



RESOLUTION 2018-002

AUTHORIZING THE CITY MANAGER TO EXECUTE A MASTER SERVICES AGREEMENT WITH THE YMCA OF THE COLUMBIA-WILLAMETTE

WHEREAS, the City recently conducted a Request for Proposals (“RFP”) in regard to the operation of a City-owned recreation facility; and

WHEREAS, by Resolution 2017-065 and pursuant to the terms of that RFP, the City Council, acting as the Selection Review Committee, established a final ranking of proposers and directed the City Manager to attempt to negotiate a contract with the proposers in ranked order, and to bring any such negotiated contract back to City Council for its consideration and approval or rejection; and

WHEREAS, the City Manager previously negotiated a contract with the top-ranked proposer, HealthFitness, and brought the contract to City Council for their consideration under Resolution 2017-070 on September 26, 2017; and

WHEREAS, the City Council rejected the proposed contract with HealthFitness on September 26, 2017; and

WHEREAS, the City Manager thereafter began negotiating a proposed contract with the second-ranked proposer, the YMCA of the Columbia-Willamette; and

WHEREAS, on December 12, 2017, the City Manager requested, and the City Council approved by Resolution 2017-090, a thirty-day extension of the time allotted to negotiate with the YMCA of the Columbia-Willamette; and

WHEREAS, the City Manager thereafter completed negotiations with the YMCA of the Columbia-Willamette and presented a contract to the City Council during a public meeting on January 2, 2018; and

WHEREAS, it appears to the City Council that approval of such contract is in the best interest of the City;

NOW, THEREFORE, THE CITY OF SHERWOOD RESOLVES AS FOLLOWS:

Section 1. The Sherwood City Council hereby authorizes and directs the City Manager to sign the Master Services Agreement with the YMCA of the Columbia-Willamette, in a form substantially similar to the attached Exhibit 1;


Section 2. This Resolution shall be effective upon its approval and adoption.

Duly passed by the City Council this 2nd of January, 2018.



Lee Weislogel, Mayor

Attest:



Sylvia Murphy, MMC, City Recorder

MASTER SERVICES AGREEMENT
between the City of Sherwood, Oregon
and The Young Men's Christian Association of Columbia-Willamette

This Master Services Agreement (this "**Agreement**") is entered into as of the date last set forth below (the "**Effective Date**") by and between the City of Sherwood, an Oregon municipal corporation, with its principal place of business located at 22560 SW Pine Street, Sherwood, Oregon 97140 (the "**City**") and The Young Men's Christian Association of Columbia Willamette, an Oregon domestic nonprofit corporation, with its principal place of business located at 9500 SW Barbur Boulevard, Suite 200, Portland, Oregon 97219 (the "**YMCACW**"). Each of City and YMCACW are referred to in this Agreement as a "**Party**" and collectively as the "**Parties**".

WHEREAS, City is the owner of a recreation and aquatic facility located at 23000 SW Pacific Highway, Sherwood, Oregon 97140 (the "**Facility**"); and

WHEREAS, YMCACW is a nonprofit organization providing programs for Healthy Living, Youth Development and Social Responsibility; and

WHEREAS, City and YMCACW previously entered into an agreement in December of 1996, which agreement was thereafter amended, specifying the terms under which YMCACW operated the Facility (the "**Existing Agreement**"); and

WHEREAS, the term of the Existing Agreement is set to expire on October 31, 2018; and

WHEREAS, City conducted a competitive request for proposals (RFP) process to solicit proposals for operation of the Facility moving forward; and

WHEREAS, as a result of that RFP process, City has selected YMCACW to provide to City, and YMCACW is willing to provide to City, the Services (as hereinafter defined) and related staff, equipment and resources, all as more fully described in the **Scope of Work** attached hereto as Exhibit A (collectively, the "**Program**").

NOW THEREFORE, in consideration of the mutual covenants herein contained, and other good and valuable consideration, the sufficiency of which is hereby acknowledged, the Parties hereto, intending to be legally bound, agree as follows:

Section 1. Services Provided. YMCACW agrees to provide to City the services described in this Agreement and the Scope of Work, attached hereto as Exhibit A, as the obligation of YMCACW (the "**Services**"). Any requirements or conditions for the Program not specifically designated as the obligation of YMCACW in this Agreement or the Scope of Work shall be the responsibility of City. Should City request additional services beyond the Services described in the Scope of Work, the Parties shall execute an amendment to the Scope of Work that describes the services that City seeks to add and the applicable rates and fees payable to YMCACW before either Party shall have any obligation with respect to the requested additional services.

Section 2. Term. The Existing Agreement shall be terminated, and the term of this Agreement shall commence, on the Effective Date. In consideration of the unexpired portion of the term of

the Existing Agreement, the term of this Agreement shall include the period from the Effective Date until October 31, 2018, and a period of five (5) years thereafter, ending on October 31, 2023 (together, the “**Initial Term**”). Unless otherwise terminated in accordance with this Agreement, this Agreement shall automatically renew for an additional five (5) year term ending October 31, 2028 (the “**Renewal Term**”). The Initial Term, and the Renewal Term, if applicable, are collectively referred to in this Agreement as the “**Term**.”

Section 3. Termination.

- a. City and YMCACW, by mutual written agreement, may terminate this Agreement at any time.
- b. City may terminate this Agreement by written notice to YMCACW, such termination to be effective immediately upon the effective date of such notice or at such later date as specified in such notice, upon the occurrence of any of the following events:
 - i. Federal or state laws, regulations, or guidelines are modified or interpreted in such a way that the work under this Agreement is prohibited;
 - ii. YMCACW no longer holds any license or certificate that is required to perform the work, or any license or certificate required by statute, rule, regulation, or other law to be held by the YMCACW to provide the services required by this Agreement is for any reason denied, revoked, suspended, not renewed, or changed in such a way that YMCACW no longer meets requirements for such license or certificate, or YMCACW fails to qualify as a non-profit public benefit corporation as such term is defined in state law and in the federal Internal Revenue Code.
- c. If any Party fails to cure a material breach of any provision of this Agreement or the Scope of Work to the other Party’s reasonable satisfaction within sixty (60) calendar days after written notice thereof, then, in addition to all other rights and remedies available to the non-breaching Party under this Agreement or applicable law, the non-breaching Party may terminate this Agreement, effective upon written notice to the breaching Party or such other date as may be specified in such notice.
- d. In the event that either Party (i) becomes insolvent or makes a general assignment for the benefit of creditors, or a petition in bankruptcy shall be filed by or against such Party (and if involuntarily filed, the involuntary petition is not dismissed within sixty (60) calendar days of filing), or any proceeding shall be instituted by or against the Party for any relief under any bankruptcy or insolvency laws or any laws relating to the relief of debtors, readjustment of indebtedness, reorganization, compositions or extensions, or a receiver shall be appointed of the Party’s property or assets; (ii) takes definitive action to cause its dissolution or liquidation; (iii) ceases to do business as a going concern; or (iv) enters into an agreement for the arrangement, extension or readjustment of substantially all of its obligations, then either Party may terminate this Agreement by written notice designating the

effective date of such termination.

- e. If YMCACW purchases the Facility from the City, this Agreement shall automatically terminate.
- f. This Agreement may be terminated in connection with condemnation of the Facilities pursuant to Section 31.
- g. Beginning two hundred seventy (270) calendar days before the end of the Initial Term, either Party may terminate this Agreement for convenience, without cause, or prejudice. The terminating Party shall provide not less than two hundred seventy (270) calendar days' prior written notice to the other Party. The effective date of such termination shall be specified in such notice.
- h. Notwithstanding any other provision of this Agreement, upon expiration or termination of this Agreement, regardless of cause, or (at the election of City) upon notice of intent to terminate this Agreement, YMCACW shall provide to City, in an electronic format readable and searchable with commonly available software (e.g. CSV, Microsoft Excel, etc., but not PDF or an image format), a complete and current listing of its Sherwood branch members, including names, mailing addresses, telephone numbers, e-mail addresses, length of membership, and membership type.
- i. Unless otherwise agreed by the Parties in writing, upon expiration or termination of this Agreement, regardless of cause, YMCACW shall remove its owned and leased property from the Facility in such a manner as to not cause damage to the Facility. If YMCACW fails to remove its owned and leased property from the Facility by the effective date of the expiration or termination, City may, at its option, either take ownership of such property or cause such property to be removed from the Facility at YMCACW's expense.

