

## PARKING AGREEMENT

This Parking Agreement (this “Agreement”) is made effective as of \_\_\_\_\_, 2018 (the “Effective Date”), by and between the City of South Bend Board of Park Commissioners (the “BPC”) and Michigan Street Shops LLC, an Indiana limited liability company with its principal place of business at 4100 Edison Lakes Parkway, Suite 350, Mishawaka, Indiana 46545 (the “Company”) (each a “Party,” and together, the “Parties”).

### RECITALS

A. Pursuant to Ind. Code 36-9-11, the City of South Bend Board of Public Works (the “BPW”) owns and operates certain parking facilities located in the City of South Bend, Indiana (the “City”), including the parking facility located at 109 W. Jefferson Boulevard in the City and commonly known as the Leighton Parking Garage (the “Leighton Garage”) and the parking facility located at 121 E. Wayne Street in the City and commonly known as the Wayne Street Parking Garage (the “Wayne Street Garage”) (together, the “Garages”).

B. On September 27, 2016, the BPW adopted its Resolution No. 42-2016 establishing parking rates and rules for the use and operation of City-operated parking facilities, including the Garages (the “Rate Resolution”), and, by its Resolution No. 4306-16 pursuant to Ind. Code 36-9-11-7, the South Bend Common Council approved the Rate Resolution on October 10, 2016.

C. In accordance with the BPW’s Resolution No. 44-2016 dated September 27, 2016, the BPW and the BPC entered into that certain Agency Agreement dated October 17, 2016 (the “Agency Agreement”), under which the BPW appointed the BPC as the BPW’s agent to act on the BPW’s behalf with respect to the management and operation of vehicular parking in the Garages.

D. On the Effective Date, the South Bend Redevelopment Commission (the “Commission”) conveyed to the Company the parcels containing the ground-floor storefront space in the Leighton Garage (the “Michigan Street Lots”) and the parcel containing the ground-floor storefront space in the Wayne Street Garage (the “Wayne Street Lot”), as more particularly described in attached **Exhibit A** (collectively, the “Property”).

E. The Parties enter this Agreement in consideration of the Commission’s conveyance of the Property to the Company and the Company’s acceptance of such conveyance from the Commission.

F. The Company and the BPC (under the authority of the Rate Resolution and serving as the BPW’s agent pursuant to the Agency Agreement) desire to enter into this Agreement on the terms set forth herein.

NOW, THEREFORE, in consideration of the mutual covenants contained in this Agreement, the Parties agree as follows:

1. Variable Parking Space Allotments; Fees; Limitation.

(a) Subject to the limitations and requirements stated in this Agreement, and provided that the Company's use is reasonable at all times and comports with all applicable laws, the BPC grants to the Company (including its tenants) an exclusive license to use for vehicular parking during the Term of this Agreement no more than sixteen (16) parking spaces in the Leighton Garage and no more than three (3) spaces in the Wayne Street Garage (collectively, the "Parking Spaces"), the use of which spaces will be subject to the parking rates and rules established under the Rate Resolution, as such rates and rules may be amended from time to time by official action of the BPW and the South Bend Common Council pursuant to IC 36-9-11-7, as amended.

(b) During the Term of this Agreement, if the Company or any of the Company's tenants (each a "Requesting Party") wishes to use one or more Parking Spaces, then the Requesting Party shall provide thirty (30) days' prior written notice (a "Space Request") to the BPC or its designee (the "Parking Administrator") of the number of Parking Spaces that the Requesting Party will use, within the limits stated in Section 1(a) above. The Parking Administrator shall approve Space Requests in the order in which they are received until all of the Parking Spaces are designated for use, and the Company shall be solely responsible for coordinating with its tenants the apportionment of the Parking Spaces during the term of this Agreement. A Requesting Party's use of one or more of the Parking Spaces shall be on a month-to-month basis, and each Requesting Party shall directly pay to the Parking Administrator the then-current parking rates established under the Rate Resolution. To terminate the month-to-month use of one or more spaces, a Requesting Party shall provide written notice to the Parking Administrator within a reasonable time prior to the final date of use.

