

**LEASE AND MANAGEMENT AGREEMENT  
BY AND BETWEEN  
THE BOARD OF PARK COMMISSIONERS FOR THE CITY OF SOUTH BEND  
AND  
THE POTAWATOMI ZOOLOGICAL SOCIETY  
  
POTAWATOMI ZOO**

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THIS LEASE AND MANAGEMENT AGREEMENT is made effective the 1<sup>st</sup> day of January, 2019 (“Effective Date”) by and between THE CITY OF SOUTH BEND, INDIANA, by and through its BOARD OF PARK COMMISSIONERS, having offices located at 321 East Walter Street, South Bend, Indiana 46614 and the POTAWATOMI ZOOLOGICAL SOCIETY, an Indiana non-profit corporation with its principle address located at 500 South Greenlawn Avenue, South Bend, IN 46615-1341.

**RECITALS**

WHEREAS, the Board of Park Commissioners for the City of South (“City”) is authorized under I.C. 36-10-4 to administer, improve and lease park property for the City of South Bend; and

WHEREAS, the City, through its Board of Park Commissioners, is the owner of certain real property and improvements located within the City of South Bend, Indiana and commonly known as the Potawatomi Zoo, which property is more specifically described at **EXHIBIT 1** attached hereto and incorporated herein (“Zoo”); and

WHEREAS, the Potawatomi Zoological Society (“PZS”) is a not-for-profit corporation organized under the laws of the State of Indiana whose primary mission to inspire excellence in education, conservation and improved animal quality of life in the operation, maintenance, and preservation of the Zoo; and

WHEREAS, the City and PZS have been working together to promote and support the operation and development of the Zoo for over 45 years, and are both dedicated to the advancement of the Zoo and support the stated mission of the PZS; and

WHEREAS, City and PZS entered into a certain Lease and Management Agreement containing the initial term of 5 years effective January 1, 2014; and

WHEREAS the initial term of the parties’ agreement was successful for the City, PZS, the Zoo, and the community at large;

WHEREAS, the City and PZS continue to prioritize the Zoo as a vital cultural and recreational community asset and wish to continue to enhance the Zoo’s contributions to the community in the areas of recreation, education and conservation; and

WHEREAS, the City and PZS are committed to the continued and ongoing development, support and enrichment of the Zoo and share the goal of providing a top-flight zoo for a city the size of South Bend, for its citizens, for the citizens of its neighbor communities, and for those who visit South Bend; and

WHEREAS, City and PZS pledge to utilize their combined experience as set forth herein, to help ensure the continued success and growth of the Zoo; and

WHEREAS, the City has determined that it is in the best interest of City and the citizens of South Bend to enter into this agreement with PZS related to the operation and management of the Zoo for an additional fifteen-year term under the terms and conditions set forth in this Lease and Management Agreement (“Agreement”).

NOW, THEREFORE, for and in consideration of the mutual promises and covenants set forth in this Agreement, the parties agree as follows:

**ARTICLE 1.0 RECITALS; OTHER AGREEMENTS; DEFINITIONS**

**1.1 Recitals.** The Recitals set forth above are incorporated and made part of this Lease and Management Agreement for all purposes.

**1.2 Definitions.** Defined terms are indicated by initial capital letters. Defined terms shall have the meanings set forth herein and the following terms are more specifically set forth below:

<b><i>Board</i></b>	The City of South Bend, Board of Park Commissioners
<b><i>Capital Project</i></b>	New construction of a building or facility as well as the expansion, renovation, or replacement of an existing facility or facilities.
<b><i>City</i></b>	The City of South Bend, Indiana
<b><i>Council</i></b>	The South Bend Common Council
<b><i>County</i></b>	St. Joseph County, Indiana
<b><i>Effective Date</i></b>	January 1, 2019
<b><i>Expiration Date</i></b>	December 31, 2033 at 11:59 p.m. as described in ARTICLE 2.0
<b><i>Parking Lot</i></b>	The parking area owned by the City of South Bend that is located within Potawatomi Park and is not included within the leasehold Premises but is utilized by patrons of the Zoo as well as visitors to the City park.

<b><i>Potawatomi Zoological Society (“PZS”)</i></b>	Potawatomi Zoological Society, Inc., a not-for-profit corporation organized under the laws of the State of Indiana whose mission is it to inspire excellence in education, conservation and improved animal quality of life.
<b><i>Term</i></b>	Fifteen (15) years commencing January 1, 2019
<b><i>Termination Date</i></b>	The date that this Agreement is ended as a result of a breach or default of this Agreement by a party, or 180 days after written notice of either party of its intent to terminate this Agreement as provided in ARTICLE 16.0
<b><i>Zoo</i></b>	The Potawatomi Zoo, a facility located at 500 South Greenlawn, Street, South Bend, Indiana

## **ARTICLE 2.0 LEASE OF PREMISES AND PERSONAL PROPERTY**

**2.1 Premises.** For the duration of this Agreement, City hereby leases to PZS and PZS hereby leases from the City the approximately twenty-three (23) acres of real property and improvements which constitute the Zoo located at 500 South Greenlawn Avenue, South Bend, Indiana, and more particularly described on **EXHIBIT 1** attached hereto and incorporated herein (“Premises”). The Premises and the equipment, buildings, fixtures, and furnishings for operation of the Zoo which are owned by the City shall be used exclusively by PZS to operate the Zoo and for Zoo related business. PZS shall not use or permit the Premises or aforementioned equipment, buildings, fixtures, or furnishings to be used for any other purpose without prior written consent of City.

