



# Counselman · Hunsaker

## AQUATICS FOR LIFE

### AQUATIC OPERATIONS AGREEMENT

**THIS AQUATIC OPERATIONS AGREEMENT** (this "**Agreement**") is made and entered on this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_ ("**Effective Date**"), by and between **the City of North Port**, ("**Owner**") and **COUNCILMAN-HUNSAKER**, a Missouri limited liability company ("**Consultant**").

WHEREAS, Owner is the owner and/or operator of an aquatic complex located at 6205 W. Price Boulevard, in North Port, Florida commonly known as "North Port Aquatic Center" ("**Facility**");

WHEREAS, Consultant is in the business of providing aquatic facility operations planning and risk management services to facilities such as the Facility; and

WHEREAS, Owner desires to engage Consultant for the purpose of providing certain aquatic facility planning and operations management and consultation services at the Facility, and Consultant is willing to provide such services, according to the terms and conditions as further set forth herein.

NOW THEREFORE, in consideration of the promises and covenants herein contained and other good and valuable consideration, the receipt of which is hereby acknowledged, Owner and Consultant agree as follows:

**I. Appointment.** Subject to the terms and conditions contained in this Agreement, Owner hereby retains and engages Consultant and Consultant hereby accepts engagement from Owner to perform certain aquatic-specific management services for the Facility, as elected by Owner and indicated below. The services elected by Owner below shall be referred to herein collectively as the "**Consulting Services**". Consultant shall have no obligation to perform any services for Owner or the Facility other than the Consulting Services.

1. CHAMP Program

- a. Provide one (1) annual lifeguard operations assessment and report including an unannounced on-site evaluation;
- b. Administer one (1) additional unannounced on-site evaluations to review the following activities:
  - i. objective and formal evaluation of lifeguards performing patron surveillance.
  - ii. lifeguard accountability and attention to safety, professionalism, and pride.
  - iii. lifeguards' emergency response skills.
- c. develop and assist in implementation of plan to address the results of such visits;
- d. Consultant shall provide an annual end of project summary with complementary PowerPoint slides
- e. Provide litigation support in the event of a fatal or catastrophic incident resulting in legal proceedings with the Client. Consultant shall provide an additional site visit to provide accident investigation and documentation. Consultant shall provide Client's legal team with appropriate records and documentation of the training and

certifications. The consultant shall be available as an expert witness in the event of course proceedings;

- f. Consultant consists of an operations team with decades of well-rounded, varying experience in all facility types and operations. As part of the Agreement, Owner will receive all of the above-described services in addition to access to Consultant's resources and knowledge as appropriate.

**II. Fees.**

**A. Consulting Fees.** In consideration of the Consulting Services provided by Consultant to Owner hereunder, Owner shall pay to Consultant a lump sum of \$4,410.00 including two (2) site visits. Reimbursable travel expenses are included in this lump sum. (Site visits in excess of two (2) shall be authorized by the Client in writing in advance and compensated with fee and reimbursable expenses as additional services according to the Additional Services Fee Schedule in Paragraph II.B.)

The consultant shall submit monthly statements based on the percentage of services completed at the time of billing.

**B. Additional Services.** In addition to all other amounts payable by Owner herein, in the event Owner requests additional services beyond the Consulting Services and Consultant agrees to perform such services in writing, Owner shall pay, in addition to all other amounts described herein, the following services rates for all such services performed by Consultant:

Principal	\$285.00/hour
Director	\$250.00/hour
Project Manager	\$220.00/hour
Project Engineer/Architect	\$185.00/hour
Design Associate	\$155.00/hour
Examiner	\$120.00/hour
Administrative	\$90.00/hour
Site Visit	\$1,800.00 /day *

\* Excluding travel expenses

**C. Travel Expenses.** Consultant may incur reasonable and necessary expenses for travel in providing the Consulting Services and the additional services, if applicable, to Owner. In addition to all other amounts payable by Owner herein, Owner shall reimburse Consultant for reasonable travel expenses incurred by Consultant's officers, agents and employees that are directly related to the provision of the Consulting Services. Travel expenses shall include but are not limited to the costs of airfare, rental cars, parking, lodging and meals related to the provision of the Consulting Services. Consultant shall provide an itemized account of such travel expenses, together with receipts, vouchers or other supporting materials.

**D. Reimbursement.** Consultant may incur reasonable and necessary business expenses in providing the Consulting Services and the additional services, if applicable, to Owner. In addition to all other amounts payable by Owner herein, Owner shall reimburse Consultant for reimbursable expenses incurred by Consultant, based upon the Consultant's schedule for such expenses in effect at the time of billing. Reimbursable expenses shall include travel expenses

described in subparagraph C above, postage, express mailings, printing and copying charges, and any artwork desired by Owner, such as renderings, and cad imaging including fly-through segments for community publicity purposes, subject to the terms of this Agreement. Telephone and fax services are included in the Consulting Fees and shall not be subject to reimbursement hereunder. Consultant shall provide an itemized account of such reimbursable business expenses, together with receipts, vouchers or other supporting materials.

