

5/19/99

34-R-99

**A RESOLUTION**

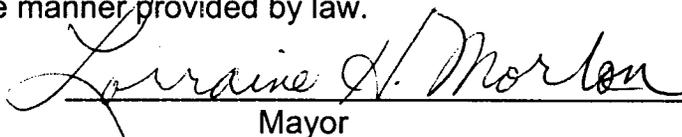
**Authorizing the City Manager to Enter Into  
a Parking Garage Construction Agreement**

BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF EVANSTON,  
COOK COUNTY, ILLINOIS:

SECTION 1: That the City Manager is hereby authorized and directed to sign, and the City Clerk hereby authorized and directed to attest on behalf of the City of Evanston, a Parking Garage Construction Agreement by and between the City of Evanston and AHC Evanston L.L.C. Such Agreement shall be in substantial conformity with the Agreement marked as Exhibit A attached hereto and incorporated herein by reference.

SECTION 2: That the City Manager is hereby authorized and directed to negotiate any additional conditions of the lease as may be determined to be in the best interests of the City.

SECTION 3 That this Resolution shall be in full force and effect from and after its passage and approval in the manner provided by law.

  
\_\_\_\_\_  
Mayor

ATTEST:

  
\_\_\_\_\_  
City Clerk

Adopted: June 28, 1999

## PUBLIC PARKING GARAGE CONSTRUCTION AGREEMENT

This Agreement is made as of the \_\_\_\_ day of \_\_\_\_\_, 1999, between AHC Evanston L.L.C. ("Developer") and the City of Evanston, an Illinois municipal corporation ("City").

### RECITALS

A. City is the owner of a certain parcel of real estate shown as Lot 4 of the Church Maple Resubdivision Plat of Resubdivision and located in the City of Evanston, Cook County, Illinois, and shown on Exhibit 1 attached hereto ("Garage Property").

B. City desires Developer to cause the Garage Property to be improved with a poured in place post tension parking garage (the "Parking Garage") for approximately 1,392 standard size cars in a structure of approximately 501,300 square feet with storm water detention capacity sufficiently sized to serve the "Development", as that term is defined in the Redevelopment Agreement, described below. Developer desires that said improvement be made.

C. City and Developer have entered into a certain Redevelopment Agreement dated October 23, 1998, as amended by that certain First Amendment to Redevelopment Agreement dated November 23, 1998, and that certain Second Amendment to Redevelopment Agreement dated June 7, 1999 (collectively, the "Redevelopment Agreement") of which the Parking Garage is a part.

D. City and Developer desire to set forth the terms and conditions regarding completion of the construction of the Parking Garage on the Garage Property.

#### 1. INCORPORATION OF RECITALS

The representations set forth in the foregoing recitals are material to this Agreement and are hereby incorporated into and made a part of this Agreement as though they were fully set forth in this Article 1.

2. DEVELOPERS SERVICES IN GENERAL

Developer shall furnish or obtain all labor, materials, supplies, apparatus, equipment, fixtures, tools and implements required to fully construct a parking garage in accordance with the Final Construction Drawings and Change Orders (hereinafter defined), all applicable provisions of the Redevelopment Agreement, all applicable laws, ordinances, rules and regulations and the minimum specification attached hereto as Exhibit 2. Developer agrees to keep the Parking Garage and Garage Property free and clear at all times of any and all liens and claims of laborers, artisans, materialmen, suppliers, and subcontractors unless the lien or claim arises from the City's wrongful failure to approve a loan disbursement. Notwithstanding the foregoing, Developer shall have the right to contest any such claims or liens.

The Developer shall perform or provide all of the following to the City:

- (a) Design and construct the Parking Garage in accordance with the Final Construction Drawings as well as the approved budget and Change Orders, if any;
- (b) Obtain with the City's cooperation all governmental permits, licenses and inspections for the work described in the preceding paragraph (collectively, the "Parking Garage Permits");
- (c) On or before July 19, 1999, the Developer shall provide the City with the Developer's Estimated Budget of the cost to construct the

poured in place post tension Parking Garage for approximately 1,392 standard size cars in a structure of approximately 501,300 square feet with storm water detention capacity sufficiently sized to serve the Development. The Developer agrees that the Final Budget (exclusive of financing costs which shall be the City's risk) for the Parking Garage shall not vary more than seven percent (7%) from the Developer's Estimated Budget unless such variance results from Change Orders (as that term is defined in paragraph 7(c) below). The Developer's Estimated Budget shall contain a reasonable soft cost contingency.

The Parties shall have fourteen (14) days from the City's receipt of the Developer's Estimated Budget to review and discuss said estimate during which process the City shall identify for the Developer any modifications to the Developer's Estimated Budget necessary for the City's acceptance of said estimate. At the end of such fourteen (14) day period, the City shall advise the Developer in writing of its acceptance or rejection of the Developer's Estimated Budget. If the City rejects the Developer's Estimated Budget, the City shall terminate this Agreement as part of its notice of rejection. If the City terminates this Agreement, it shall either assume responsibility for the construction of the Parking Garage on the schedule contemplated herein or elect to terminate the Redevelopment Agreement.

If the City elects to assume the responsibility for the Parking Garage construction, the Developer will assign it rights to the City to all the designs, plans and specifications for the Parking Garage prepared to date at the Developer's direction for the City's use in constructing the Parking Garage with no warranties other than any warranties from the architects and engineers who prepared such designs, plans and specifications. The City will pay the documented, reasonable predevelopment costs incurred by the Developer (exclusive of Developer's overhead) which are applicable to the Parking Garage upon receipt of such designs, plans, and specifications. In the alternative, if the City elects to terminate the Redevelopment Agreement, the Developer shall re-convey the Main Pavilion Parcel legally described in the Redevelopment Agreement to the City free and clear of any and all encumbrances which arose during the period of the Developer's ownership, and the City shall return the Purchase Price, as that term is defined in the Redevelopment Agreement, to the Developer simultaneously with such reconveyance.

The City agrees that it will approve the Developer's Estimated Budget so long as it does not exceed \$13,500 per parking space (excluding the costs arising from any extensions of the term of the construction financing beyond the Completion of

Construction of the Parking Garage) for 1,392 cars in a first class parking structure.