**2.2 Personal Property.** For the duration of this Agreement, City leases to PZS and PZS hereby leases from the City all personal property, including but not limited to, vehicles and equipment currently owned by the City and in use at the Zoo which is necessary to the operation and maintenance of the Zoo (collectively referred to as “City Personal Property”), a listing of which is attached hereto and incorporated herein as **EXHIBIT 2**. City authorizes employees of PZS to operate any City Personal Property vehicles and other equipment owned by the City and leased to PZS pursuant to and in furtherance of this Agreement, provided all operations shall be specifically covered by insurance policies that are required to be maintained by PZS and/or the City under the terms of this Agreement. PZS shall maintain all such City Personal Property in good condition and repair. PZS shall not be responsible for any diminution in value of City Personal Property due to normal, customary and expected wear and tear to said City Personal Property. PZS shall replace such City Personal Property with items of similar quality in the event City Personal Property becomes inoperable or unusable and is necessary for operation of the Zoo, in PZS’s reasonable discretion. All personal property procured by PZS during the Term of this Agreement for use of the Zoo shall remain PZS property upon termination of this Agreement.

**2.3 Rent.** During the Term of this Agreement, PZS shall pay to City an annual lease payment for the Premises and Personal Property of One Dollar (\$1.00) due and payable on or before January 1 during each year the Agreement is in effect.

**2.4 Delivery of Possession, Lease Term and Renewal Option.** PZS shall continue to have and hold the Premises for the additional term of fifteen (15) years, commencing on the 1st day of January, 2019 (“Term”). The parties agree to meet annually on a mutually agreeable date during the term of the Agreement to discuss any proposed revisions to the Agreement, changes in the allocation of funds or other budgetary concerns.

Unless an extension agreement is negotiated and signed by the parties, this Agreement will expire upon the earlier of: (1) 11:59 p.m. on December 31, 2033 (“Expiration Date”); or (2) 180 days after written notice of either party of its intent to terminate this Agreement (“Termination Date”). Unless earlier terminated, the parties will begin negotiations for an extension agreement in 2032 with the intent to execute such an extension agreement in early 2033.

**2.5 City’s Right of Entry.** The City or its designated representative may enter the Premises at any mutually agreeable time for the purpose of inspecting or maintaining the Premises. In the event of an emergency, the City or its representatives may enter the Premises without consent or agreement.

### **ARTICLE 3.0 ANIMAL COLLECTION.**

**3.1 Ownership of Current Zoo Animals.** Except for those animals under loan from other institutions or governmental entities (“Loaned Animals”), all animals currently and in the future exhibited, housed or otherwise kept or cared for on the Premises (“Zoo Animals”), shall be and will become the sole property of the PZS for the term of the agreement. PZS assumes all responsibility for the care, feeding and housing of all Zoo animals.

**3.2 Care for Zoo Animals.** PZS shall provide care for all Loaned Animals and Zoo Animals. Such care shall be provided in accordance with all applicable federal, state and local laws and regulations. Such care shall also be provided in accordance with the policies and guidelines adopted by the Association of Zoos and Aquariums (“AZA”).

. PZS shall have authority to sell and otherwise acquire or dispose of Zoo Animals in the course of PZS’s operation of the Zoo. The purchase, sale or other disposition of Zoo Animals shall be made in strict accordance with all applicable federal, state and local laws and regulations, together with guidelines and policies established by AZA. PZS may purchase and sell Zoo Animals with all proceeds from any such sales being used for operating and/or capital expenses at the Zoo.

**ARTICLE 4.0 CITY’S ANNUAL CONTRIBUTION TO PZS.**

**4.1 City’s Annual Contribution.** As compensation for PZS’s service in operating the Zoo pursuant to this Agreement, and for payment by PZS of Zoo operating/capital expenses, City shall appropriate and pay to PZS the following (“Annual Contribution”):

<b><u>Year</u></b>	<b><u>Annual Contribution w/o capital</u></b>	<b><u>Additional capital</u></b>
2019	\$700,000	\$3.7 million
2020	\$700,000	
2021	\$700,000	
2022	\$700,000	
2023	\$600,000	\$1.1 million
2024	\$400,000	
2025	\$350,000	\$100,000
2026	\$350,000	\$100,000
2027	\$300,000	\$100,000
2028	\$300,000	\$100,000
2029	\$250,000	\$100,000
2030	\$250,000	\$100,000
2031	\$250,000	\$100,000
2032	\$250,000	\$100,000
2033	\$250,000	\$100,000

**4.2 Payment Schedule.** The Annual Operating Contribution paid by the City shall be distributed to PZS in two (2) payments during each year the Agreement is in effect with the first Annual Contribution payment tendered by the City to PZS on January 15<sup>th</sup> and the second Annual Contribution payment tendered by the City to PZS on June 1<sup>st</sup>.

**ARTICLE 5.0 FUNDING**

**5.1 PZS to Pursue Funding.** PZS will incorporate fundraising for the capital needs and operations of the Zoo into PZS’s fundraising efforts, including public sector sources such as federal grants, state assistance, regional and local taxation, county and City grants, and private sector sources such as bequests, and contributions from individuals, corporations, foundations and trusts. PZS may subcontract or engage third parties to implement and carry out its fund-raising activities and efforts. PZS will separately account for all funds received as a result of its fundraising efforts and manage the investment of such funds within PZS's policies. The City shall not be obligated to make any expenditures or appropriations for this purpose.

**5.2 Assistance with Additional Funding Sources.** The City and the PZS agree to consider and, if deemed appropriate, pursue additional funding sources for capital improvements and operations of the Zoo. Such additional funding sources may include bond funding, hotel/motel tax appropriations, food/beverage tax appropriations, and other external funding sources. The City

and PZS will communicate as appropriate with regard to these potential funding sources for the Zoo, and the City will include or assist the Zoo in the creation of any of these funding partnerships.

