

THE CORPORATION OF THE TOWN OF AMHERSTBURG

BY-LAW NO. 2010 - 103

Being a By-law to authorize the execution of a Donation Agreement between The Athletic Club and the Corporation of the Town of Amherstburg


WHEREAS it is deemed expedient to enter into a Donation Agreement with The Athletic Club regarding the Amherstburg Recreation Complex.

NOW THEREFORE the Council of the Corporation of the Town of Amherstburg hereby enacts as follows:

1. THAT the Mayor and Clerk of the Town be and they are hereby authorized to execute and affix thereto the Corporate Seal to the Agreement attached hereto as and forming part of this by-law.
2. That this by-law shall come into full force and effect upon the final passing thereof.

Read a first and second time, and FINALLY PASSED this 12th day of October 2010.


MAYOR - WAYNE HURST


CLERK - BRENDA M. PERCY

1st Reading – October 12, 2010

2nd Reading – October 12, 2010

3rd Reading – October 12, 2010

CONTRIBUTION AGREEMENT

THIS AGREEMENT MADE IN DUPLICATE THIS 18TH DAY OF OCTOBER 2010

BETWEEN

THE CORPORATION OF THE TOWN OF AMHERSTBURG, ("AMHERSTBURG")

-AND -

THE ATHLETIC CLUB (AMHERSTBURG) INC., ("THE ATHLETIC CLUB")

WHEREAS Amherstburg is building the Amherstburg Recreation Complex, ("Complex") to be located within the Town of Amherstburg, and The Athletic Club wishes to contribute funds to Amherstburg for the payment of the costs of construction and operations of the Complex;

NOW THEREFORE THIS AGREEMENT WITNESSETH that in consideration of the respective covenants and agreements of the parties contained herein and such other good and valuable consideration (the receipt and sufficiency of which is hereby acknowledged by each of the parties hereto), it is agreed as follows:

Article 1 Definitions

1.01 "Complex" means the Amherstburg Recreation Complex.

1.02 "Adult Fitness Activities" mean those physical fitness activities provided to members of the public, 18 years of age and greater, for compensation consisting of but not limited to the generality of the foregoing;

(a) Aerobic Fitness: Includes Step Aerobics, Kick Boxing, Dance Aerobics, Yoga, Indoor Aquatic exercise programs, Pilates, Spinning and other Aerobic programs, and use of cardio equipment, whether trainer, supervised or unsupervised.

(b) Weight Training: Includes the use of free weights or machine weights, whether through a personal trainer or otherwise, targeted to ages 18 and over as would be similarly and typically offered by a commercial athletic club facility; save and except for any training related to organized Youth Sports Groups where a youth participant is older than 18 years of age but less than 21 years of age. (i.e. Junior C Hockey Team).

1.03 "Recreational Activities" mean those activities delivered to the public by Amherstburg as are permitted by the *Municipal Act 2001*, whether for compensation or not, provided it is understood that said recreational activities are offered by Amherstburg in a manner that does not offend the substance and intent of Article 4 of this Agreement and shall consist of and not be limited to:

- (a) All activities both Youth and Adult related to programming for persons with special needs;
- (b) All outdoor aquatics or outdoor water sports programming or activities regardless of age group;
- (c) All 'Boxing' programming or activities regardless of age group;
- (d) All programming or activities geared to Senior's only;
- (e) All programming or activities related to organized Youth Sport Groups including field and ice recreation;
- (f) All programming or activities related to organized Adult Sport Groups including field and ice recreation.

Article 2 *Payment of Contribution*

2.01 On January 1, 2011 The Athletic Club shall contribute the sum of one hundred-thousand dollars \$ 100,000.00 to Amherstburg for its use to contribute towards the payment of the construction costs of the Complex and/or operation of the Complex.