Section 4. Financial and Maintenance Responsibilities of the Parties.

- a. YMCACW shall be responsible for:
 - i. All supplies and direct operating costs in connection with the Facility and the Program, which includes supplies and services directly related to the operation of the Facility (including utilities, insurance, licenses and permit costs, repair costs, landscaping maintenance, office supplies, custodian supplies, chemicals, uniforms, cell phone and connectivity costs, mileage reimbursement, credit card fees, membership dues, meeting and training costs, certification costs, etc.).
 - ii. Professional and other service costs in connection with the Facility and the Program, including service contracts, such as cleaning, elevator service, etc.
 - iii. Marketing and development costs in connection with the Facility and the Program, including those that are specific to the Facility and promotion of

- its activities and events, such as annual membership drives, media blasts, advertising, program guides, etc.
- iv. Maintenance, repair, and replacement of fixtures and equipment related to pool operation, in accordance with manufacturer recommendations.
 - v. Maintenance, repair, and replacement of the internal HVAC system and pump and boiler systems, lighting fixtures, window and door equipment, and fitness and related equipment, all in accordance with manufacturer recommendations.
 - vi. Keeping a detailed log of all Facility-related maintenance performed, including dates and tasks performed, with the exception of *de minimis* maintenance tasks.
 - vii. Removal of debris from the Facility's roof in accordance with manufacturer recommendations. Within forty-five (45) calendar days after the Effective Date, the Parties will enter into an agreement regarding a mutually agreeable schedule for such work.
 - viii. Repair and replacement of plate glass and all other glass in the Facility in the event of breakage from any cause.
 - ix. Procuring and maintaining, at its sole cost and expense, all necessary business licenses, permits and/or registrations required in connection with the operation of the Facility and the Program.
- b. City shall be responsible for repairs, capital improvements, and replacements necessary to keep the Facility's building shell and site improvements in good condition. "Building shell" means: in-wall electrical systems; in-wall and ceiling-attached plumbing systems; all structural components; and all building envelope components (including the roof). "Site improvements" means: all sidewalks, signage, parking and maneuvering areas, and outdoor lighting.

Section 5. Budget.

- a. YMCACW will manage the Facility in accordance with an annually prepared budget, which shall be provided to City upon its approval by YMCACW. Budgets are informational only, and will not be binding on the Parties.
- b. The YMCACW's management support services allocation (i.e. payment for administrative overhead expenses) from the Sherwood branch to the YMCACW shall not exceed eleven percent (11%) of Sherwood branch revenue, excluding revenue from charitable contributions. However, for the period of time from the Effective Date through October 31, 2018, the allowable percentage shall be fifteen percent (15%). No other transfers of funds from Sherwood branch revenue to YMCACW or other YMCACW branches is permitted.

- c. The Parties acknowledge that YMCACW periodically participates in activities in the City of Sherwood that are not held on site at the Facility, and agree that any revenue from off-site activities will be credited on Sherwood YMCA accounting reports to the extent staff expenses for the off-site activities are debited to the Sherwood YMCA.
- d. YMCACW will inform City of its future plans for capital improvement investments.

Section 6. Financial Statements and Reporting.

- a. YMCACW shall provide City, on a quarterly basis, a written report of revenues and expenses for the immediately prior quarter, describing revenue and expenses, as well as net income or net loss for the quarter and year to date (based on a Fiscal Year). The reports will include expenditures for new equipment and all Tenant Improvement-related capital costs and amounts put into an equipment reserve account. The form and level of detail of such reports shall be consistent with that contained in Exhibit B, attached hereto.
- b. For purposes of this Agreement, quarters shall be defined as follows: First Quarter (July, August, and September); Second Quarter (October, November, and December); Third Quarter (January, February, and March); Fourth Quarter (April, May, and June). **Fiscal Year** shall be defined as July 1 through June 30.

Section 7. Membership and Program Fees and Rates. YMCACW shall have exclusive authority to set membership and program fees and rates, provided that:

- a. City residents shall receive a discount of at least ten percent (10%) as compared to the fees and rates charged to non-residents; and
- b. YMCACW shall not increase Membership Fees by more than ten percent (10%) in any twelve (12) month period without approval in advance by the City Council, in writing. "Membership Fee" is defined as, and limited to, the monthly rates and registration fee (also known as the joining fee).

Section 8. Net Proceeds.

- a. Within sixty (60) calendar days after the last day in each quarter, YMCACW shall notify the City in writing of the total revenue and the total expenses for said quarter.
- b. **Net Proceeds** are calculated, as of a particular date (the "**Calculation Date**"), as the net of all revenues and expenses (including purchases and leasing of equipment, Facility upgrade improvements or other Facility-related maintenance, whether or not capitalized for GAAP purposes) during the period from the Effective Date through the Calculation Date.
- c. All Net Proceeds will be retained for the benefit of the Sherwood YMCA, and dedicated toward operating and maintaining the Facility, equipment, and services.

- d. Within sixty (60) days after the end of each Fiscal Year, the YMCACW will provide a statement of the amount of the Net Proceeds as of the last date in said Fiscal Year and its written plans for the Net Proceeds to the City, and the City will collaborate with the YMCACW in allocating and prioritizing the use of the Net Proceeds.
- e. In the event the Parties are unable to reach agreement regarding uses of Net Proceeds, City will make the final decision regarding such uses, provided, however, that under no circumstances will City be liable to YMCACW as the result of or in connection with such decisions

Section 9. Capital Improvements.

- a. The Parties shall share information regarding material changes proposed for the Facility (including building structure, building systems, and site improvements), and agree that any such changes may not be made without the approval of both YMCACW and City, which approvals may not be unreasonably withheld or delayed. This subsection (a) does not apply to exercise or business equipment.
- b. If the City desires to invest in capital improvements for expansion of the Facility, the Parties agree to cooperate regarding public and private financing.
- c. Capital Improvement Reserve Fund
 - i. YMCACW will make an annual contribution of at least twenty-five thousand dollars (\$25,000) to a Capital Improvement Reserve Fund during each full or partial Fiscal Year during this Agreement, beginning with the fiscal year that begins on July 1, 2018. In the event YMCACW makes a contribution to the Capital Improvement Reserve Fund in excess of twenty-five thousand dollars (\$25,000) for any such full or partial Fiscal Year, YMCACW may reduce its contribution for the immediately following Fiscal Year by the amount of that excess (i.e. the difference between twenty-five thousand dollars (\$25,000) and the actual amount contributed).
 - ii. The first required annual contribution, pursuant to subsection (i) above, shall be reduced by the amount of capital expenditures (consistent with the requirements for Capital Improvement Reserve Fund expenditures set forth herein) for the Facility made by YMCACW in excess of \$25,000 during the period from December 1, 2017 to June 30, 2018.
 - iii. YMCACW will provide written plans for any expenditures from the Capital Improvement Reserve Fund to the City, and the City will collaborate with the YMCACW in prioritizing and allocating the use of such funds.
 - iv. The Capital Improvement Reserve Fund shall be used solely to upgrade Facility improvements (for expenditures of a minimum of five-thousand dollars (\$5,000) each) and to perform maintenance of the Facility's building structure, building systems, and site improvements (for expenditures of a

minimum of one-thousand dollars (\$1,000) each).

Section 10. Ownership of Equipment and Fixtures. The Parties agree that YMCACW owns the exercise and business equipment currently located at the Facility, and that the City owns the Facility fixtures, including those previously or in the future installed or improved by YMCACW, including the pool slide, boilers, lockers, welcome center, pool filters, etc. The Parties agree to continue the above method for distributing ownership in the future, so that fixtures installed in the building will be owned by the City, and exercise and business equipment will be owned by YMCACW.

Section 11. Taxes.

- a. Except to the extent otherwise required by law, YMCACW shall be responsible for all federal, state, and local taxes, government fees, charges, surcharges or similar exactions imposed on the Facility and the Services and/or products that are the subject of the Agreement including but not limited to state and local sales and use taxes.
- b. City acknowledges that currently, and from time to time, there is uncertainty about regulatory classification and/or treatment of some of the Services YMCACW provides and, consequently, uncertainty about what fees, taxes and surcharges are due from YMCACW and/or its customers and/or members. City agrees that YMCACW has the right to determine, in its sole discretion, what fees, taxes and surcharges are due and to collect, invoice and remit them to the relevant governmental authorities, provided, however, that YMCACW will be solely liable for any liability resulting from such determinations.
- c. The Parties acknowledge that YMCACW is applying to Washington County for a property tax exemption in connection with this Agreement under the provisions of ORS 307.166. In the event the application for property tax exemption is approved, it is agreed that any resulting tax savings will inure solely to the benefit of YMCACW.