Within thirty (30) days after the City approves the Design Development Drawings pursuant to paragraph 3(c), the Developer shall submit the Final Budget which shall not vary more than seven percent (7%) from the Developer's Estimated Budget (exclusive of financing costs) unless such variance results from Change Orders as that term is defined in paragraph 7(c) below. The Final Budget shall be subject to modification by Change Orders.

- (d) Submit not less than three separate binding estimates for a Guaranteed Maximum Price Contract for all elements of the Public Parking Garage from three responsible and reputable contractors licensed to do business in the State of Illinois. These estimates shall be submitted within fourteen (14) days following the City's approval of the Design Development Drawings outlined in Paragraph 3(c). In the event the City Manager is dissatisfied with said estimates, the City may within fourteen (14) days after receipt of the estimates elect to elect to assume responsibility for the construction of the Parking Garage on the schedule contemplated herein. If the City elects to assume the responsibility for the Parking Garage construction, the Developer will assign to the City all of Developer's rights to the designs, plans and specifications for the Parking Garage prepared to date at the Developer's direction

for the City's use in constructing the Parking Garage with no warranties other than any warranties from the architects and engineers who prepared such designs, plans and specifications.

The City will pay Developer the City Payment and Development Fee pursuant to Paragraph 8 below based on all costs and obligations incurred by the Developer with respect to the Parking Garage as of the date of the City's election.

- (e) Submit any and all bids received by the Developer, its architects, or general contractor from any and all proposed sub-contractors, laborers, artisans or materialmen related to the Parking Garage.
- (f) Submit any and all proposed construction contracts or subcontracts related to the Parking Garage.
- (g) Submit any and all performance, payment or other bonds executed by any and all contractors. Said performance, payment or other bonds shall include the City as a secondary beneficiary payee, if permitted by the surety.
- (h) Construct the Parking Garage with all items required by applicable law as set forth in the Final Construction Drawings for approximately 1,392 automobiles, including, without limitation, all engineering, grading, road pavement, landscaping, curbs, gutters, sidewalks, sanitary sewer, storm sewers, water, electrical, drainage, telephone, and any other utility equipment, lines, pipes and facilities; and

- (i) At all times after the date of this Contract, diligently pursue the performance of the above-described work in a first class manner. Only materials that are new shall be incorporated into the work and shall be as described in said Final Construction Drawings.
- (g) Comply with Paragraph 15A of this Agreement.
- (h) Use reasonable efforts to realize savings in the cost of constructing the Parking Garage which savings shall be reflected in the City Payment.

The matters which may be considered by the Developer in selecting a contractor or any subcontractors include availability, schedule, quality, reputation, experience, price, financial strength and the like and nothing herein shall require that the contractor or a subcontractor who submits the lowest bid be selected.

3. DEVELOPER DRAWINGS

(a) On or before July 9, 1999, Developer shall prepare and submit to the City schematic drawings for the Parking Garage prepared by Walker Parking (the "Schematic Drawings"). The City Manager shall inform the Developer of his approval or disapproval of the Schematic Drawings within twenty-one (21) days of his receipt of the same. The City Manager's approval of the Schematic Drawings shall not be unreasonably withheld. The City agrees, during the preparation of the Schematic Drawings to meet with Developer to coordinate the preparation of the submission and review of the Schematic Drawings by the City. The City shall communicate and consult informally with Developer as frequently as is necessary to insure that the formal

submittal of the Schematic Drawings to the City receives prompt and speedy consideration.

(b) INTENTIONALLY OMITTED

(c) On or before the later of August 27, 1999 or four (4) weeks after the City approves the Schematic Drawings, Developer shall prepare and submit Design Development Drawings, which shall include those drawings listed in Exhibit 3 attached hereto and made a part hereof, together with plans and specifications for mechanical, electrical, life/fire safety and elevator and a non-binding proposed construction schedule. The City Manager shall inform the Developer of his approval or disapproval of the Design Development Drawings within twenty-one (21) days of his receipt of the same. The City Manager's approval of the Design Development Drawings shall not be unreasonably withheld. The City agrees, during the preparation of all Design Development Drawings to meet with Developer to coordinate the preparation of its submissions to, and review of the Design Development Drawings by the City. The City shall communicate and consult informally with Developer as frequently as is necessary to insure that the formal submittal of the Design Development Drawings to the City receives prompt and speedy consideration.

(d) On or before October 1, 1999, Developer shall prepare and submit Final Construction Drawings to the City for the issuance of all necessary building permits that conform to the Design Development Drawings. Any minor changes from the approved Design Development Drawings must be approved by the City Manager which approval shall not be unnecessarily withheld or delayed. The City agrees, during the preparation of all Final Construction Drawings to meet with Developer to coordinate the preparation of

its submissions to, and review of the Final Construction Drawings by the City. The City shall communicate and consult informally with Developer as frequently as is necessary to insure that the formal submittal of the Final Construction Drawings to the City receives prompt and speedy consideration.

(e) Before commencement of construction of the Development as described herein, Developer shall, at its expense (which shall later be reimbursed), secure or cause to be secured any and all permits, if applicable, which may be required to commence excavating and grading by City Ordinances existing as of the date of this Agreement, and any other governmental agencies having jurisdiction over such construction, development or work, or such portion of the work being performed, including, without limitation, any applications and permits, documents or plats which may be required to be obtained from any local, federal or state environmental protection agency, the Metropolitan Water Reclamation District of Greater Chicago, or from any other agency which may have or exercise any jurisdiction of any type whatsoever which may affect the Garage Property. The City shall join in all applications necessary for construction and occupancy of the Parking Garage, provided such application is consistent with all lawful requirements. The City shall provide all proper assistance to Developer in securing such permits and shall promptly issue all permits required to be issued by the City, and agrees to sign other permits, documents or plats which require execution by the City, provided such permits, documents or plats comply with all lawful requirements.

