

MANAGEMENT AGREEMENT

This **MANAGEMENT SERVICES AGREEMENT** (hereafter, the "Agreement") is entered into as of July 1, 2016 (the "Effective Date") by and between HEALTH WORKS, INC., (hereafter "HSW"), and the TOWN OF HUNTERSVILLE, a North Carolina Municipal Corporation (hereafter "Town").

STATEMENT OF PURPOSE

HSW and Town have previously entered into a Management Agreement effective as of March 4, 2002 for HSW to provide management services to the Huntersville Family Fitness & Aquatics Center ("HFFA"). The parties wish to amend and renew that agreement by an Amended and Restated Management Agreement dated as of July 1, 2016 (collectively, the March 4, 2002 agreement the July 1, 2006 and July 1, 2011 agreements are referred to as "Present Agreement"). The term of the Present Agreement ends as of June 30, 2016. The Present Agreement provides that Town shall have the option to renew the Present Agreement for an additional year, basically on the same terms as the Present Agreement except for an increase in the base management fee. Town has exercised the option to renew and extend the renewal through this amended agreement. Both HSW and Town have mutually agreed that, for the purpose of clarity of the rights and obligations of the respective parties that an extended renewal term is in both parties best interest.

AGREEMENT

For the considerations set forth in this Agreement, the Town and HSW do hereby agree as follows:

1. **Scope of Services.** HSW shall be responsible for and provide full and complete management of HFFA (except as may be limited elsewhere in this Agreement) including programming, staffing, marketing, scheduling, accounting and financial services, maintenance, long-range planning and any other services necessary for the management of HFFA. Without limiting the generality of the foregoing, HSW shall provide all of those services set forth elsewhere in this Agreement and on Schedule A, attached hereto.
2. **Facility Management and Staffing.**
 - a. HSW will provide complete facility management for the hours of operation of the facility. The hours of operation will be established by the Town after consultation and in consideration of the recommendations of HSW and a management team to be established by HSW and Town. It is understood that staffing hours and hours of operation may vary seasonally and be subject to change from time to time. It is anticipated that thirty (30) days' notice will be given to HSW prior to any major, permanent schedule changes in order for HSW to adjust staffing requirements. Short term, temporary changes in schedule may require less advance notice, but such advance notice shall be done as soon as possible.

- b. HSW staff may honor the following holidays: Christmas Day, New Year's Day, Independence Day, Labor Day, Memorial Day, Easter Sunday and Thanksgiving Day. If staffing is to be required on such holidays, such affected staff shall be paid, and Town will be billed at regular staffing rates.
- c. Except as otherwise provided, all full-time and part-time staff will be employees of HSW, and will be comprised of degree or degree candidate instructors and/or instructors nationally certified to appropriate professional organizations in their respective areas. At their discretion, and from time to time, HSW may substitute criteria of experience and demonstrated knowledge in providing acceptable staff. The staff may include, but not limited to health educators, dietitians, group exercise instructors, massage therapists, exercise specialists, lifeguards, swim instructors, aquatic leaders, child care providers, business office specialists and other customer service specialists.
- d. It is intended by HSW that professional staff, after a 90 day probationary period may be bound by and subject to a reasonable non-compete agreement in order to insure a continuity of help within the target geographical area, but that any employee terminated during the probationary period shall not be subject to any such non-compete agreement. Such agreement will, however, be between HSW and staff, and shall be enforced by HSW.
- e. Notwithstanding, Town retains the right to have an employee or employees for financial purposes, which staff person shall report directly to Town Finance Director, whose job description shall be mutually agreed to and who shall have reporting responsibility to the Facility Manager.

3. Operational Management.

HSW will collect, and as available maintain for the Town all facility maintenance records, facility services, maintain and purchase supplies and consumable goods. HSW will follow Town's purchasing rules and regulations, specifically including the provision that all purchases exceeding \$1,000 shall be submitted to Town for a purchase order. Notwithstanding, all purchases, whether by HSW or by Town, shall at all times be subject to applicable North Carolina purchasing and bid laws, if appropriate.

