

AGREEMENT FOR SALE OF REAL ESTATE

AGREEMENT, by and between **YOUNG MEN'S CHRISTIAN ASSOCIATION OF THE IOWA MISSISSIPPI VALLEY ("Buyer")**, and **THE CITY OF BETTENDORF**, an Iowa municipal corporation ("**Seller**" or "**City**") (collectively hereinafter "**Parties**").

WHEREAS, the Buyer has offered to buy and the Seller is willing to sell the real estate and the appurtenances thereto, situated in the County of Scott and State of Iowa, as legally described on Exhibit A attached hereto, and all buildings, improvements and fixtures situated thereon and all easements, rights of way, privileges, licenses, appurtenances, grants and other rights connected therewith (hereinafter "**Property**"), and commonly known as 2222 Middle Road, Bettendorf, Iowa.

NOW, THEREFORE, in consideration of the promises and the mutual obligations of the parties hereto, each of them does hereby covenant and agree with the other as follows:

1. **PURCHASE PRICE.** Subject to all terms, covenants and conditions of the Agreement, the Seller will sell the Property to the Buyer and the Buyer will purchase the Property from the Seller, and pay therefore the amount of One Million Four Hundred Thirty Thousand Eight Hundred Forty and 00/100 Dollars (\$1,430,840.00) (the "**Purchase Price**"), payable by certified funds to Seller at Closing.

2. **CLOSING AND POSSESSION.** Closing shall be on or before the 15th day of December, 2022, or on such other date as the parties hereto may mutually agree to in writing (the "**Closing**"). Closing shall take place at the office of the closing agent mutually acceptable to Buyer and Sellers, and Buyer shall accept the conveyance at such time and place. Possession shall be given at Closing. At Closing, Seller shall deliver to Buyer the following:

- (a) the Deed (as defined below);
- (b) a declaration of value and other transfer tax documentation and other instruments to permit the recording of the Deed;
- (c) assignments of leases and other contracts, if any, affecting the Property assigned to Buyer;
- (d) existing warranties and guarantees relating to the Property, if any, assigned to Buyer;
- (e) all architectural or similar drawings pertaining to the Property;
- (f) a FIRPTA affidavit required by Internal Revenue Code §1445; and
- (g) Such other customary documents as reasonably may be requested in writing in advance of the Closing by Buyer to enable the parties to consummate the transaction contemplated by this Agreement.

3. **CONDITIONS.** Closing is contingent on the following conditions:

(a) Buyer and Seller executing an agreement relating to a new outdoor aquatic facilities (the “**Shared Use Agreement**”).

(b) Seller obtaining the necessary approvals and consents to finance the aquatic facilities and make its required contribution under the Shared Use Agreement.

4. **CONVEYANCE OF PROPERTY.**

(a) Form of Deed. Seller shall convey title to the Property by Warranty Deed (“**Deed**”). At Closing, and upon delivery of the Deed to Buyer, whatever occupancy rights Seller has in and to the Property will become Buyer’s rights. The conveyance and title of the Property shall, in addition to other conditions, covenants and restrictions set forth or referred to elsewhere in the Agreement, be subject to (i) applicable statutes, orders, rules and regulations of the federal government and State of Iowa, and laws and ordinances of the City of Bettendorf, including zoning, building, and land subdivision laws and regulations; and (ii) all easements of record.

(b) Taxes, Assessments and Adjustments. The Property is currently exempt from taxation. All adjustments, including real estate taxes for the current tax year, if any, due and payable in the following calendar year shall be adjusted, apportioned and prorated as of the date of Closing and delivery of the Deed in according to the number of days from July 1 to the date of Closing. Seller shall pay all transfer taxes of any kind or nature assessed or assessable in connection with the transactions contemplated herein. Buyer shall pay recording fees for the recording of the Deed. Utilities shall be read and prorated to the date of Closing. There are no leases for the subject Property requiring a credit for deposits or proration of rents.

(b) Abstract and Title. Seller shall deliver a merchantable abstract of title showing merchantable title of record to the real estate in Seller’s name and certified to a current date by an abstractor regularly doing business in the county where the Property is located. Buyer may, at its own expense, obtain a survey of the Property or a title commitment. If the abstract, survey or title commitment discloses exceptions other than those permitted under the rules for examination of title adopted by the local County Bar Association, Buyer or Buyer’s attorney shall give written notice of such exceptions to Seller within thirty (30) days of receipt of the abstract of title, survey or title commitment, as applicable. Seller shall have thirty (30) days to have such title exceptions removed, or, any such exception which may be removed by the payment of money may be cured by deduction from the Purchase Price at the time of Closing. If Seller fails to have such exceptions removed or insured over, Buyer may elect, on or before the Closing Date, to either (i) terminate this Agreement, in which event neither party shall have any further liability hereunder and this Agreement shall become null and void and of no further force or effect; or (ii) accept title to the Real Estate subject to such exceptions.

(c) Unrecorded Liens, Assessments, Security Interests. Seller represents that there will be no unrecorded liens, assessments, or Uniform Commercial Code Security Interests against any of the Property which will not be satisfied out of the sale price. If any representation above is untrue on the closing date, the Agreement may be terminated by Buyer.

5. **PROPERTY CONDITION.**

(a) As-Is Condition. Buyer acknowledges that the Buyer has visually inspected the Property and the improvements thereof; the Buyer is acquainted with the condition thereof and, except as otherwise provided herein, the Buyer shall accept the Property in its "As Is" condition.

(b) Seller warrants to the best of its knowledge and belief that there are no abandoned wells, solid waste disposal sites, hazardous wastes or substances, or underground storage tanks located on the Property, the Property does not contain levels of radon gas, asbestos, or urea-formaldehyde foam insulation which require remediation under current governmental standards, and Seller has done nothing to contaminate the Property with hazardous wastes or substances. Seller warrants that the Property is not subject to any local, state, or federal judicial or administrative action, investigation or order, as the case may be, regarding wells, solid waste disposal sites, hazardous wastes or substances, or underground storage tanks. Seller shall also provide Buyer with a properly executed GROUNDWATER HAZARD STATEMENT showing no wells, private burial sites, solid waste disposal sites, private sewage disposal system, hazardous waste and underground storage tanks on the Property.

