

THE STATE OF TEXAS §

Use Agreement

COUNTY OF TARRANT §

KNOW ALL MEN BY THESE PRESENTS:

THIS USE AGREEMENT FOR RECREATIONAL CENTER FACILITIES (hereinafter referred to as "Agreement") is made and entered into on this the 1<sup>st</sup> day of September 2009, by and between **CEDAR HILL INDEPENDENT SCHOOL DISTRICT (CHISD)** (hereinafter referred to as "USER") and the **CITY OF ARLINGTON**, a municipal corporation of the State of Texas, (hereinafter referred to as "CITY"), acting by and through its City Manager or his designee.

W I T N E S S E T H :

For and in consideration of the prompt and timely payment of the license fees specified herein, and in consideration of the mutual covenants, responsibilities and duties herein contained, the parties hereto do mutually agree as follows:

**I.**  
Grant of License

CITY does hereby grant a non-exclusive license to USER for the use of certain real property known as the Hugh Smith Indoor Pool, in an area to be designated by the Director of Parks and Recreation or his appointed designee (hereinafter referred to as "Premises"), during the term of this Agreement and any extension or renewal thereof.

USER shall use the Premises only for the following specified purpose: **Coaching school-related swim team practices.**

USER covenants and agrees it will not engage in any business or activity on the Premises or do anything in connection therewith which shall be in violation of any existing State, Federal or Local law.

**II.**  
Term

This Agreement shall commence on 1<sup>st</sup> day of September 2009 and terminate on the 28<sup>th</sup> day of May 2010 unless terminated earlier in accordance with the terms of this Agreement.

USER shall have the right to access and utilize such areas as are designated by the Director of Parks and Recreation or his appointed designee. USER shall have all equipment removed from the pool and have all participants out of the pool by the end of each session noted below. In no event shall USER allow a session to run over or shall USER not have all equipment removed from the pool by the end of each session or USER shall

pay to CITY as damages caused by delays the amount of \$25.00 per fifteen minutes. USER agrees to vacate designated area within times defined in **Exhibit A**.

USER will have the right to access and utilize designated areas of the Premises in accordance with **Exhibit A**.

The facility will not be available on city holidays when the facility is closed to the public. The use of the Premises by USER will be limited to such times as set forth in **Exhibit A**. CHISD shall leave the facility after the end of each practice session; any participant remaining shall pay the City a regular daily admission fee. The Director of Parks and Recreation or his designee reserves the right to regulate the hours that the USER may use the Premises. It is expressly understood by USER that from time to time, due to the necessity of rescheduling for the benefit of the citizens of Arlington, the Premises may not be available for use by USER. In addition, this Agreement is nonexclusive and CITY may contract with any other persons or entities for the same or similar services as provided under this Agreement.

### **III.** **Consideration**

In consideration of the rights and privileges herein granted, USER shall pay to CITY \$500.00 for each month of this agreement.

Payments are due to the CITY by the 10<sup>th</sup> business day of the month of facility use.

#### **CITY OF ARLINGTON will provide:**

1. Facility space, access and time to accommodate USER per a mutually agreed upon schedule/calendar. Dressing rooms will be available.
2. Lane ropes and starting blocks at Hugh Smith Indoor Swimming Pool will be made available by CITY. USER will be responsible for the proper installation, removal and storage of lane ropes as directed by the CITY.
3. Contact procedures and phone or pager numbers for key CITY staff.
4. Facility keys to access CITY locations will be issued by CITY personnel, and signed for by USER personnel. Keys issued to USER must be turned back in to CITY at the end of this agreement, unless a new agreement is signed or the current agreement is extended.

5. Alarm system code will be issued by CITY personnel, and signed for by USER personnel. USER shall be responsible for the security and protection of any building access information.
6. Monthly invoice - CITY will issue a monthly invoice to USER on the first business day of each month.

As additional consideration for the rights and privileges herein granted, USER agrees to provide the following (hereafter referred to as "Services"):

- Assumption of all responsibilities necessary for the scheduling and provision of supplies necessary to conduct USER business; and
- All equipment, trips and other items incidental to conducting practice sessions or classes as may be required; and
- USER shall provide the CITY's Director of Parks and Recreation or his appointed designee a summary report of participation by the 10<sup>th</sup> business day of each month along with the required payment (CITY will provide an example form to record the required information).

