

PARKING AGREEMENT

THIS AGREEMENT is made as of the 8th day of ^{February, 2017} ~~December, 2016~~, by and between the **CITY OF ROCHESTER**, a municipal corporation with offices at City Hall, 30 Church Street, Rochester, New York 14614 (hereinafter "the City") and **SIBLEY REDEVELOPMENT LIMITED PARTNERSHIP**, a New York limited partnership, having an address at Six Faneuil Hall Market Place, Boston, MA 02109 (hereinafter "Sibley").

RECITALS:

WHEREAS, the City is the owner of an enclosed parking garage located on Mortimer Street (the "MPG"); and

WHEREAS, Sibley has purchased the Sibley Building (sometimes herein referred to as the "Premises") and has commenced a project to develop 168 rental housing units (the "Residential Phase"), and to develop the first five stories of the Premises as commercial/retail space (the "Commercial Phase"), approximately all as shown on plans prepared by The Architectural Team, Inc. (collectively, the "Project"); and

WHEREAS, Sibley has requested a parking agreement with the City to accommodate parking needs for the residential and commercial components of the Project; and

WHEREAS, the City believes that Sibley's use of the MPG as part of the Project will enhance the economic well-being of the City of Rochester and the health, safety, and welfare of its residents and has authorized this Agreement pursuant to City Council Ordinance 2014-248.

NOW, THEREFORE, in consideration of the promises and the mutual undertakings contained herein, the City and Sibley agree as follows:

SECTION 1. DEFINITIONS

The following terms, as used in this Agreement, shall have the meanings ascribed to them herein:

- "MPG:" a parking garage owned by the City located on Mortimer Street in Rochester, NY;
- "MPG Spaces:" the parking spaces in the MPG;
- "MPG/Sibley Passes:" the parking passes for parking spaces in the MPG available for Sibley Parkers;
- "Sibley Parkers:" either residential or the employees of commercial tenants of Sibley; and
- "Lease Date:" The commencement date in any lease executed by Sibley and any tenant in the Project, provided the leased space has been issued a certificate of occupancy.

SECTION 2. PARKING SPACES

A. Parking Passes. Upon ten (10) days written request following any Lease Date, accompanied by payment in full of the first month's parking charges for the number of requested monthly spaces, Sibley shall be issued the number of MPG/Sibley Passes equal to the number of Sibley Parkers needed for the applicable lease constituting the specified Lease Date. The cumulative total of parking passes shall not exceed 400 parking passes. If after the first twelve (12) months of this Agreement, Sibley has failed to use all of the 400 parking passes for a period of over six (6) months, the number of parking passes available to Sibley under this Agreement shall be reduced by the number of available parking passes not used during that six (6) month period. The passes will not be for any specific parking spaces but will be useable for any parking space open to the general public. Any spaces needed above the 400, or any increase in the reduced number of available spaces, may be issued subject to availability in the same manner as parking passes issued to other members of the general public.

THE PARKING PASSES ISSUED HEREUNDER ARE GENERALLY AVAILABLE TO THE PUBLIC ON A FIRST COME, FIRST SERVED BASIS FOR THE SAME PRICE SPECIFIED IN THIS AGREEMENT. THIS AGREEMENT CONSTITUTES A RESERVATION PRIORITY ACCOMODATION AND SHALL NOT BE CONSTRUED AS PRIVATE USE OF ANY OF THE SPACES DESCRIBED HEREIN AND THE CITY DOES NOT RELY UPON AND HAS NOT DEDICATED OR PLEDGED ANY USE OF THE PARKING PASS REVENUES CONTEMPLATED PURSUANT TO THIS AGREEMENT.

The MPG/Sibley Passes issued pursuant to this Agreement are electronic parking tags. Mortimer Parking Garage has no gate equipment, therefore, monthly dashboard permits are issued by Municipal Parking. Sibley shall use a mutually agreeable form provided by the City to register each of the Sibley Parkers.

