

City of Piedmont
COUNCIL AGENDA REPORT

DATE: February 7, 2011

FROM: Geoffrey L. Grote, City Administrator

SUBJECT: Negotiations with the Piedmont Swim Club

RECOMMENDATION

Consider the issues raised in the City's offer and the Piedmont Swim Club's response and give direction in regard to the future operation of the Piedmont pool.

BACKGROUND

The Piedmont Swim Club has operated for forty six years using the model of a privately owned and operated club leasing the land and facilities from the City. Over the years, this arrangement has grown to include extensive community service by the Club through its granting of free water time to teams from Piedmont High School and programs of the Piedmont Recreation Department as well as the charging of greatly reduced fees for use of the pool by the Piedmont Swim Team. In addition, the Club has provided fee based public access to the pools for non-members.

Currently, the Swim Club operates on a three year lease extension, which is set to expire on June 30, 2011. This extension followed a fifteen year lease, which expired on June 30, 2008. At that time, the Club was given a three year extension of their lease because of the then ongoing discussions about the Civic Center Master Plan, which created uncertainty about the long term status of the Club and facilities.

On March 5, 2010, the Club made an initial offer and communicated that it would be open until the end of 2010. Their initial offer, with a lease term of 15 years did not include any provisions for the payment of cash rent. This was a change from the previous fifteen year lease (1993-2008), which required the club to pay cash rent, but gave them partial credit for providing pool space to the Piedmont Unified School District, the Piedmont Swim Team, and programs run for the community by the Piedmont Recreation Department. After the credits, the lease payment was \$38,000 annually. During the early stages of the negotiations, the Club stated that they could not afford to pay rent and to continue providing the free access to the groups mentioned above.

The City made an initial counter offer in March, proposing a ten year term and including the payment of rent. By letter, the Club rejected City's initial counter offer. During the spring and summer of 2010, there were no negotiations between the parties. The issue of payment of cash rent has been a threshold issue throughout the negotiations. It divided the parties, but in September, both were willing to begin negotiations again. During renewed negotiations in

November and December, the City indicated it would be willing to forgo the payment of cash rent from the Club, if it instead made a pre-determined, fixed payment into a capital improvement account that could only be used for the maintenance, repair, rehabilitation, and/or replacement of facilities and/or equipment at the pool. In addition, this clause requires that any funds remaining in the account at the end of the lease would revert to the City.

In addition to the capital improvement fund, the City added a clause to its offer that allowed the lease to be terminated after five or more years of the fifteen year term. This clause allowed the city to terminate the lease at any time after five years, provided that the city refunded unused initiation fees to members who joined after January 1, 2011; provided members of the Club one year of use of the City run pool at no cost to them; and gave the Swim Club at least one year's notice of its intent.

Both sides have discussed the central issues dividing them, as well as some minor issues, at length, but have not been able to come to mutually agreeable terms. In addition, there remain unresolved issues in regard to some language proposed by the City Attorney for inclusion into the lease. This language was proposed in an effort to modernize the lease and to help it address issues that weren't contemplated when earlier leases were agreed to. The Club has stated that it finds some of these changes unnecessarily burdensome. The Club proposed going back to the language in the most recent long-term lease in order to address some of their concerns. These issues of language were discussed in later stages of the negotiations, but took a back seat to the threshold issues of rent and/or capital improvement mentioned above.

Attached for your review are two documents. Appendix A, dated January 21, 2011, is the City's most recent offer to the Club. Appendix B, dated January 27, 2011, is the Club's most recent offer to the City. These documents are attached so that Council and the community can review each proposal and see their similarities and differences.

There are several significant issues that were not resolved between the City and the Club:

- 1) In Section 18, the City requires that the Club receive prior, written consent before expending funds from the Capital Improvement Fund. The club's position is that they should have to provide an annual accounting of the capital funds spent and that any disputes about the appropriateness of such expenditures be arbitrated.
- 2) In Section 17, the City and Club have agreed to language which defines which projects are exempt from the City's prior written consent. Minor language changes would bring the intent of the City and Club in regard to this section into alignment as it relates to removing these projects from the requirement that the club provide evidence of insurance and other administrative support material.
- 3) In Section 19, there is a dispute over the language regarding the condition to which the physical facilities of the club should be maintained. The Club wishes to use language from the previous lease stating that the premises be maintained in "satisfactory condition." Conversely, the City prefers the language that the premises be maintained in a "condition satisfactory to the landlord." In addition, the Club objects to the City's

proposal that it be allowed, in cases where it deems the Club's maintenance to be unsatisfactory, to perform needed maintenance and bill the Club for such work.

- 4) In Section 21(c), the Club objects to the City's provision that the Club be required to pay legal costs for both parties should the lease be challenged.
- 5) In Section 24, the Club objects to the City's demand that it maintain liability insurance for Hazardous Materials, rather preferring to have the insurance only if it can be procured at a reasonable price and is carried by swimming facilities similarly situated.

The financial condition and viability of the Club are of great concern to both the City and Club's board. The Club will need to conduct an extensive membership drive in the next six months if it is to increase its membership to levels that will enable it to fund the operation and maintenance costs it is likely to encounter in the coming years. Understanding these issues, the City is concerned about the long term physical condition of the facility. To allay these fears, the City has also asked for a robust and protected capital improvement fund, the contributions to which, the Club fears, are too great to be affordable.

The City is faced with the reality that should the Swim Club cease to exist, the City will need to operate the pool, which will require a significant subsidy from the general fund. In 2006, the City commissioned the Sports Management Group to do a report (the Livingston Report) on the cost of operating the facility as a public pool. This study provided a range of probable operating costs as well as an estimate of the amount of revenue that the City could reasonably expect to generate. Our best estimates indicate that the subsidy will be between \$100,000 to \$300,000 per year for operating expenditures only. This amount does not include capital costs. In addition, Mr. Delventhal's research indicated that some cities are getting out of the business of running pools on their own, rather choosing to seek private parties to operate the pool, as subsidies like the ones mentioned above are hard to afford in lean times.

It should be noted that the City has never operated a pool before. Because of this, our staff does not have the requisite time or experience to manage such a facility. City operation of the pool will require a new division of the Recreation Department solely devoted to this task and staffed by people with the requisite skills to do so. In this light, the quality of the business arrangement with the pool must be measured against the necessity of a general fund subsidy as large as the one mentioned above.

Originally these negotiations were set to conclude no later than December 31, 2010. Efforts to bridge the gap between the parties have extended these talks through the end of January. Unfortunately, time has now run out for this process. If the club is to initiate its membership drive, as mentioned above, it will need to do so by March 1st in order to meet the obligations set forth in the lease. To do this, it needs a lease agreement.

If the City is to take over on July 1st, preparations will be required immediately. As mentioned above, the city will need to bring consultants on board to handle myriad issues involved in running a public pool. These include obtaining the licenses and permits required to operate the facility and the hiring and training of staff to run the pool. Should a new lease not be granted,

this work will require the expenditure of funds in the current fiscal year, even though the City's operation of the pool will not begin until next fiscal year.

Recently, and over the years, operation of the pool by a private club has been controversial. In fact, both the community and Council have divided on the issue of who should operate the pool, not only this year, but in 1992/93 when the last long-term lease was negotiated and approved. Having been involved in both sets of negotiations, it is clear to me that whomever operates the pool is engaged in the apportionment of scarcity. The pools in Piedmont are not large enough or of the type that allow for the use desired by individual and group users during peak hours. Therefore, difficult choices must be made regarding use, with some people and/or groups always unhappy with the allocations. This will not change if the city takes over the pool. The nature of apportioning a scarce, inadequate resource is inherently likely to make the decision maker unpopular. The City, like the Club, will be lobbied intently by interest groups for use of the facility during peak periods.

In addition to the fact that the pool is inadequate to the tasks assigned it, it has become a Piedmont tradition to allow free use to the High School Swim and Water Polo teams and Piedmont Recreation Department Programs as well as hugely discounted fees for the Piedmont Swim Team. Under the model in use for the last 46 years, the Club bore the costs of operations separate and apart from non-member users. It was considered part of the rent charged to the Club for occupying public land. If the City operates the pool, we will not have the benefit of member dues to subsidize the operation and maintenance costs. The basic rule for public pools is that users pay for water time, whether the user is an individual coming in for a day or buying a season pass or if the user is an organized group such as a swim team, no matter who the sponsor is. The operator of a public pool has certain costs that must be borne by all users.

If the City operates the pool, we will of course try to maximize income through fees for lessons and other uses. However, because such a large block of time is used by the High School Swim and Water Polo teams and the Piedmont Swim team, those hours cannot be given away. To the extent that hours used by the aforementioned groups are given away, the general fund will have to subsidize the operating costs of the pool.

PIEDMONT SWIM CLUB LEASE

THIS LEASE ("Lease") is between the CITY OF PIEDMONT, a municipal corporation, hereinafter called "Landlord" or "City" and PIEDMONT SWIM CLUB, a California non-profit mutual benefit corporation, hereinafter called "Tenant."

1. **Premises.** Landlord leases to Tenant and Tenant leases from Landlord the approximately one-half (1/2) acre real property and all swimming pools, buildings, fixtures, landscape areas and all other improvements located on, about, over, or under the real property (and any improvements hereafter constructed or placed on the real property by Tenant in accordance with this Lease), commonly known as 777 Magnolia Avenue, Piedmont, California 94611, more particularly described on the map attached hereto as Exhibit A, which is incorporated herein by this reference (hereinafter called the "Premises").

2. **Condition of Premises.** The Premises are being leased to Tenant in their current, existing, "AS-IS" condition "WITH ALL FAULTS." Tenant is familiar with the existing condition of the Premises, and acknowledges that Landlord has made no representation or warranty regarding the condition of the Premises, or any portion thereof, except as specifically stated in this Lease.

3. **Term.** This Lease shall commence on July 1, 2011 and shall continue for a period of fifteen (15) years and shall terminate at 5:00 p.m. on June 30, 2026 (unless earlier terminated pursuant to Paragraph 4).

4. **Early Termination.**

(a) **Early Termination by City.** Landlord (and its successors and assigns) shall have the right to terminate this Lease as of June 30 of any year prior to June 30, 2026, upon one

(1) year's written notice to Tenant, provided it complies with either subparagraph 4(a)(1) or 4(a)(2) below.

(1) Improved Facility Membership. City has Secured Funding for the construction of an Improved Facility at the current Piedmont Swim Club site or in close proximity, it shall provide a pass to the Improved Facility at no charge to each current member of the Piedmont Swim Club as of the termination date of this Lease, to use the Improved Facility for a period of one (1) year commencing upon the opening of the Improved Facility. For purposes of this provision, the following definitions shall apply:

(i) "Secured Funding" means that City either has funds placed in a separate account segregated from City's general fund or legally binding commitments for such funds, all designated for the construction of a swim facility only, which total funds represent at least 80% of the total estimated cost of construction of an Improved Facility.

(ii) "Improved Facility" means a lap swimming pool of the same or greater capacity, additional swimming facilities such as a children's or recreational pool, and related facilities including a locker room or further pool space, all of which together will provide increased and improved swimming facilities to the Piedmont community. An "Improved Facility" shall not be a facility constructed on Piedmont School District property which is primarily for use of Piedmont High School and Middle School aquatic programs, including Swimming, Water Polo and/or Diving.

(2) Initiation Fee Reimbursement. City has provided notice of termination effective no earlier than June 30, 2016, City shall reimburse those members of Tenant who paid an initiation fee after January 1, 2011 for the difference between that fee adjusted for the number of years less than 15 they have been a member of Tenant (that is, the

initiation fee times the fraction 15 minus the number of years of membership over 15) and what it would have cost the member to buy the one-year use pass referred to above. Additionally, Landlord shall provide a pass to the facility at no charge to each current member of the Piedmont Swim Club as of the termination date of this Lease, to use the facility for a period of one (1) year commencing upon the termination of this Lease.

(b) Early Termination by Tenant. In addition to the provisions elsewhere in this Lease, Tenant may terminate the Lease upon one (1) year's written notice to Landlord prior to the effective date of Tenant's dissolution or Tenant ceasing to operate the Premises.

5. Rent. The facility use privileges which Tenant agrees to provide to Landlord, the School District, the Piedmont Swim Team and the residents of Piedmont, as enumerated in Paragraphs 10, 11, 12, 13 and 14 of this Lease, shall be in lieu of cash rent. Tenant shall pay to Landlord, as additional rent, any funds contained in the Capital Improvement Fund in accordance with the terms of Paragraph 18 of this Lease.

6. End of Lease. Tenant shall quit the Premises upon expiration or earlier termination of the Lease and surrender them to Landlord. It is expressly agreed that all of the improvements, equipment and fixtures on the Premises (including equipment installed which is necessary for the proper functioning of the swimming pool) belong to Landlord, and at the expiration or earlier termination of this Lease, Tenant shall have no rights to or ownership whatsoever in any of such improvements, equipment or fixtures on the Premises; provided, however, that Landlord may, at Landlord's election, demand the removal from the Premises of fixtures and improvements not approved by Landlord as required by this Lease or not maintained in accordance with the terms of this Lease. Landlord shall make such demand by written notice to Tenant at least six (6) months prior to the effective expiration or earlier termination of the

Lease in which case Tenant shall demolish, remove and clear all such improvements and fixtures from the Premises. Notwithstanding the foregoing, Tenant shall have the right to retain any personal property which is leased by Tenant or which belongs to a member of Tenant and is on loan to Tenant, and the Piedmont Swim Team (or any person or entity permitted to use the Premises by Tenant) shall have the right to retain any personal property which is owned or leased by it, provided that the burden of proof that specific personal property shall be retained by some person or entity other than Landlord shall be on the person or entity claiming such personal property. All such personal property leased by Tenant or owned by a member of Tenant or the Piedmont Swim Team or any person or entity permitted to use the Premises by Tenant shall be removed from the Premises upon Tenant vacating the Premises, and any remaining articles of personal property shall become property of Landlord and Landlord shall have no duty to determine prior ownership (but shall have the right to demand removal thereof as provided above in this Paragraph 6). In the event Tenant holds over, Tenant shall pay Landlord rent thereafter in the sum of Five Hundred Dollars (\$500.00) per day, until Tenant shall vacate the Premises, which rental shall increase to One Thousand Dollars (\$1,000.00) per day after Tenant has held over for ninety (90) days.

7. **Taxes and Assessments.** Tenant shall pay all taxes and assessments which shall be imposed upon the improvements constructed or placed upon the Premises. It is agreed that such taxes and assessments for the last year of this Lease shall be prorated between Landlord and Tenant as of the date Landlord shall take possession of said Premises, provided that in the event of such proration Landlord shall not be required to pay to Tenant any sum of money in reimbursement of taxes already paid by Tenant. Tenant recognizes and understands that this Lease may create a possessory interest subject to property taxes levied on such interest.

8. **Public Utilities.** All water, gas, electricity or other public utilities used upon or furnished to the Premises shall be paid for by Tenant.

9. **Use.** The Premises shall be used for the operation and maintenance of a swimming pool, and related facilities, subject to any applicable or required permits and approval from any governmental agency. Tenant shall use the Premises for no other purposes without the prior written consent of Landlord.

10. **Rules of Operation.**

(a) **Operations and Tenant Memberships.** Tenant shall conduct its operations in conformity with its Articles of Incorporation, By-Laws and Rules and Regulations as presently in effect, or as they hereafter may be amended. The Premises shall be maintained in a safe, clean and sanitary manner and operated in compliance with any and all governmental regulations or laws now or hereafter enacted, specifically including but not limited to, all applicable public health laws.

(b) **Memberships.** A membership in Tenant may only be purchased from Tenant itself and not from any other member. All of the rights, benefits and duties of membership, except the right to vote at meetings of members, shall extend to all persons who reside with and are members of the same family as any member. For the purpose of voting at meetings of members and exercising all of the rights of members other than the privilege of using the recreation facilities of Tenant, it shall be deemed that each family which is resident in one home shall have one membership and one vote. No fractional memberships shall be permitted.

