

**LEASE AND OPERATION
AGREEMENT**

Document Number

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Name and Return Address

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LEASE AND OPERATION AGREEMENT

BETWEEN

WHITEWATER UNIFIED SCHOOL DISTRICT (the "SCHOOL DISTRICT")

THE CITY OF WHITEWATER (the "CITY")

LEASE AND OPERATION AGREEMENT

THIS LEASE AND OPERATION AGREEMENT (this "Agreement") is entered into as of the _____ day of _____, 2023 (the "Effective Date"), by and among **WHITEWATER UNIFIED SCHOOL DISTRICT** (the "**SCHOOL DISTRICT**"), a Wisconsin school district and **THE CITY OF WHITEWATER**, a Wisconsin municipal corporation and political subdivision (the "**CITY**").

RECITALS

- A. The School District and the City have previously contracted in prior Lease and Operating Agreements, the most recent of which terminated in 2021.
- B. The terms of the Lease and Operating Agreement provide for the operation of a recreation facility constructed on land owned by the District and adjacent to Whitewater High School (the "Site"), an aquatic facility consisting of an eight lane, twenty-five yard competitive pool (the "Lap Pool"), a leisure pool (the "Leisure Pool"), a slide, a Fitness Center, and appurtenant fixtures, mechanical systems and related improvements (collectively, the "Aquatic Facility").
- C. The Aquatic Facility also includes a locker room facility constructed for the sole and exclusive use of the School District (the "District Locker Room Facility"). For purposes of this Agreement, the District Locker Room Facility means the area of the Aquatic Facility bounded by the interior walls, floor and ceiling of the District Locker Room Facility, as well as any portions of the Aquatic Facility utility and mechanical systems (wherever located) serving exclusively the District Locker Room Facility.
- D. The Aquatic Facility was constructed using public funds appropriated by the School District and the City which included a \$2,000,000 contribution from the City of Whitewater, and private donations obtained by other sources, and is primarily intended to serve the recreational and programmatic needs of the general public. By pooling the resources of the City, the School District, and the private sector, the above needs have been met in a comprehensive and cost-efficient manner for the benefit of all parties. The parties agree that the School District's contribution shall be used to enable all School District residents to use the Aquatic Facility under the same use and fee structures as City residents. In addition, and separate and apart from this Agreement, the City and School District have executed an agreement by which the School District will rent portions of the Aquatic Facility for curricular, special education, and extracurricular purposes.
- E. The Aquatic Center Committee of the City of Whitewater (the "ACC") will assume the responsibility for the committee oversight of the Aquatic Facility. The ACC is a governmental subdivision and agency of the City. The ACC shall have five voting members. The School District and the City shall each have the right to appoint one regular member and one alternate member to the ACC, respectively. An alternate member may only replace a regular member if the absent regular member is appointed by the same body that appointed the alternate member. Three citizens members shall be appointed by the City in accordance with the City of Whitewater Municipal Code Section 2.12.011.
- F. For purposes of this Agreement, the term "Leased Premises" means the Aquatic Facility and the Site, excluding the District Locker Room Facility.
- G. Capitalized terms used, but not defined, in this Agreement, shall have the meaning given

to them in the Cooperation Agreement. Any inconsistencies between the terms of the Cooperation Agreement and this Agreement shall be resolved in favor of this Agreement.

NOW, THEREFORE, in consideration of the foregoing Recitals, each of which is incorporated into this Agreement by reference, and further in consideration of the rents to be paid hereunder, and subject to all of the covenants and agreements contained in this Agreement, the parties agree as follows:

ARTICLE I.

DEMISE OF LEASED PREMISES

1.01 **The Leased Premises.** The School District hereby leases unto the City, and the City hereby leases from the School District, the Leased Premises. The Leased Premises are depicted on the attached Exhibit A.

1.02 **Access and Parking.** In connection with its lease of the Leased Premises, the School District hereby also grants unto the City and its employees, invitees and patrons the non-exclusive right of ingress and egress to and from the Aquatic Facility over and across the driveways and walkways serving Whitewater High School, as well as the non-exclusive right to use the parking areas, all as shown on the attached Exhibit B. In order to further accommodate the parking needs of the Aquatic Facility: (a) the School District also agrees that the parking spaces in that portion of the Whitewater High School parking area designated on the attached Exhibit B as the "Aquatic Facility Designated Parking Area" shall not be used by students of Whitewater High School as are other portions of the parking area; and (b) the School District will use reasonable efforts to assure that students are not parking in the Aquatic Facility Designated Parking Area during the customary school day hours of 7:30 a.m. to 3:30 p.m. The remaining parking spaces in the Whitewater High School parking area shall be available for use by the School District, the City and the general public on a first come/first served basis. The School District shall post signs in appropriate locations of the parking area to inform the public that the parking spaces are in the "Aquatic Facility Designated Parking Area."

ARTICLE II.

