CITY OF ROANOKE
OFFICE OF THE CITY MANAGER

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February 21, 2006

Honorable C. Nelson Harris, Mayor
Honorable Beverly T. Fitzpatrick, Jr., Vice Mayor
Honorable M. Rupert Cutler, Council Member
Honorable Alfred T. Dowe, Jr., Council Member
Honorable Sherman P. Lea, Council Member
Honorable Brenda L. McDaniel, Council Member
Honorable Brian J. Wishneff, Council Member

Dear Mayor Harris and Members of City Council:

Subject: Amendment No. 3 to the Agreement between the City of Roanoke and the YMCA of the Roanoke Valley, Inc.

Background:

On December 24, 2002, the City of Roanoke entered into an Agreement with the YMCA of Roanoke Valley, Inc. (YMCA) to provide support for the development and construction of a new YMCA facility in the West Church area of downtown Roanoke to accommodate an expanding number of YMCA programs and to transfer the former YMCA building and land located at the corner of Church Avenue and Fifth Street, SW, to the City of Roanoke.

As specified in the Agreement, the YMCA was required to remove an underground storage tank (UST), and all UST appurtenances, and to remediate any soil impacted by the presence of the UST before transferring the property to the City. The UST was removed from the former YMCA site in December 2004; however, impacted soils and piping associated with the UST were left in place by the Contractor working for the YMCA.

Furthermore, a pedestrian walkway links the former main YMCA building with the YMCA's auxiliary gymnasium. The agreement dated December 24, 2002, contemplates the transfer of the main YMCA building from the YMCA to the City, but the YMCA will retain title to the YMCA's auxiliary gymnasium. Thus, provisions for the removal of the pedestrian walkway linking the two structures need to be established. Finally, Amendment No. 3 addresses other related issues, such as the closing date and the survival of certain terms beyond the closing date.

Considerations:

The YMCA has approached the City to amend the Agreement dated December 24, 2002, in order to allow the YMCA to transfer a portion of the former YMCA facility to the City but leaving the piping and impacted soils on the property.
Under Amendment No. 3, the YMCA will remove the piping and impacted soils at its expense, if the City decides to demolish the former main YMCA building. If the City sells the property "as is," then the YMCA is under no obligation to remove the piping and impacted soil. If, however, the sale price for the property is diminished by the presence of the piping and impacted soil, the YMCA and the City will agree on a third party to establish the difference in the value of the property, and the YMCA will be responsible for the difference. Furthermore, under Amendment No. 3, the pedestrian walkway between the former YMCA building and the YMCA auxiliary gymnasium will be removed at the expense of the YMCA, and pursuant to other terms and conditions, upon the City requesting the YMCA to do so.

Recommended Action:

Authorize the City Manager to execute Amendment No. 3, and other appropriate documents to effectuate its terms and conditions, all approved as to form by the City Attorney, such Amendment No. 3 to be similar in form and content to the Amendment No. 3 attached to this report. Authorize the City Manager to execute
the appropriate documents, approved as to form by the City Attorney, to amend the Agreement dated December 24, 2002, between the City of Roanoke and the YMCA of Roanoke Valley Inc., releasing the YMCA of its initial obligation to remove all underground storage tank appurtenances as well as impacted soils from the former YMCA property located at the corner of Church Avenue and Fifth Street, SW, to the City of Roanoke

prior to transferring the former YMCA property to the City. The City Manager is further authorized to execute the appropriate documents, approved as to form by the City Attorney, to amend the Agreement dated December 24, 2002, between the City of Roanoke and the YMCA of the Roanoke Valley Inc., to include provisions for the removal of the pedestrian bridge by the YMCA, at the YMCA's expense, between the former YMCA building and the YMCA auxiliary gymnasium.

Respectfully submitted,

Darlene L. Burcham
City Manager

DLB:pjt

c: Mary F. Parker, City Clerk
William M. Hackworth, City Attorney
Jesse A. Hall, Director of Finance
R. Brian Townsend, Director of Planning, Building and Economic Development

CM06-00023

AMENDMENT NO. 3

THIS AMENDMENT NO. 3 to an Agreement dated December 24, 2002, is made and entered into this 21st day of February, 2006, by and between the **CITY OF ROANOKE** ("City"), and the **YMCA of ROANOKE VALLEY, INC.** ("YMCA").

