

RESOLUTION R-2022-96

**A RESOLUTION APPROVING A SERVICE AGREEMENT BETWEEN
THE CITY OF WHEATON AND THE DOWNTOWN WHEATON ASSOCIATION
FOR THE HALE STREET SEASONAL TENT PROGRAM**

WHEREAS, the City of Wheaton (hereinafter "City") has recently authorized the partial closure and use of tents on a portion of Hale Street north of Front Street and south of Wesley Street (hereinafter "Use Area"), to be utilized by adjacent Hale Street restaurants (hereinafter "Restaurants") to provide outdoor dining and beverage service (hereinafter "Seasonal Tent Program"); and

WHEREAS, the Seasonal Tent Program has become a valuable asset promoting the community, while generating foot traffic in the downtown business community, which benefits the City in a variety of ways; and

WHEREAS, in order to increase the efficiency of the Seasonal Tent Program, Wheaton's Corporate Authorities have determined that it is in the best interests of the City to acquire tents and appurtenances for the tents, to provide consistent and reliable availability of facilities necessary to continue the Seasonal Tent Program; and

WHEREAS, the Corporate Authorities of the City of Wheaton have elected to purchase the tents and appurtenances, for the foregoing purposes, provided that the administrative services, as described herein, are managed by the Downtown Wheaton Association (hereinafter "DWA") as an independent contract service provider; and

WHEREAS, a copy of the Service Agreement with the DWA is attached hereto and incorporated herein as Exhibit 1.

NOW, THEREFORE, BE IT RESOLVED by the Mayor and City Council of the City of Wheaton, Illinois, pursuant to its Home Rule Authority, that:

Section 1: The foregoing recitals are incorporated herein as if fully set forth as representing the intent of the parties and as substantive provisions.

Section 2: The Mayor is hereby authorized to sign and the City Clerk is hereby directed to attest to that a certain service agreement between the City of Wheaton and Downtown Wheaton Association providing for the collection of use fees and administrative services for the Hale Seasonal Tent Program.

Section 3: The staff is hereby authorized to undertake any and all acts necessary to effectuate the purpose of the Service Agreement and the Seasonal Tent Program. (Exhibit 1).

ADOPTED this 5th day of December, 2022.



Philip Suess
Philip Suess, Mayor

ATTEST:



Andrea Rosedale

City Clerk

Roll Call Vote:

Ayes: Councilwoman Robbins
Councilman Weller
Councilman Barbier
Councilwoman Bray-Parker
Councilman Brown
Mayor Suess
Councilwoman Fitch

Nays: None

Absent: None

Motion Carried Unanimously

**SERVICE AGREEMENT
BETWEEN CITY OF WHEATON AND DOWNTOWN WHEATON ASSOCIATION
PROVIDING FOR THE COLLECTION OF USE FEES AND ADMINISTRATIVE SERVICES FOR HALE
STREET SEASONAL TENT PROGRAM**

This Agreement is made by and between the City of Wheaton, an Illinois home rule municipal corporation having its principal place of business at 303 W. Wesley Street, Wheaton, Illinois, (hereinafter, "City"), and the Downtown Wheaton Association, a not-for-profit corporation organized and existing under the laws of the State of Illinois, having its principal place of business at 130 W. Liberty Drive, Wheaton, Illinois, (hereinafter, ("DWA").

RECITALS

WHEREAS, since 2020, the City has seasonally authorized the partial closure and use of tents, on a portion of Hale Street north of Front Street and south of Wesley Street (hereinafter "Use Area"), to be utilized by Hale Street restaurants (hereinafter "Restaurants") to occupy space within the Use Area to provide outdoor dining and beverage service (hereinafter "Seasonal Tent Program"); and

WHEREAS, the Use Area is depicted on the diagram attached hereto as Exhibit 1.