All payments outlined in this Agreement, required by this section shall be forwarded to:

Parks and Recreation Department  
City of Arlington  
**Attn: Aquatics Manager**  
717 W Main Street  
Arlington, Texas 76013-1855

Furthermore, USER shall pay any applicable taxes and shall obtain and keep in effect at its own cost and expense all licenses and permits necessary for the services.

#### **GENERAL GUIDELINES**

1. The facility will not be available for use if inclement weather, repair or maintenance work necessitates the closing of the facility.
2. The facility will not be available if the CITY determines that the space is needed to accommodate a program on behalf of the public.

3. The CITY will not provide administrative or water safety personnel during USER's practice sessions.
4. Practice sessions or any activities related to those sessions must end at or before the designated time each day as shown in Exhibit A.
5. Each USER participant shall adhere to staff directives and facility rules and regulations concerning behavior in the locker room and general use and care of facilities and equipment.
6. Participants shall not enter the pool area unless an authorized USER representative is present. For purposes of this agreement "authorized USER representative" is defined as head coach, or other CHISD designee certified in emergency response, CPR, and swim coach's safety training.
7. USER agrees to only provide competitive and recreational swim team services. USER agrees to not compete or offer swim lessons, learn-to-swim activities, or other educational aquatics classes offered by CITY during the term of this agreement.

#### IV.

#### Equipment and Inventory

Equipment and supplies required for USER's services under this Agreement will be provided by the USER. USER shall be responsible for maintenance and repair of equipment. USER agrees to maintain all equipment in a safe condition. The USER shall be responsible for inventory of all USER owned equipment and supplies. USER will clearly identify all equipment and inventory in a manner that delineates ownership.

#### V.

#### Maintenance of Premises and Assumption of Risk

In further consideration for the privilege of the use of the Premises, USER agrees to be solely responsible for the inspection and maintenance of the Premises during the period of USER's use of the Premises and will notify the Director of Parks and Recreation or his designated representative of any existing or developing hazardous or dangerous condition on the Premises. USER agrees to maintain the Premises in a sanitary, safe and clean condition, but only during the period of USER's use of the Premises. USER also agrees to clean any areas on the Premises if and when USER's activity or use results in or creates the need for such cleaning. USER further agrees and covenants that the Premises and any and all improvements or removable property shall at all times be subject to inspection by the CITY. However, CITY has no duty to inspect the Premises during USER's use of the Premises. **Furthermore, USER**

specifically assumes any and all liability that may arise due to premise defects upon any or all improvements which exist on the Premises at the time of execution of this Agreement or any and all improvements which are constructed thereafter related to or arising out of USER's use. USER also recognizes that the Premises may contain sporting equipment, items of clothing, and personal items strewn about which may pose a hazard to USER and/or his property. USER agrees to accept the Premises in the condition in which it is found. CITY hereby disclaims and USER hereby accepts CITY's disclaimer of any warranty, express or implied, of the conditions or fitness for use of any portions of the Premises.

#### VI.

#### CITY Access to Premises

In addition to any other right of access provided in this Agreement, CITY also reserves the right for the CITY's Director of Parks and Recreation or his designee to enter upon and have access to any portion of the Premises at any and all times on any matters connected with the Recreation Center, including cleaning, repairs and alterations as deemed necessary (but without obligation to do so).

#### VII.

#### Default

If USER fails to comply with any term, provision or covenant of this Agreement, and does not cure such failure within five (5) days after receiving written notice thereof, this Agreement shall terminate and the License granted hereunder shall be revoked. The termination of this Agreement and revocation of the License shall not preclude pursuit of any of the other remedies herein provided or any other remedies provided by law, nor shall the pursuit of any remedy herein provided constitute a forfeiture or waiver of any payment due to CITY hereunder or of any damages accruing to CITY by reason of the violation of any of the terms, provisions and covenants herein contained. No waiver by CITY of any violation or breach of any of the terms, provisions and covenants herein contained shall be deemed or constitute a waiver of any other violation or breach of any of the terms, provisions and covenants herein contained. Forbearance by CITY to enforce one (1) or more of the remedies herein provided upon an event of default shall not be deemed or construed to constitute a waiver of such default. Should CITY at any time terminate this Agreement for any default, in addition to any other remedy CITY may have, CITY may recover from USER all damages CITY may incur by reason of such default, including the cost of reasonable attorney's fees expended by reason of default.

