

## FIRST AMENDMENT TO DEVELOPMENT AGREEMENT

THIS FIRST AMENDMENT TO DEVELOPMENT AGREEMENT ("First Amendment") is made and entered into as of the 7th day of December, 2018 ("Effective Date"), by and among the **CITY OF CLEVELAND HEIGHTS** (the "City"), a municipal corporation and political subdivision duly organized and existing under the laws of the State of Ohio, and **F & C DEVELOPMENT, INC.** (the "Developer"), an Indiana corporation.

### R E C I T A L S:

WHEREAS, the City and the Developer entered into that certain Development Agreement with the effective date of April 6, 2018 (as further amended from time to time, the "Development Agreement"); and

WHEREAS, since the effective date of the Development Agreement, the City and the Developer have been working together to effectuate the terms and provisions of the Development Agreement; and

WHEREAS, in satisfaction of Section 4(B)(xv) and (xvi) of the Development Agreement, (a) the City Council has adopted Ordinance No. 16-2018 (the "TIF Ordinance") providing for, among other things, the TIF Exemption (as defined in the Development Agreement), and (b) the City, the Developer and the School District (as defined in the Development Agreement) have entered into a Compensation Agreement dated March 20, 2018 (as amended from time to time, the "School Compensation Agreement") providing for the compensation of the School District for the real estate taxes that would have been paid to the School District had the City not granted the TIF Exemption;

WHEREAS, as a result of working together since the effective date of the Development Agreement, the City and the Developer have identified (a) an opportunity to purchase a parcel of additional property adjacent to the Project Site (as defined in the Development Agreement) and (b) the need for the Developer and the City to each make an additional contribution to the Project (as defined in the Development Agreement) in order for Developer to secure construction financing for the Project, and as a result it has become apparent that certain provisions of the Development Agreement require revision in order to continue to implement the intent and purpose of the Development Agreement; and

WHEREAS, the City and the Developer desire to amend the Development Agreement as set forth herein; and

WHEREAS, execution of this First Amendment was authorized by Ordinance No. 135-2018 passed by the Cleveland Heights City Council on December 3, 2018.

NOW, THEREFORE, for good and valuable consideration, including, without limitation, the mutual covenants set forth herein and in the Development Agreement, the receipt and sufficiency of which is hereby acknowledged, the City and the Developer agree as follows:

1. Capitalized terms used herein and not defined herein have the meaning ascribed to them in the Development Agreement.

2. Recital B(i) of the Development Agreement is hereby deleted and the following inserted in its place:

(i) Developer proposes to build in a single phase a mixed-use development that shall include (a) approximately 275 luxury market-rate apartments, (b) approximately 15,000 square feet of first floor restaurant, retail and commercial space, (c) a public parking garage containing approximately 600 parking spaces, (d) public gathering and green spaces, and (e) all sidewalks, driveways, access ways and utility connections necessary for the improvements described in (a) through (d) above (collectively, the "Improvements" or the "Project").

3. The date "June 30, 2019" wherever set forth in Section 4(A)(i), Section 4(C), and Section 5(C) of the Development Agreement is hereby deleted and the date "December 31, 2019" is hereby inserted in each of its places.

4. Exhibit E to the Development Agreement is hereby deleted and Exhibit E attached hereto is hereby inserted in its place.

5. Exhibit H to the Development Agreement is hereby deleted and Exhibit H attached hereto is hereby inserted in its place.

6. Exhibit K attached hereto is hereby added as an additional Exhibit to the Development Agreement.

7. Section 2 of the Development Agreement is amended to include the following new subsection (G):

(G) **Added Property.** Liberty Development Corporation, an Ohio corporation, the local development partner of the Developer ("Liberty"), has entered into an agreement (the "Added Property Purchase Agreement") to purchase a parcel of property described in Exhibit K (the "Added Property") attached hereto and made a part hereof for the purpose of adding such Added Property to the Project Site described in the Development Agreement. Liberty will assign its rights under the Added Property Purchase Agreement to the Developer. The Developer and the City acknowledge and agree to the following with respect to the acquisition of the Added Property and the addition of the Added Property to the Project Site:

(i) The Developer agrees to acquire the Added Property from the current owner of such property (the "Seller") in accordance with the terms of the Added Property Purchase Agreement for the purchase price specified in the Added Property Purchase Agreement.

(ii) The Developer agrees to sell the Added Property to the City, and the City agrees to purchase the Added Property from the Developer, for the purchase price paid by the Developer to the Seller as specified in the Added Property Purchase Agreement together with all closing costs and due diligence

costs incurred by Developer (the "Added Property Purchase Price") at the Closing (as defined in the Development Agreement) upon satisfaction of the conditions set forth in subsection 4(B) of the Development Agreement; provided that notwithstanding the foregoing, the aggregate Added Property Purchase Price, including all closing costs and due diligence costs, shall not exceed \$395,000.

(iii) Developer agrees that it will sell the Added Property to the City, and the City agrees that it will purchase the Added Property from the Developer, for the Added Property Purchase Price in the event the Development Agreement is terminated for any reason prior to the Closing. Such sale shall be accomplished within 45 days of such termination.

(iv) In any sale pursuant to subsection (ii) or (iii) above, the Added Property shall be transferred by the Developer to the City by limited warranty deed upon payment of the Added Property Purchase Price by the City to the Developer.

(v) Upon a transfer of the Added Property from the Developer to the City at Closing, the parties acknowledge that such Added Property shall be incorporated into the description of the Project Site and for all purposes (including for purposes of the Ground Lease) shall be considered part of the Project Site.

8. Section 7(J) of the Development Agreement is hereby deleted and the following is inserted in its place:

(J) **Green Certification.** Developer shall design and construct, at its expense, the Project to receive a LEED Silver Certification from the United States Green Building Council or a similar rating from a substantially equivalent rating system (as determined by the City) including Enterprise Green Communities, as developed by Enterprise Community Partners, Green Globes by Green Building Initiatives or the National Association of Home Builders National Model Green Home Building Guidelines. Developer shall apply for and receive the applicable certification, as available, for the Project.

9. Section 8 of the Development Agreement is amended to include the following new subsection (C):

(C) **Additional Contributions.** The City and the Developer have determined that based on current assumptions, including an annualized rate of return to the Developer of 8.0% that was agreed to by the City (the "Rate of Return"), there is an approximate shortfall of \$7,000,000 (the "Shortfall"). The City and the Developer have agreed to make additional contributions to the Project in the total aggregate amount of \$4,000,000 to address the Shortfall, but recognize that the Rate of Return to the Developer will nonetheless be reduced to 7.5%. The additional contributions of the City and the Developer will be made on the following terms:

(i) Subject to adjustment as provided in Section 8(C)(vi) below, the Developer has agreed to obtain an additional \$2,150,000 to address the Shortfall in the form of additional debt or equity (the "Developer Contribution").

(ii) Subject to adjustment as provided in Section 8(C)(vi) below, the City has agreed to contribute a total of \$1,850,000 to address the Shortfall, in the form of (a) the Added Property Purchase Price and (b) a cash contribution in the amount of \$1,455,000 (exclusive of the Added Property Purchase Price (the "City Contribution").

(iii) On the date of the Closing (the "Closing Date"), the Developer shall deliver cash in the amount of the Developer Contribution either (a) to an escrow agent approved by the City and the Developer to be held until the TIF Financing closes (the "Escrow Agent"), or (b) to the trustee for the TIF Financing (the "Trustee") for deposit into the fund (the "Project Fund") established for the deposit of the net proceeds of the TIF Financing available for the payment of Improvement Costs other than capitalized interest (the "Net Proceeds"), provided that, upon the closing date for the TIF Financing, the Developer Contribution held by the Escrow Agent shall be transferred to the Trustee for deposit in to the Project Fund.

(iv) The City shall deliver cash on the date of the Closing as follows: (a) the Added Property Purchase Price, and (b) \$1,455,000 either (a) to the Escrow Agent, or (b) to the Trustee for deposit into the Project Fund, provided that, upon the closing date for the TIF Financing, the City Contribution held by the Escrow Agent shall be transferred to the Trustee for deposit in to the Project Fund.

(v) Moneys deposited with the Escrow Agent or into the Project Fund by the Developer and the City in connection with the Developer Contribution and the City Contribution shall be disbursed by the Trustee in the same manner as the Net Proceeds of the TIF Financing deposited into the Project Fund.

(vi) At or before the Closing, the Developer shall provide to the City its written computation of the Shortfall determined on a Rate of Return of 8.0% and otherwise computed based on the same concepts and parameters used in determining the Shortfall (the "Final Shortfall Amount"), which computation shall be reasonably acceptable to the City. The City and the Developer acknowledge and agree that the amount of the Developer Contribution and the City Contribution shall be reduced prior to Closing if the Final Shortfall Amount is less than \$4,000,000. If the Final Shortfall Amount is less than \$4,000,000, the amount of the City Contribution shall be reduced by an amount equal to the difference between \$4,000,000 and the Final Shortfall Amount, until the City amount is reduced to zero, and the remainder of any amount by which the Final Shortfall Amount has been reduced shall be applied to reduce the amount of the Developer Contribution.

(vii) The Developer Contribution, the City Contribution and the Added Property Purchase Price paid by the City will be repaid solely from Excess Service Payments (as defined below), if any, as further provided for in the cooperative agreement between the City and the Port Authority; provided that

76% of each dollar of such Excess Service Payments (\$.76) shall be applied to the repayment of the Developer Contribution with interest as provided in subsection (C)(viii) below and 24% of each dollar of such Excess Service Payments (\$.24) shall be applied to the repayment of the City Contribution and the Added Property Purchase Price with interest as provided in subsection (C)(viii) below until the Developer Contribution with interest as provided in subsection (C)(viii) below is repaid in full, and thereafter 100% of each dollar of Excess Service Payments (\$1.00) shall be applied to repayment of the City Contribution and the Added Property Purchase Price with interest as provided in subsection (C)(viii) below until such amounts are repaid in full. Excess Service Payments shall mean, for purposes of this Section, the amount, if any, by which Service Payments and Minimum Service Payments (determined as provided in the School Compensation Agreement) paid by the Developer or its successors as owners of the Project in any month exceed the amount necessary to pay the amounts provided for in Section (D)(1)(a) and (b) of the School Compensation Agreement. Notwithstanding any other provision in this Agreement, Excess Service Payments shall not be used for any purpose other than repayment of the Developer Contribution, the City Contribution and the Added Property Purchase Price, until the Developer Contribution, the City Contribution and the Added Property Purchase Price, together with interest thereon to the extent provided for herein, are all paid or repaid in full.