Section 12. Access to Records; Audits.

- a. YMCACW shall maintain, and City and its duly authorized representatives shall have access to, the books, documents, papers, and records of YMCACW which are directly pertinent to this Agreement for the purpose of making audit, examination, excerpts, and transcripts during the Term and for a period of three (3) years after termination or expiration of this Agreement, regardless of cause. Access to records shall be provided, and copies of applicable records shall be made available, by YMCACW to City within three (3) business days of a request by City. Payment for the reasonable cost of copies is reimbursable by City.
- b. City, either directly or through a designated representative, at City's expense except as provided herein, may conduct financial and performance audits of the Services and compliance with this Agreement at any time during the Term and during the three (3) year period established in subsection (a) above. Audits will be conducted

in accordance with generally accepted auditing standards as promulgated in Government Auditing Standards by the Comptroller General of the United States General Accounting Office.

- c. If such audit discloses noncompliance with the terms of this Agreement, then YMCACW shall take such steps as are reasonably necessary to rectify such noncompliance, and YMCACW shall repay to the City the reasonable costs of the audit.

Section 13. Co-Branding.

- a. The Parties will collaborate on enhancing the visibility of the Sherwood YMCA, its programming, and the building, equipment, and site improvements.
- b. Beginning as soon as is practicable, and in any event no later than November 1, 2018 for site signage and no later than April 1, 2018 for all other items, all site signage, websites, publications related to Sherwood YMCA programming, and all other mass communication materials and publications, whether controlled by City or YMCACW, shall indicate that the Facility and Program is provided jointly by the YMCACW and the City.
- c. YMCACW will work collaboratively with the City toward the development of the Facility's external signage, consistent with the requirements of subsection (b) above and the City's branding initiatives.

Section 14. Coordination between the Parties.

- a. YMCACW's Sherwood Executive Director and City's Community Services Director shall meet at least once every other month to discuss issues relating to the Facility and the Program, and shall confer periodically to resolve day-to-day operational issues as needed.
- b. YMCACW's Sherwood Executive Director, or designee, and City's Public Works Director, or designee, shall meet at least quarterly to discuss and coordinate regarding issues relating to the Facility and its maintenance.
- c. YMCACW's Chief Operating Officer and City's City Manager shall meet at least quarterly to discuss issues relating to the Facility and the Program.
- d. YMCACW's Sherwood Executive Director shall endeavor to attend all meetings, except executive sessions, of the City's Parks and Recreation Board, and, every other month, at such meetings shall provide an oral report regarding the Facility, the Program, community activities, and general developments. In the event YMCACW's Sherwood Executive Director is unable to attend a particular meeting of the City's Parks and Recreation Board, he or she shall designate another YMCACW representative to attend and provide the above-described oral report. At such meetings, the City's Parks and Recreation Board shall provide input to the YMCACW's Sherwood Executive Director, or designee, as needed regarding the

general direction of Facility programming.

- e. A City Council Liaison shall be assigned to the Sherwood YMCA. The City Council Liaison's point of contact shall be the YMCACW's Sherwood Executive Director. The City Council Liaison shall be permitted to attend all meetings, except annual retreats and such portions of meetings where it is necessary to exclude the City Council Liaison in connection with the discussion of confidential information, of the Sherwood YMCA's Board of Managers. In the event the City Council Liaison is unable to attend a particular meeting of the Sherwood YMCA's Board of Managers, an alternate may attend.
- f. On a quarterly basis, YMCACW shall provide a report to the City's Community Services Director which shall include the following:
 - i. Sherwood YMCA's branch income statement.
 - ii. Information regarding projects, program development, upcoming activities and services.
 - iii. Review of open issues and strategy discussions.
 - iv. Recommended enhancements to the Program and the Facility.
 - v. Information regarding use of the Facility by third parties pursuant to Section 15 below, including the identities of the users, the nature and extent of the uses, and any fees charged.
 - vi. Other items that have arisen and/or are of interest to the City.
- g. On a quarterly basis, YMCACW shall provide a copy of the maintenance log required under Section 4 above to City's Public Works Director.

Section 15. Third Party Use of Facility.

- a. Except as otherwise provided herein, the YMCACW is entitled to the use of the entire Facility, and shall not sublease any portion of the Facility or subcontract or otherwise allow use of any portion of the Facility by any third party.
- b. YMCACW shall be permitted to contract with independent contractors to provide program assistance and operational support, such as contracts with instructors acting as independent contractors.
- c. YMCACW shall be permitted to allow use of the Facility for ad hoc member uses, such as groups of members meeting in Facility rooms for social discussions for customary and reasonable durations; vendor business meetings with YMCACW staff; member discussions with YMCACW staff; Sherwood Board of Managers Meetings; community event planning where YMCACW staff is involved in the event or the planning thereof; health and wellness related seminars, meetings, or

classes related to the YMCACW's Mission and Cause; YMCACW fundraising activities where the sole beneficiary will be the Sherwood YMCA branch; and all YMCACW program-related meetings and uses, such as youth birthday parties and similar events where the core purpose is to serve the community. Provided, however, that such uses shall not substantially interfere with the use of the Facility for its primary purpose, which is the provision of the Services. And further provided that YMCACW shall charge such users fees that are consistent with the fees charged by City for comparable uses of comparable City facilities. Such fees shall be considered Sherwood branch revenue.

- d. For uses of the Facility by third parties not specifically permitted herein, the City's Community Services Director or designee shall have sole discretion and authority to approve or deny usage by such third parties, and approve all rates and fees associated with such use of the Facility. The City agrees to approve or deny such requests within five (5) business days of receipt. Each such request shall be in writing, accompanied by the name, address, email address, and phone number of the proposed third party user, a detailed description of the proposed use of the Facility, and the proposed date(s), duration, and terms thereof.

Section 16. City Access to Facilities. City shall have the right, but not the obligation, to enter into the Facility, including the roof of the Facility, at any time, without notice, to perform site inspections, or for any other legitimate business purpose.

Section 17. Sale of Facility. Prior to offering the Facility for sale, City shall notify YMCACW of its intent to offer the Facility for sale. If City makes the Facility available for sale, City shall provide YMCACW with an opportunity to make an offer for the purchase of the Facility. This Section 17 does not provide a basis for termination of this Agreement except as otherwise provided in Section 3.

Section 18. Non-Discrimination and Compliance with Laws.

- a. In connection with its activities under this Agreement, YMCACW shall comply with all applicable federal, state, and local laws and regulations, and shall indemnify City and be solely liable with regard to any liability arising out of any violation of law.
- b. Without limiting the generality of the foregoing, YMCACW shall not discriminate in provision of the Services, in hiring, or in connection with this Agreement, on the basis of religion or any class protected by law.
- c. Without limiting the generality of the foregoing, both Parties agree to comply with the Americans with Disabilities Act (ADA) in performance of this Agreement. City shall comply, at City's sole expense, with the ADA, with regard to Facility issues within the scope of City's responsibility as described in Section 4 above. YMCACW shall comply, at YMCACW's sole expense, with the ADA with regard to Facility issues outside the scope of City's responsibility as described in Section 4 above.

- d. Neither Party may take any action which would cause the other Party to incur any responsibility or cost for ADA compliance under subsection (c) above without that Party's prior written consent.
- e. Within ten (10) calendar days after receipt, a Party receiving such a notice shall advise the other Party in writing regarding, and provide the other Party with copies (as applicable) of, any notices alleging violation of or noncompliance with the ADA relating to the Facility, or any governmental or regulatory actions or investigations instituted or threatened regarding noncompliance with the ADA and relating to the Facility.

Section 19. Indemnification.