VIII.  
Termination

Either party may, at its option and without prejudice to any other remedy it may be entitled by law or in equity, or otherwise under this Agreement, terminate the Agreement, in whole or in part, with or without cause, by giving at least thirty (30) days prior written notice thereof to the other party. The parties agree that the Agreement shall terminate on the date specified on the notice and that USER shall be responsible for any fees due and owing up to and through the termination date specified on the notice.

IX.  
Waiver of Liability and Indemnification

USER does hereby agree to waive all claims, release, indemnify, defend and hold harmless CITY and all of its officials, officers, agents and employees, in both their public and private capacities, from any and all liability, claims, suits, demands or causes of action which may arise by reason of injury to property or persons occasioned by error, omission, or negligent act of USER, its officers, agents, employees, invitees or other persons, arising out of or in connection with this Agreement or any and all activity or use pursuant to this Agreement, or on or about the Premises and USER will, at its own cost and expense, defend and protect CITY from any and all such claims and demands. Also, USER agrees to and shall indemnify, defend and hold harmless CITY and all of its officials, officers, agents and employees, from and against any and all claims, losses, damages, causes of action, suits and liability of every kind, including all expenses of litigation, court costs and attorney fees for injury to or death of any person or for damage to any property arising out of or in connection with this Agreement or any and all activity or use pursuant to this Agreement on or about the Premises. Such indemnity shall apply whether the claims, losses, damages, causes of action, suits or liability arise in whole or in part from the negligence of the CITY, its officers, officials, agents or employees. It is the express intention of the parties hereto that the indemnity provided for in this paragraph is indemnity by USER to indemnify and protect CITY from the consequences of CITY's own negligence, whether that negligence is a sole or concurring cause of the injury, death or damage.

X.  
Independent Contractor

USER covenants and agrees that he or she is a licensee or an independent contractor and not an officer, agent, servant or employee of CITY; that USER shall have exclusive control of and exclusive right to control the details of the work performed hereunder or in the manner and means of providing his or her services and all persons performing same, and shall be

responsible for the acts and omissions of its officers, agents, employees, contractors, subcontractors and consultants; that the doctrine of respondent superior shall not apply as between CITY and USER, its officers, agents, employees, contractors, subcontractors and consultants, and nothing herein shall be construed as creating a partnership or joint enterprise between CITY and USER. It is understood and agreed that user may conduct lessons and coaching at other facilities not owned by the City of Arlington and may otherwise work for multiple clients.

**XI.**  
**Insurance**

USER shall, at his or her own expense, purchase, maintain and keep in force during the term of this Agreement such insurance as set forth below. USER shall not commence performance under this Agreement until it has obtained all insurance required under the Agreement and such insurance has been approved by CITY, nor shall USER allow any subcontractor to commence work as his subcontractor until all similar insurance of the subcontractor has been obtained and approved.

USER shall maintain the minimum insurance requirements:

Commercial General Liability: \$1,000,000.00 per occurrence bodily injury, personal injury and property damage. This policy shall have no coverage removed by exclusions. This policy shall provide coverage for all activities or uses arising out of or in connection with this Agreement or occurring on the Premises during USER's use.

It is agreed by all parties to this Agreement that the insurance required under this Agreement shall:

1. Name the CITY as an additional insured on the Commercial General Liability Insurance policy. This insurance policy shall contain the appropriate additional insured endorsement signed by a person authorized by that insurer to bind coverage on its behalf.
2. Be endorsed to state that coverage shall not be suspended, voided, canceled, reduced in coverage or in limits except after thirty (30) days prior written notice to terminate this Agreement has been provided to CITY.
3. Be placed with insurers with a best rating of no less than A:VII. The company must also be duly authorized to transact business in the State of Texas.
4. Waive all rights of subrogation against the CITY, its officials, officers and employees for losses arising from the activities under this Agreement.

