

RESOLUTION NO. R-2023- 108

A RESOLUTION AUTHORIZING THE EXECUTION OF A SIDE LETTER AGREEMENT BETWEEN THE CITY OF WHEATON AND THE WHEATON PLACE CONDOMINIUM ASSOCIATION RELATING TO MAINTENANCE RESPONSIBILITIES FOR THE WHEATON PLACE GARAGE

WHEREAS, the City of Wheaton, Illinois, ("City") is an Illinois Home Rule Municipality pursuant to the provisions of Article VII, Section 6, of the Illinois Constitution of 1970; and as such the City may exercise any power and perform any function pertaining to its government and affairs; and

WHEREAS, the Wheaton Place Condominium Association (the "Association") is the governing organization comprised of unit owners in the Wheaton Place Condominiums; and

WHEREAS, the Wheaton Place Garage and Condominiums were constructed in 1999; and

WHEREAS, in 1999, the developer of the Wheaton Place Garage and Condominiums and the City entered into an "Easement and Operating Agreement for Wheaton Place" (the "EOA"), which addressed maintenance obligations for the portion of the Parking Garage owned by the City and for the portion of the Parking Garage owned by the Association; and

WHEREAS, certain terms of the EOA regarding maintenance obligations for the Garage were somewhat ambiguous or in conflict with other agreements between the City and the developer; and as such, the City and the Association have decided it is necessary to clarify the Parties' timing of the maintenance obligations for the Parking Garage and the timing of the payment obligations for such maintenance and to add notice of damage and damage payment obligation provisions.

NOW, THEREFORE, BE IT RESOLVED by the City Council of the City of Wheaton, Du Page County, Illinois, pursuant to its home rule powers, as follows:

Section 1: The recitals above are hereby incorporated into this Section 1 as though fully set forth herein.

Section 2: The Mayor is hereby authorized to execute, and the City Clerk is hereby directed to attest to, the Side Letter Agreement between the City of Wheaton and the Wheaton Place Condominium Association relating to maintenance responsibilities for the Wheaton Place Garage; and that a copy of that certain Agreement is on file with the City Clerk's office and is incorporated herein as if fully set forth as Exhibit A.

ADOPTED this 18th day of December 2023.



Mayor

ATTEST: 

City Clerk

| | |
|---------|-----------------------------------|
| | Roll Call Vote |
| Ayes: | Councilman Brown |
| | Mayor Suess |
| | Councilman Clousing |
| | Councilwoman Robbins |
| | Councilman Weller |
| | Councilman Barbier |
| | Councilwoman Bray-Parker |
| Nays: | None |
| Absent: | None |
| | <u>Motion Carried Unanimously</u> |

**SIDE LETTER AGREEMENT
BETWEEN THE CITY OF WHEATON AND
THE WHEATON PLACE CONDOMINIUM ASSOCIATION**

THIS SIDE LETTER AGREEMENT is effective as of December 19th, 2023, ("**Effective Date**"), and is between the City of Wheaton, Illinois ("City") and the Wheaton Place Condominium Association ("WP Condo Association"). The City and WP Condo Association are sometimes referred to individually as "party," and collectively as the "parties."

RECITALS

WHEREAS, on November 6, 1995, the Wheaton City Council passed Ordinance No. E-4142, which amended the Wheaton Zoning Ordinance Map and granted a special use permit (the "**Special Use Permit**") for the construction and use of a Planned Unit Development (the "**PUD**"), now known as "Wheaton Place," consisting of a residential condominium building with ground level retail facilities and parking facilities; and

WHEREAS, Ordinance No. E-4142 also provides that the Special Use Permit and its conditions, restrictions and requirements shall be binding on the PUD's real property (the "**Property**"), the Property owner (the "**Owner**"), and the Owner's successors, assigns, and grantees and that the application for, and receipt of, any site development or building permit and the commencement of construction of any improvements on the Property by the Owner or by any of the Owner's successors, assigns, and grantees constitutes an agreement to the terms and conditions of Ordinance No. E-4142 and a declaration that Ordinance No. E-4142 constitutes a covenant running with and binding upon the Property in perpetuity; and

WHEREAS, Ordinance No. E-4142 was recorded on November 15, 1995 as document number R-95-161342 in the office of the DuPage County Recorder; and