#### 4. FINANCING

The Developer shall use its best efforts to obtain construction financing for all soft and hard costs and expenses arising from the design and construction of the Parking

Garage in accordance with the Final Construction Drawings and the Final Budget, including the City Payment (as defined in paragraph 8 of this Agreement). Developer shall be deemed to have used "best efforts" throughout this Paragraph 4 if it has acted reasonably in determining the availability of and in obtaining Loan Term Sheets meeting the Minimum Standards, as those terms are defined below. The City shall, at its own expense, fully cooperate with the Developer's efforts to obtain such financing and shall comply throughout the term of the construction financing with all requirements reasonably imposed by the lender.

Such construction financing shall be from a third-party lender unrelated to the Developer, shall only be subject to conditions which are reasonably within Developer's control, shall be prepayable, shall be for an amount not less than the Final Budget at a floating interest rate not to exceed LIBOR 30 day plus 250 basis points, and shall be subject to those conditions and requirements typically found in similar construction loan agreements and shall be due and payable not less than six (6) months after completion of construction of the Parking Garage (collectively, the "Minimum Loan Requirements").

Developer shall use best efforts to deliver to the City on or before the date which is ninety (90) days after the City's approval of the Design Development Drawings three (3) written term sheets (the "Loan Term Sheets") for construction financing which comply with the Minimum Loan Requirements. In the event the Developer is unable, after using best efforts, to obtain three (3) Loan Term Sheets that comply with the Minimum Loan Requirements, Developer may, but shall not be required to, submit one or more Loan Term Sheets which do not comply with any or all of the Minimum Loan Requirements for the City's consideration.

City shall have twenty-one (21) days from the date on which it receives a Loan Term Sheet to either approve or reject it in its sole discretion. In the event the City fails to notify Developer of its approval of a Loan Term Sheet within said twenty-one (21) day period, the Loan Term Sheet shall be deemed rejected. Whether or not the City approves any of the Loan Term Sheets, all costs arising from the financing of the design and construction of the Parking Garage, including, but not limited to, application fees and other lender fees and charges, mortgage broker's fees, attorney's fees, costs incurred in providing surveys and reports to lenders and potential lenders and enforcement costs will be paid by the City as reimbursable expenses pursuant to paragraph 8 of this Agreement. In the event the City approves a Loan Term Sheet, all costs and expenses arising from the financing, including, but not limited to those items described in the immediately preceding sentence, shall be paid by the City as reimbursable expenses pursuant to Paragraph 8 of this Agreement.

The City shall execute such documentation and assurances as may be reasonably requested by the lender as a condition of making the loan. The City agrees to the assignment by the Developer to the lender of all or part of Developer's interest in this Agreement and shall fully recognize the lender as the Developer's assignee. The City shall indemnify, defend and hold Developer harmless from and against any and all claims, demands, causes of action and liability, threatened, suffered or incurred by the Developer arising out of such construction financing (hereinafter, "Developer Liability") except to the extent such Developer Liability arises from a default of Developer under this Agreement. In the event the City approves financing which contains conditions

which are not reasonably within the control of the Developer, the City's approval thereof shall be deemed to be the City's agreement to comply with and fulfill all such conditions.

In the event Developer fails, after having used best efforts to obtain Term Sheet(s) consistent with the Minimum Loan Requirements on or before ninety (90) days after the City's approval of the Design Development Drawings, or the City rejects all of the Loan Term Sheets submitted by the Developer, the City shall provide, at its sole cost, all funds necessary for the design and construction of the Parking Garage, including any Change Orders, and the provisions of this Agreement with respect to "loan proceeds" shall apply to the payments to be made by the City hereunder.

Payments shall be made monthly by the City to the Developer to cover labor, materials, services, title company charges, the City Payment and all amounts to be reimbursed under the terms of this Agreement. The Developer shall give the City at least thirty (30) days' prior notice of a requested payment, which shall in each case specify the amount of the requested payment as certified by the Developer on forms reasonably and mutually approved by the City and the Developer. Each payment shall be made by the City to the Title Company (as defined in the Redevelopment Agreement) as escrowee under an Owner's Construction Escrow Trust and Disbursing Agreement in substantially the form attached hereto as Exhibit "4" and made a part hereof by reference.

If the Developer contests any amounts due any person(s) supplying labor, materials or services, the City, upon request of the Developer, shall direct the Title Company, as escrowee, to disburse any such contested amount to an indemnity account to be established with the Title Company, pursuant to a Title Company Indemnity Agreement in form and substance satisfactory to the parties, provided the Title Company

insures over any possible liens relating to or which might result from non-payment of such contested amount.

5. CONDITIONS PRECEDENT TO COMMENCEMENT OF CONSTRUCTION

(I) Developer shall not commence grading or construction of the caissons and foundations of the Parking Garage until each of the following conditions have been met:

- (a) The submission and approval of the Final Construction Drawings as described in Paragraph 3(d) hereof for the caissons and foundations of the Parking Garage;
- (b) The permits, governmental and other approvals of and for the grading, caissons and foundations of the Parking Garage;
- (c) The submission to the City of any and all estimates then received by Developer, its architect or general contractor relating to the Parking Garage;
- (d) City Manager's approval of all construction contracts for the grading, caissons and foundations of the Parking Garage, including the Guaranteed Maximum Price Contract with the general contractor, and all performance, payment and other bonds as described in Paragraphs 2(e) and 2(f) hereof. Said approval shall not be unreasonably withheld or delayed,
- (e) Developer shall have closed the Main Pavilion Construction Loan (as that term is defined in paragraph 7.VII of the Redevelopment

Agreement) and construction of the improvements on the Main Pavilion Parcel shall have commenced.

- (f) Submission and City Manager's approval (which shall not be unreasonably withheld or delayed) of the Developer's and contractor's plans for complying with the applicable City ordinances and regulations with respect to the construction of the Parking Garage during its construction concerning the hiring and employment of minorities, women and Evanston residents.
- (g) City Manager's approval of the Final Budget which shall be subject to Change Orders which approval shall not be unreasonably withheld or delayed.

The City shall confirm in writing that all of the conditions precedent included in this Paragraph 5(I) have occurred.