**E. Sponsorship and Advertising.** Owner shall pay to Consultant, as additional compensation throughout the term, twenty percent (20%) of any sponsorship and advertising revenue received by Owner where Consultant was a procuring cause of such sponsorship or advertising opportunity. Payment shall be remitted to Consultant within thirty (30) days of receipt of said payments by Owner. Owner shall provide Consultant, on a quarterly basis, an accounting of all sponsorship or advertising payments received by Owner. Such accounting shall be provided to Consultant within thirty (30) days of the conclusion of each quarter.

**F. Payment.** Unless otherwise agreed in writing or otherwise set forth herein, in accordance with the Local Government Prompt Payment Act, Florida Statutes Sections 218.70, *et seq.*, Owner will make all payments under this Agreement in U.S. dollars within forty-five (45) calendar days after the date of receipt of Consultant's invoice for same. Overdue amounts shall bear interest from thirty (30) calendar days after the due date at the rate of one percent (1.0%) per month on the unpaid balance. Consultant must invoice Owner for any interest accrued in order to receive the interest payment.

**G. Taxes.** Neither the Consulting Fees, nor any other fees charged by Consultant hereunder for which Owner is liable for payment, include any excise, sales, use, value added or other taxes, tariffs or duties that may be applicable to the Consulting Services or additional services ("**Taxes**"). All such Taxes shall be Owner's responsibility. Owner shall provide, upon demand, Consultant with receipts issued by the appropriate taxing authority or such other evidence as is reasonably requested by Consultant to establish that such taxes have been paid. If Consultant is, in Consultant's reasonable discretion and judgment, legally obligated to collect such Taxes, the amount of such Taxes will be invoiced to Owner, and Owner will pay such amount unless Owner provides Consultant with a valid tax exemption certificate authorized by the appropriate taxing authority.

**H. Withholding Taxes.** All payments by Owner for the Consulting Services and any additional services will be made free and clear of, and without reduction for, any federal or state income taxes or any other payroll taxes from any amounts payable to Consultant hereunder.

**I. Responsibility After Termination.** Termination of this Agreement will not relieve Owner of its obligation to pay for any amounts which are Owner's responsibility hereunder.

### **III. Term and Termination.**

**A. Term.** This Agreement shall become effective on the Effective Date and, unless sooner terminated pursuant to the terms hereof, shall continue in effect until (and including) the third (3<sup>rd</sup>) anniversary of the Effective Date.

**B. Termination For Convenience.** Either party may terminate this Agreement at any time by providing the other party with one hundred eighty (180) days' written notice to the other party. This Agreement may be terminated with or without cause by the City Manager in whole or

in part or whenever the City Manager determines that termination is in the Owner's best interest.

**C. Termination for Cause.** Consultant or the City Manager may terminate this Agreement immediately upon the nonterminating party's breach of any term of this Agreement and failure to cure within thirty (30) days after receiving written notice of same or immediately upon the bankruptcy, insolvency or assignment for the benefit of creditors by the nonterminating party.

**D. Effect Upon Termination.** Except as otherwise directed, Consultant shall stop work on the date of receipt of the notice of termination or other date specified in the notice; place no further orders or subcontracts for material, services, or facilities except as necessary for completion of such portion of the work not terminated; terminate all vendors and subcontracts; and settle all outstanding liabilities and claims. Consultant will be paid only for such work performed and materials supplied up to the termination. Under no circumstances shall Owner make any payment to Consultant for services that have not been performed or that are performed subsequent to the termination date. Notwithstanding the termination of this Agreement, the parties shall be required to carry out any and all provisions hereof that contemplate performance by the parties subsequent to such termination, and such termination shall not affect any liability or obligation which shall have accrued prior to such termination, including but not limited to any liability for loss or damage on account of failure to perform pursuant to the terms of this Agreement. Upon termination of this Agreement, neither party shall have any further obligation to the other under this Agreement except for (i) obligations accruing prior to the effective date of termination of the Agreement; and (ii) obligations, promises, or covenants in this Agreement which are intended to extend beyond the term of this Agreement including, without limitation, maintaining confidentiality of Confidential Information.

**E. Suspension of Services.** Notwithstanding any other provision of this Agreement, Consultant may, in its sole discretion, and in addition to and not in lieu of any rights or remedies available to it hereunder, suspend provision of the Consulting Services and any additional services, if applicable, if: (a) Owner materially breaches any of its obligations under this Agreement including, without limitation, failure by Owner to pay any amount under this Agreement within forty-five (45) days after the date of receipt of Consultant's invoice therefor; or (b) Consultant determines that Owner may be unable to make any scheduled or expected payment. Any such suspension by Consultant: (i) will not constitute termination of this Agreement unless and until Consultant gives written notice to Owner expressly terminating this Agreement; (ii) will entitle Consultant to reimbursement by Owner for any and all costs and expenses incurred by Consultant in connection with any such suspension; and (iii) may be cancelled or revoked in Consultant's sole discretion.