(c) The Property and its present use does not violate any provision of any applicable building code, fire regulation, or governmental ordinance, order, or regulation. The Seller will convey title to the Property free of any such violations.

(d) All public utilities required for the operation of the Property are available and currently serving the Property and either enter the Property through adjoining public streets, or, if they pass through adjoining private lands, they do so in accordance with valid easements.

(e) Between the date of this Agreement and the Closing, Seller will continue to maintain the Property in good condition and repair, ordinary wear and tear only excepted.

6. **POST-CLOSING COVENANTS OF BUYER.** After Closing, Buyer agrees to:

(a) Provide access on the Property to paying members for indoor tennis for a period commencing on the date of the Closing and ending upon the earlier of (i) twenty-four (24) months from the date of Closing, or (ii); such time as an indoor tennis facility offering at least two (2) regulation size tennis courts opens on the Iowa side of the Quad-Cities metropolitan area.

(b) Allow the City to utilize the Property for the City's summer day camps during inclement weather under specific terms agreed upon by the Parties.

(c) Allow use of the Property as an emergency shelter under specific terms agreed upon by the Parties.

7. **CONFLICT OF INTEREST; CITY'S REPRESENTATIVES NOT INDIVIDUALLY LIABLE.** No member, official or employee of the City shall have any personal interest, direct or indirect in this Agreement nor shall any such member, official or

employee participate in any decision relating to this Agreement which affects his or her personal interests or interest of any corporation, partnership or association in which he is directly, indirectly, interested. No member, official or employee of the City shall be personally liable to the City or any successor in interest in the event of any default or breach by the City or for any amount which may become due to the City or successor or on any obligations under the terms of this Agreement.

8. **PROVISIONS NOT MERGED WITH DEED.** No provision of this Agreement is intended to or shall be merged by reason of any deed transferring title to the Property from the Seller to the Buyer or any successor in interest, and any such deed shall not be deemed to affect or impair the provisions and covenants of this Agreement.

9. **ENTIRE AGREEMENT.** This Agreement and its Exhibits contain the entire agreement among the Parties, and supersedes all prior agreements or other understandings, oral or written, not expressly retained herein. It shall inure to the benefit of, and shall be binding upon the parties hereto and their respective successors or assigns. This Agreement may be modified only by a written amendment signed by all of the Parties.

10. **APPLICABLE LAW.** This Agreement shall be governed by the laws of the State of Iowa, and the sole and exclusive venue for any disputes arising out of this Agreement shall be any district court located within Scott County, Iowa, or federal court located within the appropriate venue. A waiver of any part of this Agreement shall be limited to that specific event and shall not be a waiver of the entire Agreement.

11. **SEVERABILITY.** Should any part of this Agreement be determined to be illegal, invalid or otherwise unenforceable, then all such remaining parts not so affected by such illegality, invalidity or unenforceability shall continue in full force and effect, fully binding all Parties, their respective heirs and assigns, as to such remaining terms.

12. **ASSURANCE OF FURTHER ACTION.** From time to time hereafter and without further consideration, each of the parties to this Agreement shall execute and deliver, or cause to be executed and delivered, such recordable memoranda, further instruments, and agreements, and shall take such other actions, as any other party may reasonably request in order to more effectively memorialize, confirm, and effectuate the intentions, undertakings, and obligations contemplated by this Agreement.

13. **NO REAL ESTATE AGENT OR BROKER.** Neither party has used the service of a real estate agent or broker in connection with this transaction.

14. **CERTIFICATION.** Buyer and Seller each certify that they are not acting, directly or indirectly, for or on behalf of any person, group, entity or nation named by any Executive Order or the United States Treasury Department as a terrorist, "Specially Designated National and Blocked Person" or any other banned or blocked person, entity, nation or transaction pursuant to any law, order, rule or regulation that is enforced or administered by the Office of Foreign Assets Control; and are not engaged in this transaction, directly or indirectly on behalf of, any such person, group, entity or nation. Each party hereby agrees to defend,

indemnify and hold harmless the other party from and against any and all claims, damages, losses, risks, liabilities and expenses (including attorney's fees and costs) arising from or related to my breach of the foregoing certification.

15. **INSPECTION OF PRIVATE SEWAGE DISPOSAL SYSTEM.** Seller represents and warrants to Buyer that the Property is not served by a private sewage disposal system, and there are no known private sewage disposal systems on the Property.

16. **ACCEPTANCE BY BUYER.** Until accepted by the Buyer, this document constitutes an irrevocable offer to sell on the terms stated above. Seller's offer to sell herein shall be irrevocable to and including _____, 2022. If not so approved or accepted by the Buyer by _____, 2022, this offer and Agreement shall be void.

17. **CITY COUNCIL APPROVAL REQUIRED.** This Agreement is expressly contingent upon approval of the Bettendorf City Council. If not approved by said Council this Agreement is void.

18. **COUNTERPARTS.** This Agreement may be executed in one or more counterparts (including electronic counterparts) each of which shall be deemed an original and all of which together shall constitute one and the same agreement.

[The remainder of this page is intentionally blank. The signature pages follow.]

IN WITNESS WHEREOF, the Agreement for Sale of Real Estate is executed this _____ day of _____, 2022.

**YOUNG MEN'S CHRISTIAN
ASSOCIATION OF THE IOWA
MISSISSIPPI VALLEY**

By: _____
Name: Brad Martell
Its: President

STATE OF IOWA)
) SS:
COUNTY OF SCOTT)

On this _____ day of _____, 2022, before me, a Notary Public in and for said County and State aforesaid, personally appeared Brad Martell, to me personally known, who being by me duly sworn (or affirmed) did say that he is the President of Young Men's Christian Association of the Iowa Mississippi Valley, and that said instrument was signed on behalf of the company, and acknowledged the execution of said instrument to be the voluntary act and deed of said company, by it and by him voluntarily executed.