TERM OF AGREEMENT

2.01 **Initial Term.** The initial term of this Agreement shall run for six (6) years commencing on _____, 2023 (the "Commencement Date") and ending at 11:59 p.m. on _____, 2029 (the "Expiration Date"), unless sooner terminated in accordance with this Agreement or in furtherance of the School District's and the City's rights and remedies in the event of an uncured default.

2.02 **Rights to Extend the Term.** The parties may extend this Lease only by mutual written agreement of the City and the School District.

ARTICLE III.

RENTAL

3.01 **Annual Rent.** During the term of this Agreement, the City shall pay to the School District annual rent of One Dollar (\$1.00), payable in advance on the Commencement Date and on each annual anniversary of the Commencement Date.

ARTICLE IV.

USE OF THE LEASED PREMISES

4.01 **Permitted Use/Continuous Use.** During the entire term of this Agreement, including any extensions: (a) the City shall have the right to use the Leased Premises; and (b) the City covenants that it will continuously use the Leased Premises, solely as a public recreation facility serving public recreational needs and the reasonable programming needs of the School District. Such use shall at all times be conducted in accordance with the terms of this Agreement and with all applicable federal, state, and local laws, codes, regulations, ordinances, permits and licenses (collectively, "Laws"), including without limitation all Laws governing the use of the School District's facilities, to the extent such Laws affect the use and operation of the Leased Premises. The School District will use diligent efforts to keep the City informed regarding Laws applicable to School District facilities, including any changes in such Laws. Without limiting the generality of the foregoing, the Aquatic Facility shall at all times be a smoke-free, alcohol-free, and drug-free environment.

ARTICLE V.

OPERATION OF THE LEASED PREMISES

5.01 **Responsibility for Operation.** During the term of this Agreement, the ACC shall have primary responsibility for the committee oversight of the Leased Premises. In that regard:

- A. **Allocation and Use of Space.** Subject to the general restrictions set forth in Article IV above and the School District's rights and remedies as set forth in this Agreement, the City and ACC will have the sole and exclusive control over and right to schedule, allocate and lease space within the Leased Premises. It is anticipated that, in connection with the operation of the Aquatic Facility, the City may enter into (a) sublease/use agreements with various individuals and user groups ("Use Agreements"); and (b) contractual arrangements with concessionaires, management companies and other service providers (collectively, "Service Contracts"). The School District consents to such Use Agreements and Service Contracts, all of which, however, shall be expressly subject and subordinate to the terms of this Agreement.

- B. Personnel.** Except as otherwise provided for herein or by other lease agreements between the parties regarding the School District's scheduled use of the Aquatic Facility, the City shall solely be responsible for staffing the Aquatic Facility (except the District Locker Room Facility), including without limitation the selection, hiring/firing, wages and benefits, workers compensation, unemployment compensation, non-discrimination requirements and all other costs and liabilities associated with all employees and volunteers, if any, necessary to operate the Aquatic Facility. Staffing needs will be determined by the Director of Parks and Recreation and reflected in the Annual Budget (as described in Section 5.02 below). The ACC may also retain, at its sole expense, such professional and administrative services (e.g., accounting, legal, purchasing, human resources, and so on) as it deems necessary to the operation and management of the Aquatic Facility. The City and ACC may use volunteer staff in operating the Aquatic Facility, provided that all such volunteers, prior to commencing any activities within the Leased Premises, sign a waiver of liability in favor of, and in form and substance satisfactory to the City and the School District. Notwithstanding the foregoing, in the event the ACC fails or declines to satisfy or comply with its responsibilities under this section, then the Parties shall fully indemnify and hold each other harmless from any and all claims or demands asserted by any Aquatic Facility staff member or third party, including reasonable attorney fees and costs of defense, relating to such violation of this section. The ACC may use Aquatic Center personnel and facilities to conduct recreation registration unrelated to the Aquatic Center and other similar activities for the benefit of the general public.
- C. Special Activities/Events.** It is anticipated that the School District may request use of the Aquatic Facility for uses in addition to those uses described in this Agreement and the City may request use of the Aquatic Facility for uses extending beyond the scope of the General Public's Recreational Needs as described herein (all such additional uses collectively referred to herein as the "Special Activities/Events"). It is intended that any use by the School District or the City for Special Activities/Events shall be subject to payment to Aquatic Facility of a reasonable additional fee for use of the Aquatic Facility beyond the School District's Program Needs and/or the General Public's Recreational Needs, as appropriate. Such uses shall be scheduled through the Aquatic Facility manager in the same manner as uses by any other party wishing to schedule an event at the Aquatic Facility, and shall be subject to availability. The School District and/or the City, as appropriate, shall be responsible for providing lifeguards and supervising all staff and other personnel necessary for any such Special Activities/Events. Subject to the approval of the ACC, Aquatic Facility personnel may be used to assist the School District and/or the City in connection with any such Special Activities/Events so long as the City and/or the School District remains primarily responsible for all liability associated with any such Special

Activities/Events and the Aquatic Facility is reimbursed for its unusual or irregular personnel and other costs incurred as a result of such activities or events. The City and/or the School District may use volunteer staff in connection with any such Special Activities/Events provided that, prior to commencing any such volunteer activities, all such volunteers sign a waiver of liability in favor of: and in form and substance satisfactory to, the School District and the City. Also, any volunteer who will act as a lifeguard must be a certified lifeguard or be otherwise properly qualified to provide lifeguard services. The ACC shall develop a written policy to assist Aquatic Center staff, the City, and the School District in the determination as to which types of activities/events will be considered special activities/events.