**F. Return of Materials.** Except as otherwise prohibited or required by Florida law, upon any expiration or termination of this Agreement, each party will return promptly or, at the other party's request, destroy all documents and other tangible objects containing or representing Confidential Information of the other party or deliverables provided by Consultant, except to the extent that such documents must be retained to satisfy auditing or regulatory requirements. If requested by the other party, each party will provide the other party with written certification of compliance with the foregoing obligations.

**G. Public Records Law.** In accordance with Florida Statutes Section 119.0701, Consultant shall comply with all public records laws, and shall specifically:

1. Keep and maintain public records required by the City to perform the service.

a. The timeframes and classifications for records retention requirements must be in accordance with the General Records Schedule GS1-SL for State and Local Government Agencies.

(See <http://dos.dos.state.fl.us/library-archives/records-management/general-records-schedules/>).

b. "Public records" means and includes those items specified in Florida Statutes Section 119.011(12), as amended from time to time, and currently defined as: All documents, papers, letters, maps, books, tapes, photographs, films, sound recordings, data processing software, or other material, regardless of the physical form, characteristics, or means of transmission, made or received pursuant to law or ordinance or in connection with the transaction of official business with the Owner. Consultant's records under this Agreement include but are not limited to, supplier/subcontractor invoices and contracts, project documents, meeting notes, e-mails and all other documentation generated during this Agreement.

2. Upon request from the Owner's custodian of public records, provide the Owner, at no cost, with a copy of the requested records or allow the records to be inspected or copied within a reasonable time at a cost that does not exceed the cost provided for by law. All records kept electronically must be provided to the Owner, upon request from the Owner's custodian of public records, in a format that is compatible with the information technology systems of the Owner.

3. Ensure that records that are exempt or confidential and exempt from public records disclosure requirements are not disclosed except as authorized by law for the duration of the Agreement term and, if Consultant does not transfer the records to Owner following completion of the Agreement, for the time period specified in General Records Schedule GS1-SL for State and Local Government Agencies.

4. Upon completion of the Agreement, transfer, at no cost, to the Owner all public records in Consultant's possession or keep and maintain public records required by the Owner to perform the service. If Consultant transfers all public records to the Owner upon completion of the Agreement, Consultant shall destroy any duplicate public records that are exempt or confidential and exempt from public records disclosure requirements. If Consultant keeps and maintains public records upon the completion of the Agreement, Consultant shall meet all applicable requirements for retaining public records.

5. IF CONSULTANT HAS QUESTIONS REGARDING THE APPLICATION OF CHAPTER 119, FLORIDA STATUTES, TO THE CONSULTANT'S DUTY TO PROVIDE PUBLIC RECORDS RELATING TO THIS AGREEMENT, CONTACT THE CUSTODIAN OF PUBLIC RECORDS AT CUSTODIAN OF PUBLIC RECORDS, 4970 CITY HALL BOULEVARD, NORTH PORT, FLORIDA 34286, (941) 429-7056 OR HOTLINE (941) 429-7270; E-MAIL: [publicrecordsrequest@cityofnorthport.com](mailto:publicrecordsrequest@cityofnorthport.com).

#### IV. Restrictive Covenants.

A. Confidential Information. Owner recognizes and acknowledges Consultant's proprietary rights in and to all information related to Consultant's business including, but not limited to, all tangible, intangible, visual, electronic, present or future information such as (a) trade secrets; (b) financial information, including pricing; (c) technical information, including research, development, procedures, algorithms, data designs, and know-how; (d) business information, including operations, planning, marketing interests, and products and services; and (e) the terms of this Agreement (all collectively referred to as "Confidential Information"), and Owner shall not disclose, furnish, or make accessible to anyone, any of the Confidential Information, directly or

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indirectly, nor use it in any way, except as required in the provision of the Consulting Services and as required by Florida law. Any use or disclosure of any Confidential Information shall be in conformance with any rules or regulations adopted by Consultant with respect to such materials. All such Confidential Information, regardless of source or creation, and all works or materials derived therefrom, shall remain the exclusive property of Consultant. Upon termination of Consultant's engagement or at any time on the request of Consultant, Owner shall deliver promptly to Consultant, without retaining any copies or excerpts therefrom, all Confidential Information and all memoranda, diaries, notes, records, and any other documents relating to the Confidential Information, whether compiled by, developed by, made available to, or otherwise obtained by Owner, unless otherwise required or prohibited by Florida law. Owner does not have an obligation to protect Confidential Information that is: (a) in the public domain through no action of Owner; (b) within the legitimate possession of Owner, with no confidentiality obligations to a third party; (c) lawfully received from a third party having rights in the information without restriction, and without notice of any restriction against its further disclosure; (d) independently developed by Owner without breaching this Agreement; or (e) disclosed with the prior written consent of Consultant. If Confidential Information is required to be produced by law, court order, or government authority, Owner must immediately notify Consultant of that obligation. Owner will not produce or disclose Confidential Information in response to that obligation until Consultant has requested protection from the court or other legal or governmental authority issuing the process and the request has been denied, or consented in writing to the production or disclosure of the Confidential Information in response to the process, or taken no action to protect its interests in the Confidential Information within fourteen (14) business days after the receipt of notice by Consultant of the obligation to produce or disclose. Owner will use the Confidential Information only to further the relationship between the parties. Confidential Information may not be disclosed to any third party without the written consent of Consultant or used by Owner in any manner which may be competitive to Consultant.

