

**OPERATING AGREEMENT BETWEEN
THE CITY OF EL MIRAGE AND THE
NORTHWEST FAMILY YMCA**

THIS OPERATING AGREEMENT (Operating Agreement) is made between the **CITY OF EL MIRAGE**, a municipal corporation of the State of Arizona (City), and **NORTHWEST FAMILY YMCA, LLC**, an Arizona limited liability company (YMCA).

RECITALS

WHEREAS, the City owns a multi-purpose recreational facility located at 12450 W Cinnabar Ave, El Mirage, Arizona (the "Center"); and

WHEREAS, the YMCA is a non-profit organization dedicated to building self-esteem and enriching body, mind, and spirit for persons of all ages and economic levels and addresses community needs through wellness, leadership, and family strengthening activities; and

WHEREAS, the City desires to provide its residents a facility for recreation, meeting space and other traditional and progressive activities and health enrichment for general public wellness and fitness; and

WHEREAS, the City has recognized the experience and expertise of the YMCA in conducting programs for families at its branches in Maricopa 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 Center and, through reciprocal membership privileges, at other YMCA's in the El Mirage area and nationally where El Mirage members work or travel; and

WHEREAS, the YMCA have been operating the Center since 2012 by way of a Lease Agreement and the Parties mutually desire for the YMCA to continue to operate and manage the Center to compliment and add to other City facilities to ensure that people of all ages and economic levels are provided with the opportunity to enjoy and have access to a broad range of programs and services that meet the needs of the

community, and to do so in the most cost-effective and efficient manner; and

WHEREAS, the City and the YMCA agree to enter into this Operating Agreement regarding management and operations of the Center for recreational purposes;

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

ARTICLE 1. AND DEFINITIONS

1.01 **City.** City means the City of El Mirage, an Arizona municipality.

1.02 **Center.** The building commonly known as the City of El Mirage/YMCA Community Recreation Center that provides health and fitness programs for residents of the City and surrounding communities and that is a resource for the public to assemble and meet during normal operating hours. The Center includes all parking lots, ball fields and outdoor recreation facilities appurtenant to the property. 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 Maricopa County, and that are approved by the City which shall not unreasonably withhold this approval.

1.03 **Director.** Director means _____.

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

1.06 **YMCA** means the Northwest Family YMCA, LLC, an Arizona limited liability company.

ARTICLE 2. TERM OF OPERATING AGREEMENT

2.01 Term. The term of this Agreement (Term) shall commence upon the date executed by the Parties regarding the Facility and shall expire on September 30, 2043.

2.02 Extension of Term. The parties may mutually agree to extend the Term of this Agreement for two (2) additional terms of five (5) years each ("Extended Terms") on the terms and conditions as provided in this Agreement unless otherwise mutually amended or modified. Either party may offer to extend the Term by providing written notice to the other party not less than one year prior to the expiration of the Term or Extended Term. The party receiving the offer to extend must accept the offer to extend not less than sixty (60) days after receiving the offer to extend. The ability to extend the Term or Extended Term of this Agreement shall be null and void and of no force or effect if (i) there exists on the date of extension offer an uncured default under this Agreement by the offering party, or (ii) there exists on the last day of the Term or Extended Term an uncured default under this Agreement by the offering party. Except as otherwise provided in this Section, there shall be no right to extend the Term or Renewal Terms of this Agreement except as expressly agreed to in writing by the parties.

2.03 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 or Extended 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. OPERATIONS

3.01 Operations in General

The YMCA agrees to manage and operate the Center in a professional, efficient and businesslike manner, similar to other YMCA operations. The YMCA shall act as the general clearing house, overseer, coordinator, and promoter of recreation, fitness, safety and therapy programs offered in the Center and act as the City's de-facto recreation department.

The Center will be available to all regardless of age, race, creed, sex, marital status, national origin, political affiliation, religious preference, physical handicap or ancestry. The YMCA will not discriminate. Individuals can purchase a

YMCA membership that provides ongoing use or purchase a daily pass membership which allows day use. Individuals who choose to participate in YMCA programs are not required to be a member.

The YMCA's community service delivery mode includes youth recreational sports leagues for children three (3) years of age to teenagers. The YMCA shall operate youth sports leagues, sport clinics and sports camps. Youth sports leagues will be available to general public regardless of member status.

YMCA will operate the Center under the direction of a Board of Directors specifically for the Northwest Family YMCA. The City shall be entitled to appoint one (1) representative to serve on the Northwest Family YMCA Branch Board of Directors for the Center during the term of this Agreement. In addition, a designated City of El Mirage Council Member will be named as ex-officio of the Northwest Family YMCA Branch Board of Directors.