(c) **Limitation of Memberships.** The membership of Tenant shall be limited to Six Hundred Fifty (650) members. Five Hundred Twenty (520) memberships shall be

reserved for bona fide residents of the City of Piedmont, California. The term "resident of Piedmont" shall mean a person whose primary residence or the lot upon which such residence is situated is located in whole or in part in the City of Piedmont, provided that Piedmont municipal taxes are payable with respect to such residence and/or lot. Any person who has his primary residence outside the City of Piedmont (notwithstanding the fact that such person continues to own a house located in the City of Piedmont) shall be deemed not to be a bona fide resident of the City of Piedmont.

There shall be no more than One Hundred Thirty (130) members of Tenant who are not residents of Piedmont. Notwithstanding the above, no membership may be issued to a non-Piedmont resident unless and until there are at least twenty-one (21) open memberships available.

Tenant shall deliver to Landlord during the month of October of each year of the Lease an accurate list of all members of the Tenant, together with their then current residence addresses.

There shall be no restrictions upon the use of Tenant's facilities based on race, religion, color, creed, national origin, gender, or sexual preference.

No alcoholic beverages shall be brought onto or consumed on the Premises except where approved by Landlord.

(d) Availability of Facilities. The swimming pool facilities shall be operated by Tenant for not less than eleven (11) months during each calendar year, unless Tenant shall determine that weather conditions, or other factors, such as facility repairs or maintenance, are such as to make a shorter period of operation necessary or desirable. In the event a shorter period of operation is necessary or desirable, Tenant shall obtain the prior written consent of Landlord,

which consent shall not be unreasonably withheld. Tenant shall give Landlord at least fifteen (15) days' advance written notice of any change in regular hours of operation on days on which the swimming pool facilities are open, but shall not be required to give notice for social events or changes the duration of which are not greater than two (2) days; provided that such notice shall not be required in the event of a temporary closure (not to exceed ten 10 days) due to Act of God, emergency, shutdown of equipment, or for health or safety reasons of major significance.

The swimming pool facilities shall not be operated later than 10:00 p.m., nor shall Tenant cause outdoor lights, other than safety night lights, to be used on the Premises without the prior written consent of Landlord.

(e) Scheduling of Usage: Rules and Regulations. Tenant agrees to make the facility available at certain times to certain community groups which have historically benefitted from access to the facility, including the Piedmont Unified School District (the "School District"), the Piedmont Swim Team, and the City of Piedmont. Such use shall be subject to the specific provisions of Paragraphs 11, 12, 13 and 14 and other applicable provisions of this Lease. Tenant agrees to consider requests for additional use privileges from these user groups as well as other parties, but Tenant shall have no obligation to permit additional access. The facility rental fee, if any, and manner of use of any additional use of Tenant's facilities by the School District, by the Piedmont Swim Team, and by other parties other than Tenant's members beyond that listed in Paragraphs 11, 12, 13 and 14 and other applicable provisions of this Lease shall be determined by Tenant after taking into account in good faith all of the uses of such facilities that are permitted at approximately the same times. In the event that Landlord objects to any such determination by Tenant with respect to use by any party, Landlord may so notify Tenant in

writing, and Tenant and Landlord shall thereafter cooperate and use their best efforts to resolve any disagreement with respect to the scheduling and manner of use of such facilities.

If any disagreement has not been resolved within thirty (30) days of the date that Landlord notifies Tenant in writing of such disagreement, then either Landlord or Tenant may activate the following dispute resolution process by providing written notice thereof to the other party setting forth exactly the dispute to be resolved:

(1) The dispute shall be resolved by a three person panel to consist of the City Administrator of Landlord or his/her designee, the President of Tenant or his/her designee, and a third person to be mutually agreed upon by the City Administrator of Landlord and the President of Tenant.

(2) The third person of the panel shall be selected within twenty-one (21) days after one party has activated the dispute resolution mechanism by written notice to the other.

(3) If no third person has been mutually agreed to within such twenty-one (21) day period, then either party may request that such third person be appointed by the Presiding Judge of the Alameda County Superior Court by a written Petition filed with such Judge, specifically asking for such appointment to be made no later than twenty-one (21) days after such Petition has been filed with the Court.

(4) Such three person panel shall convene no later than twenty-one (21) days after such third person has been either mutually agreed to by the parties or appointed by the Presiding Judge, and shall render a binding decision no later than thirty (30) days after the date on which the panel initially convenes.

(5) The basic standard governing such panel's deliberations and decision shall be reasonable adherence to the provisions of this Lease and carrying out the intent thereof.

(6) This dispute resolution process shall be exclusive, and no other process, whether mediation pursuant to Paragraph 39 hereof, litigation, or any other dispute resolution process may be used without the prior mutual written agreement of the parties hereto; provided that such dispute resolution process shall in no way abrogate the rights of the Landlord to schedule its usage pursuant to Paragraph 12 hereof.

The School District, Landlord (through its Recreation Department or otherwise), the Piedmont Swim Team, and all other parties other than Tenant members who utilize the facilities leased by Tenant hereunder shall be subject to and required to comply with the same Rules and Regulations concerning use of the facilities (including without limitation, the Rules and Regulations related to health and safety and courteous behavior) as are applicable to Tenant's members and the requirements with respect to insurance set forth in Paragraph 22.

11. **Use by School District.** The School District may use Tenant's facilities as follows:

- (a) Adaptive Physical Education—one lane, 9:00 to 11:30 AM, M-F, September-May.
- (b) Piedmont High School Swim Team—Practice, six lanes, 7:00-9:00 PM, M-F, March-May.
- (c) Piedmont High School Swim Team—Meets, six lanes, three hours per day during season between 2:00 PM and 6:00 PM. Total use by District shall be three hours per day.

(d) Piedmont High School Water Polo Team—Practice, six lanes, 7:00-9:00 PM, M-F, September-November.

(e) Piedmont High School Water Polo Team—Meets, six lanes, three hours per day during season between 2:00 PM and 6:00 PM. Total use by District shall be three hours per day.

(f) Piedmont Middle School Water Polo Class—three lanes, 10:00 AM- 12:00 Noon, M-F, two weeks per year.

Any additional use by the School District shall be subject to mutual agreement between Tenant and the School District as to schedule and fee.

12. **Use by Recreation Department.** Landlord, including its Recreation Department, shall be entitled to nonexclusive use of Tenant's facilities three (3) hours per weekday during the summer (June 15 – August 31) at mutually agreed upon times, except as provided in the next following paragraph. During the remainder of the year (September 1 – June 14) use by Landlord will be allowed up to six (6) hours of nonexclusive use per week but not more than two (2) hours per day, at mutually agreed upon times, except as provided in the next following paragraph. The type of use will be at the discretion of Landlord but such use shall not be transferable to the School District, the Swim Team or other non-member use. Said hours of use shall be noncumulative so that if Landlord, including its Recreation Department, does not use its hours on one day, it cannot transfer them to some other day.

The facilities shall be available for use by the Recreation Department at such times, in addition to the times hereinabove specified, as may from time to time be mutually agreed in writing by Tenant. With respect to the scheduling of the use of the facilities by Landlord through its Recreation Department, the parties further agree as follows: The Recreation Department shall

have the right with respect to one-half (1/2) of the usage of the facilities to which it is entitled (i.e., one and one-half (1-1/2) hours per weekday during the summer and three (3) hours per week on weekdays during the remainder of the year, but not more than two (2) hours per day) to select the exact dates and times of its usage, provided that:

(a) The Recreation Department shall be required to give not less than ninety (90) days advance written notice of its desire to exercise said right and select such exact dates and times; and

(b) Tenant shall be entitled to designate up to three (3) programs or events in any calendar year that, once they are scheduled, may not be preempted by the Recreation Department's selection of dates and times of its usage; provided, however, that no such event or program may be for a duration in excess of three (3) hours per day, and not more than one (1) such program or event shall be scheduled on any one day; provided further, that the foregoing limitation on events or programs shall not apply to competitions of the Piedmont High School Swim Team/Water Polo Team and/or the Piedmont Swim Team, but in no case shall there be more than six (6) such scheduled competitions during any calendar year without the prior written approval of Landlord. Any such designations by Tenant shall be in writing and shall be made in January of each year with respect to that calendar year.

The uses provided hereunder for the School District and Landlord may be reasonably shared with members of Tenant or members of the public, so long as sufficient space is reserved for the uses of the School District and/or Landlord. Such use shall be subject to mutual agreement in writing between Tenant and Landlord.

13. **Public Use.** Bona fide residents of Piedmont who are not members of Tenant shall have the right to use Tenant's facilities as follows:

(a) General Use on Weekdays. One weekday (the same day of each week) per week shall be set aside for such public use on either a Tuesday, Thursday, or Friday; provided that such weekday for public use shall not apply during the week in which Saturday use as provided in Paragraph 12(b) hereafter applies.

(b) Saturday. One Saturday (the same Saturday each month) per month shall be set aside for such public use.

(c) Notice of Public Use Days. Tenant shall provide Landlord with written notice of the days set aside for public use as provided in Subparagraphs 12(a) and 12(b) no later than July 1, 2011, and thereafter Tenant may only change such a public use day by at least thirty (30) days prior written notice thereof to Landlord.

(d) First Come, First Served. On the public use days, the residents of Piedmont who are not members of Tenant shall be allowed to use Tenant's facilities on an equal basis, and on a first come, first served basis, with the members of Tenant until the maximum capacity of Tenant's facilities have been reached, and when new openings are available on such public use days, the same access rules shall apply; provided that such use by Tenant's members and by the public shall be subordinate to use as set forth in Paragraph 10 hereof.

(e) Fees for Public Use. Tenant may charge a separate fee for each day of use by a Piedmont resident who is not a member of Tenant at a rate to be determined by Tenant, not to exceed Fifteen Dollars (\$15.00) per day for each adult and Eight Dollars (\$8.00) per day for each child, defined as any person who has not yet attained age eighteen (18). Landlord and Tenant shall cooperate in issuing cards or other means of identification for multiple use by Piedmont residents, and Landlord shall have the option of subsidizing use by children. Notwithstanding the above, Tenant may increase these fees from time to time by an amount not

to exceed the cumulative increase in the All Items Consumer Price Index (CPI) for San Francisco-Oakland-San Jose from the CPI set for June, 2010.

(f) Hours Available. Tenant shall make Tenant's facilities available for such public use for the same hours that Tenant makes such facilities available to its own members.

14. Piedmont Swim Team. Tenant shall be permitted by Landlord to establish a contractual relationship with The Piedmont Swim Team (or a substantially similar successor organization) to use Tenant's facilities on a reasonable basis at agreed upon times and upon mutually agreed upon terms and conditions including fees to be paid by The Piedmont Swim Team to Tenant. It is anticipated by both parties that such use shall continue on a reasonable basis in the future. Tenant agrees to make the facility available for rental by the Piedmont Swim Team at the following times:

(a) September-May, three lanes, 6:00 AM-7:30 AM, M-F and 3:30 PM-6:00 PM, Monday through Friday.

(b) June-August, three lanes, 6:00 AM-8:30 AM, Monday through Friday.

(c) During these schedules the Piedmont Swim Team may use up to two additional lanes when they are not in use by Piedmont Swim Club members, subject to coordination by Swim Club staff.

Changes to the Piedmont Swim Team's hours of use of Tenant's facilities shall be subject to mutual agreement between Tenant and the Piedmont Swim Team.

15. Learn to Swim Program. Tenant (or a qualified party designated by Tenant and acceptable to Landlord) shall offer to all Piedmont residents, on the Premises, a Learn to Swim Program within the general scope of such program that Tenant is currently conducting on the Premises, unless Landlord elects to offer a comparable program. Tenant may make a reasonable

charge for such program in amounts to be previously approved by Landlord; provided that as to the charges for such Program by Tenant as of July 1, 2011, any such charges may be increased thereafter based upon the increase in the All Items Consumer Price Index (CPI) for San Francisco-Oakland-San Jose from June, 2010, to June 1 of the year immediately preceding the calendar year in which such charges are made, and such increases shall be deemed reasonable and shall not require approval by Landlord.

16. **Terms of Membership Sales.** As a specific and important condition, Tenant agrees that its Articles of Incorporation, By-Laws and Rules and Regulations shall be consistent with this Lease.

(a) **No Sales of Memberships by Members to Third Parties.** The By-Laws of Tenant, as amended on January 12, 2010, clearly reflect that Tenant is the only entity or person that may sell memberships in Tenant. As a result, no sales of memberships shall be allowed from members of Tenant to any person, provided that Tenant's By-Laws may permit the transfer of a membership upon a member's death, to a family member who resides in the same household as the deceased member, subject to a fee to be determined by Tenant.

(b) **Prices of Memberships.** Tenant shall establish a sales price at which memberships ("New Memberships") will be sold to new members by Tenant after the Effective Date. The terms and conditions on which such sales will take place shall be as set forth in Tenant's By-Laws and Rules and Regulations.

Unless otherwise agreed by Landlord, the price ("New Membership Sales Price") at which Tenant sells New Memberships shall be determined by Tenant, but in no case shall exceed One Thousand Five Hundred Dollars (\$1,500.00) per year.

(c) Repurchases. Notwithstanding anything herein to the contrary, Landlord acknowledges and agrees that Tenant shall not be obligated to repurchase any membership for any reason.

(d) Definition of "Membership." The term "Membership" as used in this Paragraph 16 and elsewhere in this Lease shall include reference to the membership certificate issued by Tenant which evidences such membership.

17. **Buildings, Improvements and Fixtures**. Subject to the conditions and requirement set forth in this Paragraph 17, Tenant shall have the right, at its sole cost and expense, to construct additional buildings or improvements and install necessary trade fixtures for uses strictly accessory to its permitted use on the Premises, or to make alterations or additions to existing buildings and improvements for use consistent with this Lease; provided, however, that no such additional buildings, improvements or trade fixtures shall be constructed or installed without the prior written consent of Landlord to the plans and specifications thereof, which consent shall be granted or denied in Landlord's sole discretion. If Landlord approves proposed buildings, improvements or fixtures, Landlord's consent may be conditioned upon Tenant establishing compliance with this Paragraph. In no event shall Tenant undertake any construction or installation of additional buildings, improvements or trade fixtures without the prior written consent of Landlord. Any such additional buildings and improvements shall be erected and constructed by a licensed general contractor approved by Landlord, shall belong entirely to Landlord, and shall become part of the Premises subject to this Lease. Consent of the Landlord under this section shall not apply to expenditures for ordinary operations and maintenance, nor to emergency work, nor to individual work that does not exceed \$25,000.

(a) Standard of Work. All work to be performed by or on behalf of Tenant pursuant hereto shall be performed diligently and in a first-class, workmanlike manner, and in compliance with this Lease and all laws applicable to the Premises, including statutes, ordinances, rules, regulations, applicable building code and zoning ordinances of governmental agencies, including Landlord, and all requirements of insurance carriers. Landlord shall have the right, but not the obligation, to inspect periodically any work on the Premises and Landlord may require changes in the method or quality of the work.

(b) Damage; Removal. Tenant shall repair all damage to the Premises and all portions thereof caused by the construction of improvements or installation of Tenant's fixtures, equipment, furniture and any alterations thereto. All such removals and restoration shall be accomplished in a good and workmanlike manner so as not to cause any damage to the Premises whatsoever and in strict accordance with all applicable laws.

(c) Construction Requirements.

(1) Prior to commencing any work of improvement under this Paragraph 17, and during the course of work, Tenant shall require its contractors to maintain and provide evidence of "all risks" builder's risk and worker's compensation insurance coverages acceptable to Landlord. Prior to commencing any work, Tenant shall deliver to Landlord certificates of insurance evidencing the coverages. Tenant shall, or shall cause its contractors to, maintain, keep in force and pay all premiums required to maintain and keep in force the insurance above at all times during which such work is in progress.

(2) Tenant and its contractors and subcontractors shall ensure compliance with any applicable prevailing wage laws and regulations.

(3) Prior to commencing any work on the Premises, Tenant shall provide to Landlord, for Landlord's review and written approval, a construction budget for the planned improvements and proof of adequate funding and financing to complete the improvements. Tenant shall provide Landlord any additional information reasonably requested by Landlord.

(d) As-Built Plans. Upon completion of any work on the Premises (and where applicable), Tenant shall give Landlord notice of all changes in plans or specifications made during the course of the work and shall, at the same time and in the same manner, supply Landlord with "as built" drawings, both on paper and on CAD, accurately reflecting all such changes.

