

**JOINT OPERATIONS AGREEMENT
BETWEEN THE CITY OF AUSTIN
AND THE YMCA OF AUSTIN**

THIS OPERATIONS AGREEMENT (Operations Agreement) is made between the **CITY OF AUSTIN**, a home rule municipal corporation of the State of Texas located within Travis, Hayes, and Williamson Counties, Texas (City), acting through Marc A. Ott, its duly authorized City Manager, and the Young Men's Christian Association d/b/a **YMCA of Austin**, a Texas nonprofit corporation (YMCA), acting through its officers as duly authorized by its Board of Directors.

RECITALS

WHEREAS, in order to provide its citizens a facility for recreation, meeting space and other traditional and progressive recreational and community service programs, the City desires to participate in the construction of a joint use facility (Facility) with the YMCA, a non-profit organization whose goals and objectives align with the goals and objectives of the City's Parks and Recreation Department; and

WHEREAS, the Facility is planned to be constructed on City property located at 1000 Rundberg Lane, near the intersection of Mearns Meadow Boulevard and Rundberg Lane.

WHEREAS, the City has recognized the experience and expertise of the YMCA in conducting programs for families at its branches in Travis County and adjoining counties, and in providing recreational and character-building programs for adults and youth; and

WHEREAS, the residents of the City will derive substantial benefits from the activities and programs to be provided and conducted by the YMCA for YMCA members and program participants at the joint use facility and, through reciprocal membership privileges, at other YMCA's in the Austin area and nationally where Austin members work or travel; and

WHEREAS, it is the mutual desire of the City and the YMCA that the new Facility be constructed, occupied and managed by the YMCA for the offering and conducting of YMCA programs and other community based programming as contemplated by this Agreement and in accordance with its terms and conditions, based on programs of the YMCA and the City's Parks and Recreation Department offered at each of its facilities;

NOW THEREFORE, in consideration of the covenants and agreements contained in this Agreement, the City and the YMCA hereby agree as follows:

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ARTICLE 1. AND DEFINITIONS

1.01 **City.** City means the City of Austin, a home rule municipality.

1.02 **Community Center.** The building commonly known as the City of Austin/YMCA North Austin Community Recreation Center that provides health and fitness programs for the surrounding community and that is a resource for the public to assemble and meet during normal operating hours. The YMCA, as manager of the facility (defined below) is entrusted by the City to provide access and equal opportunity to services and programs administered by the YMCA that are comparable to other YMCA facilities, that meet the needs of the community, and for which the YMCA may charge fees that are reasonable, consistent with other YMCA facilities in the Austin-area, and that are approved by the City which shall not unreasonably withhold this approval.

1.03 **Director.** Director means the Director of the City's Parks and Recreation Department (**PARD**).

1.04 **Emergency Repair.** Emergency Repair means any repair or replacement of any portion of the Facility (as defined below that is the responsibility of the city), necessary to protect the public and the integrity of the building or its systems in a timely and reasonable manner. See also, Section 3.14 below.

1.05 **Facility.** Facility means the building to be constructed and operated as the City of Austin/YMCA North Austin Community Recreation Center. Facility includes all the footprint of the Facility, any exterior patios and sidewalks directly adjacent to the Facility, any improvements, amenities, and areas that were installed, constructed, or landscaped as part of the original construction completed in accordance with the Agreement for Development and Construction of New Recreation Facility for Public Use Funded in Part with Bond Funds.

1.06 **Uses Exhibit means Exhibit 2** attached to this Agreement and incorporated for all purposes. Revisions to the Uses Exhibit will not alter the terms of this Agreement (unless this Agreement is also revised by the parties) and to the extent that the Uses Exhibit is inconsistent with this Agreement, this Agreement controls.

1.07 **YMCA.** YMCA means the Young Men's Christian Association d/b/a YMCA of Austin, a Texas non-profit corporation.

ARTICLE 2. TERM OF JOINT USE AND DEVELOPMENT

2.01 **Term.** The term of this Agreement (Term) shall commence upon issuance of a Certificate of Occupancy regarding the Facility, and shall expire 240 months from that date.

2.02 Holdover. Unless terminated earlier by either party pursuant to a right stated in this Agreement, this Agreement will expire without further notice when the Term expires. Any holding over by YMCA after the Term expires will not constitute a renewal of the Agreement or give YMCA any rights under the Agreement in or to the Premises.

ARTICLE 3. USE OF PREMISES/OWNERSHIP OF PROPERTY

3.01 Premises. In consideration of the mutual terms and covenants of this Operations Agreement, YMCA has the right to occupy and jointly use with the City, (a) a 6.997 acre tract of land, more or less, as legally described in the survey, Exhibit “1,” attached to this Operations Agreement (Land), and (b) any buildings and improvements on the Land or to be constructed on the Land. The Land and Facility are collectively referred to as the “Premises”. This Agreement is subject to all existing easements for public roads, channels, highways, public utilities, railroads, pipelines and electrical transmission lines.