(viii) The City Contribution and the Added Property Purchase Price shall bear interest until reimbursed in full as provided in subsection (C)(vii) above at a rate equal to the City's cost of funds related to the City Contribution and the Added Property Purchase Price. The Developer Contribution shall bear interest until reimbursed in full as provided in subsection (C)(vii) above at a rate equal to the Developer's cost of funds related to the Developer Contribution. If requested by the City, the City may request that the Port Authority issue a subordinate bond or other obligation providing for the use of Excess Service Payments to reimburse the City for the City Contribution and the Added Property Purchase Price with interest as provided herein.


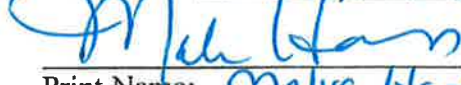
10. The City acknowledges that the Added Property was not subject to the TIF Ordinance adopted by the City Council but was included in the TIF Area defined in the School Compensation Agreement. Accordingly, the City agrees that, promptly following the transfer of the Added Property to the City in accordance with Section 2 hereof, the City will submit appropriate legislation to the City Council for adoption amending the TIF Ordinance, or establishing a new TIF Ordinance with respect to the Added Property, in order to ensure that a TIF Exemption for the Added Property has been properly established.


11. This First Amendment may be executed in counterparts, each of which shall be deemed an original, and all of which together shall constitute one agreement. The signature page of any entity, or copies or facsimiles thereof, may be appended to any counterparts of this First Amendment, and, when so appended, shall constitute an original.

IN WITNESS WHEREOF, the City and Developer have each caused this First Amendment to be executed as of the Effective Date at the beginning of this First Amendment.

Signed in the Presence of:


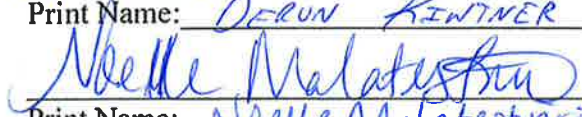
CITY OF CLEVELAND HEIGHTS

  
Print Name: Brian M. Anderson  
  
Print Name: Malva Harris


By:   
City Manager

The legal form and correctness of this instrument is approved:

  
Director of Law

  
Print Name: DERUN KINTNER  
  
Print Name: Noelle Malateshna

F & C DEVELOPMENT, INC.

By:   
Print Name: DAVID FLANERTY  
Its: C.E.O.

## CITY'S FISCAL OFFICER CERTIFICATE

It is hereby certified that the amount required to meet the contract, agreement, obligation, payment or expenditure for the attached agreement between F & C Development, Inc. and the City of Cleveland Heights has been lawfully appropriated for such purpose and is in the Treasury or in the process of collection to the credit of an appropriate fund free from any previous encumbrances.

Sharon M. Michael

~~Laurie Sabin~~, Director of Finance

Sharon M. Michael, Acting

Date: Dec. 7, 2018



**EXHIBIT E**

Form of Ground Lease

[SEE ATTACHED]



## **GROUND LEASE**

**THIS GROUND LEASE** ("Lease") is made and entered into on the Effective Date (as defined on the signature page hereof) by and between the **CITY OF CLEVELAND HEIGHTS, OHIO**, an Ohio municipal corporation, having an address of 40 Severance Circle, Cleveland Heights, Ohio 44118 (the "City"), and **F & C DEVELOPMENT, INC.**, an Indiana corporation, licensed to do business in the State of Ohio, having an address of One Indiana Square, Suite 3000, Indianapolis, Indiana 46204 (the "Developer").

### **RECITALS:**

A. The City and the Developer are parties to a Development Agreement dated [\_\_\_\_\_, 2018] (the "Development Agreement"), which provides for the development of the property commonly known as the "Top of the Hill" parcel, consisting of approximately 4.0 acres located at the intersection of Cedar Road and Euclid Heights Boulevard, in the City of Cleveland Heights, Ohio, as described in Exhibit A attached to this Lease (the "Project Site"). The Project Site is currently owned by the City.

B. Pursuant to the Development Agreement, (i) the City agreed that upon fulfillment of certain conditions specified in the Development Agreement it will lease the Project Site to Developer, and (ii) the Developer has agreed, subject to the terms of the Development Agreement, to build a mixed-use development on the Project Site that will include (a) 200 luxury market-rate apartments, (b) 15,000 square feet of first floor restaurant, retail and commercial space, (c) a public parking garage containing 525 parking spaces ("Parking Garage"), (d) public gathering and green spaces, (e) 20 for-sale townhomes, (f) a nationally-branded hotel or boutique hotel and (g) all sidewalks, driveways, access ways and utility connections and will potentially include "Class A" office space (collectively, the "Project"), all as further outlined in the Development Agreement and as depicted and described on Exhibit B to the Development Agreement (Revised Developer Proposal dated August 29, 2016, including Conceptual Drawing Depicting Improvements). [Revise to match final Improvements approved per the Development Agreement]

C. The City and Developer now desire to execute this Lease to memorialize the City's lease of the Project Site to Developer, and Developer's construction and operation of the Project, as contemplated by the Development Agreement.

D. Execution of this Lease was authorized by [Ordinance No. \_\_\_\_\_, passed by City Council on \_\_\_\_\_, 2018], which also authorized the execution of the Development Agreement.

**NOW, THEREFORE**, for good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties agree as follows:

## 1. GRANT.

(A) Grant. On the terms and conditions set forth in this Lease, the City does hereby lease the Project Site to Developer, and Developer does hereby lease the Project Site from the City, for the Term established under section 3 below. The parties acknowledge that, as part of the transactions contemplated under the Development Agreement, Developer has conducted its own title search, survey work, environmental assessments, soil and geotechnical studies, and other due diligence in order to familiarize itself with the condition and characteristics of the Project Site. The City has not made any representations or warranties concerning the condition or characteristics of the Project Site or the suitability or fitness of the Project Site for the construction and operation of the Project, and Developer acknowledges and agrees that Developer is not relying upon any such representations or warranties from the City. Without limitation of the foregoing, under no circumstances shall the City be responsible or liable for any pre-existing environmental conditions affecting the Project Site. On the Commencement Date (as defined in section 3 below), Developer shall accept the Project Site in "as is" condition.

(B) Title Matters. The City is leasing the Project Site to Developer subject to and together with (as the case may be) any and all easements, covenants, restrictions and other matters of record affecting the Project Site as of the Effective Date of the Development Agreement and any other encumbrances agreed to in writing by the City and Developer (hereinafter defined; collectively "Record Matters"). Developer shall not take any actions that would violate any Record Matters. Except for Permitted Mortgages under section 9 (Permitted Leasehold Mortgages) below and easements, covenants, conditions and restrictions that are consistent with the Final Plan (as defined in the Development Agreement), in the exercise of reasonable judgment, or any future development, improvement or alteration of the Property, or any portion thereof (collectively, the "Development Encumbrances") which future development, alteration or improvement have been approved (to the extent such approval is required by Legal Requirements) through the Planned Development Overlay/Development Plan review process of the City (the "Approved Process"), Developer shall not have the right to grant any additional easements or otherwise further encumber or restrict the City's title to the Project Site without the City's prior written consent, such consent not to be unreasonably withheld, conditioned, or delayed. The City shall not have the right to grant any additional easements or otherwise further encumber the City's title to the Project Site or materially and adversely affect Developer's ability to construct and operate the Project Site and the Improvements, or any future alterations, additions or improvements, without the Developer's prior written consent, which consent may be withheld in Developer's sole discretion.

## 2. CONSTRUCTION; OWNERSHIP OF PROJECT SITE AND IMPROVEMENTS.

(A) Construction of Improvements. Developer shall construct the Improvements in accordance with the requirements set forth in the Development Agreement. As used herein, the term "Improvements" shall mean the Project, together with all other alterations, additions, modifications and improvements made now or in the future to the Project Site.

(B) Ownership of Project Site and Improvements. Throughout the Term, the Developer shall be deemed to be the owner of Improvements, and except as set forth herein, the

City shall remain the owner of the Project Site (subject in either event to Section 17 hereof with respect to sales of portions of the Project Site and Improvements to third parties).

### 3. TERM.

(A) Term. The term ("Term") of this Lease shall commence on the Effective Date, as defined on the signature page hereof (also referred to herein as the "Commencement Date"), and, unless extended or sooner terminated in accordance with the provisions of this Lease, shall expire on the last day of the calendar month in which the ninety-ninth anniversary occurs. All obligations of Developer under this Lease that have accrued but have not been fully performed as of the end of the Term, including without limitation indemnity obligations, shall survive the expiration or termination of the Term until fully performed, provided that in the event Developer exercises its option to purchase under Section 3(c) only Developer's indemnity obligations shall survive.

(B) Grant and Exercise of Right of First Offer. Developer shall provide written notice to the City if Developer intends to sell some or all of the Improvements, other than the townhomes and hotel, identifying those Improvements Developer desires to sell and any material terms of the sale determined by Developer at that time, specifically including the purchase price at which said Improvements will be offered. The City and Developer shall negotiate in good faith for sixty (60) days for the City to buy such Improvements. In the event the City (or a related body or entity) and Developer have not executed a purchase agreement for such Improvements within such sixty (60) day period, Developer shall be free to sell the Improvements to any third party, subject to the requirements in Section 13 hereof relating to the assignment of the portion of the Lease attributable to such Improvements, and further provided that (i) the sales price of such Improvements to such third party is equal to or greater than 80% of the lowest sales price offered to the City during such negotiations, and (ii) Developer consummates such sale within 12 months after the expiration of such sixty (60) day period. If the conditions in (i) or (ii) of the immediately preceding sentence are not met, then provided that this Lease hasn't otherwise expired or been terminated pursuant to the terms and conditions hereof, the right of first offer to purchase such Improvements granted hereby shall be reinstated for the remainder of the term of this Lease with respect to the applicable Improvements. The foregoing right of first offer shall be personal to Developer and shall not run with the land and upon sale by Developer of any Improvements in accordance with the terms and conditions contained herein, City shall have no further right of first offer with respect to the Improvements so sold.