**B. Non-Solicitation.** Owner acknowledges and agrees that the employees of Consultant who perform the Consulting Services are a valuable asset to Consultant and are difficult to replace. Accordingly, during the term of this Agreement and for a period of two (2) years thereafter, Owner shall not solicit, whether directly or indirectly, the employment of any Consultant employees without the prior written consent of Consultant. If Owner violates this Paragraph B. of Article IV, the parties agree that Owner shall pay to Consultant as liquidated damages a sum representing six (6) months' pay to such employee calculated based on the amount being paid to employee at the time of such solicitation, including the cost of all benefits, for each employee solicited by Owner. The parties further agree that precise monetary damages for Owner's violation of this Paragraph would be difficult to ascertain and that the foregoing sum represents a fair and conservative approximation of cost of recruitment, hiring and training that would be incurred by Consultant as a result.

**C. Consultant Materials.** Owner acknowledges that in developing or furnishing the Consulting Services, a Deliverable (as defined below), or any other work product, Consultant may utilize pre-existing proprietary methodologies, tools, models, software, procedures, documentation, know-how and processes owned by and proprietary to Consultant ("**Consultant Materials**"). Owner further acknowledges that Consultant may modify or improve Consultant Materials during the course of the provision of the Consulting Services. Client agrees that all such modifications or improvements shall be included within the meaning of "Consultant Materials", unless otherwise specifically agreed by the parties.

**D. Deliverables.** Consultant may prepare documents or deliverables in the course of performing this Agreement, including without limitation, manuals, plans, budgets, reports, concept drawings and specifications ("**Deliverables**"). Owner agrees that Consultant will be the exclusive and sole owner of any and all rights, title, and interest (including, without limitation, any copyright,

patent right, trade secret or other intellectual property right) in and to any Deliverables, Consultant Materials, and any other findings, discovery, reports, invention, machine, output, method, process, technique, creations, work, concept, composition, program, application, code (whether in source or compiled form), formula, equation, or configuration of any kind, as well as any improvement, derivative, registration or application for registration thereto or thereof, whether or not patentable or copyrightable, that Consultant, either alone, or with others, makes, devises, conceives, discovers, reduces to practice or otherwise possesses during the term of this Agreement or thereafter. Owner shall not itself, or through any affiliate, agent, or third party: (a) sell, lease, license, sublicense, distribute or otherwise provide to any third party or any other person the Deliverables or Consultant Materials, in whole or in part; (c) modify or create derivative works of the Deliverables or Consultant Materials; (d) use or reproduce the Deliverables or Consultant Materials, except as specifically permitted under this Agreement; or (e) use the Deliverables or Consultant Materials to provide processing services to any third party. Owner shall not remove, alter, cover or obfuscate any patent, copyright, trademark or other proprietary notices, labels or marks of Consultant on or in the Deliverables or Consultant Materials. Owner shall promptly notify Consultant of any unauthorized use, disclosure, reproduction, or distribution of the Deliverables, which comes to Owner's attention, or which Owner reasonably suspects.

**E. Independent Covenants.** All of the covenants by Owner contained in this Article IV will be construed as agreements independent of any other provision of this Agreement, and the existence of any claim or cause of action against Consultant, whether predicated on this Agreement or otherwise, will not constitute a defense to the enforcement by Consultant of these covenants.

**F. Equitable Remedies.** It is agreed that any breach or default of any of the terms of this Article IV of this Agreement by Owner will result in immediate and irreparable injury to Consultant and will authorize recourse to injunction and/or specific performance as well as to all other legal or equitable remedies to which Owner may be entitled.

**G. Protection of Interest.** It is the intention of the parties to restrict the activities of Owner under this Agreement only to the extent necessary for the protection of legitimate business interests of Consultant, and the parties covenant and agree that should any of the provisions set forth herein, under any set of circumstances, be held by a court of competent jurisdiction to be illegal, invalid, or unenforceable under present or future laws during the term of this Agreement, then and in that event, the court so holding may reduce the business or territory to which it pertains and/or the period of time during which it operates, or effect any other change to the extent necessary to render such restriction enforceable by said court.

