

**LEASE AND OPERATION
AGREEMENT**

Document

Recording Area

Name and Return Address

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

LEASE AND OPERATION AGREEMENT

THIS LEASE AND OPERATION AGREEMENT (this "Agreement") is entered into as of the 28th day of May, 2024 (the "Effective Date"), by and among **WHITEWATER UNIFIED SCHOOL DISTRICT** (the "**SCHOOL DISTRICT**"), a Wisconsin school district and **THE CITY OF WHITEWATER**, a Wisconsin municipal corporation and political subdivision (the "**CITY**").

RECITALS

- A. The School District and the City have executed prior Lease and Operation Agreements, the most recent of which terminated in 2021.
- B. The terms of the Lease and Operation Agreements have provided for the operation of a recreation facility constructed on land owned by the District and adjacent to Whitewater High School (the "Site"), an aquatic facility consisting of an eight lane, twenty-five yard competitive pool (the "Lap Pool"), a leisure pool (the "Leisure Pool"), a slide, a Fitness Center, and appurtenant fixtures, mechanical systems and related improvements (collectively, the "Aquatic Facility").
- C. The Aquatic Facility also includes a locker room facility constructed for the sole and exclusive use of the School District (the "District Locker Room Facility"). For purposes of this Agreement, the District Locker Room Facility means the area of the Aquatic Facility bounded by the interior walls, floor, and ceiling of the District Locker Room Facility, as well as any portions of the Aquatic Facility utility and mechanical systems (wherever located) serving exclusively the District Locker Room Facility.
- D. The Aquatic Facility was constructed using public funds appropriated by the School District and the City, including a \$2,000,000 contribution from the City of Whitewater, as well as private donations obtained by other sources. The Aquatic Facility is primarily intended to serve the recreational and programming needs of the general public. By pooling the resources of the City, the School District, and the private sector, the above needs have been met in a comprehensive and cost-efficient manner for the benefit of all parties. The parties agree that the School District's contribution shall be used to enable all School District residents to use the Aquatic Facility under the same use and fee structures that apply to City residents. The Parties further agree that the City will, in turn, lease portions of the Aquatic Facility to the School District for curricular, special education, and extracurricular purposes.
- E. The Aquatic Center Committee of the City of Whitewater (the "ACC") will make advisory recommendations regarding the Aquatic Facility to the City and School District and will have the staff support of the Park and Recreation Director and Aquatic Center Facility Director. The ACC shall be considered a governmental subdivision and agency of the City and shall have five voting members, but it will not make substantive decisions regarding the operation of the Aquatic Facility. The School District and the City shall each have the right to appoint one regular member and one alternate member to the ACC. An alternate member may only replace a regular member if the absent regular member is appointed by the same body that appointed the alternate member. Three citizen members

shall be jointly appointed by the City and School District.

- F. For purposes of this Agreement, the term "Leased Premises" means the Aquatic Facility and the Site, excluding the District Locker Room Facility.
- G. Capitalized terms used, but not defined, in this Agreement, shall have the meaning given to them in the Cooperation Agreement. Any inconsistencies between the terms of the Cooperation Agreement and this Agreement shall be resolved in favor of this Agreement.

NOW, THEREFORE, in consideration of the foregoing Recitals, each of which is incorporated into this Agreement by reference, and further in consideration of the rents to be paid hereunder, and subject to all of the covenants and agreements contained in this Agreement, the parties agree as follows:

ARTICLE I.

LEASE PROVISIONS

1.01 **Lease of the Leased Premises to City.** The School District hereby leases unto the City, and the City hereby leases from the School District, the Leased Premises. The Leased Premises are depicted on the attached Exhibit A. During the term of this Agreement, the City shall pay to the School District annual rent of One Dollar (\$1.00), payable in advance on the Commencement Date and on each annual anniversary of the Commencement Date thereafter.

1.02 **Lease of the Aquatic Facility to the School District.** The City agrees to rent the Aquatic Facility to the School District to be used for curricular, special education, and extracurricular purposes. The School District agrees to pay the City \$7,500.00 no later than July 1 annually for its use of the Aquatic Facility for curricular, special education, and extracurricular purposes.

1.03 **Access and Parking.** In connection with its lease of the Leased Premises, the School District hereby also grants unto the City and its employees, invitees, and patrons the non-exclusive right of ingress and egress to and from the Aquatic Facility over and across the driveways and walkways serving Whitewater High School, as well as the non-exclusive right to use the parking areas, all as shown on the attached Exhibit B. In order to further accommodate the parking needs of the Aquatic Facility: (a) the School District also agrees that the parking spaces in that portion of the Whitewater High School parking area designated on the attached Exhibit B as the "Aquatic Facility Designated Parking Area" shall not be used by students of Whitewater High School as are other portions of the parking area; and (b) the School District will use reasonable efforts to assure that students are not parking in the Aquatic Facility Designated Parking Area during the customary school day hours of 7:30 a.m. to 3:30 p.m. The remaining parking spaces in the Whitewater High School parking area shall be available for use by the School District, the City and the general public on a first come/first served basis. The School District shall post signs in appropriate locations of the parking area to inform the public that the parking spaces are in the "Aquatic Facility Designated Parking Area." The City shall ensure that all City officers and employees accessing and/or traversing Whitewater High School property pursuant to this Agreement have had all appropriate background checks and meet with all other legal requirements necessary for their authorized presence in those areas.

ARTICLE II.

TERM OF AGREEMENT

2.01 **Initial Term.** The initial term of this Agreement shall run for six (6) years commencing on May 28, 2024 (the "Commencement Date") and ending at 11:59 p.m. Central time on May 28, 2030 (the "Expiration Date"), unless sooner terminated in accordance with this Agreement or in furtherance of the School District's and the City's rights and remedies in the event of an uncured default.

2.02 **Rights to Extend the Term.** The parties may extend this Agreement only by mutual written agreement of the City and the School District.

ARTICLE III.