- a. YMCACW shall indemnify and hold City, its elected officials, affiliates, officers, clients, agents, volunteers, and employees harmless of and from all manner of loss, liability, damage, claims, demands and actions of any nature whatsoever (including reasonable costs of litigation and attorneys' fees) (each a "Loss" or collectively, "Losses"), which City may hereafter incur, become responsible for, or pay out to a third party as a result of (i) the death or injury to any person or destruction or damage to any property to the extent that such Loss was due to any negligent, reckless, or willful act or omission by YMCACW or its officers, directors, volunteers, agents, affiliates, contractors, or employees, or (ii) any claim by a third party that any of the YMCACW Intellectual Property (so long as it has not been modified and is used as permitted by this Agreement) infringes upon any intellectual property of a third party, or (iii) YMCACW's breach of the terms of the Scope of Work and/or this Agreement. Notwithstanding anything contained herein to the contrary, YMCACW shall not have any obligation under this Agreement for any portion of a Loss finally determined by a court of competent jurisdiction to arise from City's negligence, recklessness, or willful misconduct.
- b. Notwithstanding the foregoing, YMCACW shall not be required to indemnify City for any infringement or alleged infringement of YMCACW Intellectual Property to the extent that the alleged infringement or unlawful use: (i) is based on information, requirements or directives furnished by City; (ii) is the result of a modification made by a party other than YMCACW or its third party subcontractors; (iii) arises from use of the Services in a manner inconsistent with the Scope of Work, or use of the Services in a manner not otherwise contemplated by this Agreement; or (iv) arises out of City's use of software licensed by City from third parties.
- c. City shall indemnify and hold YMCACW and its officers, directors, volunteers, agents, and employees harmless of and from all manner of Losses, which YMCACW may hereafter incur, become responsible for, or pay out as a result of (i) the death or bodily injury to any person or destruction or damage to any property to the extent that such Loss was due to any negligent, reckless, or willful act or omission by City or its agents or employees, or (ii) City's breach of the terms of the Scope of Work and/or this Agreement. Notwithstanding anything contained herein to the contrary, City shall not have any obligation under this Agreement for

- any portion of a Loss finally determined by a court of competent jurisdiction to arise from YMCACW's negligence, recklessness, or willful misconduct.
- d. The indemnified Party shall promptly notify the indemnifying Party in writing of any Loss claim for which it intends to seek indemnification. The indemnifying Party shall have the right to undertake, conduct and control, through counsel of its own choosing, the defense and settlement of any such Loss; provided that no such settlement may compromise any rights or interests of the indemnified Party without such Party's express written consent. The indemnified Party shall have the right to be represented by counsel of its own choosing, but, notwithstanding anything herein to the contrary, at its own expense. So long as the indemnifying Party is contesting any such Loss in good faith, the indemnified Party shall not pay or settle such Loss.
 - e. This Section 19 shall survive the expiration or termination of this Agreement, regardless of cause.

Section 20. Insurance.

- a. **YMCACW's Liability Insurance.** YMCACW shall obtain at its expense, and maintain for the term of this Agreement, occurrence form commercial general liability and commercial automobile liability insurance, including coverage for all owned, hired, and non-owned automobiles, for the protection of YMCACW, the City, its officers, agents, volunteers, and employees. Such coverage shall be primary and non-contributory. Coverage shall include personal injury, bodily injury, including death, and broad form property damage, including loss of use of property, occurring in the course of or in any way related to YMCACW's operations, and shall include coverage for any and all liability of YMCACW with respect to the Facility and the Program and under this Agreement, YMCACW's indemnity obligations under this Agreement, or arising out of the maintenance, use or occupancy of the Facility, in an amount not less than \$2,000,000 combined single limit per occurrence and \$2,000,000 aggregate. Such coverage minimums shall be automatically adjusted so as to be at least equal to the liability limits under the Oregon Tort Claims Act for local governments, with multiple claimants, for injury or death, as such limits may be adjusted from time to time. Such insurance shall name the City as an additional insured. YMCACW, its subcontractors, if any, and all employers providing work, labor, or materials under this Agreement, who are subject employers under the Oregon Workers' Compensation Law, shall comply with ORS 656.017, which requires them to provide workers compensation coverage that satisfies Oregon law for all their subject workers. Out-of-state employers must provide workers' compensation coverage for their workers that complies with ORS 656.126. Employers' Liability Insurance with coverage limits of not less than \$1,000,000 each accident shall be included. All policies will provide for not less than thirty (30) calendar days' written notice to the City before they may be canceled. Within seven (7) calendar days of the Effective Date, and thereafter upon request, YMCACW shall furnish the City certificates of insurance and necessary endorsements evidencing the effective dates, amounts, and types of insurance

required by this Agreement.

- b. **YMCACW's Property Insurance.** YMCACW shall, at its own expense, procure and maintain insurance covering all of its tenant improvements, equipment, and personal property including its furniture and inventory, and other betterments, and all plate glass and other glass (regardless of cause of breakage), in an amount equal to not less than the full replacement value thereof and insuring against fire and all risk perils coverage as provided by a standard all risk coverage endorsement (commonly known as "causes of loss-special form").
- c. **City's Liability Insurance.** City shall, at its own expense, carry in full force and effect a commercial liability insurance policy including property and personal injury coverage, with a combined single limit for bodily injury or property damage in an amount of not less than \$2,000,000 per occurrence and \$2,000,000 aggregate, insuring against any and all liability of City with respect to the Facility and under this Agreement, City's indemnity obligations under this Agreement, or arising out of the maintenance, use or occupancy of the Facility. Such policies shall be deemed primary and noncontributing. Within seven (7) calendar days of the Effective Date, City shall furnish YMCACW with a certificate or other acceptable evidence that such insurance is in effect.
- d. **City's Property Insurance.** City shall, at its own expense, procure and maintain a policy or policies of insurance covering loss or damage to the Facility in the amount of the full replacement value thereof (exclusive of YMCACW's non-standard tenant improvements, equipment, and personal property), providing protection against all perils included within the classification of fire, extended coverage, and all risk of loss as it relates to the standard insuring clause. Such insurance shall provide for payment of loss thereunder to City.
- e. **Waiver of Subrogation.** Each Party hereby releases the other Party and its agents, officers, and employees with respect to any claim that the releasing Party might otherwise have against the other Party or its agents and employees for, and waives any right of subrogation with respect to loss, damage or other casualty to tangible property owned by the releasing Party occurring during the Term of this Agreement to the extent of insurance proceeds received by the releasing Party from insurance required to be carried hereunder (or which would have been received had such Party complied with the requirements) or, if greater, the proceeds actually received from all insurance maintained by the releasing Party. YMCACW shall secure an appropriate clause in, or an endorsement upon, each insurance policy obtained by it and covering or applicable to the Program, the Facility, and the personal property and equipment located therein, pursuant to which the insurance company waives subrogation or permits the insured, prior to any loss, to make the waiver, without invalidating the coverage under the insurance policy. The waiver of subrogation or permission for waiver of any claim shall extend to City and its agents, officers, and employees.
- f. Notwithstanding the foregoing, the City may, in its sole discretion, meet any or all

of the above requirements through a policy of self-insurance.

Section 21. Dispute Resolution.

- a. The Parties will first address disputes under this Agreement cooperatively between YMCACW's Sherwood Executive Director and City's Community Services Director.
- b. If the dispute is not resolved by YMCACW's Sherwood Executive Director and City's Community Services Director within thirty (30) calendar days, or such other time period as the Parties may agree upon, the matter will be escalated to the City Manager and YMCACW's Chief Executive Officer.
- c. If the matter is not resolved by the City Manager and YMCACW's Chief Executive Officer within thirty (30) calendar days, or such other time period as the Parties may agree upon, the dispute or alleged default shall be submitted to non-binding mediation upon the request of either Party. The Parties shall exercise good faith efforts to agree upon the selection of a mediator. If a Party requests mediation and the other Party fails to respond within ten (10) business days, or if the Parties fail to agree on a mediator within ten (10) business days of such request, either Party may request a mediator be appointed by the presiding judge of the Washington County Circuit Court. The mediator shall be compensated equally by both Parties, and the Parties shall bear their own costs in mediation. Mediation will be conducted in a location agreed to by both Parties, or if the Parties cannot agree, in a location determined by the mediator. The Parties shall exercise good faith efforts to resolve disputes through the mediation process. The mediation shall occur on an expedited schedule, and the Parties will not attempt to delay mediation or the scheduling of the mediation, or to unnecessarily continue the mediation once it has been set.
- d. Any dispute not settled by mediation within sixty (60) calendar days of the request for mediation, or such other time period as the Parties may agree upon, shall be submitted to binding arbitration upon the demand of either Party. The decision(s) and award of the arbitrator shall be final, binding, and nonappealable. The arbitration shall be conducted in Sherwood, Oregon, or at such other location as may be agreed upon by the Parties, pursuant to the arbitration statutes of the State of Oregon, and any arbitration award may be enforced by any court with jurisdiction. Filing for arbitration shall be treated the same as filing in court for purposes of meeting any applicable statute of limitations or for purposes of filing a notice of pending action ("lis pendens"). The arbitration shall be conducted by a single arbitrator selected by mutual agreement of the Parties. The arbitrator selected shall be neutral and unbiased, except to the extent the arbitrator's prior relationship with any Party is fully disclosed and consented to by the other Party or Parties. If the Parties are unable to agree upon the arbitrator within ten (10) business days after a Party's demand for arbitration, upon application of any Party, the presiding judge of the Circuit Court of Washington County, Oregon, shall designate the arbitrator. The arbitrator shall be compensated equally by both Parties, and the Parties shall bear their own costs in arbitration.