### (C) Purchase Option.

(i) Provided that an Event of Default has not occurred and is continuing at the time of Developer's exercise, Developer shall have the option to purchase fee simple title to the Project Site from the City at any time after the fortieth (40th) anniversary of the Effective Date for \$10.00 upon ninety (90) days prior written notice to the City.

(ii) If Developer exercises its option to purchase, the City shall convey to Developer all of its right, title and interest to the Project Site, by transferable and recordable limited warranty deed, in its AS-IS, WHERE-IS condition and with ALL

FAULTS, and subject the following (the "Permitted Exceptions"): (a) real estate taxes and assessments not then due and payable; (b) Record Matters and encumbrances created by City but only to the extent and in the manner permitted hereunder or which are created by Developer; (c) zoning, building and other laws, ordinances and regulations; and (d) all legal highways (collectively, the "Permitted Exceptions").

If the City's title to the Project Site is subject to any liens, encumbrances, easements, conditions, restrictions or encroachments created by the City in violation of this Lease (any of these matters being referred to as a "Title Defect"), other than the Permitted Exceptions, the City, within 30 days after written notice from Developer of the Title Defect, shall remedy or remove the Title Defect. If the City is unable to remedy or remove the Title Defect within the 30-day period, Developer may, at its option, by written notice to the City, (i) accept such title to the Project Site as the City is able to convey, (ii) if City caused such encumbrance in violation of the terms and conditions contained in this Lease, remove such Title Defect and recover reasonable and actual, out-of-pocket costs thereof from the City, or (iii) terminate its exercise of the option to purchase the Project Site, in which case the parties shall be released from all further obligations under this Section. Notwithstanding the foregoing, the City shall have the obligation to discharge any monetary liens placed or suffered to be placed upon the Project Site by the City.

(iii) The closing shall occur within 90 days after Developer gives the City notice of Developer's exercise of option as provided in Section 3(C)(i). At the closing, Developer or its designee shall pay the purchase price for the Project Site. The rent and other sums then due and payable under this Lease shall be prorated to and including such date of purchase, and the City shall deliver to Developer its limited warranty deed and any other instruments reasonably required by Developer's title company or otherwise necessary to effectively convey to Developer the title to the Project Site, provided that the City shall not take on material, additional liability thereby, nor have any obligation whatsoever to indemnify any party in connection therewith.

(iv) If the City fails or refuses to convey title to the Project Site to Developer in accordance with, and by the time required by, this Lease, then Developer shall have the right to enforce specific performance of the City's obligations to convey the Project Site to Developer by writ of mandamus (in which event the City waives the defense of adequate remedy at law). Until such time as the City shall convey the Project Site with the title as required by this Lease, Developer may extend the term of this Lease on all of the terms and conditions as provided in this Lease.

#### **4. PERMITTED USE.**

Developer shall initially use the Project Site for the construction, use, maintenance, replacement and operation of the Project (including any and all ancillary or related uses) and for no other purposes without the consent of the City Manager which shall not be unreasonably withheld, delayed or conditioned. After the completion of the construction of the Project, Developer may use the Project Site for all lawful purposes so long as Developer complies with the Approved Process to the extent applicable and applicable law and without consent of the City

Manager (unless such consent is required by the Approved Process). Developer shall operate the Project Site and Improvements during the Term in a first-class manner. Developer shall obtain and maintain all necessary licenses and permits and shall operate and maintain the Project Site and Improvements in compliance with all Legal Requirements, as defined below. Throughout this Agreement, the term "Legal Requirements" shall mean all applicable federal, state and local laws, codes, ordinances and other governmental requirements, including without limitation all environmental laws, all open meeting laws and all public records laws. Throughout the Term, Developer shall make no fewer than 225 parking spaces in the Parking Garage available at all times for use by the general public (the "Public Parking Spaces") as provided in Section 7(C).

## **5. RENT.**

(A) Base Rent. Beginning on the Commencement Date, and on each anniversary thereof throughout the Term, Developer shall pay the City annual base rent ("Base Rent") in the amount of Ten and No/100 Dollars (\$10.00). Developer may, at its option, prepay Base Rent for the entire Term on the Commencement Date.

(B) Additional Rent. This is a "triple net" lease, and throughout the Term, Developer shall pay all costs associated with the Project Site and Improvements, including without limitation, taxes (or payments in lieu thereof), insurance, maintenance costs and operating expenses. Developer shall make such payments directly to the persons or entities to whom such payments are owed.

(C) Net Lease. This Lease is a net lease and City, in its private capacity as landlord hereunder, shall not be required to provide any services or security, incur any costs or do any act or thing with respect to the Project Site or the appurtenances thereto, except as may be specifically provided herein. The foregoing shall not relieve the City of its obligations as a municipal corporation.

## **6. REAL ESTATE TAXES.**

Developer shall pay all real estate taxes and assessments levied against the Project Site and Improvements that become due and payable during the Term (or payments in lieu thereof). Upon each such payment, Developer shall furnish the City with appropriate evidence of payment. Developer is permitted to contest the validity or amount of taxes or assessments. If Developer institutes proceedings to so contest the validity or amount of such taxes or assessments and such proceedings are not prohibited by applicable law or contractual agreement, the City, at no cost to the City, shall cooperate with Developer to a reasonable extent and to the extent that the participation of the owner of the lessor's interest under this Lease is required, but Developer may not defer payment of such taxes during such contest unless permitted by law. Developer shall be entitled to any and all amounts recovered which relate to tax payments previously made by Developer.

## **7. OPERATION OF THE PROJECT.**

(A) Maintenance & Repairs: Services. Throughout the Term after completion of the construction of the initial Improvements, Developer shall keep the Project Site and Improvements, including all abutting sidewalk areas, in good, clean and safe condition and

with the purchase price per Parking Permit paid by the City to the Developer; provided, that the City retains the exclusive right to determine and set the parking rates for all City parking facilities, including the rates it charges for the Parking Permits it purchases from the Developer as provided in this Section 7(C), in any manner the City determines by ordinance. If the demand for such permits declines and such decline is determined by the City to be material and more than a temporary decline, the City shall have the right at any time to purchase fewer than 175 Parking Permits from Developer to reflect the decline in demand. Such right shall be exercised by written notice to Developer given by the City not less than thirty (30) days prior to the next succeeding Purchase Date (or such lesser time as agreed to by Developer) that specifies the number of Parking Permits being purchased by the City as of the next Purchase Date. In such case, the City Permit Purchase Amount due as of the next succeeding Purchase Date shall be reduced ratably by the number of Parking Permits less than 175 actually purchased by the City. Any determination by the City to purchase fewer than 175 Parking Permits from the Developer on any Purchase Date shall not prejudice its right to purchase up to 175 Parking Permits from the Developer on any subsequent Purchase Date. In the event that the City ceases to operate, administer or otherwise provide any public parking facilities in the City, the City may elect to permanently terminate its right to purchase Parking Permits from under this Section 7(C) by giving written notice thereof to the Developer. Notwithstanding any such termination, Developer's obligation to provide spaces available to the public (including monthly permit parkers) in accordance with the first two sentences of this Section 7(C) shall continue for the entire remaining Term.

(D) Parking Garage Operator. Developer may hire a parking operator to manage and operate the Parking Garage. Such parking operator (which may be an affiliate of Developer) shall be reputable, and shall have prior experience in operating similar-sized parking garages. The hiring by Developer of a parking operator for the Parking Garage shall not relieve Developer from any obligations or liability under this Lease.

(E) Reporting Requirements. The City shall be entitled to receive copies of all financial reports and such other reports and information as may be required for compliance with any public agency providing or overseeing funding in connection with the Project Site and Improvements (all reports, records, statements and other information furnished by Developer under this paragraph being referred to herein collectively as "Records and Reports"), and Developer shall further promptly notify the City of any and all notices alleging default by Developer with respect to any financing for the project; provided that, notwithstanding the foregoing, the City may review but shall not receive copies of any Records and Reports that contain confidential information regarding the Developer or the Project (and default notices described above) and shall not disclose any such information to the public unless and until required by Legal Requirements (as defined in Section 4).

(F) Commercial Tenants. During the first twenty (20) years of the term of this Lease, Developer shall only lease the commercial space in the Project to tenants consisted with the Merchandising Plan attached hereto as Exhibit D, as amended from time to time. In the event that Developer proposes to lease any of the commercial space in the Project to tenants which are not consistent with the Merchandising Plan, during the first twenty (20) years of the term of this Lease such proposed tenants shall be subject to prior approval of the City, not to be unreasonably withheld or delayed.

repair, subject however, to reasonable wear and tear and to damage by fire or other casualty (as more specifically provided in Section 11) or taking by eminent domain (as more specifically provided in Section 11). The City shall not have any maintenance or repair obligations or any obligation to provide services for the benefit of the Project Site or Improvements under this Lease. The foregoing shall not relieve City of its obligation as a municipal corporation.

(B) Revenue from Project. Throughout the Term, Developer shall be entitled to collect all revenue generated from the operation of the Project Site and Improvements (“Project Revenue”).