USE OF THE AQUATIC FACILITY & LEASED PREMISES

3.01 **Permitted Use/Continuous Use.** During the entire term of this Agreement, including any extensions: (a) the City shall have the right to use the Leased Premises; and (b) the City covenants that it will continuously use the Leased Premises, solely as a public recreation facility serving public recreational needs and the reasonable programming needs of the School District. Such use shall at all times be conducted in accordance with the terms of this Agreement and with all applicable federal, state, and local laws, codes, regulations, ordinances, permits and licenses (collectively, "Laws"), including without limitation all Laws governing the use of the School District's facilities, to the extent such Laws affect the use and operation of the Leased Premises. The School District will use diligent efforts to keep the City informed regarding Laws applicable to School District facilities, including any changes to such Laws. Without limiting the generality of the foregoing, the Aquatic Facility shall at all times be a smoke-free, alcohol-free, and drug-free environment.

3.02 **Scheduling.**

- (a) The City shall exercise its best efforts to schedule the use of the Aquatic Facility to meet within reason the School District's Program Needs and the General Public's Recreational Needs. For purposes of this Agreement, (i) the "School District's Program Needs" shall include use of the Lap Pool during the school year or during the summer, for health and physical education courses and related curricular activities and practice, individualized instruction for students with disabilities, training and competition for co-curricular competitive swim team representing the School District and (ii) the "General Public's Recreational Needs" shall mean use of the Lap Pool, Fitness Center, and /or the Leisure Pool for youth and adult swim lessons and related aquatics training and instruction, parent-child recreational programs, senior citizen health and

recreational programs, the public's general recreational use and similar activities historically and/or customarily sponsored by the City.

The parties acknowledge that, in order to maximize the efficiency and fairness with which the Aquatic Facility is used, it will be essential that the parties cooperate in working out the Aquatic Facility's yearly schedule. Toward that end, the School District shall, not later than April 30 of each calendar year, provide the City a proposed schedule of the School District's Program Needs for the period from August 1 of that year through July 31 of the following year. Similarly, a proposed schedule of the General Public's Recreational Needs shall be developed by the City. These annual proposed schedules ("Annual Schedules") shall be used for financial planning purposes and to determine whether any scheduling conflicts exist. The parties shall meet to resolve any such scheduling conflicts to the reasonable satisfaction of all concerned, said resolution to be concluded within thirty (30) days after receipt of the School District's proposed schedule or June 1 of that year, whichever is later. The School District and the City shall comply with their Annual Schedules as set forth herein unless otherwise expressly agreed between them and shall not unreasonably object to each other's Annual Schedules absent a significant and unexpected increase in anticipated usage..

- (b) Notwithstanding the foregoing, it is also agreed and understood that the School District shall be entitled to, at a minimum, use of the same amount of time and space in the Aquatic Facility on an annual basis as is used by the School District during the 2023-24 school year and summer, and that the School District shall be entitled to, at a minimum, use of the same locations within the Aquatic Facility during the same, or substantially similar, dates and times as are used by the School District during the 2023-24 school year and summer.
- (c) After scheduling for the School District's Program needs for the coming year has been approved and adopted by the City as provided herein, said schedule shall not be modified by the City without the School District's prior written consent. In addition, throughout each year during the term of this Agreement, at such times as may be necessary, the staff of the City will meet with representatives of the School District to go over its scheduling needs and to resolve any scheduling conflicts. The School District shall be responsible for providing and supervising all staff and other personnel necessary for the School District's scheduled use of the Aquatic Facility, with the exception of lifeguards. Upon request by the School District, and subject to the approval of the City, Aquatic Facility personnel may be used to assist the School District in connection with supervision or administration of the School District's Program Needs so long as the School District remains primarily responsible for all liability associated with such activities.

3.03 **Summer Programs.** The School District may decide to offer aquatics instruction in the future as part of its summer school curriculum. If the

School District wishes to offer such instruction at the Aquatics Facility, its summer school aquatics instruction schedule shall be included in the proposed schedule of the School District's Program Needs provided pursuant to Section 3.02 above.

The School District shall be responsible for all costs associated with the School District's summer school aquatics instruction program and supervision of all personnel necessary for the organization, administration and implementation of the School District's summer school aquatics instruction program, together with all liability arising from said program. It is anticipated that, subject to the approval of the City, Aquatic Facility personnel (such as lifeguards and swimming instructors) may assist the School District in connection with such program.

3.04 **The District Locker Room Facility.**

- (a) The Aquatic Facility includes a locker room facility constructed for the sole and exclusive use of the School District (the "District Locker Room Facility"). For purposes of this Agreement, the District Locker Room Facility means the area of the Aquatic Facility bounded by the interior walls, floor and ceiling of the District Locker Room Facility, as well as any portions of the Aquatic Facility utility and mechanical systems (wherever located) serving exclusively the District Locker Room Facility.
- (b) Exclusive Use By School District. Unless otherwise agreed, the School District shall have the sole and exclusive right to use and control the District Locker Room Facility.
- (c) Maintenance and Repair. The School District shall, at its sole cost and expense, maintain and repair the District Locker Room Facility. In that regard, the School District shall keep and maintain the District Locker Room Facility in clean and good condition and repair, normal wear and tear excepted, and shall provide such insurance as the School District deems necessary or desirable in connection with the ownership and operation of the District Locker Room Facility.
- (d) Utilities. The School District shall be responsible for the cost of all directly-metered utilities supplied to the District Locker Room Facility (i.e., sewer and water and utilities to heat water). Electricity and HVAC utilities provided to the District Locker Room Facility shall not be separately metered, and shall be billed to and paid by the City. The School District shall be responsible for the cost of all sewer, water, electricity, HVAC and other utilities necessary for or relating to any future improvements to and/or expansion of the District Locker Room Facility made by the School District.
- (e) **Alterations, Additions or Improvements.** The School District shall have the full right and authority, at its sole cost and without the consent of the City, to make such alterations, additions and/or improvements to

the District Locker Room Facility, or to Whitewater High School and its environs, as the School District deems necessary or desirable in its sole discretion. All such work shall be carried out so as to limit, to the extent reasonably possible without incurring additional costs, interruption or disruption to the operation of the Leased Premises, provided, however, that the District makes no guaranty or warranty that such interruption or disruption will not occur.

ARTICLE IV.