(seal)

NOTARY PUBLIC

IN WITNESS WHEREOF, the City of Bettendorf has caused this Agreement for Sale of Real Estate to be executed in its name and on its behalf by Robert Gallagher, its Mayor, this ____ day of _____, 2022.

City of Bettendorf (Seller)

Attest:

Robert S. Gallagher, Mayor

Decker P. Ploehn, City Clerk

STATE OF IOWA)
) SS:
COUNTY OF SCOTT)

On this ____ day of _____, 2022, before me, the undersigned, a Notary Public in and for the State of Iowa, personally appeared ROBERT S. GALLAGHER and DECKER P. PLOEHN, to me personally known, who, being by me duly sworn, did say that they are the Mayor and City Clerk, respectively, of the City of Bettendorf, executing the within and foregoing instrument to which this is attached; that said instrument was signed (and sealed) on behalf of (the seal affixed thereto is the seal of said corporation) as such officers acknowledged the execution of said instrument to be the voluntary act and deed of said corporation, by it and by them voluntarily executed.

(seal)

NOTARY PUBLIC

Approved as to form:

Christopher J. Curran, City Attorney

EXHIBIT A

Legal Description

DRAFT

<p>PRELIMINARY 08-19-2022</p>	<p>BOUNDARY RETRACEMENT SURVEY TCA BETTENDORF LIFE FITNESS CENTER PART OF THE EAST HALF OF SECTION 21, TOWNSHIP 78 NORTH, RANGE 4 EAST OF THE 6TH PRINCIPAL MERIDIAN, IN THE CITY OF BETTENDORF, COUNTY OF SCOTT, STATE OF IOWA</p> <table border="0"><tr><td>Location:</td><td>East Half of Section 21,</td></tr><tr><td>Trwy/Range:</td><td>Township 78 North, Range 4 East of the 5th PM</td></tr><tr><td>County:</td><td>Scott</td></tr><tr><td>Requestor:</td><td>City of Bettendorf</td></tr><tr><td>Proprietor:</td><td>City of Bettendorf</td></tr><tr><td>Surveyor:</td><td>Daryl A. Bricker</td></tr><tr><td>Company:</td><td>IMEG Corp.</td></tr><tr><td>Return to:</td><td>IMEG Corp. 1717 State St., Suite 201 Bettendorf, IA 52722 Attn: Daryl Bricker</td></tr></table>	Location:	East Half of Section 21,	Trwy/Range:	Township 78 North, Range 4 East of the 5th PM	County:	Scott	Requestor:	City of Bettendorf	Proprietor:	City of Bettendorf	Surveyor:	Daryl A. Bricker	Company:	IMEG Corp.	Return to:	IMEG Corp. 1717 State St., Suite 201 Bettendorf, IA 52722 Attn: Daryl Bricker
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PART OF THE EAST HALF OF SECTION 21, TOWNSHIP 78 NORTH,
RANGE 4 EAST OF THE 5TH PRINCIPAL MERIDIAN,
IN THE CITY OF BETTENDORF, COUNTY OF SCOTT, STATE OF IOWA

ATTENDANCE: DOWNSIDE SCHOOL DISTRICT
WARRANTY DEPT
SCHOOL RECORDS DIVISION

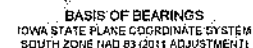
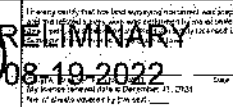


Figure 1 shows a horizontal beam with a total length of 100 units. The beam is divided into four segments: a 40-unit segment on the left, a 20-unit segment, a 0-unit segment (a point), and a 40-unit segment on the right. A scale bar below the beam indicates that 1 inch equals 40 units.

[illegible][illegible][illegible]

BETTENDORF LIFE FITNESS CENTER
2222 MIDDLE ROAD, BETTENDORF, IA
BOUNDARY RETRACEMENT SURVEY

Drawn By: DAB.
Checked By: ***



MEETING DATE: September 20, 2022

COUNCIL LETTER

**REQUESTED BY: Decker Ploehn,
Kim Kidwell, Chris Curran**

ITEM TITLE:
Resolution setting a public hearing relating to the lease of certain city-owned real property pursuant a Shared Use Agreement with the YMCA of the Iowa Mississippi Valley.
Explanation:
The attached draft Shared Use Agreement with the YMCA of the Iowa Mississippi Valley (“YMCA”) contemplates a twenty (20) year lease of a contemplated aquatic facility to be constructed on city-owned real property located in Middle Park to the YMCA. The terms of the lease are set forth in the attached draft Shared Use Agreement. Pursuant to this resolution, city council is setting a public hearing to hear public comment on the lease of city-owned property to the YMCA.
List Attachments:
<ul style="list-style-type: none">• Resolution• Draft Shared Use Agreement

RESOLUTION _____-22

**RESOLUTION SETTING A PUBLIC HEARING RELATING TO THE LEASE
OF CERTAIN CITY-OWNED REAL PROPERTY PURSUANT TO A SHARED
USE AGREEMENT WITH THE YMCA OF THE IOWA MISSISSIPPI VALLEY**

WHEREAS, a proposed lease of a to-be constructed aquatic center located on city-owned real property at Middle Park is contemplated;

WHEREAS, the terms of the proposed lease are set forth in the attached draft Shared Use Agreement;

WHEREAS, a public hearing is required pursuant to Iowa Code § 364.7.

BE IT RESOLVED by the City Council of the City of Bettendorf, Iowa, that a public hearing be set for the 4th day of October, 2022, at 7:00 pm, in the Council Chambers at City Hall, 1609 State Street, Bettendorf, Iowa, to hold a public hearing and receive public comment regarding the lease of certain city-owned real property pursuant to a Shared Use Agreement with the YMCA of the Iowa Mississippi Valley.