All expenses for the operations of the Center will be paid by the YMCA. Operations include all personnel, supplies, promotion, insurance, and miscellaneous materials necessary to serve members, guests, and spectator who utilize the Center or participate in YMCA programs. In addition to any City and/or YMCA provided subsidy of resident rates/fees/charges the YMCA shall provide scholarships and/or other forms of financial assistance for the programs or qualifying members as per established practice for all other YMCA facilities and members. Scholarships for membership and programs shall be publicized by the City and the YMCA and made readily and quickly available for those who cannot afford the full cost of participating.

In complying with its obligations and responsibilities herein, the YMCA shall not employ or contract with any person(s) convicted of a sex crime, regardless of age or sex of the victim and shall not knowingly allow an employee of a contractor, or subcontractor to work on the premises who has been convicted of a sex crime, regardless of age or sex of the victim.

It is the goal of the YMCA and City to maximize the usage of the Center. Neither the YMCA nor the City desires for the operations of the Center to require operating subsidy from the City to balance the annual operating costs of the Center. It is the understanding of both the YMCA and the City that there exists a correlation with the number of membership units maintained through a given year and the cost of operating the Center. In calendar years where the Northwest Valley Family YMCA net income/profit (before reserves, general administration, capital, and debt charges)

exceeds \$250,000 the YMCA shall compensate the City \$100,000 to be paid by April 1st following the end of the calendar year.

A. User Fees, Programs Schedule, and Budget

The specific programming, user fees and scope of services to be provided by the YMCA are set forth in the Scope of Services and Operations Exhibit attached to this Agreement. The Scope of Services and Operations Exhibit may be revised from time to time as the Parties see fit without altering the terms of this Agreement. Prior to the end of _____ of each calendar year the City shall submit to the YMCA for the following calendar year requested dates for scheduled City use of the Center. The City will be responsible for incidental costs associated with the use of the Center, i.e. lifeguards, janitorial. Usage of the Center for City events cannot conflict, compete or be similar to programs being offered by the YMCA. The YMCA shall consider the City's submitted information in preparing the annual schedule.

Prior to the end of _____ of each calendar year, the YMCA and the City shall discuss proposed programs that will be mutually beneficial to the community. The YMCA shall produce a schedule for a seasonal brochure of programs available to the community. The City will distribute this brochure through any and all means necessary to promote recreational offerings to the general public.

B. Maintenance Obligations of YMCA

Annually before the end of February, the City and the YMCA will meet at the Center and perform a facility walkthrough. At that time, the City and the YMCA will outline all planned maintenance needs for the Center and agree to the responsibilities. A timeline will be developed, and confirmation of both the City and YMCA's responsibilities will be formalized by both parties by July of each year.

The YMCA agrees to maintain the Center and the moveable equipment provided within the Center, and all parts thereof, in good condition and repair and in as safe a condition as its operation will reasonably permit, and to make all repairs thereto which may be reasonably necessary for this purpose. It is the expectation and goal of both the YMCA and the City that the movable equipment maintenance, typical daily maintenance, preventative maintenance, Center finishes maintenance and replacement, and capital fixed asset maintenance repair

and replacement will be completed in a timely, efficient manner (no longer than 14 days from the time of breakdown).

Moveable equipment/daily maintenance, preventative maintenance and finish maintenance will be completed and funded by the YMCA. All capital fixed asset repairs, maintenance and replacement will be completed and funded by the City per the plan as discussed above.

ARTICLE 3. USE OF PREMISES/OWNERSHIP OF PROPERTY

3.01 Premises. In consideration of the mutual terms and covenants of this Operating Agreement, YMCA has the right to occupy and jointly use with the City, (a) a _____ acre tract of land, more or less, as legally described in Exhibit B attached to this Operating Agreement (Land), and (b) buildings and improvements on the Land or to be constructed on the Land described in Exhibit B. The Land and Facility are collectively referred to as the "Premises".

3.02 Permitted Use of Premises. YMCA may use the Premises only for the purpose of 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 Scope of Services and Operations Exhibit.

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 Arizona, the County of Maricopa, or the City of El Mirage, or other lawful authority with jurisdiction over the Premises.

3.04 Condition of Premises. YMCA accepts the Premises described in Exhibit B in its 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 its suitability for the purposes intended. YMCA further accepts the Premises described in Exhibit B AS-IS 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 Membership Fees. Fees for memberships and programs shall be priced in

accordance with fees established by the YMCA for branches of similar size, community structure, and amenities located in Maricopa County and consistent with the YMCA's goal to permit participation by all socio-economic groups.

3.06 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 Operating. The YMCA shall pay the full cost of the total salary and fringe benefits of said employee(s) or contractors.

3.07 Inspections. The City shall conduct periodic and regular inspections as may be required of the Facility to ensure 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.