Section 22. Confidentiality. Each Party acknowledges that it and its employees or other Representatives may, in the course of the Agreement, be exposed to or acquire Confidential Information of the other Party. Each Party agrees that it will cause its employees and other Representatives to comply with the terms and provisions of this Agreement applicable to such Party, including this Section 22. Each Party agrees to use reasonable measures, no less stringent than those measures used by such Party to protect its own Confidential Information (but not less than reasonable measures), to protect the Confidential Information of the other Party from disclosure to any third party. Each Party agrees to use Confidential Information received from the other Party pursuant to this Agreement solely in connection with the performance of such Party's obligations under this Agreement. Each Party acknowledges and agrees that all Confidential Information of a Party is the property of that Party alone. Nothing in this Agreement shall be construed as granting any rights, title, interest, or privileges to the Party receiving Confidential Information of another Party, by license or otherwise, of any of the Disclosing Party's Confidential Information. Upon Termination of this Agreement for whatever reason (i) City shall return to YMCACW and cease use of all of YMCACW's Confidential Information and (ii) YMCACW shall return to City and cease use of all of City's Confidential Information. Notwithstanding the foregoing, the Parties acknowledge that City and/or YMCACW may be required by law, including but not limited to Oregon Public Records Law, to retain certain Confidential Information, and to release certain Confidential Information to a third party, and the Parties agree that (1) retaining and releasing Confidential Information as required by law does not constitute a breach of this Agreement, and (2) prior to any such release of Confidential Information, the Party intending to disclose such information will provide written notice to the other Party, and the other Party may seek to prevent such disclosure by any legal means available to it. For purposes of this Agreement, "**Confidential Information**" means any and all non-public information (including all ideas, discoveries, concepts, know-how, trade secrets, techniques, designs, specifications, drawings, sketches, models, manuals, samples, tools, computer programs, technical information, and other confidential business, customer, member, City or personnel information or data) that is or reasonably could be regarded as confidential by, or proprietary to, the Party (the "**Disclosing Party**") making the disclosure to the other Party or its Representatives (the "**Receiving Party**"), including information embedded in, contained in or related to other information disclosed by the Disclosing Party to the Receiving Party, whether or not marked as "confidential", "private" or otherwise, whether disclosed orally or in printed, electronic or other form or manner, whether disclosed in original form, copies or reproductions and whether disclosed by such Disclosing Party or its Representatives. Confidential Information does not include information that (i) is or becomes generally available to the public other than as a result of a breach of this Agreement or any other agreement by the Receiving Party or its Representatives, (ii) was lawfully within the Receiving Party's possession prior to being furnished by the Disclosing Party or its Representatives, (iii) is or becomes lawfully available to the Receiving Party from a source other than the Disclosing Party, without any breach or violation of any non-disclosure or confidentiality agreement by the Party disclosing such information to the Receiving Party, or (iv) is independently developed by the Receiving Party without use of any of the Disclosing Party's Confidential Information. For purposes of this Agreement the term "**Representative**" shall mean a designated representative or agent (whether as independent contractor or a subcontractor) of either Party empowered and

authorized by such Party and acting with or on behalf of such Party, including any Affiliate of such Party so empowered and authorized.

Section 23. HIPAA; Business Associate Agreement. Except to the extent provided in a separate business associate agreement between the Parties, Confidential Information includes “Protected Health Information,” as that term is defined in 45 CFR Section 160.103 of the federal privacy regulations and such Confidential Information is subject to the protections and requirements of the Health Insurance Portability and Accountability Act of 1996 (and the applicable regulations, rules and procedures thereunder, collectively “HIPAA”). In the event that City will provide, directly or through its subcontractors, Protected Health Information to YMCACW as part of the Program, or vice versa, prior thereto the Parties will enter into a business associate agreement on such terms a mutually agreeable to the Parties.

Section 24. Intellectual Property; Proprietary Rights of the Parties.

- a. Each Party acknowledges that the other Party owns Intellectual Property (as hereinafter defined), and the City acknowledges that YMCACW’s national organization, Y-USA, owns Intellectual Property, as of the Effective Date of this Agreement. Each Party agrees that, except as explicitly and specifically provided in this Agreement, it shall acquire no license, right, title or interest in or to the other Party’s Intellectual Property by virtue of this Agreement. For purposes of this Agreement, “**Intellectual Property**” means the collective reference to all rights, title, interest, and privileges in or relating to intellectual property, whether arising under United States, multinational or foreign laws or otherwise, including all creative or proprietary interests, data, tools, business processes, methods, symbols, copyrights, patents, trademarks, service marks, trade names, trade secrets, internet domain names, and licenses, whether now or hereafter existing.
- b. City shall own and continue to own: (i) all Intellectual Property owned by City as of the Effective Date of this Agreement, and (ii) all Intellectual Property developed or purchased by City independent of and apart from this Agreement (collectively, “**City Intellectual Property**”), and nothing herein grants or transfers to YMCACW any ownership interest in such City Intellectual Property.
- c. YMCACW (including, for all purposes, YMCACW’s Affiliates, and third party licensors) shall own and continue to own all Intellectual Property owned by YMCACW as of the Effective Date of this Agreement, including (i) all registrations worldwide for a family of trademarks incorporating the term *Live for Life*, used for a variety of health-related goods and services and (ii) all programming and operational manuals prepared by YMCACW for delivery of Services and management of the Program and all systems and methods of delivery for the Services and management of the Program (collectively, “**YMCACW Intellectual Property**”), and nothing herein grants or transfers to City any ownership interest in such YMCACW Intellectual Property, even if such Intellectual Property is embodied in any Services or deliverables provided to City. For purposes of this Agreement, the term “**Affiliate**” shall mean any other entity directly or indirectly controlling, controlled by, or under common control with an entity. An entity shall

be deemed to control another entity if the controlling entity owns fifty-one percent (51%) or more of any class of voting securities (or other ownership interests) of the controlled entity, or possesses, directly or indirectly, the power to direct or cause the direction of the management or policies of the controlled entity, whether through ownership of stock or other ownership interests, by contract or otherwise.

Section 25. Publicity. Neither Party shall use the other Party's (or its respective Affiliates') trademarks, logos, or other Intellectual Property in any Publicity Matters without the prior written consent of the other Party or its respective Affiliates, as applicable. Neither Party shall use the other Party's (or its respective Affiliates') name in a manner that could, in the other Party's reasonable judgment, imply endorsement by the other Party, its respective Affiliates, or any of their respective employees, in any Publicity Matters without the prior written consent of the other Party or its respective Affiliates, as applicable. For purposes of this Agreement, "**Publicity Matters**" means any public statement, publicity, advertising, presentation, brochure, newsletter, book, electronic database or any other matter of whatever nature, form or manner involving a communication with a third party, whether written, electronic or oral.

Section 26. Notices.

Notices shall be made by personal service, in which case they are effective on the date of service, or by certified mail, in which case they are effective on the date of delivery, or if delivery is refused, upon the date of delivery refusal. Notices shall be provided to the persons specified below. Either Party may alter the person designated for receipt of notices under this Agreement by written notice to the other Party.

If to YMCACW:
YMCA of Columbia-Willamette
9500 SW Barbur Boulevard, Suite 200
Portland, OR 97219
Attention: Bob Hall, CEO

If to City:
City of Sherwood
22560 SW Pine Street
Sherwood, Oregon 97140
Attention: Kristen Switzer, Community Services Director

Section 27. General Representations and Warranties.