**5.3 Public Tax Support.** If a voter-approved tax, hotel motel or food and beverage tax or any other form of public support that would provide funding for the Zoo or any part of the Zoo occurs, the parties will discuss whether it is appropriate to reduce annual City support by the amount of the revenue provided by the tax funding which is dedicated to the Zoo, not to exceed the current level of funding reduction to zero.

**5.4 City Bond/Capital Funding mechanisms.** If the City pursues bond funding for Parks, quality of life initiatives, or other recreational infrastructure projects, the City will in good faith consider the Zoo as part of the bond funding. The City will consider in good faith any future written requests for capital funding improvements that the PZS may make above and beyond the \$3.7 million bond and \$1.1 million option within the 15-year time of this Agreement. The City may request a reduction of annual City support in connection to additional capital funding.

**5.5 Capital Project Funding.** Because the City will retain ownership of the Real Property, including buildings and infrastructure, and because, at the Effective Date many of these facilities will have a remaining useful life, the City will consider capital improvements for the Zoo similar to improvements to other City-owned facilities and infrastructure. These capital improvements would be in addition to any current agreed upon capital funding mechanisms.

**5.6 Insufficient Appropriation to Maintain Financial Sustainability.** As soon as practicable, the City will provide notice to PZS if a recommended or proposed budget does not include the full appropriation of sufficient funds for the payment of the City subsidy for any fiscal year.

**5.7 Renegotiation or Termination under Certain Circumstances.** Upon the occurrence of any of (a) through (c) below, PZS may: (i) enter into contract re-negotiation with City to increase the amount of the operating subsidy or capital contributions; or (ii) deliver Notice of Termination of this Agreement under Section 2.4:

- (a) the City does not appropriate sufficient funds to make payments to PZS in accordance with this Agreement; or
- (b) after application of any available business income loss insurance proceeds available for such losses, an annual operating deficit exists which is greater than 5% of the operating budget due to unforeseen circumstances related to weather, construction, or other factors outside of PZS management control; or
- (c) additional requirements are placed on PZS and the Zoo by the AZA accrediting body to maintain AZA accreditation which result in an increase of operating expenses of greater than 5% of the operating budget or result in the need for significant additional capital funding; or

- (d) Additional funds for publicly funded capital and operating support outside of this agreement through taxes, bonds or other means is not secured within 7 years from the effective date of this Agreement.

## **ARTICLE 6.0 EMPLOYEE/LABOR RELATED ISSUES**

**6.1 Employee Supervision.** PZS will employ, supervise and direct all personnel necessary to manage and operate the Zoo, including the Executive Director, and have sole responsibility for all decisions relating to the hiring, supervision, discipline, and termination of such personnel, all of whom shall be employees of PZS. PZS shall control and supervise the conduct, demeanor and appearance of its employees and shall train its employees to render a high degree of courteous and efficient service to the public. PZS shall comply with all applicable federal, state and local laws, ordinances and regulations pertaining to all employees of the Zoo. PZS shall be responsible for any employment benefits provided to PZS employees, including health insurance benefits, retirement plans and such benefits.

## **ARTICLE 7.0 CAPITAL IMPROVEMENTS; CAPITAL CONTRIBUTIONS; MASTER PLAN**

**7.1 PZS Capital Improvement Responsibility.** PZS is hereby empowered to develop the Zoo grounds, buildings and zoological collection as it deems appropriate and in the best interest of the public. Capital improvements will be in accordance with the current Master Plan or capital improvements otherwise necessary for further development of the Zoo. In furtherance thereof, PZS may construct capital improvements and major alterations to the Zoo buildings and grounds consistent with any master plan or deferred maintenance plan then in effect, as outlined to the Board, or as otherwise consistent with the general intent and purpose of the Zoo.

**7.2 Requirement of City Approval for Certain Capital Improvements.** PZS shall be allowed to make such capital improvements and alterations, without need of prior City approval, for expenditures for any single capital improvement up to Twenty-Five Thousand Dollars (\$25,000). PZS shall not make any expenditure of funds for any single capital improvement or alteration to the Premises in excess of Twenty-Five Thousand Dollars (\$25,000) without the express written permission of the City. PZS shall be responsible for obtaining any required permits for such alterations and capital improvements, at its expense. PZS shall maintain records of all capital projects and, upon request of the City, provide a report of all capital projects to the City.

**7.3 City's Annual Capital Contributions to Zoo.** Given City ownership of the Premises, the City agrees that it will actively participate in providing assistance for the development of capital funding for use with Zoo capital improvement projects that are necessary to the operation of the Zoo. As part of this commitment, City shall provide PZS with a non-reverting minimum payment of one hundred thousand dollars (\$100,000) during years 7-15 of the Agreement. Additionally, the City will give PZS one-million and one hundred thousand dollars (\$1,100,000) million in capital funding in year 5 of the Agreement which funding may be derived from currently available revenues of the City or through the issuance of economic development revenue bonds issued by the City under Indiana Code 36-7-12 and payable from revenues to be identified by the City. Should PZS seek additional capital funds from the City or assistance in

raising such funds, PZS will address such proposal to the City through the Executive Director of Venues Parks and Arts.