**V. Owner Covenants.**

**A. Owner Responsibilities.** Owner will make available in a timely manner for Consultant's use, at no charge to Consultant, all technical data, computer facilities, programs, files, documentation, test data, sample output, or other information, resources, and personnel required by Consultant for the performance of the Consulting Services pursuant to the terms of this Agreement. Owner will be responsible for, and assumes the risk of any issues or damages resulting from the content, accuracy, completeness, competence, or consistency of all computer facilities, programs, files, documentation, test data, sample output, or other information, resources, and personnel supplied by Owner. Owner will provide, at no charge to Consultant, reasonable office space and equipment at the Facility (such as copiers, fax machines and modems) as Consultant requires in performing the Consulting Services. Owner assumes all responsibility for financial and other risks associated with the planning, development, operations and management of the Owner's Facility. Consultant assumes no such liability and Owner hereby fully releases Consultant from all such liability. Owner agrees to seek independent accounting



and legal services that Owner deems necessary for the operation of Owner's Facility.

**B. Duties.**

1. Owner shall comply with all federal and state law, rules, and regulations in connection with the ownership and operation of the Facility.

2. Owner shall obtain and maintain at all times during the term of this Agreement commercial general liability insurance covering operations and premises liability insuring against claims for injuries to persons and damages to property arising from or out of the ownership and operation of the Facility. Owner, on behalf of itself and its insurer, with respect to any claim covered by any insurance policy maintained by Owner, expressly waives all subrogation rights against Consultant and, in the event of a subrogation action brought by Owner's insurer, Owner agrees to indemnify, defend and hold Consultant harmless from such claim.

3. Owner shall comply with the American Red Cross Lifeguard standards, American Red Cross Lifeguard Instructor standards, and consultant recommendations.

**C. Access.** Owner shall provide, and Consultant shall have, access to the Facility to the extent necessary for Consultant to perform the Consulting Services.

**D. Staffing.** Consultant shall have the right to determine which of Consultant's employees, agents, representatives, or subcontractors shall be assigned to perform the Consulting Services, or any part of them, under this Agreement. Consultant shall use reasonable efforts to fulfill Owner's request for specific individuals, subject to scheduling and staffing considerations.

**E. Publicity.** Owner shall not publish or use any advertising, sales promotion, or publicity matters wherein Consultant's name, tradename, trademarks and/or logo(s) are used nor use language pursuant to which the connection of such name, tradename, trademarks and/or logo(s) may, in Consultant's judgment, be inferred or implied, without the prior written approval of Consultant.

**F. Control of Operations.** Nothing contained herein shall be construed to impose any obligation on Consultant for implementation of policies and operation procedures, scheduling, oversight or discipline of employees, facility, equipment, or supply purchase, construction, or maintenance; or supervision or direction of daily operations. Owner shall retain discretion with respect to each of the foregoing.

**VI. Insurance: Liability.**

**A. Insurance.** Consultant shall obtain and maintain throughout the term of this Agreement insurance with coverage and limits as follows:

1. Workers' Compensation Insurance at statutory limits as provided by the state in which the Consulting Services are to be performed, and Employer's Liability Insurance at a limit of not less than Five Hundred Thousand Dollars (\$500,000) for all damages arising from each accident;

2. Comprehensive General Liability Insurance Covering Operations and Premises Liability insuring against claims for injuries to persons or damage to property arising from or out of the Consulting Services performed hereunder by Consultant, its agents, employees or subcontractors. The limits of such liability insurance shall be no less



than Five Hundred Thousand Dollars (\$500,000) combined single limit of liability for each occurrence; and

3. Professional Errors and Omissions Coverage insuring against claims arising from or out of the Consulting Services performed hereunder by Consultant, its agents, employees or subcontractors, with a minimum limit of One Million Dollars (\$1,000,000) per occurrence.

**B. Policy Conditions.** All such insurance shall be carried with companies licensed to do business in the jurisdiction where the Consulting Services are to be performed, and such policies shall name Owner as an additional insured.

**C. Limitation of liability.** Notwithstanding anything contained herein to the contrary, in no event will Consultant be liable for any indirect, special, incidental, consequential, exemplary or punitive damages or costs of procurement of substitute goods or services arising out of or related to this Agreement, including but not limited to damages for lost data, revenue or profits, however caused and arising under any theory of liability, including but not limited to contract or tort (including products liability, strict liability, and negligence), and whether or not such party was or should have been aware or advised of the possibility of such damage. In no event shall Consultant's aggregate liability arising out of or related to this Agreement exceed the net amount Consultant has actually received from Owner pursuant to this Agreement.

**D. No Warranty.** EXCEPT AS EXPRESSLY SET FORTH HEREIN, CONSULTANT MAKES NO REPRESENTATIONS, WARRANTIES, OR CONDITIONS OF ANY KIND, WHETHER ORAL OR WRITTEN, WHETHER EXPRESS, IMPLIED, OR ARISING BY STATUTE, CUSTOM, COURSE OF DEALING OR TRADE USAGE, WITH RESPECT TO THE SUBJECT MATTER OF THIS AGREEMENT OR IN CONNECTION WITH THIS AGREEMENT. CONSULTANT SPECIFICALLY DISCLAIMS ANY AND ALL IMPLIED WARRANTIES OR CONDITIONS OF MERCHANTABILITY, AND FITNESS FOR A PARTICULAR PURPOSE.