3.08 Fire Code Inspections. YMCA will permit the City's Fire Chief or authorized agents to inspect the Premises, and YMCA and City will comply with all requirements of the Fire Chief or 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 Chief or 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 designee. YMCA shall submit a request for reimbursement for the cost of an approved repair. The Director shall determine what is an approved repair and what is general maintenance as outlined in section (b) below. 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 \$30,000, 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 \$30,000, the YMCA shall use existing standard purchasing procedures currently in place by the City of El Mirage for expenses more than \$30,000, 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, general pool maintenance, and window glass replacement. Such repairs will be made in an expeditious and proper manner. Further, the YMCA shall be responsible for 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.

3.14 Emergency Repairs.

(a) 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 3.13(a) 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.

(b) 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.

ARTICLE 4. VEHICLE USE

4.01 Vehicles. City agrees to lease to YMCA, vehicles for program participant transportation. Participants include but are not limited to persons meeting the statutory requirements of the funding source of the associated vehicle. List of vehicles to be leased shall be maintained by the City.

- (a) Payments: YMCA shall pay the City as rent the sums outlined in Exhibit A
- (b) Use: YMCA shall use the Vehicles, solely for the transportation of Youth for field trips related only to the Northwest Valley Family YMCA's Spring, Summer, Fall, and \or Winter Youth Camp seasons (Youth Camp).
- (c) No warranties: Exclusive of original vehicle warranties and/or factory warranties that are in effect, City makes no representations, covenants or warranties, express or implied, concerning the condition of any of the Vehicles, their delivery, or fitness for any particular purpose. City shall in no way be held responsible for any damages, whether actual, special, consequential or otherwise, arising from the Leased Vehicles(s), or this Lease.
- (d) Vehicle maintenance: YMCA is responsible for all routine maintenance including gasoline and other fluids while Vehicles are in YMCA's possession. YMCA shall return Vehicles to Landlord in the same condition they were obtained subject to normal wear and tear associated with the use of the vehicle. YMCA is responsible for any and all damage, vandalism, maintenance, repairs, etc. while Vehicles are in YMCA's possession or while parked at the NW Valley Family YMCA facility.
- (e) Insurance: YMCA shall provide insurance, evidenced by a certificate issued to City, for such amounts and coverages as are satisfactory and approved by City, naming City, its employees, officers and directors, as additional insureds.

Commented [NR1]: Check with YMCA for intended use. Needs to meet grant funding requirements of vehicle procurement.

ARTICLE 5. AUDITING

5.01 Audits. YMCA agrees that the representatives of the City, 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 6. INSURANCE REQUIREMENTS

6.01 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:

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| (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/Operating, independent contractors, products/completed Operating, personal injury, and contractual liability.

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| (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.

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|----------------------------------|-------------|-----------------|
| (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.

6.02 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 Arizona. 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 Management 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 Management 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 Management.

- (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.

6.03 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.

6.04 Center and Facility 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.

ARTICLE 7. TAXES

7.01 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 11.01 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 8. UTILITIES

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

ARTICLE 9. RESTORATION

9.01 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 10. INDEMNIFICATION

10.01 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 3.13 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.

10.02 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 ARIZONA.

10.03 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.

10.04 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.

10.05 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 11. DEFAULT AND REMEDIES

11.01 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.

11.02 Curing a Default. 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. If the nature of the defaulting party's nonperformance is such that it cannot reasonably be cured within 90 days, then the defaulting party will have such additional periods of time as may be reasonably necessary under the circumstances, provided the defaulting party immediately (A) provides written notice to the non-defaulting party and (B) commences to cure its nonperformance and thereafter diligently continues to completion the cure of its nonperformance.

11.03 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 12. RECORDS

12.01 Provision of Records. On a quarterly 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.

12.02 Public Records. YMCA acknowledges that City is required to comply Arizona Revised Statutes Title 39 (Arizona Public Records Statutes or Statutes). Under the Statutes, 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 Statutes applies to a document.

12.03 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 Operating of the Facility.

ARTICLE 13. NOTICES

13.01 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.

If to City: City Manager
 City of El Mirage
 City Hall
 10000 N EL Mirage Road
 El Mirage, Arizona 85335

With a copy to:

If to YMCA:

Commented [NR2]: Need YMCA contact info here

ARTICLE 14. GENERAL PROVISIONS

14.01 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.

14.02 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.

14.03 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.

14.04 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.

14.05 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.

14.06 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.

14.07 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.

14.08 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.

14.09 Applicable Laws. The laws of the State of Arizona shall govern this 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 Maricopa County, Arizona.

14.10 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.

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

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

14.13 Sole Agreement. This Agreement constitutes the sole and only agreement of the parties respecting the Operating of the Premises.

14.14 Termination; Cancellation.

14.14.1 This Agreement may be terminated without cause by either party after providing one (1) year written notice from the terminating party.

