

MEMORANDUM OF UNDERSTANDING

This Memorandum of Understanding (this “Agreement”), effective as of this 13th day of December 2018, by and between the City of South Bend Department of Redevelopment, acting by and through its governing body, the South Bend Redevelopment Commission (the “Commission”), and Wharf Partners, LLC, an Indiana limited liability company (the “Developer”) (the Developer and the Commission each being referred to herein as a “Party” and collectively as the “Parties”).

RECITALS

WHEREAS, the Commission exists and operates under the provisions of the Redevelopment of Cities and Towns Act of 1953, as amended (the “Act”); and

WHEREAS, the Commission and the Developer have previously entered into a Development Agreement, dated as of February 22, 2018, as the same may be amended from time to time (collectively, the “Development Agreement”), whereby the Developer agreed to undertake an economic development project more fully described in the Development Agreement (the “Project”) on certain property owned by the Developer described in the Development Agreement (the “Developer Property”); and

WHEREAS, the Developer Property is wholly located within the boundaries of the River East Development Area (the “Area”), an area previously designated by the City as an economic development area and an allocation area for purposes of tax increment finance (“TIF”) and as more fully described in the Development Agreement, the Commission believes completion of the Project is consistent with the goals of the development plan previously approved by the Commission for the Area; and

WHEREAS, the Commission agreed to undertake certain local public improvements as more fully described in the Development Agreement; and

WHEREAS, since executing the Development Agreement, the Parties have determined that, to ensure success of the Project and continued operation and development of the surrounding properties, certain additional conveyances of real property, namely the granting and/or termination of temporary and permanent easements, will be necessary to accommodate the completion of the Project; and

WHEREAS, the Parties also desire to set forth further agreements with regard to other maintenance and development concerns.

NOW, THEREFORE, in consideration of the mutual promises and obligations set forth herein, the adequacy of which is hereby acknowledged, the Parties agree as follows:

1. Recitals. The representations, covenants and recitations set forth in the foregoing recitals are material to this Agreement and are hereby incorporated into and made a part of this Agreement by this reference.

2. Temporary Easements.

- a. Commission Grants of Temporary Easement.** The Commission agrees to grant a temporary construction easement to the Developer for the use of that portion of Lot 3 marked as Outlot “A” on the Seitz Park Minor Subdivision plat (the “Seitz Park Plat”), which is attached as Exhibit A for reference, during completion of Phase 1 of the Project (as described in the Development Agreement) including for the purpose of locating sheet pilings thereon (the “Seitz Outlot”). Additionally, the Commission agrees to grant a temporary construction easement to the Developer for the use of Outlot A, as designated on the Cascades Minor Subdivision plat (the “Cascades Plat”), attached hereto for reference as Exhibit B, for use during the construction of Phase 2 of the Project including for the purpose of locating sheet pilings thereon (the “Cascades Outlot”). The City of South Bend (the “City”) contemplates that it will be constructing improvements to the area commonly known as the River Walk, which is located on the Cascades Outlot, and the Parties agree to work in good faith to coordinate the timing of their respective projects.
- b. Developer Responsibilities.** With respect to the temporary easements granted by Commission herein, the Developer agrees that it will provide a clear lane over the Seitz Outlot at least 15 feet wide or will cause its contractor to move any temporary construction barriers as necessary to provide such 15 feet wide lane so that said drive may be used by contractors working in Seitz Park (the “Park”) to construct a hydroelectric power generation facility adjacent to the Park and also to reconstruct the Park. The Developer agrees to coordinate the installation of sheet pilings on the Cascades Outlot with improvements to be undertaken by the City thereon and agrees further that it will reimburse and indemnify the City for any damage to the trail improvements installed by the City on the Cascades Outlot that may occur as a result of the installation of the sheet pilings by the Developer or its contractors or for any increased costs of the trail improvements resulting from the installation of the sheet pilings. The Developer agrees (i) that the River Lights structures (the “Structures”) presently on the Cascades Outlot will remain during construction by the Developer, and the Developer will reimburse and indemnify the Commission for any damage to such Structures as a result of the Developer’s use of the Cascades Outlot for its Project and (ii) to the extent that the Structures must be relocated during such construction, the Developer shall be solely responsible for all expenses incurred by the Commission for the temporary relocation and later reinstallation of the Structures.
- c. Developer Grant of Temporary Easement.** The Developer agrees to grant to the Commission a temporary easement over Lot 1 identified on the Cascades Plat to provide parking for up to 26 automobiles for a period beginning on the date hereof until August 31, 2020, or sooner as required to accommodate the parking spaces displaced by neighboring construction projects. In the event that the grant of this temporary easement precludes the Developer from commencing phase II of