WHEREAS, City Council authorized the City to enter into an Agreement with the YMCA, providing for the City to transfer certain property for the construction of a new YMCA facility, and upon completion of the construction of the new YMCA facility, the YMCA would transfer to the City a portion of the property on which the former YMCA facility is located.

WHEREAS, the parties entered into such Agreement dated December 24, 2002 ("Agreement");

WHEREAS, the parties executed Amendment Nos. 1 and 2, dated February 28, 2005, and December 23, 2005, respectively, to extend the deadline by which the YMCA needed to transfer the Property For City to the City; and

WHEREAS, the parties wish to further amend the Agreement.

NOW, THEREFORE, the parties in consideration of the promises and the mutual covenants contained herein and in the Agreement, and in Amendment Nos. 1 and 2, agree to amend the Agreement as follows:

1. Paragraph No. 1, Term of Agreement, of the Agreement shall be amended to read as follows:

> The rights and responsibilities of Subparagraph No. 7D of Paragraph No. 7 and Paragraph Nos. 5, 8, 12, 14, 15, 16, 17 and 26, of this Agreement shall commence on the 1st day of July, 2004, and continue for a period of twenty years through 2024. The rights and responsibilities of the remaining sections shall be completed as of the dates stated herein.

2. Paragraph No. 5, Transfer of real estate from the YMCA to the City, of the Agreement shall be amended to read as follows:

> Within thirty (30) days after the issuance of a permanent certificate of occupancy for the New YMCA, but in no event later than February 28, 2006, ("Second Closing Date"), the YMCA shall transfer title of Roanoke City Official Tax Nos. 1011206, 1011209 and 1011210 (hereinafter "Property For City") to the City. The property shall be in substantially the same condition as it was on December 24, 2002, subject to the other provisions of the Agreement bearing that same date, and its amendments, including the clean up of the Property For City. The YMCA shall not be obligated to prepare the subject Property For City for use by the City, subject to Paragraph No. 8F. Pursuant to Paragraph No. 8, the City assumes no duty to insure the Property For City for any loss or liability prior to the closing date therefor.

3. Paragraph No. 7, Exchange of Property For City and warranties, of the Agreement shall be amended by amending subparagraphs B and C and by adding subparagraph D, and Paragraph No. 7 shall read as follows:

> A. Simultaneously with the transfer set forth in Paragraph 5, above, the YMCA shall record the deed with the Clerk of the Circuit Court for the City of Roanoke. In addition to any representations and warranties contained elsewhere in this Agreement, the YMCA warrants and represents that: (a) the YMCA will, in accordance with this Agreement, convey title to the Property For City free and clear of all liens, covenants, conditions, restrictions, right-of-ways, easements, and encumbrances of any kind or character whatsoever; (b) the YMCA has good and marketable fee simple title to the Property For City, and the YMCA is the sole owner of the Property For City; (c) the YMCA has no knowledge of any pending or threatened proceedings for condemnation or the exercise of the right of eminent domain as to any part of the Property For City or the limiting or denying of any right of access thereto; (d) the YMCA has no knowledge of, nor has it received any notice of, any special taxes or assessments relating to the Property For City or any part thereof; and (e) there are no leases of the Property For City.
>
> B. Title to the Property For City shall be conveyed by YMCA to the City with good, clear marketable title by general warranty deed, free and clear of all liens, covenants, conditions, restrictions, right-of-ways, easements, and encumbrances of any kind or character whatsoever, in form acceptable to the City Manager for the City of Roanoke. The YMCA shall convey title to the Property For City by a good and sufficient General Warranty Deed with English covenants of title, prepared at the expense of the YMCA, in recordable form, conveying fee simple title to the Property For City to the City.

C. Delivery of title in accordance with the foregoing shall be evidenced by the willingness on the closing date of a title company selected by the City to issue, upon payment of its normal premium, to the City its American Land Title Association (Form B) Owner's Policy of Title Insurance insuring the City in the amount of $2,856,200.00 in respect to the Property For City and that title to the Property For City is vested in the YMCA.

D. The General Warranty Deed shall provide that the representations and covenants contained in the Agreement dated December 24, 2002, between the City of Roanoke and the YMCA of Roanoke Valley, Inc., and Amendment Nos. 1, 2 and 3, dated February 28, 2005, December 23, 2005, and February 21, 2006, respectively, to such Agreement, shall survive the closing date of the deed, and that title to Official Tax No. 1011206 shall not include title or ownership of any portion of the pedestrian walkway connecting the structure on Official Tax No. 1011206 and the structure on Official Tax No. 1011202.

