

COPY

**COOPERATION AGREEMENT**

This Cooperation Agreement is made as of the 19<sup>th</sup> day of March, 2001, by and among the CITY OF WHITEWATER, WISCONSIN, a Wisconsin municipal corporation and political subdivision ("City"), the WHITEWATER UNIFIED SCHOOL DISTRICT, a Wisconsin school district and political subdivision ("School District") and S.W.I.M., Inc., a non-profit organization organized under the laws of the State of Wisconsin ("S.W.I.M.").

**ARTICLE I  
WITNESSETH**

WHEREAS, the parties hereto and the general public have identified and found a need for an Aquatic Facility to (i) provide recreational opportunities to the general public; (ii) serve the needs of the aquatic organizations within the community; and (iii) support the School District's program needs for its students; and

WHEREAS, the parties have jointly undertaken studies to determine the feasibility of constructing an Aquatic Facility (as hereinafter defined) on a Site on the grounds of the Whitewater High School located at 534 South Elizabeth Street, in the City of Whitewater, Wisconsin ("School Site"); and

WHEREAS, in connection with the study, private individuals and entities within the community have pledged funds to be used for the construction and operation of the Aquatic Facility; and

WHEREAS, as a result of the general public support and the result of the study, the parties hereto intend to undertake the construction and operation of the Aquatic Facility whereby (i) the School District will make available a portion of the School Site for the Aquatic Facility and will pay for the construction of a locker room facility for school use; (ii) the City will manage the construction of the Project and contribute \$2,000,000 on a matching fund basis toward the Aquatic Facility construction, plus an additional \$150,000.00 which shall be allocated first to the construction of the project, and then any amount remaining shall be allocated to the endowment fund for the project; (iii) S.W.I.M. will contribute not less than \$3.5 million of private donations toward the Aquatic Facility construction; and (iv) all parties will create a non-profit entity to undertake the operation and management of the completed Aquatic Facility in accordance with a Lease and Operation Agreement to be entered into by the parties, all as set forth in this Agreement; and

WHEREAS, this Cooperation Agreement is intended to provide for certain duties and obligations of the parties for the construction and subsequent operation of the Aquatic Facility; and

WHEREAS, the parties find that the construction of the Aquatic Facility and development of the School Site pursuant to this Agreement and the fulfillment generally of this Agreement are in the vital and best interests of the City and the School District and their

respective residents and students and in accordance with the public purposes and conditions governing each.

NOW, THEREFORE, in consideration of the promises and mutual obligations of the parties hereto, each of them does hereby covenant and agree with the others as follows:

## **ARTICLE II**

### **Definitions; Appendices**

#### **2.01. DEFINITIONS.**

As used in this Agreement, the following terms having an initial capital letter shall have the following meanings:

“Aquatic Facility” means an indoor multi-purpose facility which shall include an eight lane, twenty-five yard competitive pool of not less than 4,698 square feet, a leisure pool of not less than 2,625 square feet (or such larger square footages as may be required to provide a maximum depth of four (4) feet) and an approximately 130 to 150 foot long slide with the appurtenant fixtures, mechanical systems and related improvements, and a school use locker room facility which shall be maintained and controlled by the School District.

“Agreement” means this Cooperation Agreement by and among the City, the School District and S.W.I.M. as amended and supplemented from time to time.

“Trust Funds” shall mean the following funds created and established by the parties in connection with the construction and operation of the Aquatic Facility including:

1. Construction Fund into which all City, School District and S.W.I.M. funds for the construction of the Aquatic Facility shall be deposited, administered and disbursed by City for the Project construction in accordance with the provisions of this Agreement; and

2. Operating Endowment Fund into which all surplus construction monies are deposited together with funds made available to or provided by the City, School District and S.W.I.M. and the Operating Entity to be used for the continued operation and capital improvements of the Project in accordance with the terms of the Lease and Operation Agreement.

“Costs” means the hard and soft costs enumerated in the Development Budget set forth in Appendix A.

“Development” means the Site and the Project.

“Lease and Operation Agreement” means that certain Agreement to be entered into by the City, the School District, S.W.I.M. and the Operating Entity setting forth the terms and conditions for the management and operation of the Project and under which the Project is operated as a public facility serving general public recreational needs and one serving

programmatic needs of the School District; an outline of the general terms of which is attached as Appendix B.

“Operating Entity” means a to-be-created, not-for-profit entity created and organized under the laws of the State of Wisconsin which will operate and maintain the completed Project in accordance with the Lease and Operation Agreement.