3.02 Permitted Use of Premises. YMCA may use the Premises only for the purpose of constructing and operating the Facility for use by the public. YMCA will offer, conduct, and operate non faith-based recreation, wellness, and youth and family programs and related activities, consistent with other YMCA facilities and the Uses Exhibit attached as Exhibit 2 to this Agreement and Exhibit D of the Agreement For Development and Construction of New Recreation Facility for Public Use Funded in Part with Bond Funds , and for no other purpose without the prior written consent of City. Not less than 3,000 net usable square feet of the Premises shall be dedicated to purposes commonly associated with a City recreation center.

Scheduling will be coordinated through the YMCA to prevent conflict with regularly scheduled programs of the YMCA.

3.03 Illegal Use Not Permitted. YMCA may not use any part of the Premises or any building situated on them for any use or purpose that violates any applicable law, regulation, or ordinance of the United States, the State of Texas, the County of Travis , or the City of Austin, or other lawful authority with jurisdiction over the Premises.

3.04 Condition of Premises. YMCA accepts the Premises described in Exhibit 1 in their present condition, finds them suitable for the purposes intended, and further acknowledges that it is thoroughly familiar with such condition by reason of a personal inspection and does not rely on any representations by City as to the condition of the Premises or their suitability for the purposes intended. YMCA further accepts the Premises described in Exhibit 1 subject to all previous recorded easements, if any, that may have been granted on, along, over, under or across said property, and releases City from any and all damages, claims for damages, loss or liabilities that may be caused to all invitees, licensees, or trespassers by reason of the exercise of such rights or privileges granted in these easements.

3.05 Zoning Restrictions and Other Laws. The Premises are subject to any statement of facts which an accurate survey or physical inspection might show, all zoning, restrictions, regulations, rulings and ordinances, building restrictions, and other laws and restrictions now in effect or later adopted by any governmental authority having jurisdiction.

3.06 Membership Fees. Fees for memberships and programs shall be priced in accordance with fees established by the YMCA for branches of similar size and amenities located in the City of Austin and consistent with the YMCA's goal to permit participation by all socio-economic groups. As set forth in the Uses Exhibit, such fees will be will be approved annually by the Director or her designee, who may request that the YMCA modify such fees.

3.07 Janitorial Services and Housekeeping. The YMCA, at its sole cost and expense, shall provide daily janitorial and custodial service for the Facility. For the Term of this Agreement, the YMCA will employ or subcontract for housekeeping staff whose function shall be daily in-house tasks related to routine and emergency cleanups, room or facilities preparation, minor repairs and other routine function associated with programs and building operations. The YMCA shall pay the full cost of the total salary and fringe benefits of said employee(s) or contractors.

3.08 Inspections. The City shall conduct periodic and regular inspections as may be required of the Facility to insure that fire, safety and sanitation regulations and other provisions contained in this Agreement or in the City Code are being adhered to by the YMCA. The City shall notify the YMCA of its findings, specifying any items needing attention. The YMCA agrees to grant the City the right to access the facility for inspections during normal business hours, and after hours, with prior notice as may be necessary. Failure to conduct any inspections as may be required shall not operate as a waiver of the City's right to conduct these inspections and shall not be considered a default of the terms of this Agreement.

3.09 Fire Code Inspections. YMCA will permit the City's Fire Marshal or his or her authorized agents to inspect the Premises, and YMCA and City will comply with all requirements of the Fire Marshal or his or her authorized agents that are necessary to bring the Premises into compliance with the City Fire Code and Building Code provisions regarding fire safety, as such provisions exist or may later be amended subject to the maintenance and repair obligations under Paragraph 3.12 (a) below. YMCA shall maintain in proper condition accessible fire extinguishers of a number and type approved by the Fire Marshal or his or her authorized agents for the particular hazard involved.

3.10 Ownership of Equipment and Furniture. No City funds shall be used to acquire equipment and furniture to be used by the YMCA. The YMCA shall own all equipment and furniture purchased by it. The YMCA, at its sole cost and expense shall be responsible for repair and/or replacement of this furniture and equipment during the term of the Agreement.

3.11 Ownership of Building and Fixtures. City shall own the Facility and all attached fixtures. The Facility and any other buildings, improvements, additions, alterations, and fixtures (except furniture, movable equipment, and trade fixtures) constructed, placed, or maintained on any part of the Premises during the Term are considered part of the real property of the Premises and must remain on the Premises and title to all permanent improvements on the Premises shall vest in the City.