OPERATION OF THE LEASED PREMISES

4.01 **Responsibility for Operation.** During the term of this Agreement, the City and School District shall be responsible for the oversight of the Leased Premises as further set forth below:

- A. **Allocation and Use of Space.** Subject to the general restrictions set forth in Article III above and the School District's rights and remedies as set forth in this Agreement, the City will have the sole and exclusive control over and right to schedule, allocate and lease space within the Leased Premises. It is anticipated that, in connection with the operation of the Aquatic Facility, the City may enter into (a) sublease/use agreements with various individuals and user groups ("Use Agreements"); and (b) contractual arrangements with concessionaires, management companies and other service providers (collectively, "Service Contracts"). The School District consents to such Use Agreements and Service Contracts, all of which, however, shall be expressly subject and subordinate to the terms of this Agreement.
- B. **Personnel.** Except as otherwise provided for herein or by other lease agreements between the parties regarding the School District's scheduled use of the Aquatic Facility, the City shall solely be responsible for staffing the Aquatic Facility (except the District Locker Room Facility), including without limitation the selection, hiring/firing, wages and benefits, workers compensation, unemployment compensation, non-discrimination requirements and all other costs and liabilities associated with all employees and volunteers, if any, necessary to operate the Aquatic Facility. Staffing needs will be determined by the City and reflected in the Annual Budget (as described below). The City may also retain, at its sole expense, such professional and administrative services (e.g., accounting, legal, purchasing, human resources, and so on) as it deems necessary to the operation and management of the Aquatic Facility. The City may use volunteer staff in operating the Aquatic Facility, provided that all such volunteers, prior to commencing any activities within the Leased Premises, sign a waiver of liability in favor of, and in form and substance satisfactory to, the City and the School District. Notwithstanding the foregoing, in the event the City fails or declines to satisfy or comply with its responsibilities under this section, then the City shall fully indemnify and hold the School District harmless

from any and all claims or demands asserted by any Aquatic Facility staff member or third party, including reasonable attorney fees and costs of defense, relating to such violation of this section. The City may use Aquatic Center personnel and facilities to conduct recreation registration unrelated to the Aquatic Center and other similar activities for the benefit of the general public.

C. Budget.

1. General Budget. The Aquatic Facility will have a separate budget and shall maintain a separate operating account from the City. All revenue generated by the Aquatic Center operations will be used for Aquatic Facility expenses.
2. Operations Budget.
 - a) The City shall contribute \$258,767.00 towards Aquatic Facility operations costs for the first year of the Agreement's Term. For each subsequent year for the term of this Agreement, plus any extensions, the City shall contribute an amount equal to the previous year's contribution for operational costs plus an additional three percent (3%). The City shall be solely responsible for any operations budget deficits during the Agreement Term.
 - b) The School District shall contribute \$178,000.00 towards Aquatic Facility operations costs for the first year of the Agreement's Term. For each subsequent year for the term of this Agreement, plus any extensions, the School District shall contribute an amount equal to the previous year's contribution for operational costs plus an additional three percent (3%).
 - c) Any annual operational surplus shall be applied to the operations budget for the following year.
3. Capital Budget. The City and the School District shall each contribute \$100,000.00 towards capital repairs and improvements for each of the first three years of the Agreement's Term. After the first three annual capital contribution payments are made, each subsequent capital contribution payment shall be the amount made in the previous year plus three percent (3%), respectively.

D. Revenues. The City shall be responsible for operating the Leased Premises in a way that generates sufficient revenues to cover all of the expenses related to the Aquatic Facility's obligations under this Agreement, including, without limitation, all of the expenses of operating, maintaining, repairing, replacing and staffing the Leased Premises (except for Special Activities/Events as set forth above). The Aquatic Facility shall have the right to receive and/or be reimbursed for all revenues generated by the use and operation of the Leased Premises,

including swimming lessons and any revenues generated by the User Agreements and/or the Service Contracts and/or Special Activities/Events described above, provided, however, that the School District shall have the right to retain curriculum fees, meet entry fees, revenues from sales of School District apparel, swimming lessons the School District provides and other similar revenues (but not revenues from concessions from use of the Aquatic Facility) in connection with use of the Aquatic Facility for the School District's Program needs above or in connection with any Special Activities/Events above subject to the obligation to reimburse the Aquatic Facility for any use of Aquatic Facility staff and other Aquatic Facility costs as provided above. The City shall establish appropriate user fees for the use of the Aquatic Facility. All such user fees received by the Aquatic Facility shall be deposited to appropriate operating accounts administered and controlled by the City for use in connection with the operation and staffing of the Aquatic Facility and the maintenance, repair and replacement of the Aquatic Facility and the equipment and other assets of the Aquatic Facility.

In addition, the City shall engage in annual fundraising activities as a means of generating funds for the Aquatic Facility. Any directed gifts acquired through such fundraising activities shall be utilized for such charitable purposes as the donor may so direct (subject to the terms of this Agreement) and, further, shall be held in and disbursed from such segregated accounts as the City deems necessary or appropriate.

Any fundraising activities conducted on the Leased Premises (including without limitation, any commercial sponsorships and/or Service Contracts requiring the use, display or recognition of commercial logos within or upon the Aquatic Facility) shall be subject to the prior approval of the School District and the City, which approval shall not be unreasonably withheld, suspended or delayed.

- E. Use of Capital Funds for Operations Prohibited.** The City shall not transfer any funds out of its capital account for operational expense use. Capital account funds shall be expended exclusively on capital maintenance projects reflected in the Capital Maintenance Plan for a given budget year, the most recent of which is attached hereto as Exhibit C. Said capital account funds shall not be intermingled with operational account funds and the parties shall review each year's capital maintenance budget and make reasonable efforts to resolve any disputes or inconsistencies related thereto.

4.02 **Annual Budget.** Not later than October 31 of each calendar year during the term of this Agreement, or such other time as may be mutually agreeable to the parties, the Parks and Recreation Director or other City designee shall deliver to the School District and the City an annual budget for the upcoming calendar year (the "Annual Budget"). The Annual Budget will show all anticipated funding and revenues of the Aquatic Facility for the upcoming year together with a schedule of the projected user fees to be charged for the upcoming year, and projected expenditures for the upcoming year together with such

reserves for capital expenditures and improvements as appropriate. Within thirty (30) days after its receipt of the Annual Budget, the School District shall provide the City with any suggestions or comments it may have regarding the Annual Budget, and the City shall give due consideration to the School District's input in arriving at its final Annual Budget for the upcoming year.

4.03 **Financial Reports.** Not later than May 1st of each calendar year during the term of this Agreement, the City shall submit to the School District annual financial reports regarding the operation of the Aquatic Facility during the most recent preceding calendar year, certified as having been reviewed by a qualified representative of the City. In addition, the City shall make its financial books and records available to representatives of the School District and the City during normal business hours upon request.