“Project” means the Aquatic Facility and related site improvements constructed in accordance with the approved plans and specifications.

“Site” means that portion of the School Site necessary for the construction and operation of the Project as more fully described in Appendix C.

“Substantial Completion” means the time at which a Certificate of Occupancy is issued for the Project.

## 2.02. APPENDICES.

The following appendices are hereby attached to and incorporated to this Agreement:

Appendix A: Development Costs

Appendix B: Outline of Lease and Operation Agreement

Appendix C: Site

Appendix D: Construction Insurance Requirements

## ARTICLE III City Obligations

3.01. Manage Construction of Project. The City shall undertake the administration and management of the construction of the Project. The construction contract shall be let by the City consistent with the public bidding laws of the State of Wisconsin applicable to all public construction. The City shall require the successful contractor to maintain or cause to be maintained in effect during the term of the construction, policies of insurance against such risks, both generally and specifically with respect to the construction of the Project, as are customarily assured against in projects of like size and character; including the insurance requirements set forth in the attached Appendix D. The City, School District and S.W.I.M. shall be named as additional insureds under all insurance policies. In addition, the contractor shall be required to provide payment and performance bonds in such amount as necessary to insure the satisfactory completion of the Project as well as payment for the performance of all labor and furnishing of materials for the Project. No liens shall be permitted to be maintained on the Development.

The plans and specifications for the Project will include the High School locker rooms, the cost of which will be borne by the School District.

The letting of the construction contracts by the City shall be subject to the availability of funds which in the sole discretion of the City are sufficient and available to pay all liability to be incurred under the construction contracts and accepted alternates. The parties agree that the City shall not be required to execute the construction contracts and alternates if sufficient funds are not available to pay the liabilities to be incurred under such contracts.

3.02. Trust Funds. In connection with the Project, the parties shall create and administer the following trust funds.

A. Construction Fund. The City shall create and establish a Construction Fund into which all funds for the construction of the Project shall be deposited. Such funds shall include the City construction funding provided in accordance with Section 3.03 below, the School District funding for the locker room, and the deposit of contributions for the Project construction by S.W.I.M. in accordance with Section 5.01 below. All interest earnings, if any, from the Construction Fund shall be applied to hard and soft (e.g., legal fees and bond placement fees) construction costs of the Project. All surplus funds remaining in the Construction Fund upon final completion of the Project shall be transferred to the Operating Endowment Fund created in Section 3.02(B) below and the Construction Fund shall be closed. The construction fund shall also be used for the payment of interest on any loan necessary during the construction due to funds on hand being insufficient to make contractor draw payments.

B. Operating Endowment Fund. The parties shall create and establish an Operating Endowment Fund to be maintained and controlled by the Operating Entity which shall be used for capital improvements, operation revenue shortfalls, subsidies for youth and families in need of financial assistance to use the Aquatic Facility, and other expenditures related to the operation of the Project in accordance with the Lease and Operation Agreement. All endowment funds appropriated or received by the City, School District or S.W.I.M. shall be deposited into the Operating Endowment Fund. The City may, but shall be under no obligation so to do, appropriate funds from time to time for the Operating Endowment Fund. The Operating Entity shall quarterly provide to School District and City a fund activity report.

3.03. Project Construction Funding. The City shall deposit \$2,150,000 into the Construction Fund. The City contribution to the Project is specifically contingent upon the deposit of \$3.5 million by S.W.I.M. into the Construction Fund. In addition, the City contribution is further conditioned upon the deposit by the School District under 4.02 below of sufficient funds to pay for the locker room improvement into the Construction Fund.

3.04. Plans and Specifications. The City has caused the retention of architects and consultants, including those specialized in aquatic facilities, necessary for the construction. The City shall cause to be prepared all plans and specifications for the Project. The plans and specifications shall include a Project budget setting forth the estimated Development Costs for the Project. The plans and specifications and Development Costs and any material changes thereto shall be subject to the final approval of City, School District and S.W.I.M. The locker

room improvement shall be subject to the final approval of the School District. The source of payment for construction of Site Improvements shall be the Construction Fund.

3.05. Permits, Licenses and Approvals. The City shall be responsible for obtaining or causing to be obtained, all permits, licenses and approvals necessary for the Project construction.