3.12 Right to Remove Personal Property; Trade Fixtures. YMCA may, at any time while it occupies the Premises, or within a reasonable time thereafter, not to exceed ninety (90) days, remove personal property, furniture, machinery, equipment, or other trade fixtures owned solely by YMCA, in, under, or on the Premises, or acquired by YMCA, whether before or during the Term and any extension, this property is referred to as “YMCA Property.” On or before the date of expiration of this Agreement, YMCA shall vacate the Premises, remove all YMCA Property, repair any damage to any buildings or improvements on the Premises resulting from the removal, restoring the Premises to a condition reasonably satisfactory to the City. If the City or YMCA terminates this Agreement, YMCA shall vacate the Premises, remove the YMCA Property and restore the Premises within such time as the City shall reasonably designate, but in no event less than ninety (90) days. In either event, if YMCA shall fail or neglect to remove the YMCA Property within a reasonable time after the Agreement termination date, not to exceed ninety (90) days and so restore the Premises, then the YMCA Property shall become the property of the City.

3.13 Maintenance and Repair.

(a) City Obligations. Except for repairs required by YMCA under (b) below, the City will at all times during the Term, keep and maintain, or cause to be kept and maintained, the Premises, including the Facility and all other buildings and improvements erected on the Premises, in good state of appearance and repair (except for reasonable wear and tear)-at the City’s sole expense including, without limitation, the structure, roof, foundation, HVAC, electrical, plumbing and the parking area. Such maintenance and repairs will be made expeditiously and in the same manner as a person generally proficient in that industry or trade performing under similar circumstances.

After City receives notice of needed repairs pursuant to (b) below, the City shall within five (5) working days of notification inspect the Facility to determine the extent of repair required. The City shall complete the repairs within ninety (90) days from the date of such notice. If the City is unable to initiate the repairs as required, the City shall notify the YMCA in writing and YMCA may make and pay for repairs as approved in writing by the Director or her designee. YMCA shall submit a request for reimbursement for the cost of an approved repair. The City shall reimburse the YMCA for the approved repair within 30 days. Needed repairs as used in this subsection exclude obligations of the YMCA in (b) below. For repair and/or replacement expenses less than or equal to \$5,000, YMCA may make repairs internally or hire outside contractors, but agrees to solicit at least one bid and provide a copy of the bid if requested by the City. For repair and/or replacement expenses greater than \$5,000 and less than or equal to \$50,000, YMCA may

make repairs internally and submit a written request for reimbursement or hire outside contractors based on the YMCA's determination of the best of three (3) bids. The City may request a copy of the bids solicited prior to reimbursement. For repair and/or replacement expenses greater than \$50,000, the YMCA shall use existing standard purchasing procedures currently in place by the City of Austin for expenses more than \$50,000, and upon approval by the Director, the City shall reimburse the YMCA for approved repairs or replacement.

(b) YMCA Obligations. At all times during the Term, the YMCA shall, at its sole cost and expense, make all regular and ordinary minor nonstructural building maintenance and repairs including but not limited to painting, wallpaper, tile, flooring, and window glass replacement. Such repairs will be made in an expeditious and proper manner. Further, the YMCA shall be responsible for keeping any landscaping, including any irrigation system, within the Site Plan approved for construction upon the Premises in a neat, tidy and working condition, with adequate watering and maintenance, and replacing landscaping, including all growth of weeds and other objectionable vegetation on said property from reaching such conditions as to violate governmental requirements, if any, or to be hazardous and/or objectionable to the City or the YMCA. Collection and proper disposal of trash, garbage, litter and debris will be the responsibility of YMCA, at its sole cost and expense.

YMCA shall neither commit nor allow to be committed any waste on the Premises, nor shall YMCA maintain, commit or permit the maintenance or commission of any nuisance on the Premises or use the Premises for any unlawful purpose.

Upon discovery of any condition that requires the City to make needed repairs under (a) above, the YMCA shall notify the City of the defect or condition.

(i) If the City receives the required notice and does not perform as required in (a) , the YMCA may undertake the necessary repair and the City shall be responsible to reimburse the YMCA within thirty (30) days the reasonable costs of the repairs; or

(ii) If the YMCA is unable to reach the City's contact person or the City does not respond within five working days of notification by the YMCA, the YMCA may undertake the necessary repair and the City shall be responsible to reimburse the YMCA within thirty (30) days the reasonable costs of the repairs.

(iii) YMCA agrees to maintain at it own expense during the term of this agreement, a preventative maintenance program for all systems, including but not limited to, HVAC systems, elevators, plumbing, pool pumps and apparatus, fire suppression and sprinkler systems, and other systems that require periodic maintenance to continue operating efficiency and warranty compliance. When notified by maintenance contractors of potential capital replacement issues or,

remedial action, YMCA shall promptly notify City in writing of any items that are the responsibility of the City,

3.14 Emergency Repairs.

(i) If the YMCA and City mutually agree that emergency repairs need to be undertaken immediately, the YMCA may undertake the necessary repair waiving the bidding requirements of Section 3.12(b)(iii) and the City shall be responsible to reimburse the YMCA within thirty (30) days. The City will approve the emergency repair in writing to the YMCA as soon as is reasonably possible, but not more than five (5) business days.