- a. City hereby represents and warrants to YMCACW that:
 - i. City is a municipal corporation duly organized, validly existing, and in good standing under the laws of the State of Oregon, and has the requisite corporate power and authority to own, lease, or otherwise hold its properties and assets and to carry on its business as presently conducted;
 - ii. City has the requisite corporate power and authority to execute and to deliver this Agreement and to perform the transactions contemplated

hereunder; and

- iii. The execution and delivery by City of this Agreement and the performance by City of the transactions contemplated hereunder have been duly authorized by the City Council and, assuming the due execution and delivery by YMCACW, this Agreement constitutes a valid and binding agreement of City, enforceable against City in accordance with its terms, subject to applicable bankruptcy, reorganization, moratorium, and similar laws affecting creditors' rights and remedies generally and subject, as to enforceability, to general principles of equity.
- b. YMCACW hereby represents and warrants to City that:
- i. YMCACW is a nonprofit corporation, duly organized, validly existing, and in good standing under the laws of the State of Oregon, and has the requisite corporate power and authority to own, lease, or otherwise hold its properties and assets and to carry on its business as presently conducted;
 - ii. YMCACW has the requisite corporate power and authority to execute and to deliver this Agreement and to perform the transactions contemplated hereunder;
 - iii. The execution and delivery by YMCACW of this Agreement and the performance by YMCACW of the transactions contemplated hereunder have been duly authorized by all necessary corporate action on the part of YMCACW and, assuming the due execution and delivery by City, this Agreement constitutes a valid and binding agreement of YMCACW, enforceable against YMCACW in accordance with its terms, subject to applicable bankruptcy, reorganization, moratorium, and similar laws affecting creditors' rights and remedies generally and subject, as to enforceability, to general principles of equity; and
 - iv. YMCACW will perform the Services in accordance with its reasonable judgment and experience and in compliance with applicable standard industry practices, subject to direction given by City, and consistent with the requirements of the Scope of Work.
- c. EXCEPT FOR THE WARRANTIES SPECIFICALLY PROVIDED IN THIS AGREEMENT, THE SERVICES AND FACILITY ARE PROVIDED "AS IS" WITHOUT WARRANTY OF ANY KIND, EXPRESS OR IMPLIED. THE PARTIES EXPRESSLY DISCLAIM ANY IMPLIED WARRANTY OR REPRESENTATION WITH RESPECT TO THE SERVICES AND FACILITY, INCLUDING WITHOUT LIMITATION, ANY IMPLIED WARRANTY OF MERCHANTABILITY OR IMPLIED WARRANTY OF FITNESS FOR A PARTICULAR PURPOSE. A PARTY'S SOLE AND EXCLUSIVE REMEDY FOR BREACH OF ANY WARRANTY SHALL BE RE-PERFORMANCE OF THE WARRANTIED SERVICE.

Section 28. Successors and Assigns. City may not assign its rights and obligations under this Agreement without YMCACW's prior written consent, which consent is in the sole discretion of YMCACW. YMCACW may not assign its rights and obligations under this Agreement without City's prior written consent, which consent is in the sole discretion of City. The provisions of this Agreement shall be binding upon and shall inure to the benefit of the Parties hereto, and their respective successors and approved assigns.

Section 29. Independent Contractor Relationship.

- a. At all times during the term of this Agreement, YMCACW shall be deemed to be an independent contractor of City. The personnel or subcontractors hired or retained by YMCACW to provide Services or manage the Program shall be solely employees, subcontractors or agents of YMCACW, shall not under any circumstances be deemed to be employees, subcontractors or agents of City, and shall not be entitled to participate in any employee benefit plans or employee programs of City. Nothing contained within this Agreement shall be deemed or construed to create a partnership or joint venture, to create the relationship of employee/employer, principal/agent, or otherwise to create any liability whatsoever between YMCACW and City in any capacity other than as Parties to this Agreement. Except as may be otherwise provided in this Agreement, in addition to contracts for the employment of personnel or subcontractors necessary to deliver the Services and manage the Program as specifically set forth in this Agreement, all other contracts or undertakings necessary for the delivery of the Services or management of the Program shall be in the name of and the obligation of YMCACW, including contracts for repairs or maintenance services, utilities, supplies and merchandise.
- b. YMCACW acknowledges that it has no right to bind City to any commitment or obligation and City shall not incur any liability as the result of YMCACW's actions or the actions of any employee or subcontractor of YMCACW. YMCACW's employees and subcontractors shall at all times disclose that they are employees of YMCACW or contractors retained by YMCACW, as applicable, and shall not represent to any third party that they are employees, agents, co-ventures, or representatives of City.

Section 30. Personnel; Subcontractors.

- a. YMCACW may hire or retain such employees and subcontractors as it deems reasonably necessary or appropriate in connection with providing the Services under this Agreement.
- b. YMCACW will hire, train, promote, discharge and supervise the work of all such YMCACW employees and subcontractors.
- c. YMCACW shall have sole responsibility for all compensation and benefits for all employees and subcontractors employed or retained by YMCACW.

- d. With respect to all YMCACW employees and subcontractors, YMCACW has conducted or caused to be conducted, or will conduct or cause to be conducted prior to such employees and subcontractors performing any work, a background investigation in accordance with applicable law.

Section 31. Eminent Domain. If all or a portion of the Facilities is condemned by a government agency other than City, either Party may terminate this Agreement, effective immediately, upon written notice to the other Party, City shall be entitled to all of the proceeds of condemnation, and YMCACW shall have no claim against City as a result of the condemnation. Sale of all or part of the Facilities to a purchaser with the power of eminent domain in the face of a threat or probability of the exercise of the power shall be treated for the purposes of this Section 31 as a taking by condemnation.

Section 32. Liens.

- a. Except with respect to activities for which City is responsible, YMCACW shall pay as due all claims for work done on and for services rendered or material furnished to the Facilities and shall keep the Facilities free from any liens. If YMCACW fails to pay any such claims or to discharge any lien, City may do so and collect the cost from YMCACW. Any such amount shall bear interest at the rate of nine percent (9%) per annum from the date expended by City and shall be payable on demand. Such action by City shall not constitute a waiver of any right or remedy which City may have on account of YMCACW's default.
- b. YMCACW may withhold payment of any claim in connection with a good-faith dispute over the obligation to pay, as long as City's property interests are not jeopardized. If a lien is filed as a result of nonpayment, YMCACW shall, within ten (10) calendar days after knowledge of the filing, either secure the discharge of the lien, or deposit with City cash or sufficient corporate surety bond or other surety satisfactory to City in an amount sufficient to discharge the lien plus any costs, attorney fees, and other charges that could accrue as a result of a foreclosure or sale under the lien.

Section 33. Governing Law; Jurisdiction; Venue. This Agreement shall be construed and enforced under the laws of the State of Oregon, without giving consideration to any conflicts of law provisions. Each Party agrees that claims arising out of or related to this Agreement shall be brought exclusively in the courts of the State of Oregon sitting in Washington County, Oregon or the United States District Court for the District of Oregon and the appellate courts having jurisdiction over appeals from such courts. Each Party hereby irrevocably agrees that all claims in respect of any such suit, action or proceeding may be heard and determined in any such court and irrevocably waives any objection it may now or hereafter have as to the venue of any such suit, action or proceeding brought in such a court or that such a court is an inconvenient forum.

Section 34. Limitation on Liability. IN NO EVENT WILL EITHER PARTY'S LIABILITY UNDER THIS AGREEMENT OR IN CONNECTION WITH THE SERVICES PROVIDED HEREUNDER, REGARDLESS OF THE FORM OF ACTION, INCLUDE ANY INDIRECT, INCIDENTAL, SPECIAL, OR CONSEQUENTIAL DAMAGES OR CLAIMS FOR LOSS OF

BUSINESS OR PROFITS OR COST OF COVER, UNDER CONTRACT, TORT (INCLUDING NEGLIGENCE), OR OTHER LEGAL THEORY, EVEN IF THE PARTY HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH POTENTIAL LOSS OR DAMAGE.

Section 35. Litigation Costs and Attorneys' Fees. In the event of any litigation between the Parties based upon or arising out of this Agreement, the substantially prevailing Party, as determined by a court of competent jurisdiction, shall be entitled to recover all of its reasonable costs and expenses (including attorneys' fees) from any non-prevailing Party. If a Party substantially prevails on some aspects of such litigation, but not others, the court shall apportion any costs and expenses, as it deems equitable.