4. Subparagraph E, Removal of Underground Storage Tank(s), of Paragraph No. 8, Environmental, shall read as follows:

(1) On or before the date the City takes title to Property For City, the YMCA, at its own expense, shall remove the underground storage tank used to store diesel fuel for heating purposes ("UST"), and all appurtenances and attachments thereto, if any, and any other underground storage tank, and appurtenances and attachments thereto, used for the storage of any fuel or hazardous materials as used and defined in this Agreement, that are located on Property For City. The YMCA shall be solely responsible and remain liable for any and all costs associated with such removal, and such removal shall be in compliance with all applicable local, state and federal laws. The YMCA shall supply the City with such documents as the City may request to show the YMCA's compliance.

(2) Prior to beginning the removal of the UST or any other underground storage tank, or appurtenances or attachments thereto, referred to in subsection (1), above, the YMCA shall notify the Environmental Administrator for the City and the Fire Marshall for the City of such removal. Such persons, or their designees, shall be permitted to be present during the course of the entire removal and to perform, or require the YMCA, at its sole expense, to have performed such tests as the City may deem necessary and appropriate to ensure compliance with all applicable codes, statutes, laws and ordinances, and to ensure that no stored substances have leaked or been released by the UST, or any other underground storage tank, or appurtenances or attachments thereto, referred to in subsection (1), above, at any time.

(3) Upon completing the removal, the YMCA shall restore any disturbed portion of the Property For City to its condition in existence before the YMCA

began the removal. Such restoration shall not begin until both the Fire Marshall and the Environmental Administrator have permitted, in writing, that such restoration may begin.

(4) Subject to subsection Nos. 7 and 8, below, in the event the YMCA fails to remove the UST, or any other underground storage tank, or appurtenances or attachments thereto, referred to in subsection (1), above, from the Property For City on or before the date City takes title to Property For City, and if the City, or its designee, removes the UST, or any appurtenances or attachments thereto, at the City's expense, the YMCA shall reimburse the City in full for the costs of such removal and restoration of the Property For City to its original condition prior to the initiation of such removal, plus fifty percent (50%) of the cost of such removal and restoration, within thirty (30) days of completion of the removal and restoration, as liquidated damages for such expenses incurred by the City which are not out-of-pocket expenses.

(5) If the testing performed by, or at the request of, the City reveals that any substance stored in the UST, or any other underground storage tank, or appurtenances or attachments thereto, referred to in subsection (1), above, leaked at any time, the YMCA shall be responsible for remediation of such condition.

(6) The provisions of this section shall be read and construed in conjunction with the other sections of this Agreement and the obligations under this section are in addition to, and not in place of, any other obligations of the YMCA in any other sections of this Agreement.

(7) The preceding language of this subparagraph E notwithstanding, the YMCA shall not be required to remove and dispose of the piping and impacted soil of the UST on or before the date the City takes title to the Property For City. The YMCA, or any of its successors in interest, shall remove and dispose of the piping and impacted soil of the UST at the sole expense of the YMCA, or any of its successors in interest, if the City, or any person or entity at the request of the City, elects to demolish the structure or remove the asphalt on the Property for the City. Such removal and disposal shall occur during the course of, or prior to, the completion of the demolition of the structure or removal of the asphalt and shall be to the complete satisfaction of the City Manager for the City of Roanoke. The duty to remove the piping and impacted soil shall not be that of the YMCA, if the City subsequently sells, or otherwise transfers, all of the Property For City "as is" to any party or entity, subject to subsection No. 8, below.

(8) If the City is required to remove the piping and impacted soil for any reason, including the preparation of the Property For City for sale, lease or transfer, to any person or entity, without demolishing the structure or removing the asphalt, the YMCA will reimburse the City for all costs and expenses incurred by the City for the removal and disposal of the piping and impacted soil. If the City decides to sell the Property For City,

or any portion thereof, prior to demolition of the structure and removal of the asphalt, and prior to removal of the piping and impacted soil, and if there is a reduction in the sale price of the property being sold due to the presence of the piping and impacted soil, the City Manager for the City of Roanoke shall determine the amount of such reduction and the YMCA will pay to the City an amount equal to such reduction within thirty (30) days of written notification from the City. Such determination shall be based on the opinion of a real estate appraiser who is certified by the Commonwealth of Virginia and who is mutually approved, in writing, by the City and the YMCA. Such approval shall not be unreasonably withheld.