(ii) If the YMCA is unable to reach the City's contact person and action is necessary to prevent further damage to the Facility or to prevent imminent danger or injury to persons, the YMCA may undertake the necessary repairs to cure the condition and the City shall be responsible to reimburse the YMCA within 30 days the reasonable cost of the repairs.

3.15 Dedicated Community Area. Not less than 10% of the square footage of the Facility shall be dedicated for use as a City recreation center, available to all members of the public without charge. Children under the age of 8 years shall be accompanied by an adult, including a staff member operating an afterschool or camp program. After school and other children's programming, as well as programming for seniors, shall be as described in Exhibit 2 – Uses.

3.16 Naming. The Facility shall be named the City of Austin/YMCA North Austin Community Recreation Facility. Any change in the name of the Facility must be done in accordance with City Code Sections 14-1-31 through 14-1-34.

ARTICLE 4. BOND FUND REQUIREMENTS

4.01 **Use.** During the Term of this Agreement, the YMCA must use the Facility for the operation of a recreation center, and for recreation center-related educational purposes. The operations may also include incidental office space, and food service related to the recreation center operations.

It is the understanding of the YMCA and the City that the City financed the grant for the improvement of the Facility (the Tax-Exempt Facility) with the proceeds of certain obligations the interest on which is tax-exempt under the Federal income tax laws (the Tax-Exempt Bonds). In connection with the issuance of the Tax-Exempt Bonds, the City has covenanted (the Bond Covenants) with the holders of the Tax-Exempt Bonds that the proceeds of such bonds and the Tax-Exempt Facilities will be used in a manner which assures that the Tax-Exempt Bonds will qualify as obligations within the meaning of section 103 of the Internal Revenue Code (the Code). The YMCA agrees not to use

nor permit the use of the proceeds of the grant or the Tax-Exempt Facility in a manner which it knows or should know would result in their use either in an unrelated trade or business or in a manner which would otherwise violate the Bond Covenants. Moreover, if the YMCA is notified by City that the Tax-Exempt Bonds have been selected for audit by the Internal Revenue Service, then the YMCA agrees to provide to the City any information which is in its possession regarding the use of the proceeds or the Tax-Exempt Facility as may be needed by the City to timely respond to questions posed by the Internal Revenue Service. In the event of a failure to comply with this covenant the City will have the right to specific performance, injunctive relief, or the recovery of economic damages suffered by the City.

ARTICLE 5. CONSTRUCTION OF THE FACILITY

5.01 General Conditions. City and YMCA agree that YMCA will award the contract for construction of the Facility, subject to the Agreement for Development and Use of Bond Funds to Construction of New Recreation Facility for Public Use Funded in Part with Bond Funds between the City and the YMCA.

ARTICLE 6. AUDITING

6.01 Audits. YMCA agrees that the representatives of the Office of the City Auditor, or other authorized representatives of the City, shall have access to, and the right to audit, examine, or reproduce, any and all records of YMCA related to the performance under this Contract. YMCA shall retain all such records for a period of three (3) years after final payment on this Contract or until all audit and litigation matters that the City has brought to the attention of YMCA are resolved, whichever is longer. YMCA agrees to refund to the City any overpayments disclosed by any such audit.

ARTICLE 7. INSURANCE REQUIREMENTS DURING TERM OF JOINT OCCUPANCY

7.01 Insurance Required. Prior to the time YMCA is entitled to any right of access to or use of the Facility, YMCA shall obtain and maintain the following types of insurance and minimum limits of coverage during the Term of the Lease of the Facility:

(a) Workers' Compensation	Statutory limits	
	Employer's liability	
	\$100,000	Each accident/occurrence
	\$100,000	Disease - each employee
	\$500,000	Disease - policy limit
(b) Commercial General Liability	\$1,000,000	each occurrence
	\$2,000,000	aggregate limit

Coverage shall include but not be limited to the following: premises/operations, independent contractors, products/completed operations, personal injury, and contractual liability.

- (c) Automobile Liability \$1,000,000 Each accident on a combined single limit basis

A commercial business policy shall provide coverage on "Any Auto", defined as autos owned, hired and non-owned.

- (d) Umbrella or Excess Liability \$5,000,000 Each occurrence
\$5,000,000 Aggregate

(e) Sexual Abuse and Molestation coverage is required if care of a child is provided outside the presence of a legal guardian or parent, this coverage shall be written for a minimum limit of \$500,000 per occurrence. If this coverage is written on a stand alone basis the City shall be listed as an additional named insured.