WHEREAS, the Seasonal Tent Program has become a valuable asset promoting the community, while generating foot traffic in the downtown business community, which benefits the City in a variety of ways; and

WHEREAS, in order to increase the efficiency of the Seasonal Tent Program, the Corporate Authorities of the City have determined that it is in the best interests of the City to acquire tents and appurtenances for the tents, to provide consistent and reliable availability of facilities necessary to continue the Seasonal Tent Program; and

WHEREAS, the Corporate Authorities of the City of Wheaton have elected to purchase the tents and appurtenances for the foregoing purposes provided that some administrative services, as described herein, are managed by the DWA as an independent contract service provider; and

WHEREAS, the City and the DWA have a preexisting working relationship that qualifies the DWA to perform the necessary administrative services authorized and required by this Agreement.

NOW, THEREFORE, based upon the consideration of Ten Dollars (\$10.00) paid in hand from the City to the DWA, and other good and valuable consideration, the City and the DWA agree as follows:

1. Recitals. That the foregoing recitals are incorporated herein by reference as substantive provisions and representing the intent of the parties as if fully set forth.
2. Service Provider. The DWA acknowledges and accepts responsibility as an independent contractor, to perform the administrative services and functions as follows:
 - A. To measure, divide, allocate and designate restaurant boundaries within the Use Area to be utilized for the exclusive, or time divided use, of Restaurants occupying space in the Use Area and participating in the Seasonal Tent Program (hereinafter "**Designated User Area**") and depict the Designated User Area and time division where applicable in each User's Hold Harmless, Indemnification and Temporary License Agreement for Food and Beverage Service on a Portion of Hale Street, (hereinafter, "**Use Agreement**"); and
 - B. To distribute and secure signed Use Agreements with Restaurants participating in the Seasonal Tent Program. A copy of the Use Agreement is attached hereto and incorporated herein as Exhibit 2; and
 - C. Determine Use Agreement fees to be charged to the Restaurants; and
 - D. To collect the Use Agreement fees, as part of or all of, an amount totaling not less than \$35,000 annually, for the entire Use Area, from any sources excluding Special Service Area 8 taxes, and deliver those fees to the City Finance Department not less than seven (7) calendar days from the first date the tents and appurtenances are installed in and over the Use Area; and
 - E. To create and maintain the books and records necessary for the City to verify receipt and payment of the Use Agreement fees to the City; and
 - F. To interface with the restaurant users regarding concerns related to the management of the Use Area (and attempt to resolve those concerns without City intervention, but if intervention is required, to tender those issues to the Wheaton City Manager's office); and
 - G. To create and post signage providing information to benefit patrons of the Seasonal Tent Program; and
 - H. To notify the City Manager's office of all issues that arise regarding the use of the Use Area and solutions, or request the City intervene to provide a solution; and

- I. To perform the work and services described herein in a timely, efficient and diligent fashion.
3. DWA Further Duties. During the term of this Agreement, the DWA shall maintain its not-for-profit status, and corporate purpose as set forth in its organizing documents with the office of the Illinois Secretary of State. It shall further maintain its corporate by-laws subject to the same terms as they are set forth in the Special Service Area No. 8 Implementing Agreement, as amended, between the City and the DWA. In no circumstance shall Special Service Area No. 8 taxes be used to defray the \$35,000 use fee.
4. City's Responsibilities. The City's responsibilities under this Agreement shall be to:
 - A. Acquire, erect, dismantle, clean and store the tents and the appurtenances; and
 - B. Enforce the terms of the Use Agreements; and
 - C. Resolve any disputes or issues regarding the use of the Use Area which the DWA is unable to resolve; and
 - D. Appoint the Director of Planning and Economic Development as a liaison to communicate with the DWA and Restaurants regarding the Seasonal Tent Program; and
 - E. Accept communications from the DWA regarding issues pertaining to the use and operations of the Use Area; and
 - F. Enforce all applicable ordinances and laws in the Use Area.
5. Term and Season. The term of this Agreement shall be five (5) years commencing on January 1, 2023, with a second five (5) year term if so approved unless this Agreement is terminated pursuant to other terms of this Agreement.
6. Use Season. The use season shall be determined by the DWA in its discretion but shall commence no earlier than the first Saturday in May, nor terminate later than the last Sunday, in October of any Seasonal Tent Program year. The DWA shall provide the City with three weeks' notice of commencement and termination of each annual Seasonal Tent Program to allow the City time to plan installation and removal of the tents and appurtenances.