**E. Legal Compliance.** To the extent the Consulting Services, Consultant Materials, and Deliverables to be provided by Consultant are subject to legal requirements, Consultant makes no representation or warranty regarding compliance with any applicable laws or regulations. Owner will consult with and rely on its legal counsel for determination of compliance with all laws and regulations. Owner understands and agrees that Consultant is an aquatic operations consulting firm, and is not licensed to sell securities, is not a licensed accounting practice, and is not licensed to practice law.

**F. Indemnity.**

1. TO THE EXTEND PERMITTED BY FLORIDA LAW, OWNER AGREES, AT ITS SOLE COST AND EXPENSE, TO PROTECT, DEFEND, INDEMNIFY AND SAVE HARMLESS CONSULTANT, ITS OFFICERS, DIRECTORS, MEMBERS, MANAGERS, AGENTS, EMPLOYEES, SUBCONTRACTORS, PARENTS, SUBSIDIARIES, SUCCESSORS, ASSIGNS, AND AFFILIATES ("CHO PARTIES") FROM AND AGAINST ALL LIABILITIES, OBLIGATIONS, CLAIMS, DAMAGES, PENALTIES, CAUSES OF ACTION, AND OTHER COSTS AND EXPENSES (INCLUDING, WITHOUT LIMITATION, REASONABLE ATTORNEYS' AND PARALEGALS' FEES, CONSULTANT'S FEES, INVESTIGATION, EXPERT FEES, COURT COSTS AND LITIGATION EXPENSES), IMPOSED UPON OR INCURRED BY OR ASSERTED OR ASSESSED AGAINST THE CHO PARTIES, ARISING OUT OF OR RELATED IN ANY WAY TO OWNER'S OWNERSHIP OR OPERATION OF THE FACILITY OR A BREACH OF THIS AGREEMENT BY OWNER, NOTWITHSTANDING ANYTHING CONTAINED HEREIN TO THE CONTRARY.

2. TO THE EXTENT PERMITTED BY FLORIDA LAW, THE CONSULTANT ASSUMES ALL LIABILITY FOR, AND RELEASES AND AGREES TO DEFEND, INDEMNIFY, PROTECT, AND HOLD HARMLESS THE OWNER, ITS COMMISSIONERS, OFFICERS, AGENTS, AND EMPLOYEES, FROM ALL LIABILITIES, FINES, CLAIMS, ASSESSMENTS, SUITS, JUDGMENTS, DAMAGES, LOSSES AND COSTS, INCLUDING CONSEQUENTIAL, SPECIAL, INDIRECT, AND PUNITIVE DAMAGES, (INCLUDING, BUT NOT LIMITED TO, REASONABLE ATTORNEYS' FEES AND COURT COSTS, WHETHER SUCH FEES AND COSTS ARE INCURRED IN NEGOTIATIONS, AT THE TRIAL LEVEL OR ON APPEAL, OR IN THE COLLECTION OF ATTORNEYS' FEES), ARISING OUT OF ANY ACTS, ACTIONS, BREACHES, NEGLIGENCE OR OMISSIONS OF THE CONSULTANT, OR CONSULTANT'S OFFICERS, EMPLOYEES, AGENTS, SUBCONTRACTORS, SUB-CONSULTANTS, AND OTHER PERSONS EMPLOYED OR UTILIZED BY THE CONSULTANT IN THE PERFORMANCE OF, OR THE FAILURE TO PERFORM, THE AGREEMENT. THIS AGREEMENT DOES NOT CONSTITUTE A WAIVER OF SOVEREIGN IMMUNITY OR CONSENT BY THE OWNER OR ITS SUBDIVISIONS TO SUIT BY THIRD PARTIES.

3. THE OWNER MUST PROVIDE ALL AVAILABLE INFORMATION AND ASSISTANCE THAT THE CONSULTANT MAY REASONABLY REQUIRE REGARDING ANY CLAIM. IN THE EVENT OF A CLAIM, OWNER MUST PROMPTLY NOTIFY THE CONSULTANT IN WRITING BY PREPAID CERTIFIED MAIL (RETURN RECEIPT REQUESTED) OR BY DELIVERY THROUGH ANY NATIONALLY RECOGNIZED COURIER SERVICE (SUCH AS FEDERAL EXPRESS OR UPS) WHICH PROVIDES EVIDENCE OF DELIVERY, AT THE ADDRESS PROVIDED FOR RECEIPT OF NOTICES IN THIS AGREEMENT.