3.06. Creation of Operating Entity. The City, the School District and S.W.I.M. shall cooperate in the creation of the Operating Entity which once created, will operate and maintain the Project in accordance with the Lease and Operation Agreement.

#### **ARTICLE IV School District Obligations**

4.01. Availability of Site. The School District shall make the Site available to the City by temporary construction license (the "License") for construction of the Project. The License shall include all reasonable means of access to the Project as deemed necessary for Project construction. The Lease and Operation Agreement shall include permanent access upon Substantial Completion of the Project. The School District shall execute all consents deemed necessary by the parties for this access.

4.02. Locker Room Facilities. The School District has elected to build school locker room facilities connected to the project for School District student and staff use. The cost of said locker room facilities is \$177,627.00 and shall be borne solely by the School District, and the maintenance and control of the locker room shall be the responsibility of the School District.

4.03. Ownership and Lease of Project. At all times, the School District shall hold title to the Development and shall lease the Development to the Operating Entity for a nominal rent in accordance with the Lease and Operation Agreement. The lease of the Development shall be specifically conditioned upon operation of the Project as a public facility servicing general public recreational needs and School District programming needs and upon such other terms and conditions as may be set forth in the Lease and Operation Agreement. The Lease and Operation Agreement shall be for an initial term of twenty (20) years with an option to renew the Lease and Operation Agreement, exercisable by Lessee, for two (2) additional twenty (20) year terms. Thereafter, additional leases shall be agreed to by the parties which shall provide for reasonable recreation and program services to School District and the general public.

Under the terms of the Lease and Operations Agreement, the School District shall make a \$75,000 annual financial commitment to the operation costs of the Development.

4.04. Creation of Operating Entity. The School District shall cooperate with S.W.I.M. and City in the creation of the Operating Entity which, once created, will operate and maintain the Project in accordance with the Lease and Operation Agreement.

#### **ARTICLE V S.W.I.M. Obligations**

5.01. Project Construction Funding. Within ten (10) days of the execution of this agreement, S.W.I.M. shall deposit all construction funds exclusive of interest earnings in its possession or control into the Construction Fund to be disbursed by City in connection with the Project construction. As additional Construction Fund donations are received by S.W.I.M. it shall, within sixty (60) days of receipt, deposit such funds into the Construction Fund. If S.W.I.M. accumulates \$50,000 or more of construction funds, such funds shall be deposited into the Construction Fund within 15 days of such accumulation. S.W.I.M. shall contribute a minimum of \$3.5 million to the Construction Fund by December 31, 2001.

5.02. Operating Funds. In the event S.W.I.M. receives fund donations dedicated to the operation of the Project, it shall within fifteen (15) days of receipt deposit such funds into the Operating Endowment Fund. The operating entity shall manage the Operating Endowment Fund.

5.03. Creation and Organization of Operating Entity. Not later than three (3) months prior to Substantial Completion, S.W.I.M., the City and the School District shall cause to be created the Operating Entity. The Operating Entity board shall consist of not more than nine (9) voting members which shall include two (2) members appointed by the City, two (2) members appointed by the School District and five (5) members appointed by S.W.I.M. who shall be residents of the City or School District. S.W.I.M. shall designate one of its five board position seats as a member whose appointment can be rejected if the City and the School District both object to the appointment of that member. Following initial appointments, the non-City and non-School District appointed members shall be selected by the remaining non-City and non-School District Operating Entity Board members under the same procedure as stated above. In addition to the voting members, the Operating Entity shall include two (2) ex-officio non-voting School District members, and two (2) ex-officio non-voting City members, one of whom shall be the City Manager. The Operating Entity shall have the duties and responsibilities as set forth in Article VI.

#### **ARTICLE VI Lease and Operations Operating Entity Obligations**

6.01. Lease and Operation Agreement. Upon Substantial Completion of the Project, the City, School District, S.W.I.M. and Operating Entity shall enter into the Lease and Operation Agreement granting to the Operating Entity full responsibility for the operation and management of the Project. The Lease and Operation Agreement shall be specifically

conditioned upon continued use and operation of the Project as a public facility and one serving programmatic needs of the School District. The Lease and Operation Agreement shall incorporate the general terms and conditions set forth in Appendix B.

6.02. Annual Budget and Reports. The Operating Entity shall be required to prepare an annual budget for the operation of the Project which shall be submitted to the City and School District no later than September 1<sup>st</sup> of each year. In addition, the Operating entity shall be required to submit quarterly reports within 30 days after the end of each calendar quarter and annual reports regarding the prior year's project operation to the City and School District no later than May 1<sup>st</sup> of each year and if requested by the City and/or School District, the Operating Entity shall provide an annual audit of its operations.