7. Independent Contractor Status. Neither the DWA nor any DWA employee under this Agreement shall be considered an employee or agent of the City, but shall instead, as to the City, be considered an independent contractor. The City shall not have the authority or power to control the means, method, or manner in which the DWA or any of its employees perform their services and functions under this Agreement. Furthermore, neither the DWA nor any of the employees and/or independent contractors shall represent themselves as employees or agents of the City. Neither the DWA nor any of its employees shall be authorized to bind, solicit, negotiate, or perform any work or service on behalf of the City, with it being the intent of this Agreement that the DWA and any employees and/or independent contractors of the DWA are now and for the entire term of this Agreement are, and shall remain, as it pertains to the City, independent contractors.
8. Indemnification and Hold Harmless. To the greatest extent permitted under Illinois law, the DWA on behalf of itself and its employees and/or independent contractors, shall indemnify, hold harmless, and defend the City, its elected or appointed officials, directors, officers, employees, attorneys, and agents (hereinafter collectively, the "**City Indemnitees**") in whole or in part from and against any and all lawsuits, claims, demands, losses, damages, injuries, liabilities, fines, judgments, settlements, penalties, costs, including reasonable attorneys' fees, costs of litigation, claims of copyright or trademark infringement, (hereinafter the "**Claims**"), that arise, or may be alleged to have arisen, out of or in connection with, either directly or indirectly, the negligent or intentional acts or omissions of the DWA or its employees, in the performance or failure to perform this Agreement. In the event that any provision hereof is determined to be unenforceable, the indemnification obligations shall be severable and the fullest extent of indemnification that may lawfully apply shall remain in full force and effect.

DWA shall assume the entire liability for all personal injury claims suffered by its own employees and waives any limitation of liability defense based upon the Worker's Compensation Act and cases decided thereunder. DWA agrees to indemnify and defend the City and City indemnitees from and against all such loss, expense, damage or injury, including reasonable attorneys' fees, which the City or City Indemnitees may sustain as a result of personal injury claims by DWA's employees, except to the extent those claims arise as a result of the City's liability.

The obligation on the part of the DWA to defend, hold harmless, and indemnify the City shall survive the expiration or termination of this Agreement. Nothing in this Agreement shall be construed as prohibiting the City or City Indemnitees from defending, through the selection and use of their own agents, attorneys and experts, any claims, actions or suits brought against them arising out of the performance of this Agreement.

In the event that any claim for indemnification hereunder arises from the breach of a duty or willful misconduct of both the DWA and the City, the parties agree that any and all lawsuits, claims, demands, damages, liabilities, losses, fines, judgments, settlements, penalties, costs, and expenses shall be apportioned between the parties on the basis of their comparative degrees of fault, except as otherwise herein provided.

9. Insurance.

A. The DWA shall maintain minimum limits of insurance coverage as follows, subject to the additional conditions set forth in the provisions of this paragraph that follow:

Commercial General Liability Insurance

Each Occurrence Limit	\$1,000,000
General Aggregate Limit	\$2,000,000
Produce/Completed Operations Agg.	\$2,000,000
Personal & Advertising Injury Limit	\$1,000,000
Medical Expenses, each person	\$ 10,000

Comprehensive Automobile Liability Insurance

Combined Single Limit, each accident	\$1,000,000
OR	
Bodily Injury (per person)	\$1,000,000
Bodily Injury (per accident)	\$1,000,000
Property Damage (per accident)	\$1,000,000

Worker's Compensation & Employer's Liability

Worker's Compensation	Statutory Limits
Employer's Liability	
Bodily Injury by Accident	\$500,000 each accident
Bodily Injury by Disease	\$500,000 policy limit
Bodily Injury by Disease	\$500,000 each employee

