



Council Agenda Item

Meeting Date: Tuesday, July 20, 2021

Agenda Item: WAFC Lease and Operations Agreement

Staff Contact (name, email, phone): Eric Boettcher 262-473-0122

BACKGROUND

(Enter the who, what when, where, why)

The Whitewater Aquatic and Fitness Center (WAFC) operates under two separate agreements between the City of Whitewater (City) and the Whitewater Unified School District (WUSD). The agreements spell out how the two entities will work together to financially support and operate the WAFC facility. The existence of two agreements came at the request of the WUSD for accounting purposes.

- The Lease & Operations Agreement is the primary operating agreement for the WAFC.
- The Lease Programming Agreement, as staff has deemed it, addresses specific elements of WAFC programming and WUSD's annual contribution.

The term for each of the previous agreements was 5 years, beginning July 1, 2016 and ending June 30, 2021. The new agreements will also expire at the end of the next 5-year period, June 30, 2026.

PREVIOUS ACTIONS – COMMITTEE RECOMMENDATIONS

(Dates, committees, action taken)

June 9, 2021 – Park Board Approval of WAFC Operations and Lease Agreement and WAFC Lease Programming Agreement

June 28, 2021- WUSD Board Approves WAFC Operations and Lease Agreement and WAFC Lease Programming Agreement

FINANCIAL IMPACT

(If none, state N/A)

Contributions

City of Whitewater (City)

\$153,000 – 2021 Calendar Year

\$178,000 – 2022 and each remaining year of Agreement

Whitewater School District (WUSD)

\$153,000 – 2021/22 School year

\$178,000 – 2022/23 School year and each remaining year of Agreement

STAFF RECOMMENDATION

Staff recommends the approval of both WAFC Operations and Lease Agreement and WAFC Lease Agreement.

ATTACHMENT(S) INCLUDED

(If none, state N/A)

- WAFC Lease and Operations Agreement
- WAFC Lease Programming Agreement

City Common Council July 20, 2021 meeting notes recap
Eric Boettcher, Parks and Recreation Director
March 7, 2023

At the Common Council meeting the following notes detail the action taken.

Council requested: Approval pending one final review by legal council and city manager; Jim Allen moved approval (and with amendments to the motion) seconded by Greg Majkrzak. Motion passes - unanimously.

Lynn Binnie had two questions - page three of second document page 195 of council packet. The last line under summer programs - reimbursements essentially. Payments from district to aquatic center if we provide statement. "Rate of reimbursement being similar to rate of reimbursement of 2015" Antiquated potential cost for years 2015 to end of new contract through 2026. Asked to be updated to be determined in a similar manner. Sentence before mentions mutually acceptable and he wondered if that line was necessary with wages increasing the way that they are. Eric mentioned it should be 2019 not 2015. HR offered opinion. Advised locking into wages even of 2019 would be inadvisable because we are paying more already. Jim suggest that staff look at it and refer with attorney.

Lynn Binnie also mentions page four first document page 177 of council packet

paragraph C - seventh sentence from bottom. Scheduling through aquatic center manager - inaccurate title in document. New title for 2022 to be presented HR. Attorney says no need to be that specific.

These changes were listed to be made on the proposed agreement that was never signed by the entities.

Document Number

**LEASE AND OPERATION
AGREEMENT**

Recording Area

Name and Return Address

Wallace K. McDonell
Harrison, Williams & McDonell, LLP
452 W. Main Street
P.O. Box 59
Whitewater, WI 53190

**LEASE AND OPERATION AGREEMENT
BETWEEN
WHITEWATER UNIFIED SCHOOL DISTRICT (the "SCHOOL DISTRICT")
THE CITY OF WHITEWATER (the "CITY")**

- F. The City and the School District are entering into this Lease and Operation Agreement to provide for the operation of the Aquatic Facility at the expiration of the prior agreement on June 30, 2021.
- 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

I.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.