D. Budget.

1. General Budget. The Aquatic Facility will have a separate budget and shall maintain a separate operating account from the City and the Whitewater Park and Recreation Department. The City will cover expenses equally to the extent that they are not covered by revenues otherwise generated. All revenue generated by the Aquatic Center operations will be used for Aquatic Facility expenses.
2. Operations Budget. The City shall initially contribute \$248,000.00 towards the Aquatic Facility operations costs. For each subsequent year for the term of this Agreement, plus any extensions, the City shall contribute an amount equal to the previous year's contribution for operational costs plus an additional three percent (3%). The School District shall initially contribute \$178,000.00 towards the Aquatic Facility operations costs. For each subsequent year for the term of this Agreement, plus any extensions, the School District shall contribute an amount equal to the previous year's contribution for operational costs plus an additional three percent (3%).
3. Capital Budget. The City and the School District shall each contribute \$100,000.00 annually for capital repairs and improvements. After the first three annual capital contribution payments are made, each subsequent capital contribution payment shall be the amount made in the previous year plus three percent (3%), respectively.

E. Revenues. The City and ACC shall be responsible for operating the Leased Premises in such a way that attempts to generate sufficient revenues to cover all of the expenses related to the Aquatic Facility's obligations under this Agreement, including without limitation, all of the expenses of operating, maintaining, repairing, replacing and staffing the Leased Premises (except for Special Activities/Events as set forth above). The City and ACC shall have the right to receive and/or be reimbursed for all revenues generated by the use and operation of the Leased Premises, including swimming lessons and any revenues generated by the

User Agreements and/or the Service Contracts and/or Special Activities/Events described above, provided, however, that the School District shall have the right to retain curriculum fees, meet entry fees, revenues from sales of School District apparel, swimming lessons the School District provides and other similar revenues (but not revenues from concessions from use of the Aquatic Facility) in connection with use of the Aquatic Facility for the School District's Program Needs. above or in connection with any Special Activities/Events above subject to the obligation to reimburse the Aquatic Facility for any use of Aquatic Facility staff and other Aquatic Facility costs as provided under Sections 5.01 B. and 5.01 C., above. The ACC shall establish appropriate user fees for the use of the Aquatic Facility. All such user fees received by the Aquatic Facility shall be deposited to appropriate operating accounts administered and controlled by the ACC for use in connection with the operation and staffing of the Aquatic Facility and the maintenance, repair and replacement of the Aquatic Facility and the equipment and other assets of the Aquatic Facility.

In addition, the ACC shall engage in appropriate fundraising activities as a means of generating operating funds for operation of the Aquatic Facility. Any directed gifts acquired through such fundraising activities shall be utilized for such charitable purposes as the donor may so direct (subject to the terms of this Agreement) and, further, shall be held in and disbursed from such segregated accounts as the ACC deems necessary or appropriate.

Any fundraising activities conducted on the Leased Premises (including without limitation, any commercial sponsorships and/or Service Contracts requiring the use, display or recognition of commercial logos within or upon the Aquatic Facility) shall be subject to the prior approval of the School District and the City, which approval shall not be unreasonably withheld, suspended or delayed.

- F. **Request for Additional Operating or Capital Funds.** The ACC shall obtain the consent of the City and School District prior to transferring any funds out of its capital account for operational expense use. The ACC will make requests to the City and School District in the event it needs additional funds for capital expenses.

5.01 **Annual Budget.** Not later than October 31 1 of each calendar year during the term of this Agreement, or such other time as may be mutually agreeable to the parties, the ACC shall deliver to the School District and the City an annual budget for the upcoming calendar year (the "Annual Budget"). The Annual Budget will show all anticipated funding and revenues of the Aquatic Facility for the upcoming year together with a schedule of the projected user fees to be charged for the upcoming year, and projected expenditures for the upcoming year together with such reserves for capital expenditures and improvements as the ACC deems appropriate. Within thirty (30) days after their receipt of the Annual Budget, the School District and the City shall provide the ACC any suggestions or comments they may have to the Annual Budget, and the

ACC shall give due consideration to the direction of the School District and the City in arriving at its final Annual Budget for the upcoming year.