6.03. The Operating Entity shall during the life of the Project solicit donations and conduct other fundraising activities for the Project operation. Any fundraising activities (other than normal project operations such as concessions, user fees, entry fees) which take place on School district property shall be subject to School Board approval.

6.04. Operating Entity Failure to Perform. In the event that the Operating Entity fails to substantially perform its obligations hereunder the Lease and Operation Agreement shall provide for the assignment of the Project's operations to the City and School District. The Assignment shall include the Assignment by Operating Entity of all assets, contracts, funds, permits, and personal property and all rights and interests of Operating Entity in and to the Project. The City and School District shall have the right to operate the Project under City and School District directed management or through a third party service provider acceptable to City and School District. The terms and conditions for City and School District's assumption of Project operation shall be as set forth in the Lease and Operation Agreement. The City and School District reserve the right to decline to undertake the Project operation under such circumstances.

## **ARTICLE VII Non-discrimination**

In the construction and operation of the Project under this Agreement, the City, School District and S.W.I.M. agree and the Operating Entity and construction contractor shall be required to agree not to discriminate against any employee or applicant for employment within the Project, nor shall the Project or any portion thereof 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 and that the construction and operation of the Project shall be in compliance with all laws, ordinances and regulations related to discrimination on any of the foregoing grounds.

## **ARTICLE VIII No Personal Liability**

Under no circumstances shall any Alderman, officer, official, commissioner, director, member, partner or employee of the City, the School District or S.W.I.M. have any

personal liability arising out of this Agreement and no parties shall seek or claim any such personal liability.

**ARTICLE IX**  
**Special Provisions**

9.01. Wisconsin Law. This Agreement shall be deemed to have been made in the State of Wisconsin and its validity, construction, performance, breach and operation shall be governed by the laws of the State of Wisconsin. No provision of this Agreement shall be construed to require any party to take any action in violation of law.

9.02. Approval. Whenever under this Agreement approvals, authorization, determination, satisfactions or waivers, are authorized or required, such approvals, authorizations, determinations, satisfaction or waivers shall be effective and valid only when given in writing by the officers of the City, School District and S.W.I.M. authorized by law to give such approval and delivered to the party to whom it is directed at the address specified hereto under.

9.03. Notices and Demands. A notice, demand or other communication under this Agreement by any party to any other party (parties) shall be sufficiently given or delivered, if dispatched by registered or certified mail, postage prepaid, return receipt requested or delivered personally to the party at their addresses as follows:

CITY OF WHITEWATER

312 Whitewater Street

Whitewater, WI 53190

To: City Manager

With copies to: City Attorney

WHITEWATER UNIFIED SCHOOL DISTRICT

401 South Elizabeth Street

Whitewater, WI 53190

To: District Superintendent

With copies to:

S.W.I.M.

Michael Ciardo

221 South Cottage Street

Whitewater, WI 53190

To: President

With copies to:

Or such other addresses as the parties may designate to each other in writing from time to time.

9.04. Counterparts. This Agreement may be executed in any number of Counterparts, each of which shall constitute an original.

9.05. Amendments and Supplements. This Agreement may be supplemented or amended only by written instrument executed by all parties.

9.06. Severability. If any provisions 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 of statute, rule or public policy or for any other reason said circumstances 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.

9.07. City and School District Authorization. Execution of this Agreement by the City and the School District is authorized by Resolution of the Common Council adopted December 5, 2000 and the School District Board adopted March 19, 2001, respectively.

9.08. Except as expressly stated to the contrary in this Agreement or in the Lease and Operation Agreement, this Agreement shall terminate upon the execution of the Lease and Operation Agreement.

IN WITNESS WHEREOF, the parties have duly executed this Agreement or caused it to be duly executed as of the date shown below.

CITY OF WHITEWATER

By: [Signature] 05-03-01  
City Manager Date

By: Michele R. Smith 5/2/01  
City Clerk Date

WHITEWATER UNIFIED SCHOOL DISTRICT

By: James M Stewart May 19 2001  
School Board President Date

By: Kathleen Shanahan 3-28-01  
School Board Clerk Date

SWIM, INC

By: J. J. [Signature] 5-7-01  
President Date

By: Jeani Way 5-21-01  
Secretary Date