(C) Public Parking Spaces; City Permit Spaces. Throughout the Term, Developer shall provide resident, guest, commercial and public parking sufficient to meet the needs of the Project and shall designate no fewer than 225 parking spaces (the “Public Parking Spaces”) that are available to the public (to replace the existing 225 parking spaces that were available in the City’s Lot 9 prior to construction of the Improvements) at parking rates that are consistent/compatible with parking rates in the Cedar-Fairmount District, taking into account location, age, amenities and other commercially reasonable factors. Developer agrees that throughout the Term 175 spaces of the 225 Public Parking Spaces shall be designated as permit spaces to replace the 175 permit spaces that were available in the City’s Lot 9 prior to construction of the Improvements. Developer further agrees that it will allow the City to purchase 175 permits allowing permit holders to park in the Public Parking Spaces as provided herein (the “Parking Permits”). Throughout the Term, the City may purchase up to 175 Parking Permits from Developer annually commencing on the date the garage opens to the public (the “Opening Date”) and thereafter on or before the first day of the month during which each annual anniversary date of the Opening Date occurs (each, a “Purchase Date”) at an initial annual purchase price equal to the annual permit price charged by the City for permits in Lot 9 on the Opening Date multiplied by 175 Parking Permits (as adjusted from time to time as provided herein, the “City Permit Purchase Amount”), and such Parking Permits shall cover the one-year period from the anniversary of the Opening Date in the year purchased through and including the day prior to the next annual anniversary of the Opening Date. The City Permit Purchase Amount shall increase annually to reflect inflation based on the change over the prior twelve month period in the Cleveland-Akron, Ohio Consumer Price Index for all Urban Consumers (CPI-U) compiled and determined by the United States Department of Labor, Bureau of Labor Statistics; provided the first such annual increase shall not occur until the second Purchase Date following the Opening Date. The City shall pay the City Permit Purchase Amount within fifteen (15) days after receipt of Developer’s invoice therefor (reflecting any increase in the City Permit Purchase Amount as of the most recent Purchase Date). During the Term, the City shall have exclusive authority to re-sell its Parking Permits to the public at prices determined by the City as set forth below, provided that (i) the City may only re-sell its Parking Permits to individuals residing or working in the area of Lot 9, including the residents of the Buckingham Condominiums and residents of the area (the “Designated Area”) approximately bounded by the Project Site on the west, Lennox Road on the East, Euclid Heights Boulevard on the north, and Cedar Road on the south (but excluding individuals who work or reside in the Project), (ii) the City may only re-sell one (1) Parking Permit to any individual permit holder, and (iii) the City will provide to the Developer on each Purchase Date (and more frequently upon the request of the Developer) a list of permit holders (including contact information and license plate numbers). The City intends to re-sell its Parking Permits to residents of the Designated Area at prices which generally coincide



(G) City's Right to Inspect. The City shall have the right to inspect the Project Site and Improvements from time to time for any proper purpose.

## **8. ALTERATIONS; SIGNS; NO LIENS.**

(A) Alterations. From and after substantial completion of construction of the Project, Developer shall be permitted to alter or modify the Improvements or construct additional improvements on the Project Site. Any and all alterations, modifications or additions made by Developer shall be made in a good and workmanlike manner and in compliance with all Legal Requirements.

(B) Signs. Developer shall be permitted to install such directional, informational, advertising and other signs at the Project Site which Developer deems appropriate, provided that all such signs are professionally prepared and comply with all Legal Requirements. Developer shall, at its expense, keep all signs in good condition and repair, reasonable wear and tear excepted.

(C) No Liens. If any mechanics' lien or other similar lien is filed against the Project Site as a result of labor or material furnished at Developer's request. Developer shall cause the lien to be released or bonded off within sixty (60) days following the filing of such lien.

## **9. PERMITTED LEASEHOLD MORTGAGES.**

(A) Permitted Mortgages. The parties acknowledge and agree that (i) Developer has obtained or may obtain one or more loans from time to time in connection with the construction of any Improvements, and (ii) following the parties' execution of this Lease, Developer may grant to its lenders a leasehold mortgage and other security instruments with respect to Developer's leasehold interests in the Project Site as security for the repayment of such loans (herein, a "Permitted Mortgage", and one or more extensions, modifications, renewals or replacements of a Permitted Mortgage, in such amounts and in such terms as Developer may from time to time determine with the holder of each such Permitted Mortgage being referred to herein as a "Permitted Mortgage"). Except to the extent Developer purchases the fee title to the Project Site, at the end of the Term, Developer shall surrender the Project Site and Improvements to the City free and clear of all Permitted Mortgages.

(B) Notice to Permitted Mortgagees; Opportunity to Cure Developer's Default. If the City sends a notice of default to Developer under this Lease and intends to exercise any right it may have under this Lease to terminate this Lease by reason of such default, the City shall, prior to exercising such right, send a copy of such notice of default to each Permitted Mortgagee (but only if the Permitted Mortgagee shall have previously provided the City with the address to which such notices to the Permitted Mortgagee shall be sent). The City shall send notices to the Permitted Mortgagees in the same manner in which the City sends notices to Developer under this Lease. Notwithstanding anything in section 12 (Default; Remedies) below to the contrary, the City shall permit each Permitted Mortgagee a reasonable opportunity to cure Developer's default; provided, however, that if the Permitted Mortgagee has not notified the City in writing, within thirty (30) days after receiving a copy of the notice of default, that they have commenced to cure the default (with respect to the Permitted Mortgagee, by way of instituting foreclosure

proceedings or otherwise), or if the Permitted Mortgagee notifies the City in writing, within thirty (30) days after receiving a copy of the notice of default, that they have commenced to cure the default but they fail to completely cure the default to the City's reasonable satisfaction within ninety (90) days after receiving a copy of the notice of default or within such additional period of time as may be reasonably required in order for the Permitted Mortgagee to complete the foreclosure proceedings, obtain possession of the Project Site and Improvements and thereafter cure the default, the City may exercise its right to terminate this Lease. Nothing in this Lease shall be construed as requiring any Permitted Mortgagee to cure defaults of Developer under this Lease.

(C) Right to Obtain New Lease. In the event of the termination of this Lease by reason of the happening of any default, or of the rejection of this Lease in any bankruptcy of the then Developer, the City shall give prompt notice thereof to any Permitted Mortgagee. The City shall, subject to Legal Requirements, on written request of any Permitted Mortgagee, made at any time within thirty (30) days after the giving of such notice by the City, enter into a new lease of the Project Site with the Permitted Mortgagee within ninety (90) days after receipt of such request, which new lease shall be effective as of the date of such termination of this Lease for the remainder of the Term of this Lease, at the rent provided for in this Lease, and upon the same terms, covenants, conditions and agreements as are contained in this Lease; provided that the Permitted Mortgagee shall (i) contemporaneously with the delivery of such request pay to the City all the installments of rent and all items of additional rent and other charges payable by Developer under this Lease that are then due, whether or not the City has specified them as due in any notice to the Permitted Mortgagee; (ii) pay to the City at the time of the execution and delivery of the new lease any and all sums for rent and additional rent and other charges payable by Developer to and including the date of the new lease (which shall be determined as if this Lease had remained in effect), together with all out-of-pocket costs and expenses, including reasonable attorney's fees, incurred by the City in connection with the termination of this Lease and with the execution and delivery of the new lease; and (iii) on or prior to the execution and delivery of the new lease, agree in writing that promptly following the delivery of the new lease, the Permitted Mortgagee will perform or cause to be performed all of the other covenants and agreements contained in this Lease on Developer's part to be performed to the extent that Developer shall have failed to perform the same to the date of delivery of such new lease (which shall be determined as if this Lease had remained in effect), except for any non-curable default, which shall be deemed waived.

(D) Subordination of City's Rights of Distraint with Respect to Developer's Personal Property. Notwithstanding any existing or future statute, law or rule of law to the contrary, the City hereby agrees that any rights of distraint or liens arising in favor of the City under this Lease to machinery, equipment, apparatus, appliances, goods, chattels and any other personal property located at the Project Site and belonging to Developer shall be subject and subordinate to the rights of any holder of a Permitted Mortgage. Although the foregoing subordination shall be self-operative without the necessity for any further instrument or document, the City hereby agrees, upon written request from Developer, to furnish written confirmation thereof to Developer and any vendor, supplier, holder of a security interest in Developer's property, or any other third party designated by Developer.

(E) City's Transfer of its Interest in the Project Site and Improvements. If during the Term of this Lease the City sells or otherwise transfers its interest in the Project Site to a third party, such sale or transfer shall be subject to this Lease and to the rights of each Permitted Mortgagee hereunder. Developer agrees to attorn to any such transferee provided such transferee agrees to be bound by, and perform all of its obligations under, this Lease.

(F) No Surrender. If any Permitted Mortgage is in effect, the City will not accept a voluntary surrender of this Lease. If any Permitted Mortgage is in effect, this Lease shall not be modified or amended without the prior written consent of the Permitted Mortgagee.

(G) Nonliability for Covenants. The provisions of this Section 9 are for the benefit of the Permitted Mortgagee(s) and may be relied upon and shall be enforceable by the Permitted Mortgagee(s). Neither the Permitted Mortgagee(s) nor any other holder or owner of the indebtedness secured by the Permitted Mortgage(s) or otherwise shall be liable upon the covenants, agreements or obligations of Developer contained in this Lease, unless and until the Permitted Mortgagee(s) or that holder or owner acquires the interest of Developer, and then only for the period that the Permitted Mortgagee(s) owns such interest.

(H) HUD Financing. Notwithstanding anything contained in this Lease to the contrary, if and so long as Developer's leasehold interest in and to the Project Site is subject to a security instrument insured, reinsured or held by HUD or given to HUD in connection with a resale, or the Project Site and Improvements are acquired and held by HUD because of a default under the security instrument, HUD shall be deemed a Permitted Mortgagee and the additional terms and conditions contained in Exhibit C attached hereto shall apply (with the terms and conditions contained in Exhibit C controlling over any conflicting terms contained in the Lease).

## **10. INSURANCE; INDEMNITY.**

(A) Insurance. From and after the completion of the Project, Developer shall maintain, or cause to be maintained, the following insurance:

(i) special peril (formerly known as "all-risk") full replacement cost insurance on the Project;

(ii) property insurance on any and all personal property of Developer from time to time located at the Project Site in the amount of the full replacement cost thereof;

(iii) liability insurance covering claims for bodily injury, personal injury or death, and property damage occurring at the Project Site in an amount not less than Five Million Dollars (\$5,000,000) per accident, or such additional amounts as the City or its insurance or risk advisors may determine from time to time to be customary, together with umbrella liability insurance in the amount of not less than \$10,000,000, naming the City as an additional insured;

(iv) workers compensation insurance as required by law;

(v) such other or additional amounts of insurance as may be required under any and all Permitted Mortgages; and

(vi) the insurance requirements during construction of the Improvements are set forth in the Development Agreement.

(B) Policy Requirements. Developer's insurance policies shall (i) be written in standard form by insurance companies authorized to do business in Ohio and having an A.M. Best rating of A VII or better, (ii) provide (if commercially available) that the insurer will notify the City thirty (30) days prior to any cancellation or modification of the policy, and (iii) be primary and non-contributory with respect to insurance maintained by the City. Upon the initial completion of the Improvements and annually thereafter, Developer shall provide the City with a certificate of insurance evidencing the insurance required to be maintained by Developer hereunder and naming City as an additional insured.