WHEREAS, on November 25, 1996, the Wheaton City Council passed Ordinance No. F-0081, which amended certain provisions of the Special Use Permit including the addition of certain property to the PUD; and

WHEREAS, Ordinance No. F-0081 was recorded on January 29, 1997 as document number R-97-13940 in the office of the DuPage County Recorder; and

WHEREAS, on October 20, 1997, the Wheaton City Council passed Ordinance No. F-0179, which further amended the Special Use Permit to require the construction and use of the PUD to be in compliance with any development agreement entered into by the City regarding the PUD property, and required the Declaration of Covenants, Conditions, Easements, and Restrictions connected to the PUD to provide for a monthly assessment representing the condominium owners association's pro rata share of the maintenance and operation of the parking garage structure, as agreed to between the City and the developer of the PUD; and

WHEREAS, Ordinance No. F-0179 was recorded on November 25, 1997 as document number R97-181790 in the office of the DuPage County Recorder; and

WHEREAS, on November 17, 1997, Wheaton Wesley, L.L.C. (the "**Developer**"), the developer of the PUD, entered into a "Redevelopment Agreement" with the City, which was recorded with the DuPage County Recorder as document number R-97-187256 and pursuant to the Redevelopment Agreement, a parking garage ("Parking Garage") was constructed as part of the PUD, a portion of which is owned by the City for public parking and a portion of which was owned by the Developer and which portion is now owned by the WP Condo Association; and

WHEREAS, pursuant to the Redevelopment Agreement, the Parking Garage is to be maintained, managed and operated by the City with a proportionate share of the costs of such services incurred by the City to be paid by the WP Condo Association pursuant to a reciprocal easement and operating agreement entered into by the Developer and the City; and

WHEREAS, on July 19, 1999, the Wheaton City Council passed Ordinance No. F-0369, which authorized the execution of a Grant of Easement between the City and the Developer and the execution of an Easement and Operating Agreement between the City and the Developer; and

WHEREAS, on September 30, 1999, a Grant of Easement between the City and Developer was recorded in the office of the DuPage County Recorder, document number R-1999-208441, as a covenant running with the land and obligates the Developer and the Developer's successors and assigns to maintain the easements granted to the City by the Developer under the Grant of Easement; and

WHEREAS, on September 30, 1999, an "Easement and Operating Agreement for Wheaton Place" (the "**EOA**") was recorded in the office of the DuPage County Recorder, document number R1999-208440, which addresses maintenance obligations for the portion of the Parking Garage owned by the City and for the portion of the Parking Garage owned by the WP Condo Association; and

WHEREAS, the Developer of the recorded with the DuPage County Recorder on November 15, 1999, document number R-1999-239049, "Declaration of Condominium Ownership and of Easements, Restrictions, Covenants and By-Laws for Wheaton Place Condominium Association" (the "**Declaration**") which requires the WP Condo Association Board of Directors, for the benefit of all WP Condo Association unit owners, to pay the City in accordance with the EOA for the City's maintenance, management, and operation of the portion of the Parking Garage owned by the WP Condo Association; and

WHEREAS, in light of the Special Use Permit and additional documents relating to the maintenance of the Parking Garage, the City and WP Condo Association have decided to clarify the Parties' timing of the maintenance obligations for the Parking Garage and the timing of the payment obligations for such maintenance and to add notice of damage and damage payment obligation provisions.

NOW, THEREFORE, in consideration of the mutual covenants set forth herein, the parties hereto covenant and agree as follows:

1. **Definitions.**

For purposes of this Side Letter Agreement, the following definitions apply when used herein.