ARTICLE V.

IMPROVEMENTS; ALTERATIONS; REPAIRS AND MAINTENANCE

5.01 **Alterations and Additions.** Subject to the advance, written approval of the School District and all applicable laws, codes, regulations and ordinances, the City shall have the right at any time and from time to time during the term of this Agreement, to make such changes, alterations and additions, structural or otherwise, to the Leased Premises, and the fixtures and equipment thereof now or hereafter located on the Leased Premises, as the City shall deem necessary or desirable in connection with the City's permitted use of the Leased Premises. Prior to the commencement of any such work, the City shall submit to the School District for its review and approval the plans and specifications for such work, together with confirmation that the City has on hand, or has obtained written commitments for, all funds sufficient to pay the total estimated cost of such work. Any alterations to the exterior of the Leased Premises shall be compatible with the exterior design and appearance of Whitewater High School. If the School District has not approved or rejected the plans and specifications by written notice to the City within sixty (60) days after submission, such plans and specifications shall be deemed to have been approved. Approval of any such plans and specifications shall not be unreasonably withheld provided, however, that unavailability of funds to pay for the proposed work and/or unreasonable interference with or limitation upon the City's ability to meet the School District's Program needs and/or the General Public's Recreational needs shall be a proper basis for rejection.

The cost of any such change, alteration or addition shall be promptly paid and discharged by the City so that the Leased Premises shall at all times be free of liens for labor and materials supplied to the Leased Premises.

5.02 **No Waste.** The City shall not do or permit any waste or damage, disfigurement or injury to the Leased Premises or any building or improvement now or hereafter on the Leased Premises or the fixtures or equipment thereof.

5.03 **Condition of Leased Premises.** The City, prior to the occupancy thereof, shall fully familiarize itself with the physical condition of the Leased Premises and the improvements, fixtures and equipment thereof.

5.04 **Maintenance and Repair Obligations.** The City covenants and agrees,

throughout the term of this Agreement, to maintain the Leased Premises and keep the Leased Premises in as good order and condition as they are in as of the Effective Date, reasonable use and wear thereof excepted. The City shall promptly report and make or cause to be made all necessary repairs, interior and exterior, structural and nonstructural. When used in this Agreement, the term "repairs" shall include replacements or renewals when necessary, and all such repairs made by the City shall be at least equal in quality and class to the original work. The School District shall, throughout the term of this Agreement, have the right, upon reasonable notice to the City, to inspect the Leased Premises to verify compliance with the terms of this Article V. If the School District believes that the City is not properly carrying out its duties of maintenance and repair, it shall deliver to the City a notice of default alleging the same, and, the City shall cure such default, or if a cure within that time period is not reasonably possible, commence a cure within that time period and thereafter diligently proceed to cure such default as provided in Article XI below.

The School District shall be responsible for the cost of providing electricity to operate the emergency lighting, exit lighting, and fire alarm systems serving the Aquatic Facility and the lighting to the parking areas, including those areas shared with the Leased Premises as described above and maintenance and repair of the parking area lighting, cost of maintenance and repair of the parking areas and sidewalks serving the School District's property. Snow removal costs for the Leased Premises shall be split equally by the City and School district.

The City shall be solely responsible for maintenance of the Lap Pool and Leisure Pool within the Aquatic Facility, including the management of Lap Pool and Leisure Pool chemistry.

All maintenance, repairs, and capital replacement of the Leased Facility exceeding \$50,000 shall be reviewed and approved by the City and School District.

ARTICLE VI.

OPERATING EXPENSES

6.01 **Aquatic Center Obligations.** Except as otherwise provided in this Agreement, the City shall be solely responsible for facilitating and paying, when due, any and all costs and expenses of every kind and nature required to operate, maintain, repair or replace the Leased Premises, including, without limitation, those of cleaning, lighting, maintaining, repairing and replacing the structures located thereon; the hiring of engineers, architects and other experts in connection with improving, maintaining, repairing or replacing the Leased Premises; maintaining, repairing, or replacing any capital equipment or interior fixtures of the Leased Premises; providing security and other special services; supplies; water and sewer charges; electricity, gas, and all other utility charges; licenses and permit fees; and any and all other expenses whatsoever of maintaining, operating, repairing and replacing the Leased Premises. The School District shall have no duty to provide any utility or other services to the Leased Premises, other than the electricity (including back-up system) necessary to operate the emergency lighting, exit lighting, and fire alarm systems serving the Leased Premises, all of which shall be operated, at School District

expense, as part of the systems serving Whitewater High School.

The Annual Budget prepared by the City each year shall include adequate capital reserves for the expected future replacement of the structural, mechanical and utility systems of the Leased Premises as reasonably deemed appropriate by the City.

In addition to the foregoing, beginning on the Effective Date, the City shall be solely responsible for any taxes, special assessments, or other governmental assessments or exactions levied, assessed, or otherwise relating to the entire Leased Premises, including without limitation, real estate taxes; governmental assessments such as special assessments, or payments in lieu of taxes. If any such taxes or assessments are payable, or may at the option of the taxpayer be paid, in installments, then the City shall have the right to pay the same in installments. The City shall have the right to contest and review the amount for validity, in whole or in part, of any taxes, payments in lieu of taxes, or special assessments levied, imposed, assessed or payable upon, against, for or with respect to the Leased Premises. The term "legal proceedings" includes appropriate appeals of any judgments, decrees, orders and certiorari proceedings and appeals of orders therein, to and including appeals to the court of last resort. In the event any rebate of special assessments or other charges levied, imposed, assessed or payable upon, against or with respect to the Leased Premises is made, such rebate shall be the sole property of the City, provided the City shall have paid such special assessment or other charge in the first instance.

ARTICLE VII.

SIGNS

7.01 **Signs.** The City shall have the right to erect, maintain and replace identification and directional signs on the exterior of the Leased Premises, subject to the written consent of the School District, which consent shall not be unreasonably withheld or delayed.

ARTICLE VIII.