5.02 **Financial Reports.** Not later than May 1st of each calendar year during the term of this Agreement, the ACC shall submit to the School District and to the City annual financial reports regarding the operation of the Aquatic Facility during the most recent preceding calendar year, certified as having been reviewed by a qualified representative of the City or ACC. In addition, the ACC shall make its financial books and records available to representatives of the School District and the City during normal business hours upon request.

ARTICLE VI.

IMPROVEMENTS; ALTERATIONS; REPAIRS AND MAINTENANCE

6.01 **Alterations and Additions.** Subject to the advance, written approval of the School District and the City, and all applicable laws, codes, regulations and ordinances, the ACC shall have the right at any time and from time to time during the term of this Agreement, to make such changes, alterations and additions, structural or otherwise, to the Leased Premises, and the fixtures and equipment thereof now or hereafter located on the Leased Premises, as the ACC shall deem necessary or desirable in connection with the ACC's permitted use of the Leased Premises. Prior to the commencement of any such work, the ACC shall submit to the School District and the City for their review and approval, the plans and specifications for such work, together with confirmation that the ACC has on hand, or has obtained written commitments for, all funds sufficient to pay the total estimated cost of such work. Any alterations to the exterior of the Leased Premises shall be compatible with the exterior design and appearance of the exterior of Whitewater High School. If the School District and the City have not approved or rejected the plans and specifications by written notice to the ACC within sixty (60) days after submission, such plans and specifications shall be deemed to have been approved. Approval of any such plans and specifications shall not be unreasonably withheld provided, however, that unavailability of funds to pay for the proposed work and/or unreasonable interference with or limitation upon the ACC's ability to meet the School District's Program Needs and/or the General Public's Recreational Needs shall be a proper basis for rejection. The cost of any such change, alteration or addition shall be promptly paid and discharged by the ACC so that the Leased Premises shall at all times be free of liens for labor and materials supplied to the Leased Premises.

6.02 **No Waste.** The ACC shall not do or permit any waste or damage, disfigurement or injury to the Leased Premises or any building or improvement now or hereafter on the Leased Premises or the fixtures or equipment thereof.

6.03 **Condition of Leased Premises.** The ACC, prior to the occupancy thereof, shall fully familiarize itself with the physical condition of the Leased Premises and the improvements, fixtures and equipment thereof.

6.04 **Maintenance and Repair Obligations.** The ACC covenants and agrees, throughout the term of this Agreement, to maintain the Leased Premises and keep the Leased Premises in as good order and condition as they are in as of the Effective Date, reasonable use and wear thereof excepted. The ACC shall promptly make or cause to be made all necessary repairs, interior and exterior, structural and nonstructural. When used

in this Agreement, the term "repairs" shall include replacements or renewals when necessary, and all such repairs made by the ACC shall be at least equal in quality and class to the original work. The School District and the City shall, throughout the term of this Agreement, have the right, upon reasonable notice to the ACC, to inspect the Leased Premises to verify compliance with the terms of this Article VI. If the School District believes that the ACC is not properly carrying out its duties of maintenance and repair, they shall deliver to the ACC a notice of default alleging the same, and, the ACC shall cure such default, or if a cure within that time period is not reasonably possible, commence a cure within that time period and thereafter diligently proceed to cure such default as provided in Article VII below.

The School District shall be responsible for the cost of providing electricity to operate the emergency lighting, exit lighting, and fire alarm systems serving the Aquatic Facility and the lighting to the parking areas, and for the cost of maintenance and repair of, and snow removal from, the parking areas and sidewalks serving the School District's property, including those areas shared with the Leased Premises as described above and maintenance and repair of the parking area lighting.

ARTICLE VII.

OPERATING EXPENSES

7.01 **Aquatic Center Committee Obligations.** Except as otherwise provided in this Agreement, the City and ACC shall be solely responsible for paying, when due, any and all costs and expenses of every kind and nature required to operate, maintain, repair or replace the Leased Premises, including, without limitation, those of cleaning, lighting, maintaining, repairing and replacing the structures located thereon; the hiring of engineers, architects and other experts in connection with improving, maintaining, repairing or replacing the Leased Premises; maintaining, repairing, or replacing any of the walls, foundations or exterior structural portions of the structures located upon the Leased Premises; providing security and other special services; supplies; water and sewer charges; electricity, gas, and all other utility charges; licenses and permit fees; and any and all other expenses whatsoever of maintaining, operating, repairing and replacing the Leased Premises. The School District shall have no duty to provide any utility or other services to the Leased Premises, with the exception of the electricity (including back-up system) necessary to operate the emergency lighting, exit lighting, and fire alarm systems serving the Leased Premises, all of which shall be operated, at School District expense, as part of the systems serving Whitewater High School.

The Annual Budget prepared by the ACC each year shall include adequate reserves for the expected future replacement of the structural, mechanical and utility systems of the Leased Premises as reasonably deemed appropriate by the ACC.