4. Management Fees.

- a. Base Fee. Beginning with the Effective Date, Town will pay HSW an annual base fee of \$183,564, payable in equal monthly installments. Said management fee shall increase at a rate of 3% annually for the length of the agreement. This base fee, plus up to \$50,000 at-risk performance fees provided for in paragraph 4b, shall be inclusive of all fees payable to HSW for services rendered pursuant to this Agreement. These fees shall not be inclusive of reimbursable expenses as provided for in this Agreement, which shall continue to be charged and billed as provided for in this Agreement.
- b. At Risk Performance Fee. In addition to the Base Fee, HSW may earn and be paid an at-risk performance fee based upon the degree of attainment of pre-determined goals. The annual performance fee shall not exceed \$50,000. This fee shall be determined following the close of each contract year upon an evaluation by the Town and HSW of the extent to which HSW has attained the goals. The present matrix for evaluating this performance is attached hereto as Schedule B, provided that the parties may mutually agree to modify this matrix from time to time without having to amend this Agreement. Based upon a maximum at risk

performance fee of \$50,000, the parties shall determine the portion thereof that HSW has earned in attaining the performance goals and such amount shall be payable as a lump sum payment. Payment of at risk award shall be paid on or before December 31st, each year and/or within 30 days of the audited financial statements being presented to the board and shall be based on a budgetary basis performance excluding capital, debt service and unexpected maintenance.

- c. Profitability. In the event that HFFA reaches a point at which it becomes profitable, Town will in good faith consider, but has no obligation to make, additional compensation to HSW based upon HSW's efforts in attaining such status. For these purposes, profit shall mean the amount by which income generated from the operation of the facility exceeds all expenses and costs which are an obligation of the Town, including expenses and fees under this Agreement and the institutional debt service on the facility. Expense does not include the funds transferred by Town's general fund to the HFFA enterprise fund, but the extent to which the excess funds may be used to restore such amounts to the general fund may be considered in determining whether to award this additional compensation, which shall be solely in Town's good faith discretion.

5. Financial and Accounting.

- a. HSW will prepare and submit a proposed operating budget for the facility prior to Town's annual budget process. Town will have overall and final determination of the budget to be established pursuant to its budgetary requirements under State law. HSW will maintain operation accounting and sales records and will provide reports to the Town upon 30 days written notice. Any deviations from the adopted budgets will require approval by Town.
- b. In addition to management fees, Town will be responsible for non-service related operational expenses, including but not limited to contract janitorial or custodial services, equipment purchases and maintenance, computer hardware and software, copies, phone service, office supplies and furniture, uniforms and other similarly related items, all to be determined by the normal municipal budgetary process under the guidance of Town's Finance Director. Town will not be responsible for any proportionate share of HSW corporate office overhead, the same being included with the management fee paid to HSW.
- c. Town will reimburse HSW for workers compensation premiums required by paragraph 7 of this Agreement, provided HSW has obtained coverage from a company reasonably approved by Town at best available rates.
- d. Town will reimburse HSW for certain portions of increased premiums for professional and general liability insurance policies attributable solely to its management of the Facility. Based upon the current premium, HSW will absorb and be responsible for the first ten percent (10%) of such increase annually and Town shall reimburse HSW for the increase in excess of ten percent (10%). Increases for successive years shall be based upon the adjusted premium for the preceding year. Nevertheless, HSW's obligation to absorb the first ten percent (10%) shall be annualized and cumulative, so that if, for example, there are no increased premiums above the then current premium for three (3) years, HSW's obligation shall have accrued at ten percent (10%) per year, and there is then an increase for the fourth year, HSW shall be responsible for all of the increased premium up to thirty percent (30%) of the current base and Town will reimburse it for the excess amounts. Town's obligation is conditioned upon

HSW obtaining coverage from a company reasonably approved by Town at best available rates.