Commercial Umbrella/Excess Liability

Each Occurrence	\$2,000,000
Aggregate	\$2,000,000

- B. The City shall be included under the DWA's general commercial liability insurance as well as under any special event insurance coverages which Corporation secures to cover the Seasonal Tent Program, as an additional primary insured.
- C. Coverage shall be on a per occurrence basis in accordance with the limits and provisions specified in subparagraph A above.
- D. All insurance shall provide that it will not be cancelled or materially altered to reduce the policy limits until the City has received at least thirty (30) days prior written notice of such cancellation or change.
- E. The DWA's insurance shall be primary with respect to any other valid or collectable insurance that the City may possess, including any self-insured retentions that the City may have. Any other insurance the City possesses shall be considered excess insurance only and shall not be required to contribute with the DWA's insurance.
- F. During the term of this Agreement, the City may require the DWA to increase insurance coverage in those categories and in those amounts deemed necessary by the City.

The insurance described herein as set forth in subparagraph A above shall be maintained for the duration of the Agreement.

- 10. City Indemnification. The City shall indemnify and hold harmless the DWA for any and all claims, actions, causes of action, injuries, death, property damage, costs or casualties caused by actionable incidents related to the erection, maintenance, and removal of the tent and their appurtenances, as well as the condition of the surface of Hale Street and its curbs, for each year of the Seasonal Tent Program.
- 11. Third Person Beneficiaries. There are no third person beneficiaries of this Agreement. Nothing in this agreement shall be interpreted to waive or release in any manner or compromise any and all immunities and privileges of the City under state statute or common law which are specifically reserved.
- 12. State of Cooperation. The City and the DWA agree, where possible, to cooperate with each other in achieving the purposes set forth herein.
- 13. Termination of Agreement. This Agreement shall terminate on the earliest of the following: (a) December 31, 2027; (b) the voluntary or involuntary dissolution of the Corporation; (c) if either party breaches the terms set forth in this Agreement; or (d) by the entry of a court order invalidating this Agreement.

14. Amendment. This Agreement constitutes the entire agreement of the parties regarding this matter and all prior negotiations or discussions related thereto have been incorporated herein. This Agreement may not be amended except by mutual written agreement of the parties.
15. Counterparts. This Agreement may be executed in two or more counterparts each of which shall be deemed an original.
16. Dissolution Meeting. In the event of the dissolution of the terms of this Agreement or the termination of the use of the Designated User Area, or a dissolution of the DWA, the parties shall meet to discuss the events that may need to occur to wind up the dissolution. The City will be responsible for any and all acts necessary to wind up a termination, except those things specifically related to the legal status and the operation of the DWA.

IN WITNESS WHEREOF, the Downtown Wheaton Association, and the City of Wheaton, by the approval of its Corporate Authorities, have approved and authorized the execution of this Agreement this 9th day of December, 2022.

CITY OF WHEATON, a municipal corporation existing under the laws of the State of Illinois

By: Philip J. Suess
Mayor Philip Suess

ATTESTATION:

Andrea Ronedale
City of Wheaton, City Clerk

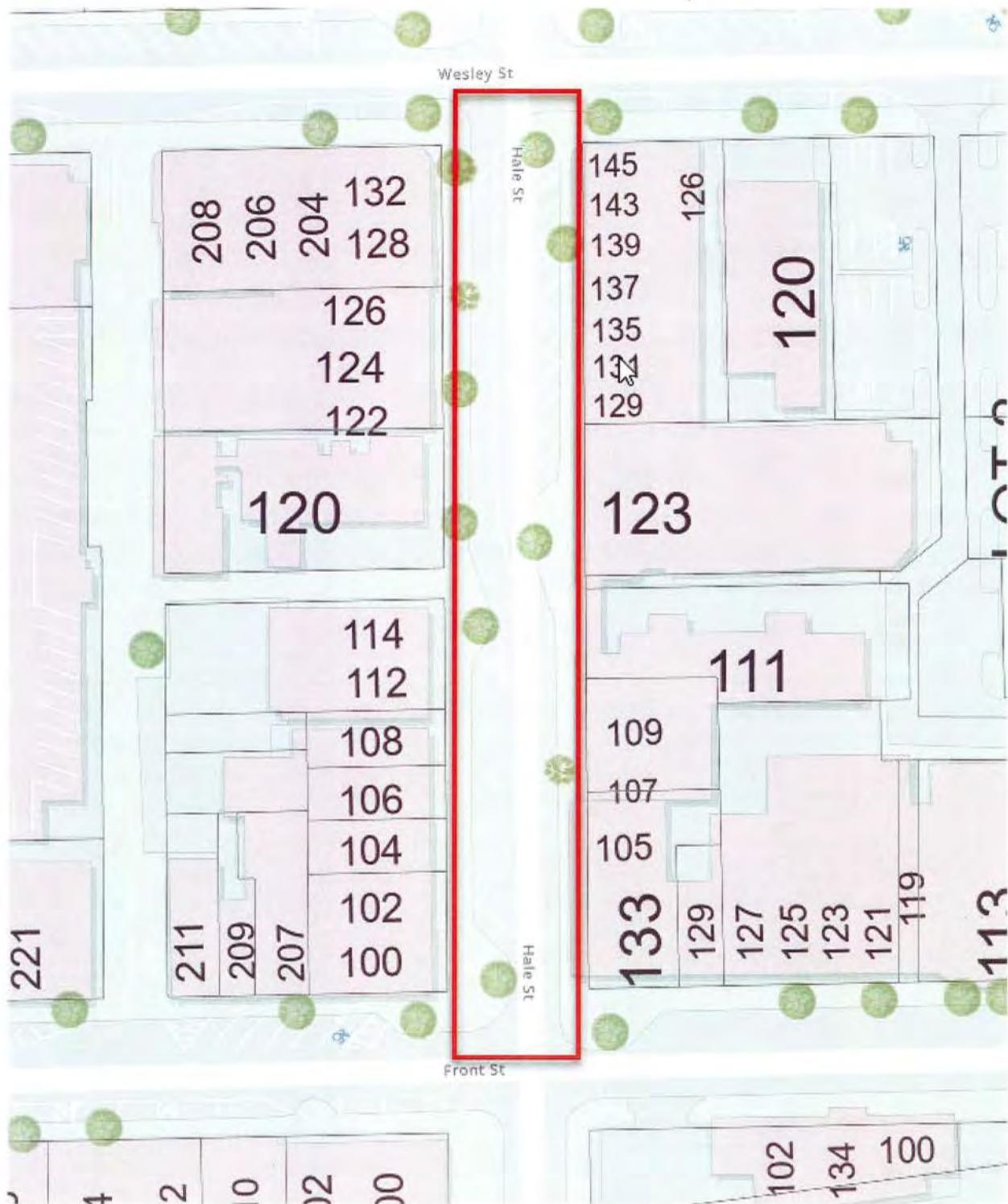
DOWNTOWN WHEATON ASSOCIATION,
a not-for-profit corporation organized and existing
under the laws of the State of Illinois

By: Aesa

ATTESTATION:

Kathy J. Meyer
Secretary

Exhibit 1



Use area



HOLD HARMLESS, INDEMNIFICATION AND TEMPORARY LICENSE AGREEMENT FOR FOOD AND BEVERAGE SERVICE ON A PORTION OF HALE STREET

This Hold Harmless, Indemnification and Temporary License Agreement ("Agreement") is dated this _____ day of _____, 2022, and is between _____ ("Indemnitor"), a corporation or other business entity created under the laws of the State of _____, authorized to conduct business in the State of Illinois and the City of Wheaton, Illinois, an Illinois municipal corporation, DuPage County, Illinois ("City").