I.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

II.01 Initial Term. The initial term of this Agreement shall run for five (5) years commencing on July 1, 2021 (the “Commencement Date”) and ending at 11:59 p.m. on June 30, 2026 (the “Expiration Date”), unless sooner terminated in accordance with this Agreement or in

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 Park Board 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 Park Board and reflected in the Annual Budget (as described in Section 5.02 below). The Park Board 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 Park Board 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 Park Board fails or declines to satisfy or comply with its responsibilities under this section, then the City shall fully indemnify and hold the School District 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 Park Board 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 Section 5.01 B. above 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 in Section 5.01 B. above (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 Park Board, 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

such user fees received by the Aquatic Facility shall be deposited to appropriate operating accounts administered and controlled by the Park Board 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 Park Board 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 Park Board 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 Board and the City, which approval shall not be unreasonably withheld, suspended or delayed.

- F. **Request for Additional Operating or Capital Funds.** The Park Board 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 Park Board will make requests to the City and School District in the event it needs additional funds for operational expenses. While the City and WUSD contribute designated amounts for both operations and capital expenses, funds will be kept in a co-mingled account. The Park Board will have authority to spend all dollars (*in a way that sustains operations*). However, the Park Board will be accountable to both the City and WUSD for the tracking and reporting of all dollars used.

V.02 **Annual Budget.** Not later than September 1 of each calendar year during the term of this Agreement, or such other time as may be mutually agreeable to the parties, the Park Board 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 Park and Recreation Board deems appropriate. Within thirty (30) days after their receipt of the Annual Budget, the School District and the City shall provide the Park and Recreation Board any suggestions or comments they may have to the Annual Budget, and the Park Board 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.

V.03 **Financial Reports.** Not later than May 1st of each calendar year during the term of this Agreement, the Park Board shall submit to the School District and to the City annual financial reports regarding the operation of the Aquatic Facility during the most recent calendar year, certified as having been reviewed by a qualified representative of the Park Board. In

is not properly carrying out its duties of maintenance and repair, they shall deliver to the Park Board a notice of default alleging the same, and, the Park Board 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

VII.01 Park Board Obligations. Except as otherwise provided in this Agreement, the Park Board 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 Park Board 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 Park Board.

In addition to the foregoing, beginning on the Effective Date, the Park Board 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 and personal property taxes; governmental assessments such as special assessments, or payment 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 Park Board shall have the right to pay the same in installments. The Park Board shall have the right to contest and review the amount or 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

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 Park Board 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 Park Board may obtain such coverage through existing or future policies held by the School District and/or the City so long as the Park Board 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.

IX.04 Property Insurance. The District will maintain an insurance policy which provides property insurance coverage for the Aquatic Facility.

IX.05 Other Insurance. The Park Board 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

X.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 Park Board 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.

X.02 Assignment Upon Expiration or Termination Uncured Default. Upon the expiration or earlier termination of this Agreement, the Park Board 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 Park Board'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 Park Board 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:

Article XVI below regarding transfer of management and control following such termination.

(iii) 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 Park Board 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 Park Board, except to the extent such costs are covered by insurance and insurance proceeds are or will be made available to pay the cost thereof. The School District and the City shall have the right to enter upon the Leased Premises at all times in order to verify that the Park Board is in compliance with the terms of this Agreement and to carry out their various rights and obligations hereunder.

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 Park Board if the School District is unable to fund its obligations under Section 5.01.F through its Fund 80 community service budget.

(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

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

XVI.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.

XVI.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.

XVI.03 **Governing Law.** The laws of the State of Wisconsin shall govern the interpretation and enforcement of this Agreement.

XVI.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 Park Board and the successors and assigns of the School District and the City.

XVI.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.

XVI.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.

XVI.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

XVII.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.

XVII.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.

XVII.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.

**LEASE AGREEMENT BETWEEN
WHITEWATER UNIFIED SCHOOL DISTRICT
AND THE CITY OF WHITEWATER**

This Lease Agreement (“this Agreement”) is entered into as of the 28th day of June, 2021 (“the Effective Date”), by and among the **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 are currently parties to a Lease and Operating Agreement, dated June 28, 2021, which provides for the operation of a recreation facility constructed on land owned by the School District and adjacent to Whitewater High School (the “Site”), an aquatic facility consisting of an eight lane, twenty-five yard competitive pool, a leisure pool, a slide, a Fitness Center, and appurtenant fixtures, mechanical systems, and related improvements (collective, the “Aquatic Facility”).
- B. The Lease and Operating Agreement provides for the use of the Aquatic Facility by the general public. The Aquatic Facility is primarily intended to serve the recreational and programmatic needs of the general public, but the School District also wishes to use the Aquatic Facility for curricular, special education, and extracurricular purposes.