Passed, Approved and Adopted this 20th day of September, 2022.

Mayor Robert S. Gallagher

Attest:

Decker P. Ploehn, City Clerk

**SHARED USE AGREEMENT
CITY OF BETTENDORF AND SCOTT COUNTY FAMILY Y**

THIS AGREEMENT is made and entered into as of _____, 2022, (the "Agreement") by and between the CITY OF BETTENDORF ("City") and the YOUNG MEN'S CHRISTIAN ASSOCIATION OF THE IOWA MISSISSIPPI VALLEY ("YMCA"):

WHEREAS, the City is a municipal corporation organized and existing under the laws of the State of Iowa and is a public agency as defined in Iowa Code Chapter 28E;

WHEREAS, YMCA is an Iowa non-profit corporation organized and existing under the laws of the State of Iowa and is a private agency as defined in Iowa Code Chapter 28E;

WHEREAS, public agencies may enter into an agreement with a private agency for joint and cooperative actions pursuant to Iowa Code Chapter 28E;

WHEREAS, the City intends to construct certain improvements and facilities, including a new outdoor aquatic facility, associated concession building and support structures, new parking facilities, and a future outdoor ice facility;

WHEREAS, the YMCA has developed certain expertise in operating aquatic facilities and desires to use and operate the Aquatic Facilities (as defined below) in the manner set forth in this Agreement;

WHEREAS, the Aquatic Facilities will be constructed utilizing funding from the City, the YMCA, and private funding;

WHEREAS, the parties expect to obtain private funding for approximately one third of the cost of construction of the Aquatic Facilities;

WHEREAS, the YMCA is facing spacing needs for certain programming and is desirous of purchasing the real property located at 2222 Middle Road, Bettendorf, Iowa pursuant to a separate agreement (the "Real Estate Purchase Agreement"), and the City is amenable to such sale;

WHEREAS, the City and YMCA have agreed that cooperative action will be to their mutual advantage, and will allow more efficient use of the Aquatic Facilities, and will promote the health and welfare of the public;

WHEREAS, the City and YMCA wish to provide for the terms and conditions under which the parties are willing to utilize the Aquatic Facilities for public and YMCA programmatic purposes pursuant to Iowa Code Chapter 28E.

NOW, THEREFORE, the City and YMCA agree as follows:

1. **Aquatic Facilities.** The City shall construct the aquatic facility, associated vertical infrastructure, parking lot, and related ancillary improvements at Middle Park in Bettendorf, Iowa, as described on Exhibit A (the "Aquatic Facilities"), utilizing funding as described herein. The Aquatic Facilities shall include vertical infrastructure to service both the Aquatic Facilities and a future outdoor ice facility, and such vertical infrastructure is intended to provide concession services, lockers, bathrooms, and other amenities deemed appropriate. The parties understand and agree that the vertical infrastructure will also

be used by the City for the operation of the ice facility, and the YMCA shall have no obligation for the operation of the vertical infrastructure during such time as the ice facility is in operation. The parties understand and agree that the new parking lot constructed as part of the project described herein is a public parking lot intended for public use, including the Aquatic Facilities and ice facility. Additionally, the current parking lot located west of the current swimming pool shall remain a public parking lot. The YMCA will lease the Aquatic Facilities under the terms herein, and will operate the Aquatic Facilities as set forth in this Agreement.

2. **Term of Agreement.** The term ("Term") of this Agreement shall commence upon the filing of this Agreement with the Iowa Secretary of State's Office (the "Commencement Date"), and, unless terminated earlier pursuant to this Agreement, shall expire twenty (20) years from the date of the issuance of the certificate of occupancy for the Aquatic Facilities (the "Expiration Date"). No later than eighteen (18) months preceding the expiration of the twenty (20) year term, the parties shall commence discussions regarding a potential extension of this Agreement.

3. **Funding Provisions.**

A. The YMCA agrees to contribute up to Four Million Five Hundred Sixty Nine Thousand One Hundred Sixty Dollars (\$4,569,160.00) (the "YMCA Funds") toward the planning, design and construction of the Aquatic Facilities as set forth in the Construction Budget (as defined below). For avoidance of doubt, the purchase price paid to the City under the Real Estate Purchase Agreement (\$1,430,840.00) shall be allocated to the Aquatic Facilities and will be part of the Construction Budget.

B. The City agrees to contribute up to Six Million Dollars (\$6,000,000) (the "City Funds") toward the planning, design and construction of the Aquatic Facilities as set forth in the Construction Budget.

C. In the event additional grant funds or private contributions are secured, the parties may agree to increase the funding caps set forth above, in a manner consistent with the Construction Budget. The parties shall execute an amendment to this Agreement to memorialize the increased funding caps and any materially revised Construction Budget.

4. **Planning of the Design and Construction of Aquatic Facilities.** The parties shall jointly develop plans for the design and construction of the Aquatic Facilities consistent with an approved budget. The parties have jointly selected RDG Planning & Design as the architect/engineer to prepare the plans for the Aquatic Facilities. Both parties shall have the right to participate in the planning process with the architect/engineer and to approve the final plans and any revisions to the plans.

5. **Approved Project Construction Budget and Project Completion.**

A. Each party shall expend its own funds according to final construction budget relating to the Aquatic Facility, as formally approved by the parties ("Construction Budget"). The Construction Budget shall be the parties' estimate of the cost of construction, furnishing, and equipping the Aquatic Facilities. The Construction Budget shall be considered as a part of this Agreement as if fully set forth herein. For avoidance of doubt, the City and the YMCA intend to fund the construction (as reflected in the Construction Budget) of the Aquatic Facility at equal levels (inclusive of the purchase price under the Real Estate Purchase Agreement). In the event of cost overruns or, the City and YMCA agree to split any such cost overrun, acknowledging that both parties will endeavor to obtain additional private funding for such cost overrun.