INSURANCE: DESTRUCTION OF LEASED PREMISES

8.01 **Casualty Insurance.** During the entire term of this Agreement, the City shall, at its sole expense, obtain and maintain comprehensive casualty insurance with coverage limits of not less than \$5,000,000 insuring the Leased Premises against all risks, both general and specific, as are customarily insured against for developments of like size and character to the Leased Premises. In that regard, the City shall obtain, and provide to the School District, the written advice of a qualified risk management specialist advising the City regarding such recommended coverages. The City shall cause the School District to be named insureds under all such policies. On or before the Effective Date, the City shall provide the School District with a certificate or certificates of insurance showing such coverages. As an alternative to the City obtaining separate comprehensive casualty insurance as provided herein, if such is agreeable to the parties hereto, the City may obtain such comprehensive casualty insurance coverage through the existing or future policies issued to the School District so long as the City reimburses the School District, as appropriate, for the actual cost of said coverage. In any event, the School District and the City shall be named insureds on all such coverage.

8.02 **Waiver of Claims.** The parties acknowledge that there are certain risks associated with the operation of the Aquatic Facility and related programs and activities. Each party hereby assumes all risks in connection with, and holds harmless and indemnifies the other parties hereto with respect to any damage, loss or destruction to the Leased Premises, or any part thereof, arising from or in any way attributable to the activities of each party and/or said party's directors, officers, officials, agents, employees and volunteers in, on or about the Aquatic Facility. It is agreed that all insurance proceeds available as a result of any damage, loss or destruction to the Aquatic Facility shall be applied as necessary to repair, restore, rebuild or replace the same as nearly as possible to the condition such were in immediately prior to such damage, loss or destruction.

8.03 **Liability Insurance.** During the entire term of this Agreement, the City shall obtain and maintain a policy or policies of general liability insurance, with coverage limits of not less than \$5,000,000 for any one occurrence for both injury to person and damage to property. All such policy or policies shall name the School District as additional insureds as their interests may appear. On or before the Effective Date, the City shall provide the School District with a certificate or certificates of insurance showing such coverages. As an alternative to obtaining a separate general liability policy or policies as provided herein, if agreeable to the parties hereto, the City may obtain such coverage through existing or future policies held by the School District and/or the City so long as the City reimburses the School District, as appropriate, for the actual cost of said coverage. In any event, the School District shall be named insureds on said liability coverage.

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

8.05 **Other Insurance.** The City shall also obtain and maintain such other coverages, including without limitation, worker's compensation, unemployment compensation, automobile coverage, directors and officers' liability as may be required by law.

ARTICLE IX.

ASSIGNMENT AND SUBLETTING

9.01 **No Assignment or Subletting.** Except as permitted under Article IV above regarding Use Agreements and Service Contracts, and at all times subject to the use limitations contained in Article III above and to the terms of this Agreement generally, the City may not assign this Agreement or sublet the Leased Premises except in connection with the transfer of complete responsibility for operation of the Aquatic Facility, and then only with the written consent of the School District and the City, which consent shall be within the reasonable discretion of those bodies.

9.02 **Assignment Upon Expiration or Termination Uncured Default.** Upon the expiration or earlier termination of this Agreement, the City agrees to execute any and all assignments or other instruments necessary to convey to whomever is designated to receive them by the School District, all of the City's right, title and interest in and to this Agreement and all other assets, contracts, funds, permits, and personal property, and any and all other rights of the City in and to the Leased Premises. This covenant shall be enforceable by specific performance.

ARTICLE X.

NOTICES

All notices, certificates or other communications hereunder shall be given in one of the following methods, and shall be deemed received (i) when hand delivered; or (ii) two business days after deposit in the U.S. Mail, postage prepaid, by certified or registered mail; or (iii) one business day after deposit with an overnight commercial courier, addressed as follows:

To The School District: Whitewater Unified School District
419 South Elizabeth Street Whitewater, WI 53190
Attn: District Administrator

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

To the ACC: The City of Whitewater Aquatic Center Committee
312 West Whitewater Street
Whitewater, WI 53190

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

ARTICLE XI.

TERMINATION EVENTS

11.01 **Termination Events.** This Agreement may only be terminated prior to the Expiration Date pursuant to subsection A or B below (a "Termination Event"):

- A. (i) Event of Default by City.** If the City, or its permitted successors or permitted assigns, fails to perform any material term, condition or covenant of this Agreement and if such failure continues more than thirty (30) days after the City receives written notice thereof (or such longer time as reasonably necessary not to exceed ninety (90) days, except with the written consent of the School District and the City in their reasonable discretion, if such is not susceptible to cure within thirty (30) days, and the City, upon receipt of such notice, promptly and diligently attempts to effect such cure and thereafter diligently and continuously pursues such cure), then either the School District or the City shall have the right to terminate this Agreement and to recover possession of the Leased Premises. Notwithstanding and in addition to the foregoing, before terminating this Agreement pursuant to this Section, the School District and/or the City must first comply with the notice and arbitration procedures set forth Article XVI below.

Any claim to recover unpaid rents or other sums owing hereunder, including any costs, liabilities or damages incurred by the School District or the City due to the City's failure to abide by its covenants and obligations hereunder, shall also be subject to the notice and arbitration procedures set forth in Article XVI below. Any termination of this Agreement for default shall also be subject to Article XIV below regarding transfer of management and control following such termination.

(ii) Right to Cure Defaults. In addition to any other remedies the School District may have, the School District may, but shall not be obligated to, perform any obligation which the City has failed to perform after written notice and opportunity to cure as set forth above (or without notice in the event of a situation where failure to effect an immediate cure could result in substantial harm to the Leased Premises or injury to person), and all costs incurred by the School District in doing so shall be immediately due the School District from the City, except to the extent such costs are covered by insurance and insurance proceeds are or will be made available to pay the cost thereof.

B. Lack of Funding.

- (i)** Notwithstanding any other terms of this Agreement, the School District may, at its sole discretion, terminate this Agreement at any time upon ninety (90) days' notice to the City and the ACC if the School District is unable to fund its obligations under this Agreement.
- (ii)** Notwithstanding any other terms of this Agreement, the City may, at its sole discretion, terminate this Agreement at any time upon ninety (90) days' notice to the School District if the City loses substantial sources of funds (for example shared revenue) such that it is no longer practical for the City to continue to fund its obligations under this Agreement.
- (iii)** The City and the School District agree to be equally responsible for refunding prorated membership fees if the facility closes due to mutual consent or if the School District terminates this agreement in accordance with 12.01(B)(i). The City shall be fully responsible for refunding prorated membership fees if the facility closes due to the City terminating this agreement in accordance with 12.01(B)(ii).