In addition to the foregoing, beginning on the Effective Date, the ACC shall be solely responsible for any taxes, special assessments, or other governmental assessments or exactions levied, assessed, or otherwise relating to the entire Leased Premises, including without limitation, real estate taxes; governmental assessments such as special assessments, or payments in lieu of taxes. If any such taxes or assessments are payable, or may at the option of the taxpayer be paid, in installments, then the ACC shall have the right to pay the same in installments. The ACC shall have the right to contest and review the amount for validity, in whole or in part, of any taxes, payments in lieu of taxes, or

special assessments levied, imposed, assessed or payable upon, against, for or with respect to the Leased Premises. The term "legal proceedings" includes appropriate appeals of any judgments, decrees, orders and certiorari proceedings and appeals of orders therein, to and including appeals to the court of last resort. In the event any rebate of special assessments or other charges levied, imposed, assessed or payable upon, against or with respect to the Leased Premises is made, such rebate shall be the sole property of the ACC, provided the ACC shall have paid such special assessment or other charge in the first instance.

ARTICLE VIII.

SIGNS

The ACC shall have the right to erect, maintain and replace identification and directional signs on the exterior of the Leased Premises, subject the written consent of the School District, which consent shall not be unreasonably withheld or delayed.

ARTICLE IX.

INSURANCE: DESTRUCTION OF LEASED PREMISES

9.01 **Casualty Insurance.** During the entire term of this Agreement, the City shall, at its sole expense, obtain and maintain comprehensive casualty insurance with coverage limits of not less than \$5,000,000 insuring the Leased Premises against all risks, both general and specific, as are customarily insured against for developments of like size and character to the Leased Premises. In that regard, the City shall obtain, and provide to the School District, the written advice of a qualified risk management specialist advising the ACC regarding such recommended coverages. The ACC shall cause the School District and the City to be named insureds under all such policies. On or before the Effective Date, the ACC shall provide the School District and the City with a certificate or certificates of insurance showing such coverages. As an alternative to the ACC obtaining separate comprehensive casualty insurance as provided herein, if such is agreeable to the parties hereto, the ACC may obtain such comprehensive casualty insurance coverage through the existing or future policies issued to the School District and/or the City so long as the ACC reimburses the School District and/or the City, as appropriate, for the actual cost of said coverage. In any event, the School District and the City shall be named insureds on all such coverage.

9.02 **Waiver of Claims.** The parties acknowledge that there are certain risks associated with the operation of the Aquatic Facility and related programs and activities. Each party hereby assumes all risks in connection with, and holds harmless and indemnifies the other parties hereto with respect to any damage, loss or destruction to the Leased Premises, or any part thereof, arising from or in any way attributable to the activities of each party and/or said party's directors, officers, officials, agents, employees and volunteers in, on or about the Aquatic Facility. It is agreed that all insurance proceeds available as a result of any damage, loss or destruction to the Aquatic Facility shall be applied as necessary to repair, restore, rebuild or replace the same as nearly as possible to the condition such were in immediately prior to such damage, loss or destruction.

9.03 **Liability Insurance.** During the entire term of this Agreement, the ACC shall obtain and maintain a policy or policies of general liability insurance, with coverage limits of not less than \$5,000,000 for any one occurrence for both injury to person and damage to property. All

such policy or policies shall name the School District and the City as additional insureds as their interests may appear. On or before the Effective Date, the ACC shall provide the School District and the City with a certificate or certificates of insurance showing such coverages. As an alternative to obtaining a separate general liability policy or policies as provided herein, if agreeable to the parties hereto, the ACC may obtain such coverage through existing or future policies held by the School District and/or the City so long as the ACC reimburses the School District and/or the City, as appropriate, for the actual cost of said coverage. In any event, the School District and the City shall be named insureds on said liability coverage.

9.04 **Property Insurance.** The District will maintain an insurance policy which provides property insurance coverage for the Aquatic Facility.

9.05 **Other Insurance.** The ACC shall also obtain and maintain such other coverages, including without limitation, worker's compensation, unemployment compensation, automobile coverage, directors and officers' liability as may be required by law.

ARTICLE X.

ASSIGNMENT AND SUBLETTING

10.01 **No Assignment or Subletting.** Except as permitted under Article V above regarding Use Agreements and Service Contracts, and at all times subject to the use limitations contained in Article IV above and to the terms of this Agreement generally, the ACC may not assign this Agreement or sublet the Leased Premises except in connection with the transfer of complete responsibility for operation of the Aquatic Facility, and then only with the written consent of the School District and the City, which consent shall be within the reasonable discretion of those bodies.