5. Paragraph No. 12, Second Closing, of the Agreement shall be amended in subparagraphs A, B and C, to read as follows:

A. The purchase of the Property For City shall occur at 10:00 a.m. on a date selected by the YMCA within thirty (30) days after the issuance of a permanent certificate of occupancy for the New YMCA but in no event later than February 28, 2006 (hereinafter "Second Closing Date"), in the Office of the City Attorney, or at such other location and time as shall be approved by the City and the YMCA.

B. On the Second Closing Date, the YMCA shall deliver or cause to be delivered to the City the following documents:

(1) Its duly executed and acknowledged General Warranty Deed conveying to the City the Property For City, approved as to form by the City Attorney, at least five (5) business days before the Second Closing Date.

(2) A mechanic's lien affidavit executed by a representative of the YMCA, satisfactory to the title company selected by the City, and to the effect that no work has been performed on the Property For City in the one hundred twenty-five (125) days immediately preceding the Second Closing Date that could result in a mechanic's lien claim, or, if such work has been performed, it has been paid for in full;

(3) Such evidence and documents including, without limitation, a certified copy of the resolution adopted by the YMCA, as may reasonably be required by the title company selected by the City, evidencing the authority of the person(s) executing the various documents on behalf of the YMCA in connection with its sale of the Property For City;

(4) A duly executed counterpart of a Closing Statement;

(5) Any other items required to be delivered pursuant to this Agreement, and any other documents or Agreements referred to in this Agreement.

C. With respect to the Property For City, the City shall pay for: (i) the cost of examination of title and title insurance premiums for issuance of the Title Policy; (ii) all attorney's fees and expenses incurred by legal counsel to City; and (iii) any Grantee's tax and recording costs required to be paid in connection with the recording of Deed. The YMCA shall pay the Grantor's tax, if any, and the expenses of legal counsel for YMCA, if any. The YMCA shall deliver exclusive possession of the Property For City to the City on the Second Closing Date.

6. Paragraph No. 22, Notice, shall be amended to read as follows:

Notice under this Agreement shall be sent, in writing, by certified mail to the following persons:

If to the City:	City Manager Room 364 Municipal Building 215 Church Avenue, S.W. Roanoke, VA 24011
If to the YMCA:	Executive Director 520 Church Avenue, S.W. Roanoke, VA 24016

Notice shall be effective upon receipt.

7. A new Paragraph No. 26, Pedestrian Walkway, shall be added to read as follows:

(a) Upon receiving written notification from the City Manager for the City of Roanoke, the YMCA shall demolish and remove the pedestrian walkway which connects the structures on Official Tax Nos. 1011202 and 1011206 and which is the subject of the Ordinance No. 22249, adopted by City Council for the City of Roanoke on June 2, 1975. Such demolition and removal shall begin within thirty (30) calendar days of receipt of such notice to proceed and shall be completed to the satisfaction of the City Manager within sixty (60) calendar days of receipt of such notice. Such demolition and removal shall be at the sole cost and expense of the YMCA and shall be performed by a licensed contractor experienced in such work. In the event demolition of the structure on Official Tax No. 1011202 is initiated or completed before demolition of the structure on Official Tax No. 1011206 is initiated, the YMCA shall restore the condition of the facade of the structure on Official Tax No. 1011206 to the satisfaction of the City Manager.

(b) Prior to initiating the removal of the pedestrian walkway, the YMCA shall do the following:

(1) Obtain and maintain, or have obtained or maintained, at the sole expense of the YMCA, the insurance policies required by this Paragraph No. 26. Any required insurance policies shall be effective prior to the beginning of any work or other performance by the YMCA, or its contractor, under this Agreement. The following policies and coverages are required:

(i) Commercial General Liability. Commercial general liability insurance shall insure against all claims, loss, cost, damage, expense or liability from loss of life or damage or injury to persons or property arising out of the YMCA=s performance under this Agreement. The minimum limits of liability for this coverage shall be $1,000,000.00 combined single limit for any one occurrence. The Certificate of Insurance must state that Rigger's coverage is included.