14.14.2 For Cause. If either party fails to perform any obligation pursuant to this Agreement and such party fails to cure its nonperformance as set

forth in Sections 11.01 and 11.02, such party will be in default. In the event of such default, the non-defaulting party may terminate this Agreement immediately for cause and will have all remedies that are available to it at law or in equity including, without limitation, the remedy of specific performance. In the event of such termination for cause, payment shall be made by the City to the Vendor for the undisputed portion of its fee due as of the termination date.

14.14.3 Conflict of Interest. This Agreement is subject to the provisions of ARIZ. REV. STAT. § 38-511. The City may cancel this Agreement without penalty or further obligations by the City or any of its departments or agencies if any person significantly involved in initiating, negotiating, securing, drafting or creating this Agreement on behalf of the City or any of its departments or agencies is, at any time while this Agreement or any extension of this Agreement is in effect, an employee of any other party to this Agreement in any capacity or a vendor to any other party of this Agreement with respect to the subject matter of this Agreement.

14.14.4 Gratuities. The City may, by written notice to YMCA, cancel this Agreement if it is found by the City that gratuities, in the form of economic opportunity, future employment, entertainment, gifts or otherwise, were offered or given by YMCA or any agent or representative of the Vendor to any officer, agent or employee of the City for the purpose of securing this Agreement. In the event this Agreement is canceled by the City pursuant to this provision, the City shall be entitled, in addition to any other rights and remedies, to recover and withhold from YMCA an amount equal to 150% of the gratuity.

14.14.5 Agreement Subject to Appropriation. This Agreement is subject to the provisions of ARIZ. CONST. ART. IX, § 5 and ARIZ. REV. STAT. § 42-17106. The provisions of this Agreement for payment of funds by the City shall be effective when funds are appropriated for purposes of this Agreement and are actually available for payment. The City shall be the sole judge and authority in determining the availability of funds under this Agreement and the City shall keep YMCA fully informed as to the availability of funds for this Agreement. The obligation of the City to make any payment pursuant to this Agreement is a current expense of the City, payable exclusively from such annual appropriations, and is not a general

obligation or indebtedness of the City. If the City Council fails to appropriate money sufficient to pay the amounts as set forth in this Agreement during any immediately succeeding fiscal year, this Agreement shall terminate at the end of then-current fiscal year and the City and the YMCA shall be relieved of any subsequent obligation under this Agreement.

ARTICLE 15. YMCA WARRANTIES

YM understands and acknowledges the applicability to it of the American with Disabilities Act, the Immigration Reform and Control Act of 1986 and the Drug Free Workplace Act of 1989. The following is only applicable to construction contracts: The YMCA must also comply with A.R.S. § 34-301, "Employment of Aliens on Public Works Prohibited", and A.R.S. § 34-302, as amended, "Residence Requirements for Employees".

Under the provisions of A.R.S. § 41-4401, YMCA hereby warrants to the City that the YMCA and each of its subcontractors ("Subcontractors") will comply with and are contractually obligated to comply with all Federal Immigration laws and regulations that relate to their employees and A.R.S. § 23-214(A) (hereinafter "YMCA Immigration Warranty").

A breach of the YMCA Immigration Warranty shall constitute a material breach of this Agreement and shall subject the YMCA to penalties up to and including termination of this Contract at the sole discretion of the City.

The City retains the legal right to inspect the papers of any YMCA or Subcontractors employee who works on this Agreement to ensure that the YMCA or Subcontractor is complying with the YMCA Immigration Warranty. YMCA agrees to assist the City in regard to any such inspections.

The City may, at its sole discretion, conduct random verification of the employment records of the YMCA and any of subcontractors to ensure compliance with YMCA's Immigration Warranty. YMCA agrees to assist the City in regard to any random verification performed.

Neither the YMCA nor any Subcontractor shall be deemed to have materially breached the YMCA Immigration Warranty if the YMCA or Subcontractor establishes that it has complied with employment verification provisions prescribed by sections 274A and 274B of the Federal Immigration and Nationality Act and the E-Verify requirements prescribed by A.R.S. § 23-214, Subsection A.

The provisions of this Section must be included in any contract the YMCA enters into with any and all of its subcontractors who provide services under this Contract or any subcontract. "Services" are defined as furnishing labor, time or effort in the State of Arizona by a YMCA or subcontractor. Services include construction or maintenance of any structure, building or transportation facility or improvement to real property.

Israel Boycott. To the extent applicable, YMCA certifies that it is not currently engaged in, and agrees for the duration of this Agreement that it will not engage in a "boycott," as that term is defined in Ariz. Rev. Stat. § 35-393, of Israel.

EXECUTED this the _____ day of _____, 202_.

CITY OF EL MIRAGE

YMCA OF EL MIRAGE