

## **FIRST AMENDMENT TO USE AND OPERATING AGREEMENT**

This First Amendment to Use and Operating Agreement (“**First Amendment**”) is made and entered into effective June 1, 2021 (“**Effective Date**”), by and between **CITY OF HIGH POINT, NORTH CAROLINA**, a municipal corporation incorporated under the laws of the State of North Carolina (“**City**”), and **HIGH POINT DOWNTOWN STADIUM FOUNDATION**, a non-profit corporation organized and existing under the laws of the State of North Carolina (“**Operator**”).

**WHEREAS**, City and Operator entered into that certain Use and Operating Agreement, dated January 31, 2018 (the “**Agreement**”), for the use and operation of Stadium (as defined in the Agreement), known currently as Truist Point;

**WHEREAS**, in order to ensure Stadium’s long-term sustainability and to better achieve City’s downtown economic development and related goals, the parties wish to amend the terms of the Agreement; and

**WHEREAS**, the parties have agreed to amend the Agreement as follows.

**NOW THEREFORE**, in consideration of the mutual covenants herein granted and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties hereto agree as follows:

1. Section 4.3.3 of the Agreement is amended and restated in its entirety as follows:

“In partial consideration of the rights granted to Operator as set forth in this Agreement, Operator shall pay to City on or before October 31<sup>st</sup> of each Agreement Year the sum of Four Hundred Thousand Dollars (\$400,000) (the “Management License Fee”), without deduction or setoff (except as otherwise expressly provided in this Agreement), at City’s address provided for in this Agreement or as otherwise specified by City in writing.”
2. Sections 4.3.4(c) and 4.3.4(d) of the Agreement are deleted in their entirety.
3. Section 4.3.5 of the Agreement is amended and restated in its entirety as follows:

“Operator shall not pay the Management License Fee for the Agreement Year corresponding with Sanctioning Association’s 2020 playing season, and City waives all rights to receipt of such 2020 Management License Fee. Moreover, Operator shall not pay sums otherwise due to City for sales of Team Game and Operator Event tickets during the first Agreement Year, and City waives all rights to receipt of such sums otherwise due for the first Agreement Year.”
4. The first sentence of Section 4.4 of the Agreement is amended to delete the words “the sale of tickets and . . .”

5. Section 6.1.6 of the Agreement is hereby amended and restated in its entirety as follows:

“arrange for and provide all utility and other services for the Stadium, with payment and monitoring of such utilities as set forth in Section 6.3 of this Agreement (City and/or the Project Contractor shall be responsible for providing permanent utility services infrastructure and hook-ups for Operator’s use);”

6. A new Section 6.3 is added to the Agreement as follows:

“**Section 6.3. Utilities.** City shall pay for, or cause to be paid for, utility usage at Stadium, including electric, gas, water and sewer, beginning June 1, 2021. Operator shall provide for and pay for telephone and internet services at Stadium. City and Operator agree that City shall have the right to monitor/audit utility usage, and to implement reasonable recommendations for utility cost savings. City will pay for actual use in Agreement Years 2021, 2022 and 2023. After 2023, City’s payment shall be capped at the average of the annual utility costs paid during those three Agreement Years. The cap shall adjust each year to match any changes in overall utility rates (*e.g.*, inflationary adjustment). The parties agree to revisit this arrangement after Agreement Year 2030 to make any equitable adjustments, which shall be determined mutually and in good faith.”

7. The last sentence of Section 7.1 of the Agreement is amended and restated in its entirety as follows:

“‘Operational Maintenance’ shall mean, as a general matter, day-to-day maintenance and minor repairs at the Stadium. City shall be responsible for Capital Repair, Maintenance and Improvements (in accordance with Section 7.2, herein), as well as maintenance and repair of those elements of Stadium’s structure and surrounding land which City would typically maintain and repair at other similar City-owned facilities. More specifically, ‘Operational Maintenance’ shall include, by way of example only and without limitation:

7.1.1 Keeping, maintaining, and preparing Stadium’s artificial surface used as the playing field and event staging area (the “Turf”) in a good, first-class condition suitable for professional baseball games and other permitted uses of the Turf. Subject to Section 7.1.15, Operator shall perform and pay all costs of Turf restoration required as a result of damage to the Turf caused by, during, and in connection with Operator Events, including Team Games.