18. **Capital Improvement Fund**. Tenant shall maintain a "Capital Improvement Fund" which shall be used for maintenance of and capital improvements on the Premises. Any expenditures from the Capital Improvement Fund by Tenant must have prior ~~approval by Landlord~~ written approval by Landlord. Requests for such approval must be made to the City Administrator, or the Administrator's designee, who shall have the authority to approve these requests. The Administrator shall respond within ten (10) business days from receipt of such written request. Tenant shall deposit at least Thirty-Three Thousand Three Hundred Thirty-Three Dollars (\$33,333.00) per year into this Fund. Upon expiration or earlier termination of the Lease, the amount remaining in the Capital Improvement Fund, after all liabilities have been paid, shall be paid to Landlord as additional rent. If Tenant continues to operate the facilities under a new agreement with Landlord and the amount remaining in the Capital Improvement Fund exceeds six months' total operating expenses as shown on Tenant's compiled financial statements for the final year of the Lease, those excess funds shall be paid to Landlord. During

the final three years of the Lease, Tenant shall not lower its annual dues for the purpose of depriving Landlord of these payments, except that Tenant shall have the right to lower, prorate (with or without a balloon payment of the balance if a new lease is signed) or eliminate its initiation fee to attempt to increase membership or ameliorate the loss of dues revenue during those years.

19. **Repairs and Maintenance.** Tenant shall, at its sole cost and expense, keep and maintain all buildings and improvements, and all appurtenances thereto, in good and neat order and repair, and in operating condition satisfactory to Landlord. In addition, Tenant shall restore and rehabilitate any buildings or improvements, which may be destroyed or damaged by fire or other insured casualty (subject to the qualifications stated in Paragraph 22 hereof) and shall allow no nuisance to exist or be maintained on the Premises. Tenant shall keep and maintain the grounds, sidewalks, pools and landscaped areas on the Premises in good and neat order and repair. Tenant expressly waives all right to make repairs at Landlord's expense under sections 1941 and 1942 of the California Civil Code. Tenant agrees that it will not commit or permit waste upon the Premises. In the event Tenant fails, in the reasonable judgment of Landlord, to maintain the Premises in good order, condition and repair, Landlord shall, upon five (5) days' written notice to Tenant, have the right to perform such maintenance, repairs or refurbishing at Tenant's expense, provided Tenant fails to do so within that five-day period. If Landlord elects to undertake any such repairs or maintenance as provided above, then Tenant shall pay as additional rent Landlord's actual costs paid or incurred in connection therewith.

20. **Mechanics' and Other Liens.** Tenant covenants and agrees to keep the Premises, and every part thereof, free and clear of any and all mechanic's, materialmen's or other liens. Tenant shall pay for all work performed on the Premises by its employees or contractors

and shall indemnify, defend and hold Landlord harmless from any and all liability resulting from any lien or claim of lien arising out of such work. Tenant shall give Landlord at least thirty (30) days written notice in advance of making any alteration, addition or improvement, except in the event of emergency or safety-related repairs, or in the event of work, repairs, or replacements which are less than Twenty-Five Thousand Dollars (\$25,000.00) in value. Landlord shall have the right to post and maintain on the Premises notices of nonresponsibility in accordance with the applicable provisions of California law. Tenant further agrees that for all work in excess of Twenty-Five Thousand Dollars (\$25,000.00), it will cause to be obtained, without expense to Landlord, corporate surety bonds payable to Tenant and Landlord assuring performance by the contractor in sufficient amounts to assure completion of any work contemplated so as to protect the Premises against any mechanics', materialmen's, or other liens of the type hereinbefore described, copies of all such bonds to be furnished to Landlord at the time Tenant shall let any contract for the construction or alteration of any improvements on the Premises. If Tenant does not cause to be recorded the bond described in California Civil Code section 3143 or otherwise protect the property under any alternative or successor statute, and a final judgment has been rendered against Tenant by a court of competent jurisdiction for the foreclosure of a mechanic's, materialman's, contractor's or subcontractor's lien claim, and if Tenant fails to stay the execution of the judgment by lawful means or to pay the judgment, Landlord shall have the right, but not the duty, to pay or otherwise discharge, stay or prevent the execution of any such judgment or lien or both. Tenant shall, within ten (10) days, reimburse and indemnify Landlord for all sums, costs, expenses and liabilities incurred by Landlord.

21. **Indemnity.**

(a) Tenant's Obligation. Except to the extent claims are caused by Landlord's sole or active negligence or willful misconduct, Tenant shall indemnify, protect, defend, and hold harmless Landlord and its elected officials, officers, employees, volunteers, lenders, agents, contractors and each of their successors and assigns from and against any and all claims, judgments, causes of action, damages, penalties, costs, liabilities, and expenses, including all costs, attorneys' fees, expenses and liabilities incurred in the defense of any such claim or any action or proceeding brought thereon, arising at any time during or after the Lease as a result (directly or indirectly) of or in connection with (i) any default in the performance of any obligation on Tenant's part to be performed under the terms of this Lease; (ii) Tenant's use of the Premises, the conduct of Tenant's business or any activity, work or things done, permitted or suffered by Tenant in or about the Premises; (iii) any act, error or omission of Tenant or of any invitee, licensee or guest of Tenant, in or about the Premises; (iv) loss of, injury, or damage to or destruction of property (including loss of use resulting from that loss, injury, damage or destruction); (v) all resulting economic losses, consequential and/or exemplary damages; and (vi) any subleases, assignments and related activities (collectively, "Indemnification"). Tenant shall provide such Indemnification by and through counsel reasonably acceptable to Landlord. The obligations of Tenant under this Paragraph 21 shall survive the termination of this Lease with respect to any claims or liability arising prior to such termination.

(b) Landlord Not Responsible for Damages; Exempt from Liability. This Lease is made upon the express condition that Landlord shall not be liable for any damages or claims for damages by reason of any injury to or death of any person or persons while in, upon or in any way connected with the Premises during the occupancy thereof by Tenant, either in construction or operation, or damages to property, except damages or claims for damage

resulting from the willful or negligent acts of Landlord, its agents or servants. Thus, Tenant, as a material part of the consideration to Landlord, hereby assumes all risk of damage to property including, but not limited to, Tenant's personal property, or injury to or death of persons in, upon or about the Premises arising from any cause, and Tenant hereby waives all claims in respect thereof against Landlord, except to the extent such claims are caused by Landlord's sole or active negligence or willful misconduct. Tenant hereby agrees that Landlord shall not be liable for injury to Tenant's business or any loss of income therefrom or for damage to the property of Tenant, or injury to or death of Tenant, or any other person in or about the Premises, whether such damage or injury is caused by fire, steam, electricity, gas, water or rain, or from the breakage, leakage or other defects of sprinklers, wires, appliances, plumbing, air conditioning or lighting fixtures, or from any other cause, whether said damage or injury results from conditions arising within or about the Premises or from other sources or places, and regardless of whether the cause of such damage or injury or the means of repairing the same is inaccessible to Tenant, except damage or injury caused solely by Landlord's sole or active negligence or willful misconduct.

(c) Responsibility in the Event of Challenge to Lease. Landlord and Tenant, at Tenant's sole cost and expense, shall cooperate in the event of any court action instituted by a third party or other governmental entity or official challenging the validity of any provision of this Lease, and Landlord shall, upon request of Tenant, appear in the action and defend its decision. To the extent Tenant determines to contest or defend such litigation challenges or requests that Landlord cooperate in those defense efforts, Tenant shall reimburse Landlord, within ten (10) days following Landlord's written demand therefor, which may be made from time to time during the course of such litigation, all costs incurred by Landlord in connection

with the litigation challenge, including Landlord's administrative, legal and court costs. If Tenant opts to defend any such legal challenge, Tenant shall indemnify, defend, and hold harmless Landlord and its and their officials and employees from and against any claims assessed or awarded against Landlord by way of judgment, settlement, or stipulation. Nothing herein shall authorize Tenant to settle such legal challenge on terms that would constitute an amendment or modification of this Lease, unless such amendment or modification is approved by Landlord's City Council in accordance with applicable legal requirements, and Landlord reserves its full legislative discretion with respect thereto.

(d) Contest by Tenant. If Tenant desires to contest any lien of the nature set forth in Paragraph 20 hereof, or if Tenant desires to contest any tax, assessment, charge or other item to be paid by it other than to Landlord under the terms hereof, it shall notify Landlord of its intention so to do within ten (10) days after the filing of such lien or at least ten (10) days prior to the delinquency of such tax, assessment, charge or other item, as the case may be. In either such case, Tenant shall not be in default hereunder until ten (10) days after the final determination of the validity thereof, within which time Tenant shall satisfy and discharge such lien or pay and discharge such tax, assessment, charge or other item to the extent held valid, and all penalties, interest and costs in connection therewith, as the case may be. In the event of any such contest, Tenant shall protect and indemnify Landlord against all loss, cost, expense and damage resulting therefrom and shall promptly secure the performance of such indemnification in a manner satisfactory to Landlord.

22. Insurance. Tenant shall, at its sole cost and expense, obtain and keep in force at all times the following "Tenant's Insurance" and shall be liable for all premiums, deductibles, and self-insured amounts, if any, in connection therewith:

(a) Property Insurance. "All risk" fire and extended coverage insurance on all buildings and improvements located on the Premises covering damage to or loss of the Premises and Tenant's Property (and coverage for the full replacement cost thereof including business interruption of Tenant), together with, if the property of Tenant's invitees is to be kept in the Premises, warehouse's legal liability or bailee customers insurance for the full replacement cost of the property belonging to invitees and located in the Premises. The amount of such insurance shall be not less than one hundred percent (100%) of the replacement value of said buildings and improvements on the Premises.

(b) Comprehensive Public Liability Insurance. Tenant shall, at its sole cost and expense, obtain and maintain in full force and effect comprehensive public liability insurance, naming Landlord as an additional insured, insuring against claims for bodily injuries, death or property damage occurring in or about the Premises with limits of not less than \$5,000,000.00 in respect to injury or death of one person, not less than \$5,000,000.00 in respect to any one accident, and not less than \$50,000.00 in respect to property damage. As a condition to allowing the Piedmont Swim Team to use the Premises, Tenant shall require the Piedmont Swim Team to obtain and maintain in full force and effect during any period that such Swim Team is using the Premises comprehensive public liability insurance naming Tenant and Landlord as additional insureds, insuring against claims for bodily injuries, death or property damage occurring in or about the Premises with limits of not less than \$5,000,000.00 in respect to injury or death of one person, not less than \$5,000,000.00 in respect to any one accident, and not less than \$50,000.00 in respect to property damage. As a condition to allowing any other entity, association or organization (including without limitation, the School District, but not including the Landlord, through its Recreation Department or otherwise) to use the Premises,

Tenant may require such entity, association or organization (i) to obtain and maintain in full force and effect during any period that such entity, association or organization is using the Premises, similar comprehensive public liability insurance (or equivalent protection) which, in the case of entities, association or organizations other than Landlord, name Tenant and Landlord as additional insureds, and (ii) to provide Tenant with satisfactory evidence of such insurance including copies of insurance policies or certificates of insurance which include an endorsement (or other appropriate written agreement) that such insurance shall not be canceled except after twenty (20) days written notice to Tenant. Landlord shall provide Tenant a Certificate of Coverage evidencing liability coverage for any acts of sole or active negligence or willful misconduct occurring on the Premises on the part of City, including employees and volunteers of City. Tenant also may require the agents of any party using its facilities to provide evidence of similar public liability insurance coverage as a condition to using the facilities.

(c) Workers' Compensation and Employer's Liability Insurance. Workers' compensation insurance, if required by Law, which complies with all applicable state statutes and regulatory requirements, and, if Tenant hires any employees, employer's liability insurance coverage in the amount of at least One Million Dollars (\$1,000,000).

(d) Certificates of Insurance. Tenant shall provide Landlord with copies of all of said policies or certificates of coverage for all Tenant's Insurance, in the form of the ACORD standard certificate of insurance, prior to the effective date of the Lease. Tenant shall, at least ten (10) days prior to expiration of the policy, furnish Landlord with certificates of renewal or "binders" thereof. Each certificate shall expressly provide that such policies shall not be cancelable or otherwise subject to modification except after twenty (20) days' prior written notice to the parties named as additional insureds as required in this Lease. If Tenant fails to

maintain any insurance required in this Lease, Tenant shall be liable for all losses and cost resulting from said failure.

(e) Standards for Insurance Policies. All of the insurance provided for under this Paragraph 22 and all renewals thereof and all of the bonds provided for in this Lease shall be issued by such good, responsible and standard companies and in such form and substance as are rated at least A by Best's Insurance Guide, are California admitted, and the form thereof shall be subject to approval by Landlord.

(f) Additional Insureds. Landlord shall be named as an additional insured on the policy. An additional insured endorsement naming such parties as additional insured(s) shall be attached to the certificate of insurance.

(g) Primary Coverage. Tenant's Insurance shall be primary, without right of contribution from any insurance maintained by Landlord.

(h) Umbrella/Excess Insurance. Any umbrella liability policy or excess liability policy (which shall be in "following form") shall provide that if the underlying aggregate is exhausted, the excess coverage will drop down as primary insurance. The limits of Tenant's Insurance shall not limit Tenant's liability under this Lease.

(i) Waiver of Subrogation. Tenant waives any right to recover against Landlord for claims for damages to Tenant's personal property to the extent covered (or required by this Lease to be covered) by Tenant's Insurance. This provision is intended to waive fully, and for the benefit of Landlord, any rights and/or claims which might give rise to a right of subrogation in favor of Tenant's insurance carrier(s). The coverage obtained by Tenant pursuant to this Lease shall include a waiver of subrogation endorsement attached to the certificate of insurance.

(j) Notification of Incidents. Tenant shall notify Landlord within twenty-four (24) hours after the occurrence of any accident or incident on or about the Premises or any portion thereof which could give rise to a claim against Landlord, Landlord's insurance, Tenant or Tenant's Insurance, except that Tenant shall not be obligated to give Landlord notice of any accident or incident which could give rise to a claim under Tenant's workers' compensation insurance. Tenant's notice shall be accompanied by a copy of any report relating to the accident or incident.

(k) Compliance With Insurance Requirements, Warranties. Tenant shall not do anything in the Premises, or bring or keep anything therein, or subject the Premises or any portion thereof to any use which would damage the same or increase the risk of loss or fire, or violate Tenant's Insurance, or which shall conflict with the regulations of the fire department or any laws or with any insurance policy on the Premises or any part thereof, or with any rules or regulation established by any administrative body or official having jurisdiction. Tenant shall promptly comply with the reasonable requirements of any board of fire insurance underwriters or other similar body now or hereafter constituted. Tenant shall not take any action which would abrogate any warranties.

(l) Insurance Proceeds and Deficiencies. In the event of damage to or destruction of any building or improvement on the Premises, the net proceeds of all insurance money collected therefore shall be available for and used with all reasonable dispatch by Tenant in rebuilding, repairing or otherwise reinstating the buildings or improvements so destroyed or damaged. In the event such insurance proceeds available therefor shall be insufficient for rebuilding, repairing or otherwise reinstating such buildings or improvements as aforesaid, and if Tenant shall decline or shall be unable to make up the deficiency out of its own funds, Tenant

may elect by giving Landlord written notice thereof within ninety (90) days after such damage, to declare this Lease terminated. In such event, Landlord shall be entitled to all insurance proceeds therefor.

(m) Appraisal. In the fifth year and in the tenth year of the Lease, Tenant at Tenant's sole expense shall have an appraisal made by a fully qualified appraiser or a licensed building contractor, either of whom shall be approved by Landlord. Said appraisal shall assess the replacement value of all of the improvements then existing upon the Premises and to the extent the insurance coverage provided under this Paragraph 22 is required to be increased due to such appraisal, Tenant shall increase such insurance coverage to one hundred percent (100%) of the amount shown in such appraisal within twenty-one (21) days after receipt of such appraisal. In addition, to the extent at any time during the term of the Lease Tenant makes a capital improvement costing Fifteen Thousand Dollars (\$15,000.00) or more, Tenant shall increase the insurance coverage by one hundred percent (100%) of such improvement cost within twenty-one (21) days after completion of such improvement. Copies of any such appraisals and written evidence of such insurance increases shall be provided by Tenant to Landlord within five (5) days after receipt thereof by Tenant.