10.02 **Assignment Upon Expiration or Termination Uncured Default.** Upon the expiration or earlier termination of this Agreement, the ACC agrees to execute any and all assignments or other instruments necessary to convey to whomever is designated to receive them by the School District and the City, all of the ACC's right, title and interest in and to this Agreement and all other assets, contracts, funds, permits, and personal property, and any and all other rights of the ACC in and to the Leased Premises. This covenant shall be enforceable by specific performance.

ARTICLE XI.

NOTICES

All notices, certificates or other communications hereunder shall be given in one of the following methods, and shall be deemed received (i) when hand delivered; or (ii) two business days after deposit in the U.S. Mail, postage prepaid, by certified or registered mail; or (iii) one business day after deposit with an overnight commercial courier, addressed as follows:

To The School District:	Whitewater Unified School District 419 South Elizabeth Street Whitewater, WI 53190 Attn: District Administrator
To the City:	The City of Whitewater 312 West Whitewater Street Whitewater, WI 53190 Attn: City Manager
To the ACC:	The City of Whitewater Aquatic Center Committee 312 West Whitewater Street Whitewater, WI 53190

Either party may, upon prior written notice to the other, specify a different address and/or recipient for the giving of notice.

ARTICLE XII.

TERMINATION EVENTS

12.01 **Termination Events.** This Agreement may only be terminated prior to the Expiration Date pursuant to subsection A or B below (a "Termination Event"):

- A. **(i) Event of Default by ACC.** If the ACC, or its permitted successors or permitted assigns, fails to perform any material term, condition or covenant of this Agreement and if such failure continues more than ninety (90) days after the ACC receives written notice thereof (or such longer time as reasonably necessary not to exceed one hundred fifty (150) days, except with the written consent of the School District and the City in their reasonable discretion, if such is not susceptible to cure within ninety (90) days, and the ACC, upon receipt of such notice, promptly and diligently attempts to effect such cure and thereafter diligently and continuously pursues such cure), then either the School District or the City shall have the right to terminate this Agreement and to recover possession of the Leased Premises. Notwithstanding and in addition to the foregoing, before terminating this Agreement pursuant to this Section, the School District and/or the City must first comply with the notice and arbitration procedures set forth Article XVIII below.

Any claim to recover unpaid rents or other sums owing hereunder, including any costs, liabilities or damages incurred by the School District or the City due to the

ACC's failure to abide by its covenants and obligations hereunder, shall also be subject to the notice and arbitration procedures set forth in Article XVIII below. Any termination of this Agreement for default shall also be subject to Article XVI below regarding transfer of management and control following such termination.

(ii) **Right to Cure Defaults.** In addition to any other remedies the School District may have, the School District may, but shall not be obligated to, perform any obligation which the ACC has failed to perform after written notice and opportunity to cure as set forth above (or without notice in the event of a situation where failure to effect an immediate cure could result in substantial harm to the Leased Premises or injury to person), and all costs incurred by the School District and/or the City in doing so shall be immediately due the School District and/or the City from the ACC, except to the extent such costs are covered by insurance and insurance proceeds are or will be made available to pay the cost thereof.

B. Lack of Funding.

- (i) Notwithstanding any other terms of this Agreement, the School District may, at its sole discretion, terminate this Agreement at any time upon ninety (90) days' notice to the City and the ACC if the School District is unable to fund its obligations under Section 5.01.F.
- (ii) Notwithstanding any other terms of this Agreement, the City may, at its sole discretion, terminate this Agreement at any time upon ninety (90) days' notice to the School District if the City loses substantial sources of funds (for example shared revenue) such that it is no longer practical for the City to continue to fund its obligations under this Agreement.
- (iii) The City and the School District agree to be equally responsible for refunding prorated membership fees if the facility closes.

ARTICLE XIII.

INDEMNIFICATION

Each party hereto and said party's permitted successors and permitted assigns, agree to indemnify, save harmless and defend all other parties hereto, and their respective directors, officers, officials, agents and employees (collectively, the "Indemnified Parties") from any and all liability, suits, actions, claims, demands, losses, costs, damages and expenses of every kind and description, including attorney costs and fees, for claims of any character, including liability and expenses in connection with employment or personnel actions or policies of said party, the loss of life, personal injury or damage to property, or any of them, brought because of any injuries or damages received or sustained by any person, persons or property on account of or arising out of the operation, use or occupancy of all or any portion of the Leased Premises by said party, its permitted successors, permitted assigns, sublessees and other users and patrons, or at any time occurring on, at, or in the Leased Premises. No party shall be required to so indemnify any Indemnified Party whose negligence or willful misconduct was a cause of the injury or loss that is the subject of such claim. This requirement shall also apply with equal force to all work performed by a party, its successors or permitted assigns, said party's contractor or any subcontractor or any other party directly or indirectly employed by or retained by said party to

perform work relating to the operation, repair, maintenance or replacement of all or any portion of the Leased Premises or any equipment or fixtures thereon.

ARTICLE XIV.