B. The Construction Budget shall include, without limitation, the Aquatic Facilities construction costs and all soft costs such as architect fees, engineering fees, surveys, soil investigations, and permit fees, as are allocated between the City and YMCA in the Construction Budget. The Construction Budget shall also include equipment, furnishings and other items to equip and furnish the Aquatic Facilities.

C. The parties shall be responsible for the construction cost of the Aquatic Facilities. The Aquatic Facilities shall be constructed on a joint or cooperative basis in order to reduce the overhead costs.

D. The Construction Budget shall set forth the capital expenditures by each party toward the construction, equipping and furnishing the Aquatic Facilities.

E. The City shall enter into the construction contracts to construct the Aquatic Facilities in accordance with the Plans and Construction Budget, subject to the following:

(1) YMCA may review and consult with the City before the City enters into such contracts;

(2) YMCA may review any proposed change orders; provided, however, only the City shall be authorized to execute any change orders for the Aquatic Facilities;

(3) Each party shall approve the final acceptance of the completed Aquatic Facilities from the contractor and/or vendors in writing.

F. At all times, the City shall own the Aquatic Facilities, including the real estate and all attached fixtures, subject to the terms and conditions of this Agreement.

6. **Rent.** YMCA shall pay to the City an annual rental amount of One Dollar (\$1.00) per year for twenty (20) years for its use of the Aquatic Facilities. The YMCA shall have possession of the Aquatic Facilities (and the ice facility, to the extent the ice facility is able to be used for overflow seating for the Aquatic Facility) during the pool season, including all related opening and closing activities. For avoidance of doubt, the parking lot shall remain open to the public. The City shall use the vertical infrastructure and parking lot during any period of time in which the ice facility is open, including such times as necessary to prepare the ice facility for opening. The parties shall work together to develop a schedule of operation of the Aquatic Facilities and ice facility, including opening and closing of the Aquatic Facilities and ice facility.

7. **Operation of the Aquatic Facilities.** The YMCA is responsible for the operation of the Aquatic Facilities during the Term of this Agreement, as such obligations are further addressed herein and in the operating budget.

A. **Licenses and Permits.** The YMCA shall be responsible for obtaining all necessary permits and licenses for the operation of the Aquatic Facilities and shall pay all costs associated therewith.

B. **Fees.** The Aquatic Facilities will be operated by the YMCA utilizing the expertise of the YMCA in the operation of similar facilities. Access to the Aquatic Facilities shall be available through a YMCA membership or through a daily fee. Daily fee entry shall not require a YMCA membership. The daily fee price shall be reasonably commensurate to other publicly available aquatic facilities in the Quad-

Cities area. In accordance with the mission of the YMCA, financial assistance is available to youth and families in need of such assistance.

C. Scheduling of Aquatic Facilities. The Aquatic Facilities shall be open to the public and YMCA members during all regularly scheduled hours. The parties expect typical hours of operation to be [11 a.m. to 5 p.m.]. The City and the YMCA may, from time to time, and particularly in the morning hours of the summer, provide access to camp and group members, including City summer camp participants and YMCA groups and camps. During all regularly scheduled hours, daily fee guests and YMCA members shall all enjoy the same amenities. Special privileges shall not be afforded YMCA members.

D. General Provisions Relative to Operation of Aquatic Facilities.

(1) Compliance, Background Checks, Facility Security. The YMCA agrees to comply with all state, federal, local laws and regulations, non-discrimination guidelines applicable to the YMCA and City, including adopted policies, rules, guidelines and procedures (collectively "Policies"). In addition, YMCA agrees to comply with all the Iowa requirements regarding security, background checks for employees, contractors, volunteers and others at the Aquatic Facilities. Consistent with the above, the parties may establish from time to time rules of conduct and behavior for persons within the Aquatic Facilities, which shall be in effect for all persons within the Aquatic Facilities. YMCA staff shall have authority to enforce such rules. YMCA will operate the Aquatic Facilities and all of its programs in a non-discriminatory manner and in a conformity with all laws, rules, procedures and regulations applicable to the parties.

(2) Staffing of the Aquatic Facilities. The YMCA shall provide all staffing for the Aquatic Facilities, including, but not limited to, supervisors, janitorial staff, lifeguards, and concession workers.

(3) Signage. The City and the YMCA shall cooperate in the naming of the Aquatic Facilities. YMCA shall have the right to install signs bearing YMCA identification and logos on the grounds, the exterior of the Aquatic Facilities and within the Aquatic Facilities which have been approved by the City and YMCA. Such signage shall reference the City and YMCA in the manner agreed upon by the parties.

(4) YMCA's Contracts with Third Parties. YMCA shall have the right to negotiate and purchase directly from vendors for the procurement of any supplies including, without limitation, items used, sold or consumed in the Aquatic Facilities. No current or future agreements entered into by the City for said items shall bind YMCA.

(5) Environmental Laws. YMCA will be responsible for compliance with all Federal, State and local environmental laws and regulations. The use of hazardous substances necessary for the operation of the Aquatic Facilities will be in strict compliance with all Federal, State and local laws.

(6) Maintenance of Aquatic Facilities. YMCA shall use its best efforts to maintain and operate the Aquatic Facility in a first-class, safe, and efficient manner, in accordance with YMCA policies, and any joint policies adopted between the City and the YMCA.

(7) Preventative Maintenance. The YMCA shall be responsible for preventative maintenance, as addressed in Section 8.B herein.

8. **Annual Operating Budget.**

A. **Operating Budget.** YMCA shall prepare an annual operating budget ("Operating Budget") for each fiscal year (which shall commence on January 1, or such other date that YMCA may establish as its fiscal year).