Section 36. Waiver. A delay in notification of a breach or making a claim shall not constitute a waiver of a breach or remedy. No waiver of a breach of any provision of the Agreement by a Party shall constitute a waiver of any other or subsequent breach, or of the breached provision itself. No claim or right of a Party arising under, or related to, this Agreement may be discharged in whole or in part by a waiver or renunciation unless supported by additional consideration and in writing signed by the Party discharging such claim or right.

Section 37. Severability. If any provision of this Agreement is held to be illegal, invalid, or unenforceable under any present or future law, and if the rights or obligations under this Agreement of City on the one hand and YMCACW on the other hand will not be materially and adversely affected thereby, (i) such provision will be fully severable; (ii) this Agreement will be construed and enforced as if such illegal, invalid, or unenforceable provision had never comprised a part hereof; (iii) the remaining provisions of this Agreement will remain in full force and effect and will not be affected by the illegal, invalid, or unenforceable provision or by its severance from this Agreement; and (iv) in lieu of such illegal, invalid, or unenforceable provision, there will be added automatically as a part of this Agreement a legal, valid, and enforceable provision as similar in terms to such illegal, invalid, or unenforceable provision as may be possible.

Section 38. Not Exclusive. Notwithstanding any other term or provision of this Agreement, YMCACW shall not be precluded in any manner from providing services similar to the Services for third parties even where such services may produce similar results, nor from using and disclosing for any purpose any general ideas, concepts or techniques which may result from the performance of Services hereunder so long as the same do not include any of City's Confidential Information. Notwithstanding any other term or provision of this Agreement, City shall not be precluded in any manner from procuring or providing services similar to the Services for or from itself or third parties even where such services may produce similar results, nor from using and disclosing for any purpose any general ideas, concepts or techniques which may result from the performance of Services hereunder so long as the same do not include any of YMCACW's Confidential Information.

Section 39. Force Majeure. Neither City nor YMCACW shall be liable for its failure to perform any obligation under this Agreement due to any cause beyond its reasonable control, including, but not limited to, strikes, riots, war, fire, acts of God, and acts required for compliance with any law or government regulation.

Section 40. Counterparts; Signature. This Agreement and the Scope of Work may be signed

in any number of counterparts all of which together shall constitute one and the same document. A signed copy of this Agreement and the Scope of Work transmitted via facsimile, email or other electronic means shall constitute an originally signed Agreement or Scope of Work, as applicable, and, when together with all other required signed copies of this same Agreement or Scope of Work, as applicable, shall constitute one and the same instrument.

Section 41. Restricted Persons. The Parties both warrant that they have not been placed on any list published and maintained by the Government of the United States of America of persons or entities with whom any U.S. person or entity is prohibited from conducting business, including without limitation the Denied Persons List maintained by the Bureau of Industry and Security and the Specially Designated Nationals and Blocked Persons List maintained by the Department of Treasury's Office of Foreign Assets Control.

Section 42. Hazardous Substances. YMCACW shall not cause or permit any hazardous substance to be spilled, leaked, disposed of, or otherwise released on or under the Facilities. YMCACW may use or otherwise handle at the Facility only those Hazardous Substances typically used in the prudent and safe operation of similar types of Facilities. YMCACW may store such hazardous substances at the Facility only in quantities necessary to satisfy YMCACW's reasonably anticipated needs. YMCACW shall comply with all environmental laws and exercise the highest degree of care in the use, handling, and storage of hazardous substances and shall take all practicable measures to minimize the quantity and toxicity of hazardous substances used, handled, or stored at the Facility. Upon the expiration or termination of this agreement, regardless of cause, YMCACW shall remove all hazardous substances from the Facility. The term "environmental law" shall mean any federal, state, or local statute, regulation, or ordinance, or any judicial or other governmental order pertaining to the protection of health, safety, or the environment. The term "hazardous substance" shall mean any hazardous, toxic, infectious, or radioactive substance, waste, and material as defined or listed by any environmental law and shall include, without limitation, petroleum oil and its fractions.

Section 43. Visual Art. City may condition its consent to installation of a work of visual art at the Facility, as defined in the Visual Artists Rights Act of 1990 (VARA) at 17 USC §101 (which definition specifically excludes posters), on YMCACW's delivery to City of a written waiver of moral rights under the VARA executed by the artist and to be executed by City acknowledging that the work may be subject to destruction upon removal.

Section 44. Entire Agreement. This Agreement, including all exhibits, sets forth the entire agreement of the Parties with respect to the subject matter hereof and cannot be changed or modified except by an agreement in writing signed by each Party. In the event of any conflict between the terms of this Agreement and any exhibit, the terms of this Agreement shall control, unless the specific conflicting term in the exhibit explicitly states that that particular term is intended to control over a specific conflicting term in the Agreement. This Agreement, including all exhibits, supersedes all prior oral and written communications, agreements and understandings of the Parties, if any, with respect to the subject matter hereof.

Section 45. Survival. All terms, conditions, obligations, representations and warranties capable of surviving termination or expiration of this Agreement shall so survive, including, without limitation, those provisions relating to indemnification.

Section 46. Time of Essence. Time is of the essence in this Agreement.

Section 47. Interpretation of Agreement. In interpreting this Agreement, each Party expressly agrees that the Parties prepared this Agreement jointly, and no ambiguity shall be resolved against any Party on the basis that it was responsible or primarily responsible for having drafted this Agreement. In addition, each Party hereto expressly represents and warrants to any other Party hereto that (a) before executing this Agreement, said Party has fully informed itself of the terms, contents, conditions, and effects of this Agreement; (b) said Party has relied solely and completely upon its own judgment in executing this Agreement; (c) said Party has had the opportunity to seek and has obtained the advice of counsel before executing this Agreement; (d) said Party has acted voluntarily and of its own free will in executing this Agreement; (e) said Party is not acting under duress, whether economic or physical, in executing this Agreement; and (f) this Agreement is the result of arm's-length negotiations conducted by and among the Parties and their counsel. The Parties are sophisticated and have been represented by attorneys throughout the negotiations of the provisions contained herein. All capitalized terms used herein shall have the meanings ascribed to them herein or in the Scope of Work.

Section 48. References. Except as otherwise specifically indicated, all references to Article, Section, and Subsection numbers refer to Articles, Sections, and Subsections of this Agreement, and all references to exhibits, schedules or appendices refer to the exhibits, schedules or appendices attached hereto. The words "herein," "hereof," "hereunder," "hereinafter," and words of similar import refer to this Agreement as a whole, including attachments, and not to any particular Article, Section, or Subsection hereof. Unless expressly stated to the contrary, reference to any Article includes all of the Sections contained therein, and reference to any Section includes the Subsections contained therein. The terms "include" and "including" shall be construed as if followed by the phrase "without being limited to." The captions or section headings used herein are for convenience only, and are not a part of this Agreement. The same shall not be referred to in construing or interpreting this Agreement. Whenever the context of this Agreement requires, the masculine gender includes the feminine or neuter, and the singular number includes the plural.

Section 49. Miscellaneous Terms and Statutory Provisions.

- a. Identification. Upon execution of this Agreement, YMCACW shall furnish to the City YMCACW's employer identification number, as designated by the Internal Revenue Service, or, if the Internal Revenue Service has designated no employer identification number, YMCACW's Social Security number.
- b. Duty to Inform. YMCACW shall give prompt written notice to the City if, at any time during the performance of this Agreement, YMCACW becomes aware of actual or potential problems, faults, or defects in the Facility, any nonconformance with the Agreement or with any federal, state, or local law, rule, or regulation, or has any objection to any decision or order made by the City. Any delay or failure on the part of the City to provide a written response to YMCACW shall constitute neither agreement with nor acquiescence in YMCACW's statement or claim, and shall not constitute a waiver of any of the City's rights.
- c. Statutory Provisions. As provided by ORS 279B.220, YMCACW shall:

