

Section VII. Title to Improvements. Both the Existing Lease and Amended Lease vest title to the improvements to the City upon the termination of the lease. (See paragraph 10).

Section VIII. Access to Property. Gives the City the right to entry upon the property as is typical in a lease. This same provision is found in the Amended Lease. (See paragraph 4(f)).

Section IX. Covenants and Restrictions.

EXISTING LEASE: This section restricts uses to those provided for in the Site Development plan (they have been so restricted). It requires that all utilities be placed underground (they have been). And, the provision requires that the City retain ingress-egress easements over the property for access, maintenance, etc.

AMENDED LEASE: Restates and greatly expands the Section IX Covenants and Restrictions. (See sections 2-4 on pp 2-5 of Amended Lease).

ADVANTAGE TO THE CITY: The expanded and restated covenants and restrictions make the rights granted under the Lease subject to various state and federal grant restrictions, provides for a minimum additional investment by the tenant of a least \$2 million, provides that the leased premises shall be used as outdoor recreation areas for the use and benefit of the general public, and provides for unrestricted use by visitors to Bartram Park, including without limitation full access to the water adjacent to Bartram Park¹ “for swimming, fishing, launching kayaks and paddleboards, parking, and other public outdoor recreational uses” at the Park. These changes put the Lease into full compliance of the City’s obligations under the federal and state grants. The requirement for building of the breakwater, a project the City has been trying (unsuccessfully) to fund since Ivan, would provide protection to the City’s Park, and the City’s property being leased.

Section X. Indemnification and Hold Harmless Agreement.

EXISTING LEASE: Contains a two paragraph general release for liability for personal injury and property damages caused by the tenant or its guests.

¹ Note: the Existing Lease would allow exclusion of these uses, which has never been done.

AMENDED LEASE: The Amended Lease expands the indemnity provision to protect the City against any damages, loss or cost relating to “any claim, dispute, lawsuit, administrative proceeding or enforcement action arising out, by reason or with respect to any such permit, grant, and instruments; or violation of alleged violation of any such permit, grant, or instrument by Lessor or Lessee with respect to the Lease Premises.” This provision incorporates by reference three pages of grant provisions from Section 2, pp. 2-5. The provision also adds indemnity and hold harmless provisions relating to dredging (see, Section 20(a)) not included in the Existing Lease.

ADVANTAGE TO THE CITY: Substantial expansion of the City’s right to indemnification.

Section XI. Insurance Required.

EXISTING LEASE: Requires Workers Compensation, Comprehensive General Liability, Business Auto.

AMENDED LEASE. Requires these same coverages, but expands Marina Operators coverage, liquor liability coverage, and adds pollution/environmental, builders risk, and Property Insurance coverages. (see Section 26; pp 18-21).

ADVANTAGE TO THE CITY: Greatly expanded insurance coverage required to protect the City’s interests.

Section XII. Special Provisions. Both the Existing Lease and Amended Lease contain provisions regarding equal opportunity compliance, assignments requiring City approval, lessee’s obligation for ad valorem taxes, development at tenant’s sole expense, construction bonds, permitting, dredging, and utilities. However, the Amended Lease eliminates the lessee’s right of first refusal of adjacent property, a valuable right that would have existed for the next 27 years absent this Amended Lease.

Section XIII. Enforcement of Lease, Forfeiture Default, Remedies, Non-Waiver. These provisions have been carried over into, and made stronger, in Section 27 of the Amended Lease, pp 22-24.

Section XIV and XV. Fees & Costs; Notices. Virtually unchanged.

ADDITIONAL PROVISIONS in the Amended Lease:

1. *Improvements.* The Amended Lease addresses the construction of the breakwater and marina improvements; requires expenditure by tenant of no less than \$2 million. It also provides for dismissal of the pending lawsuit for attorney's fees and costs. The liability for fees and costs to date exceeds \$500,000. 🗨️

FAVORABLE TO CITY.

2. *Section 6(f).* Provides for a 15 percent charge on late payments.

FAVORABLE TO CITY.

3. *Section 8.* Provides for \$10,000 rental deposit; unusual provision for a long-term leased that is secured by millions in tenant improvements.

FAVORABLE TO CITY.

4. *Section 9(a).* Contains the typical ("landlord approval required") for assignments. It adds some qualification of assignee provisions not in the Existing Lease. It also adds approval of assignments by Ray Russenberger to other entities in which he the majority owner, and to immediate family members for estate planning purposes.

OVERALL NEUTRAL

5. *Section 9(b).* Provides for advance approval of subleases (excepting existing ones).

OVERALL NEUTRAL

6. *Section 11.* "As is, where is" provisions.

FAVORABLE TO CITY.

7. *Section 12.* Adds two pages of maintenance requirements (pp 12-14) which expand tenant obligations well beyond the Existing Lease.

FAVORABLE TO CITY.

8. Section 14. Damage and destruction. The Amended Lease requires replacement and repair of breakwater, replacement of damaged structures (excluding docks, marina), and naming of the City as additional insured on Property Insurance to assure that this occurs.

FAVORABLE TO CITY.

9. Section 19. Environmental Compliance. Adds full page of requirements beyond those in existing lease.

FAVORABLE TO CITY.

10. Section 26 (after subsection (b)), provides for limitation on City's liability. Not found in existing lease.

FAVORABLE TO CITY

11. Section 41, Mutual Waiver of Consequential Damages.

NEUTRAL ADDITION, as it benefits both parties.