23. A.D.A. Compliance. Tenant at Tenant's sole cost and expense shall be responsible for complying fully with any and all applicable provisions of the A.D.A. (The Americans With Disabilities Act) as it relates to Tenant, Tenant's facilities, and the Premises leased hereunder. Tenant, at Tenant's sole cost and expense, shall defend, hold harmless, and indemnify Landlord against any and all claims, lawsuits, damages, and actions for compliance whatsoever, related to Tenant's responsibility under this Paragraph 23, in any way, relating to this Lease.

24. **Hazardous Materials.**

(a) Environmental Compliance. Tenant shall, at its sole cost and expense, comply with all Federal, State or local laws from time to time in effect ("Hazardous Materials Laws") concerning the management, use, generation, storage, transportation, presence, discharge or disposal of hazardous, toxic, radioactive or carcinogenic materials, substances or wastes ("Hazardous Materials"). Except for materials normally and customarily used in swimming facilities, such as chlorine and other cleaning supplies, kept in small quantities and safely stored, neither Tenant nor its agents, employees, contractors, sublessees, assignees or invitees shall use, handle, store, transport, release or dispose of any Hazardous Materials anywhere in, on, under or about the Premises or any portion thereof. Tenant shall cause any and all Hazardous Materials brought onto, used, generated, stored or discharged in the Premises to be removed from the Premises and transported for disposal in accordance with applicable Hazardous Materials Laws. Landlord shall have the right to enter the Premises from time to time to conduct tests, inspections and surveys concerning Hazardous Materials and to monitor Tenant's compliance with its obligations concerning Hazardous Materials and Hazardous Materials Laws. Tenant shall immediately notify Landlord in writing of any voluntary clean-up or removal action instituted or proposed by Tenant, any enforcement, clean-up, removal or other governmental or regulatory action instituted or threatened, or any claim made or threatened by any person against Tenant, the Premises, or any portion thereof, relating to Hazardous Materials or Hazardous Materials Laws. Tenant shall also supply to Landlord as promptly as possible, and in any event within five (5) business days after Tenant receives or sends same, copies of all claims, reports, complaints, notices, warnings or asserted violations relating in any way to the Premises or Tenant's use thereof and concerning Hazardous Materials or Hazardous Materials Laws.

(b) Landlord's Right to Inspect for Chlorination and Chemicals. In addition to any and all rights and remedies of Landlord hereunder, Landlord shall have the right to inspect and regulate anything whatsoever on the Premises relating to chlorine, chemicals and other Hazardous Materials, including but not limited to their use and storage, and specifically including total prohibition thereof. The Piedmont Fire Chief shall be primarily responsible on behalf of Landlord for enforcement of this Paragraph 24.

(c) Tenant's Indemnification. Except to the extent caused by Landlord's sole or active negligence or willful misconduct, Tenant shall indemnify, defend and hold Landlord harmless from any claims, causes of action, liabilities, losses, damages, injunctions, suits, fines, penalties, costs or expenses (including attorneys' fees and expenses) caused or alleged to have been caused by the presence of Hazardous Materials in or about the Premises, including, without limitation, any bodily injury, death, property damage, decrease in value of the Premises, caused or alleged to have been caused by the use, storage, generation, presence or release of Hazardous Materials in violation of Tenant's obligations under this Lease, whether such claims, causes of action or liabilities are first asserted during the Lease term or thereafter, and including without limitation, claims made against Landlord with respect to bodily injury, death or property damage sustained by third parties caused or alleged to have been caused by the use, storage, generation, presence or release of Hazardous Materials. The obligations of Tenant under this Paragraph 24 shall survive the termination of this Lease with respect to any claims or liability arising prior to such termination.

In addition to the insurance requirements in Paragraph 22 of this Lease, Tenant shall obtain and keep in force at all times insurance adequate to guarantee the indemnification

provisions of this paragraph. This insurance shall be in ~~a form and~~the amount of at least One Million Dollars (\$1,000,000), in a form acceptable to Landlord.

25. **No Assignment.** Tenant shall not assign or transfer this Lease or any interest therein, as security or otherwise, nor sublet the whole or any part of the Premises. Tenant agrees that neither this Lease nor any interest therein shall be assignable or transferable in any proceedings in execution against Tenant, or in any voluntary or involuntary proceedings in bankruptcy or insolvency taken by or against Tenant, or by process of any law applying to such proceeding without the written consent of Landlord.

26. **Remedies of Landlord.** If a petition or complaint shall be filed by Tenant or by any other party against Tenant, seeking relief or reorganization of Tenant under the Bankruptcy Act, or if Tenant shall for any reason or purpose go into bankruptcy proceedings voluntarily, or suffer an adjudication in involuntary bankruptcy proceedings, or if Tenant shall make any assignment for the benefit of creditors or shall petition for an arrangement under the Bankruptcy Act, or if any order, decree or judgment shall be made with respect to Tenant under any insolvency or bankruptcy act, or if any order, decree or judgment shall be made for the appointment of a trustee or receiver at the Premises against Tenant, or if any receiver, sheriff, marshal, constable, keeper or trustee is appointed to take possession of the Premises in any creditor's insolvency, dissolution, bankruptcy or reorganization, suit, action or other proceeding of any kind against Tenant, unless such petition or complaint shall be denied or dismissed, or such order, decree or judgment shall be superseded or the enforcement thereof stayed within thirty (30) days after it becomes operative, or unless possession of the Premises is returned to Tenant within thirty (30) days, or if Tenant shall attempt to abandon or assign said Premises, or remove its furniture, furnishings, fixtures and equipment therefrom other than in the ordinary

course of business, or if Tenant shall fail to remedy any default in any payment of any sum due hereunder for ten (10) days after receipt by it of Landlord's written notice of default, or if Tenant shall default in the performance of any other obligation hereunder for a period of thirty (30) days after receipt by it of Landlord's written notice of default plus such period of delay - if the default be other than the payment of money - as may be caused by governmental regulation or inability to obtain labor or materials by reason thereof, strikes, fire, earthquake or other acts of God or similar matters which are beyond the control of Tenant, then in any such event Landlord may at its option and without limiting Landlord in the exercise of any other right or remedy that it may have on account of such default, and without any demand or notice, declare this Lease at an end, re-enter the Premises with or without process of law, eject all parties in possession thereof and repossess the Premises together with all additions, alterations and improvements thereto. The remedies of Landlord as hereinabove provided are in addition to and not exclusive of any other remedy of Landlord herein given or which may be permitted by law. Any re-entry as provided for herein shall be allowed by Tenant without hindrance, and Landlord shall not be liable in damages or guilty of trespass because of such re-entry.

No waiver by Landlord at any time of performance by Tenant of any of the provisions of this Lease shall be deemed a waiver of such performance thereafter.

27. **Notice of Change of Condition Affecting Leased Real Property.** Landlord shall provide not less than a 30-day written notification to Tenant prior to initiating or permitting any significant change of condition affecting Tenant's use or occupancy of the Leased Real Property, including without limitation, the following changed conditions: construction on the Piedmont Recreation Department property, adjacent to the Leased Real Property; plans to sell food and/or drink at or near the entrance to the Leased Real Property; the sale, assignment or

transfer of the Leased Real Property to a third party, not affiliated with or a political subdivision of Landlord, the listing of the Leased Real Property for sale or execution of a written agreement for the sale of the Leased Real Property; and any lien or encumbrance of the Leased Real Property.

28. **Covenants of Parties.**

(a) **Landlord's Covenants.** Landlord covenants and agrees to keep and perform all the terms and conditions hereof on its part to be kept and performed, and that Tenant, keeping and performing all the terms and conditions hereof on its part to be kept and performed, may, subject to the terms and conditions hereof, have and hold the Premises, for the term hereof, without hindrance by Landlord. Landlord shall not be in default in the performance of any of its obligations in the Lease contained unless and until Landlord shall have failed to perform such obligations within thirty (30) days after written notice from Tenant to Landlord specifying wherein the obligation has not been performed.

(b) **Tenant's Covenants.** Tenant covenants and agrees to perform all the terms and conditions hereof on its part to be kept and performed and, at the expiration or sooner termination of this Lease, peaceably and quietly to quit and surrender to Landlord the Premises in good order and condition subject to the other provisions of this Lease. The performance of each and every covenant of Tenant hereunder shall be a condition, for nonperformance of which this Lease may be terminated as in this Lease; provided, however, that Tenant shall not be deemed to be in default in the performance of any of its obligations in the Lease contained unless and until Tenant shall have failed to perform such obligations within thirty (30) days of receipt of written notice of such default.

29. **Financial Records.** Landlord shall have the right at all reasonable times to inspect the books and financial records of Tenant. Such books and financial records shall be released to Landlord within ten (10) calendar days of receipt by Tenant of a written request for their production from Landlord.

30. **Inspection of Premises.** Landlord shall be entitled to enter upon the Premises at all reasonable times for the purpose of determining either that Tenant is complying with the terms and conditions hereof or for the purpose of posting thereon notices of nonresponsibility for any construction, alteration or repair thereof.

31. **Not a Joint Venture or Partnership.** It is understood and agreed that Landlord shall in no event be construed or held to be a partner or associate of or joint venturer with Tenant in the use of the Premises, nor shall Landlord be liable for any debts incurred by Tenant in any way connected with the use of the Premises, but it is understood and agreed that the relationship of the parties is, and at all times shall remain, that of Landlord and Tenant. Landlord shall have no right of control over the operation of the Premises except as expressly provided in this Lease.

32. **Non-Waiver of Breach.** The waiver by either party of any breach of any term, covenant or condition herein contained may be accomplished only by a writing signed by such party, and nothing other than such a writing shall be deemed to be a waiver of any term, covenant or condition or any breach thereof.

33. **Waiver of Claims for Damages.** Tenant acknowledges that the Premises are in good and tenantable condition at the commencement date and hereby waives as against Landlord all claims for damages hereafter suffered by Tenant except claims for damages resulting from the willful or negligent acts of Landlord, its agents or servants. Tenant hereby expressly waives the

38. **Approvals by Landlord.** All consents and approvals herein required to be obtained from Landlord shall not be unreasonably withheld by Landlord and shall be obtained from the City Administrator of the City of Piedmont in writing.

39. **Dispute Resolution.** If a dispute arises out of or related to this Lease or alleged breach, and if the dispute cannot be settled through direct discussions, the parties agree that before resorting to any other method of resolving the dispute, the matter shall be submitted to mediation before a mediator mutually agreed to by the parties, or, failing such agreement, a mediator appointed by the Alameda County Superior Court. The cost of the mediation shall be borne equally by the parties. In the event mediation fails to resolve the dispute, the parties agree that the dispute shall be resolved by judicial reference pursuant to the provisions of Code of Civil Procedure §638-645.1. The cost of the referee shall be borne equally by each party, or in such other manner as deemed equitable by the referee. Any referee must be a retired judge and should be experienced in resolving disputes. The referee shall be agreed upon the parties within ten (10) days of the demand for judicial reference. In the event the parties cannot agree on the selection of a referee, any party may petition the Alameda County Superior Court for the appointment of a qualified retired judge as the referee.

40. **Relocation.** Tenant fully releases and discharges Landlord (in its capacity as Landlord and otherwise as a municipal corporation) from all and any manner of rights, demands, liabilities, obligations, claims, or cause of actions, in law or equity, of whatever kind or nature, whether known or unknown, whether now existing or hereinafter arising, which arise from or relate in any manner to the sale of the Premises; the full or partial termination or expiration of Tenant's leasehold interest as permitted under this Lease; or the relocation of Tenant's business operations or the relocation of any person or persons, business or businesses, or other occupant

or occupants located on the Premises including, without limitation, the specific waiver and release of any right to any relocation benefits, assistance and/or payments under Government Code sections 7260 et seq. ("**Relocation Assistance Law**"), notwithstanding that such relocation assistance, benefits and/or payments may be otherwise required under the Relocation Assistance Law or other state or federal law. Tenant acknowledges and agrees that the release and waiver set forth in this Paragraph 40 is material consideration for Landlord's lease of the Premises to Tenant on the terms set forth herein and that, but for this release and waiver, Landlord would not have leased the Premises to Tenant. It is hereby intended that the above release relates to both known and unknown claims that the Tenant may have, or claim to have, against the Landlord with respect to the subject matter contained herein or the events relating thereto. By releasing and forever discharging claims both known and unknown which are related to or which arise under or in connection with the items set out above, the Tenant expressly waives any rights under California Civil Code section 1542, which provides:

"A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM OR HER MUST HAVE MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE DEBTOR."

41. **Attorneys' Fees**. In any action or proceeding which either party brings against the other to enforce its rights hereunder, the unsuccessful party shall pay all costs incurred by the prevailing party, including reasonable attorneys' fees, which amounts shall be a part of the judgment in said action or proceeding.

42. **Authority.** Tenant shall deliver to Landlord on execution of this Lease a certified copy of a resolution of its board authorizing the execution of this Lease and naming the officers of the entity that are authorized to execute this Lease on behalf of the entity.

43. **Cancellation of Lease.** It is agreed by the parties that all prior leases and agreements between the parties, including but not limited to that certain lease dated June 22, 1964, as amended by Amendment to Lease dated January 1, 1969, that certain lease dated January 31, 1978, that certain lease dated July 1, 1993 and that certain Amendment to Lease dated June 30, 2008, are hereby canceled and terminated as of midnight on the date of adoption of this Lease.

DATED: _____ 2010

LANDLORD:
CITY OF PIEDMONT
A Municipal Corporation

TENANT:
PIEDMONT SWIM CLUB
A California Mutual Benefit Non-Profit Corporation

By: _____
Mayor/Council Member

By: _____
Timothy Rood, President

By: _____
William Drum, Vice President

ATTEST:

City Clerk or Deputy City Clerk

APPROVED AS TO FORM:

City Attorney or Deputy City Attorney

Document comparison done by DeltaView on Friday, January 21, 2011 3:42:54 PM

Input:	
Document 1	C:\Documents and Settings\fazzino-d\My Documents\Echo\Piedmont Swim Club Lease (1).doc
Document 2	C:\Documents and Settings\fazzino-d\My Documents\Echo\Piedmont Swim Club Lease (PSC).doc
Rendering set	Standard

Legend:	
<u>Insertion</u>	
Deletion	
Moved from	
<u>Moved to</u>	
Style change	
Format change	
Moved deletion	
Inserted cell	
Deleted cell	
Moved cell	
Split/Merged cell	
Padding cell	

Statistics:	
	Count
Insertions	6
Deletions	5
Moved from	0
Moved to	0
Style change	0
Format changed	0
Total changes	11

PIEDMONT SWIM CLUB LEASE

THIS LEASE ("Lease") is between the CITY OF PIEDMONT, a municipal corporation, hereinafter called "Landlord" or "City" and PIEDMONT SWIM CLUB, a California non-profit mutual benefit corporation, hereinafter called "Tenant."

1. **Premises.** Landlord leases to Tenant and Tenant leases from Landlord the approximately one-half (1/2) acre real property and all swimming pools, buildings, fixtures, landscape areas and all other improvements located on, about, over, or under the real property (and any improvements hereafter constructed or placed on the real property by Tenant in accordance with this Lease), commonly known as 777 Magnolia Avenue, Piedmont, California 94611, more particularly described on the map attached hereto as Exhibit A, which is incorporated herein by this reference (hereinafter called the "Premises").

2. **Condition of Premises.** The Premises are being leased to Tenant in their current, existing, "AS-IS" condition "WITH ALL FAULTS." Tenant is familiar with the existing condition of the Premises, and acknowledges that Landlord has made no representation or warranty regarding the condition of the Premises, or any portion thereof, except as specifically stated in this Lease. Landlord acknowledges that the fixtures, equipment and improvements on the Premises have been approved by Landlord and properly maintained, prior to the "effective date."

3. **Term.** This Lease shall commence on July 1, 2011 (the "Effective Date") and shall continue for a period of fifteen (15) years and shall terminate at 5:00 p.m. on June 30, 2026 (unless earlier terminated pursuant to Paragraph 4).