- e. Accounting. HSW shall review, approve and prepare cash disbursement documents for payment of HFFA invoices in accordance with Town's financial procedures. Cash receipt reports, along with the cash, shall be prepared and brought to Town's finance department on a daily basis. HSW will work with Town's financial staff in preparing year-end financial information needed for the annual audit.
- f. Invoicing. HSW shall invoice Town monthly for management fees, staff costs, and reimbursable expenses. Management fees and staffing fees will be paid on or before the first of each month for that current month's service. Any variances in actual staff costs within that month will be adjusted on the following month's invoice, showing the debit or credit adjustment, whichever is applicable, as a separate line item. All salaried employees shall work forty (40) hour weeks on behalf of HFFA (subject to normal vacation, sick leave, etc.). A reconciliation report of employees' gross wages and salaries, health care insurance fees, employer payroll taxes and other applicable payroll costs will be provided. Town shall pay for non-employee expenses associated with service operations that fall within the budgetary guidelines without requiring prior approval as long as single expenses do not exceed the amounts defined in the section entitled Operational Management. Any expenses that are outside of the budget will not be purchased until the Town has consented thereto and adjusted the budget accordingly. Invoices shall be due on the first of each calendar month. Town shall have the right to examine all reimbursable expenses, including payroll, at any reasonable time and such reasonable location as Town requests, including summary payroll reports. Town shall reasonably reimburse HSW for the additional cost of running a separate summary payroll for HFFA for the specific purpose of auditing. Audit-able payroll reports shall be provided for inspection at an HSW determined location and shall be marked as proprietary trade information and confidential, may not be copied and shall only be used for the purpose of validating invoicing. Departmental employees will be identified by employee number only so as to reasonably protect private company information and data. Auditable reports will be made available upon request with 30 day notice.

6. Indemnity.

- a. HSW will indemnify and save harmless the Town, officers, employees and agents, from and against all liabilities, claims, costs, damages, expenses, losses and attorney fees arising from or alleged to have arisen from any act or omission of HSW, or any of its officers, directors or employees, arising out of or in connection with the performance of their duties under this Agreement.
- b. To the extent permitted by law, Town will indemnify and hold harmless HSW, its officers, directors and employees from and against any and all liabilities, claims, costs, damages, expenses, losses and attorney fees arising from or alleged to have arisen from any act or omission of Town or any of its officers, directors, or employees arising out of or in connection with the performance of their duties under the Agreement.

- 7. Insurance.** HSW will maintain all workers compensation insurance on all of its employees according to North Carolina law, and will provide Town with a valid Certificate of Insurance showing proof of said insurance. HSW will additionally maintain, or cause to be maintained, liability insurance for its employees for any liability which may arise during the course of the performance of their duties, whether on premises or off premises, with a minimum liability limit of \$1,000,000.00, and shall provide that Town is an additional insured thereunder. Town will likewise maintain public liability insurance with a minimum liability limit of \$1,000,000.00.
- 8. Term of Agreement.**
- a. This Agreement shall become effective on July 1, 2016 and shall continue in effect until June 30, 2021, unless terminated as hereafter provided. Additionally, Town shall have the option to renew this Agreement for three (3), additional two (2) year terms, on the same terms and conditions as this Agreement.
 - b. If Town desires to exercise its option to renew, it shall do so by giving notice to HSW at least 120 days in advance of the end of the term of this Agreement, or any renewal term. If Town does not exercise its option, then this Agreement shall terminate at the end of its term and there shall be no further obligation between the parties. In the event Town does exercise its option to renew, this Agreement remains in effect for said three (3) year term.
 - c. Notwithstanding any provision herein, the Town reserves the right to terminate the Agreement with or without cause at any time. In the event the Town terminates the Agreement without cause effective either prior to or subsequent to, but not on July 1, 2019, Town will pay a termination fee equal to six (6) months base management fees, and eight weeks severance for department heads in addition to any and all accrued managements fees until the time of the termination of service. If the termination date is July 1, 2019, Town may terminate without cause and without paying any termination fee. In such events, Town shall reimburse HSW for any expenses or obligations incurred by HSW pursuant to and authorized by this Agreement prior to said termination, and shall further give HSW ninety (90) days' notice of such July 1, 2019 termination.
 - d. If the Agreement is terminated for cause because of the default of HSW in its performance of the Agreement as provided in Paragraph 9, then no termination fee shall be payable provided town has met the provision for curing default as described in paragraph 9 below. Default shall include, but not be limited to, failure to perform the services described in paragraph 1 of this Agreement in the manner specified in that paragraph.
 - e. If the facility is destroyed or damaged by any casualty or condemnation to the extent that the facility cannot substantially continue operation, and such damage cannot readily be restored in sixty (60) days, then either party may terminate this Agreement without any obligation to the other party.
 - f. If the underlying lease with Mecklenburg County is terminated, this Agreement will be deemed terminated as of the effective date of the termination of the underlying lease, without any termination fee being payable to HSW. Town will give HSW notice of such termination within 10 days after receiving any termination notice from Mecklenburg County.
- 9. Default.** In the event of default by either party, the other party shall notify the defaulting party of the default, and the defaulting party shall have thirty (30) days in which to remedy such default. During this period of time, the Agreement shall continue in full force and effect. If the default is not cured by the expiration of the thirty (30) days, this Agreement may be terminated,