**7.4 Capital Contribution of City.** In addition to the Annual Capital Contribution described above in 7.3, the City agrees to undertake the approval and issuance process for one (1) or more series of economic development revenue bonds in an aggregate principal amount not to exceed three-million and seven hundred thousand dollars (\$3,700,000) issued by the City under Indiana Code 36-7-12 and payable from revenues to be identified by the City. One-million and five hundred thousand dollars (\$1,500,000) of such bond proceeds will fund the Phase I front entrance project and the remaining amount of the proceeds will fund deferred maintenance and capital needs in order to maintain accreditation or continued improvement to the zoo. The City agrees to proceed to undertake authorizing and other actions necessary to provide for the issuance and sale of such bonds immediately upon execution of this Agreement. The City will pay the \$3,700,000 as soon as practicable once the funds become available, but no later than January 31, 2019.

**7.5 Control and Ownership of Capital Project.** At its election, PZS will be the contracting party for any capital projects or improvements to the Zoo. The parties recognize and acknowledge that the provisions of Indiana Code § 36-1-12-0.1, *et seq.* do not apply to projects for which PZS is the contracting party because PZS is not a political subdivision or an agency of a political subdivision. The parties further recognize and acknowledge that this Agreement is an operating agreement with a political subdivision under Indiana Code § 5-23, *et seq.* as contemplated by Indiana Code § 36-1-12-1(f). Any capital project that results in the erection or remodel of a fixture shall become the property of City without the requirement of reimbursement to PZS.

## **ARTICLE 8.0 USE AND MAINTENANCE; HOURS OF OPERATION**

**8.1 Use of the Premises.** PZS acknowledges and agrees that the Premises shall only be used for the operation, administration, and maintenance of a zoo, which may include educational programs consistent with the purposes and intent of this Agreement, as well as the occasional use of the Premises for entertainment, fundraising or similar uses as a source of revenue for the Zoo and/or PZS, as long as such activities and uses are consistent with governing laws, ordinances, rules and regulations.

PZS shall use the Premises in a careful and proper manner in compliance with all applicable laws, ordinances, rules, and regulations. PZS shall not cause or permit toxic or hazardous substances to be brought, kept, or used in or about the Premises without the prior written consent of the City.

**8.2 Maintenance of the Premises.** The Parties mutually agree that the Premises are an asset of the City. For purposes of this Agreement, “Zoo” shall be defined as all Zoo facilities, structures, building, equipment, fixtures, appliances, grounds, driveways, paths, walkways, parking lots and fencing on or around the Premises and any and all landscaping in, on or around same and as more specifically depicted on **EXHIBIT 1**.



**8.3 Routine Maintenance.** During the term of this Agreement and any extension of its term, PZS will be responsible for all routine maintenance and day-to-day maintenance, including but not limited to, janitorial services, window washing, pest control, mowing of grass, regular tree trimming, general upkeep, repair, and replacement. Such maintenance work will be completed by PZS in a workmanlike and expedited manner. Damage caused by PZS, its employee's, agents, contractors and vendors shall be PZS's sole responsibility and at PZS's sole expense. In the event that it becomes necessary for the City to undertake such activities, PZS shall reimburse the City for all expenses and associated costs.

**8.4 Paving, Concrete, Major Tree Work Maintenance, and Trash.** Maintenance and upkeep related to the parking lot, major tree work, paving and concrete work within and around the Zoo facility shall be the sole responsibility of PZS. Any work done with regard to these particular issues will be conducted in a timely and workmanlike manner. PZS shall be responsible for snow plowing and snow shoveling of the Premises as described herein, and shall be responsible for maintaining the Premises free from trash, litter, and debris.

**8.5 Parking Lot - Potawatomi Park.** There exists a parking area owned by the City of South Bend that is located within Potawatomi Park ("Park") and adjacent to the Zoo ("Parking Lot") as well as property located to the east of the Parking Lot which will be developed for additional parking ("Additional Parking"). The Parking Lot and the Additional Parking are not included within the Premises. However, the Parking Lot is anticipated to be utilized by patrons of the Zoo as well as visitors to the City park. The City agrees that access to adequate parking by Zoo patrons is essential to the overall success of the Zoo. As such, the City will be responsible for providing safe and adequate parking for Zoo patrons through the Term of the Agreement on the Parking Lot, and upon mutual agreement, to the area designated as Additional Parking. The City shall maintain the Parking Lot in good repair and in a safe and structurally sound condition and shall be responsible for snowplowing in a manner consistent with the City's usual and customary practice for public facilities.

**8.6 Days/Hours of Operation.** Except in the case of public disaster or other major emergency, the Zoo shall remain open on a yearly calendar basis. As operator of the Zoo, PZS shall have authority to increase or decrease the days and hours during which the Zoo is open to the public in accordance with the operational needs of the Zoo.

## **ARTICLE 9.0 AZA ACCREDITATION, PERMITS AND LICENSES**

**9.1 Mutual Cooperation.** The City and PZS acknowledge and agree that continuing accreditation of the Zoo by AZA is of critical importance to the Zoo's success. Throughout the Term of this Agreement, PZS with support of the City shall cause the Zoo, to be at all times accredited and in good standing with the AZA. At least one year prior to each scheduled AZA accreditation review, the parties agree to meet to review and discuss all issues which may require attention to ensure continued accreditation of the Zoo including, but not limited to, any funding issues associated with same.

**9.2 Permits, Licenses, Memberships, Accreditation.** PZS will maintain and secure any and all permits, licenses, memberships, registrations, certifications and AZA accreditation necessary and appropriate for the operation of a premier zoo, including but not limited to,

USDA, ISIS and AZA. During the term of this Agreement PZS shall be solely responsible for the preparation, timely submission and results of any AZA accreditation application on behalf of the Zoo.