ARTICLE XII.

INDEMNIFICATION

Each party hereto and said party's permitted successors and permitted assigns, agree to indemnify, save harmless and defend all other parties hereto, and their respective directors, officers, officials, agents and employees (collectively, the "Indemnified Parties") from any and all liability, suits, actions, claims, demands, losses, costs, damages and expenses of every kind and description, including attorney costs and fees, for claims of any character, including liability and expenses in connection with employment or personnel actions or policies of said party, the loss of life, personal injury or damage to property, or any of them, brought because of any injuries or damages received or sustained by any person, persons or property on account of or arising out of the operation, use or occupancy of all or any portion of the Leased Premises by said party, its

permitted successors, permitted assigns, sublessees and other users and patrons, or at any time occurring on, at, or in the Leased Premises. No party shall be required to so indemnify any Indemnified Party whose negligence or willful misconduct was a cause of the injury or loss that is the subject of such claim. This requirement shall also apply with equal force to all work performed by a party, its successors or permitted assigns, said party's contractor or any subcontractor or any other party directly or indirectly employed by or retained by said party to perform work relating to the operation, repair, maintenance or replacement of all or any portion of the Leased Premises or any equipment or fixtures thereon.

ARTICLE XIII.

EQUAL OPPORTUNITY/NON-DISCRIMINATION POLICY

The City for itself, its permitted successors and permitted assigns, agrees that in the operation, management and use of the Leased Premises, it and they will abide by all applicable federal, state, and local laws, codes and ordinances relating to equal opportunity and non-discrimination. Without limiting the generality of the foregoing, the City covenants that it will not discriminate against any employee or applicant for employment within the Leased Premises, nor shall the Leased Premises or any portion of it be used by any party in any manner to permit discrimination or restriction on the basis of race, religion, marital status, age, color, sex, sexual orientation, physical condition, disability, national origin or ancestry. In the event of any claim asserted by any employee of the Aquatic Facility or any third party which arises from a violation of this section, the City shall fully indemnify and hold the School District harmless from any and all such claims or demands, including reasonable attorney fees and costs of defense, relating to the same.

ARTICLE XIV.

TRANSFER OF MANAGEMENT AND CONTROL UPON EXPIRATION OR TERMINATION

14.01 Upon Expiration or Termination. Upon expiration or earlier termination of this Agreement as set forth in Article XI above (collectively a "Termination Event"), management of the Leased Premises shall become the joint responsibility of the School District and the City, and all funds then existing in the operating account or any other account held by the City (excluding segregated funds held for a specifically- designated charitable purpose at the direction of a donor) shall be transferred to the joint control of the School District and the City. After the occurrence of a Termination Event, the School District and the City shall confer in good faith to determine whether the Leased Premises shall continue to be operated as a public aquatic center, and if so, whether such operation shall be delegated to one or more departments or subagencies of either or both of the School District and the City, or contracted to an independent third party; provided, however, that any such use must qualify as a charitable purpose under applicable laws and regulations. If a Termination Event has occurred and the School District and the City jointly and voluntarily agree, in writing, to abandon the operation of a public aquatic center at the Leased Premises, all rights of the City and any other party hereunder shall cease, and the School District shall assume full management and control of the Leased Premises, and may use it, replace it, demolish it, or otherwise dispose of it at the School District's sole discretion. All funds then contained in the operating funds established hereunder (excluding segregated funds held for a specifically-designated charitable purpose at the direction of a donor) shall be paid to the School District to be used for the costs related thereto. If a Termination Event has occurred and the

School District and the City are unable to jointly agree upon a disposition or use of the Leased Premises within ninety (90) days thereafter (or such longer time as may be mutually agreeable), the matter shall be submitted to mediation or arbitration pursuant to Article XVIII. It is acknowledged that, in the event the City and the School District are not able to reach an agreement as to the future use and/or disposition of the Aquatic Facility after the occurrence of a Termination Event, neither the City nor the School District shall be deemed to have superior rights in the Leased Premises by virtue of this Agreement or otherwise unless and until a final determination is made by the court.

ARTICLE XV.

MISCELLANEOUS

15.01 **Captions.** The captions or headings in this Agreement are for convenience and in no way define, limit or describe the scope or intent of the provisions of this Agreement.

15.02 **Terms.** Whenever herein the singular number is used, the same shall include the plural, and the masculine gender shall include the feminine and neuter genders.

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

15.04 **Successors and Assigns.** Except as limited or conditioned by the express provisions hereof, the provisions of this Agreement shall inure to the benefit of and be binding upon the permitted successors and assigns of the School District and the City.

15.05 **Amendment.** This Agreement shall not be effectively amended, changed, modified, or altered without the written consent of all parties hereto (or any successor, if any), and no modification, alteration or amendment to this Agreement shall be binding upon either hereto until such modification, alteration or amendment is reduced to writing and executed by all such parties.

15.06 **Counterparts.** This Agreement may be signed in any number of counterparts with the same effect as if the signatures thereto and hereto were on the same instrument.

15.07 **Severability.** If any provision of this Agreement shall be held or deemed to be or shall, in fact, be inoperative or unenforceable as applied in any particular case in any jurisdiction or jurisdictions or in all jurisdictions, or in all cases because it conflicts with any other provision or provisions hereof or any constitution or statute or rule of public policy, or for any reason, such circumstance shall not have the effect of rendering the provision in question inoperative or unenforceable in any other case or circumstances, or of rendering any other provision or provisions herein contained invalid, inoperative, or unenforceable to any extent whatever. The invalidity of any one or more phrases, sentences, clauses or paragraphs in this Agreement contained, shall not affect the remaining portions of this Agreement, or any part thereof.

15.08 **No Third Party Beneficiaries.** This Agreement is entered into for the sole and exclusive benefit of the parties hereto. No third party shall have obtain or derive from this Agreement any rights or other benefits or interests, under any laws or otherwise.

15.09 **Exculpatory Provision.** The parties to this Agreement expressly acknowledge and agree that, anything herein to the contrary notwithstanding, that no officer, director, employee, agent, or official (elected or appointed) of any party hereto shall have any personal liability or obligation arising out of this Agreement, and no party hereto shall make any claim to the contrary.