4. THIS AGREEMENT FOR INDEMNIFICATION SURVIVES TERMINATION OR COMPLETION OF THE AGREEMENT. THE INSURANCE COVERAGE AND LIMITS REQUIRED IN THIS AGREEMENT MAY OR MAY NOT BE ADEQUATE TO PROTECT THE CLIENT AND SUCH INSURANCE COVERAGE WILL NOT BE DEEMED A LIMITATION ON THE CONSULTANT'S LIABILITY UNDER THE INDEMNITY PROVIDED IN THIS SECTION. IN ANY PROCEEDINGS BETWEEN THE PARTIES ARISING OUT OF OR RELATED TO THIS INDEMNITY PROVISION, THE PREVAILING PARTY SHALL BE REIMBURSED ALL COSTS, EXPENSES AND REASONABLE ATTORNEY FEES THROUGH ALL PROCEEDINGS (AT BOTH TRIAL AND APPELLATE LEVELS).

5. NOTHING IN THIS AGREEMENT SHALL BE DEEMED TO AFFECT THE RIGHTS, PRIVILEGES, AND IMMUNITIES OF THE CLIENT AS SET FORTH IN FLORIDA STATUTES SECTION 768.28.

6. THE TERMS OF THIS SECTION SURVIVE THE TERMINATION OF THIS AGREEMENT.

**G. Force Majeure.**

1. Should performance of any obligation created under this Agreement become illegal or impossible by reason of:

- a) A strike or work stoppage, unless caused by a negligent act or omission of any party;
- b) An act of God, tornado, hurricane, flood, sinkhole, fire, explosion, landslide, earthquake, epidemic, pandemic, quarantine, pestilence, or extremely abnormal and excessively inclement weather;
- c) An act of a public enemy, act of war, terrorism, effect of nuclear radiation, blockage, insurrection, riot, civil disturbance, state of martial law, or national or international calamity;
- d) A declared emergency of the federal, state, or local government; or
- e) Any other like event that is beyond the reasonable control of the non-performing party;

then the performance of any such obligation is suspended during the period of, and only to the extent of, such prevention or hindrance, provided that:

- f) The non-performing party provides written notice within five (5) days of the event of *force majeure*, describing the event in sufficient detail, including but not limited to: the nature of the occurrence, a good faith estimate of the duration of the delay, proof of how the event has precluded the non-performing party from performing, and the means and methods for correcting the delay; and continues to furnish timely reports of all actions required for it to commence or resume performance of its obligations under this Agreement;
  - g) The excuse of performance is no greater in scope or duration than required by the event of *force majeure*;
  - h) No obligations of either party that arose before the *force majeure* are excused as a result of the event of *force majeure*; and
  - i) The non-performing party uses all reasonable diligence to remedy its inability to perform.
2. Economic hardship of a party does not constitute an event of *force majeure*. A party will not be excused from performance due to forces that it could have reasonably prevented, removed, or remediated prior to, during, or immediately after their occurrence.
3. The non-performing party's affected obligations under this Agreement will be temporarily suspended during, but not longer than, the continuance of the event of *force majeure* and a reasonable time thereafter as may be required to commence or resume performance of its obligations. Notwithstanding the above, performance shall not be excused under this Section for a period exceeding two (2) months, provided that in extenuating circumstances, the City may excuse performance for a longer term.

4. The term of the Agreement will be extended by a period equal to that during which the non-performing party's performance is suspended under this Section.

**VII. Miscellaneous.**

**A. Authority to Execute Agreement.** The signature by any person to this Agreement shall be deemed a personal warranty that the person has the full power and authority to bind any corporation, partnership, or any other business or governmental entity for which the person purports to act hereunder.

**B. Binding Effect/Counterparts.** By the signatures affixed hereto, the parties intend to be bound by the terms and conditions hereof. This Agreement is binding upon and shall inure to the benefit of the parties and their respective heirs, executors, administrators, successors and assigns. It may be signed in counterparts.

**C. Entire Agreement.** This Agreement, including any specified attachments, constitutes the entire agreement between Owner and Consultant with respect to the Consulting Services for the Facility and supersedes and replaces any and all previous agreements entered into or/and negotiated between Owner and Consultant relating to the Facility. No amendment to this Agreement shall be valid unless made by supplemental written agreement executed and approved by Owner and Consultant. Except as otherwise provided herein, any and all amendments, additions, or deletions to this Agreement shall be null and void unless approved by Owner and Consultant in writing. Each party to this Agreement hereby acknowledges and agrees that the other party has made no warranties, representations, covenants, or agreements, express or implied, to such party, other than those expressly set forth herein, and that each party, in entering into and executing this Agreement, has relied upon no warranties, representations, covenants, or agreements, express or implied, to such party, other than those expressly set forth herein.