(c) The Parties mutually agree that the Parking Spaces will not be reserved, specifically designated, or confined to any particular areas within the Garages. Further, the Parties agree that the Company's use of the Parking Spaces under the license granted in Section 1(a) above will be strictly limited to parking of passenger vehicles for ordinary business operations by the Company's tenants occupying space in the Michigan Street Lots and the Wayne Street Lot, respectively, and the employees of such tenants.

2. Term; Termination. The term of this Agreement will commence on the Effective Date and, unless earlier terminated pursuant to this Section 2, will expire on December 31, 2037 (the "Term"). Notwithstanding anything to the contrary set forth in this Agreement, the BPC may terminate this Agreement and revoke the Company's license if one or more of the following has occurred or is occurring: (a) the Company breaches any term, provision, or obligation under this Agreement and fails to cure such breach within thirty (30) days after receiving written notice of the breach from the BPC (or its representative); (b) the Company's use of the Parking Spaces violates any term or provision of this Agreement or applicable law and the Company fails to cure such violation within thirty (30) days after receiving written notice of the violation from the BPC (or its representative); (c) the Company's use of the Parking Spaces harms or endangers public health, safety, or general welfare and the Company fails to cure such harm or endangerment within thirty (30) days after receiving written notice of the breach from the BPC (or its representative); (d) the South Bend Board of Public Works determines that the Leighton Garage or the Wayne

Street Garage has reached or is expected to reach, within one (1) year of such determination, the end of its useful life; or (e) upon mutual agreement of the Parties.

3. Security. The Company understands and agrees that neither the City nor the BPC will be liable for (a) any loss, damage, destruction, or theft of the property of the Company or its guests or (b) any bodily harm or injury that may arise in connection with the Company's use of the Parking Spaces, except to the extent caused by the City's or the BPC's gross negligence or willful misconduct. The Company understands and agrees that it will at all times be solely responsible for the safety and security of its guests and its guests' property, including vehicles and their contents, while present in the Garage, except to the extent caused by the City's or the BPC's gross negligence or willful misconduct.

4. Damage. In the event any portion of either Garage is disturbed or damaged in connection with the Company's use or operation of the Property, including use of the Parking Spaces, the Company, at the Company's sole expense, will restore the Garage to the condition that existed immediately prior to such disturbance or damage to the satisfaction of the BPC and the BPW.

5. Insurance.

(a) The Company will purchase and maintain comprehensive insurance policies as are appropriate for its management and operation of the Property, including, without limitation, a commercial general liability insurance policy in an amount not less than Five Million Dollars (\$5,000,000.00), inclusive of the limit of any umbrella policy following the form of the commercial general liability policy. All such insurance policies will be maintained in insurance companies rated A- or better by A.M. Best Company, will be countersigned by an agent of the insurer who is a resident of Indiana, and will name the City and the BPC as additional insureds. The Company will prove such adequate insurance coverage by submitting to the BPC both a certificate of and a copy of each such policy properly endorsed, and the Company will notify the BPC of any change in or termination of such coverage.

(b) The BPC will ensure that the Garages remain insured under the City's property insurance coverage, as such coverage is kept in force and modified from time to time by the City in its sole discretion. The Company acknowledges that the City is insured against claims of tort liability in accordance with its liability self-insurance program. In the event the City discontinues its liability self-insurance program, the BPC agrees to maintain, or ensure that the City will maintain, in place of said program, reasonable insurance provisions as are appropriate for the BPC's management and operation of the Garages.

6. Indemnification.

(a) The Company agrees and undertakes to indemnify and hold the City and the BPC, and their respective agents, employees, successors, and assigns (the "City Indemnitees"), harmless from and against any liabilities, losses, costs, damages, or expenses, including attorneys' fees, which the City or the BPC may suffer or incur as a result of any claims or actions brought by any person or entity (a) arising out of this Agreement or (b) the Company's use of the Parking Spaces, except to the extent caused by the City's or the BPC's gross negligence or willful misconduct. If

any such action is brought against one or more of the City Indemnitees, the Company agrees to defend such action or proceedings at its own expense and to pay any judgment rendered therein.