15.10 **Rules of Construction/Conduct.** The parties to this Agreement further acknowledge and agree that this Agreement is a good faith attempt to memorialize the intent of the parties, that in the course of its preparation, each party has been adequately and fully represented, and that, accordingly, rules of interpretation that signify that an agreement shall be

construed against the drafter shall not apply. In addition, the parties acknowledge and agree that they shall endeavor to resolve any and all issues that may arise under this Agreement in a spirit of cooperation consistent with the intent of the Cooperation Agreement and with the aim of benefitting the entire Whitewater area community.

ARTICLE XVI.

ARBITRATION

16.01 **Agreement to Arbitrate.** The parties to this Agreement agree that any dispute, grievance, controversy, demand, claim, counterclaim, or cause of action (all of which are referred to as a "Claim") by or between any of the parties hereto, which arises out of or relates to any term or requirement of this Agreement, shall be submitted to arbitration pursuant to the procedures set forth below, regardless of whether such Claim arises in tort, contract, or otherwise.

16.02 **Notice of Claim.** If and when any Claim arises, the party asserting the Claim shall provide written notice of the claim ("Notice of Claim") to the opposing party within ninety (90) days of the event or occurrence giving rise to the Claim. Upon receipt of such Notice of Claim, the party against whom the Claim is made shall have twenty (20) days to either: (a) cure or satisfy the Claim, or (b) notify the other party in writing that the Claim is disputed ("Notice of Dispute"). Failure to satisfy either of the proceeding (a) or (b) shall also be considered a Notice of Dispute. If the Claim is disputed, then within twenty (20) days of the Notice of Dispute each party involved in the Claim shall select an arbitrator, attorney, or other individual (herein an "Arbitration Representative") to represent them in the Arbitration process set forth below, and each party shall notify the other party of said Arbitration Representative.

16.03 **Arbitration Panel.** If a Notice of Dispute has been provided and all other requirements of Section 18.02 have been met, then:

- A.** The two (2) Arbitration Representatives as a body shall, as promptly as possible, select a third disinterested person to compose a panel of three to arbitrate the Claim. If a third person cannot be agreed upon by the two (2) Arbitration Representatives, the two (2) representatives shall jointly request that the Wisconsin Employment Relations Commission (WERC) submit a list of five (5) names from which the two (2) Arbitration Representatives, within three (3) days of receipt, shall each strike two (2) names. The remaining name shall be the disinterested person for the arbitration proceeding.
- B.** Except as provided in subsection 17.05 below, the decision of a majority of the arbitration panel shall be final and binding upon the parties and any party to the arbitration may apply to the Circuit Court in Walworth County or Jefferson County for an order confirming the award in accordance with Chapter 70 of the Wisconsin Statutes. The arbitration panel shall not, however, have the authority to add to, subtract from, or otherwise modify or change the terms of this Agreement.
- C.** If there is any charge for the service of the disinterested third person arbitrator, or for a transcript of the proceedings, the parties shall share the expense equally. Each party shall bear the expense of preparing and presenting its own case.

16.04 **Arbitration Default.** If any party fails or refuses to comply with any of the procedures or requirements of this Article XVI, then the party aggrieved by such failure or refusal may petition the Circuit Court in Walworth County or Jefferson County for an order to enforce the terms of this Article XVI. If such an order to enforce is entered by the Court, then the party who failed or refused to comply with this Article XVI shall be liable to the petitioning party for all costs and attorney's fees incurred in obtaining such an order.

16.05 **Right to Judicial Relief.** The arbitration procedures set forth in this Article XVI shall be followed with respect to all Claims arising out of or relating to any term of requirement or this Agreement. However, notwithstanding Section 16.03.B above, the parties may seek de novo judicial relief from a court of competent jurisdiction in the State of Wisconsin with respect to an arbitration decision arising out of or relating to (a) section 11.01.A(i) of this Agreement, (b) Article XIV of this Agreement; or (c) the arbitrability of the Claim under this Agreement.