7.02 Additional Insurance Requirements.

- (a) The City and its Officers, Employees and Volunteers shall be named as an Additional Insured on the Automobile and Commercial General Liability policies.
- (b) Thirty days (30) prior written notice of cancellation or non-renewal is required.
- (c) Waiver of rights of recovery (subrogation) in favor of the City.
- (d) The insurers for all policies must be licensed and/or approved to do business in the State of Texas. Except for workers' compensation, all insurers must have a minimum rating of A: VII in the current A. M. Best Key Rating Guide or have reasonably equivalent financial strength and solvency to the satisfaction of Risk Management. If the rating is below that required, prior written approval of the City's Risk Management Division is required.
- (e) If insurance policies are not written for specified coverage limits, an Umbrella or Excess Liability insurance for any differences is required. Excess Liability shall follow form of the primary coverage.
- (f) Unless otherwise stated, all required insurance shall be written on the "occurrence basis". Prior written approval from the City's Risk Management Division is required for any claims-made policies. If coverage is underwritten on a claims-made basis, the retroactive date shall

be coincident with or prior to the date of the contractual agreement and the certificate of insurance shall state that the coverage is claims-made and the retroactive date. The insurance coverage shall be maintained for the duration of the contractual agreement and for five (5) years following completion of the contractual agreement. An annual certificate of insurance submitted to the City shall evidence such insurance coverage.

- (g) Any deductible in excess of \$5,000.00, for any policy that does not provide coverage on a first-dollar basis, must be approved in writing by the City's Risk Management division.
- (h) The City, at its sole discretion, reserves the right to review the insurance requirements and to make reasonable adjustments to insurance coverages and their limits when deemed necessary and prudent by the City based upon changes in statutory law, court decision or the claims history of the industry as well as of the contracting party to the City. The City shall be required to provide prior written notice of ninety (days).
- (i) The City shall be entitled, upon request and without expense, to receive copies of policies and endorsements thereto and may make any reasonable requests for deletion or revision or modifications of particular policy terms, conditions, limitations, or exclusions except where policy provisions are established by law or regulations binding upon either of party or the underwriter on any such policies.

7.03 Minimum Coverage. Insurance coverage specified herein constitutes the minimum requirements and said requirement shall in no way lessen or limit the liability of the YMCA under the terms of this Agreement. YMCA shall procure and maintain, at its own cost and expense, any additional kinds and amounts of insurance that, in its own judgment, it deems to be necessary

7.04 YMCA Coverage. During the Term of this Agreement and at its sole cost and expense, YMCA shall at all times maintain in effect property and casualty insurance coverages insuring the Premises in an amount equal to at least 100% of the actual replacement cost thereof and providing protection against any peril generally included in the classification "Fire and Extended Coverage" or so called "special form" coverage. The YMCA shall be the named insured under the policy and the City shall be named as Loss Payee. Such insurance must be payable to the YMCA and the City, as their interests may appear, and shall include a waiver of subrogation in favor of the City. YMCA shall deliver to City, upon City's request, certificates of such insurance. In no event shall the City be responsible for damage to the Facility by reason of fire or other casualty, or by reason of any other cause that could have been insured against under the terms of a standard fire and extended coverage insurance policy or policies. In the event of a casualty, if the YMCA reconstructs the Facility under Section 10.01, YMCA and City shall use all insurance proceeds to reconstruct the Facility. If the Facility is not

reconstructed after a casualty, the YMCA and City shall proportionally share in the insurance settlement proceeds.

Following the completion of construction YMCA shall cooperate with the City's Risk Management Division for scheduling of property insurance inspections and responding to the property carriers recommendations as set forth in the inspection reports.

ARTICLE 8. TAXES

8.01 Payment by YMCA. YMCA will pay and discharge all taxes, general and special assessments, and other charges of any kind levied on or assessed against the Premises and all interests in the Premises and all improvements and other property on them during the Term and any extension, whether belonging to City or to YMCA. YMCA will pay all the taxes, charges, and assessments directly to the public officer charged with their collection before they become delinquent, and, to the extent permitted by law, YMCA will indemnify City and hold it harmless from all such taxes, charges, and assessments. YMCA may, in good faith at its own expense (and in its own name) contest any such taxes, charges, and assessments and must pay the contested amount, plus any penalties and interest imposed, if and when finally determined to be due. YMCA's failure to discharge any such tax, charge or assessment when finally due within ten (10) days after the date City's written notice is received by YMCA shall constitute an event of default under Section 12.01 (d) below. However, YMCA's financial obligation to City to liquidate and discharge such lien shall survive following termination of this Agreement and until such a time as the lien is discharged.

ARTICLE 9. UTILITIES

9.01 Payment by YMCA. The YMCA, at its sole cost and expense, will incur the cost to provide all gas, water, sewer, electric utilities, network and communication services for use by the YMCA at the Facility.