(b) The BPC agrees and undertakes to indemnify and hold the Company, and its respective agents, employees, successors, and assigns (the “Company Indemnitees”), harmless from and against any and all claims, liabilities, losses, costs, damages, fees, or expenses, including attorneys’ fees, which the Company may suffer or incur as a result of any claims or actions brought by any person or entity (a) arising out of this Agreement or (b) the City’s or BPC’s use, possession, maintenance, ownership, or operation of the Garages, except to the extent caused by the Company’s gross negligence or willful misconduct. If any such action is brought against one or more of the Company Indemnitees, the City and BPC agree to defend such action or proceedings at their own expense and to pay any judgment rendered therein.

7. Hazardous Substances. The Parties will not permit, knowingly or unknowingly, any Hazardous Substance to be brought or remain upon, kept, used, discharged, leaked, or emitted at the Garages. For purposes of this Agreement, “Hazardous Substance” means, without limitation, any substance, chemical, material or waste, whether solid, liquid, gaseous or thermal, (i) the presence of which causes a nuisance or trespass of any kind; (ii) which is regulated by any Environmental Law as defined herein because of its toxic, flammable, corrosive, reactive, carcinogenic, mutagenic, infectious, radioactive, or other hazardous property or because of its effect on the environment, natural resources or human health and safety, including, but not limited to, petroleum and petroleum products, polychlorinated biphenyls, trichloroethylene, trichloroethane and other chlorinated industrial solvents, and a volatile organic compounds; or (iii) which is designated, classified, or regulated as being a hazardous or toxic substance, material, pollutant, waste (or a similar such designation) under any federal, state or local law, regulation or ordinance, including under any Environmental Law such as the Comprehensive Environmental Response Compensation and Liability Act (42 U.S.C. §9601 *et seq.*), the Emergency Planning and Community Right-to-Know Act (42 U.S.C. §11001 *et seq.*), the Hazardous Substances Transportation Act (49 U.S.C. §1801 *et seq.*), or the Clean Air Act (42 U.S.C. §7401 *et seq.*), or Indiana Environmental Legal Action statute (I.C. § 13-30-0, *et seq.*). For purposes of this Agreement, “Environmental Law” means, as amended and as now in effect, any and all federal, state, local, and foreign statutes, regulations, ordinances, and other provisions having the force or effect of law, all judicial and administrative orders and determinations, all contractual obligations, and all common law concerning public health and safety, worker health and safety, pollution, or protection of the environment, including, without limitation, all those relating to the presence, use, production, generation, handling, transportation, treatment, storage, disposal, distribution, labeling, testing, processing, discharge, release, threatened release, control, or cleanup of any hazardous materials, substances, or wastes, chemical substances or mixtures, pesticides, pollutants, contaminants, toxic chemicals, petroleum products or byproducts, asbestos, polychlorinated biphenyls, noise, or radiation.

8. License Only. The BPC and the Company mutually acknowledge and agree that this Agreement does not constitute a lease of or an easement in the Garages or the Parking Spaces. This Agreement grants the Company no interest of any kind in the Garages or the Parking Spaces except the license granted in Section 1(a) above and revocable in accordance with the terms of this Agreement.

9. Entire Agreement; Recitals. This Agreement embodies the entire agreement between the BPC and the Company and supersedes all prior discussions, understandings, or agreements, whether written or oral, between the BPC and the Company concerning its subject matter. The recitals set forth above are hereby incorporated into and made a part of this Agreement.

10. Parties Benefitted. This Agreement benefits and binds the Parties, as well as their respective successors and assigns. The Parties acknowledge and agree that this Agreement is for the benefit of the Parties and that there are no third-party beneficiaries of this Agreement. Nothing herein expressed or implied is intended to give or will be construed to confer upon any person other than the Parties hereto, and their permitted successors or assigns, any rights or remedies under or by reason of this Agreement.

11. Assignment. Neither Party shall transfer or assign this Agreement without first obtaining the written consent of the other Party, which consent shall not be unreasonably withheld, conditioned, or delayed.