**9.3 Transfer, Assignment and/or Termination of Licenses and Permits.** At such time as this Agreement may be terminated, PZS agrees to engage in all actions required to transfer all licenses or permits in its name back to the City for the continued operation of the Zoo. Further, it will be the sole responsibility of PZS to pay for all permits and licensing necessary to the performance of its obligations under this Agreement. In performance of its obligations with respect to licenses and permits under this Agreement, PZS shall comply with all applicable laws, rules and regulations.

## **ARTICLE 10. UTILITIES**

**10.1 Natural Gas, Electricity and Telephone Service.** PZS shall be responsible for providing all natural gas, electricity, and telephone service ~~reasonably~~ necessary and appropriate to the continued operation of the Zoo, at PZS's sole cost and expense.

**10.2 Water/Sewer.** The Parties will share costs of all water and sewer services necessary for the continued operation of the Zoo as follows: PZS will be responsible for 30% of the total cost of all water and sewer services throughout the term of this Agreement.

**10.3 Future Planning.** PZS shall consider utility costs in its planning for new exhibits, together with making design and construction decisions in a manner that seeks to minimize costs, to the extent commercially reasonable. Further, PZS shall not construct any new exhibits or take any other actions that will result in a material increase in the cost of such utilities to the City without prior written consent of the City.

**10.4 VOIP Phone Equipment.** City agrees, as part of the Personal Property necessary to operate Zoo, to allow PZS to possess and utilize the VOIP phone system and all equipment related to same currently in place at the Zoo. PZS shall pay to the City not more than the actual costs chargeable for such services and equipment.

## **ARTICLE 11.0 FINANCIAL RECORDKEEPING AND AUDITING**

**11.1 Financial Recordkeeping and Auditing.** PZS agrees to report financial information regarding its expenses and income with the City by reporting and presenting its filed IRS Form 990 (or its equivalent) and audited financial statements annually no later than the June Board meeting. PZS agrees to provide an interim report on its financial and operational status at least 1 other time or as often as reasonably requested by the Board. PZS will also have its financial records audited on an annual basis and will share such audit results with the City.

**11.2 Audit of City Funds by State Board of Accounts.** PZS acknowledges that it may be required to submit to an audit of City funds paid through this Agreement. Any such audit shall be conducted in accordance with IC 5-11-1, et. seq. and the audit guidelines specified by the State Board of Accounts.

**11.3 Audit of Federal Funds.** If the City receives Federal funds which it passes on to PZS as a sub-recipient of such funds, following the Expiration Date of this Agreement, PZS shall arrange for a financial and compliance audit of such funds provided by the State pursuant to this Agreement. Such audit shall be conducted by an independent public or certified public accountant (or as applicable, the Indiana State Board of Accounts), and shall be performed in accordance with Indiana State Board of Accounts publication entitled "Uniform Compliance Guidelines for Examination of Entities Receiving Financial Assistance from Governmental Sources," and applicable provisions of the Office of Management and Budget ("OMB") "Circular A-133 (Audits of States, Local Governments, and Non-Profit Organizations), along with periodic supplements. PZS is responsible for ensuring that the audit and any management letters are completed and forwarded to the State in accordance with the terms of this Agreement. Audits conducted pursuant to this Section must be submitted no later than nine (9) months following the close of PZS' fiscal year. PZS agrees to provide the Indiana State Board of Accounts and the State an original of all financial and compliance audits. The audit shall be an audit of the actual entity, or distinct portion thereof that is PZS, and not of a parent, member, or subsidiary corporation of PZS, except to the extent such an expanded audit may be determined by the Indiana State Board of Accounts or the City to be in the best interests of the City. The audit shall include a statement from the Auditor that the Auditor has reviewed this Agreement and that PZS is in compliance with the financial aspects of this Agreement.

## **ARTICLE 12.0 INSURANCE**

**12.1 Responsibility for Insurance Coverage.** During the Term of this Agreement, PZS shall, at PZS' expense, procure and keep in force at all times insurance written by an insurer licensed to conduct business within the State of Indiana, insuring the City and PZS. PZS shall procure the following insurance coverage, and shall provide evidence of same to the City:

Commercial General Liability. Coverage shall have minimal limits for bodily injury of \$1,000,000 per occurrence, combined single limit for bodily injury liability and property damage liability with an umbrella coverage limit of \$5,000,000.

Attractions Insurance. PZS will maintain all insurance required under state and federal law for each of its current and future attractions, such as the Zoo train.

Workers' Compensation. Insurance covering all employees with statutory limits in compliance with applicable State and Federal laws.

Automobile Insurance. Vehicles owned or used by PZS for Zoo business under this Agreement shall at all times be insured against loss or damage resulting to persons with minimum liability limits of \$500,000 per occurrence, \$1,000,000 aggregate, and against loss or damage to property with minimum liability limits of \$100,000 per occurrence.

Beer and Wine Sales. Insurance covering the sale and consumption of beer and wine on the Premises.

Errors and Omissions. Insurance covering errors and omissions by PZS Board Members or Directors.

Property Insurance. City shall provide property insurance coverage for all its owned assets, including the Real Estate, and, if permitted, the City's insurance carrier, shall name the PZS as additional insureds. City may elect to be self-insured.

### **ARTICLE 13.0 PZS BOARD MEMBERSHIP**

**13.1 Mayoral Appointment.** As evidence of the public-private partnership between the City and PZS, and as part of this Agreement, the then sitting Mayor of City shall have the right to appoint one individual to the PZS Board of Directors. This individual's term will be for one (1) calendar year in duration and shall continue from year to year unless a new appointment is made by the Mayor. This appointed individual shall have all of the rights and obligations of a regular member of the PZS Board and will be subject to PZS' By-Laws and policies, including any term limits imposed by the PZS By-Laws.