**D. Rights Cumulative: No Waiver.** No right or remedy herein conferred upon or reserved to either of the parties to this Agreement is intended to be exclusive of any other right or remedy, and each and every right and remedy shall be cumulative and in addition to any other right or remedy given under this Agreement or now or hereafter legally existing upon the occurrence of an event of default under this Agreement. The failure of either party to this Agreement to insist at any time upon the strict observance or performance of any of the provisions of this Agreement, or to exercise any right or remedy or be construed as a waiver or relinquishment of such right or remedy with respect to subsequent defaults. Every right and remedy given by this Agreement to the parties may be exercised from "time to time" and as often as may be deemed expedient by those parties.

**E. Applicable Law.** The laws of the State of Florida govern the rights, obligations, and remedies of the parties under this Agreement. The exclusive venues for any legal or judicial proceedings in connection with the enforcement or interpretation of this Agreement are the Circuit Court of the Twelfth Judicial Circuit in and for Sarasota County, Florida and the United States District Court for the Middle District of Florida.

**F. Acknowledgement.** The parties hereto acknowledge that they have been provided with a copy of this Agreement for review prior to signing it, that they have been given the opportunity to review it prior to signing it, that they have been given the opportunity to have this Agreement reviewed by their attorney prior to signing it, and that they understand the purposes and effect of this Agreement.

**G. Severability.** If any provision or portion thereof, of this Agreement is found to be invalid, unlawful or unenforceable to any extent, such provision of this Agreement will be enforced

to the maximum extent permissible by applicable law so as to affect the intent of the parties, and the remainder of this Agreement will continue in full force and effect. The parties will negotiate in good faith an enforceable substitute provision for any invalid or unenforceable provision that most nearly achieves the intent and economic effect of such provision.

H. **No Agency.** Nothing contained herein shall be deemed or construed as creating the relationship of principal and agent, or of partnership or joint venture, between the parties, it being understood and agreed that no provision contained herein, or any acts of the parties shall be deemed to create any relationship between them other than that as detailed herein.

I. **Amendment.** No amendment, change, or addendum to this Agreement is enforceable unless agreed to in writing by both parties and incorporated into this Agreement. Any amendments changing Owner's financial obligations under this Agreement shall require approval by the City Commission. The City Commission hereby authorizes the City Manager or City Manager's authorized designee to approve and execute all Agreement amendments on behalf of Owner that do not change Owner's financial obligations under this Agreement.

J. **Assignment.** Consultant shall not assign this Agreement or any right or responsibility herein unless with the written consent of the Owner.

K. **Non-Discrimination.** The City of North Port, Florida does not discriminate on the basis of race, color, national origin, sex, age, disability, family, or religious status in administration of its programs, activities, or services. Consultant shall not administer this Agreement in an unlawfully discriminatory manner, nor deny participation in or the benefits of same to any individual based on that individual's race, color, national origin, sex, age, disability, family or religious status, marital status, sexual orientation, gender identity or expression, or physical characteristic.

H. **No Third Party Beneficiary.** The terms of this agreement are enforceable by the parties, but are not enforceable by any third party. Nothing contained herein shall, or shall be construed, to create any rights in any third party.

I. **Independent Contractors.** The relationship of the parties under this Agreement is that of an independent contractor. Neither party will be deemed to be an employee, agent, partner, franchisor, franchisee nor legal representative of the other for any purpose and neither will have any right, power or authority to create any obligation or responsibility on behalf of the other.

J. **Notices.** Any notice or other communication required or permitted hereunder shall be in writing and shall be delivered personally or sent by certified, registered or express mail, postage prepaid. Any such notice shall be deemed given on the date delivered personally, or if mailed, three (3) days after the date of deposit in the United States mail, addressed to Owner or Consultant, as applicable, at the address set forth below such party's signature.

K. **Execution.** This Agreement may be executed and delivered by facsimile and the parties agree that such facsimile execution and delivery will have the same force and effect as delivery of an original document with original signatures, and that each party may use such facsimile signatures as evidence of the execution and delivery of this Agreement by all parties to the same extent that an original signature could be used.

L. **Survival.** All provisions of this Agreement that, judging by their terms and context, are intended to survive, shall survive the termination of this Agreement.

***The remainder of this page is intentionally left blank***

IN WITNESS WHEREOF, the parties have caused this Agreement to be executed as of the day and year first above written.

**CONSULTANT:**

**COUNSILMAN-HUNSAKER**, a Missouri limited liability company

By: \_\_\_\_\_

Name: Miklos Valdez

Title: Studio Director - CHAMP

Address: 10733 Sunset Office Drive  
Suite 400  
St. Louis, Missouri 63127-1018

Approved by the City Commission of the City of North Port, Florida on \_\_\_\_\_, 2022.

**OWNER: CITY OF NORTH PORT, FLORIDA**

By: \_\_\_\_\_  
A. Jerome Fletcher, II, ICMA-CM, MPA  
City Manager

ATTEST

\_\_\_\_\_  
Heather Faust, MMC  
City Clerk

APPROVED AS TO FORM AND CORRECTNESS

\_\_\_\_\_  
Amber L. Slayton  
City Attorney