(II) Developer shall not commence construction of the Parking Garage beyond the construction of the caissons and foundations (the "Remainder") until each of the following conditions have been met:

- (a) The submission and approval of the Final Construction Drawings as described in Paragraph 3(d) hereof for Remainder of the Parking Garage;
- (b) The permits, governmental and other approvals of and for the Remainder of the Parking Garage;

- (c) The submission to the City of any and all estimates then received by Developer, its architect or general contractor relating to the Parking Garage;
- (d) City Manager's approval of all construction contracts for the Remainder of the Parking Garage, including the Guaranteed Maximum Price Contract with the general contractor, and all performance, payment and other bonds as described in Paragraphs 2(e) and 2(f) hereof. Said approval shall not be unreasonably withheld or delayed,

The City shall confirm in writing that all of the conditions precedent included in this Paragraph 5(II) have occurred.

6. CONSTRUCTION COMMENCEMENT

On or before thirty (30) days after the satisfaction of the conditions contained in Paragraph 5 of this Agreement, (the "Construction Commencement Date"), the Developer agrees that it shall commence and thereafter diligently pursue completion of the construction of the Parking Garage on the Garage Property. For the purpose of the preceding sentence, commencement of construction shall be deemed to have occurred when the Developer begins grading the Garage Property. The Developer shall complete construction of the Parking Garage not less than twelve (12) months following of the Construction Commencement Date as may be extended by Paragraphs 7 and 14 (the "Construction Completion Date"). For purposes of this Agreement, "Complete

Construction” or “Completion of Construction” shall mean in a condition that warrants issuance of a temporary certificate of occupancy.

7. CHANGES IN THE WORK

(a) City may from time to time by written notice to Developer signed by City request changes in the work (“City Request”). Each City Request shall include a statement setting forth in detail a description of the requested change and an explanation of the reason therefor. Upon receipt of a City Request, Developer shall promptly, but in no event later than fifteen (15) days thereafter, furnish to City a statement setting forth in detail Developer’s good faith estimate of the “Net Cost” (hereinafter defined) of such change and the delay, if any, which may be occasioned thereby. Developer may, as part of Developer’s Statement, disapprove a City Request solely on the basis that the requested changes (i) will result in the unavailability of adequate parking when the hotel, retail and cinema are completed or (ii) are below the Minimum Specifications attached hereto as Exhibit 2. Developer’s failure to disapprove a City Request in the Developer’s Statement shall be deemed consent thereto. Within seven (7) days after City receives the Developer’s Statement, City shall approve or disapprove the same by written notice to Developer. City’s failure to approve a Developer’s Statement within said seven (7) day period shall be deemed to be a disapproval. In the event of Developer’s disapproval of a City request or City’s disapproval of the Developer’s Statement, either Party may as its sole remedy bring the matter to mediation and arbitration under subparagraphs 18(e) and (f) of this Agreement.

(b) Developer may from time to time by written notice to City signed by Developer request changes in the work ("Developer Request"). Each Developer Request shall include a statement setting forth in detail a description of the requested change, an explanation of the reason therefor, Developer's good faith estimate of the Net Cost of such change and the delay, if any, which may be occasioned thereby. Within fifteen (15) days after City receives a Developer Request, City shall approve or disapprove the same by written notice to Developer. If City does not approve or disapprove a Developer Request upon the expiration of said fifteen (15) day period, the Developer Request shall be deemed to be disapproved. If the City disapproves a Developer Request, the Developer may, but shall not be obligated to, perform the work described therein and shall pay the Net Cost, if any, in connection with said disapproved Developer Request. Notwithstanding anything to the contrary contained herein, any change in the work required by an emergency affecting the safety of persons or property shall not require the prior written approval of City, provided that Developer shall give immediate notice thereof to City and furnish a detailed description of the change in the work so required, an explanation of the reason therefore and a good faith estimate of the Net Cost and delay to be occasioned thereby.

(c) If (i) City approves in writing the Developer's Statement responding to a City Request and, or (ii) City approves in writing a Developer Request, or (iii) the work is modified as a result of mediation or arbitration as provided in sub-paragraphs 7(a), 18(e), or 18(f) hereof, the addition to, modification of and/or deletion from the work therein described shall constitute a

Change Order (“Change Order”) which shall amend the Final Construction Drawings, and the Net Cost of such Change Order shall be set forth as an increase or decrease, as the case may be, to the Final Budget under Subparagraph 5(g) above and the amount to be paid to Developer by City, pursuant to paragraph 8 hereof. If the Net Cost of a Change Order would cause Developer’s construction loan not to be “in balance” Developer shall request the lender make an appropriate loan increase to put said loan back in balance (hereinafter defined). Should Developer be unsuccessful in these efforts, City shall advance to Developer that portion of the Net Cost of such Change Order to cause Developer’s construction loan to be “in balance.” Any delay occasioned by a Change Order shall be deemed a Permitted Delay under Paragraph 14 hereof and no further notice of such Permitted Delay shall be required.

(d) The City shall not unreasonably disapprove a Developer Request for a change arising from a soil condition including, but not limited to Affected Soil (as that term is defined in the Redevelopment Agreement). In the event the City disapproves a Developer Request for a change arising from such a soil condition, the Developer may dispute such disapproval utilizing the mediation and arbitration provisions contained in Subparagraphs 18(e) and (f) below.

Notwithstanding any of the above, all reasonable costs incurred in addressing soil conditions, including, but not limited to Affected Soil, shall be the City’s responsibility and shall amend the Final Construction Drawings and shall increase or decrease, as the case may be, the Final Budget under Subparagraph 5(g) above and the amount to be paid to Developer by City, pursuant to paragraph 8 hereof.

If such increased cost would cause Developer's construction loan not to be "in balance" (hereinafter defined), City shall advance to Developer that portion of the Net Cost of such work to cause Developer's construction loan to be "in balance." Any delay occasioned by a Change Order shall be deemed a Permitted Delay under Paragraph 14 hereof and no further notice of such Permitted Delay shall be required.

(e) For purposes of this paragraph 7, the following shall have the following meanings:

(i) "Net Cost" shall mean an amount equal to the additional costs, if any, attributable to a requested change in the work including, but not limited to re-stocking fees, cancellation fees, and other fees which may result from reducing the scope of the work to be performed hereunder, less the savings, if any, resulting from any work deleted or modified thereby.