(ii) Workers= Compensation. Workers= compensation insurance covering the YMCA=s statutory obligation under the laws of the Commonwealth of Virginia and employer=s liability insurance shall be maintained for all its employees engaged in work under this Agreement. Minimum limits of liability for employer=s liability shall be one hundred thousand dollars and no cents ($100,000.00) bodily injury by accident each occurrence; five hundred thousand dollars and no cents ($500,000.00) bodily injury by disease (policy limit); and one hundred thousand dollars and no cents ($100,000.00) bodily injury by disease (each employee). With respect to workers= compensation coverage, the contractor=s insurance company shall waive rights of subrogation against the City, its officers, employees, agents, volunteers and representatives.

(2) Umbrella Coverage. The insurance coverages and amounts set forth in subsections (1)(i) and (1)(ii), above, of this subsection (b) may be met by an umbrella liability policy following the form of the underlying primary coverage in a minimum amount of $5,000,000.00. Should an umbrella liability insurance coverage policy be used, such coverage shall be accompanied by a certificate of endorsement stating that it applies to the specific policy numbers indicated for the insurance providing the coverages required by subsections (1)(i) and (1)(ii), above, of this subsection, and it is further agreed that such statement shall be made a part of the certificate of insurance furnished by to this City.

(3) Evidence of Insurance. All insurance shall meet the following requirements:

(i) Prior to execution of this Agreement, the YMCA shall furnish the City a certificate or certificates of insurance showing the type, amount, effective dates and date of expiration of the policies. Certificates of insurance shall include any insurance deductibles. Such certificates shall be attached to this Agreement at the time of execution of this Agreement and shall be furnished in a timely fashion to demonstrate continuous and uninterrupted coverage of all of the required forms of insurance for the entire term of this Agreement.

(ii) The required certificate or certificates of insurance shall include substantially the following statement: AThe insurance covered by this certificate shall not be canceled or materially altered, except after thirty (30) days written notice has been received by the Risk Management Officer for the City of Roanoke.@

(iii) The required certificate or certificates of insurance shall name the City of Roanoke, its officers, employees, agents, volunteers and representatives as additional insureds.

(iv) Where waiver of subrogation is required with respect to any policy of insurance required under this section, such waiver shall be specified on the certificate of insurance.

(v) Insurance coverage shall be in a form and with an insurance company approved by the City which approval shall not be unreasonably withheld. Any insurance company providing coverage under this Agreement shall be authorized to do business in the Commonwealth of Virginia.

(4) Ranges and Limits. At the end of three (3) years from the date of the Agreement dated December 24, 2002, the City shall have the right to require increases in the amounts of insurance specified herein. Any adjustments shall bear a reasonable relation to any change in the cost of living or cost of repair or replacement, as measured by changes in the consumer Price Index of the United States Bureau of Labor Statistics

applicable to the Commonwealth of Virginia or comparable measure if the Consumer Price Index is no longer being issued.

(c) During the entire time this Agreement is in force, and immediately prior to the removal of the pedestrian walkway, the YMCA shall secure the structure on Official Tax No. 1011202 to ensure that no person gains access to the pedestrian walkway.

(d) During the entire time this Agreement is in force, and immediately prior to the removal of the pedestrian walkway, the YMCA shall inspect and maintain the pedestrian walkway to ensure structural soundness and integrity and safety.

(e) The demolition and removal of the pedestrian walkway shall be performed in accordance with all applicable local, state and federal ordinance, laws and regulations, including those applicable to asbestos and lead-based paint removal.

(f) Title to, and any interest in, Official Tax No. 1011202 may not be transferred by the YMCA to any person or entity without the written approval of the City Manager for the City of Roanoke, such approval containing specific reference to the Agreement dated December 24, 2002, between the City and the YMCA, and any amendment of such Agreement.

(g) The rights of the City in this paragraph shall be in addition to those rights it has pursuant to Ordinance No. 22249, adopted June 2, 1975, and all applicable state and city code provisions.

7. The Agreement dated December 24, 2002, as amended by Amendment Nos. 1 and 2, dated February 28, 2005, and December 23, 2005, respectively, shall be changed in no other way.

WITNESS the following signatures and seals:

ATTEST:

CITY OF ROANOKE:

_____
Mary F. Parker, City Clerk

By_____
Darlene L. Burcham, City Manager

ATTEST:

YMCA OF ROANOKE VALLEY, INC.

_____
Secretary

By _____
Phillip D. Short, President, Board of Directors

Approved as to form:

_____
Assistant City Attorney

Approved as to execution:

_____
Assistant City Attorney