### **ARTICLE 14.0 NAMING PROVISION; DONATIONS; ADMISSION POLICIES AND FEES**

**14.1 Naming Provision.** The name of the Zoo shall remain "The Potawatomi Zoo" during the term of this Agreement, unless both parties mutually agree in writing to a name change.

**Naming Rights.** PZS may grant naming rights to an exhibit, building, feature or smaller item within the Zoo without the prior consent and approval of the City. No naming rights may be granted following a notice of termination by either party without the consent and approval of the City. Neither PZS nor the City may convey rights to (or commit to) naming the entirety of the Zoo, the entirety of the Zoological Garden, or the entirety of the Public Park without the consent of both parties. Funds received for naming any part of the Zoo shall be used exclusively for the benefit of the Zoo.

**14.2 Donations.** Any and all cash or in-kind donations received by PZS for the operation of the Zoo or for the preservation, or display of the Collection shall be retained by PZS and shall be used for the stated purpose; provided however, that a report of such donations shall be made in accordance with this ARTICLE 14.0. In complying with this section of the Agreement, PZS is not required to disclose the source of any donations received by PZS nor will it be required to provide the City with any donor identifying information during the Term of this Agreement.

**14.3 Admission Fee Policies; Increase in Fees and Pricing.** The City and PZS agree that maintaining affordable pricing for Zoo admission and attractions is an essential component to successful operation of the Zoo. While admission and attraction pricing shall be at the sole discretion of PZS, both parties agree to utilize their best efforts to ensure that access to the Zoo remains an affordable family experience. PZS shall be responsible for setting admission prices,

membership fees, concession prices, rental fees, and fees or prices for all items or experiences sold at the Zoo.

## **ARTICLE 15.0 BEER AND WINE SALES AND CONSUMPTION**

**15.1 Licensing required.** PZS has applied to and received a license to sell beer and wine for consumption on the Zoo premises from the Indiana Alcohol and Tobacco Commission. PZS may continue to sell beer and wine in accordance with its license if the following conditions are met and maintained:

- 15.1.a At all times when alcohol is being sold or consumed, PZS must comply with all Applicable Laws including but not limited to the obligation to have trained supervisory and service personnel on site;
- 15.1.b Insurance naming the City as an additional insured is obtained and maintained.
- 15.1.c PZS meets and maintains all requirements of the State of Indiana with regard to liquor licenses including but not limited to obligations of Financial Responsibility.

**15.2 Change in Licensing Regulations.** In the event that during the Agreement term there is a substantial change in the regulations or statutes under the Indiana Alcohol and Tobacco Commission or such other laws as may be established from time-to-time by the State of Indiana governing the sale of alcoholic beverages, the City and PZS shall discuss the impact of such changes on permission to sell beer and wine. The parties do not intend that any change in the State of Indiana regulations or statutes would extend the permission granted by the City to PZS concerning sales of alcohol without further agreement of the parties.

## **ARTICLE 16.0 DEFAULT; TERMINATION OF AGREEMENT WAIVER OF JURY TRIAL; ATTORNEYS FEES**

**16.1 Events of Default; Remedies; Attorney Fees Upon Default.** The following occurrences are “Events of Default”:

- (a) PZS vacates or abandons the Premises; or
- (b) This Lease Agreement or the Premises or any part of the Premises are taken upon execution or by other process of law directed against PZS, or are taken upon or subjected to any attachment by any creditor of PZS or claimant against PZS and the attachment is not discharged within fifteen (15) days; or
- (c) PZS files a petition in bankruptcy or insolvency under the bankruptcy laws of the United States, or involuntary proceedings under any bankruptcy or insolvency act for the dissolution of PZS are instituted against PZS, or a

receiver or trustee is appointed against all or substantially all of PZS' property and proceedings are not dismissed within ninety (90) days; or

- (d) City fails to make timely payment of its Annual Contribution to PZS (on either January 15<sup>th</sup> or June 1<sup>st</sup>) during the Term of this Agreement; or
- (e) City fails to make timely payment of its Annual Capital Contribution to PZS during the Term of this Agreement; or
- (f) City files a petition for bankruptcy or insolvency under the bankruptcy laws of the United States, or involuntary proceedings under any bankruptcy or insolvency act are instituted against the City, or a receiver or trustee is appointed against all or substantially all of City's property and proceedings are not dismissed within ninety (90) days; or
- (g) Either City or PZS materially breaches any of the other agreements, terms, or conditions of this Agreement and the breach continues for a period for sixty (60) days after notice by City or PZS to the breaching party.

If any one or more Events of Default set forth above occurs by PZS as the breaching party, then the City may, at the City's sole option: (i) re-enter and repossess the Premises in accordance with all applicable law; (ii) sue for any damages sustained; or (iii) terminate this Agreement. Under any option elected by City, the Loaned Animals and Zoo Animals will immediately become the property of the City and under the City's direct control. Upon such material default by PZS, City shall have any or all of the above remedies and all other remedies at law or in equity, all of which amounts owing by PZS shall be paid upon demand.

If any one or more Events of Default set forth above occurs by City as the breaching party, then PZS may, at PZS sole option: (i) sue for any damages sustained; or (ii) terminate this Agreement. Upon such material default by City, PZS shall have all of the above remedies and all other remedies at law or in equity, all of which amounts owing by City shall be paid upon demand.