(ii) "In balance" shall mean at any time prior to the Closing that the undisbursed proceeds of Developer's construction loan allocated for construction of the Parking Garage (including reserves and holdbacks) are sufficient, in lender's determination, to pay the unpaid costs to complete the Parking Garage in accordance with the final budget therefore previously approved by City and lender under the terms of the financing described in Paragraph 4 of this Agreement.

## 8. CITY PAYMENT

The City agrees to take possession of the Parking Garage and assume all obligations with respect to the ownership and operation of the Parking Garage and shall

pay the full cost of each of the improvements which are a part of the Parking Garage, including all reimbursable expenses, as set forth in the Final Budget under paragraph 5(g) and the Change Orders approved pursuant to the terms hereof (the "City Payment"). The City shall make the City Payment within thirty (30) days from the date on which the condition of the improvements which compose the Parking Garage would warrant issuance of a temporary Certificate of Occupancy. The City shall have the right to extend the date for making the City Payment up to six months by providing written notice to the Developer a minimum of seven (7) business days before the date on which the City Payment would otherwise be due. In the event the City does extend the date for payment in whole or in part, the City Payment shall include any additional interest, fees and costs charged by Developer's lender due to the six-month extension. The City Payment shall include the items contained in the Final Budget which shall be subject to Change Orders (collectively referred to herein as "Reimbursements and Reimbursable Expenses"). Nothing herein shall be construed to require the City reimburse the Developer for either its Northbrook or Evanston home office overhead expenses incurred in the normal course of Developer's business.

The City shall pay to Developer a sum equal to three and one half percent (3-1/2%) of the amount of the City Payment, less construction interest as the development fee ("Development Fee") for the services rendered hereunder. Stated as an algebraic formula, the Development Fee shall be calculated as follows: " $0.035 \times (\text{City Payment} - \text{Construction Interest}) = \text{Development Fee}$ ." The estimated Development Fee and the Reimbursements payable to Developer shall be included in the Budget(s) and financed as part of the construction financing of the Parking Garage. All Reimbursements shall be

paid out of loan proceeds as they are incurred. All Reimbursable Expenses incurred prior to closing of the first payment, shall be paid out of the first payment. The Development Fee shall be paid out of loan proceeds, as follows:

- (i) 10% of the budgeted Development Fee shall be paid upon the initial funding of the loan or initial payment by the City for the construction of the Parking Garage.
- (ii) 70% of the budgeted Development Fee shall be paid during the period of construction in twelve (12) equal monthly installments, or until such time that the condition of the Parking Garage would warrant issuance of a certificate of occupancy, on the date of each application for a construction draw for the Parking Garage;
- (iii) 10% of the Development Fee, which shall be calculated based on the then estimated amount of Development Fee, shall be paid on the date of the final application for a construction draw for the Parking Garage; and
- (iv) At the time the City Payment is due under this Paragraph 8, the Development Fee shall be finally calculated based on the actual amount of the City Payment and construction interest and any amounts that remain owing shall be paid to the Developer.

Amounts owing pursuant to this Paragraph 8, if not paid when due and not otherwise excused herein, shall accrue interest at the rate of four percent (4%) over the prime rate of the Bank of America per annum (the "Interest Rate").

9. REPRESENTATIONS AND WARRANTIES OF DEVELOPER

To induce City to enter into this Agreement and to consummate the transaction contemplated hereby, the Developer covenants and represents to City as of the date of this Agreement as follows, subject only to matters created by City:

(a) Developer has full power and authority to enter into and consummate the transaction contemplated by this Agreement, and when signed and delivered by Developer, this Agreement constitutes a legal, valid and binding obligation of Developer, enforceable in accordance with its terms.

(b) No consent or approval of any other person or entity is required in order for this Agreement to be legal, valid and binding upon Developer.

(c) Neither the execution and delivery of this Agreement, nor the performance by Developer of its obligations hereunder does or will violate any applicable law, decree, judgment, or order of any court or constitute a default under to which it is a party or by which it is bound.

10. REPRESENTATIONS AND WARRANTIES OF CITY

City represents and warrants that:

(a) It has all the power and legal right to enter into this Agreement and has duly authorized the execution, delivery and performance of this Agreement by proper action, and when signed and delivered by the City, this Agreement constitutes a legal, valid and binding obligation to the City, enforceable in accordance with its terms.

(b) No consent or approval of any other person or entity is required in order for this Agreement to be legal, valid and binding upon City.

(c) The consummation of the transactions contemplated by this Agreement will not violate any provisions of the governing documents of City or

constitute a default or result in the breach of any term or provision of any contract or agreement to which City is a party or by which it is bound.

(d) There is no litigation, proceeding or investigation contesting the power or authority of City or its officers with respect to the Garage Property, the Development, or this Agreement and City is unaware of any such litigation, proceedings, or investigation that has been threatened.

(e) City has the technical expertise and the financial capacity and responsibility necessary to perform all of its obligations pursuant to this Agreement.

#### 11. INSURANCE

(a) The Developer shall maintain either itself, or through its contractors, architects, engineers, subcontractors and consultants (together the "Development Team"), as a Reimbursable Expense throughout the life of this Agreement, the minimum types and amounts of insurance set forth below in this sub-paragraph (a) and in sub-paragraph (c) below, insuring the Development Team, its employees, agents and designees and the beneficiaries of the indemnity contained in paragraph 17 (hereinafter the "Indemnitees"), as required herein, which insurance shall be placed with insurance companies rated at least "A" by Best's Key Rating Guide. Each policy of insurance shall incorporate a provision requiring the giving of written notice to the City at least thirty (30) days prior to the cancellation, non-renewal, or material modification of any such policies as evidenced by return receipt of United States certified mail:

- (1) Workmen's Compensation Insurance in the amount of the statutory maximum with an employer's liability coverage;

- (2) Comprehensive Automobile Liability Insurance, including hired and non-owned vehicles, if any, in the amount of One Million Dollars (\$1,000,000.00) covering personal injury, bodily injury, and property damage;

(b) The Developer shall insure specifically the indemnity contained in Paragraph 17 of the Agreement, as a Reimbursable Expense throughout the life of this Agreement. The Developer shall include the Indemnitees as additional insureds by causing amendatory riders or endorsements to be attached to the insurance policies described in Paragraphs (a) and (c) of this Paragraph 11, except for Subparagraph c(1), with respect to Professional Liability coverage. The insurance coverage afforded under these policies shall be primary to any insurance carried independently by the Indemnitees. Such amendatory riders or endorsements shall indicate, concerning the Indemnitees, that there shall be severability of interests under such insurance policies for all coverage provided under such insurance policies.