B. Sibley Visitors Parking. If Sibley desires to pay for Sibley Visitors, the City will accept validated parking receipts in accordance with all City policies and payment procedures with regard to validated parking.

C. Sibley Liaison. Sibley shall designate a parking pass liaison located at the Premises to deal with day to day parking issues. Each month the liaison shall submit a list of names of the Sibley Parkers using the parking passes with the submission of the parking pass payments as detailed in Section 4 below.

D. Maintenance/Repair/Security. The City shall be responsible for the maintenance and repair and for security of the MPG.

E. Utilities. The City shall be responsible for payment of water and electric charges for service to the MPG.

SECTION 3. PEDESTRIAN ACCESS

Sibley Parkers shall have unrestricted, non-exclusive, pedestrian access to and from the MPG in the same manner as the general public using the MPG.

SECTION 4. PAYMENT

Sibley shall pay for each MPG/Sibley Pass each month the same fee as the general public using the MPG. Sibley shall submit a check to the City Parking Bureau in the total amount owed for MPG/Sibley Passes required for each month. The payment to the City Parking Director shall be delivered within the first five (5) business days of each month.

Sibley shall pay a replacement fee of fifteen Dollars (\$15) for each replacement parking pass.

Sibley shall not charge its employees or tenants more than the fee charged to the general public using the MPG.

SECTION 5. TERM

A. The term of this Agreement shall commence on the date that a Certificate of Occupancy is issued by the City for each Leased Space and shall terminate at 11:59 p.m. on the tenth (10th) anniversary of that date, unless sooner terminated as provided in subsection B. herein. Subject to subsection C. of this Section 5, Sibley shall have two (2) ten (10) year renewal options, to be exercised on the terms and conditions contained herein, upon ninety (90) days prior written notice from Sibley to the City. Upon termination of this Agreement, Sibley's ability to continue to retain such parking passes for its exclusive use, even if at full market value, shall be contingent upon the legal and bonding requirements that exist at that time.

B. This Agreement shall sooner terminate upon the occurrence of any of the following:

1. In the event Sibley, or affiliates, fail to complete construction of the Project on or before December 31, 2017; or

2. In the event that the City determines, in its sole discretion, as provided in Section 12 hereof, that the MPG has become unusable for parking; or

3. In the event that Sibley defaults in or violates the terms and provisions of this Agreement, and fails to end, cure or remedy such default or violation within thirty (30) days of receipt of a written notice from the City specifying the default or violation (or if the default or violation cannot be reasonably cured, ended or remedied within such thirty (30) day period, Sibley has not diligently commenced to cure, end or remedy such default or violation within such thirty (30) day period and fails to diligently thereafter continue to cure, end or remedy such default or violation until cured, ended or remedied).

4. In the event that the City provides Sibley with one hundred twenty (120) days written notice (the "Termination Notice") that this Agreement must terminate so that the City can qualify for tax-exempt bonding to pay for repairs, maintenance, upgrades or capital improvements (collectively the "Improvements") needed at the MPG.

C. In the event the City sells the Garage prior to expiration of the initial term hereof, the purchaser shall assume the obligations of the City hereunder. In the event the City shall convey title to the Garage at any time after expiration of the initial term hereof, the purchaser may terminate this Agreement upon one hundred twenty (120) days prior written notice to Sibley.

SECTION 6. LEGAL REQUIREMENTS

Sibley's use of parking spaces pursuant to the MPG/Sibley Passes as well as the ingress and egress routes of the MPG shall comply with all law, orders, regulations, rules, ordinances, and requirements of the Federal, State, County and local Governments and "Environmental Laws" defined below herein (collectively the "Legal Requirements"). City shall maintain the MPG and all ingress and egress routes in compliance with all Legal Requirements as they relate to structural repairs, changes or alterations to or in and about the MPG or any buildings or improvements thereon and to repairs, changes or alterations incident to or as the result of any use or occupation of the MPG, or use of the adjacent sidewalks, and whether the same now are in force, or that may, at any time in the future, be enacted or directed; and each party shall pay all direct and actual costs, expenses, claims, fines, penalties and damages that may in any manner arise out of or be imposed because of the failure of either party to comply with the respective Legal Requirements of each as set forth herein.