B. **Review of Budget.** YMCA shall provide a draft copy of its Operating Budget for the Aquatic Facilities to the City no later than thirty (30) days before the beginning of each fiscal year. The City may provide comments to the proposed Operating Budget, subject to final approval by the YMCA board. Notwithstanding the foregoing, the City shall not be required to contribute funds to the Operating Budget, unless such expenditures are approved by the City Council. There is no expectation that the City has any financial operating obligation for the Aquatic Facilities. The YMCA is responsible for the operation of the Aquatic Facilities, and the associated income and expense thereof. The parties recognize that the Aquatic Facilities may operate at a loss, and the YMCA is willing to accept such loss.

C. **Payment of Operating Costs.** YMCA shall be responsible for the payment of all operating costs of the Aquatic Facilities (including the ice facility to the extent used for the Aquatic Facility) and all operating costs shall be included in the Operating Budget. The operating costs to be paid by YMCA shall include, without limitation:

(1) Repair and keep in good working order of all plumbing, electrical, mechanical, HVAC, pool, sanitation, filtration, and sewer systems and other components, fixtures and equipment in the Aquatic Facilities;

(2) Janitorial and custodial service and supplies for the Aquatic Facilities;

(3) All utilities including without limitation, gas, sewer, water, electricity, heat, air conditioning, telephone, and telecommunications;

(4) All insurance premiums specified in this Agreement;

(5) Repair and keep in good working order all furniture, furnishings, and equipment used in the Aquatic Facilities, including the pool vessel, with the exception of the City's obligation of capital expenditures as described in Section 9;

(6) All personnel costs for the operation of the Aquatic Facilities;

(7) All chemicals and related materials required for the proper operation of a first class aquatic facility;

(8) Landscaping within the fence of the Aquatic Facility (the City shall provide landscaping services outside the fenced area); and

(9) YMCA shall keep the Aquatic Facilities in good and clean condition and repair, including replacements, so as to maintain the Aquatic Facilities in good condition, as at the time of opening of the Aquatic Facilities, subject to only reasonable wear and tear and damage by casualty.

The labor associated with the painting of the pool shell, lazy river and other swimming amenities, as addressed in Section 9.F.

9. **Replacements and Capital Expenditures.**

A. **Upkeep and Replacement Responsibilities.** The City shall, at its own expense (except as to insured casualties, as provided in Section 17, be responsible for the replacement of the Aquatic Facilities including the replacement of all concrete flatwork, plumbing, electrical, mechanical and HVAC systems and controls, (including the vertical infrastructure) pool sanitation, and filtration systems and all other exterior structural components.

B. **Preventative Maintenance.** YMCA shall, with the input of the City, prepare a preventative maintenance schedule for all mechanical systems and equipment in the Aquatic Facilities. YMCA shall perform all scheduled preventative maintenance according to the maintenance schedules. Preventative maintenance obligations shall be part of the YMCA's operating obligations. When the YMCA becomes or is made aware of potential capital replacement issues, YMCA shall promptly notify City in writing of any items that are the responsibility of the City.

C. **Inspection of Aquatic Facilities.** Annually, the parties shall jointly inspect the Aquatic Facilities to determine if the maintenance, repair and replacements of the Aquatic Facilities or component parts thereof are acceptable to the parties. If the maintenance and repair of the Aquatic Facilities is not in accordance with acceptable standards, necessary maintenance, repairs or replacements needed shall be commenced within thirty (30) days and completed within a reasonable time.

D. **Capital Expenditures.** The City shall annually review and approve a capital expenditures budget ("Capital Expense Budget") for the replacement of major components of the Aquatic Facilities as such components reach the end of their useful lives. The City may amend the annual Capital Expense Budget as may be needed. The parties may project and review annually an anticipated future capital expenditures for three (3) and/or five (5) years in the future. For avoidance of doubt, the City is responsible for capital expenditures for the Aquatic Facilities.

E. **Repair/Replace.** The parties acknowledge that the distinction between operations (repair) and capital expenditure (replace) is unclear in certain circumstances. The general guidelines the parties will use is based on cost to repair (under \$5000.00 considered to be operational) and expected useful life (under 2 years considered operational). In the event of disagreement, the parties will utilize the process set forth in Section 10 to resolve such dispute.

F. **Painting of Aquatic Facilities.** The parties are jointly responsible for the painting of the pool shell, lazy river, and other swimming amenities. The parties agree to annually review the need to paint such amenities. When painting is required, the City shall be responsible for the purchase of the paint and other necessary supplies. The YMCA shall be responsible for the labor involved in the preparation of the surface and the application of paint.

10. **Executive Committee.** An executive committee ("Executive Committee") consisting of the CEO of the YMCA and the City Administrator of the City shall meet and confer on any substantial issue that arises in the use and operation of the Aquatic Facility. The Executive Committee shall not be empowered to alter or amend this Agreement, but rather to facilitate the resolution of any issues that may arise.

11. **Restrictions on Use.** The parties shall not use, or permit the use of, the Aquatic Facilities for any purpose which would adversely affect the value or character of the Aquatic Facilities. No party shall, at any time or times during the agreement, conduct or permit any activities, program, or practices on the premises which shall violate any federal or state constitutional, regulatory or statutory provisions, or which would change, jeopardize, or result from the loss of YMCA's status as a charitable organization under Iowa law or Internal Revenue Code §501(c)(3).