Field Code Changed
Formatted: Line spacing: single
Deleted: ¶ ¶ OAK #4852-8675-9944 v7
Formatted: Font: 8 pt

4. **Early Termination.**

Formatted: Keep with next

(a) Early Termination by City. Landlord (and its successors and assigns) shall have the right to terminate this Lease as of June 30 of any year prior to June 30, 2026, upon one (1) year's written notice to Tenant, provided ~~that Landlord~~ complies with either subparagraph 4(a)(1) or 4(a)(2) below.

Deleted: it

(1) Improved Facility Membership. City has Secured Funding for the construction of an Improved Facility at the current Piedmont Swim Club site or in close proximity, ~~and provides~~ a pass to the Improved Facility at no charge to each current member of the Piedmont Swim Club as of the termination date of this Lease, to use the Improved Facility for a period of one (1) year commencing upon the opening of the Improved Facility. For purposes of this provision, the following definitions shall apply:

Deleted: it shall provide

(i) "Secured Funding" means that City either has funds placed in a separate account segregated from City's general fund or legally binding commitments for such funds, all designated for the construction of a swim facility only, which total funds on deposit and/or committed represent at least 80% of the total estimated cost of construction of an Improved Facility.

(ii) "Improved Facility" means a lap swimming pool of the same or greater capacity, additional swimming facilities such as a children's or recreational pool, and related facilities including a locker room or further pool space, all of which together will provide increased and improved swimming facilities to the Piedmont community. An "Improved Facility" shall not be a facility constructed on Piedmont School District property which is primarily for use of Piedmont High School and Middle School aquatic programs, including Swimming, Water Polo and/or Diving.

Field Code Changed

Formatted: Line spacing: single

Deleted: ¶

¶
OAK #4852-8675-9944 v7

Formatted: Font: 8 pt

2

(2) Initiation Fee Reimbursement. City has provided notice of

termination effective no earlier than June 30, 2016, ~~and reimburses~~ those members of Tenant who paid an initiation fee after January 1, 2011 for the difference between that fee adjusted for the number of years less than 15 they have been a member of Tenant (that is, the initiation fee times the fraction 15 minus the number of years of membership over 15) and what it would have cost the member to buy the one-year use pass referred to ~~in this Paragraph 4(a)(2).~~ Additionally, Landlord shall provide a pass to the facility at no charge to each current member of the Piedmont Swim Club as of the termination date of this Lease, to use the facility for a period of one (1) year commencing upon the termination of this Lease.

Deleted: City shall reimburse

Deleted: above.

(b) Early Termination by Tenant. In addition to the provisions elsewhere in this Lease, Tenant may terminate the Lease upon one (1) year's written notice to Landlord prior to the effective date of Tenant's dissolution or Tenant ceasing to operate the Premises.

5. Rent. The facility use privileges which Tenant agrees to provide to Landlord, the Piedmont School District, the Piedmont Swim Team and the residents of Piedmont, as enumerated in Paragraphs 10, 11, 12, 13 and 14 of this Lease, shall be in lieu of cash rent. Tenant shall pay to Landlord, as additional rent ~~upon expiration or earlier termination of the Lease,~~ any funds contained in the Capital Improvement Fund in accordance with the terms of Paragraph 18 of this Lease.

6. End of Lease. Tenant shall quit the Premises upon expiration or earlier termination of the Lease and surrender them to Landlord. It is expressly agreed that all of the improvements, equipment and fixtures on the Premises (including equipment installed which is necessary for the proper functioning of the swimming pool) belong to Landlord, and at the expiration or earlier termination of this Lease, Tenant shall have no rights to or ownership

Field Code Changed

Formatted: Line spacing: single

Deleted: ¶
¶
OAK #4852-8675-9944 v7

Formatted: Font: 8 pt

2/3/11 (15361) #402783.1
Our Clean 402702
Their Original 402124

whatsoever in any of such improvements, equipment or fixtures on the Premises; provided, however, that Landlord may, at Landlord’s election, demand the removal from the Premises of fixtures and improvements not approved by Landlord as required by this Lease or not maintained in accordance with the terms of this Lease. Landlord shall make such demand by written notice to Tenant at least six (6) months prior to the effective expiration or earlier termination of the Lease in which case Tenant shall demolish, remove and clear all such improvements and fixtures from the Premises. Notwithstanding the foregoing, Tenant shall have the right to retain any personal property which is leased by Tenant or which belongs to a member of Tenant and is on loan to Tenant, and the Piedmont Swim Team (or any person or entity permitted to use the Premises by Tenant) shall have the right to retain any personal property which is owned or leased by it, provided that the burden of proof that specific personal property shall be retained by some person or entity other than Landlord shall be on the person or entity claiming such personal property. All such personal property leased by Tenant or owned by a member of Tenant or the Piedmont Swim Team or any person or entity permitted to use the Premises by Tenant shall be removed from the Premises upon Tenant vacating the Premises, and any remaining articles of personal property shall become property of Landlord and Landlord shall have no duty to determine prior ownership (but shall have the right to demand removal thereof as provided above in this Paragraph 6). In the event Tenant holds over, Tenant shall pay Landlord rent thereafter in the sum of Five Hundred Dollars (\$500.00) per day, until Tenant shall vacate the Premises, which rental shall increase to One Thousand Dollars (\$1,000.00) per day after Tenant has held over for ninety (90) days.

7. **Taxes and Assessments.** Tenant shall pay all taxes and assessments which shall be imposed upon the improvements constructed or placed upon the Premises. It is agreed that

4

2/3/11 (15361) #402783.1
 Our Clean 402702
 Their Original 402124

Field Code Changed

Formatted: Line spacing: single

Deleted: ¶
 ¶
 OAK #4852-8675-9944 v7

Formatted: Font: 8 pt

such taxes and assessments for the last year of this Lease shall be prorated between Landlord and Tenant as of the date Landlord shall take possession of said Premises, provided that in the event of such proration Landlord shall not be required to pay to Tenant any sum of money in reimbursement of taxes already paid by Tenant. Tenant recognizes and understands that this Lease may create a possessory interest subject to property taxes levied on such interest.

8. **Public Utilities.** All water, gas, electricity or other public utilities used upon or furnished to the Premises shall be paid for by Tenant.

9. **Use.** The Premises shall be used for the operation and maintenance of a swimming pool, and related facilities, subject to any applicable or required permits and approval from any governmental agency. Tenant shall use the Premises for no other purposes without the prior written consent of Landlord.

10. **Rules of Operation.**

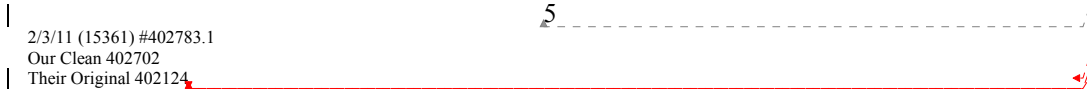
(a) **Operations and Tenant Memberships.** Tenant shall conduct its operations in conformity with its Articles of Incorporation, By-Laws and Rules and Regulations as presently in effect, or as they hereafter may be amended. The Premises shall be maintained in a safe, clean and sanitary manner and operated in compliance with any and all governmental regulations or laws now or hereafter enacted, specifically including but not limited to, all applicable public health laws.

(b) **Memberships.** A membership in Tenant may only be purchased from Tenant itself and not from any other member. All of the rights, benefits and duties of membership, except the right to vote at meetings of members, shall extend to all persons who reside with and are members of the same family as any member. For the purpose of voting at meetings of members and exercising all of the rights of members other than the privilege of

5

2/3/11 (15361) #402783.1
Our Clean 402702
Their Original 402124

Field Code Changed
Formatted: Line spacing: single
Deleted: ¶ ¶ OAK #4852-8675-9944 v7
Formatted: Font: 8 pt



using the recreation facilities of Tenant, it shall be deemed that each family which is resident in one home shall have one membership and one vote. No fractional memberships shall be permitted.

(c) Limitation of Memberships. The membership of Tenant shall be limited to Six Hundred Fifty (650) members. Five Hundred Twenty (520) memberships shall be reserved for bona fide residents of the City of Piedmont, California. The term "resident of Piedmont" shall mean a person whose primary residence or the lot upon which such residence is situated is located in whole or in part in the City of Piedmont, provided that Piedmont municipal taxes are payable with respect to such residence and/or lot. Any person who has his primary residence outside the City of Piedmont (notwithstanding the fact that such person continues to own a house located in the City of Piedmont) shall be deemed not to be a bona fide resident of the City of Piedmont.

There shall be no more than One Hundred Thirty (130) members of Tenant who are not residents of Piedmont. Notwithstanding the above, no membership may be issued to a non-Piedmont resident unless and until there are at least twenty-one (21) open memberships available.

Tenant shall deliver to Landlord during the month of October of each year of the Lease an accurate list of all members of the Tenant, together with their then current residence addresses.

There shall be no restrictions upon the use of Tenant's facilities based on race, religion, color, creed, national origin, gender, or sexual preference.

No alcoholic beverages shall be brought onto or consumed on the Premises except where approved by Landlord.

Field Code Changed
Formatted: Line spacing: single
Deleted: ¶ ¶ OAK #4852-8675-9944 v7
Formatted: Font: 8 pt

(d) Availability of Facilities. The swimming pool facilities shall be operated by Tenant for not less than eleven (11) months during each calendar year, unless Tenant shall determine that weather conditions, or other factors, such as facility repairs or maintenance, are such as to make a shorter period of operation necessary or desirable. In the event a shorter period of operation is necessary or desirable, Tenant shall obtain the prior written consent of Landlord, which consent shall not be unreasonably withheld. Tenant shall give Landlord at least fifteen (15) days' advance written notice of any change in regular hours of operation on days on which the swimming pool facilities are open, but shall not be required to give notice for social events or changes the duration of which are not greater than two (2) days; provided that such notice shall not be required in the event of a temporary closure (not to exceed ten 10 days) due to Act of God, emergency, shutdown of equipment, or for health or safety reasons of major significance.

The swimming pool facilities shall not be operated later than 10:00 p.m., nor shall Tenant cause outdoor lights, other than safety night lights, to be used on the Premises without the prior written consent of Landlord.

(e) Scheduling of Usage: Rules and Regulations. Tenant agrees to make the facility available at certain times to certain community groups which have historically **benefitted** from access to the facility, including the Piedmont Unified School District (the "School District"), the Piedmont Swim Team, and the City of Piedmont. Such use shall be subject to the specific provisions of Paragraphs 11, 12, 13 and 14 and other applicable provisions of this Lease. Tenant agrees to consider requests for additional use privileges from these user groups as well as other parties, but Tenant shall have no obligation to permit additional access. The facility rental fee, if any, and manner of use of any additional use of Tenant's facilities by the School District, by the Piedmont Swim Team, and by other parties other than Tenant's members beyond that

Deleted: benefitted

Field Code Changed

Formatted: Line spacing: single

Deleted: ¶
 ¶
 OAK #4852-8675-9944 v7

Formatted: Font: 8 pt

2/3/11 (15361) #402783.1
 Our Clean 402702
 Their Original 402124

7

listed in Paragraphs 11, 12, 13 and 14 and other applicable provisions of this Lease shall be determined by Tenant after taking into account in good faith all of the uses of such facilities that are permitted at approximately the same times. In the event that Landlord objects to any such determination by Tenant with respect to use by any party, Landlord ~~shall~~ so notify Tenant in writing, and Tenant and Landlord shall thereafter cooperate and use their best efforts to resolve any disagreement with respect to the scheduling and manner of use of such facilities.

Deleted: may

If any disagreement has not been resolved within thirty (30) days of the date that Landlord notifies Tenant in writing of such disagreement, then either Landlord or Tenant may activate the following dispute resolution process by providing written notice thereof to the other party setting forth exactly the dispute to be resolved:

(1) The dispute shall be resolved by a three person panel to consist of the City Administrator of Landlord or his/her designee, the President of Tenant or his/her designee, and a third person to be mutually agreed upon by the City Administrator of Landlord and the President of Tenant.

(2) The third person of the panel shall be selected within twenty-one (21) days after one party has activated the dispute resolution mechanism by written notice to the other.

(3) If no third person has been mutually agreed to within such twenty-one (21) day period, then either party may request that such third person be appointed by the Presiding Judge of the Alameda County Superior Court by a written Petition filed with such Judge, specifically asking for such appointment to be made no later than twenty-one (21) days after such Petition has been filed with the Court.

Field Code Changed
Formatted: Line spacing: single
Deleted: ¶
 ¶
 OAK #4852-8675-9944 v7
Formatted: Font: 8 pt

(4) Such three person panel shall convene no later than twenty-one (21) days after such third person has been either mutually agreed to by the parties or appointed by the Presiding Judge, and shall render a binding decision no later than thirty (30) days after the date on which the panel initially convenes.

(5) The basic standard governing such panel’s deliberations and decision shall be reasonable adherence to the provisions of this Lease and carrying out the intent thereof.

(6) This dispute resolution process shall be exclusive, and no other process, whether mediation pursuant to Paragraph 39 hereof, litigation, or any other dispute resolution process may be used to resolve any disagreement with respect to scheduling or the manner of use. without the prior mutual written agreement of the parties hereto; provided that such dispute resolution process shall in no way abrogate the rights of the Landlord to schedule its usage pursuant to Paragraph 12 hereof.

The School District, Landlord (through its Recreation Department or otherwise), the Piedmont Swim Team, and all other parties other than Tenant members who utilize the facilities leased by Tenant hereunder shall be subject to and required to comply with the same Rules and Regulations concerning use of the facilities (including without limitation, the Rules and Regulations related to health and safety and courteous behavior) as are applicable to Tenant’s members and the requirements with respect to insurance set forth in Paragraph 22.

11. **Use by School District.** The School District may use Tenant’s facilities as follows:

- (a) Adaptive Physical Education—one lane, 9:00 to 11:30 AM, M-F, September-May.

2/3/11 (15361) #402783.1
Our Clean 402702
Their Original 402124

Field Code Changed
Formatted: Line spacing: single
Deleted: ¶ OAK #4852-8675-9944 v7
Formatted: Font: 8 pt

(b) Piedmont High School Swim Team—Practice, six lanes, 7:00-9:00 PM, M-F, March-May.

(c) Piedmont High School Swim Team—Meets, six lanes, three hours per day during season between 2:00 PM and 6:00 PM. Total use by District shall be three hours per day.

(d) Piedmont High School Water Polo Team—Practice, six lanes, 7:00-9:00 PM, M-F, September-November.

(e) Piedmont High School Water Polo Team—Meets, six lanes, three hours per day during season between 2:00 PM and 6:00 PM. Total use by District shall be three hours per day.

(f) Piedmont Middle School Water Polo Class—three lanes, 10:00 AM-12:00 Noon, M-F, two weeks per year.

Any additional use by the School District shall be subject to mutual agreement between Tenant and the School District as to schedule and fee.

12. **Use by Recreation Department.** Landlord, including its Recreation Department, shall be entitled to nonexclusive use of Tenant’s facilities three (3) hours per weekday during the summer (June 15 – August 31) at mutually agreed upon times, except as provided in the next following paragraph. During the remainder of the year (September 1 – June 14) use by Landlord will be allowed up to six (6) hours of nonexclusive use per week but not more than two (2) hours per day, at mutually agreed upon times, except as provided in the next following paragraph. The type of use will be at the discretion of Landlord but such use shall not be transferable to the School District, the Swim Team or other non-member use. Said hours of use shall be noncumulative so that if Landlord, including its Recreation Department, does not use its hours on one day, it cannot transfer them to some other day.