- 1.1 **"First Class"** means of the highest standards or of the highest quality, or both, as applicable, in accordance with then-recognized standards for parking garage structures.
- 1.2 **"Long-Term Maintenance"** means the periodic inspection, evaluation, and assessment of the Parking Garage by a professional parking structure consultant and the repair of identified defects, deterioration and/or sources of atrophy and damage to the Parking Garage.
- 1.3 **"Parking Garage"** means the Wheaton Place Parking Garage facility located at 232 W. Wesley Street, Wheaton, Illinois together with all surfaces, walls, driveways, ramps, paved areas, walkways, stairs, elevator, gates, fixtures, equipment, systems, personal property, signage, Utility Facilities, and other improvements forming a part of and appurtenant to such parking facility and used or useful in connection with the use and operation thereof whether located on City owned real property or on real property owned by the WP Condo Association.
- 1.4 **"Professional Assessment"** means the inspection, evaluation, and assessment of the Parking Garage by a professional parking structure consultant which may include but is not limited to a structural evaluation of all structural components and floors of the Parking Garage to identify locations of defects, deterioration and/or sources of atrophy and damage to the Parking Garage followed by a recommendation on appropriate repairs and/or restoration to be made to the Parking Garage.
- 1.5 **"Regular Maintenance"** means those maintenance functions performed on a regular basis to keep the Parking Garage in good, usable condition and repair, including minor repairs, and to a reasonable standard consistent with First Class parking garage structures located in the same metropolitan area as the Parking Garage.
- 1.6 **"Shared Costs"** means all costs associated with Regular Maintenance and Long-Term Maintenance of the Parking Garage, including but not limited to the cost of the City employees or contractors performing any inspections, evaluations, assessments, Regular Maintenance work and Long-Term Maintenance work as well as the reasonable costs of any equipment or supplies needed to perform the Regular Maintenance work and Long-Term Maintenance work.

1.7 **“Utility Facilities”** means all utility, communication, lighting, heating, ventilation and other similar systems and facilities including, without limitation, intake and exhaust systems, any back flow preventors, any drainage systems, ducting systems for ventilation and utility services, lighting systems (including lighting fixtures), water systems, sanitary sewer systems, natural gas systems, electrical systems, fire life safety systems (including the fire suppression system), central plants, exhaust fans, lightning rods, vaults, switchgears, heating, ventilation and air conditioning systems, (including without limitation, all machinery controls and vents relating thereto), Emergency generators, central utility services and all other utility systems, conduits, cabling and facilities servicing the Parking Garage which are situated in, on, over, under or across the Parking Garage property.

2. **Maintenance.**

2.1 **Regular and Long-Term Maintenance.** The City is responsible for managing and contracting for all Regular Maintenance and Long-Term Maintenance of the Parking Garage based on the terms and conditions described herein including referenced prior agreements and easements.

A. **Regular Maintenance.** WP Condo Association agrees to share the costs associated with Regular Maintenance of the Parking Garage, as further provided in **Section 3** herein. Both parties acknowledge that costs may be impacted by numerous factors, including but not limited to supply and demand, inflation and deflation, labor and services costs, union contracts, crime, laws and regulations, interest rates and a myriad of other factors that can impact costs. If the parties ever disagree about the level and quality of Regular Maintenance that the City is providing, the parties will meet and confer in a good faith effort to resolve the differences between the expected level of maintenance and the provided level of maintenance. In the event the Parties are unable to agree on the level of maintenance, the City shall have the ultimate decision-making authority insuring that the Parking Garage will continue to be maintained as a First-Class facility.

B. **Long-Term Maintenance.** The parties acknowledge and agree that the Parking Garage requires Long-Term Maintenance. The parties further acknowledge and agree that Long-Term Maintenance activities may include, but shall not be limited to, patching concrete surfaces, bead blasting floors and wall surfaces in preparation of applying a protective sealer, re-striping floors, painting interior walls with anti-graffiti paint, painting ceilings with high reflection paint, replacement of failed joint sealants, unclogging drains, and replacement of faded signage to keep the Parking Garage in first-class condition, structurally sound and safe for the City and WP Condo Association use. The City will cause such Long-Term Maintenance to be performed in accordance with the City’s Capital Improvement Plan, unless the condition of the Parking Garage requires sooner Long-Term Maintenance repair and restoration. The parties acknowledge that the City currently strives to undertake Professional Assessment, repairs and

restoration of the Parking Garage every five (5) years. In accordance with the City's Capital Improvement Plan for fiscal years 2021-2025, a Professional Assessment was performed in fiscal year 2021 with repairs and restoration based on that Professional Assessment made in fiscal year 2022. The parties acknowledge that as the structure of the Parking Garage ages, repairs and restoration following a Professional Assessment may become more frequent. WP Condo Association agrees to share the costs associated with Long-Term Maintenance of the Parking Garage, as further provided in **Section 3** herein, including the Long-Term Maintenance performed in 2022 and any Professional Assessments, Long-Term Maintenance and restoration performed in subsequent years undertaken based on the applicable Professional Assessment. The City will provide a copy of any Professional Assessment to the WP Condo Association within fifteen (15) days of receipt of any such assessment.