5. Be written on an "occurrence" basis.
6. Be underwritten by contractual liability coverage sufficient to include all provisions of the Agreement concerning liability, duty and standards of care, together with the indemnification provision, within applicable policies.

It is further agreed that:

1. Companies issuing the insurance policies and USER shall have no recourse against CITY for any payment of any premiums or assessments for any deductible, as all such premiums and deductibles are the sole responsibility and risk of USER.
2. Approval, disapproval or failure to act by CITY regarding any insurance supplied by USER shall not relieve USER of full responsibility or liability for damages and accidents as set forth in the Agreement. Neither shall the insolvency or denial of liability by the insurance company exonerate USER from liability.
3. USER shall require its contractors and subcontractors to furnish CITY insurance which meets the requirements and conditions of this section.
4. Certificates of Insurance and endorsements effecting coverage's required by this section shall be forwarded to:

Parks and Recreation Department  
City of Arlington  
**Attn: Aquatics Manager**  
717 W Main Street  
Arlington, Texas 76013-1855

## **XII.** **Applicable Laws**

This Agreement is entered into subject to the charter and ordinances of CITY, as they may be amended from time to time, and is subject to and is to be constructed, governed and enforced under all applicable State of Texas and federal laws. Sites for this Agreement is agreed to be Tarrant County, Texas, for all purposes, including performances and execution.

## **XIII.** **Severability**

If any of the terms, sections, subsections, sentences, clauses, phrases, provisions, covenants, conditions or any other part of this Agreement are for any reason held to be

invalid, void or unenforceable, the remainder of the terms, sections, subsections, sentences, clauses, phrases, provisions, covenants, conditions or any other part of this Agreement shall remain in full force and effect and shall in no way be affected, impaired or invalidated.

**XIV.**  
**Remedies**

No right or remedy granted herein or reserved to the parties is exclusive of any other right or remedy herein by law or equity provided or permitted; but, each shall be cumulative of every right or remedy given hereunder. No covenant or condition of this Agreement may be waived without consent of the parties. Forbearance or indulgence by CITY shall not constitute a waiver of any covenant or condition to be performed pursuant to this Agreement.

**XV.**  
**Entire Agreement**

This Agreement embodies the complete agreement of the parties hereto, superseding all oral or written previous and contemporary agreements between the parties relating to matters herein; and except as otherwise provided herein, cannot be modified without written agreement of the parties.

**XVI.**  
**Successors and Assigns**

USER shall not sell or assign this Agreement or any rights hereunder, and any sale or assignment or attempt to do so shall thereby terminate this Agreement.

**XVII.**  
**Non-Waiver**

It is further agreed that one (1) or more instances of forbearance by CITY in the exercise of its rights herein shall in no way constitute a waiver thereof.

**XVIII.**  
**Equal Employment Opportunity**

USER shall not discriminate against any employee or applicant for employment of USER or of the CITY because of race, age, color, religion, sex, disability, ancestry, national origin or place of birth. USER shall take action to ensure that all persons are employed and/or treated without regard to

their race, age, color, religion, sex, disability, ancestry, national origin or place of birth. This action shall include but not be limited to the following: employment, promotion, demotion, transfer, working conditions, recruitment, layoff, termination, rates of pay or other forms of compensation, and training opportunities.

No person, firm, corporation, organization, association, league or group shall be denied use of or access to the Premises or service provided under this Agreement because of race, sex, color, religion, national origin or disability.

#### **XIX.**

#### **No Third Party Beneficiaries**

For purposes of this Agreement, including its intended operation and effect, the parties (CITY and USER) specifically agree and contract that: (1) this Agreement only affects matters/disputes between the parties to this Agreement, and is in no way intended by the parties to benefit or otherwise affect any third person or entity, notwithstanding the fact that such third person or entities may be in a contractual relationship with CITY or USER or both; and, (2) the terms of this Agreement are not intended to release, either by agreement or operation of law, any third person or entity from obligations owing by them to either CITY or USER.