WHEREAS, the City is in possession and owns improved public right-of-way known as Hale Street; and

WHEREAS, since 2020, the City has adopted Ordinances authorizing businesses located on a portion of Hale Street north of Front Street and south of Wesley Street that provide food and beverage service to the public, to occupy dining tents and associated accoutrements, allowing for retail sale of food and beverages in the Hale Street right of way, (hereinafter the "Program") subject certain terms and conditions, including the execution of a Hold Harmless, Indemnification and Temporary License Agreement and the provision of commercial liability and umbrella insurance; and

WHEREAS, the City has elected to extend the Program pursuant to the terms of this Agreement; and

WHEREAS, Indemnitor desires to participate in the Program by using a portion of Hale Street north of Front Street and south of Wesley Street in the vicinity of Indemnitor's property located at _____, Wheaton, Illinois for the exclusive purpose of occupying dining tents and installing associated restaurant accoutrements for retail sale of food and beverages for _____ (Business Name) in accordance with City Ordinance(s) authorizing the temporary occupation of a portion of Hale Street for dining and retail sale of food and beverages.

NOW THEREFORE, in consideration of receipt of a non-exclusive temporary license, from the City to occupy a portion of Hale Street including dining tents and associated accoutrements for retail sale of food and beverages in Hale Street, the parties agree as follows:

1. **Recitals.** The foregoing recitals are incorporated herein as representing the intent of the undersigned and as substantive representations and covenants.
2. **Indemnification.** Indemnitor hereby indemnifies, holds harmless, and shall defend to the maximum extent allowed by law, the City, its Corporate Authorities, officers, employees, agents, representatives, and volunteers from and against any and all claims, demands, losses, damages, liabilities, fines, charges, penalties, administrative and judicial proceedings and orders, judgments, remedial actions of any kind, all costs and cleanup actions of any kind, and all costs

and expenses incurred in connection therewith, including but not limited to reasonable attorney's fees, expert witness fees and costs of defense (collectively, the "**Claims**") which in whole or in part result from, or arise out of, or are claimed to result from or to rise out of any acts, negligence, errors, or omissions, of Indemnitor, its employees, representatives, contractors, subcontractors, or agents by reason of or arising out of, or in any matter connected with, any and all acts, operations, privileges authorized, allowed or undertaken pursuant to Indemnitor's use of Hale Street for dining purposes and Indemnitor's installation and use of dining accoutrements for retail food and beverage service. Any personal property, including but not limited to tables, chairs, serving equipment, fencing, tenting, barriers or other non-permanent fixtures, erected, used or installed on Hale Street or private property are the sole and exclusive responsibility of the Indemnitor. The City makes no representations, warranties or promises related to the use of Hale Street for outdoor seating and dining.

This indemnity Agreement includes, but is not limited to, personal injury (including death and/or health pandemics at any time) and property or other damage sustained by any person or persons (including, but not limited to, companies, corporations, Indemnitor and its employees or agents, and members of the general public).

The indemnification provided by this Agreement shall apply to Claims occurring on or after the date on which Indemnitor begins occupying dining tents in Hale Street or begins installing dining accoutrements for retail food and beverage service in Hale Street, but shall not apply to any Claims occurring after Indemnitor ceases its operations in, and removes its installations from, Hale Street. Indemnitor shall cease its occupancy and use of Hale Street in accordance with the City's Ordinance(s) authorizing the temporary occupation of Hale Street for dining and retail sale of food and beverages. Indemnitor shall provide the City written notification of such cessation in operations and removal of installations ("**Termination**"). Indemnitor shall have no obligation to indemnify the City for Claims occurring after Termination hereunder.

Upon Termination, the City may remove and dispose of any remaining Indemnitor installations or accoutrements placed upon Hale Street by Indemnitor or its employees, representatives, contractors, subcontractors, or agents without liability to the City.

3. **Insurance.** Indemnitor further agrees to purchase commercial general liability insurance and umbrella insurance and maintain such insurance coverages for the duration of Indemnitor's use of Hale Street for dining and installing associated accoutrements for retail sale of food and beverages. Indemnitor agrees to purchase such insurance from an insurance company or companies with an A.M. Best rating of A- (VII) or better and purchase commercial general liability insurance in the amount of \$1 million per occurrence and \$2 million in the aggregate. Indemnitor shall provide the City with an insurance certificate showing the coverages required herein, prior to Indemnitor's use of Hale Street for occupying dining tents and installing associated accoutrements for retail sale of food and beverages. The City, its officers, elected

officials, employees, agents and volunteers shall be named as additional insureds on the insurance procured, and not merely a certificate holder.