2.2 **Right of Entry.** The City and its employees, agents, and contractors shall have the right to enter upon the portion of the Parking Garage owned by WP Condo Association to inspect, evaluate, assess, prepare, plan, conduct and perform Regular Maintenance and Long-Term Maintenance activities in, over, on, across, under and through the Parking Garage and the same will not constitute a violation of either the City's or WP Condo Association's easements as granted under the Grant of Easement recorded with the DuPage County Recorder on September 30, 1999 and the EOA.

2.3 **Notice of Damage.** Each party agrees to provide prompt notice to the other party with respect to any unusual damage to the Parking Garage, including information regarding who may have caused such damage. Each party also agrees to use commercially reasonable efforts to pursue any available claims for damage with respect to third parties, including third parties that may have a contractual obligation to either the City or WP Condo Association to pay the costs of repairing such damage. In the event of any such unusual damage, the City agrees to perform any required repairs to the extent reasonably possible subject to reimbursement by WP Condo Association for its share of the repair costs, as further provided in **Section 3** herein, less any third-party reimbursement received.

Notwithstanding the foregoing, if a party damages or destroys any part of or all of the Parking Garage (whether or not such act is negligent or otherwise culpable) such party (hereinafter the "**Damaging Party**") shall be obligated to pay for all costs to repair the damage or destruction to the extent any insurance proceeds do not cover the same (hereinafter the "**Damage Repair Costs**"), provided that any liability imposed on a party hereunder shall not limit or prejudice the right of the party to pursue any available legal remedies against the person(s) causing such damage or destruction.

2.4 **Fire or Other Casualty.** Any repair, replacement, reconstruction and /or restoration of the Parking Garage required as a result of fire or other casualty is governed by Article 9 of the EOA.

2.5 **Failed Structural Supports.** Any repair, replacement, reconstruction and/or restoration of the Parking Garage required because a Structural Support is inadequate, fails, or is reduced below the support required to maintain the structural safety or integrity of the Parking Garage is governed by Article 4 of the EOA.

3.0 **Shared Costs.** The City and WP Condo Association, each covenants to pay, severally and not jointly, its allocable share of all Shared Costs.

3.1 **WP Condo Association's Allocable Share.** WP Condo Association's allocable share of Shared Costs with respect to the Parking Garage (the "WP Condo Association Shared Costs") shall be based on a fraction, the numerator of which is the number of WP Condo Association parking spaces owned by the WP Condo Association unit owners in the Parking Garage and the denominator of which is the total number of parking spaces in the Parking Garage.

3.2 **City's Allocable Share.** The City's allocable share of Shared Costs with respect to the Parking Garage (the "City Shared Costs") shall be based on a fraction, the numerator of which is the number of City-owned parking spaces in the Parking Garage and the denominator of which is the total number of Parking Spaces in the Parking Garage.

3.3 **Parking Spaces.** The parties acknowledge and agree that there are four-hundred and fourteen (414) total parking spaces in the Parking Garage. Sixty (60) Parking Garage spaces (14.5%) are owned by WP Condo Association unit owners and three hundred fifty-four (354) Parking Garage spaces (85.5%) are owned by the City.

3.4 **Payment.** No later than September 1st of each year, the City will provide WP Condo Association with an estimate of anticipated costs for Regular Maintenance and Long-Term Maintenance for the following calendar year so that WP Condo Association may include such costs in its budget. The City will invoice WP Condo Association on a monthly basis for WP Condo Association Shared Costs, and such invoices shall be paid within thirty (30) days of receipt by WP Condo Association.

In the event maintenance or repair costs in a given year exceed the amount WP Condo Association budgeted for that year, WP Condo Association will include that excess amount in its budget for the following calendar year, in addition to the amount it budgets for anticipated costs for Regular Maintenance and Long-Term Maintenance. The City will provide WP Condo Association with an invoice for the amount of the excess costs in January of the following year, and said invoice shall be paid within thirty (30) days of receipt by WP Condo Association.