and the non-defaulting party shall have all remedies available to it in either law or equity against the defaulting party. The parties herewith stipulate, however, in the event of an unresolved default, the manner shall be submitted to non-binding arbitration or mediation prior to filing any suit or proceeding to force the remedies.

10. Controlling Principles and Agreements.

- a. The facility shall always be operated as a public facility, and HSW will, at all times, manage the facility as such, and will take no action that would be deemed discriminatory or not afford equal opportunities for full participation according to the policies established by Town.
- b. This Agreement is subject to the provisions of the above referred lease agreement with Mecklenburg County and the Town of Huntersville which provides, in part, the facility is a "joint venture" of the Town of Huntersville and Mecklenburg County, that Town and the county agree that their staffs shall engage in program coordination and joint planning, and any other provisions therein. Said lease is a matter of public record and HSW shall abide by any applicable provisions.
- c. The facility shall not be managed in such a manner as would constitute a default in the terms and conditions of any Installment Financing Agreements for the facility or any replacement financing.
- d. The Town has entered into certain contracts for the usage of the facility and such contracts, as well as any other usage contracts that the Town may enter into, will be honored by HSW in planning and managing the facility. However, any Town Board decision affecting the operation of the facility will involve consultation with HSW to determine the impact of such decision on this Agreement.
- e. It is understood that Town, at all times, retains the right of final decision on the use of the facility and that HSW does not have the right to make a binding obligation on behalf of the Town except as may be specifically delegated in this Agreement or in subsequent action of the Town. HSW manager has the authority to execute certain maintenance and supply contracts. Contracts must be pre-audited prior to signature under the requirement of current law.

11. Non-Compete. HSW agrees that during the term of this Agreement, or during any subsequent extension, "winding up" period, or period until the final determination of any default and its remedy, HSW will not offer, or contract with, or provide management and marketing services to any other public health, fitness, or aquatic center or facility within a five (5) mile radius of the facility, unless Town has given prior consent to such provision of services. In determining whether or not to give its consent, Town may consider any likely adverse impact on or any benefit to the Town's Facility.

12. Notices. Any notice required or permitted under this Agreement shall be in writing and shall be deemed given two (2) days following the time it is deposited either in the US mail with sufficient postage prepaid, certified or registered mail, return receipt requested, or deposited in a recognized overnight service, such as Federal Express, or United Parcel Service, and addressed to the party to whom it is given as follows:

- a. To HSW: Ansle Hudson, 19219 Betty Stough Road, Cornelius, North Carolina 28031, and Dee Jetton, 11725 Verhoeff Drive, Huntersville, NC 28078

- b. To Town: Town of Huntersville, Attn: Town Manager, Post Office Box 664, Huntersville, North Carolina 28070, or Town of Huntersville, Attention Town Manager, 101 Huntersville-Concord Road, Huntersville, North Carolina 28078.

13. Governing Law. All questions relating to the construction and validity of the Agreement and its enforceability shall be governed by and construed and enforced under the laws of the State of North Carolina, and the sole venue for any dispute shall be a State or Federal Court in Mecklenburg County, North Carolina.

14. Independent Contractor. It is understood that HSW is an independent contractor and that this Agreement shall not be construed as creating a relationship of employment, partnership or joint venture. Each party shall be responsible for the conduct of its respective employees and agents in connection with the performance of its obligations.