(c) The Developer shall purchase and maintain Project Management Protective Liability insurance also known as "Wrap Around" insurance from the Developer's usual insurance provider covering the Development Team's (including its employees, agents and designees) and the Indemnitees' liability relating to or arising out of the Project. The cost of such insurance shall be a Reimbursable Expense. The minimum limits of liability purchased with such coverage shall be equal to the limits listed below with requirements for waivers of subrogation by endorsement or otherwise:

- (1) Professional Liability coverage in the amount of Five Million Dollars (\$5,000,000.00) per claim/annual/aggregate (including contractual liability

coverage with all coverage retroactive to the earlier of the date of this Agreement or the commencement of Developer's services in relation to the Project), with a Five Hundred Dollars (\$500,00) maximum deductible, covering personal injury, bodily injury, and property damages, said coverage to be maintained from the date of final payment until the expiration of all statutes of limitation including statutes of limitation for construction defects. The Developer may be directed by the City to purchase additional amounts of Professional Liability coverage. The City shall reimburse the Developer for the costs of such additional coverage at the Developer's cost without any mark-up;

- (2) Comprehensive or Commercial General Liability coverage, including limited-form contractual liability and completed operations, in the amount of Five Million Dollars (\$5,000,000.00) covering personal injury, bodily injury, and property damage;
- (3) Umbrella or Excess Liability coverage in the amount of Fifteen Million Dollars (\$15,000,000.00). This Umbrella or Excess Liability coverage shall include the same types and forms of coverage provided for by the Developer's Comprehensive General Liability Insurance as set forth in (2) above;
- (4) Valuable Papers coverage in the amount of Fifty Thousand Dollars (\$50,000.00); and
- (5) Builder's Risk "all risk" completed coverage in the amount of Fifteen Million Dollars (\$15,000,000.00) including perils of fire, physical loss or

damage including, but not limited to, theft, vandalism, malicious mischief, collapse, earthquake, flood, windstorm, falsework, testing and startup, temporary buildings and debris removal including demolition, and reasonable compensation for the Development Team's services and expenses required as a result of such insured losses.

(d) The Developer shall submit valid certificates in form and substance satisfactory to City evidencing the effectiveness of the foregoing insurance policies along with original copies of amendatory riders to any such policies to City within 30 days of the actual execution of this Agreement by the parties.

(e) The Developer shall supply City with certificates evidencing the fact that all of the above coverage's are currently in force throughout the life of this Agreement and that City will receive at least 30 days advance notice of any change in or cancellation of any coverage.

(f) If the Developer fails to furnish and maintain the insurance required by this Paragraph 11, the City may purchase such insurance on behalf of the Developer, and the City shall pay the cost thereof rather than reimburse the Developer for such insurance costs and the Developer shall furnish to the City any information needed to obtain such insurance.

## 12. PROGRESS REPORTS

The Developer agrees to make brief, written monthly progress reports informing the other party of all matters and of all studies made by the reporting party relating to the construction of the Parking Garage as well as meeting the requirements of minority,

women, and Evanston resident participation as set forth in applicable law. The parties agree to meet informally if required.

13. LEGAL CONFORMITY

The Developer shall carry out the construction of the Parking Garage in conformity with all applicable laws and ordinances, including all applicable federal and state standards. The laws of the State of Illinois shall govern the interpretation and enforcement of this Agreement.

14. PERMITTED DELAYS

Performance by either party hereunder shall not be deemed to be in default where delays or defaults are due to war, insurrection, strikes, lockouts, riots, floods, earthquakes, fires, casualties, acts of God, epidemics, quarantine restrictions, freight embargoes, lack of transportation, governmental restrictions or priority, environmental conditions on the Subject Property, unusually severe weather, inability to obtain labor, materials or tools, acts or failures to act of the other party, acts or failure to act of any public or governmental agency or entity (except that the acts of or failure to act of the City shall not excuse performance by the City) and, subject to the approval of the other party which shall not be unreasonably withheld, other similar events clearly not within the control of the party claiming the extensions. Residential, retail and financial market risks are explicitly excluded from the definition of Permitted Delays. An extension of time for any such cause shall be permitted provided that written notice thereof (which notice shall contain an estimate of the length of the delay) is sent by the party claiming the extension to the other party within twenty (20) working days of the commencement of the cause. The period of delay shall commence upon commencement of the cause and

shall end upon termination of the cause. In the event that said notice is not sent within twenty (20) working days, the period of delay will commence upon the receipt of said notice and shall end upon the termination of the cause. Such notice may be included in the Developer's monthly progress reports described in Paragraph 12 hereof.

15. NO DISCRIMINATION - CONSTRUCTION EMPLOYMENT

Developer for itself and its successors and assigns, agrees solely for the purpose of the construction of the Parking Garage as follows:

(a) Developer agrees to comply with all applicable laws prohibiting discrimination against any employee or applicant for employment because of race, color, religion, sex, national origin or sexual orientation. Developer shall require that applicants for employment with Developer are treated during the application process and during employment, without regard to race, creed, color, religion, sex, national origin, disability or sexual orientation in accordance with applicable laws. Such action shall include, but shall not be limited to, the following: employment upgrading, demotion, or transfer; recruitment or recruitment advertising, solicitations or advertisements of employees; layoff or termination; rates of pay or other forms of compensation, and selection for training, including apprenticeship. Developer agrees to post in conspicuous places, in and on the Garage Property, available to employees and applicants for employment, notices which may be provided by the City setting forth the provisions of the nondiscrimination clause as required by the City's ordinances.