(C) Self-Insurance. Any insurance required to be maintained by Developer may be maintained in whole or in part either on its own plan of self-insurance, or from a carrier which specializes in providing coverage to or for such party or its affiliates, or firms in the same or related businesses, if (i) such party's net worth exceeds \$250,000,000.00, as shown in its most recent audited financial statements, and (ii) such party maintains appropriate loss reserves for the amount of its self-insurance obligations under this Lease and otherwise which are actuarially derived in accordance with accepted standards of the insurance industry and accrued (i.e., charged against earnings) or otherwise funded. Any successor to the named Developer under this Lease may retain (in whole or in part) the financial risk for any claim as long as such successor maintains the net worth and loss reserves set forth in clauses (i) and (ii) above and such successor maintains a ratio of current to current liabilities of at least 2 to 1. In the event that Developer self-insures under the provisions of this Section 10(C), Developer agrees to indemnify, defend and hold harmless the City from any loss, damage, liability expense, suits, claims, or judgments which would have been covered had the City been named as an additional insured with a third party (procured by the self-insuring party). Developer shall be permitted to have an affiliate provide the insurance required hereunder, if such affiliate agrees in writing that its program is applicable to such party and that it guarantees performance of such party's insurance and indemnification obligations under this Lease; provided, however, such affiliate may undertake the self-insurance obligation only if it satisfies the financial criteria requirement. If Developer shall elect to self-insure, the City shall have all of the benefits provided by this Section 10 that it would have had if Developer carried the required insurance.

(D) Waiver of Subrogation. Developer hereby waives all claims and rights of recovery, and on behalf of Developer's insurers, rights of subrogation, against the City, its employees, agents, contractors and subcontractors with respect to any and all damage to or loss of property that is covered or that would ordinarily be covered by the insurance required under this Lease to be maintained by Developer, even if such loss or damage arises from the negligence of the City, its employees, agents, contractors or subcontractors; it being the agreement of the parties that Developer shall at all times protect itself against such loss or damage by maintaining adequate insurance. Developer shall cause its property insurance policies to include a waiver of subrogation provision consistent with the foregoing waiver.

(E) Indemnity. The City assumes no responsibility for any acts, errors or omissions of Developer or any employee, agent, representative or any other person acting or purporting to act for or on behalf of Developer. Developer shall defend, indemnify and hold the City, its

employees and agents ("Indemnified Parties") harmless from and against all costs (including without limitation reasonable legal costs), losses, claims, demands, actions, suits, judgments, claims for relief, damages and liability suffered or incurred by or asserted against the Indemnified Parties or any one or more of them as a result of or arising from the acts of Developer, its agents, employees, licensees, invitees, contractors, subcontractors or anyone else acting at the request of Developer in connection with Developer's activities at or with respect to the Project Site or in connection with any breach by Developer under this Lease.

## **11. CASUALTY; EMINENT DOMAIN.**

(A) Casualty. If the Project shall be damaged or rendered wholly or partially untenable by fire or other casualty during the term of this Lease, no rent shall abate during such period, this Lease shall remain in effect, and Developer shall promptly clear the damage in a manner to create, as nearly as reasonably practicable, a Project Site clean of debris and ready for construction activities. Thereafter Developer shall rebuild or repair the Improvements to substantially their former condition, or, at Developer's sole option, build new or different improvements, or repair or rebuild the existing Improvements to a condition, reflecting current market conditions. Developer's obligation to rebuild shall not be limited by the amount of insurance proceeds available for rebuilding. However, if Developer rebuilds the Project to the condition as required by this Lease and there are excess proceeds, the excess proceeds shall belong to Developer.

### **(B) Condemnation.**

(i) Unless this Lease is terminated pursuant to Section 11(B)(ii), if a portion of the Project Site or Improvements shall be taken by condemnation or other eminent domain proceedings pursuant to any law, general or special, by an authority ("Condemning Authority") having the power of eminent domain, or is sold to a Condemning Authority under threat of the exercise of that power, this Lease shall continue and Developer shall restore the affected Improvements, to the extent practicable, to complete architectural unit(s), or otherwise as market conditions may dictate or require, and the Project Site so that it continues to function as an integrated project.

(ii) If a portion of the Project Site and Improvements is so taken or sold, and that portion in Developer's judgment is material to Developer's use and occupancy of the Project Site and Improvements, or if all of the Project Site and Improvements is so taken or sold, Developer may terminate this Lease by giving written notice to the City. This Lease shall then terminate on the day following the vesting of title in the Condemning Authority, except as provided below and except with respect to obligations and liabilities of Developer and the City under this Lease that have arisen on or before the date of termination. Rent and other charges under this Lease shall be prorated as of the date of termination, and upon termination Developer shall satisfy and cause to be released any mortgages (including any Permitted Mortgage), liens or other encumbrances placed or suffered to be placed on the Project Site and Improvements by Developer. In the event that Developer shall fail to exercise its option to terminate this Lease as provided in this subsection, or in the event that a part of the Project Site and Improvements shall be taken under circumstances under which Developer will have no such option, Developer shall

have the sole responsibility for restoring the affected Improvements to complete architectural unit(s), or otherwise as market conditions may dictate or require, and the Project Site so that it continues to function as an integrated project.

(iii) Any award or compensation paid on account of any taking or sale described in this Section 11(B) shall, as to the Improvements, belong to Developer, and shall, as to the Project Site (the land value), be divided between the City and Developer based upon their respective interests in the Project Site.

## **12. DEFAULT: REMEDIES.**

(A) Default. Each of the following shall constitute an event of default (an "Event of Default") by Developer under this Lease;

(i) If Developer fails to pay any sum payable to the City hereunder when due, and such failure to pay continues for longer than thirty (30) days after Developer receives written notice thereof from the City;

(ii) If Developer fails to perform or observe any of the other covenants, terms or conditions contained in this Lease, and such failure continues for longer than thirty (30) days after Developer receives written notice thereof from the City; provided, however, that if such failure is not reasonably susceptible of being cured within such thirty (30) day period, an event of default shall not be deemed to have occurred if Developer commences to cure such failure within such thirty (30) day period and thereafter diligently pursues such cure to completion. The foregoing notwithstanding, if the failure creates a dangerous condition or otherwise constitutes an emergency as reasonably determined by the City, an event of default shall be deemed to have occurred if Developer fails to take corrective action promptly after written notice from the City that the City has determined such a condition exists;

(iii) Developer files or there is filed against Developer a petition in bankruptcy or a petition or answer seeking reorganization under the Federal Bankruptcy Code or any other applicable statute (unless, in the case of involuntary proceedings, the same shall be dismissed within ninety (90) days after institution); or an order is entered adjudicating Developer a bankrupt or approving an involuntary petition seeking a reorganization of Developer under the Federal Bankruptcy Code or any other applicable statute or appointing a receiver, trustee or conservator for all or any substantial part of the property of Developer, and the order is not vacated or stayed within 90 days of entry; and

(iv) If Developer has "abandoned" the Improvements and/or Project Site and fails to cure such abandonment as provided in paragraph 12(B), below. For purposes of this Lease, "abandoned", "abandon", "abandonment" and words of the like shall mean that Developer (a) voluntarily relinquished its interest in the Improvements and/or the Project Site or failed to use the Improvements and/or the Project Site without vesting such interest in another party; and (b) does not intend to reclaim or continue with the operation or use of the Improvements and/or the Project Site (in accordance with the Approved Process, if applicable). [Subject to final discussion and lender consent].

(B) Remedies. Upon the occurrence of an Event of Default that continues beyond the applicable notice and cure period provided for under paragraph 12(A) above, the City shall be entitled, subject to the rights of any Permitted Mortgagee as provided in this Lease, to (i) take such actions in the way of "self-help" as the City determines to be reasonably necessary or appropriate to cure or lessen the impact of such Event of Default, all at the expense of Developer, including without limitation paying any costs due and owing by Developer for which the Developer shall promptly reimburse the City within thirty (30) days after demand therefor, and (ii) exercise any and all other rights and remedies under this Lease or available at law or in equity, including without limitation pursuing an action for specific performance; all such rights and remedies being cumulative, provided that in no event shall the City be entitled to exercise the remedy of termination and the City hereby waives its right to terminate the Lease as a remedy for an Event of Default except to the extent an Event of Default occurs due to Developer abandoning the Project. Developer shall be liable for all direct, actual costs and damages, including without limitation reasonable legal fees, suffered or incurred by the City as a result of the occurrence of an Event of Default of Developer under this Lease or the City's enforcement or termination of this Lease. Developer shall pay all such costs and damages within thirty (30) days after receiving documentation from the City of the amount due. The failure of the City to insist upon the strict performance of any covenant or duty or to pursue any remedy under this Lease shall not constitute a waiver of the breach of such covenant or of such remedy. Nothing contained in this Lease shall limit or prejudice the right of a party to prove for and obtain as damages incident to a termination of this Lease in any bankruptcy, reorganization or other court proceedings, the maximum amount allowed by any statute or rule of law in effect when such damages are to be proved. Notwithstanding anything contained herein to the contrary, in the event that Developer has abandoned the Improvements and/or the Project Site, then City may terminate this Lease by written notice to Developer, and City shall thereafter have the right to reenter or repossess the Project Site, either by summary proceedings, surrender or otherwise, and dispossess and remove therefrom Developer, and, at City's option, title to all Improvements owned by Developer shall revert to City; provided, however, that City shall not have the right to terminate this Lease until City has provided written notice of the alleged abandonment to Developer and its lender and has provide Developer and its lender thirty (30) days to cure such abandonment.

(C) Rights of Permitted Mortgagees. Notwithstanding the City's rights provided for in paragraph 12(B) above, prior to exercising such rights the City shall provide each Permitted Mortgagee with notice and an opportunity to cure as described in paragraph 9(B) above.