ARTICLE 10. RESTORATION

10.01 Damage or Destruction. City shall not be responsible, under any circumstances, for any damage to property belonging to YMCA, its members, employees, agents, contractors, subcontractors, invitees, licensees, or trespassers, which may be damaged, stolen, or destroyed, and YMCA hereby releases City from any responsibility therefore. If the Facility or any other building or improvement constructed on the Premises is damaged or destroyed by fire or any other casualty, YMCA shall within ninety (90) days from the date of the damage or destruction, begin to repair, reconstruct, or replace the damaged or destroyed Facility and pursue the repair, reconstruction, or replacement with reasonable diligence so as to restore the Facility to substantially the condition it was in before the casualty. But if beginning or completing this work is

prevented or delayed by war, civil commotion, acts of God, strikes, governmental restrictions or regulations, or interferences, fire or other casualty, or any other reason beyond the YMCA's control, whether similar to any of those enumerated or not, the time for beginning or completing the restoration (or both) will automatically be extended for the period of each such delay. In lieu of reconstructing the Facility, the parties can mutually agree to declare this Agreement terminated.

ARTICLE 11. INDEMNIFICATION

11.01 Liability of City. CITY IS NOT LIABLE FOR ANY LOSS, DAMAGE, OR INJURY OF ANY KIND TO ANY PERSON OR PROPERTY ARISING FROM ANY USE OF THE PREMISES (OR ANY PART OF THEM), OR CAUSED BY ANY DEFECT IN ANY BUILDING, STRUCTURE, IMPROVEMENT, EQUIPMENT, OR FACILITY ON THE PREMISES (EXCEPT AS RELATED TO THE CITY'S REPAIR AND MAINTENANCE OBLIGATIONS DESCRIBED IN SECTION 10.01 ABOVE) OR CAUSED BY OR ARISING FROM ANY ACT OR OMISSION OF YMCA, OR OF ANY OF ITS AGENTS, EMPLOYEES, LICENSEES, OR INVITEES, OR BY OR FROM ANY ACCIDENT, FIRE, OR OTHER CASUALTY ON THE PREMISES, OR BROUGHT ABOUT BY YMCA'S FAILURE TO MAINTAIN THE PREMISES IN SAFE CONDITION.

11.02 INDEMNIFICATION. YMCA AGREES TO DEFEND, INDEMNIFY AND HOLD THE CITY, ITS OFFICERS, AGENTS SERVANTS AND EMPLOYEES, HARMLESS AGAINST ANY AND ALL CLAIMS, LAWSUITS, ACTIONS, COSTS AND EXPENSES OF ANY KIND, INCLUDING, BUT NOT LIMITED TO, THOSE FOR PROPERTY DAMAGE OR LOSS AND/OR PERSONAL INJURY, INCLUDING DEATH, THAT MAY RELATE TO, ARISE OUT OF OR BE OCCASIONED BY (i) YMCA'S BREACH OF ANY OF THE TERMS OR PROVISIONS OF THIS AGREEMENT OR (ii) ANY NEGLIGENT ACT OR OMISSION OR INTENTIONAL MISCONDUCT OF YMCA, ITS OFFICERS, AGENTS, ASSOCIATES, EMPLOYEES, CONTRACTORS (OTHER THAN THE CITY) OR SUBCONTRACTORS, RELATED TO CONSTRUCTION OF A FACILITY OR THE PERFORMANCE OF THIS AGREEMENT; EXCEPT THAT THE INDEMNITY PROVIDED FOR IN THIS PARAGRAPH SHALL NOT APPLY TO ANY LIABILITY RESULTING FROM THE NEGLIGENCE OF THE CITY OR ITS OFFICERS, AGENTS, EMPLOYEES OR SEPARATE CONTRACTORS, AND IN THE EVENT OF JOINT AND CONCURRENT NEGLIGENCE OF BOTH YMCA AND CITY, RESPONSIBILITY, IF ANY, SHALL BE APPORTIONED COMPARATIVELY IN ACCORDANCE WITH THE LAWS OF THE STATE OF TEXAS.

11.03 Notification. YMCA agrees to notify City promptly upon the receipt of any claim or lawsuit brought in connection with any injury, death or damages on the Premises. YMCA agrees to make its officers, agents, and employees available to the City, at all reasonable times for any statements and case preparation necessary for the

defense of any claims or litigation for which the City may be responsible hereunder. YMCA shall place language in its contract with contractors that contractors shall notify the City as required by YMCA in this subsection.

11.04 Waiver of Immunity. Nothing in this Agreement shall be deemed to constitute a waiver of any immunity or affirmative defense, which may be asserted by City or YMCA as to any claim of any third party.

11.05 Cause of Action. Nothing in this Agreement shall be construed in any manner, to create a cause of action for the benefit of any person not a party to this Agreement, or to create any rights for the benefit of any person not a party to this Agreement not otherwise existing at law.