SECTION 7. LIENS/ASSIGNMENTS/MORTGAGING

This Agreement may not be mortgaged, assigned or otherwise transferred in whole or in part by Sibley without the prior written consent of the City provided, however, this Agreement may be apportioned among Sibley affiliates upon prior written notice to the City. This Agreement is assignable by the City (and any subsequent owner) to any subsequent owner(s) of the MPG.

SECTION 8. COVENANTS/REPRESENTATIONS AND WARRANTIES

A. By City:

The City covenants, represents and warrants to Sibley as follows:

1. The City is a municipal corporation duly established and validly existing under the laws of the State of New York, and has full, right and lawful authority to enter into this Agreement and perform all its duties and obligations hereunder.
2. All necessary and appropriate actions have been taken, including without limitation adoption of all necessary resolutions of the City and any necessary approvals by the Rochester City Council to allow the City to enter into, acquire and perform its obligations under this Agreement.
3. The City has all requisite power, right and legal authority to execute, deliver and perform its obligations under this Agreement and has taken all action necessary to authorize the execution and delivery of, and the performance and observance of its obligations under, this Agreement.

4. The MPG shall be, at the time of commencement of this Agreement and throughout the term of this Agreement, maintained in good condition and repair and, subject to the terms hereof, kept in usable condition pursuant to the terms of this Agreement and in compliance with all applicable laws including the Americans with Disabilities Act.

B. By Sibley:

Sibley covenants, represents and warrants to the City as follows:

1. Sibley is a New York limited partnership, and has full right and lawful authority to enter into this Agreement and perform all its duties and obligations hereunder and Sibley Redevelopment GP LLC, is its General Partner with full authority to execute this agreement;

2. There are no actions, suits or proceedings at law or in equity, or by or before any court, governmental instrumentality or other agency or regulatory authority, pending against Sibley, to the best of Sibley's knowledge, threatened in writing against (a) the Premises and/or the Project, (b) Sibley, or (c) any other person, entity or property with respect to the Premises and/or the Project which would have a material adverse effect on Sibley's development of the Premises for the Project, the use and occupancy of the Premises or the Project or which questions the validity of this Agreement or the transactions contemplated hereby.

3. Sibley will cooperate with the City in implementing this Agreement, and shall promptly commence and diligently proceed to complete as quickly as possible all steps and take all affirmative actions necessary, or which may be necessary, and appropriate for the implementation of this Agreement.

4. To the best of its knowledge, the execution, delivery, performance or observance by Sibley of this Agreement will not violate or contravene any provisions of (a) any Federal, state or local law, (b) any order or decree of any court, governmental authority, bureau or agency, or (c) any mortgage, indenture, security agreement, contract, document undertaking or other agreement or instrument to which Sibley is a party or is binding upon it or any of its property or assets.

5. Sibley has all requisite power, right and legal authority to execute, deliver and perform its obligations under this Agreement and has taken all action necessary to authorize the execution and delivery of, and the performance and observance of its obligations under this Agreement. This Agreement, when executed and delivered, will constitute a legal, valid and binding obligation of Sibley enforceable against Sibley in accordance with its terms, without the joinder of any party.

SECTION 9. CONDEMNATION

In the event that the MPG, or any part of thereof shall be taken in condemnation proceeding or by exercise of any right of eminent domain, the City shall be entitled to the full amount of any condemnation award regarding its fee interest in the MPG. Sibley shall not be entitled to any

portion of any condemnation award for fee interest because of this Agreement. In no event shall this Agreement be termed, deemed or considered a leasehold interest.