NOW, THEREFORE, in consideration of the foregoing Recitals, 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:

1. **Use of Space.** The City agrees to rent the Aquatic Facility to the School District to be used for curricular, special education, and extracurricular purposes.
2. **Annual Rent.** The School District agrees to pay the City \$7,500.00 on or about July 1 annually for its use of the Aquatic Facility for curricular, special education, and extracurricular purposes.
3. **Scheduling.**
 - (a) The Park and Recreation Board of the City of Whitewater (the “Park Board”) shall exercise its best efforts to schedule use of the Aquatic Facility to meet within reason the School District’s Program Needs and the General Public’s Recreational Needs. For purposes of this Agreement, (i) the “School District’s Program Needs” shall include use of the Lap Pool, Leisure Pool, and Fitness Center, during the school year or during the summer, for health and physical education courses and related curricular activities and practice, individualized instruction for students with disabilities, training and competition for co-curricular competitive swim teams representing the School District and (ii) the “General Public’s Recreational Needs shall mean use of the Lap Pool, Fitness Center, and/or the Leisure Pool for youth and adult swim

lessons and related aquatics training and instruction, parent-child recreational programs, senior citizens health and recreational programs, the public's general recreational use and similar activities historically and/or customarily sponsored by the City.

The parties acknowledge that, in order to maximize the efficiency and fairness with which the Aquatic Facility is used, it will be essential that the parties cooperate in working out the Aquatic Facility's yearly schedule. Toward that end, the School District shall, not later than April 30 of each calendar year, provide Park Board and the City a proposed schedule of the School District's Program Needs for the period from August 1 of that year through July 31 of the following year. Similarly, a proposed schedule of the General Public's Recreational Needs shall be developed by the Park Board for the same period. If the Aquatic Facility is available on the dates and at the times selected by the School District, then the School District's use of the Aquatic Facility shall be included in the Aquatic Facility's schedule as proposed. If, on the other hand, the Aquatic Facility may be scheduled for another use at a time proposed for the School District's Program Needs, the Park Board shall notify the School District, and the parties shall meet to resolve the conflict to the reasonable satisfaction of all concerned, said resolution to be concluded within thirty (30) days after receipt of the School District's proposed schedule or June 1 of that year, whichever is later.

- (b) Notwithstanding the foregoing, it is also agreed and understood that the School District shall be entitled to, at a minimum, use of the same amount of time and space in the Aquatic Facility on an annual basis as is used by the School District during the 2018-2019 school year and summer, and that the School District shall be entitled to, at a minimum, use of the same locations within the Aquatic Facility during the same, or substantially similar, dates and times as are used by the School District during the 2018-2019 school year and summer.
- (c) After the scheduling for the School District's Program Needs for the coming year has been approved and adopted by the Park Board as provided herein, said schedule shall not be modified by the Park Board without the School District's prior written consent. In addition, throughout each year during the term of this Agreement, at such times as may be necessary, the staff of the Park Board will meet with representatives of the School District to go over their various scheduling needs and to resolve any scheduling conflicts. The School District shall be responsible for providing and supervising all staff and other personnel necessary for the School District's scheduled uses of the Aquatic Facility, with the exception of a lifeguard. Upon request by the School District and subject to approval of the Park Board, Aquatic Facility personnel may be used to assist the School District in connection with supervision and/or administration of the School District's Program Needs so long as the School District remains primarily responsible for all liability associated with such activities and the Park Board is reimbursed for any unusual or irregular personnel or other costs incurred as a result of such activities.

(d) In addition to incorporating the School District's scheduled dates into the Aquatic Facility schedule, the Park Board shall use diligent efforts to arrange for ongoing use of the Aquatic Facility in such manner as is reasonably necessary to maximize revenues.

4. **Summer Programs.** The School District may decide to offer aquatics instruction in the future as part of its summer school curriculum. If the School District wishes to offer such instruction at the Aquatics Facility, its summer school aquatics instruction schedule shall be included in the proposed schedule of the School District's Program Needs provided pursuant to Section 3 above.