**16.2 Notice of Default.** If either party fail to comply with or perform any conditions or covenants under this Agreement, and such failure continues for more than sixty (60) days after written notice thereof by the other, a default shall occur, and the non-defaulting party shall have the option to terminate this Agreement by giving the defaulting party a written notice of termination specifying a date upon which this Agreement shall terminate, provided, however, that if the defaulted party is pursuing a cure for the default in good faith, then the non-defaulting party shall give due consideration to the granting of a reasonable extension of time to complete the cure of the default, and, provided, further, that in any event the non-defaulting party may, in its sole discretion, grant an extension of time to cure the default. In the event of a default, either party may seek all other remedies provided for hereunder or now or hereafter existing in law or in equity. Election of any of these remedies by either party shall not constitute a waiver of the right to pursue other available remedies. No waiver of a default shall operate as a waiver of any other default or of the same default on another occasion.

**16.3 Waiver of Jury Trial.** The parties acknowledge that disputes arising under this Agreement are likely to be complex and they desire to streamline and minimize the cost of resolving such disputes. In any legal proceeding, each party knowingly, intentionally, and voluntarily waives the right to trial by jury in any action, counterclaim, dispute or proceeding based upon, or related to the subject matter of this Agreement. This waiver applies to all claims arising against all parties to such actions and proceedings.

**16.4 Attorney Fees.** In the event of any litigation or mediation between the parties, regarding an alleged breach of this Agreement, neither party shall be entitled to attorney fees.

## **ARTICLE 17.0 INDEMNIFICATION**

**17.1 PZS' Duty to Indemnify.** PZS agrees to hold harmless, indemnify, and defend the City, its directors, officers and employees against any claim, action, loss, damage, injury, liability, cost and expense of whatsoever kind or nature (including, but not by way of limitation, attorneys' fees and court costs), all the foregoing being a "Claim" arising out an injury (whether mental or corporeal) to persons, including death, or damage to property, with respect to or incidental to PZS's performance of this Agreement or PZS's work performed hereunder, other than those Claims arising out of the gross negligence or willful misconduct of the City, its directors, officers or employees.

**17.2 City's Duty to Indemnify.** City agrees to hold harmless, indemnify, and defend the PZS, its directors, officers and employees against any claim, action, loss, damage, injury, liability, cost and expense of whatsoever kind or nature (including, but not by way of limitation, attorneys' fees and court costs), all the foregoing being a "Claim" arising out an injury (whether mental or corporeal) to persons, including death, or damage to property, with respect to or incidental to City's performance of this Agreement or City's work performed hereunder, other than those Claims arising out of the gross negligence or willful misconduct of the PZS, its directors, officers or employees. Nothing in this Agreement shall be construed or interpreted as a waiver of the City's right to immunity or other such protections afforded under Indiana law including the Indiana Tort Claims Act, IC § 34-13-3, as amended from time-to-time.

## **ARTICLE 18.0 NOTICES**

**18.1 Notices.** All notices from City to PZS shall be deemed duly served if mailed, postage prepaid, by registered or certified U.S. Mail to PZS at the following address:

Potawatomi Zoological Society  
500 South Greenlawn Avenue  
South Bend, IN 46615  
Attn: Executive Director

All notices from PZS to City shall be deemed duly served if mailed, postage prepaid, by registered or certified U.S. Mail to City at the following address:

Board of Park Commissioners for the City of South Bend  
321 East Walter Street  
South Bend, IN 46614  
Attn: Executive Director, Venues Parks and Arts

*With a Copy to:*  
City of South Bend Department of Law  
227 West Jefferson  
County-City Building, Ste. 1200-South  
South Bend, Indiana 46601  
Attn: Corporation Counsel

## **ARTICLE 19.0 MISCELLANEOUS PROVISIONS**

**19.1 PZS Tax Exempt Status.** PZS is a non-profit corporation, duly incorporated, validly existing and in good standing under the laws of the State of Indiana. PZS shall, at all times during the term of this Agreement, maintain its tax-exempt status.

**19.2 Authority.** City and PZS confirm to one another through the signatures to this Agreement that each has full power and authority to enter into this Agreement. The action contemplated by this Agreement has been duly authorized by all actions necessary for City and PZS. No other action is necessary on the part of either City or PZS to authorize execution of this Agreement.

**19.3 No Liens.** PZS will not suffer, or through its actions, cause to be filed upon the Zoo Premises any lien or encumbrance of any kind.

**19.4 Intellectual Property.** Any and all intellectual property associated with marketing of the Zoo, including, without limitation, ad campaigns, membership materials, leadership campaigns, special events, trademarks, trademark applications, copyrights and copyright applications, shall be the exclusive property of PZS, to which PZS shall have the entire right, title and interest.

**19.5 Non-Discriminatory Policy.** There shall be no discrimination as to race, gender, religion, color, creed, sexual orientation, or national origin, against any worker, employee or applicant or any member of the public in the operations referred to by this Agreement. Further, there shall be no discrimination regarding any use, service, maintenance or operation of the premises, nor will PZS allow any subcontractors to so discriminate.

**19.6 Minority and Women's Enterprise Diversity Development.** Persons, partnerships, corporations, associations, or joint venturers awarded a contract by the City of South Bend through its agencies, boards, or commissions shall not discriminate against any employee or



applicant for employment in the performance of a City contract with respect to hire, tenure, terms, conditions, or privileges of employment, or any matter directly or indirectly related to employment because of race, sex, religion, color, national origin, ancestry, age, or disability that does not affect that person's ability to perform the work.

In awarding contracts for the purchase of work, labor, services, supplies, equipment, materials, or any combination of the foregoing including, but not limited to, public works contracts awarded under public bidding laws or other contracts in which public bids are not required by law, the City, its agencies, boards, or commissions may consider the Contractor's good faith efforts to obtain participation by those Contractors certified by the State of Indiana as a Minority Business ("MBE") or as a Women's Business Enterprise ("WBE") as a factor in determining the lowest, responsible, responsive bidder.