4. **Authorization Revocable.** The City hereby grants a temporary license to the Indemnitor to participate in the Program. It is not a lease, easement, or any interest in the Hale Street public right of way. Indemnitor understands that the authorization to occupy a portion of Hale Street including dining tents and associated accoutrements for retail sale of food and beverages in Hale Street is authorized only as a temporary license which may be revoked, amended, or otherwise changed in the City's sole and absolute discretion. Revocations, amendments, or changes shall be provided by the City in writing and shall be effective of the date of hand delivery to the Indemnitor's Hale Street address. If the authorization is revoked Indemnitor shall have 7 (seven) calendar days to remove its restaurant accoutrements from the program premises at its sole cost and expense. No sales of food or beverages shall be allowed during the 7 (seven) days. Failure to remove the accoutrements within the 7 (seven) days shall authorize the City to remove and dispose of the same without liability to the Indemnitor, its successors or assigns. In this circumstance the Indemnitor shall reimburse the City for the actual out of pocket costs in removing the restaurant accoutrements.
5. **City Immunities.** Nothing set forth in this Agreement shall be deemed a waiver by the City of any defenses or immunities relating to Indemnitor or its property, or to any other person or entity or their property, that are or would be otherwise available to the City or its Corporate Authorities, officers and employees under the provisions of the Illinois Local Government and Governmental Employees Tort Immunity Act, or that are otherwise available to local governments and their corporate authorities, officers and employees under the common law of the State of Illinois or the United States of America. There are no third person beneficiaries of this Agreement or the Program.
6. **Code Compliance.** As a condition of this temporary license, Indemnitor shall comply with all applicable codes and Ordinances of the City. The City Manager may revoke a temporary license after a hearing before him or his appointee if the Indemnitor violates this section in a manner determined by the City Manager to be inconsistent with the public health, safety and welfare, including but not limited to: Underage Alcoholic Beverage sales or deliveries, overserving alcoholic beverages, failure to maintain its food and beverage service area in a sanitary manner, etc. The hearing shall provide the Indemnitor an opportunity to contest any such allegation before the City Manager or appointee.
7. **Entire Agreement; Amendment.** The provisions set forth in this Agreement represent the entire Agreement between the parties and shall supersede all prior agreements, contracts, understandings, promises and representations, oral or written, as it is the intent of the parties to provide for a complete integration within the terms of this Agreement. This Agreement may be modified only by a further written agreement between the parties, and no modification shall be effective unless properly approved by the City.

8. **Agreement Not Binding on Assigns.** This Agreement shall be binding upon the parties hereto only. No heir, successor, lessee or assign of Indemnitor shall have the rights or privileges under this Agreement without the express written consent of the City.

9. **Agreement Not an Easement or Leasehold.** The use of Hale Street authorized by this Agreement is a temporary license and not a property interest or an estate in land. This Agreement shall not be construed as an easement. If any court of competent jurisdiction construes this Agreement as a leasehold, easement or other interest in land it shall only be a temporary easement which shall terminate 3 (three) calendar days after the Indemnitor asserts in writing that it constitutes an easement, leasehold or other interest in real estate. Any Indemnitor asserting that this Agreement constitutes a leasehold, easement or other interest in land shall reimburse the City's attorney's fees and costs asserting or defending its status as a temporary license.

IN WITNESS WHEREOF, the parties have entered into this Agreement this _____ day of _____, 2022.

CITY OF WHEATON, an Illinois municipal corporation
Existing under the laws of the State of Illinois

By: _____ Date: _____

ATTEST:

BY: _____

Title: _____

INDEMNITOR:

By: _____

Its: _____