ARTICLE 12. DEFAULT AND REMEDIES

12.01 Event of Default. The following shall be deemed events of default by YMCA under this Agreement:

- a. YMCA fails to use the Premises for conducting and operating the Facility for the purpose of offering, conducting and operating non faith-based recreation, wellness, and youth and family programs and related activities, consistent with other YMCA facilities;
- b. YMCA makes a transfer in fraud of creditors, or makes an assignment for the benefit of creditors;
- c. YMCA vacates any substantial portion of the Premises for a period of longer than thirty (30) days, unless YMCA can demonstrate to the reasonable satisfaction of the City that all reasonable efforts are being made by YMCA to occupy said Premises or
- d. YMCA fails to comply with any other term, provision or covenant of this Agreement that is material.
- e. YMCA fails to provide services in accordance with the requirements of the Services Plan.

12.02 Curing a Default.

(i) If an event of default occurs, the City shall give written notice that describes the default in reasonable detail to the YMCA. The YMCA must commence curing such default within fourteen (14) calendar days after the time it receives the notice from the City, and then complete the cure within ninety (90) days thereafter.

(ii) If the YMCA does not substantially complete the cure within the stated time in (i) of this section, the City may terminate this Agreement by giving

written notice of the termination; provided, however, if the default is not reasonably susceptible to cure within the stated time, the City will not exercise its right to terminate this Agreement so long as the YMCA has commenced to cure the default within the required time and diligently completes the cure within a reasonable time without unreasonable cessation of the work to complete the cure.

12.03 Other Remedies. Any termination of this Agreement as provided in this article will not relieve YMCA from paying any sum or sums due and payable to City under this Agreement at the time of termination, or any claim for damages then or previously accruing against YMCA under this Agreement. Any such termination will not prevent City from enforcing the payment of any such sum or sums or claim for damages by any remedy provided for by law, or from recovering damages from YMCA for any default under the Agreement. All City's rights, options, and remedies under this Agreement will be construed to be cumulative, and not one of them is exclusive of the other. City may pursue any or all such remedies or any other remedy or relief provided by law, whether or not stated in this Agreement.

ARTICLE 13. RECORDS

13.01 Provision of Records. On a monthly basis, or at such intervals as may be requested, the YMCA shall provide the City digital copies of current Facility membership in the form of electronic statistics, e.g. itemized by zip code, family unit or as reasonably specified by the City, as well as financial, operational and maintenance information related to the Facility and all other information reasonably deemed necessary by the City and the YMCA.

13.02 Open Records. YMCA acknowledges that City is required to comply with Chapter 552 of the Texas Government Code (Public Information Act or Act). Under the Public Information Act, this agreement, and documents related to this agreement, which are in City's possession, or to which City has access, are presumed to be public and the City may release these records to the public unless an exception described in the Act applies to a document.

13.03 Notice of complaints or violation reports. The YMCA shall promptly notify the City of any complaints or reports of violations of the law that have occurred at the Facility and that are significant in nature and that have a material effect on the operations of the Facility.

ARTICLE 14. NOTICES

14.01 Notices. Any notice, demand, request or other communication hereunder given or made by either party to the other shall be in writing and shall be deemed to be delivered whether actually received or not, when deposited in the United States mail, postage prepaid, certified or registered mail, return receipt requested, addressed to the parties hereto at the respective addresses set out below, or at such other address as they may hereafter specify by written notice so given.

- a. If to City: City Manager
 City of Austin
 City Hall
 301 W. 2nd, 3rd Floor
 Austin, Texas 78701
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b. If to YMCA: 1402 E. Cesar Chavez
 Austin, Texas 78702
 Attn: President/CEO

ARTICLE 15. GENERAL PROVISIONS

15.01 Right of Entry and Inspection. YMCA must permit City or its agents, representatives, or employees to enter the Premises for the purposes of inspection; determining whether YMCA is complying with this Agreement; maintaining, repairing, or altering the Premises; or any other reasonable purpose During any inspection, City may perform any obligations that City is authorized or required to perform under the terms of this Agreement or pursuant to its governmental duties under federal state or local laws, rules or regulations.

15.02 Interpretation. In the event of any dispute over the meaning or application of any provision of this Agreement, this Agreement shall be interpreted fairly and reasonably, and neither more strongly for or against any party, regardless of the actual drafter of this Agreement.

15.03 No Third Party Rights. The provisions and conditions of this Agreement are solely for the benefit of the City and YMCA, and any lawful assign or successor of the YMCA, and are not intended to create any rights, contractual or otherwise, to any other person or entity.