In no event shall persons or entities seeking the award of a City contract be required to award a subcontract to an MBE/WBE; however, it may not unlawfully discriminate against said WBE/MBE. A finding of a discriminatory practice by the City's MBE/WBE Utilization Board shall prohibit that person or entity from being awarded a City contract for a period of one (1) year from the date of such determination, and such determination may also be grounds for terminating the contract for which the discriminatory practice or noncompliance pertains.

Notwithstanding the foregoing, the award and performance of all City contracts shall comply with applicable federal, state, and local laws.

**19.7 Choice of Law.** This Agreement shall be governed by and construed in accordance with the laws of the State of Indiana. Any legal action arising out of the terms or performance of this Agreement shall be first submitted to mediation before a mediator agreeable to each Party. The Parties agree to split the cost of such mediator on a 50/50 basis. Should mediation not successfully resolve the issues(s) between the Parties, any legal action formally brought by one Party against the other shall be initiated in the State Courts of St. Joseph County, Indiana.

**19.8 Severability.** If any provision of this Agreement is held by a court of competent jurisdiction to be illegal or in conflict with an applicable law, the validity of the remaining provisions of this Agreement shall not be affected unless amended or modified by mutual consent of the parties. Notwithstanding the foregoing, if any material provision of this Agreement, or the application of such provision to a particular situation is held to be invalid, void, or otherwise unenforceable, the City, in its sole discretion, may terminate this Agreement by providing written notice to PZS in conformance with ARTICLE 18.0.

**19.9 Other Necessary Acts.** Each party shall execute and deliver to the other all such further instruments and documents as may be reasonably necessary to carry out the purposes and intents of this Agreement, and to provide and secure to the other party the full and complete enjoyment of its rights and privileges provided in this Agreement.

**19.10 Funding Cancellation and Payments.** In accordance with I.C. 6-1.1-18, payments by the City are subject to annual appropriation by its fiscal body. Subject to Articles 5.6 and 5.7 above, a determination by the City that funds are not appropriated or otherwise available to support

continuation of the performance shall be final and conclusive.

**19.11 Non-Collusion and Acceptance.** The undersigned persons acting on behalf of PZS, affirms, subject to the penalties for perjury, that he/she is the properly authorized representative, agent, member or officer of PZS, that he/she has not, nor has any other member, employee, representative, agent or officer of PZS, directly or indirectly, to the best of the undersigned's knowledge, entered into or offered to enter into any combination, collusion or agreement to receive or pay, and that he/she has not received or paid, any sum of money or other consideration for the execution of this Agreement other than that which appears upon the fact of this Agreement.

**19.12 E-Verify.** PZS affirms under the penalties of perjury that he/she/it does not knowingly employ an unauthorized alien. PZS shall enroll in and verify the work eligibility status of all his/her/its newly hired employees through the E-Verify program as defined in IC 22-5-1.7-3. PZS shall not knowingly employ or contract with an unauthorized alien. PZS shall not retain an employee or contract with a person that PZS subsequently learns is an unauthorized alien.

PZS is not required to participate in the E-Verify program should the E-Verify program cease to exist. Additionally, PZS is not required to participate if PZS is self-employed and does not employ any employees.

PZS shall require his/her/its subcontractors, who perform work under this Agreement, to certify to PZS that the subcontractor does not knowingly employ or contract with an unauthorized alien and that the subcontractor has enrolled and is participating in the E-Verify program. PZS agrees to maintain this certification throughout the duration of the term of a contract with a subcontractor.

The City may terminate for default if PZS fails to cure a breach of this provision no later than thirty (30) days after being notified by the City.

**19.13 Entire Agreement.** This Agreement contains the sole and entire Agreement of the parties and no prior or contemporaneous oral or written representation or agreement between the parties shall have any legal effect. No provision in this Agreement shall be waived unless such waiver is expressly made in writing and signed by an authorized representative of each Party.

This Agreement constitutes the entire Agreement between the parties with respect to the subject matter of the Agreement. This Agreement may not be amended or modified except by written agreement executed by the Parties, their respective successors, permitted assigns or legal representatives. This Agreement and the rights to payment hereunder shall not be assignable or transferrable to any other party without the prior written consent of the other party hereto.

**19.14 Counterparts.** This Agreement may be executed in counterparts, all of which shall be deemed originals.

**19.15 Headings.** All headings in this Agreement are for convenience only and shall not affect the interpretation or enforcement of this Agreement in any way whatsoever. Words used in

the singular shall include the plural and words used in the masculine shall include the feminine in all cases where such would apply.

[SIGNATURES APPEAR ON THE FOLLOWING PAGE]

This Lease and Management Agreement is made effective as of January 1, 2019.

**CITY OF SOUTH BEND, INDIANA**

**POTAWATOMI ZOOLOGICAL SOCIETY**

DATE: \_\_\_\_\_

DATE: \_\_\_\_\_

By: \_\_\_\_\_  
Pete Buttigieg, Mayor

By: \_\_\_\_\_  
George E. Horn, Jr. President

By: \_\_\_\_\_  
Marcy Dean, Executive Director

DATE: \_\_\_\_\_

By: \_\_\_\_\_  
Aaron Perri, Executive Director, Venues Parks and Arts

**CITY OF SOUTH BEND, INDIANA  
BOARD OF PARK COMMISSIONERS**

DATE: \_\_\_\_\_

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

\_\_\_\_\_  
Consuela Hopkins, Vice-President

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

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

Attest this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_.

\_\_\_\_\_  
Eva Ennis

*Signature Page to Lease and Management Agreement By and Between the Board of Park Commissioners for the City of South Bend and the Potawatomi Zoological Society, Effective January 1, 2019*