### **13. ASSIGNMENT AND SUBLETTING; SEPARATION OF GROUND LEASE.**

(A) Developer acknowledges that the City is entering into this transaction because of the City's confidence that Developer has the financial backing, business experience and community support that are necessary to carry out the construction and operation of the Project in accordance with the provisions of this Lease. Developer acknowledges that the City shall not be expected to consent to a proposed assignment by Developer of its interests under this Lease prior to the expiration of the fifth (5th) anniversary of the Effective Date (the period between the Effective Date and the fifth (5th) anniversary of the Effective Date is hereafter referred to as the "Hold Period") to any person or entity in whom the City does not have similar confidence. Any



attempt by Developer to assign or otherwise transfer its interests under this Lease to a third party prior to the expiration of the Hold Period without the City's prior written consent (which shall not be unreasonably withheld, delayed or conditioned) shall be null and void and shall, at the option of the City, constitute a default of Developer under this Lease. The foregoing notwithstanding, if Developer transfers its interests under this Lease, or a portion of this Lease, (i) to an affiliate of Developer, or to the surviving entity in a merger involving Developer, to the purchaser of all or substantially all of Developer's assets or ownership interests, (ii) after the expiration of the Hold Period, to an entity which has experience in the asset class which is the subject of the assignment of this Lease, or portion thereof, or (iii) at any time during the term hereof the portion of the Project being used for a hotel to an operator of a hotel, any transfer of the foregoing shall not constitute a prohibited assignment for purposes of this section and shall be permitted without the consent of the City. As used in the preceding sentence, an "affiliate" of Developer means an entity that controls, or is controlled by, or is under common control with Developer. For purposes hereof "control" shall mean the power, exercisable jointly or severally, to manage and direct the business and affairs of a party through the ownership of more than fifty percent (50%) of membership or partnership interests, corporate stock and/or voting rights. Developer shall not assign its interests under this Lease pursuant to the preceding three sentences without giving the City at least thirty (30) days prior written notice thereof. The foregoing limitations shall not apply to a transfer upon foreclosure of a Permitted Mortgage or a deed in lieu of foreclosure, nor to the subsequent transfer by a Permitted Mortgagee acquiring Developer's interests under this Lease by foreclosure or deed in lieu of foreclosure. There are no restrictions on Developer's right to sublease the Project Site and Improvements, provided that any sublease shall be in compliance with the terms hereof and all Record Matters. No assignment (other than with the consent of the City or otherwise as permitted without the consent of the City) or sublease by Developer of its rights or obligations under this Lease to any third party shall relieve Developer from any liability to the City under this Lease.

(B) Provided no Event of Default has occurred and is continuing, in connection with a permitted assignment of a portion of this Ground Lease set forth in Section 13(A) above, Developer shall have the right to separate the portion of the Ground Lease being assigned from the portion of the Ground Lease being retained by Developer. Developer shall give written notice to the City at least sixty (60) days prior to the desire to separate the Ground Lease which notice shall describe the portion of the Improvement and the Project Site subject to the assignment of the portion of the Ground Lease. The new ground lease with respect to the assignment of a portion of this Ground Lease (the "New Ground Lease") shall be in form and contain terms and conditions substantially and materially similar to this Ground Lease and will be coterminous with this Ground Lease, provided that the New Ground Lease shall not be cross defaulted with this Ground Lease. The parties shall finalize and execute a partial termination of this Ground Lease as to the portion of the Project Site and Improvements being transferred by an assignment permitted in Section 13(A) above and New Ground Lease prior to the closing of such partial assignment.

#### **14. ESTOPPEL CERTIFICATES.**

Within fifteen (15) days after written request from the other party (or, with respect to certificates from the City, within such longer period of time (not to exceed thirty (30) days) as may be reasonably needed in order to obtain all required governmental authorizations and

signatures), each party shall execute and deliver to the requesting party an estoppel certificate (i) certifying that this Lease is unmodified and in full force and effect (or if there have been modifications, that the same is in full force and effect as modified and stating the modifications), (ii) stating, to the best of such party's knowledge, whether or not the requesting party is in default under this Lease, and, if so, specifying the nature of such default, and (iii) covering such other matters pertaining to this Lease as the requesting party may reasonably request.

#### **15. SURRENDER; HOLDOVER.**

(A) Surrender. On the last day of the Term of this Lease (and unless Developer shall have purchased the Project from the City), Developer shall surrender the Project Site and Improvements to the City in good condition and repair, reasonable wear and tear excepted, and free and clear of all mortgages and other monetary liens. On or before the last day of the Term, Developer shall remove all of Developer's personal property, trade fixtures and equipment, and any property not so removed shall be deemed abandoned. Developer shall not remove any signs, ordinary fixtures or equipment used in connection with the Project unless the City approves of such removal in writing, which shall not be unreasonably withheld, delayed or conditioned. Developer shall promptly repair any and all damage to the Project caused by its removal of any items under this paragraph.

(B) Holdover. If Developer fails to surrender possession of the Project Site and Improvements to the City at the end of the Term, such holdover shall be deemed as creating a tenancy-at-will on all of the same terms and conditions as set forth herein (except for the duration of the Term), terminable by the City upon thirty (30) days' notice by giving written notice thereof to Developer. Developer shall be liable for all direct, actual costs and damages suffered or incurred by the City as a result of Developer's holding over after the initial thirty (30) days of holdover.

(C) Documents to be Delivered to City. At the end of the Term of this Lease and if Developer has not exercised the purchase option hereunder, Developer shall deliver to the City originals of all books and records, unpaid invoices, operating manuals, contracts with third parties, warranty information, and all other written materials and documents that are in Developer's possession or under Developer's control and that are reasonably needed in order for there to be a seamless transition with respect to the operation of the Project.

#### **16. NOTICES.**

All notices required to be given to any party under this Lease shall be in writing and (i) deposited in the United States mail, first class, postage prepaid, or (ii) delivered by a nationally recognized overnight courier service, to the parties at the following addresses or such other address as either party may specify from time to time by notice to the other. Notices shall be deemed given upon receipt.

To the City:	City of Cleveland Heights 40 Severance Circle Cleveland Heights, OH 44118 Attention: Economic Development Director
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With a copy to: City of Cleveland Heights  
40 Severance Circle  
Cleveland Heights, OH 44118  
Attention: City Law Director

To the Developer: F&C Development, Inc.  
One Indiana Square, Suite 3000  
Indianapolis, IN 46240  
Attention: Deron Kintner

With a copy to: Arik Sherk, Esq.  
Thompson Hine LLP  
Austin Landing I  
10050 Innovation Drive  
Suite 400  
Dayton, Ohio 45342-4934

If Developer sends a notice to the City alleging that the City is in breach of this Lease, Developer shall simultaneously send a copy of such notice by U.S. certified mail to: Law Director, City of Cleveland Heights, 40 Severance Circle, Cleveland Heights, Ohio 44118.

**17. TRANSFER OF PORTIONS OF THE PROJECT SITE.**

(A) Grant of Option. The Development Agreement contemplates that the townhouses on the Project Site to be developed will be sold to end users upon completion (each, a “For-Sale Parcel” and collectively, the “For-Sale Parcels”). The specific location of the For-Sale Parcels has or will be identified on or prior to the date hereof. In connection therewith, and in consideration of the covenants and conditions contained in this Lease, City hereby grants to Developer the exclusive right and option (the “Option”) to purchase each of the For-Sale Parcels upon the terms and conditions set forth in this Section 17. For purposes of the Option, the term For-Sale Parcels shall not include property that is not owned by the City but acquired by the Developer.

(B) Exercise of Option. Developer may exercise the Option with respect to any For-Sale Parcel at any time following substantial completion of, or sale to a third party of, the Improvements to be constructed on the For-Sale Parcel by giving written notice thereof to City in the manner set forth herein. In the event that Developer does not exercise the Option with respect to any For-Sale Parcel, said For-Sale Parcel shall remain subject to the terms and conditions contained in this Lease.

(C) Exercise Fee. In connection with Developer’s sale of a For-Sale Parcel, City shall be entitled to an “Exercise Fee” on a per-lot basis. The Exercise Fee shall be agreed upon by the parties prior to any transfer of a For-Sale Parcel, shall take into consideration relevant market conditions and shall be payable to City on the closing of such sale.

(D) Terms of Purchase and Sale of For-Sale Parcel.

(i) Conveyance of any For-Sale Parcel from the City shall be by Limited Warranty Deed and shall be subject to (i) Record Matters; (ii) taxes and assessments, both general and special, which are a lien but not yet due and payable; (iii) zoning and building ordinances, regulations and restrictions; and (iv) any matter which would be disclosed by an accurate survey as of the Effective Date.

(ii) All documentation necessary to effect the transfer shall be prepared by Developer but shall be subject to City's approval, in City's reasonable discretion. Closing shall take place through escrow, utilizing a nationally-recognized title insurance company reasonably satisfactory to City.

(iii) All costs and expenses of any transfer of one or more For-Sale Parcels shall be borne by Developer, including without limitation, any due diligence expenses, title search/title commitment fees, title policy premiums, cost of any Developer financing, surveying fees, costs of platting the subject property and any necessary lot splits/consolidations, transfer taxes and conveyance fees, escrow fees and recording fees.

(iv) At Developer's request, City shall "direct deed" the For-Sale Parcel to the end user, subject to all of the conditions contained herein.

(E) Cooperation by City.

(i) To the extent that any of the For-Sale Parcels are to be converted to the condominium form of ownership, City shall cooperate with such process, at no cost to City, in order to allow the ultimate sale of the For-Sale Parcel condominiums. In such event, the underlying land shall remain subject to the terms and conditions contained in this Lease.

(ii) City shall grant such access and other easements as are reasonably necessary in order to provide reasonable vehicular and pedestrian access to and from the For-Sale Parcels following their conveyance to the end users.

**18. INTELLECTUAL PROPERTY.**

(A) Grant of License. Subject to the further terms and conditions of this Lease and provided Developer has the right to so permit such use, the City shall have the right to use the Intellectual Property (hereinafter defined) during the Term in connection with the promotion, advertising, reporting and dissemination of information with respect to the Project and the Project Site, whether as a part of internally-prepared materials and media, or other materials or media prepared at the direction of City. For purposes of this Lease, the term "Intellectual Property" shall mean all right, title, claim and interest of Seller and its affiliates in and to any trademarks, service marks, trade names or copyrights used exclusively in connection with the Project Site and Project, whether registered or unregistered, and any applications therefore, as may exist as of the Effective Date or thereafter. Notwithstanding the foregoing, the City shall follow reasonable direction from Developer regarding the use of the Intellectual Property.