Article 3 *Naming Right*

3.01 In consideration of the contributions to be paid pursuant to Article 2, Amherstburg undertakes to name the 'Second Ice Pad' with the Athletic Club name to be designated by The Athletic Club (hereinafter referred to as the "Naming Right").

3.02 The Athletic Club may, at its own expense, cause such signs to be placed on the component of the Complex, as agreed upon in Article 3.01, in such locations, numbers, size and formats as will be approved by Amherstburg.

3.03 The Athletic Club may, at its own expense and with the consent of Amherstburg, which consent shall not be unreasonably withheld, remove and replace the said signs from time to time.

3.04 Subject to the provisions of this Agreement, the Naming Right shall be for a term of twenty-five (25) years from the date of this Agreement.

3.05 The Naming Right does not give The Athletic Club any right, licence or interest in the Complex, save and except, the right to name the Complex for the term described in Article 3.04.

Article 4 *Operations of the Complex – Restrictive Covenant*

4.01 Amherstburg shall operate the Complex for the purposes of providing Recreational Activities.

4.02 Amherstburg, its counselors, directors, officers, agents, administrators, employees, successors and assignees shall not, subject to the terms herein provided without the prior written consent of The Athletic Club,

(i) At any time during the period commencing from October 1, 2010 and ending December 31st, 2018, within the Town of Amherstburg and a radius of ten (10) kilometers therefrom either individually or in partnership or jointly in conjunction with any person or persons, firm, association, syndicate or corporation as principal, agent, shareholder or in any manner whatsoever, carry on or be engaged in or be concerned with or be interested in or advise, lend or grant money to, guarantee the debts or obligations of or permit its name or any part thereof to be used or employed by any person or persons, firm association, syndicate or corporation which is engaged in the business of an Athletic Club Facility. The foregoing restrictive covenant shall include the prohibition by Amherstburg in constructing, maintaining or operating an Athletic Club Facility. For the purposes of this Agreement, "Athletic Club Facility" shall be deemed to mean and include carrying on the business of a health and fitness club containing weight and cardio equipment within which is conducted Adult Recreational Activities and personal training services. The Athletic Club acknowledges and accepts the construction and operation of the Complex by Amherstburg provided it is understood that Amherstburg is prohibited from allowing or conducting directly or indirectly Adult Recreational Activities. Notwithstanding the aforesaid restrictive covenant, it shall have no application to employees of Amherstburg who may have an interest in or operate or intend to operate and/or own, in whole or in part and Athletic Club Facility in their personal capacity not affiliated with Amherstburg.

(ii) Contact any person, firm, association, syndicate, corporation, or governmental agency to induce, encourage, and invite to invest, in an Athletic Club Facility in competition with The Athletic Club.

(iii) Grant a leasehold or freehold interest in lands and/or buildings, owned or controlled by Amherstburg to any person, firm, association, syndicate, corporation, governmental agency for nominal consideration to construct and/or operate an Athletic Club Facility in competition with The Athletic Club.

(iv) Contact, recruit, or market any employee of The Athletic Club for the purpose of offering him or her employment to carry out duties similar to those carried on by said employee with The Athletic Club in Amherstburg's Complex, other recreational facilities or programs.

- 4.03 If any covenant or provision herein contained is determined to be void, voidable or unenforceable, in whole or in part, such determination shall not affect or impair or be deemed to affect or impair the validity of any other covenant or provision herein contained and each of such covenants and provisions are hereby declared to be separate, severable and distinct. Amherstburg hereby agrees that all restrictions in paragraph 4.02 hereof are reasonable and valid and all defences to the strict enforcement thereof by The Athletic Club are hereby waived by Amherstburg.
- 4.04 It is also understood and agreed that, subject to sections 4.02 (i), (ii),(iii) and (iv), these covenants and agreements will not prevent Amherstburg from performing normal administrative procedures such as processing, rezoning and licensing applications or processing building permits associated with arm's length third parties seeking to operate an athletic club or facility in the Town of Amherstburg.
- 4.05 This undertaking shall not be interpreted to limit the authority of Amherstburg to permit any other party from providing Adult Fitness Activities within the geographic limits of the Town of Amherstburg on lands and premises not owned or possessed by Amherstburg.
- 4.06 This undertaking shall not be interpreted to limit the authority of Amherstburg to provide any Recreational Activities to persons under the age of 18 years.