In consideration of the WP Condo Association's obligations for budgeting and reserves under applicable statutes and its own governing instruments, the City will provide WP Condo Association with a copy of, or information reflecting the pertinent substance of, its anticipated five-year Parking Garage Repair evaluations/projections as soon as available, as well as updates to same as they become available.

3.5 **Excluded from Shared Costs.** Notwithstanding anything to the contrary contained in this Side Letter Agreement, in no event shall Shared Costs include any of the following: (i) any costs incurred in connection with or directly related to the original construction or voluntary modification, redevelopment or remodeling (as distinguished from Regular Maintenance and Long-Term Maintenance) of the Parking Garage; (ii) any interest or penalties incurred as a result of any failure to pay any bill as the same shall become due and costs, fines, or fees incurred due to knowing violations of any federal, state, or local law, statutes or ordinances, or any rule, regulations, judgment or decree of any governmental authority; (iii) any costs incurred for the Parking Garage that are also incurred with respect to the Wheaton Place residential condominium building and that are not separately billed as expenses independent of the Wheaton Place residential condominium building (e.g., a single charge to the residential condominium building that includes both the Parking Garage and residential condominium repairs, maintenance, improvements).

4.0 **Term.** The term of this Side Letter Agreement shall begin on the Effective Date. This Side Letter Agreement shall be in effect for as long as the Special Use Permit granted under City of Wheaton Ordinance No. E-4142 is in effect. If the law provides for a time limit on the enforceability of this Side Letter Agreement (the "**Shorter Term**") and the Special Use Permit is still in effect, then this Side Letter Agreement shall be deemed as having a twenty-year initial term ("**Initial Term**") which shall automatically renew for subsequent periods of the same length as the Initial Term ("**Renewal Clause**") so long as the Special Use Permit remains in effect. In the event the law requires a Shorter Term triggering the Renewal Clause for a subsequent term or terms, this Side Letter Agreement shall terminate as of the date on which the Special Use Permit granted under City of Wheaton Ordinance No. E-4142 is no longer in effect.

5.0 **General Provisions.**

5.1 **Binding Effect.** The terms of this Side Letter Agreement shall bind and inure to the benefit of the parties hereto and their agents, successors and assigns.

5.2 **No Personal Liability.** No elected or appointed official, director, officer, agent or employee of the City or WP Condo Association shall be personally liable, in law or in contract as the result of the execution or attempted execution, approval, and any and all acts or conduct in furtherance of this Side Letter Agreement.

5.3 **Governmental Immunity.** Nothing in this Side Letter Agreement shall be construed as a waiver of any and all privileges, immunities, or defenses provided to or enjoyed by the City under common law or pursuant to statute, including but not limited to the Illinois Local Governmental and Governmental Employees Tort Immunity Act, 745 ILCS 10/1-101 *et seq.*

5.4 **Force Majeure.** No party hereto shall be deemed to be in default or to have breached any provision of this Side Letter Agreement (hereinafter, "Excused Status") as the

result of any delay, failure in performance or interruption of services resulting directly or indirectly from acts of God; acts of civil or military disturbance; acts of war; fire; natural disaster; epidemic, pandemic, quarantine or public health crisis; state of emergency; or electrical, internet, or telecommunication outages which are beyond the control of such non-performing party (hereinafter "Force Majeure Event"); provided, however, that notice thereof is given by the Party whose performance is delayed to the other Party without delay. If notice thereof is not given without delay, the relief provided by this paragraph is effective from the time at which notice of the Force Majeure Event reaches the other Party. Where the effect of the Force Majeure Event invoked is temporary, the Excused Status of the Party whose performance is delayed shall apply only as long as the Force Majeure Event invoked impedes performance by that Party. Both Parties will use reasonable efforts to mitigate the effect of a Force Majeure Event.

IN WITNESS WHEREOF, the parties have entered into this Agreement this 19th day of December 2023.

CITY OF WHEATON, an Illinois municipal corp.

By: Philip J. Suen Date: 12/19/2023

ATTEST:
By: Andrea Rovedale
City Clerk

WHEATON PLACE CONDOMINIUM ASSOCIATION

BY: Lynne M. Engel Date: Dec. 8, 2023

Its: President

ATTEST:

BY: Nancy J. Roth
Title: Secretary