- i. Make payment promptly, as due, to all persons supplying to YMCACW labor or material for the performance of the work provided for in this Agreement.
- ii. Pay all contributions or amounts due the Industrial Accident Fund from YMCACW or any subcontractor incurred in the performance of this Agreement.
- iii. Not permit any lien or claim to be filed or prosecuted against the state or a county, school district, municipality, municipal corporation or subdivision thereof, on account of any labor or material furnished.
- iv. Pay to the Department of Revenue all sums withheld from employees under ORS 316.167.
- v. As provided by ORS 279B.230, YMCACW shall promptly, as due, make payment to any person, copartnership, association, or corporation furnishing medical, surgical, and hospital care services or other needed care and attention, incident to sickness or injury, to the employees of YMCACW, of all sums that YMCACW agrees to pay for the services and all moneys and sums that YMCACW collected or deducted from the wages of employees under any law, contract, or agreement for the purpose of providing or paying for the services. It is a condition of this Agreement that all employers working under this Agreement are either subject employers that will comply with ORS 656.017 or employers that are exempt under ORS 656.126.
- vi. As provided by ORS 279A.110, YMCACW may not discriminate against a subcontractor in the awarding of a subcontract because the subcontractor is a minority-owned business, a woman-owned business, a business that a service-disabled veteran owns, or an emerging small business enterprise certified under ORS 200.055 or a business enterprise that is owned or controlled by or that employs a disabled veteran, as defined in ORS 408.225. If YMCACW violates this subsection (vi), the City may regard the violation as a breach of contract that permits the City to: (1) terminate this Agreement; or (2) exercise any remedies for breach of contract that are reserved in this Agreement.
- vii. As provided by ORS 279B.235, YMCACW employees shall be paid at least time and a half for all overtime worked in excess of 40 hours in any one week, except for individuals under personal services contracts who are excluded under ORS 653.010 to 653.261 or under 29 U.S.C. 201 to 209 from receiving overtime. YMCACW must give notice in writing to employees who work on this Agreement, either at the time of hire or before commencement of work on this Agreement, or by posting a notice in a location frequented by employees, of the number of hours per day and days per week that the employees may be required to work.

IN WITNESS WHEREOF, the Parties hereto have executed this Agreement as of the day last set forth below.

City of Sherwood, Oregon

YMCA of Columbia-Willamette

By: _____
Name: _____
Title: _____
Date: _____

By: _____
Name: _____
Title: _____
Date: _____

Exhibit A Scope of Work

This Scope of Work is governed by the Master Services Agreement to which it is attached (the “Agreement”). Except as otherwise provided herein, all capitalized terms used herein shall have the same meaning as in the Agreement.

Section 1. YMCACW Responsibilities Generally.

- a. YMCACW will operate the Facility as a community recreation and fitness facility, providing the same or a higher level of service than was provided during the year prior to the Effective Date, at YMCACW’s sole risk and expense, except as specifically provided herein.
- b. YMCACW acknowledges that the performance of its obligations under the Agreement and this Scope of Work present a certain level of financial risk, that City will not under any circumstances be liable to YMCACW for any financial loss in connection with YMCACW’s performance of such obligations, and that financial loss by YMCACW in connection with performance of its obligations under the Agreement and this Scope of Work will not permit YMCACW to terminate the Agreement.
- c. Subject to the requirements set forth herein, and except as otherwise provided herein, YMCACW shall have exclusive authority and control over the programming offered at the Facility and the selection of exercise and office equipment for use at the Facility.
- d. YMCACW will provide all on-site and off-site staffing, program delivery, and account management support, as necessary to provide the Services.
- e. YMCACW will pay all such staff salaries, wages and benefits. YMCACW will provide all staff replacements as needed.

Section 2. Quality Assurance Services. YMCACW will ensure that the Facility remains a safe, secure, and quality establishment for its members, participants, volunteers, and employees, and will:

- a. Perform general administrative functions in accordance with the Agreement and this Scope of Work.
- b. Perform periodic onsite safety drills.
- c. Conduct annual member satisfaction surveys and provide the City with the complete report regarding such surveys as well as any supporting documentation. The written comments and other data included in such reports and documentation may be aggregated and de-identified (non-individually identifiable).
- d. Accommodate an annual walk-through and inspection by the City Council.

Section 3. Management and Operations Support. YMCACW will provide operational support to members, participants, volunteers, and employees that promotes the City and YMCACW, including, but not limited to:

- a. Development and maintenance of an operating budget, mission statement, and overall program goals and objectives.
- b. Development and maintenance of a staff training manual with position-specific responsibilities.
- c. Development and maintenance of an operating procedures manual (also known as operational policies and procedures).
- d. Maintenance of on-site and up-to-date membership and personnel files.
- e. Maintenance of the Facility in a safe, clean and sanitary manner.
- f. Material Safety Data Sheet (MSDS) compliance.
- g. Development and maintenance of sanitation plans and action reports for aquatic surfaces and fitness equipment.
- h. Proper handling of hazardous substances.

Section 4. Member and Community Services and Support. YMCACW shall be responsible for the following, which shall be performed and/or offered at the same or a higher level of service than was provided during the year prior to the Effective Date, so long as member demand for a listed service or program is sustained. YMCACW has the authority to adapt any of the programs and services listed below to reflect fitness and community trends, and member demand.

- a. Facilitating all aspects of member engagement (i.e., registration, forms and processes, participant pre-program screenings, etc.).
- b. Orientations to facilities and program amenities and options.
- c. General daily activity area and floor supervision and participant guidance throughout the Facility.
- d. Child Watch services.
- e. The Sherwood Dragons swim team, along with scheduled pool time for the local High School teams.
- f. Active Older Adult programs substantially similar to Silver Sneakers and Silver & Fit.
- g. Programming for special needs and handicapped persons.
- h. A reduced fee program that provides financial assistance to residents that meet

established award criteria.

- i. Personal training delivered as a fee-for-service.
- j. Group class instruction.
- k. Water workout classes.
- l. Instructional swim lessons. All swim instructors will be required to carry the following American Red Cross certifications, or substantially comparable certifications:
 - i. First Aid, CPR/AED for the Professional Rescuer and Water Safety Instructor (WSW).
 - ii. At least one year of experience teaching swimming (strongly preferred).
 - iii. Experience in teaching age groups from 0 to 100 and special populations.
 - iv. Ability to pass background checks.
- m. Recreation/Family Programming, such as fun runs, open swim, sports leagues, etc.
- n. Thematic and seasonal/holiday special events.
- o. Teen Center events, such as dances and sports-themed activities.

Section 5. Marketing and Communication.

- a. YMCACW will develop an annual marketing and communication plan and strategy to generate and sustain participation in Facility programs, and provide a copy of such plan to City.
- b. YMCACW will develop, at least annually, a program calendar including categorical program areas such as participant engagement and education, community outreach, group exercise, member retention, and health improvement programs, and provide a copy of such calendar to City. Such calendar shall complement the needs of the community and the City's Parks Department.

Section 6. Hours of Operation.

- a. The hours of operation of the Facility shall be as follows:

Monday through Thursday: 5:00 am to 10:00 pm

Friday: 5:00 am to 9:00 pm

Saturday: 6:00 am to 7:00 pm

Sunday: 8:00 am to 6:00 pm

- b. YMCACW may adjust the hours of operation of the Facility at its discretion,

provided, however, that Facility operations shall be open at least one-hundred (100) hours each week.

- c. YMCACW will post on site at the Facility a notice of any such change in hours of operation, and except when impracticable, such notices shall be so posted at least one month in advance of any such change.

YMCA OF COLUMBIA-WILLAMETTE
City of Sherwood Family YMCA
Financial Performance For the Quarter Ending _____
 Confidential Information | Not for Public Disclosure

	This Quarter Actual	This Quarter Budget	Variance	This Fiscal YTD Actual	This Fiscal YTD Budget	Variance
Revenues:						
Contributions and Fundraising						
Membership						
Programs						
Other						
Total Income						
Expenses:						
Wages and Employee Benefits						
Professional Services						
Supplies and Direct Operating Costs						
Management Support Services						
Occupancy						
Equipment						
Marketing and Development						
Miscellaneous and Other						
Depreciation and Amortizations						
Total Expense						
Net Branch Proceeds						
Authorized Signature:	_____					
Date:	_____					

YMCA OF COLUMBIA-WILLAMETTE
City of Sherwood Family YMCA

Notes to Financial Performance For the Quarter Ending _____
 Not for Public Disclosure Without Permission

Note 1: Membership	As of End of Quarter		
	Residents	Non-residents	Total

Note 2: Equipment	This Quarter		Fiscal YTD
	Leasing Costs		
Maintenance Costs			
Total	\$ -	\$ -	

Note 3: Capital Expenditures during this Quarter	Asset #	Description	Cost
Total			\$ -

Note 4: Explanation to Budget Variances greater than 50% YTD	Statement Category	Explanation