EQUAL OPPORTUNITIES/NON-DISCRIMINATION POLICY

The ACC for itself, its permitted successors and permitted assigns, agrees that in the operation, management and use of the Leased Premises, it and they will abide by all applicable federal, state, and local laws, codes and ordinances relating to equal opportunities and non-discrimination. Without limiting the generality of the foregoing, the ACC covenants that it will not discriminate against any employee or applicant for employment within the Leased Premises, nor shall the Leased Premises or any portion of it be used by any party in any manner to permit discrimination or restriction on the basis of race, religion, marital status, age, color, sex, sexual orientation, physical condition, disability, national origin or ancestry. In the event of any claim asserted by any employee of the Aquatic Facility or any third party which arises from a violation of this section, the City shall fully indemnify and hold the School District harmless from any and all such claims or demands, including reasonable attorney fees and costs of defense, relating to the same.

ARTICLE XV.

TRANSFER OF MANAGEMENT AND CONTROL UPON EXPIRATION OR TERMINATION

15.01 Upon Expiration or Termination. Upon expiration or earlier termination of this Agreement as set forth in Article XII above (collectively a "Termination Event"), management of the Leased Premises shall become the joint responsibility of the School District and the City, and all funds then existing in the operating account or any other account held by the ACC (excluding segregated funds held for a specifically- designated charitable purpose at the direction of a donor) shall be transferred to the joint control of the School District and the City. After the occurrence of a Termination Event, the School District and the City shall confer in good faith to determine whether the Leased Premises shall continue to be operated as a public aquatic center, and if so, whether such operation shall be delegated to one or more departments or subagencies of either or both of the School District and the City, or contracted to an independent third party; provided, however, that any such use must qualify as a charitable purpose under applicable laws and regulations. If a Termination Event has occurred and the School District and the City jointly and voluntarily agree, in writing, to abandon the operation of a public aquatic center at the Leased Premises, all rights of the City and any other party hereunder shall cease, and the School District shall assume full management and control of the Leased Premises, and may use it, replace it, demolish it, or otherwise dispose of it at the School District's sole discretion. All funds then contained in the operating funds established hereunder (excluding segregated funds held for a specifically-designated charitable purpose at the direction of a donor) shall be paid to the School District to be used for the costs related thereto. If a Termination Event has occurred and the School District and the City are unable to jointly agree upon a disposition or use of the Leased Premises within ninety (90) days thereafter (or such longer time as may be mutually agreeable), the matter shall be submitted to mediation or arbitration pursuant to Article XVIII. It is acknowledged that, in the event the City and the School District are not able to reach an agreement as to the future use and/or disposition of the Aquatic Facility after the occurrence of a Termination Event, neither the City nor the School District shall be deemed to have superior

rights in the Leased Premises by virtue of this Agreement or otherwise unless and until a final determination is made by the court.

ARTICLE XVI.
MISCELLANEOUS

16.01 **Captions.** The captions or headings in this Agreement are for convenience and in no way define, limit or describe the scope or intent of the provisions of this Agreement.

16.02 **Terms.** Whenever herein the singular number is used, the same shall include the plural, and the masculine gender shall include the feminine and neuter genders.

16.03 **Governing Law.** The laws of the State of Wisconsin shall govern the interpretation and enforcement of this Agreement.

16.04 **Successors and Assigns.** Except as limited or conditioned by the express provisions hereof, the provisions of this Agreement shall inure to the benefit of and be binding upon the permitted successors and permitted assigns of the ACC and the successors and assigns of the School District and the City.

16.05 **Amendment.** This Agreement shall not be effectively amended, changed, modified, or altered without the written consent of all parties hereto (or any successor, if any), and no modification, alteration or amendment to this Agreement shall be binding upon either hereto until such modification, alteration or amendment is reduced to writing and executed by all such parties.

16.06 **Counterparts.** This Agreement may be signed in any number of counterparts with the same effect as if the signatures thereto and hereto were on the same instrument.

16.07 **Severability.** If any provision of this Agreement shall be held or deemed to be or shall, in fact, be inoperative or unenforceable as applied in any particular case in any jurisdiction or jurisdictions or in all jurisdictions, or in all cases because it conflicts with any other provision or provisions hereof or any constitution or statute or rule of public policy, or for any reason, such circumstance shall not have the effect of rendering the provision in question inoperative or unenforceable in any other case or circumstances, or of rendering any other provision or provisions herein contained invalid, inoperative, or unenforceable to any extent whatever. The invalidity of any one or more phrases, sentences, clauses or paragraphs in this Agreement contained, shall not affect the remaining portions of this Agreement, or any part thereof.

16.08 **No Third Party Beneficiaries.** This Agreement is entered into for the sole and exclusive benefit of the parties hereto. No third party shall have obtain or derive from this Agreement any rights or other benefits or interests, under any laws or otherwise.