(B) Conveyance Upon Default. Should an Event of Default under this Lease shall occur and City exercises its right to terminate this Lease pursuant to Section 12 hereof, Developer hereby agrees to take any and all actions reasonably necessary to grant, convey and transfer all of Developer's rights in and to the Intellectual Property to City to the extent the Intellectual Property is transferable. Upon the occurrence of an Event of Default which gives the City the right to terminate this Lease, Developer by these presents does hereby make, constitute and appoint City its true and lawful attorney with respect to the granting, conveying and transfer set forth in the first sentence of this Section 18(B), giving and granting unto City full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done with respect to the Intellectual Property with respect to the transactions contemplated in the first sentence of this Section 18(B), as fully, to all intents and purposes, as the Developer might or could do, with full power of substitution and revocation, hereby ratifying and confirming all that said attorney in fact or its substitute shall lawfully do or cause to be done by virtue hereof.

## **19. GENERAL PROVISIONS.**

(A) Entire Agreement. This Lease (including the exhibits hereto and the other agreements referred to herein) contains the entire agreement between the parties with respect to the subject matter hereof and supersedes any and all prior discussions, negotiations, representations or agreements, written or oral, between them respecting the subject matter hereof.

(B) Amendments. This Lease may be amended only by a written amendment signed by both parties.

(C) Governing Law. This Lease shall be governed by and construed in accordance with the laws of the City of Cleveland Heights and the State of Ohio. All actions regarding this Lease shall be brought in the Cuyahoga County Court of Common Pleas, and Developer agrees that venue in such court is proper. The parties hereby waive trial by jury with respect to any and all disputes arising under this Lease.

(D) Binding Effect. This Lease shall be binding upon and shall inure to the benefit of and be enforceable by and against the parties and their respective successors and permitted assigns.

(E) Captions. The captions of the various sections and paragraphs of this Lease are not part of the context hereof and are only guides to assist in locating such sections and paragraphs and shall be ignored in construing this Lease.

(F) Severability. If any part of this Lease is held to be void, illegal or unenforceable by a court of law, such part shall be deemed severed from this Lease, and the balance of this Lease shall remain in full force and effect.

(G) No Recording. This Lease shall not be recorded in the Cuyahoga County Recorder's office. At the request of either party, the parties shall execute a memorandum of lease for recording purposes in substantially the form attached hereto as Exhibit B (Form of Memorandum of Lease).

(H) Time. Time is of the essence with respect to the performance by the parties of their respective obligations under this Lease.

(I) No Third Party Beneficiaries. The parties hereby agree that, except for the rights of Permitted Mortgagees under section 9 (Permitted Leasehold Mortgages) hereof, no third party beneficiary rights are intended to be created by this Lease.

(J) No Brokers. The City and Developer represent to each other that they have not dealt with a real estate broker, salesperson or other person who might claim entitlement to a fee or other compensation as a result of the parties' execution of this Lease.

(K) Official Capacity. All representations, warranties, covenants, agreements and obligations of the City under this Lease shall be effective to the extent authorized and permitted by applicable law. None of those representations, warranties, covenants, agreements or obligations shall be deemed to be a representation, warranty, covenant, agreement or obligation of any present or future member, officer, agent or employee of the City in other than his or her official capacity. No official executing or approving the City's participation in this Lease shall be personally liable under this Lease.

(L) Representation as to Authority. The City and Developer each represents to the other that it has the power and authority to enter into and perform its obligations under this Lease without the consent of anyone who is not a party to this Lease and that the execution and performance of this Lease have been duly authorized by all necessary actions on the part of the performing party.

(M) The City's Assistance. From time to time during the Term at the request of Developer, and without further consideration, but subject to all Legal Requirements (as defined in Section 4), the City, in its capacity as landlord, shall execute and deliver, and/or join with Developer in executing and delivering, such applications for licenses, variances, zoning changes, approvals, permits and consents from governmental bodies, utility companies and other entities and shall supply such information, execute such forms and take such actions as Developer may reasonable request in connection with the construction, development, use, ownership, operation, maintenance or replacement of any of the Improvements or Project Site; provided, however, that the City shall not be required to incur any expense or liabilities in connection with these matters or to agree to any material restrictions or limitation of City's rights hereunder, encumbrances on title to the Project Site (except as permitted herein), transfers of any portion of the Project Site (except as permitted herein), or modifications to this Lease.

(O) Exhibits. The following Exhibits are attached hereto and made a part hereof:

Exhibit A – Legal Description

Exhibit B – Form of Memorandum of Lease

Exhibit C – HUD Addendum

Exhibit D – Merchandising Plan

[REMAINDER OF PAGE INTENTIONALLY LEFT BLANK]

[SIGNATURE PAGE TO GROUND LEASE]

This Lease is executed by the parties on the dates indicated below their respective signatures, effective as of the later of such dates (the "Effective Date").

**CITY OF CLEVELAND HEIGHTS, OHIO**

**[F & C DEVELOPMENT, INC.]**

By: \_\_\_\_\_  
\_\_\_\_\_, City Manager

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

Date: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

Date: \_\_\_\_\_

Approved as to Form:

By: \_\_\_\_\_  
City of Law Director

**CITY'S FISCAL OFFICER CERTIFICATE**

It is hereby certified that the amount required to meet the contract, agreement, obligation, payment or expenditure for the attached agreement between F & C Development, Inc. and the City of Cleveland Heights has been lawfully appropriated for such purpose and is in the Treasury or in process of collection to the credit of an appropriate fund free from any previous encumbrances.

\_\_\_\_\_

Laurie Sabin, Director of Finance

Date: \_\_\_\_\_



STATE OF OHIO

COUNTY OF CUYAHOGA

The foregoing instrument was acknowledged before me this \_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_, by \_\_\_\_\_, City Manager of the City of Cleveland Heights, an Ohio municipal corporation, on behalf of the corporation.

\_\_\_\_\_  
Notary Public

My commission expires: \_\_\_\_\_

STATE OF OHIO

COUNTY OF CUYAHOGA

The foregoing instrument was acknowledged before me this \_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_, by \_\_\_\_\_, the \_\_\_\_\_ of [F&C DEVELOPMENT, INC., an Indiana corporation,] licensed to do business in the State of Ohio, on behalf of the corporation.

\_\_\_\_\_  
Notary Public

My commission expires: \_\_\_\_\_

This instrument prepared by:  
Tucker Ellis LLP  
950 Main Avenue, Suite 1100  
Cleveland, Ohio 44113

4826-2117-5633.3

**EXHIBIT A**  
**LEGAL DESCRIPTION**

**EXHIBIT B**

**FORM OF MEMORANDUM OF LEASE**

**MEMORANDUM OF LEASE**

(Ground Lease – Top of the Hill)

This Memorandum of Lease is executed by and between the **CITY OF CLEVELAND HEIGHTS, OHIO**, an Ohio municipal corporation, having an address of 40 Severance Circle, Cleveland Heights, Ohio 44118 (the “City”), and **F & C DEVELOPMENT, INC.**, an Indiana corporation, licensed to do business in the State of Ohio, having an address of One Indiana Square, Suite 3000, Indianapolis, Indiana 46204 (the “Developer”).

1. The City and Developer entered into a certain Ground Lease (“Lease”) dated \_\_\_\_\_, \_\_\_\_\_ pursuant to which the City has leased to Developer certain real estate (the “Project Site”), being the real property commonly known as the Top of the Hill parcel, consisting of approximately 4.0 acres located at the intersection of Cedar Road and Euclid Heights Boulevard, in the City of Cleveland Heights, Ohio. The legal description of the Project Site is attached hereto as Exhibit A.

2. The initial term of the Lease commenced on \_\_\_\_\_, 20\_\_\_\_ and will expire \_\_\_\_\_ ( ) years following the Commencement Date of this Lease.

3. The Lease contains an option to purchase in favor of Developer.

4. This Memorandum of Lease is executed solely for recording purposes, and nothing herein shall be deemed as modifying any of the terms or conditions of the Lease.

[REMAINDER OF PAGE INTENTIONALLY LEFT BLANK]

[SIGNATURE PAGE TO MEMORANDUM OF LEASE]

Executed by the parties on the dates of their respective signatures.

**CITY OF CLEVELAND HEIGHTS, OHIO**

**[F & C DEVELOPMENT, INC.]**

By: \_\_\_\_\_  
\_\_\_\_\_, City Manager

Date: \_\_\_\_\_

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

Name: \_\_\_\_\_

Title: \_\_\_\_\_

Date: \_\_\_\_\_

Approved as to Form:

By: \_\_\_\_\_  
City of Law Director

**CITY'S FISCAL OFFICER CERTIFICATE**

It is hereby certified that the amount required to meet the contract, agreement, obligation, payment or expenditure for the attached agreement between F & C Development, Inc. and the City of Cleveland Heights has been lawfully appropriated for such purpose and is in the Treasury or in process of collection to the credit of an appropriate fund free from any previous encumbrances.

\_\_\_\_\_  
Laurie Sabin, Director of Finance

Date: \_\_\_\_\_

STATE OF OHIO

COUNTY OF CUYAHOGA

The foregoing instrument was acknowledged before me this \_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_, by \_\_\_\_\_, City Manager of the City of Cleveland Heights, an Ohio municipal corporation, on behalf of the corporation.

\_\_\_\_\_  
Notary Public

My commission expires: \_\_\_\_\_

STATE OF OHIO

COUNTY OF CUYAHOGA

The foregoing instrument was acknowledged before me this \_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_, by \_\_\_\_\_, the \_\_\_\_\_ of [F&C DEVELOPMENT, INC., an Indiana corporation,] licensed to do business in the State of Ohio, on behalf of the corporation.

\_\_\_\_\_  
Notary Public

My commission expires: \_\_\_\_\_

This instrument prepared by:  
Tucker Ellis LLP  
950 Main Avenue, Suite 1100  
Cleveland, Ohio 44113

**EXHIBIT A TO MEMORANDUM OF LEASE**

**[LEGAL DESCRIPTION]**



### EXHIBIT C

- a) Developer is authorized to obtain a loan, the repayment of which is to be insured by HUD and secured by a security instrument on this leasehold estate and the Improvements. Developer is further authorized to execute all documents necessary as determined by HUD and otherwise to comply with Program Obligations<sup>1</sup> for obtaining such an insured loan.
  