(b) Developer agrees to make good faith, commercially reasonable efforts to have its General Contractor and subcontractors, to the extent they hire new employees and can include minorities, women and Evanston residents to work on the construction of the Parking Garage, hire minorities, women or Evanston residents, in any combination, at a cumulative rate of 15% of the total trade labor work force during the course of Construction to the extent practical and feasible. Nothing herein shall require Developer

or its contractors or subcontractors to displace any employees in its current work force to achieve the foregoing goal. The foregoing requirement shall apply to the Parking Garage taken as a whole during the entire course of Construction and shall not be applied to any one point in time or to any one individual contractor or subcontractor.

(c) Notwithstanding the foregoing provisions, Developer shall be entitled to employ union labor hereunder pursuant to the rules, regulations and practices of applicable unions.

(d) Developer's contracts with contractors and subcontractors for construction of the Development shall contain provisions which are consistent with the requirements of this paragraph 15.

15a. NO DISCRIMINATION CONSTRUCTION – MBE/WEB/EBE  
BUSINESS PARTICIPANT

The Developer shall comply with Paragraph 28 of the Redevelopment Agreement entitled, "No Discrimination Construction – Business Participation" which is attached hereto as Exhibit 5. The remedy set forth in Paragraph 28(b) shall be the sole and exclusive remedy with respect to the matters set forth in Paragraph 28 and this reference to Paragraph 28 shall not be construed to subject the Developer to any additional liability.

16. INSPECTION OF THE WORK; MONITORING OF PROGRESS  
PAYMENTS

(a) City shall have the right to designate a representative ("Consultant") to inspect and monitor all aspects of the construction of the Parking Garage. The Consultant shall be located on the construction site, at no

cost to the City and shall be notified of, and have the right to attend all Parking Garage construction meetings. Copies of all inspection reports made by or at the request of Developer or the construction lender's inspecting architect or engineer shall be simultaneously furnished to the consultant.

(b) Each application for payment submitted to the construction lender for the Project shall be simultaneously submitted to City for its reasonable approval with respect to the performance of the Work, quality of workmanship and conformity with the Final Construction Drawings. Prior to the commencement of the work Developer shall obtain in writing the agreement of the construction lender for the Project to make no progress payment with respect to any portion of the work unless and until the quality of workmanship and conformity with the Plans and Specifications for the portion of the work covered thereby have been approved in writing by City, which approval shall not be unreasonably withheld or delayed. The City agrees to provide reasonable cooperation to expedite the monitoring and payment process.

17. INDEMNIFICATION

Each of the parties hereto shall indemnify, defend and hold the other harmless from and against any and all claims, demands, causes of action and liability threatened, suffered or incurred by such indemnified party arising out of any negligent or intentional act, error or omission of the indemnifying party or any of its respective agents, representatives, officers, or employees, contractors or sub-contractors arising from the design and construction of the Parking Garage. This indemnity shall survive completion of the Parking Garage and the issuance of a final Certificate of Occupancy.

18. DEFAULT; REMEDIES

(a) Each of the Parties may institute the mediation and arbitration procedures set forth in Subparagraphs 18(e) and (f) below against the other party to cure, correct or remedy any default, to recover damages for any default, to settle any dispute (collectively referred to as "Claims"). The mediation and arbitration procedures set forth in Subparagraphs 18(e) and (f) below are the exclusive dispute resolution processes available under this Agreement.

(b) The rights and remedies of the Parties are cumulative, and the exercise by either Party of one or more of such rights or remedies shall not preclude the exercise by it, at the same time or different times, of any other rights or remedies for the same default or for any other default by the other party.

(c) Failure or delay by any Party to perform any act required in this Agreement or negligence which results in such failure or delay, subject to rights to extend contained in this Agreement, or Permitted Delays in paragraphs 7 and 14, shall constitute a default under this Agreement. The Party who so fails or delays must, upon receipt of written notice of the existence of such default, immediately commence to cure, correct or remedy with due diligence. The Party claiming such default shall give written notice of the alleged default to the Party alleged to be in default, specifying the default complained of by the injured Party. Failure or delay in giving such notice shall not constitute a waiver of any default, nor shall it change the time of default. Except as required to protect against further damages, and except as otherwise expressly provided in this Agreement, the injured Party may not institute proceedings against the Party in default until thirty (30) days after giving such notice. If such default cannot be cured within such

thirty (30) day period, said thirty (30) day period shall be extended for such time as is reasonably necessary for the curing of the same, so long as the defaulting Party diligently proceeds therewith; if such default is cured within such extended period, the default shall not be deemed to constitute a breach of this Agreement. A default not cured as provided above shall constitute a breach of this Agreement. Except as otherwise expressly provided in this Agreement, any failure or delay by any Party in asserting any of its rights or remedies as to any default or alleged default or breach shall not operate as a waiver of any such default or breach of any rights or remedies it may have as a result of such default or breach.

(d) Each of the following acts or omissions of either Party shall constitute a breach of this Agreement:

1. Except as provided in Paragraph 4 of this Agreement, the Party transfers, or suffers any involuntary transfer of its interest in this Agreement; provided, however, it is intended and nothing herein shall be construed to prohibit Developer from hiring agents and contractors for the purposes hereof.

2. The filing or execution or occurrence of a petition filed by either Party seeking any debtor relief; the making of an assignment by either Party for the benefit of creditors or execution by either Party of any instrument for the purpose of effecting a composition of creditors; or if Developer is adjudicated as bankrupt.

(e) Mediation

i. All Claims shall be subject to mediation as a condition precedent to arbitration by either Party.

ii. The Parties shall endeavor to resolve their Claims by mediation which, unless the Parties mutually agree otherwise, shall be in accordance

with the Construction Industry Mediation Rules of the American Arbitration Association currently in effect. Request for mediation shall be filed in writing with the other Party to this Agreement and with the American Arbitration Association. The request may be made concurrently with the filing of a demand for arbitration but, in such event, mediation shall proceed in advance of arbitration proceedings, which shall be stayed pending mediation for a period of 60 days from the date of filing, unless stayed for a longer period by agreement of the Parties.

iii. The Parties shall share the mediator's fee and any filing fees equally. The mediation shall be held in the place where the Parking Garage is located, unless another location is mutually agreed upon. Agreements reached in mediation shall be enforceable as settlement agreements in any court having jurisdiction thereof.