Field Code Changed
Formatted: Line spacing: single
Deleted: ¶ ¶ OAK #4852-8675-9944 v7
Formatted: Font: 8 pt

The facilities shall be available for use by the Recreation Department at such times, in addition to the times hereinabove specified, as may from time to time be mutually agreed in writing by Landlord and Tenant. With respect to the scheduling of the use of the facilities by Landlord through its Recreation Department, the parties further agree as follows: The Recreation Department shall have the right with respect to one-half (1/2) of the usage of the facilities to which it is entitled (i.e., one and one-half (1-1/2) hours per weekday during the summer and three (3) hours per week on weekdays during the remainder of the year, but not more than two (2) hours per day) to select the exact dates and times of its usage, provided that:

(a) The Recreation Department shall be required to give not less than ninety (90) days advance written notice of its desire to exercise said right and select such exact dates and times; and

(b) Tenant shall be entitled to designate up to three (3) programs or events in any calendar year that, once they are scheduled, may not be preempted by the Recreation Department's selection of dates and times of its usage; provided, however, that no such event or program may be for a duration in excess of three (3) hours per day, and not more than one (1) such program or event shall be scheduled on any one day; provided further, that the foregoing limitation on events or programs shall not apply to competitions of the Piedmont High School Swim Team/Water Polo Team and/or the Piedmont Swim Team, but in no case shall there be more than six (6) such scheduled competitions during any calendar year without the prior written approval of Landlord. Any such designations by Tenant shall be in writing and shall be made in January of each year with respect to that calendar year.

The uses provided hereunder for the School District and Landlord may be reasonably shared with members of Tenant or members of the public, so long as sufficient space is reserved

Field Code Changed

Formatted: Line spacing: single

Deleted: ¶
 ¶
 OAK #4852-8675-9944 v7

Formatted: Font: 8 pt

for the uses of the School District and/or Landlord. Such use shall be subject to mutual agreement in writing between Tenant and Landlord.

13. **Public Use.** Bona fide residents of Piedmont who are not members of Tenant shall have the right to use Tenant’s facilities as follows:

(a) General Use on Weekdays. One weekday (the same day of each week) per week shall be set aside for such public use on either a Tuesday, Thursday, or Friday; provided that such weekday for public use shall not apply during the week in which Saturday use as provided in Paragraph 12(b) hereafter applies.

(b) Saturday. One Saturday (the same Saturday each month) per month shall be set aside for such public use.

(c) Notice of Public Use Days. Tenant shall provide Landlord with written notice of the days set aside for public use as provided in Subparagraphs 12(a) and 12(b) no later than July 1, 2011, and thereafter Tenant may only change such a public use day by at least thirty (30) days prior written notice thereof to Landlord.

(d) First Come, First Served. On the public use days, the residents of Piedmont who are not members of Tenant shall be allowed to use Tenant’s facilities on an equal basis, and on a first come, first served basis, with the members of Tenant until the maximum capacity of Tenant’s facilities have been reached, and when new openings are available on such public use days, the same access rules shall apply; provided that such use by Tenant’s members and by the public shall be subordinate to use as set forth in Paragraph 10 hereof.

(e) Fees for Public Use. Tenant may charge a separate fee for each day of use by a Piedmont resident who is not a member of Tenant at a rate to be determined by Tenant, not to exceed Fifteen Dollars (\$15.00) per day for each adult and Eight Dollars (\$8.00) per day for

12

2/3/11 (15361) #402783.1
Our Clean 402702
Their Original 402124

Field Code Changed
Formatted: Line spacing: single
Deleted: ¶ ¶ OAK #4852-8675-9944 v7
Formatted: Font: 8 pt

each child, defined as any person who has not yet attained age eighteen (18). Landlord and Tenant shall cooperate in issuing cards or other means of identification for multiple use by Piedmont residents, and Landlord shall have the option of subsidizing use by children. Notwithstanding the above, Tenant may increase these fees from time to time by an amount not to exceed the cumulative increase in the All Items Consumer Price Index (CPI) for San Francisco-Oakland-San Jose from the CPI set for June, 2010.

(f) Hours Available. Tenant shall make Tenant’s facilities available for such public use for the same hours that Tenant makes such facilities available to its own members.

14. **Piedmont Swim Team**. Tenant shall be permitted by Landlord to establish a contractual relationship with The Piedmont Swim Team (or a substantially similar successor organization) to use Tenant’s facilities on a reasonable basis at agreed upon times and upon mutually agreed upon terms and conditions including fees to be paid by The Piedmont Swim Team to Tenant. It is anticipated by both parties that such use shall continue on a reasonable basis in the future. Tenant agrees to make the facility available for rental by the Piedmont Swim Team at the following times:

- (a) September-May, three lanes, 6:00 AM-7:30 AM, M-F and 3:30 PM-6:00 PM, Monday through Friday.
- (b) June-August, three lanes, 6:00 AM-8:30 AM, Monday through Friday.
- (c) During these schedules the Piedmont Swim Team may use up to two additional lanes when they are not in use by Piedmont Swim Club members, subject to coordination by Swim Club staff.

Changes to the Piedmont Swim Team’s hours of use of Tenant’s facilities shall be subject to mutual agreement between Tenant and the Piedmont Swim Team.

Field Code Changed
Formatted: Line spacing: single
Deleted: ¶ ¶ OAK #4852-8675-9944 v7
Formatted: Font: 8 pt

15. **Learn to Swim Program.** Tenant (or a qualified party designated by Tenant and acceptable to Landlord) shall offer to all Piedmont residents, on the Premises, a Learn to Swim Program within the general scope of such program that Tenant is currently conducting on the Premises, unless Landlord elects to offer a comparable program. Tenant may make a reasonable charge for such program in amounts to be previously approved by Landlord; provided that as to the charges for such Program by Tenant as of July 1, 2011, any such charges may be increased thereafter based upon the increase in the All Items Consumer Price Index (CPI) for San Francisco-Oakland-San Jose from June, 2010, to June 1 of the year immediately preceding the calendar year in which such charges are made, and such increases shall be deemed reasonable and shall not require approval by Landlord.

16. **Terms of Membership Sales.** As a specific and important condition, Tenant agrees that its Articles of Incorporation, By-Laws and Rules and Regulations shall be consistent with this Lease.

(a) **No Sales of Memberships by Members to Third Parties.** The By-Laws of Tenant, as amended on January 12, 2010, clearly reflect that Tenant is the only entity or person that may sell memberships in Tenant. As a result, no sales of memberships shall be allowed from members of Tenant to any person, provided that Tenant's By-Laws may permit the transfer of a membership upon a member's death, to a family member who resides in the same household as the deceased member, subject to a fee to be determined by Tenant.

(b) **Prices of Memberships.** Tenant shall establish a sales price at which memberships ("New Memberships") will be sold to new members by Tenant after the Effective Date. The terms and conditions on which such sales will take place shall be as set forth in Tenant's By-Laws and Rules and Regulations.

Field Code Changed
Formatted: Line spacing: single
Deleted: ¶ ¶ OAK #4852-8675-9944 v7
Formatted: Font: 8 pt

Unless otherwise agreed by Landlord, the price ("New Membership Sales Price") at which Tenant sells New Memberships shall be determined by Tenant, but in no case shall exceed One Thousand Five Hundred Dollars (\$1,500.00) per year.

(c) Repurchases. Notwithstanding anything herein to the contrary, Landlord acknowledges and agrees that Tenant shall not be obligated to repurchase any membership for any reason.

(d) Definition of "Membership." The term "Membership" as used in this Paragraph 16 and elsewhere in this Lease shall include reference to the membership certificate issued by Tenant which evidences such membership.

17. **Buildings, Improvements and Fixtures.** The requirements of this Paragraph 17 shall not apply to expenditures for ordinary operations and routine maintenance nor to emergency work or repairs to the Premises nor to individual work that does not exceed \$25,000.00. Subject to the conditions and requirements set forth in this Paragraph 17 and to Paragraph 19 hereof, Tenant shall have the right, at its sole cost and expense, to construct additional buildings or improvements and install necessary trade fixtures for uses strictly accessory to its permitted use on the Premises, or to make alterations or additions to existing buildings and improvements for uses consistent with this Lease except as set forth in this Paragraph 17, provided, however, that no such additional buildings, improvements or trade fixtures shall be constructed or installed without the prior written consent of Landlord to the plans and specifications thereof, which consent shall be granted or denied in Landlord's sole discretion. If Landlord approves proposed buildings, improvements or fixtures, Landlord's consent may be conditioned upon Tenant's compliance with this Paragraph. In no event shall Tenant undertake any construction or installation of additional buildings, improvements or trade

Deleted: ;

Deleted: Tenant establishing

Field Code Changed

Formatted: Line spacing: single

Deleted: ¶
¶
OAK #4852-8675-9944 v7

Formatted: Font: 8 pt

fixtures without the prior written consent of Landlord. Any such additional buildings and improvements shall be erected and constructed by a licensed general contractor approved by Landlord, shall belong entirely to Landlord, and shall become part of the Premises subject to this Lease.

Deleted: Consent of the Landlord under this section shall not apply to expenditures for ordinary operations and maintenance, nor to emergency work, nor to individual work that does not exceed \$25,000.

(a) Standard of Work. All work to be performed by or on behalf of Tenant pursuant hereto shall be performed diligently and in a first-class, workmanlike manner, and in compliance with this Lease and all laws applicable to the Premises, including statutes, ordinances, rules, regulations, applicable building code and zoning ordinances of governmental agencies, including Landlord, and all requirements of insurance carriers. Landlord shall have the right, but not the obligation, to inspect periodically any work on the Premises and except in cases of ordinary work, routine maintenance, emergency repairs. Landlord may require changes in the method or quality of the work provided that Landlord shall pay any increase in the cost of the work required by Landlord's changes to the method or quality of work.

(b) Damage: Removal. Tenant shall repair all damage to the Premises and all portions thereof caused by the construction of improvements or installation of Tenant's fixtures, equipment, furniture and any alterations thereto. All such removals and restoration shall be accomplished in a good and workmanlike manner so as not to cause any damage to the Premises whatsoever and in strict accordance with all applicable laws.

(c) Construction Requirements.

(1) Prior to commencing any work of improvement under this Paragraph 17, and during the course of work, Tenant shall require its contractors to maintain and provide evidence of "all risks" builder's risk and worker's compensation insurance coverages acceptable to Landlord. Prior to commencing any work, Tenant shall deliver to Landlord

Field Code Changed
Formatted: Line spacing: single
Deleted: ¶
OAK #4852-8675-9944 v7
Formatted: Font: 8 pt

certificates of insurance evidencing the coverages. Tenant shall, or shall cause its contractors to, maintain, keep in force and pay all premiums required to maintain and keep in force the insurance above at all times during which such work is in progress.

(2) Tenant and its contractors and subcontractors shall ensure compliance with any applicable prevailing wage laws and regulations.

(3) Prior to commencing any work on the Premises, Tenant shall provide to Landlord, for Landlord’s review and written approval, a construction budget for the planned improvements and proof of adequate funding and financing to complete the improvements. Tenant shall provide Landlord any additional information reasonably requested by Landlord.

(d) As-Built Plans. Upon completion of any work on the Premises (and where applicable), Tenant shall give Landlord notice of all changes in plans or specifications made during the course of the work and shall, at the same time and in the same manner, supply Landlord with "as built" drawings, both on paper and on CAD, accurately reflecting all such changes.

18. **Capital Improvement Fund**. Tenant shall maintain a "Capital Improvement Fund" which shall be used for maintenance of and capital improvements on the Premises.

Tenant shall provide Landlord with an annual accounting of expenditures from and additions to the Capital Improvement Fund. Tenant shall deposit at least Thirty-Three Thousand Three Hundred Thirty-Three Dollars (\$33,333.00) per year into this Fund. Upon expiration or earlier termination of the Lease, the amount remaining in the Capital Improvement Fund, after all liabilities have been paid, shall be paid to Landlord as additional rent. If Tenant continues to operate the facilities under a new agreement with Landlord and the amount remaining in the

Deleted: Any expenditures from the Capital Improvement Fund by Tenant must have prior written approval by Landlord. Requests for such approval must be made to the City Administrator, or the Administrator's designee, who shall have the authority to approve these requests. The Administrator shall respond within ten (10) business days from receipt of such written request.

Field Code Changed

Formatted: Line spacing: single

Deleted: ¶
¶
OAK #4852-8675-9944 v7

Formatted: Font: 8 pt

Capital Improvement Fund exceeds six months' total operating expenses as shown on Tenant's compiled financial statements for the final year of the Lease, those excess funds shall be paid to Landlord. During the final three years of the Lease, Tenant shall not lower its annual dues for the purpose of depriving Landlord of these payments, except that Tenant shall have the right to lower, prorate (with or without a balloon payment of the balance if a new lease is signed) or eliminate its initiation fee to attempt to increase membership or ameliorate the loss of dues revenue during those years.

19. **Repairs and Maintenance.** Subject to Paragraph 17 hereof. Tenant shall, at its sole cost and expense, keep and maintain all buildings and improvements, and all appurtenances thereto, in good and neat order and repair and in satisfactory operating condition. In addition, Tenant shall restore and rehabilitate any buildings or improvements, which may be destroyed or damaged by fire or other insured casualty (subject to the qualifications stated in Paragraph 22 hereof) and shall allow no nuisance to exist or be maintained on the Premises. Tenant shall keep and maintain the grounds, sidewalks, pools and landscaped areas on the Premises in good and neat order and repair. Tenant expressly waives all right to make repairs at Landlord's expense under sections 1941 and 1942 of the California Civil Code. Tenant agrees that it will not commit or permit waste upon the Premises.

Deleted: ,
Deleted: satisfactory to Landlord.

20. **Mechanics' and Other Liens.** Tenant covenants and agrees to keep the Premises, and every part thereof, free and clear of any and all mechanic's, materialmen's or other liens. Tenant shall pay for all work performed on the Premises by its employees or contractors and shall indemnify, defend and hold Landlord harmless from any and all liability resulting from any lien or claim of lien arising out of such work. Tenant shall give Landlord at least thirty (30) days written notice in advance of making any alteration, addition or improvement, except in the

Deleted: In the event Tenant fails, in the reasonable judgment of Landlord, to maintain the Premises in good order, condition and repair, Landlord shall, upon five (5) days' written notice to Tenant, have the right to perform such maintenance, repairs or refurbishing at Tenant's expense, provided Tenant fails to do so within that five-day period. If Landlord elects to undertake any such repairs or maintenance as provided above, then Tenant shall pay as additional rent Landlord's actual costs paid or incurred in connection therewith.

Field Code Changed
Formatted: Line spacing: single
Deleted: ¶
¶
OAK #4852-8675-9944 v7
Formatted: Font: 8 pt

event of emergency or safety-related repairs, or in the event of work, repairs, or replacements which are less than Twenty-Five Thousand Dollars (\$25,000.00) in value. Landlord shall have the right to post and maintain on the Premises notices of nonresponsibility in accordance with the applicable provisions of California law. Tenant further agrees that for all work in excess of Twenty-Five Thousand Dollars (\$25,000.00), it will cause to be obtained, without expense to Landlord, corporate surety bonds payable to Tenant and Landlord assuring performance by the contractor in sufficient amounts to assure completion of any work contemplated so as to protect the Premises against any mechanics', materialmen's, or other liens of the type hereinbefore described, copies of all such bonds to be furnished to Landlord at the time Tenant shall let any contract for the construction or alteration of any improvements on the Premises. If Tenant does not cause to be recorded the bond described in California Civil Code section 3143 or otherwise protect the property under any alternative or successor statute, and a final judgment has been rendered against Tenant by a court of competent jurisdiction for the foreclosure of a mechanic's, materialman's, contractor's or subcontractor's lien claim, and if Tenant fails to stay the execution of the judgment by lawful means or to pay the judgment, Landlord shall have the right, but not the duty, to pay or otherwise discharge, stay or prevent the execution of any such judgment or lien or both. Tenant shall, within ten (10) days, reimburse and indemnify Landlord for all sums, costs, expenses and liabilities incurred by Landlord.