The YMCA represents to the City that it has been determined by the IRS to be a §501(c)(3) charitable organization pursuant to the applicable Internal Revenue Code and IRS regulations. Documentation satisfactory to the City has been provided as a condition of this Agreement. The YMCA covenants that it will maintain its status as a qualified §501(c)(3) charitable organization for the life of this Agreement. Annually, the YMCA shall provide to the City copies of its IRS form 990 (or subsequent returns as applicable) outlining its status and compliance with applicable IRS regulations for each year. The YMCA acknowledges that the City anticipates issuing one or more series of tax exempt qualified §501(c)(3) bonds (the "City Bonds") to finance construction of the City Facility. A legal opinion acceptable to the City and its Bond Counsel, confirming the §501(c)(3) status of the YMCA shall be provided to the City as a condition of the issuance of the City Bonds. The YMCA reasonably expects and covenants that it will not use the Aquatic Facilities in any way which will cause the City Bonds to be classified as (i) private activity bonds within the meaning of Section 141 of the Internal Revenue code, or (ii) arbitrage bonds within the meaning of Section 148(a) and (b) of the Internal Revenue Code, or to no longer be classified as "qualified §501(c)(3) bonds". Through the term of this Agreement, the YMCA will comply with the requirements of the Internal Revenue Code and the regulations issued thereunder with respect to the City Bonds. To the actual knowledge of the YMCA, there are no facts or circumstances that would materially change the forgoing statements or the conclusion that it is not expected that the proceeds of the City Bonds will be used in a manner that would cause the City Bonds to be arbitrage bonds, private activity bonds, or fail to be considered "qualified §501(c)(3) bonds". The YMCA will bring to the City's attention any change and facts that could impact the tax status of the City Bonds.

For the life of this Agreement including any extensions, the YMCA covenants not to allow any user or use of occupancy of the Aquatic Facilities for any purpose that would cause interest on the City Bonds to be includable in gross income under Section 103 of the Internal Revenue Code. The YMCA covenants that it will not permit any natural person, firm, joint venture, association, partnership, business trust, corporation, public body, agency or political subdivision thereof or any other similar entity ("Person") to use the Aquatic Facilities if use by such Person is not (1) considered by a "Government Person" as defined in Treasury of Regulation 1.141-1; (2) considered use by an organization described in Section 501(c)(3) of the Internal Revenue Code which is exempt from taxation under Section 501(a) of the Internal Revenue Code ("Tax Exempt Organization"), which does not adversely impact the City Bonds as "qualified §501(c)(3) bonds"; or (3) available for use on the same basis as the "general public use" exception described in Treasury Regulation section 1.141-3, and any such use is in such a manner or to such extent as could adversely affect the exemption from federal income tax of interest on the City Bonds.

Furthermore, the YMCA covenants not to allow use of the Aquatic Facilities which would result in Unrelated Business Income for the YMCA, whether as a result of noncompliance of such use in relation to the YMCA's exempt purpose under Section 501(c)(3), or otherwise. The YMCA represents that the use of the Aquatic Facilities furthers the YMCA's exempt purposes. YMCA covenants to obtain the prior written approval of the City for any purposed uses beyond use by the YMCA for its stated exempt purposes under Section 501(c)(3), use by other than a Governmental Person, or use by another Tax Exempt Organization. Prior to such approval by the City, a favorable opinion of a nationally recognized Bond counsel shall be

obtained by the City and the tax status of the City Bonds will not be adversely impacted by such proposed use, the cost of which shall be reimbursed to the City by the YMCA.

In the event any action or inaction by the YMCA, except for action or inaction based upon prior written consent from the City, causes the City Bonds to lose their tax exempt status, the YMCA shall pay to the City an amount equal to the additional debt service, if any (or settlement amount which the IRS e.g. pursuant to the IRS voluntary closing agreement program (VCAP), or such other program designated to ameliorate the tax status of otherwise nonqualified City Bonds) due on the City Bonds.

12. **Taxes.** The YMCA is exempt from income taxes under federal and Iowa law and is qualified as an IRC §501(c)(3) tax exempt charitable organization. The YMCA shall take all action necessary to assure the continuation of the tax exempt status of the YMCA. However, in the event that such exemption is wholly or partially lost, or in the event of public charges or charges in lieu of taxes, the YMCA shall pay, in addition to other amounts provided in this Agreement as they accrue, including all property taxes if levied the Aquatic Facilities or any part thereof, all taxes, assessments and other public charges or charges in lieu of taxes levied upon or assessed against the City of the Aquatic Facilities or the property on which it is located, arising by reason of the YMCA's occupancy and use of the Aquatic Facilities, or the activities carried on therein.

13. **Indemnification.** The YMCA agrees to defend, indemnify and hold harmless the City from any and all claims, damages, injuries, demands, settlements, suits, causes of action, and other claimed damages, including reasonable attorney's fees, investigative fees, suit fees and other costs associated therewith arising out of YMCA's possession, occupancy, maintenance, operation, or use of the Aquatic Facilities, or other activities carried on therein, and which do not arise out of the City's activities in the Aquatic Facilities.

The City agrees to defend, indemnify and hold the YMCA harmless from any and all claims, damages, injuries, demands, settlements, suits, causes of action, and other claimed damages, including reasonable attorneys' fees, investigative fees, suit fees and costs associated therewith arising out of City's use or occupancy of the Aquatic Facilities or other activities which it may carry on therein and which does not arise out of the YMCA's activities in the Aquatic Facilities; nothing in this section shall be construed to waive any immunity applicable to the City as a governmental entity.

14. **Right to Alter and Improve.** YMCA shall have the right to make changes or alterations to of the Aquatic Facilities, subject to the following conditions:

A. No change or alteration which might impair the structural soundness or diminish the value of the building shall be made.

B. No change or alteration shall be made without the prior written consent of the City.

C. Any improvement to the building or to any part thereof and any replacement of equipment or fixtures shall become the property of the City without payment of any kind.

D. The cost of any approved alteration or improvement shall be at the YMCA's expense unless otherwise agreed by the parties.

15. **Fire or Other Casualty Loss.** If all or any part of the Aquatic Facilities is damaged or destroyed by fire or other casualty, the City shall repair and rebuild the structure with reasonable diligence

using only the insurance proceeds. All insurance proceeds received pursuant to the provisions of this agreement shall be payable to the City as applicable, and shall be and applied to the payment of such restoration.

If there is a substantial interruption with the YMCA's operation due to fire or casualty damage requiring the YMCA to temporarily close operations, the term of this Agreement shall be tolled for the duration of the period of restoration.