SECTION 10. OPERATING AGREEMENT

The parties acknowledge that it is the normal practice of the City to retain an independent operator to manage and operate the MPG, pursuant to an operating agreement. The terms of any such operating agreement executed subsequent to the execution of this Agreement shall be consistent with the terms of this Agreement.

SECTION 11. INDEMNIFICATION

A. Sibley will defend, indemnify and hold the City harmless against any and all claims, suits, damages or causes of action for damages arising during the term of this Agreement, and against any orders or decrees or judgments which may be entered therein, brought for damages or alleged damages resulting from any injury to person and/or property or loss of life sustained in or about MPG by any person or persons whatever, to the extent such damages or alleged damages directly results from or directly arises out of the activities of Sibley, its agents, employees, contractors, invitees, successors and/or assigns, unless the foregoing results from fraud, misconduct, or an intentional or negligent act or omission of the City or its operator pursuant to Section 10 hereof. The foregoing indemnities shall apply irrespective of the application of any rule of comparative or apportioned liability. These indemnities shall survive the expiration of the term of this Agreement.

B. The City shall not in any event whatsoever be liable for any injury or damage to any property or to any person happening on, in or about the MPG, or to any property belonging to Sibley or any other person which may arise from any other cause whatsoever, unless the foregoing results from the fraud, misconduct, or an intentional or negligent act or omission of the City.

SECTION 12. UNUSABLE FOR PARKING

The City may permanently close all or a substantial portion of the MPG prior to the termination of this Agreement for safety reasons, if licensed professional engineers certify the safety reasons exist and the City determines that it is economically or practically infeasible to restore the MPG, or portion thereof, to a safe condition, or if the City of Rochester in its governmental capacity orders such closure. Such closure shall also be deemed a determination that the MPG is "unusable for parking" as this phrase is used in this Agreement.

SECTION 13. DESTRUCTION

A. If, during the term of this Agreement, MPG shall be destroyed or damaged in whole or in part by fire or other cause, the City shall give Sibley immediate notice thereof. If practically and economically feasible, based on the type and extent of damage, the estimated remaining useful life of the structure, and the availability of insurance proceeds, (this, however, is not a commitment by the City to have insurance or any particular amount of insurance), the City shall

promptly, at its own cost and expense, repair, rebuild, and replace the same, at least to the extent of the value and as nearly as possible to the character of the MPG and the equipment therein existing immediately prior to such occurrence. The City shall give Sibley written notice within one hundred twenty (120) days of such occurrence whether or not the damage will be repaired.

B. If the damage set forth in subsection A, above is not repaired, it shall be deemed a determination that the MPG is "unusable for parking" as this phrase is used in this Agreement.

SECTION 14. NOTICES

Any notice, demand or request required or agreed to be given under this Agreement by either party shall be sufficiently given or served if in writing and signed by the party giving it and either (a) personally delivered (including delivery by an overnight express delivery service if a receipt is obtained) or (b) mailed by certified mail, return receipt requested, addressed to the party to be notified as follows or (c) provided by fax or e mail if provided below:

CITY: Director of Finance
City of Rochester
City Hall, Room 108A
30 Church Street
Rochester, New York 14614

SIBLEY: SIBLEY REDEVELOPMENT LIMITED PARTNERSHIP
Attention: Joseph Eddy
Six Faneuil Hall Market Place
Boston, MA 02109
617 742 4500 office
617 742 0725 fax
E-mail: jeddy@wincco.com

or to such other address as the City and/or Sibley may from time to time designate by giving notice thereof in writing. Service shall be complete upon such mailing except in case of a notice to change an address in which case service shall be complete when the notice is received by the addressee.

SECTION 15. INDEPENDENT CONTRACTORS

Nothing contained in this Agreement shall be construed to make the City and Sibley partners or joint ventures or to render either of said parties liable for the debts or obligations of the other, except as in this Agreement expressly provided.