21. **Indemnity.**

(a) Tenant's Obligation. Except to the extent claims are caused by Landlord's

~~willful, or negligent acts, or omissions or the acts or omissions of Landlord's agents, contractors or employees, and to the extent claims are covered by Tenant's insurance, required by Paragraph 22 hereof,~~ Tenant shall indemnify, protect, defend, and hold harmless Landlord and its elected

- Formatted:** Keep with next
- Deleted:** sole
- Deleted:** active negligence
- Deleted:** willful misconduct
- Field Code Changed**
- Formatted:** Line spacing: single
- Deleted:** ¶
¶
OAK #4852-8675-9944 v7
- Formatted:** Font: 8 pt

officials, officers, employees, volunteers, lenders, agents, contractors and each of their successors and assigns from and against any and all claims, judgments, causes of action, damages, penalties, costs, liabilities, and expenses, including all costs, attorneys' fees, expenses and liabilities incurred in the defense of any such claim or any action or proceeding brought thereon, arising at any time during or after the Lease as a result (directly or indirectly) of or in connection with (i) any default in the performance of any obligation on Tenant's part to be performed under the terms of this Lease; (ii) Tenant's use of the Premises, the conduct of Tenant's business or any activity, work or things done, permitted or suffered by Tenant in or about the Premises; (iii) any act, error or omission of Tenant or of any invitee, licensee or guest of Tenant, in or about the Premises; (iv) loss of, injury, or damage to or destruction of property (including loss of use resulting from that loss, injury, damage or destruction); (v) all resulting economic losses, consequential and/or exemplary damages; and (vi) any subleases, assignments and related activities (collectively, "Indemnification"). Tenant shall provide such defense of Landlord by and through counsel reasonably acceptable to Landlord. The obligations of Tenant under this Paragraph 21 shall survive the termination of this Lease with respect to any claims or liability arising prior to such termination.

Deleted: Indemnification

(b) Landlord Not Responsible for Damages; Exempt from Liability. This Lease is made upon the express condition that Landlord shall not be liable for any damages or claims for damages by reason of any injury to or death of any person or persons while in, upon or in any way connected with the Premises during the occupancy thereof by Tenant, either in construction or operation, or damages to property, except damages or claims for damage resulting from the willful or negligent acts or omissions of Landlord, its employees, agents, contractors or servants. Thus, Tenant, as a material part of the consideration to Landlord, hereby

Field Code Changed
Formatted: Line spacing: single
Deleted: ¶
 ¶
 OAK #4852-8675-9944 v7
Formatted: Font: 8 pt

assumes all risk of damage to property including, but not limited to, Tenant’s personal property, or injury to or death of persons in, upon or about the Premises arising from any cause, and Tenant hereby waives all claims in respect thereof against Landlord, except to the extent such claims are caused by Landlord’s ~~willful or negligent acts or omissions~~. Tenant hereby agrees that Landlord shall not be liable for injury to Tenant’s business or any loss of income therefrom or for damage to the property of Tenant, or injury to or death of Tenant, or any other person in or about the Premises, whether such damage or injury is caused by fire, steam, electricity, gas, water or rain, or from the breakage, leakage or other defects of sprinklers, wires, appliances, plumbing, air conditioning or lighting fixtures, or from any other cause, whether said damage or injury results from conditions arising within or about the Premises or from other sources or places, and regardless of whether the cause of such damage or injury or the means of repairing the same is inaccessible to Tenant, except damage or injury caused by Landlord’s ~~willful or negligent acts or omissions~~.

Deleted: sole or active negligence or
Deleted: misconduct.

Deleted: solely
Deleted: sole or active negligence or
Deleted: misconduct.
Deleted: , at Tenant’s sole cost and expense,
Deleted: other
Deleted: ,
Deleted: Landlord
Deleted: , upon request of Tenant, appear in the action and defend

Deleted: decision. To the extent Tenant determines to contest or defend such litigation challenges or requests that Landlord cooperate in those defense efforts, Tenant shall reimburse Landlord, within ten (10) days following Landlord’s written demand therefor, which may be made from time to time during the course of such litigation, all costs incurred by Landlord in connection with the litigation challenge, including Landlord’s administrative, legal and court costs. If Tenant opts to defend any such legal challenge, Tenant shall indemnify, defend, and hold harmless Landlord and its and their officials and employees from and against any claims assessed or awarded against Landlord by way of judgment, settlement, or stipulation. Nothing herein shall authorize Tenant to settle such legal challenge on terms that would constitute an amendment or modification of this Lease, unless such amendment or modification is approved by Landlord’s City Council in accordance with applicable legal requirements, and Landlord reserves its full legislative discretion with respect thereto.

(c) Responsibility in the Event of Challenge to Lease. Landlord and Tenant shall cooperate in the event of any court action instituted by a third party or governmental entity or official ~~other than Landlord or Tenant~~ challenging the validity of any provision of this Lease. ~~Landlord and Tenant shall each be solely responsible for the cost and expense of its respective defense thereof and for any damages awarded against it.~~

Field Code Changed
Formatted: Line spacing: single
Deleted: ¶
 ¶
 OAK #4852-8675-9944 v7
Formatted: Font: 8 pt

(d) Contest by Tenant. If Tenant desires to contest any lien of the nature set forth in Paragraph 20 hereof, or if Tenant desires to contest any tax, assessment, charge or other item to be paid by it other than to Landlord under the terms hereof, it shall notify Landlord of its intention so to do within ten (10) days after ~~Tenant has received notification in writing of~~ the filing of such lien or at least ten (10) days prior to the delinquency of such tax, assessment,

charge or other item, ~~whichever is later~~. In either such case, Tenant shall not be in default hereunder until ten (10) days after the final determination of the validity thereof, within which time Tenant shall satisfy and discharge such lien or pay and discharge such tax, assessment, charge or other item to the extent held valid, and all penalties, interest and costs in connection therewith, as the case may be. In the event of any such contest, Tenant shall protect and indemnify Landlord against all loss, cost, expense and damage resulting therefrom and shall promptly secure the performance of such indemnification in a manner satisfactory to Landlord.

Deleted: as the case may be.

22. **Insurance.** Tenant shall, at its sole cost and expense, obtain and keep in force at all times the following "Tenant's Insurance" and shall be liable for all premiums, deductibles, and self-insured amounts, if any, in connection therewith:

(a) **Property Insurance.** "All risk" fire and extended coverage insurance on all buildings and improvements located on the Premises covering damage to or loss of the Premises and Tenant's Property (and coverage for the full replacement cost thereof), together with, if the property of Tenant's invitees is to be kept in the Premises, warehouse's legal liability or bailee customers insurance for the full replacement cost of the property belonging to invitees and located in the Premises. The amount of such insurance shall be not less than one hundred percent (100%) of the replacement value of said buildings and improvements on the Premises.

Deleted: including business interruption of Tenant).

(b) **Comprehensive Public Liability Insurance.** Tenant shall, at its sole cost and expense, obtain and maintain in full force and effect comprehensive public liability insurance, naming Landlord as an additional insured, insuring against claims for bodily injuries, death or property damage occurring in or about the Premises with limits of not less than \$5,000,000.00 in respect to injury or death of one person, not less than \$5,000,000.00 in respect to any one accident, and not less than \$50,000.00 in respect to property damage. As a condition

Field Code Changed
Formatted: Line spacing: single
Deleted: ¶
 ¶
 OAK #4852-8675-9944 v7
Formatted: Font: 8 pt

to allowing the Piedmont Swim Team to use the Premises, Tenant shall require the Piedmont Swim Team to obtain and maintain in full force and effect during any period that such Swim Team is using the Premises comprehensive public liability insurance naming Tenant and Landlord as additional insureds, insuring against claims for bodily injuries, death or property damage occurring in or about the Premises with limits of not less than \$5,000,000.00 in respect to injury or death of one person, not less than \$5,000,000.00 in respect to any one accident, and not less than \$50,000.00 in respect to property damage, and to provide Tenant with satisfactory evidence of such insurance. As a condition to allowing any other entity, association or organization (including without limitation, the School District, but not including the Landlord, through its Recreation Department or otherwise) to use the Premises, Tenant may require such entity, association or organization (i) to obtain and maintain in full force and effect during any period that such entity, association or organization is using the Premises, similar comprehensive public liability insurance (or equivalent protection) which, in the case of entities, association or organizations other than Landlord, name Tenant and Landlord as additional insureds, and (ii) to provide Tenant with satisfactory evidence of such insurance including copies of insurance policies or certificates of insurance which include an endorsement (or other appropriate written agreement) that such insurance shall not be canceled except after twenty (20) days written notice to Tenant. Landlord shall provide Tenant a Certificate of Coverage evidencing liability coverage for any willful, or negligent acts, or omissions, occurring on the Premises on the part of City, including employees and volunteers of City. Tenant also may require the agents of any party using its facilities to provide evidence of similar public liability insurance coverage as a condition to using the facilities.

Deleted: .

Deleted: acts of sole

Deleted: active negligence

Deleted: willful misconduct

Field Code Changed

Formatted: Line spacing: single

Deleted: ¶
¶
OAK #4852-8675-9944 v7

Formatted: Font: 8 pt

(c) Workers' Compensation and Employer's Liability Insurance. ~~Tenant shall, at its sole cost and expense, obtain and maintain in full force and effect, workers'~~

Deleted: Workers'

compensation insurance, if required by Law, which complies with all applicable state statutes and regulatory requirements, and, if Tenant hires any employees, employer's liability insurance coverage in the amount of at least One Million Dollars (\$1,000,000).

(d) Certificates of Insurance. Tenant shall provide Landlord with copies of all of said policies or certificates of coverage for all Tenant's Insurance, in the form of the ACORD standard certificate of insurance, prior to the effective date of the Lease. Tenant shall, at least ten (10) days prior to expiration of ~~any such policy,~~ furnish Landlord with certificates of renewal

Deleted: the

or "binders" thereof. Each certificate shall expressly provide that such policies shall not be cancelable or otherwise subject to modification except after twenty (20) days' prior written notice to the parties named as additional insureds as required in this Lease, ~~or ten (10) days prior written notice in the event of cancellation due to non-payment of premiums.~~ If Tenant fails to

Deleted: .

maintain any insurance required in this Lease, Tenant shall be liable for all losses and cost resulting from said failure.

(e) Standards for Insurance Policies. All of the insurance provided for under this Paragraph 22 and all renewals thereof and all of the bonds provided for in this Lease shall be issued by such good, responsible and standard companies and in such form and substance as are rated at least A by Best's Insurance Guide ~~and~~ are California admitted, and the form thereof shall be subject to approval by Landlord.

Deleted: ,

(f) Additional Insureds. Landlord shall be named as an additional insured on the ~~property and comprehensive public liability insurance policies.~~ An additional insured

Deleted: policy.

Field Code Changed

Formatted: Line spacing: single

Deleted: ¶

¶ OAK #4852-8675-9944 v7

Formatted: Font: 8 pt

endorsement naming Landlord as an additional insured(s) shall be attached to the certificate of insurance.

Deleted: such parties

(g) Primary Coverage. Tenant's Insurance shall be primary, without right of contribution from any insurance maintained by Landlord.

(h) Umbrella/Excess Insurance. Any umbrella liability policy or excess liability policy (which shall be in "following form") shall provide that if the underlying aggregate is exhausted, the excess coverage will drop down as primary insurance. The limits of Tenant's Insurance shall not limit Tenant's liability under this Lease.

(i) Waiver of Subrogation. Tenant waives any right to recover against Landlord for claims for damages to Tenant's personal property to the extent covered (or required by this Lease to be covered) by Tenant's Insurance. This provision is intended to waive fully, and for the benefit of Landlord, any rights and/or claims which might give rise to a right of subrogation in favor of Tenant's insurance carrier(s). The coverage obtained by Tenant pursuant to this Lease shall include a waiver of subrogation endorsement attached to the certificate of insurance.

(j) Notification of Incidents. Tenant shall notify Landlord within twenty-four (24) hours or as soon thereafter as practicable, after notification to Tenant of the occurrence of any accident or incident on or about the Premises or any portion thereof which Tenant knows or reasonably believes could give rise to a claim against Landlord, Landlord's insurance, Tenant or Tenant's Insurance, except that Tenant shall not be obligated to give Landlord notice of any accident or incident which could give rise to a claim under Tenant's workers' compensation insurance. Tenant's notice shall be accompanied by a copy of any available written report relating to the accident or incident.

Field Code Changed

Formatted: Line spacing: single

Deleted: ¶

¶
OAK #4852-8675-9944 v7

Formatted: Font: 8 pt

(k) Compliance With Insurance Requirements, Warranties. Tenant shall not do anything in the Premises, or bring or keep anything therein, or subject the Premises or any portion thereof to any use which would damage the same or increase the risk of loss or fire, or violate Tenant’s Insurance, or which shall conflict with the regulations of the fire department or any laws or with any insurance policy on the Premises or any part thereof, or with any rules or regulation established by any administrative body or official having jurisdiction. Tenant shall promptly comply with the reasonable requirements of any board of fire insurance underwriters or other similar body now or hereafter constituted. Tenant shall not take any action which would abrogate any warranties.

(l) Insurance Proceeds and Deficiencies. In the event of damage to or destruction of any building or improvement on the Premises, the net proceeds of all insurance money collected therefore shall be available for and used with all reasonable dispatch by Tenant in rebuilding, repairing or otherwise reinstating the buildings or improvements so destroyed or damaged. In the event such insurance proceeds available therefor shall be insufficient for rebuilding, repairing or otherwise reinstating such buildings or improvements as aforesaid, and if Tenant shall decline or shall be unable to make up the deficiency out of its own funds, Tenant may elect by giving Landlord written notice thereof within ninety (90) days after such damage or after Tenant knows or should reasonably have known that such insurance proceeds are insufficient, whichever is later, to declare this Lease terminated. In such event, Landlord shall be entitled to all insurance proceeds therefor.

(m) Appraisal. In the fifth year and in the tenth year of the Lease, Tenant at Tenant’s sole expense shall have an appraisal made by a fully qualified appraiser or a licensed building contractor, either of whom shall be approved by Landlord. Said appraisal shall assess

Field Code Changed

Formatted: Line spacing: single

Deleted: ¶
 ¶
 OAK #4852-8675-9944 v7

Formatted: Font: 8 pt

the replacement value of all of the improvements then existing upon the Premises and to the extent the insurance coverage provided under this Paragraph 22 is required to be increased due to such appraisal, Tenant shall increase such insurance coverage to one hundred percent (100%) of the amount shown in such appraisal within twenty-one (21) days after receipt of such appraisal. In addition, to the extent at any time during the term of the Lease Tenant makes a capital improvement costing Fifteen Thousand Dollars (\$15,000.00) or more, Tenant shall increase the insurance coverage by one hundred percent (100%) of such improvement cost within twenty-one (21) days after completion of such improvement. Copies of any such appraisals and written evidence of such insurance increases shall be provided by Tenant to Landlord within five (5) days after receipt thereof by Tenant.

23. **A.D.A. Compliance.** Tenant at Tenant's sole cost and expense shall be responsible for complying fully with any and all applicable provisions of the A.D.A. (The Americans With Disabilities Act) as it relates to Tenant, Tenant's facilities, and the Premises leased hereunder. Tenant, at Tenant's sole cost and expense, shall defend, hold harmless, and indemnify Landlord against any and all claims, lawsuits, damages, and actions for compliance whatsoever, related to Tenant's responsibility under this Paragraph 23, in any way, relating to this Lease.

24. **Hazardous Materials.**

(a) **Environmental Compliance.** Tenant shall, at its sole cost and expense, comply with all Federal, State or local laws from time to time in effect ("Hazardous Materials Laws") concerning the management, use, generation, storage, transportation, presence, discharge or disposal of hazardous, toxic, radioactive or carcinogenic materials, substances or wastes ("Hazardous Materials"). Except for materials normally and customarily used in swimming

Formatted: Don't keep with next

Field Code Changed

Formatted: Line spacing: single

Deleted: ¶
 ¶
 OAK #4852-8675-9944 v7

Formatted: Font: 8 pt

Deleted: small

facilities, such as chlorine and other cleaning supplies, kept in appropriate quantities for Tenant's operation of the Premises, and safely stored, neither Tenant nor its agents, employees, contractors, sublessees, assignees or invitees shall use, handle, store, transport, release or dispose of any Hazardous Materials anywhere in, on, under or about the Premises or any portion thereof. Tenant shall cause any and all Hazardous Materials brought onto, used, generated, stored or discharged in the Premises to be removed from the Premises and transported for disposal in accordance with applicable Hazardous Materials Laws. Landlord shall have the right to enter the Premises from time to time to conduct tests, inspections and surveys concerning Hazardous Materials and to monitor Tenant's compliance with its obligations concerning Hazardous Materials and Hazardous Materials Laws. Tenant shall immediately notify Landlord in writing of any voluntary clean-up or removal action instituted or proposed by Tenant other than voluntary clean-up or removal by Tenant as part of its ordinary, daily operation of the Premises, any enforcement, clean-up, removal or other governmental or regulatory action instituted or threatened, or any claim made or threatened by any person against Tenant, the Premises, or any portion thereof, relating to Hazardous Materials or Hazardous Materials Laws. Tenant shall also supply to Landlord as promptly as possible, and in any event within five (5) business days after Tenant receives or sends same, copies of all claims, reports, complaints, notices, warnings or asserted violations relating in any way to the Premises or Tenant's use thereof and concerning Hazardous Materials or Hazardous Materials Laws.