7.1.2 Performing routine maintenance and repair of minor fixtures (“toilets and doorknobs”). Replacement of such minor fixtures shall be the responsibility of City.

7.1.3 Keeping and maintaining in good repair and condition the hitting screen, batting cage and all other on-Turf equipment such as foul ball screens,

soccer goals and the like.

7.1.4 Providing or causing to be provided all furnishings, fixtures and equipment for the portions of Stadium occupied exclusively by Operator, other than those included with Stadium as part of the Project Plans.

7.1.5 Subject to Section 7.1.12, providing for janitorial and housekeeping services and supplies, and collection and removal of trash and debris, as necessary to keep and maintain Stadium and the surrounding premises in a neat, clean, sanitary and safe condition.

7.1.6 Maintaining the sound system and the scoreboard system, and performing minor repairs as necessary.

7.1.7 Painting or staining, as the case may be, the interior walls of the administrative offices, of the souvenir store, of the concession areas, of the suites, and of any other interior area of the ballpark occupied exclusively by Operator. Operator shall not modify the color or colors of any paint or stain that it intends to use without City's prior written consent, which consent shall not be unreasonably withheld.

7.1.8 Maintaining Operator's Exclusive Use Areas, and repairing or replacing as necessary any furniture used by Operator.

7.1.9 Cleaning and maintaining the concessions areas after all events for which the concessions areas are used. Repair and replacement of ventilation hoods and walk-in coolers shall be the responsibility of City.

7.1.10 Maintaining and repairing the seats in the Stadium. This shall not include major repairs to the seats (such as re-affixing the seats to the structure of the Stadium), which shall be the responsibility of City.

7.1.11 Performing and paying for all costs of repairs and replacements to the Premises, including but not limited to the furnishings, fixtures and equipment contained or located on or in the Premises, arising out of or in connection with the acts or omissions of Operator, the home and visiting teams at professional baseball games umpires, players, employees, agents, concessionaires and licensees of Operator; *provided however*, that such obligation of Operator shall not extend to such repairs and replacements arising out of ordinary wear and tear.

'Operational Maintenance' shall ***not*** include, by way of example only and without limitation, the following City responsibilities:

7.1.12 Providing for janitorial and housekeeping services and supplies (by contract with Operator or otherwise), and collection of trash and debris for City

Events, as necessary to keep and maintain the ballpark and the premises in a neat, clean, sanitary and safe condition.

7.1.13 Repairing and maintaining the physical structure of Stadium and Premises, and repairing and maintaining the operating systems of Stadium, except as provided in Section 7.1.2. By way of illustration but not limitation, City shall be responsible for maintaining and repairing the electrical, plumbing, fire protection, elevator, HVAC systems and other core mechanical systems. For the purposes of this Section, the physical structure shall include but shall not be limited to the roof, concrete slab, concrete walls, the materials that form the parking areas, the structure of any other improvements on the Premises, caulking, seals, and joints, lavatories and their fixtures (except for minor repairs to such lavatory fixtures), and ceilings. City shall be responsible for any damage caused by flooding or leaking.

7.1.14 Maintaining the lighting towers and lighting tower fixtures.

7.1.15 Repairing and maintaining the Turf, as well as the playing field drainage system, except as provided in Section 7.1.1 City also shall be responsible for any damage caused to the Turf or the drainage system caused by changes in subterranean conditions or by City's use of Stadium. If the Turf becomes in a condition which no longer meets the minimum Sanctioning Association standards for an event - due to damage, ordinary wear and tear, or any other reason (other than the gross negligence or intentional act of Operator, or Operator's failure to fulfill its obligations to properly maintain the Turf) - then City shall be responsible for field restoration or replacement, as applicable.