#### **XX.**

#### **Procurement of Goods and Services from Arlington Businesses and/or Historically Underutilized Businesses**

In performing this Agreement, USER agrees to use diligent efforts to purchase all goods and services from Arlington businesses whenever such goods and services are comparable in availability, quality and price.

As a matter of policy with respect to CITY projects and procurements, CITY also encourages the use, if applicable, of qualified contractors, subcontractors and suppliers where at least fifty-one percent (51%) of the ownership of such contractor, subcontractor or supplier is vested in racial or ethnic minorities or women. In the selection of subcontractors, suppliers or other persons in organizations proposed for work on this Agreement, the USER agrees to consider this policy and to use its reasonable and best efforts to select and employ such company and persons for work on this Agreement.

**XXI.**  
**Headings**

The headings of this Agreement are for the convenience of reference only and shall not affect in any manner any of the terms and conditions hereof.

**XXII.**  
**Venue**

The parties to this Agreement agree and covenant that this Agreement will be enforceable in Arlington, Texas; and that if legal action is necessary to enforce this Agreement, exclusive venue will lie in Tarrant County, Texas.

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

**CEDAR HILL INDEPENDENT SCHOOL DISTRICT**

BY \_\_\_\_\_  
GINA FARMER  
\_Athletic Director\_

WITNESS:

\_\_\_\_\_

**CITY OF ARLINGTON, TEXAS**

BY \_\_\_\_\_  
PETER J. JAMIESON  
Director, Parks & Recreation

ATTEST:

\_\_\_\_\_  
KAREN BARLAR, City Secretary

APPROVED AS TO FORM:  
JAY DOEGEY, City Attorney

BY \_\_\_\_\_

THE STATE OF TEXAS §

**User Acknowledgment**

COUNTY OF TARRANT §

BEFORE ME, the undersigned authority, a Notary Public in and for the State of Texas, on this day personally appeared **Gina Farmer**, known to me or who was proved to me on the oath of \_\_\_\_\_ (name of person identifying the acknowledging person) or who was proved to me through \_\_\_\_\_ to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that he/she executed same for the purposes and consideration therein expressed.

GIVEN UNDER MY HAND AND SEAL OF OFFICE this the \_\_\_\_\_ day of \_\_\_\_\_, 2009.

(Seal)

\_\_\_\_\_  
Notary Public In and For  
The State of Texas

\_\_\_\_\_  
Notary's Printed Name

My Commission Expires: \_\_\_\_\_

THE STATE OF TEXAS §

**City Acknowledgment**

COUNTY OF TARRANT §

BEFORE ME, the undersigned authority, a Notary Public in and for the State of Texas, on this day personally appeared **PETER J. JAMIESON**, known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that he executed same for and as the act and deed of the **CITY OF ARLINGTON, TEXAS**, a municipal corporation of Tarrant County, Texas, and as the Director of Parks and Recreation thereof, and for the purposes and consideration therein expressed and in the capacity therein stated.

GIVEN UNDER MY HAND AND SEAL OF OFFICE this the \_\_\_\_\_ day of \_\_\_\_\_, 2009.

(Seal)

\_\_\_\_\_  
Notary Public In and For  
The State of Texas

\_\_\_\_\_  
Notary's Printed Name

My Commission Expires: \_\_\_\_\_

## **EXHIBIT A**

USER will have the right to utilize designated areas of the Premises during the dates outlined on a calendar mutually agreed on by the CITY and USER. (See Section III. Consideration).

USER will have access to hold **school-related swim team practice** sessions during the following dates and times.

### **Hugh Smith Indoor Pool** - 1815 New York Avenue

- September 1, 2009 - May 28, 2010
  - 6:30 AM - 8:00 AM - Monday, Wednesday and Friday
  - 6:30 AM - 8:30 AM - Tuesday and Thursday

### **Scheduled Pool Closures**

- November 26 and November 27, 2009
- December 24 and December 25, 2009
- January 1, 2010