12. Notices. Any notice required or permitted to be given by either Party to this Agreement will be in writing, and will be deemed to have been given: (a) when delivered in person to the other Party; (b) three (3) days after being sent by First Class Mail; or (c) one (1) day after being sent by national overnight delivery service, with confirmation of receipt, addressed as follows:

BPC: South Bend Board of Park Commissioners  
321 E. Walter St.  
South Bend, IN 46614  
Attn: Aaron Perri, Executive Director, Venues Parks & Arts

With a copy to: South Bend Legal Department  
1200 S. County-City Building  
227 West Jefferson Blvd.  
South Bend, IN 46601  
Attn: Corporation Counsel

Company: Michigan Street Shops LLC  
4100 Edison Lakes Parkway, Suite 350  
Mishawaka, IN 46545  
Attn: Edward Bradley, Member

Any Party may change its address for purposes of this Section 12 by giving the other party written notice of the new address in the manner set forth above.

13. Force Majeure. Notwithstanding anything to the contrary contained in this Agreement, neither of the Parties will be deemed to be in default where delays in performance or failures to perform are due to, and a necessary outcome of, war, insurrection, strikes or other labor

disturbances, walk-outs, riots, floods, earthquakes, fires, casualties, acts of God, acts of terrorism, restrictions imposed or mandated by governmental entities, enactment of conflicting state or federal laws or regulations, new or supplemental environments regulations, contract defaults by third parties, or similar basis for excused performance which is not within the reasonable control of the Party to be excused (each, an event of “Force Majeure”). Upon the request of any of the Parties, a reasonable extension of any date, deadline, or time for performance set forth in this Agreement due to such cause will be granted in writing for a period necessitated by the event of Force Majeure, or longer as may be mutually agreed upon by the Parties.

14. Amendment. This Agreement may be amended or modified only by a written instrument signed by an authorized representative of each Party.

15. Interpretation; Severability; Applicable Law. Both Parties having participated fully and equally in the negotiation and preparation of this Agreement, this Agreement will not be more strictly construed, nor will any ambiguities in this Agreement be presumptively resolved, against either Party. If any provision, covenant, agreement, or portion of this Agreement or its application to any person, entity, or property, is held invalid, such invalidity will not affect the application or validity of any other provision, covenant, agreement, or portion of this Agreement. This Agreement will be construed in accordance with and governed by the laws of the State of Indiana.

16. Authority; Counterparts; Signatures. Each undersigned person signing on behalf of his or her respective Party certifies that he or she is duly authorized to bind his or her respective Party to the terms of this Agreement. This Agreement may be separately executed in counterparts by the BPC and the Company, and the same, when taken together, will be regarded as one original Agreement. Electronically transmitted signatures will be regarded as original signatures.

17. Further Assurances. The Parties agree that they will undertake in good faith, as permitted by law, any action and execute and deliver any document reasonably required to carry out the intents and purposes of this Agreement.

[Signature page follows.]

IN WITNESS WHEREOF, the Parties have each executed this Parking Agreement to be effective as of the Effective Date stated above.

CITY OF SOUTH BEND  
BOARD OF PARK COMMISSIONERS

\_\_\_\_\_  
Mark Neal, President

\_\_\_\_\_  
Consuella Hopkins, Vice President

\_\_\_\_\_  
Aimee Buccellato, Member

\_\_\_\_\_  
Dan Farrell, Member

ATTEST: \_\_\_\_\_  
Eva Ennis, Clerk

MICHIGAN STREET SHOPS LLC,  
an Indiana limited liability company

\_\_\_\_\_  
Edward Bradley, Member

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## **EXHIBIT A**

### **Description of Property**

#### **Michigan Street Lots**

Lots 2 through 9 as shown on the recorded plat of Leighton Plaza First Minor Subdivision recorded on February 23, 2017, as Document No. 1704410 in the Office of the Recorder of St. Joseph County, Indiana. [Parcel Key Nos. 018-3006-019002, 018-3006-019003, 018-3006-019004, 018-3006-019005, 018-3006-019006, 018-3006-019007, 018-3006-019008, 018-3006-019009]

#### **Wayne Street Lot**

Lot 2 of the recorded plat of Wayne Street Parking Garage Minor Subdivision recorded on February 19, 2016, as Document No. 1604082 in the Office of the Recorder of St. Joseph County, Indiana. [Parcel Key No. 018-3003-005801]