15. Assignment. This is a personal service contract and may not be assigned by HSW except with the consent of the Town Board.

16. Miscellaneous.

- a. HSW and the Town agree that Town shall give at least an annual review for each year of the contract, and semi-annual or quarterly reviews if either deems appropriate. Each party shall designate the individuals to conduct the review process on their behalf.
- b. External marketing materials, uniforms and logos bearing the Town or facility name, representative of and/or used in conjunction with the services provided, must be approved by the Town in advance. Town shall provide a single point of contact for all such approvals.
- c. Facility logos, exact external marketing materials and uniforms, shall remain the property of Town at the termination of this Agreement. All marketing and membership lists developed by HSW (whether pursuant to this Agreement or the separate sales and marketing agreement) shall be and remain the property of Town and not used by HSW for any other purpose, either during or following termination of this Agreement and the sales and marketing agreement, unless Town gives its consent thereto.
- d. HSW maintains the right to certain proprietary programs that may be developed for the global business that may also benefit HFFA members. The only program that meets this qualification at the time of this agreement is the Pure Choice Training Education and Training System and the "Lose It" and supporting "It" group exercise programs. Carolina Diving Academy, Carolina Synchro and TAC - Triathlon Academy of the Carolinas are also programs provided by HSW employees and said services may be provided at other locations provided such locations are not in direct conflict with HFFA operations. Licensure of these and other service programs are waived to HFFA as a part of the management fee. Continuation of such programs without a management agreement is subject to a licensing fee and usage agreement. HSW shall keep an annual updated list of programs and services that requires licensure. Certain programs may require an independent memorandum of understanding to protect the interests of all parties.
- e. E-VERIFY. HSW shall comply with the requirements of Article 2, Chapter 64 of the NC General Statutes. Further, HSW shall require any subcontractor it utilizes to comply with the requirements of Article 2, Chapter 64 of the NC General Statutes.

IN WITNESS WHEREOF, the parties have executed this Agreement as of the Effective Date set forth above.

HEALTH WORKS, INC.

By: _____

Ansle Hudson

ATTEST:

TOWN OF HUNTERSVILLE

Janet Pierson, Town Clerk

(Corporate Seal)

Greg Ferguson, Town Manager

This instrument has been pre-audited in the manner required by the Local Government and Fiscal Control Act.

Janet Stoner, Town Finance Director

Scope of Services

HSW shall provide complete facility management to include but not be limited to the following:

- Cooperative budgeting for the facility with the Town following the Town's schedule and process for approval
- Manage the budget according the Town guidelines and compliance orders
- Hire, employ and manage all aspects of all staff member's employment with the exception of the Town's provision of a business office manager should Town desire to employ their own.
 - Participate in the management of and review of Town's appointed business office manager
- Manage all tenant, vendor and service contracts for the building, keeping Town staff apprised of any major changes to these relationships
- Supervise the maintenance of the building and grounds to mutually agreed upon standards as determined by periodic mutual inspection processes
- Develop and implement the internal and external marketing and sales processes for the center
- Develop and implement: membership plans and programs, fitness, aquatic and children's services programs and services that keep HFFA competitive in the marketplace and increase non-dues revenue
- Survey and collect feedback from members and service users on a periodic and as needed basis to assist with continuous quality improvement
- Comply with Town's requirements and requests related to financial recording and reporting
- Build and maintain cooperative and mutually beneficial community partnerships for the purpose of improving the health and well being of the general community, visitors and guests.
- Maintain financial data, membership data and program utilization for the purpose of reporting and business analysis.
- Attend Town staff and board meetings as needed and requested

HFFA Metrics with Recommended Goals

1. Maintain or increase net membership level based on budgetary requirements

Net memberships are the metric.	Weight	15%
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2. Increase non-dues revenue per budgetary requirements

Revenues are the metric	Weight	15%
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3. Revenues exceed expenses excluding unexpected maintenance and major capital

Budget is the metric,	Weight	60%
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4. Maintain member satisfaction (Overall quality of service – survey) 85% or better.

Metric is member survey	Weight	10%
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