7.1.16 Repairing (other than minor repairs) or upgrading/replacing (once functionally obsolete) the sound system and the scoreboard system.

7.1.17 Painting or staining, as necessary, Stadium or portions of Stadium in order to restore the appearance of Stadium. City's painting responsibility shall include major indoor painting/staining (other than that set forth in Section 7.1.7), as well as all outdoor painting/staining. City shall not modify the color or colors of any paint or stain that it intends to use without Operator's prior written consent, which consent shall not be unreasonably withheld.

7.1.18 Repairing or replacing as necessary all field wall pads and the outfield fence.

7.1.19 Performing major repairs to the seats in the Stadium (such as re-affixing the seats to the structure of the Stadium), as well as replacement of seats in the Stadium due to Physical Obsolescence.

7.1.20 Making any repairs or replacements made necessary by an event of casualty not caused by Operator or any repairs to furniture, fixtures, or equipment

that is under warranty.

7.1.21 Maintaining and repairing the natural landscaped areas of Premises, in and around Stadium.

7.1.22 Repairing and replacing as necessary, any portion of Stadium, its furniture, fixtures, or equipment that is damaged or destroyed by City or any other third party who uses the ballpark through City (*i.e.*, other than by Operator or Operator's licensees)."

8. A new Section 7.26 is added to the Agreement as follows:

**"Section 7.26. Communication.** City and Operator shall meet no less frequently than quarterly during each Agreement Year to communicate and coordinate regarding operation of Stadium, as well as any other matters arising under this Agreement. In particular, the parties agree to cause consistent communication between City's and Operator's Stadium operational representatives regarding (a) utility uses and costs, and (b) maintenance and repair needs, costs and schedules."

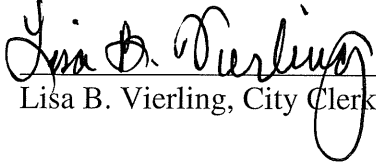
9. Except as modified by the express terms of this First Amendment, all of the terms and provisions of the Agreement shall remain in full force and effect, unmodified by the terms of this First Amendment, and the parties hereby ratify and reaffirm each and all of the terms and provisions of the Agreement, as modified hereby. All terms capitalized herein shall have the meanings ascribed to it in the Agreement.

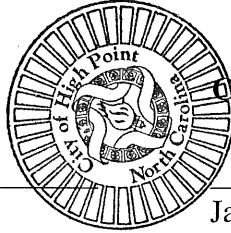
10. This First Amendment may be executed in counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument. Signatures delivered by electronic means shall have the same effect as original signatures.

\* \* \* \*

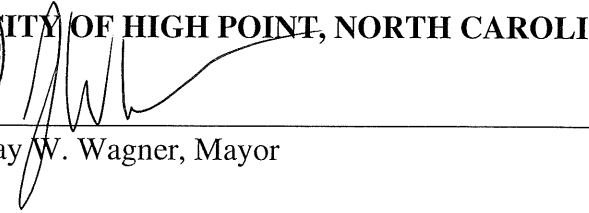
IN WITNESS WHEREOF, the parties hereto have caused this First Amendment to be executed by their respective duly authorized officers or representatives as of the date first set forth above.

ATTEST:

  
Lisa B. Vierling, City Clerk



CITY OF HIGH POINT, NORTH CAROLINA

  
Jay W. Wagner, Mayor

Date: May 19, 2021

Date: May 19, 2021

This instrument has been pre-audited in the manner required by the Local Government Budget and Fiscal Control Act.

  
Bobby Fitzjohn, Financial Services Director

**HIGH POINT DOWNTOWN STADIUM FOUNDATION:**

By: \_\_\_\_\_

Name: Coy O. Williard, Jr.

Title: Chairman

Date: \_\_\_\_\_