- b) In the event that HUD acquires title to this leasehold estate or otherwise acquires title to the Developer's interest herein, HUD shall have the option to purchase good and marketable fee simple title to the Project Site and the City's interest, if any, in the Improvements, free of all liens and encumbrances except such as may be waived or accepted by HUD. Such option shall be exercised within twelve (12) months after HUD so acquires such leasehold estate or the Developer's interest. The purchase price shall be the sum of \_\_\_\_\_ Dollars (\$ \_\_\_\_\_), payable in cash, by check drawn on the U.S. Treasury, by electronic funds transfer or by wire transfer, provided all rents are paid to date of transfer of title. HUD shall, within said twelve months, give written notice to the City of its election to exercise said option to purchase. The City shall, within thirty (30) days after HUD gives such notice, execute and deliver to HUD a warranty deed of conveyance to HUD as grantee conveying the said fee and interest and containing a covenant against the grantor's acts, but excepting therefrom acts of the Developer and those claiming by, through or under the Developer. Nothing in this option shall require the City to pay any taxes or assessments that were due and payable by the Developer.
  
- c) If approved by HUD, the Developer may convey, assign, transfer, lease, sublease or sell all or any part of its leasehold interest in the Property and its interest in the Improvements without the need for approval or consent by any other person or entity.
  
- d)
  - (i) Insurance policies shall be in an amount, and with such company or companies and in such form, and against such risks and hazards, as shall be approved by lender and HUD.
  
  - (ii) The City shall not take out separate insurance concurrent in form or contributing in the event of loss with that specifically required to be furnished by the Developer to lender.

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<sup>1</sup> **"Program Obligations"** means (1) all applicable statutes and any regulations issued by the Secretary pursuant thereto that apply to the Project, including all amendments to such statutes and regulations, as they become effective, except that changes subject to notice and comment rulemaking shall become effective only upon completion of the rulemaking process, and (2) all current requirements in HUD handbooks and guides, notices, and mortgagee letters that apply to the Project, and all future updates, changes and amendments thereto, as they become effective, except that changes subject to notice and comment rulemaking shall become effective only upon completion of the rulemaking process, and provided that such future updates, changes and amendments shall be applicable to the Project only to the extent that they interpret, clarify and implement terms in this Lease Addendum rather than add or delete provisions from such document. Handbooks, guides, notices, and mortgagee letters are available on HUD's official website: (<http://www.hud.gov/offices/adm/hudclips/index.cfm> or a successor location to that site).

The City may at its own expense, however, take out separate insurance which is not concurrent in form or not contributing in the event of loss with that specifically required to be furnished by the Developer to lender.

- e) (i) If all or any part of the Project Site or the Improvements or the leasehold estate shall be taken or damaged by condemnation, that portion of any award attributable to the Improvements or the Developer's interest in the leasehold estate or damage to the Improvements or to Developer's interest in the leasehold estate shall be paid to lender or otherwise disposed of as may be provided in the security instrument. Any portion of the award attributable solely to the underlying fee estate (exclusive of any Improvements) shall be paid to the City. After the date of taking, the annual ground rent shall be reduced ratably by the proportion which the award paid to the City bears to the total value of the Property as established by the amount HUD is to pay, as set forth in paragraph (b) of this Lease Addendum.  
  
(ii) In the event of a negotiated sale of all or a portion of the Project Site or the Improvements, in lieu of condemnation, the proceeds shall be distributed and annual ground rent reduced as provided in cases of condemnation, but the approval of HUD and lender shall be required as to the amount and division of the payments to be received.
- f) The City may terminate the ground lease prior to the expiration day of the full term of this ground lease ("**Expiration Date**") after a Developer default under this ground lease ("**Ground Lease Event of Default**"), but only under the following circumstances and procedures. If any Ground Lease Event of Default shall occur, then and in any such event, the City shall at any time thereafter during the continuance of such Ground Lease Event of Default and prior to any cure, give written notice of such default(s) ("**Notice of Default**") to the Developer, lender and HUD, specifying the Ground Lease Event of Default and the methods of cure, or declaring that a Ground Lease Event of Default is incurable. If the Ground Lease Event of Default is a failure to pay money, the City shall specify and itemize the amounts of such default. Failure to pay money shall be specified as a separate default and not combined with a non-monetary Ground Lease Event of Default. Within sixty (60) days from the date of giving the Notice of Default to the Developer, the Developer must cure a monetary default by paying the City all amounts specified in the Notice of Default and must cure any specified Ground Lease Event of Default that is capable of being cured within such period. During the period of 180 days commencing upon the date Notice of Default was given to lender and HUD, lender or HUD may: (a) cure any Ground Lease Event of Default; and (b) commence foreclosure proceedings or institute other state or federal procedures to enforce lender's or HUD's rights with respect to the leasehold or the Developer Improvements. If the Developer, lender or HUD reasonably undertake to cure any Ground Lease Event of Default during the applicable cure period and diligently pursues such cure, the City shall grant such further reasonable time as is necessary to complete such cure. If HUD or lender commences foreclosure or other enforcement action within such 180 days, then its cure period shall be extended during the period of the foreclosure or other action and for 90 days after the ownership of the Developer's rights under the lease is established in or assigned to HUD or such lender or a purchaser at any foreclosure sale pursuant to such foreclosure or other action. The transfer of the Developer's rights under the lease to

lender, HUD or purchaser, pursuant to such foreclosure or other action shall be deemed a termination of any incurable Ground Lease Event of Default and such terminated Ground Lease Event of Default shall not give the City any right to terminate the lease. Such purchaser may cure a curable Ground Lease Event of Default within said 90 days. If after the expiration of all of the foregoing cure periods, no cure or termination of an existing Ground Lease Event of Default has been achieved as aforesaid, then and in that event, this lease shall terminate, and, on such date, the term of this lease shall expire and terminate and all rights of the Developer under the lease shall cease and the Improvements, subject to the security instrument and the rights of lender thereunder, shall be and become the property of the City. All costs and expenses incurred by or on behalf of the City (including, without limitation, reasonable attorneys' fees and expenses) occasioned by any default by the Developer under this ground lease shall constitute additional rent hereunder. The City shall have no right to terminate this ground lease except as provided in this paragraph (f).

- g) Upon termination of this ground lease pursuant to paragraph (f) above, the City shall immediately seek to obtain possession of the Property and Improvements. Upon acquiring such possession, the City shall notify HUD and lender in writing. Lender and HUD shall each have six (6) months from the date of receipt of such notice of acquisition to elect to take, as Developer, a new ground lease on the Property and on the Improvements. Such new ground lease shall have a term equal to the unexpired portion of the term of this ground lease immediately prior to such termination and shall, except as otherwise provided herein, be on the same terms and conditions as contained in this ground lease, including without limitation, the option to purchase set forth under paragraph (b) above, except that lender's or HUD's liability for ground rent shall not extend beyond their occupancy under such ground lease. The City shall tender such new ground lease to lender or HUD within thirty (30) days after a request for such ground lease and shall deliver possession of the Property and Improvements immediately upon execution of the new ground lease. Upon executing a new ground lease, lender or HUD shall pay to the City any unpaid ground rent due or that would have become due under this ground lease to the date of the execution of the new ground lease, including any taxes which were liens on the Property or the Improvements and which were paid by the City, less any net rentals or other income which the City may have received on account of the Property and Improvements since the date of default under this ground lease.
- h) The City agrees that within ten (10) days after receipt of written request from the Developer, it will join in any and all applications for permits, licenses or other authorizations required by any Governmental Authority<sup>2</sup> in connection with any work which the Developer may do hereunder and will also join in any grants for easements for electric telephone, telecommunications, cable, gas, water, sewer and such other public utilities and facilities as may be reasonably necessary in the operation of the Property or of any Improvements and if, at the expiration of such ten (10) day period, the City shall

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<sup>2</sup> "Governmental Authority" means any board, commission, department or body of any municipal, county, state, tribal or federal governmental unit, including any U.S. territorial government, and any public or quasi-public authority, or any subdivision of any of them, that has or acquires jurisdiction over the mortgaged property, including the use, operation or improvements of the mortgaged property.

not have joined in any such application, or grants for easements, the Developer shall have the right to execute such application and grants in the name of the City, and for that purpose, the City hereby irrevocably appoints the Developer as its attorney-in-fact to execute such papers on behalf of the City, only to the extent that a public body as City may do so within the exercise of its municipal powers and responsibilities.

- i) Nothing in this ground lease shall require the Developer to pay any franchise, estate, inheritance, succession, capital levy or transfer tax of the City or any income excess profits or revenue tax, or any other tax, assessment charge or levy upon the rent payable by the Developer under this ground lease.
- j) All notices, demands and requests which are required to be given by the City, the Developer, lender or HUD in connection with this Ground Lease shall be in writing and shall be sent by registered or certified mail, postage prepaid, and addressed to the address of the party as given in this instrument unless a request for a change in this address has been sent to the party giving the notice by registered or certified mail prior to the time when such notice is given.

All notices to lender or HUD shall be addressed as follows:

If to Lender:

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If to HUD:

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If to Developer:

F&C Development, Inc.  
One Indiana Square, Suite 3000  
Indianapolis, IN 46240  
Attention: \_\_\_\_\_

If to City:

City of Cleveland Heights  
40 Severance Circle  
Cleveland Heights, OH 44118  
Attention: Economic Development Director

- k) This ground lease shall not be modified without the written consent of HUD and lender.
- l) The provisions of this Lease Addendum benefit lender and HUD and are specifically declared to be enforceable against the parties to this lease and all other persons by lender and HUD. In the event of any conflict, inconsistency or ambiguity between the provisions of this Lease Addendum and the provisions of any other part of this ground lease, the provisions of this Lease Addendum shall prevail and control.

**EXHIBIT D**  
**MERCHANDISING PLAN**

[See Exhibit F of Development Agreement]

## **EXHIBIT H**

### **Project Schedule**

Second Quarter 2018	-	Development Agreement
First Quarter 2019	-	Approvals and Due Diligence
Third Quarter 2019	-	Design & Permitting Complete
Third Quarter 2019	-	Closing
Fourth Quarter 2019	-	Construction Commences
Fourth Quarter 2020	-	Garage Delivered
First Quarter 2021	-	Project Complete

**EXHIBIT K**

Added Property

Permanent Parcel No. 685-18-011