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

WHITEWATER UNIFIED SCHOOL DISTRICT

By: *Jennifer Kienbaum*

Name: Jennifer Kienbaum

Title: School Board President

By: *Stephanie Hicks*

Name: Stephanie Hicks

Title: School Board Clerk

THE CITY OF WHITEWATER

By: *Patrick Singer*

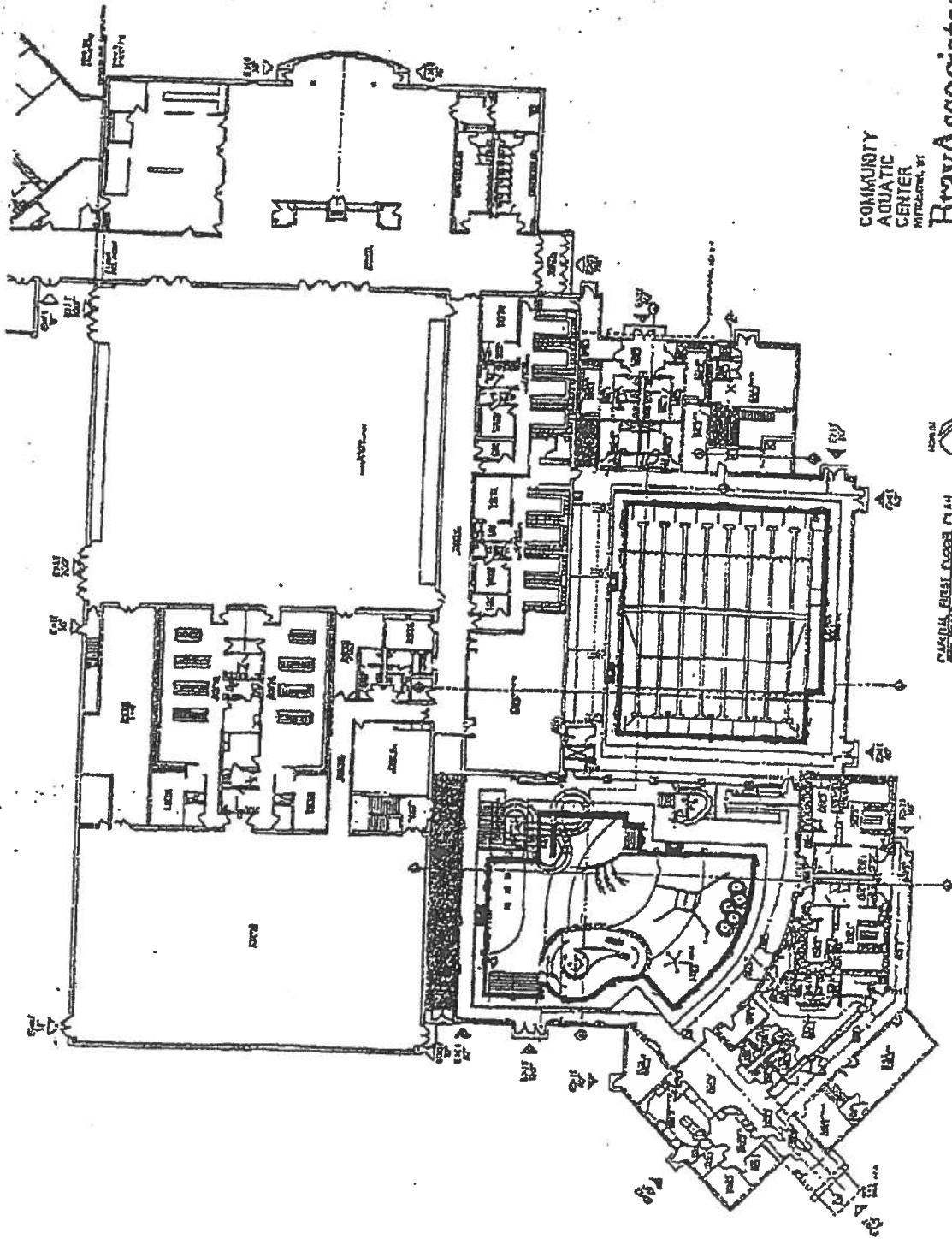
Name: Patrick Singer

Title: Council President

By: *Heather M Boehm*

Name: Heather Boehm

Title: City Clerk



COMMUNITY
AQUATIC
CENTER
HITENWATER, WY

BrayAssociates
ARCHITECTS, INC.
10000 Dine Dr. Lakewood, CO 80401

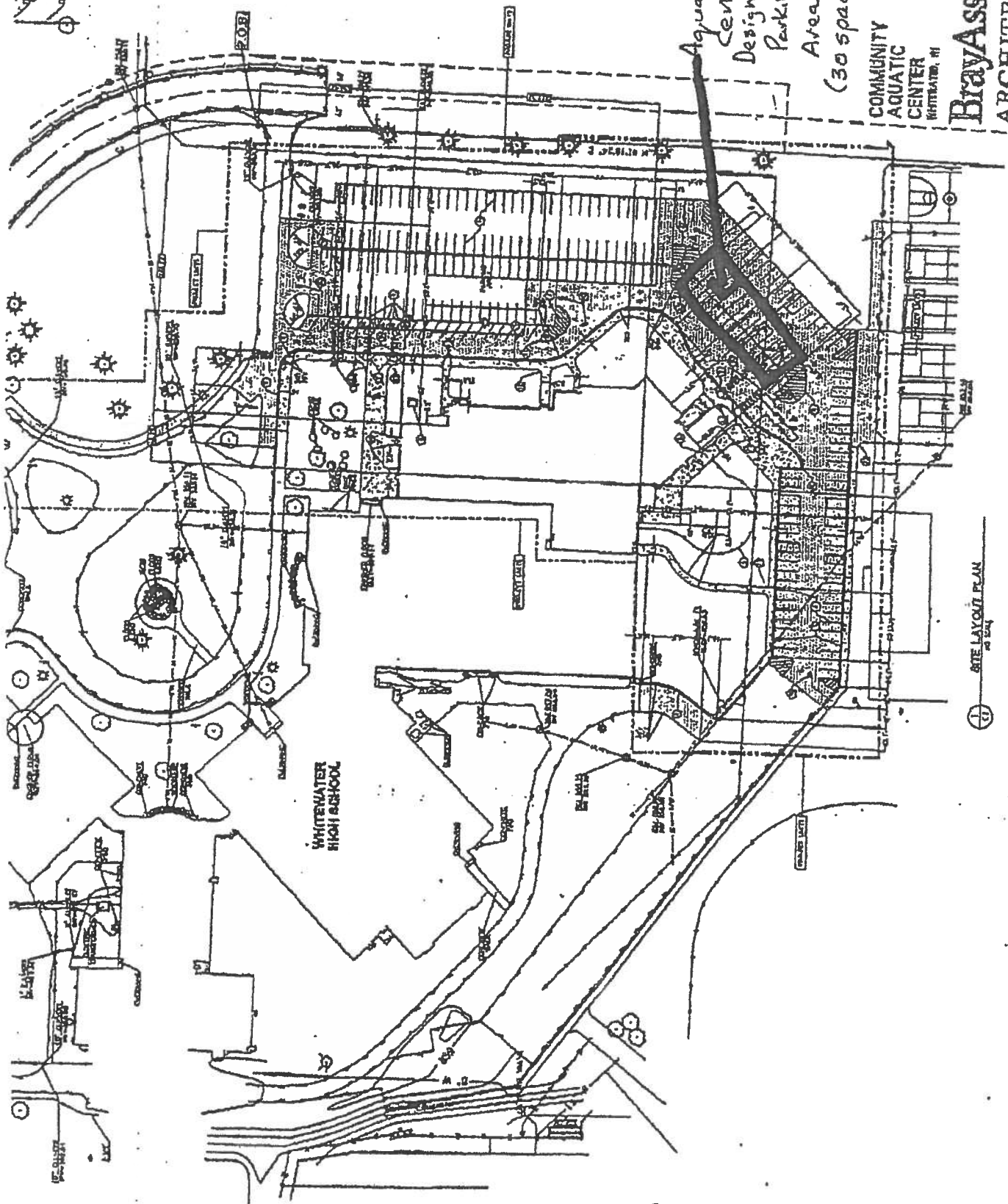
SCALE: 1/8" = 1'-0"

EXHIBIT A

BrayAssociate
ARCHITECTS, INC.
10000 Old Orchard Road, Suite 100, White Plains, NY 10614

COMMUNITY
AQUATIC
CENTER
HAMILTON, NY

Aquatic
Center
Designated
Parking
Area
(30 spaces)



11 SITE LAYOUT PLAN
AS SHOWN