16. **Fire or Casualty Insurance.** The City shall insure the Aquatic Facilities for full replacement cost (but not the YMCA's personal property), and the YMCA shall pay the insurance premiums attributable to the Aquatic Facilities as part of the operating costs of the Aquatic Facilities.

17. **Liability Insurance.** The City and the YMCA shall each carry liability insurance coverage claims arising out of any accident or other occurrence causing any injury and/or damage to any person or property on or about the Aquatic Facilities. Liability policies shall have limits of not less than \$5,000,000 for bodily injury per person and \$10,000,000 per occurrence. Each party shall name the other party as an additional insured on its liability policy. The cost of liability insurance shall be paid as part of the operating cost of the Aquatic Facility.

18. **Worker's Compensation and Employee's Liability Insurance.** The YMCA shall maintain worker's compensation and employee's liability insurance at statutory limits.

19. **Waiver of Subrogation Rights.** Each of the parties hereby releases the other from any claim for any loss or damage to any of its property or for any liability which is insured under valid and collectible insurance policies. It is further agreed that this waiver applies only when permitted by the applicable policy of insurance.

20. **Non-Assignment of Interest Under this Agreement.** The YMCA shall not assign its interests under this Agreement without the prior written consent of the City.

21. **Several Obligations.** The obligations of the City and the YMCA under this Agreement are separate obligations, and are not joint obligations. It does not create any separate legal entity, joint venture or partnership.

22. **Termination.** This Agreement may be terminated as follows:

A. By mutual agreement of all the parties;

B. By the City in the event of the YMCA's material breach of any of the terms of this Agreement. Termination shall be accomplished by giving the YMCA written notice specifying the breach and stating that the Agreement will be terminated if the breach is not cured within thirty (30) days; provided, however, that for so long as a good faith effort is being made to cure any such material breach, the thirty (30) day time period in which to cure shall be extended. Failure to cure the breach within such time period shall result in termination of this Agreement.

C. By the YMCA in the event of the City's material breach of any of the terms of this Agreement. Termination shall be accomplished by giving the City written notice specifying the breach and stating that the Agreement will be terminated if the breach is not cured within thirty (30) days; provided, however, that for so long as a good faith effort is being made to cure any such material breach, the thirty

(30) day time period in which to cure shall be extended. Failure to cure the breach within such time period shall result in termination of this Agreement.

D. In the event of termination, all parties shall be relieved of obligations or duties after the date of termination, but no party shall be relieved of its duties and obligations under this Agreement arising through the date of termination.

E. In the event that the City unilaterally terminates this Agreement other than pursuant to Section 22.B (an ultra vires action), the City shall pay the YMCA the unamortized portion of the YMCA Funds at \$228,458.00 per year for the remaining Term. For example, if this Agreement is terminated with fifteen (15) years remaining on the Term, the City shall pay the YMCA \$228,458.00 times 15 years or \$3,426,870.00. This provision shall survive termination of this Agreement.

F. Upon expiration or termination of this Agreement, the YMCA shall surrender the Aquatic Facilities to the City in a clean, neat and functioning condition, subject only to reasonable wear and tear and or other causes beyond the control of the YMCA. Any additions or improvements affixed to the Aquatic Facilities shall remain with the Aquatic Facilities. Equipment and furnishings which have been replaced shall remain with the Aquatic Facilities upon expiration.

23. **Binding Effect.** The terms and conditions of this Agreement shall extend to and be binding upon the successors in interest of the respective parties hereto.

24. **Entire Agreement; Amendment.** This Agreement contains the entire understanding between the parties and cannot be changed or terminated orally but only by an agreement in writing signed by all parties.

25. **No Joint Venture.** Each party to this Agreement is an independent contractor and shall fulfill its obligations under this Agreement independently of the other parties. This Agreement shall not create any type of joint venture or partnership between the parties hereto.

26. **Governing Law.** This Agreement shall be governed and construed in accordance with the laws of the State of Iowa.

27. **Titles of Articles and Sections.** Any titles of the several parts, Articles, and Sections of this Agreement are inserted for convenience of reference only and shall be disregarded in construing or interpreting any of its provisions.

28. **Counterparts.** This Agreement may be executed in any number of counterparts, each of which shall constitute one and the same instrument.

29. **Severability.** If any provision of this Agreement shall be declared invalid or unenforceable, the remainder of the agreement shall continue in full force and effect.

30. **Filing.** A copy of this Agreement shall be filed electronically with the Iowa Secretary of State's Office in the manner specified by the Secretary of State.

31. **Notices.** Any and all notices hereunder shall be in writing and shall be directed to the persons set forth below:

If to City:

Mayor and City Administrator
City of Bettendorf
1609 State Street
Bettendorf, IA 52722
Facsimile: _____
Email: _____

If to YMCA:

Executive Director and CEO
Scott County Family YMCA
606 W. 2nd Street
Davenport, IA 52801
Facsimile: _____
Email: _____

Notices may be personally delivered or delivered by facsimile or other commonly used electronic means of communication. Notice may also be given by mailing certified U.S. mail, return receipt requested, with postage thereon prepaid. If notice is delivered personally or electronically, delivery is date of receipt, if by mailing three (3) days after the date of posting.

[The remainder of this page is intentionally blank. The signature page follows.]

IN WITNESS WHEREOF, the parties have caused this instrument to be executed by their respective officers, pursuant to authority granted and given as of the day and year first above written.

CITY OF BETTENDORF, IOWA

By: _____
Robert S. Gallagher, Mayor

ATTEST:

By: _____
Decker P. Ploehn, City Administrator

**YOUNG MENS CHRISTIAN ASSOCIATION
OF THE IOWA MISSISSIPPI VALLEY**

By: _____
Name: _____
Its: _____

EXHIBIT "A"

Depiction of the Aquatic Facilities

DRAFT

LIMITS OF FUTURE
OUTDOOR ICE
FACILITY PROJECT

LIMITS OF
AQUATIC
FACILITIES
PROJECT