(b) Landlord's Right to Inspect for Chlorination and Chemicals. In addition

to any and all rights and remedies of Landlord hereunder, Landlord shall have the right to inspect and regulate anything whatsoever on the Premises relating to chlorine, chemicals and other Hazardous Materials, including but not limited to their use and storage, and specifically

Field Code Changed

Formatted: Line spacing: single

Deleted: ¶

¶
OAK #4852-8675-9944 v7

Formatted: Font: 8 pt

including total prohibition thereof. The Piedmont Fire Chief shall be primarily responsible on behalf of Landlord for enforcement of this Paragraph 24.

(c) Tenant's Indemnification. ~~To the extent covered by Tenant's insurance required by this Paragraph 24, and except~~ to the extent caused by Landlord's ~~willful or negligent acts or omissions.~~ Tenant shall indemnify, defend and hold Landlord harmless from any claims, causes of action, liabilities, losses, damages, injunctions, suits, fines, penalties, costs or expenses (including attorneys' fees and expenses) caused or alleged to have been caused by the presence of Hazardous Materials in or about the Premises, including, without limitation, any bodily injury, death, property damage, decrease in value of the Premises, caused or alleged to have been caused by the use, storage, generation, presence or release of Hazardous Materials in violation of Tenant's obligations under this Lease, whether such claims, causes of action or liabilities are first asserted during the Lease term or thereafter, and including without limitation, claims made against Landlord with respect to bodily injury, death or property damage sustained by third parties caused or alleged to have been caused by the use, storage, generation, presence or release of Hazardous Materials. The obligations of Tenant under this Paragraph 24 shall survive the termination of this Lease with respect to any claims or liability arising prior to such termination.

- Deleted: Except
- Deleted: sole
- Deleted: active negligence
- Deleted: willful misconduct

In addition to the insurance requirements in Paragraph 22 of this Lease, ~~provided that such insurance is readily available to Tenant at reasonable cost and is in force at other similar swimming facilities.~~ Tenant shall obtain and keep in force at all times insurance adequate to guarantee the indemnification provisions of this paragraph. This insurance shall be in the amount of at least One Million Dollars (\$1,000,000), in a form acceptable to Landlord. ~~Tenant shall promptly provide written notification to Landlord of Tenant's failure to obtain such insurance or, in the alternative, evidence of such insurance.~~

- Deleted: ,
- Field Code Changed
- Formatted: Line spacing: single
- Deleted: ¶
- ¶
- OAK #4852-8675-9944 v7
- Formatted: Font: 8 pt

25. **No Assignment.** Tenant shall not assign or transfer this Lease or any interest therein, as security or otherwise, nor sublet the whole or any part of the Premises. Tenant agrees that neither this Lease nor any interest therein shall be assignable or transferable in any proceedings in execution against Tenant, or in any voluntary or involuntary proceedings in bankruptcy or insolvency taken by or against Tenant, or by process of any law applying to such proceeding without the written consent of Landlord.

26. **Remedies of Landlord.** If a petition or complaint shall be filed by Tenant or by any other party against Tenant, seeking relief or reorganization of Tenant under the Bankruptcy Act, or if Tenant shall for any reason or purpose go into bankruptcy proceedings voluntarily, or suffer an adjudication in involuntary bankruptcy proceedings, or if Tenant shall make any assignment for the benefit of creditors or shall petition for an arrangement under the Bankruptcy Act, or if any order, decree or judgment shall be made with respect to Tenant under any insolvency or bankruptcy act, or if any order, decree or judgment shall be made for the appointment of a trustee or receiver at the Premises against Tenant, or if any receiver, sheriff, marshal, constable, keeper or trustee is appointed to take possession of the Premises in any creditor's insolvency, dissolution, bankruptcy or reorganization, suit, action or other proceeding of any kind against Tenant, unless such petition or complaint shall be denied or dismissed, or such order, decree or judgment shall be superseded or the enforcement thereof stayed within thirty (30) days after it becomes operative, or unless possession of the Premises is returned to Tenant within thirty (30) days, or if Tenant shall attempt to abandon or assign said Premises, or remove its furniture, furnishings, fixtures and equipment therefrom other than in the ordinary course of business, or if Tenant shall fail to remedy any default in any payment of any sum due hereunder for ten (10) days after receipt by it of Landlord's written notice of default, or if Tenant

Field Code Changed

Formatted: Line spacing: single

Deleted: ¶
 ¶
 OAK #4852-8675-9944 v7

Formatted: Font: 8 pt

shall default in the performance of any other obligation hereunder for a period of thirty (30) days after receipt by it of Landlord’s written notice of default plus such period of delay - if the default be other than the payment of money - as may be caused by governmental regulation or inability to obtain labor or materials by reason thereof, strikes, fire, earthquake or other acts of God or similar matters which are beyond the control of Tenant, then in any such event Landlord may at its option and without limiting Landlord in the exercise of any other right or remedy that it may have on account of such default, and without any demand or notice, declare this Lease at an end, re-enter the Premises with or without process of law, eject all parties in possession thereof and repossess the Premises together with all additions, alterations and improvements thereto. The remedies of Landlord as hereinabove provided are in addition to and not exclusive of any other remedy of Landlord herein given or which may be permitted by law. Any re-entry as provided for herein shall be allowed by Tenant without hindrance, and Landlord shall not be liable in damages or guilty of trespass because of such re-entry.

No waiver by Landlord at any time of performance by Tenant of any of the provisions of this Lease shall be deemed a waiver of such performance thereafter.

27. **Notice of Change of Condition Affecting Premises**, Landlord shall provide not less than a 30-day written notification to Tenant prior to initiating or permitting any significant change of condition affecting Tenant’s use or occupancy of the **Premises**, including without limitation, the following changed conditions: construction on the Piedmont Recreation Department property adjacent to the **Premises**; plans to sell food and/or drink at or near the entrance to the **Premises**; the sale, assignment or transfer of the **Premises** to a third party, not affiliated with or a political subdivision of Landlord, the listing of the **Premises** for sale or

Deleted: Leased Real Property.

Deleted: Leased Real Property

Deleted:

Deleted: ,

Deleted: Leased Real Property

Deleted: Leased Real Property

Deleted: Leased Real Property

Deleted: Leased Real Property

Field Code Changed

Formatted: Line spacing: single

Deleted: ¶
¶
OAK #4852-8675-9944 v7

Formatted: Font: 8 pt

execution of a written agreement for the sale of the Premises; and any lien or encumbrance of the Premises.

Deleted: Leased Real Property

Deleted: Leased Real Property

28. **Covenants of Parties**.

(a) Landlord’s Covenants. Landlord covenants and agrees to keep and perform all the terms and conditions hereof on its part to be kept and performed, and that Tenant, keeping and performing all the terms and conditions hereof on its part to be kept and performed, may, subject to the terms and conditions hereof, have and hold the Premises, for the term hereof, without hindrance by Landlord. Landlord shall not be in default in the performance of any of its obligations in the Lease contained unless and until Landlord shall have failed to perform such obligations within thirty (30) days after written notice from Tenant to Landlord specifying wherein the obligation has not been performed.

(b) Tenant’s Covenants. Tenant covenants and agrees to perform all the terms and conditions hereof on its part to be kept and performed and, at the expiration or sooner termination of this Lease, peaceably and quietly to quit and surrender to Landlord the Premises in good order and condition subject to the other provisions of this Lease. The performance of each and every covenant of Tenant hereunder shall be a condition, for nonperformance of which this Lease may be terminated as provided in this Lease; provided, however, that Tenant shall not be deemed to be in default in the performance of any of its obligations in the Lease contained unless and until Tenant shall have failed to perform such obligations within thirty (30) days of receipt of written notice of such default.

29. **Financial Records**. Landlord shall have the right at all reasonable times to inspect the books and financial records of Tenant. Such books and financial records shall be

Field Code Changed

Formatted: Line spacing: single

Deleted: ¶
¶
OAK #4852-8675-9944 v7

Formatted: Font: 8 pt

released to Landlord within ten (10) calendar days of receipt by Tenant of a written request for their production from Landlord.

30. **Inspection of Premises**. Landlord shall be entitled to enter upon the Premises at all reasonable times for the purpose of determining either that Tenant is complying with the terms and conditions hereof or for the purpose of posting thereon notices of nonresponsibility for any construction, alteration or repair thereof.

31. **Not a Joint Venture or Partnership**. It is understood and agreed that Landlord shall in no event be construed or held to be a partner or associate of or joint venturer with Tenant in the use of the Premises, nor shall Landlord be liable for any debts incurred by Tenant in any way connected with the use of the Premises, but it is understood and agreed that the relationship of the parties is, and at all times shall remain, that of Landlord and Tenant. Landlord shall have no right of control over the operation of the Premises except as expressly provided in this Lease.

32. **Non-Waiver of Breach**. The waiver by either party of any breach of any term, covenant or condition herein contained may be accomplished only by a writing signed by such party, and nothing other than such a writing shall be deemed to be a waiver of any term, covenant or condition or any breach thereof.

33. **Waiver of Claims for Damages**. Tenant acknowledges that the Premises are in good and tenantable condition at the commencement date and hereby waives as against Landlord all claims for damages arising from the condition of the Premises hereafter suffered by Tenant except claims for damages resulting from the willful or negligent acts of Landlord, its agents or servants. Tenant hereby expressly waives the right to the provisions of California Civil Code Section 1542 in limitation of the waiver set forth in this Paragraph 33.

Field Code Changed
Formatted: Line spacing: single
Deleted: ¶ OAK #4852-8675-9944 v7
Formatted: Font: 8 pt

34. **Time of Essence.** Time is hereby expressly declared to be of the essence of the performance of this Lease and of each and every covenant, term, condition and provision hereof.

35. **Paragraph Headings.** Paragraph headings in this Lease are for convenience only and are not to be construed as a part of this Lease or in any way limiting or amplifying the provisions hereof.

36. **Recording.** Upon execution of this Lease, Landlord and Tenant may execute and deliver a "short form lease" for recording by Tenant or by Landlord, which short form lease shall include such provisions of this Lease as Landlord and Tenant shall determine.

37. **Notices.** Any demand or notice which either party shall be required, or may desire, to make upon or give to the other party, shall be in writing and shall be by personal service or sent by prepaid certified or registered mail, return receipt requested, addressed to the respective parties as follows:

Landlord: City Administrator
City of Piedmont
120 Vista Avenue
Piedmont, California 94611

Tenant: President
Piedmont Swim Club
777 Magnolia Avenue
Piedmont, California 94611

Either party may, at any time, change the address to which notice shall be given by giving written notice thereof to the other party as above provided. Notice or demand by personal service or by prepaid registered or certified mail addressed as aforesaid shall be deemed to be fully communicated upon the date of actual receipt.

Field Code Changed

Formatted: Line spacing: single

Deleted: ¶
OAK #4852-8675-9944 v7

Formatted: Font: 8 pt

38. **Approvals by Landlord.** All consents and approvals herein required to be obtained from Landlord shall not be unreasonably withheld by Landlord and shall be obtained from the City Administrator of the City of Piedmont in writing.

Deleted: If

39. **Dispute Resolution.** ~~Except as provided in Paragraph 10(e) herein, if~~ a dispute arises out of or related to this Lease or alleged breach, and if the dispute cannot be settled through direct discussions, the parties agree that before resorting to any other method of resolving the dispute, the matter shall be submitted to mediation before a mediator mutually agreed to by the parties, or, failing such agreement, a mediator appointed by the Alameda County Superior Court. The cost of the mediation shall be borne equally by the parties. In the event mediation fails to resolve the dispute, the parties agree that the dispute shall be resolved by judicial reference pursuant to the provisions of Code of Civil Procedure §638-645.1. The cost of the referee shall be borne equally by each party, or in such other manner as deemed equitable by the referee. Any referee must be a retired judge and should be experienced in resolving disputes. The referee shall be agreed upon the parties within ten (10) days of the demand for judicial reference. In the event the parties cannot agree on the selection of a referee, any party may petition the Alameda County Superior Court for the appointment of a qualified retired judge as the referee.

40. **Relocation.** ~~Except as expressly set forth herein,~~ Tenant fully releases and discharges Landlord (in its capacity as Landlord and otherwise as a municipal corporation) from all and any manner of rights, demands, liabilities, obligations, claims, or cause of actions, in law or equity, of whatever kind or nature, whether known or unknown, whether now existing or hereinafter arising, which arise from or relate in any manner to the sale of the Premises; the full or partial termination or expiration of Tenant's leasehold interest as permitted under this Lease;

Field Code Changed
Formatted: Line spacing: single
Deleted: ¶
OAK #4852-8675-9944 v7
Formatted: Font: 8 pt

or the relocation of Tenant’s business operations or the relocation of any person or persons, business or businesses, or other occupant or occupants located on the Premises including, without limitation, the specific waiver and release of any right to any relocation benefits, assistance and/or payments under Government Code sections 7260 et seq. ("**Relocation Assistance Law**"), notwithstanding that such relocation assistance, benefits and/or payments may be otherwise required under the Relocation Assistance Law or other state or federal law. Tenant acknowledges and agrees that the release and waiver set forth in this Paragraph 40 is material consideration for Landlord’s lease of the Premises to Tenant on the terms set forth herein and that, but for this release and waiver, Landlord would not have leased the Premises to Tenant. It is hereby intended that the above release relates to both known and unknown claims that the Tenant may have, or claim to have, against the Landlord with respect to the subject matter contained herein or the events relating thereto. By releasing and forever discharging claims both known and unknown which are related to or which arise under or in connection with the items set out above, the Tenant expressly waives any rights under California Civil Code section 1542, which provides:

"A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM OR HER MUST HAVE MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE DEBTOR."

41. **Attorneys’ Fees.** In any action or proceeding which either party brings against the other to enforce its rights hereunder, the unsuccessful party shall pay all costs incurred by the prevailing party, including reasonable attorneys’ fees, which amounts shall be a part of the judgment in said action or proceeding.

Field Code Changed

Formatted: Line spacing: single

Deleted: ¶
OAK #4852-8675-9944 v7

Formatted: Font: 8 pt

42. **Authority.** Tenant shall deliver to Landlord on execution of this Lease a certified copy of a resolution of its board authorizing the execution of this Lease and naming the officers of the entity that are authorized to execute this Lease on behalf of the entity.

43. **Cancellation of Lease.** It is agreed by the parties that all prior leases and agreements between the parties, including but not limited to that certain lease dated June 22, 1964, as amended by Amendment to Lease dated January 1, 1969, that certain lease dated January 31, 1978, that certain lease dated July 1, 1993 and that certain Amendment to Lease dated June 30, 2008, are hereby canceled and terminated as of midnight on the date of adoption of this Lease.

(Signature page follows)

Field Code Changed
Formatted: Line spacing: single
Deleted: ¶
OAK #4852-8675-9944 v7
Formatted: Font: 8 pt

DATED: _____ 2011

Deleted: 2010

LANDLORD:
CITY OF PIEDMONT
A Municipal Corporation

TENANT:
PIEDMONT SWIM CLUB
A California Mutual Benefit Non-Profit
Corporation

By: _____
Mayor/Council Member

By: _____
Timothy Rood, President

By: _____
William Drum, Vice President

ATTEST:

City Clerk or Deputy City Clerk

APPROVED AS TO FORM:

City Attorney or Deputy City Attorney

Field Code Changed

Formatted: Line spacing: single

Deleted: ¶

¶
OAK #4852-8675-9944 v7

Formatted: Font: 8 pt