SECTION 16. WAIVERS

No delay or omission by either of the parties hereto in exercising any right or power accruing upon the non-compliance or failure of performance by the other party under the provisions of this Agreement shall impair any such right or power or be construed to be a waiver thereof. A

waiver by either of the parties hereto of any of the covenants, conditions or agreements hereof to be performed by the other party shall not be construed to be a waiver of any subsequent breach thereof or of any other covenant, condition or agreement herein contained.

SECTION 17. REMEDIES CUMULATIVE.

All rights, privileges and remedies afforded the parties by this Agreement shall be deemed cumulative and the exercise of one of such remedies shall not be deemed to be a waiver of any other right, remedy or privilege provided for herein.

SECTION 18. MODIFICATIONS.

Any alteration, change or modification hereof, in order to become effective, shall be made by written instrument or endorsed hereon and, in each such instance, executed on behalf of each party.

SECTION 19. PARTIAL INVALIDITY.

If any provisions of this Agreement or the application thereof to any party or circumstances shall, to any extent, be invalid or unenforceable, the remainder of this Agreement shall not be affected thereby and each provision of this Agreement shall be valid and enforceable to the fullest extent permitted by law.

SECTION 20. SUCCESSORS AND ASSIGNS.

This Agreement shall be binding upon and shall inure to the benefit of the respective successors and assigns of the parties hereto.

SECTION 21. FURTHER ACTS.

Each party covenants and agrees that it will at any time and from time to time do, execute, acknowledge and deliver or will cause to be done, executed, acknowledged and delivered all such further acts, documents and instruments as may reasonably be required by the other party in order to carry out fully and effectuate the transactions herein contemplated.

SECTION 22. SECTION HEADINGS, SCHEDULE OF DEFINITIONS AND EXHIBITS.

The section headings in this Agreement are for convenience and for reference only and in no way define or limit the scope or contents of this Agreement or in any way affect its provisions. Unless otherwise set forth, references in this Agreement to sections and subsections shall mean the sections and subsections of this Agreement. All exhibits attached hereto are hereby made a part of this Agreement.

SECTION 23. COUNTERPARTS

This Agreement may be executed in several counterparts, each of which shall be deemed an original.

SECTION 24. ENTIRE CONTRACT


This Agreement embodies the entire agreement between the parties hereto and may be amended only by a document in writing signed by the parties hereto and properly acknowledged.

SECTION 25. APPLICABLE LAW

This agreement shall be governed by the laws of the State of New York. Any action or proceeding regarding this agreement shall be brought in the Supreme Court of New York State, in the Seventh Judicial District.


IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the date first above written.

CITY OF ROCHESTER

By: 
Name: Brian F. Curran
Title: Corporation Counsel

SIBLEY REDEVELOPMENT LIMITED PARTNERSHIP

By: Sibley Redevelopment GP LLC, its General Partner
By: WDP Manager Corp., its Manager

By: 
Name: Gilbert J. Winn
Title: President

STATE OF NEW YORK)
COUNTY OF MONROE) ss:

On the 8th day of December, 2016 before me, the undersigned, a Notary Public in and for said State, personally appeared **Brian F. Curran**, personally known to me or proved to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the within instrument and acknowledged to me that he executed the same in his capacity, and that by his signature on the instrument, the individual, or the person upon behalf of which the individual acted, executed the instrument.

Bonnie K. De Carlo
Notary Public

COMMONWEALTH OF MASSACHUSETTS)
COUNTY OF SUFFOLK) ss.:

BONNIE K. DE CARLO
Notary Public, State of New York
Qualified in Monroe County
Commission Expires November 6, 2018

On the 14 day of December, 2016 before me, the undersigned, a Notary Public in and for said State, personally appeared **Gilbert J. Winn**, personally known to me or proved to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the within Instrument and acknowledged to me that he executed the same in his capacity, and that by his signature on the instrument, the individual, or the person upon behalf of which the individual acted, executed the instrument.

Kelly Noe
Notary Public



KELLY NOE
Notary Public
Commonwealth of Massachusetts
My Commission Expires
December 14, 2018