(f) Arbitration

i. All claims arising out of or related to this Agreement shall be resolved by arbitration. Prior to arbitration, the Parties shall endeavor to resolve disputes by mediation in accordance with the provisions of Subparagraph 18(e) above.

ii. Claims not resolved by mediation shall be decided by arbitration which, unless the Parties mutually agree otherwise, shall be in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association currently in effect. The demand for arbitration shall be filed in writing with the other Party to this Agreement and with the American Arbitration Association.

iii. A demand for arbitration shall be made in this Agreement, as applicable, and in other cases within a reasonable time after the Claim has arisen, and in no event shall it be made after the date when institution of legal or equitable proceedings based on such Claim would be barred by the applicable statute of limitations.

iv. All arbitrations, whenever possible, shall include, by consolidation or joinder or in any other manner, all relevant parties including a separate contractor and other persons substantially involved in a common question of fact or law whose presence is required if complete relief is to be accorded in arbitration.

v. The Party filing a notice of demand for arbitration and the responding Parties must assert in the demand or response all Claims then known to that Party on which arbitration is permitted to be demanded.

vi. The award rendered by the arbitrator or arbitrators shall be final, and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction thereof.

19. NOTICES

(a) All notices, demands, and other communications required or permitted to be given pursuant to this Contract shall be in writing and shall be deemed to have been served and given when personally delivered or on the second business day after the same is deposited in the United States Certified Mail, postage prepaid, return receipt requested, addressed as follows:

If to the City: City of Evanston  
2100 Ridge Avenue  
Evanston, Illinois  
Attn: City Manager

With a copy to: Burke and Ryan  
33 N. Dearborn St. (402)  
Chicago, IL 60602

With a copy to: US Equities Realty Inc.  
20 N. Michigan Ave.  
Suite 400  
Chicago, IL 60602  
Attn: Mr. Martin Stern

If to the Developer: Arthur Hill  
Arthur Hill & Co. LLC  
5 Revere Drive (300)  
Northbrook, IL 60062

With a copy to: Mark Yates  
Sonnenschein, Nath & Rosenthal  
8000 Sears Tower  
Chicago, IL 60606-6404

20. ASSIGNMENT; BINDING EFFECT

Neither this Agreement nor any interest of either party therein shall be assigned except as permitted in Paragraph 4 of this Agreement.

21. RIGHT OF ENTRY

Developer, its agents, contractors, subcontractors, artisans and materialmen shall have the right to enter upon the Garage Property for purposes related to the construction of the Parking Garage from the date of this Agreement to Developer's receipt of a final certificate of occupancy. The City shall provide additional documentation, including leases and/or licenses if required by the lender, in conjunction with construction financing.

22. GOVERNING LAW

The provisions of this Contract shall be governed by and construed in accordance with the laws of the State of Illinois.

23. COVENANT

(a) Developer covenants and agrees that no part of the Garage Property will be used by Developer, its agents, contractors, subcontractors, and the officers and employees of each of them (collectively, the "Developer Parties") as a landfill or disposal facility for any hazardous substances (as defined in the federal Comprehensive Environmental Response, Compensation and Liability Act, and the regulations promulgated thereunder or crude oil or any fraction thereof (collectively, "Hazardous Materials"). The Developer indemnifies and holds harmless the City for any claim, demand, loss, damage, response cost and expense including without limitation attorneys fees and costs of defense (collectively, "Claims") arising out of or in any way related to (i) the Developer Parties breach of the covenant in this subparagraph 23(a), (ii) the release

or threat of release of Hazardous Materials, first brought on to the Garage Property by the Developer Parties, on, under or about the Garage Property, except to the extent that such Hazardous Materials are normally used in the construction process, and (iii) negligent acts or omissions of the Developer Parties that exacerbate the release or threat of release of pre-existing Hazardous Materials on, under or about the Garage Property.

(b) The City indemnifies and holds harmless the Developer for any Claims arising out of or in any-way-related to the release or threat of release of Hazardous Materials (i) by the City, its agents, contractors, subcontractors, and the officers and employees of each of them (collectively, the "City Parties") on, under or about the Garage Property, or (ii) pre-existing on the Garage Property and which release or threat of release was not exacerbated by the negligent acts or omissions of the Developer Parties.

(c) In the event that the Claims arise out of the release or threat of release of Hazardous Materials for which the Developer Parties and the City are both liable under (a) and (b) above, then the Developer and the City agree that the Claims shall be apportioned between them according to the harm caused by each.

#### 24. DEFINED TERMS

Unless otherwise specifically defined herein, all terms used both in this Agreement and in the Redevelopment Agreement shall have the meaning ascribed thereto in the Redevelopment Agreement.

#### 25. ENTIRE UNDERSTANDING

This Contract, together with the Redevelopment Agreement and all documents executed and delivered pursuant to or referred to in said instruments, constitute the entire agreement between City and Developer with respect to the Garage Property; provided,

however, that if and to the extent that the provisions of any of the foregoing instruments are inconsistent with each other, all of the foregoing instruments shall be taken together as a whole to ascertain the intent of the parties. If there should arise an inconsistency between this Agreement and the Redevelopment Agreement, the terms of this Agreement shall control.

26. MISCELLANEOUS

If any term, provision, or condition set forth in this Contract is declared invalid, illegal or unenforceable by a court of competence jurisdiction, the remaining terms conditions and provisions contained in this Contract shall remain in full force and effect and shall in no way be affected, impaired or invalidated.

IN WITNESS WHEREOF, Developer and City have signed this Agreement as of this day and year first above written.

**DEVELOPER**

**CITY**

AHC EVANSTON, LLC,  
an Illinois limited liability company  
By: AHC MANAGEMENT, INC.,  
an Illinois corporation

CITY OF EVANSTON

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

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

ATTEST

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City Clerk