its Project, the City agrees to assist Developer by coordinating with neighboring construction projects and landowners to facilitate Developer's objectives. Prior to first use, the Commission shall provide evidence of insurance for use of Lot 1 for parking purposes. The Commission agrees to undertake any improvements and repairs and provide routine maintenance necessary to use Lot 1 for the purposes described herein. The Developer agrees that the Commission shall have exclusive use of the parking spaces for itself and tenants of the property commonly known as Stephenson Mills, located as depicted on Lot 4 of the Cascades Plat. Further, the Developer agrees that if any permanent lighting is removed from this area for construction purposes, Developer will provide temporary lighting for the parking area.

- 3. Permanent Easements.** The Commission agrees to grant to the Developer the following permanent easements: (i) over Lot 1 as depicted on the Seitz Plat for ingress and egress to and from the Developer's property, (ii) over the Cascades Outlot for the purpose of installing and maintaining footings, lights, and landscaping, subject to the prior approval of the Commission, and (iii) under the southern portion of the Cascades Outlot for the purpose of discharging storm outfall. The Commission authorizes the Executive Director of the City's Department of Community Investment or his designee to receive notice of and approve Developer's plans for and installation of such improvements, and Developer shall be responsible for all maintenance pertaining to such improvements. Developer shall indemnify the Commission for any loss or damage resulting from the improvements, including any additional costs required for the City's improvements to the River Walk which are caused directly or indirectly by the Developer's improvements.
- 4. Terminations of Easements.** The Developer acquired certain easement rights over Lot 2 as depicted on the Seitz Park Plat and Lot 4 as depicted on the Cascades Plat, which the Developer agrees to terminate. Additionally, the Commission shall work with FREG Stephenson Mills Associates, LLC ("FREG") to terminate any interest FREG may have in Lot 2 as depicted on the Cascades Plat.
- 5. Easement Agreements.** The Parties shall mutually agree upon the terms of the easement agreements and terminations contemplated herein and agree to execute such instruments within a reasonable time after the execution of this Agreement to effect the transactions contemplated hereby.
- 6. Property Transfers.** Concurrently with this Agreement, the Commission shall transfer its ownership interest in Lot 2 as depicted on the Cascades Plat to the Developer, and the Developer shall transfer its ownership interest in the Cascades Outlot and a portion of Lot 4 as depicted in the Cascades Plat and more particularly shown as the western twelve feet (12') of Lot 1 as depicted on the Seitz Park Plat to the Commission.
- 7. Miscellaneous.**

 - a. Severability.** If any term or provision of this Agreement is held by a court of competent jurisdiction to be invalid, void, or unenforceable, the remaining terms

and provisions of this Agreement shall continue in full force and effect unless amended or modified by mutual consent of the Parties.

- b. **Amendment.** This agreement may be modified only by the written mutual consent of the Parties.
- c. **Attorneys' Fees.** In the event of litigation, mediation, or arbitration among the parties regarding an alleged breach of this Agreement, neither Party shall be entitled to any award of attorneys' fees.
- d. **Governing Law; Jurisdiction; Waiver of Jury Trial.** This Agreement shall be construed and governed according to the laws of the State of Indiana, and any disputes arising hereunder that cannot be resolved amicably as set forth herein shall be resolved exclusively in state or federal courts seated in St. Joseph County, Indiana. In any legal proceeding, each Party 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 against all parties to such actions and proceedings. This waiver is knowingly, intentionally, and voluntarily made by all Parties.
- e. **Counterparts.** This agreement may be executed in separate counterparts, each of which when so executed shall be an original, but all of which together shall constitute one and the same instrument. Any electronically transmitted version of a manually executed original shall be deemed a manually executed original.
- f. **Authority.** Each undersigned person executing and delivering this Agreement on behalf of a Party represents and certifies that he or she is the duly authorized officer or representative of such Party, that he or she has been fully empowered to execute and deliver this Agreement on behalf of such Party, and that all necessary action to execute and deliver this Agreement has been taken by such Party.

[Signatures follow on next page.]

IN WITNESS WHEREOF, the Parties hereby execute this Agreement to be effective as of the date first set forth above.

SOUTH BEND REDEVELOPMENT COMMISSION

By: _____
Marcia I. Jones, President

ATTEST:

Donald E. Inks, Secretary

WHARF PARTNERS, LLC,
an Indiana limited liability company

By: _____

Printed Name: _____

Its _____