Article 5 *Termination of the Agreement by Amherstburg*

- 5.01 In the event that The Athletic Club fails to make a payment, is convicted of a breach of any offence under, or criminal law, commits such act that Amherstburg acting reasonably and in good faith deems is inconsistent with the continuation of the Naming Right, ceases operation or is subject to any insolvency or winding up proceeding, Amherstburg may terminate this Agreement, discontinue the use of the Name, and retain all monies paid to the date of termination without set-off and without recourse to any unpaid installments.
- 5.02 In the event of Termination, in addition to remedies set out in Article 5.01, Amherstburg may remove all signs and other references to the Naming Right at the expense of The Athletic Club.
- 5.03 In the event of Termination, each party shall mutually release the other from all claims under this Agreement.
- 5.04 In the event that Amherstburg breaches its obligations under this Agreement, in addition to all other remedies available at law, The Athletic Club shall have the right to terminate this Agreement as it may in its sole and absolute discretion determine.

Article 6 *Representations and Warranties*


- 6.01 The Athletic Club represents and warrants that it has the sole right to use the Name designated by it in the Naming Rights and shall indemnify and hold harmless Amherstburg in the event of a breach of this representation and warranty.
- 6.02 The Athletic Club represents and warrants that it is a duly incorporated business entity entitled to carry on business in the Province of Ontario and that it has all capacity and authority by law and its constituting documents to enter into this Agreement and to fulfill its obligations hereunder.
- 6.03 The parties represent and warrant that this Agreement does not create a partnership, agency, joint venture, lease, license or legal relationship save as expressly described herein and solely for the limited purposes noted.

Article 7 Other Provisions

- 7.01 The Athletic Club agrees that waiver by Amherstburg shall be in writing, of any breach of covenant or provision contained herein shall only be a waiver in respect of the particular breach thereof giving rise to such waiver.
- 7.02 This Agreement shall be governed by and interpreted in accordance with the laws of the Province of Ontario, and any proceeding in relation to this Agreement shall be taken in the Superior Court of Justice in the County of Essex.
- 7.03 This Agreement contains the entire understanding of the parties hereto with regard to the subject matter contained herein and shall not be amended, modified or supplemented except by written instrument of the parties as executed in writing or as otherwise provided in this Agreement.
- 7.04 Wherever possible, each provision hereof will be interpreted in such manner as to be effective and valid under applicable law, but in case any one or more of the provisions contained herein will, for any reason, be held to be invalid, illegal or unenforceable in any respect, such provision will be ineffective to the extent, but only to the extent, of such invalidity, illegality or unenforceability without invalidating the remainder of such invalid, illegal or unenforceable provision or provisions or any other provision hereof, unless such a construction would be unreasonable. Upon any such determination that any term or other provision hereof is invalid, illegal or unenforceable, the parties hereto shall negotiate in good faith to modify this Agreement so as to effect the original intent of the parties as closely as possible in an acceptable manner, to the end that the provisions contemplated hereby are fulfilled to the extent possible in the circumstances.
- 7.05 This Agreement shall be binding upon the affiliates, successors and assignees of The Athletic Club.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the date set forth above.

THE ATHLETICI CLUB (AMHERSTBURG) INC.

Per: 
Name: *Charles Kelly*
Position: *TREASURER*
I have the authority to bind the Corporation.

**THE CORPORATION OF THE TOWN OF
AMHERSTBURG**

Per: 
MAYOR, WAYNE HURST

Per: 
CLERK, BRENDA M. PERCY