15.04 No Partnership or Joint Venture. YMCA shall operate as an independent contractor and not as an officer, agent, servant, or employee of the City. YMCA shall have the exclusive control of, and the exclusive right to, control the work designated to the YMCA to be performed under this Agreement, and all persons performing the same, and shall be solely responsible for the acts and omissions of its officers, agents, servants,

contractors, subcontractors and employees. Neither City nor YMCA shall be responsible under the Doctrine of Respondeat Superior for the acts and omissions of its officers, agents, servants, contractors, subcontractors, or employees. It is understood and agreed that the City is not involved as a party to any activities that may be carried on by YMCA pursuant to this Agreement. YMCA acknowledges itself solely responsible for such activities and for all persons and property involved or used in connection with YMCA's use of the Premises. Provided, however, that no provision of this Agreement shall operate or be construed as a waiver by either party of any immunity from liability which it has or could be asserted under the doctrine of governmental immunity or any other immunity which it has under law.

15.05 Declared Emergency. In the event of a declared City, state or federal emergency, the YMCA will immediately make the facility available for use as deemed necessary by the City in order to respond to the declared emergency. Should the declared emergency extend beyond 72 hours, the City will seek reimbursement from federal, state and/or local funding and compensate the YMCA for any lost revenue as a result of declared emergency use, to the extent funds are received from these sources.

15.06 Force Majeure. Each party to this agreement agrees to excuse the failure of another party to perform its obligations under this Agreement to the extent that failure is caused by an event of Force Majeure. ***Force Majeure means acts and events not within the control of the party, and which the party could not use due diligence to avoid or prevent.*** Events of Force Majeure include acts of God, strikes, riots, sabotage, civil disturbances, epidemics, acts of domestic or foreign terrorism, lightning, earthquakes, fires, storms, floods, and landslides. Force Majeure does not include economic or market conditions, which affect a party's cost, but not its ability to perform. The party invoking Force Majeure shall give timely and adequate notice to the other party of the event by facsimile transmission, telephone, or e-mail and then the party must promptly provide written notice of the Force Majeure in the manner required by this Agreement. The party shall use due diligence to remedy the effects of Force Majeure as soon as reasonably possible. If a party's performance is delayed by the event of Force Majeure, the parties will mutually agree to extend the time for the completion of obligations by a period of time reasonably necessary to overcome the effect of the Force Majeure event

15.07 Binding Covenants. Subject to the limitations contained in this Agreement, the covenants, conditions and agreements made and entered into by the parties are declared to be for the benefit of and binding upon their respective successors, representatives and assigns, if any.

15.08 Invalid Provision. It is agreed that, in the event any covenant, condition or provision of this Agreement is held to be invalid by any court of competent jurisdiction, the invalidity of such covenant, condition or provision shall in no way affect any other covenant, condition or provision; provided, however, that the invalidity of any such covenant, condition or provision does not materially prejudice either YMCA or City in connection with the rights and obligations contained in the valid covenants, conditions

or provisions of this agreement.

15.09 Assignment and Successors. YMCA may not assign, transfer or otherwise convey any of its rights or obligations under this Agreement to any party without the prior written consent of the City, which consent shall not be unreasonably withheld or delayed, conditioned on (i) the prior approval of the assignee or successor and a finding by the City Council that the proposed assignee or successor is financially capable of completing the construction and occupancy of Facility and (ii) the proposed assignee or successor has executed a written agreement with the City under which it agrees to assume all covenants and obligations of the YMCA under this Agreement, in which case such assignee or successor shall thereafter be deemed “YMCA” for all purposes under this Agreement. An attempt to assign this contract without the consent of the YMCA shall be considered an event of default.

15.10 Reciprocal Waiver of Immunity. The parties each waive their rights of charitable or governmental immunity in any action between them.

15.11 Applicable Laws. The laws of the State of Texas shall govern this license agreement and the relationship created hereby. Venue for any action brought to interpret or enforce, or arising out of or incident to, the terms of this agreement shall be in Travis County, Texas.

15.12 Severability of Provisions. If any of the provisions contained in this Agreement shall be held, for any reason, to be invalid, illegal, or unenforceable in any respect, such invalidity, illegality, or unenforceability, shall be construed as if such invalid, illegal, or unenforceable provision had never been in this Agreement.

15.13 Governmental Powers. It is understood that by execution of this Agreement, the City does not waive or surrender any of its governmental powers

15.14 Captions. Captions and headings used in this Agreement are for reference purposes only and shall not be deemed a part of this Agreement.

15.15 Sole Agreement. This Agreement constitutes the sole and only agreement of the parties respecting the operations of the Premises.

EXECUTED this the _____ day of _____, 2010.

CITY OF AUSTIN

YMCA OF AUSTIN

By: _____
Marc A. Ott
City Manager

By: _____
James Finck
President/CEO

APPROVED AS TO FORM AND LEGALITY

By: _____
Leela Fireside
Assistant City Attorney