The School District shall be responsible for all costs associated with the School District's summer school aquatics instruction program and supervision of all personnel necessary for the organization, administration and implementation of the School District's summer school aquatics instruction program, together with all liability arising from said program. It is anticipated that, subject to the approval of the Park Board, Aquatic Facility personnel (such as lifeguards and swimming instructors) may assist the School District in connection with such program. The parties agree to establish a mutually acceptable arrangement for staffing of the School District's summer school aquatics instruction program and reimbursement of the Aquatic Facility for its costs associated therewith no later than March 15 of each year. The rate of reimbursement will be substantially similar to the rate of reimbursement for Summer 2015.

5. **The District Locker Room Facility**

- (a) The Aquatic Facility 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.
- (b) Exclusive Use By School District. Unless otherwise agreed, the School District shall have the sole and exclusive right to use and control the District Locker Room Facility.
- (c) Maintenance and Repair. The School District shall, at its sole cost and expense, maintain and repair the District Locker Room Facility. In that regard, the School District shall keep and maintain the District Locker Room Facility in clean and good condition and repair, normal wear and tear excepted, and shall provide such insurance as the School District deems necessary or desirable in connection with the ownership and operation of the District Locker Room Facility.
- (d) Utilities. The School District shall be responsible for the cost of all directly-metered utilities supplied to the District Locker Room Facility (i.e., sewer and water and utilities to heat water). Electricity and HVAC utilities provided to the District Locker Room Facility shall not be separately metered, and shall be billed to and paid by the

Park Board. The School District shall be responsible for the cost of all sewer, water, electricity, HVAC and other utilities necessary for or relating to any future improvements to and/or expansion of the District Locker Room Facility made by the School District pursuant to Section 8.04 below.

- (e) **Alterations, Additions or Improvements.** The School District shall have the full right and authority, at its sole cost and without the consent of the Park Board or the City, to make such alterations, additions and/or improvements to the District Locker Room Facility, or to Whitewater High School and its environs, as the School District deems necessary or desirable in its sole discretion. All such work shall be carried out so as to limit, to the extent reasonably possible without incurring additional costs, interruption or disruption to the operation of the Leased Premises, provided, however, that the District makes no guaranty or warranty that such interruption or disruption will not occur.
6. **Term of Agreement.** The initial term of this Agreement shall run for five (5) years commencing on July 1, 2021 (the "Commencement Date") and ending at 11:59 p.m. on June 30, 2026 (the "Expiration Date", unless sooner terminated in accordance with this Agreement. The parties may extend this Lease by mutual written agreement of the city and the School District.
7. **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.
8. **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.

9. **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: Superintendent

To the City: The City of Whitewater
312 West Whitewater Street
Whitewater, WI 53190
Attn: City Manager

To the Park Board: The City of Whitewater Park Board
312 West Whitewater Street
Whitewater, WI 53190
Attn: Director

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

10. **Miscellaneous.**

- (a) **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.
- (b) **Governing Law.** The laws of the State of Wisconsin shall govern the interpretation and enforcement of this Agreement.
- (c) **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 Park Board and the successors and assigns of the School District and the City.
- (d) **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.

- (e) **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.
- (f) **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.
- (g) **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.
- (h) **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.
- (i) **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.

11. **Arbitration**.

- (a) **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.

- (b) 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 11 below, and each party shall notify the other party of said Arbitration Representative.
- (c) Arbitration Panel. If a Notice of Dispute has been provided and all other requirements of Section 11 have been met, then:

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.

Except as otherwise provided for herein, 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.

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.

- (d) Arbitration Default. If any party fails or refuses to comply with any of the procedures or requirements of this Section 11, 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 Section 11. If such an order to enforce is entered by the Court, then the party who failed or refused to comply with this Section 11 shall be liable to the petitioning party for all costs and attorney’s fees incurred in obtaining such an order.
- (e) Right to Judicial Relief. The arbitration procedures set forth in this Section 11 shall be followed with respect to all Claims arising out of or relating to any term or

requirement of this Agreement. However, notwithstanding the terms of this section, 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 Section 11(a) or the arbitrability of the claim under this Lease.

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

WHITEWATER UNIFIED SCHOOL DISTRICT

THE CITY OF WHITEWATER

By: _____
Name: Carroll E. Judd, Jr.
Title: School Board President

By: _____
Name: Cameron Clapper
Title: City Manager

By: _____
Name: Steven J. Ryan
Title: School Board Clerk

By: _____
Name: Michele R. Smith
Title: City Clerk