16.09 **Exculpatory Provision.** The parties to this Agreement expressly acknowledge and agree that, anything herein to the contrary notwithstanding, that no officer, director, employee, agent, or official (elected or appointed) of any party hereto shall have any personal liability or obligation arising out of this Agreement, and no party hereto shall make any claim to the contrary.

16.10 **Rules of Construction/Conduct.** The parties to this Agreement further acknowledge and agree that this Agreement is a good faith attempt to memorialize the intent of

the parties, that in the course of its preparation, each party has been adequately and fully represented, and that, accordingly, rules of interpretation that signify that an agreement shall be construed against the drafter shall not apply. In addition, the parties acknowledge and agree that they shall endeavor to resolve any and all issues that may arise under this Agreement in a spirit of cooperation consistent with the intent of the Cooperation Agreement and with the aim of benefitting the entire Whitewater area community.

ARTICLE XVII.

ARBITRATION

17.01 **Agreement to Arbitrate.** The parties to this Agreement agree that any dispute, grievance, controversy, demand, claim, counterclaim, or cause of action (all of which are referred to as a "Claim") by or between any of the parties hereto, which arises out of or relates to any term or requirement of this Agreement, shall be submitted to arbitration pursuant to the procedures set forth below, regardless of whether such Claim arises in tort, contract, or otherwise.

17.02 **Notice of Claim.** If and when any Claim arises, the party asserting the Claim shall provide written notice of the claim ("Notice of Claim") to the opposing party within ninety (90) days of the event or occurrence giving rise to the Claim. Upon receipt of such Notice of Claim, the party against whom the Claim is made shall have twenty (20) days to either: (a) cure or satisfy the Claim, or (b) notify the other party in writing that the Claim is disputed ("Notice of Dispute"). Failure to satisfy either of the proceeding (a) or (b) shall also be considered a Notice of Dispute. If the Claim is disputed, then within twenty (20) days of the Notice of Dispute each party involved in the Claim shall select an arbitrator, attorney, or other individual (herein an "Arbitration Representative") to represent them in the Arbitration process set forth in Section 17.03 below, and each party shall notify the other party of said Arbitration Representative.

17.03 **Arbitration Panel.** If a Notice of Dispute has been provided and all other requirements of Section 18.02 have been met, then:

- A. The two (2) Arbitration Representatives as a body shall, as promptly as possible, select a third disinterested person to compose a panel of three to arbitrate the Claim. If a third person cannot be agreed upon by the two (2) Arbitration Representatives, the two (2) representatives shall jointly request that the Wisconsin Employment Relations Commission (WERC) submit a list of five (5) names from which the two (2) Arbitration Representatives, within three (3) days of receipt, shall each strike two (2) names. The remaining name shall be the disinterested person for the arbitration proceeding.
- B. Except as provided in subsection 17.05 below, the decision of a majority of the arbitration panel shall be final and binding upon the parties and any party to the arbitration may apply to the Circuit Court in Walworth County or Jefferson County for an order confirming the award in accordance with Chapter 70 of the Wisconsin Statutes. The arbitration panel shall not, however, have the authority to add to, subtract from, or otherwise modify or change the terms of this Agreement.

- C. If there is any charge for the service of the disinterested third person arbitrator, or for a transcript of the proceedings, the parties shall share the expense equally. Each party shall bear the expense of preparing and presenting its own case.

17.04 **Arbitration Default.** If any party fails or refuses to comply with any of the procedures or requirements of this Article 17, then the party aggrieved by such failure or refusal may petition the Circuit Court in Walworth County or Jefferson County for an order to enforce the terms of this Article 17. If such an order to enforce is entered by the Court, then the party who failed or refused to comply with this Article 17 shall be liable to the petitioning party for all costs and attorney's fees incurred in obtaining such an order.

17.05 **Right to Judicial Relief.** The arbitration procedures set forth in this Article XVII shall be followed with respect to all Claims arising out of or relating to any term of requirement or this Agreement. However, notwithstanding Section 17.03.B above, the parties may seek de novo judicial relief from a court of competent jurisdiction in the State of Wisconsin with respect to an arbitration decision arising out of or relating to (a) section 12.01.A(i) of this Agreement, (b) Article XV of this Agreement; or (c) the arbitrability of the Claim under this Agreement.

SIGNED AND SEALED as of the day, month, and year first above written.

WHITEWATER UNIFIED SCHOOL DISTRICT

By: _____

Name: _____

Title: School Board President

By: _____

Name: _____

Title: School Board Clerk

THE CITY OF WHITEWATER

By: _____

Name: _____

Title: Council President

By: _____

Name: _____

Title: City Clerk

AUTHENTICATION

Signature of _____ and _____, the School Board President and School Board Clerk, respectively, of the Whitewater Unified School District, authenticated as of the _____ day of _____, _____;

Name:

Member, State Bar of Wisconsin

Signed and sworn to before me
on _____

by

Notary Public, State of Wisconsin
My commission expires: _____

Drafted by: