

AMENDMENT NUMBER TWO TO PARKING AGREEMENT
BETWEEN VILLAGE GREEN RESIDENTIAL PROPERTIES, L.L.C., THE CITY OF
ANN ARBOR AND THE ANN ARBOR DOWNTOWN DEVELOPMENT AUTHORITY

THIS AMENDMENT NO. 2 TO THE PARKING AGREEMENT is made and executed as of the ____ day of _____, 2010, by and between the City of Ann Arbor, a Michigan municipal corporation, with offices at 100 N. Fifth Avenue, Ann Arbor, Michigan 48107-8647 ("City"), the Ann Arbor Downtown Development Authority, with offices at 150 South Fifth Avenue, Suite 301, Ann Arbor, Michigan 48104 ("DDA") and Village Green Residential Properties, L.L.C., having its offices at 30833 Northwestern Highway, Suite 300, Farmington Hills, Michigan 48334 ("Village Green") (herein collectively referred to as the "Parties")

GENERAL RECITALS:

- A. City is the owner of a certain parcel of real estate commonly described as "First and Washington Site" (the "Property").
- B. DDA, manages and operates, under Agreement with the City, City-owned parking facilities.
- C. In response to the City Request for Proposal RFP No. 621, Village Green was selected by the City to develop the Property;
- D. Village Green's proposal, dated April 28, 2006 (the "Village Green Proposal") called for the redevelopment of the Property as residential housing, including a multi-level Parking Garage, and the conveyance of that multi-level Parking Garage to the City as a condominium unit upon substantial completion of the garage (the "Project").
- E. The Village Green Proposal was accepted by the City pursuant, and subject to the conditions set forth in, City Resolution No. R-354-8-06, dated August 10, 2006 ("the Authorizing Resolution").
- F. The City and Village Green subsequently entered into an Option Agreement for the Purchase of Land, dated February 20, 2007, ("Original Option") which has thereafter been amended by Amendment No. 1, approved February 4, 2008; Amendment No. 2, approved December 1, 2008; Amendment No. 3, approved May 18, 2009; Amendment No. 4, approved June 21, 2010; and Amendment No. 5, approved August 5, 2010 (collectively "the Option") whereby Village Green was given the exclusive option to purchase the Property for a limited period of time, subject to a series of terms and conditions set forth therein and subject to Village Green's continued prosecution of all elements necessary to the timely commencement and completion of the Project in accordance with the Village Green Proposal.
- G. The terms of the Option between the City and Village Green required the negotiation and approval by the governing boards of the Parties of a Parking Agreement, the terms of which include but are not limited to, definition of the rights and responsibilities of the City, DDA, and Village Green during design and construction of the multi-level Parking Garage and ownership and occupancy of the Parking Garage thereafter.

- H. The City, DDA and Village Green entered into a Parking Agreement, dated October 3, 2007 (“Original Parking Agreement”), which has thereafter been amended by Amendment No. 1, dated May 22, 2008 (collectively “the Parking Agreement”).
- I. As a condition of approval of this Amendment No. 5 to the Option and further extension of the term of the Option, the City has required that Village Green enter into a further amendment of the Parking Agreement consistent with the revised and modified terms of the Option and to further define the necessary allocation of rights and responsibilities in connection with operation of the Parking Garage after construction and to comply with the terms and conditions stated in this Amendment No. 2 to the Parking Agreement.

TERMS AND CONDITIONS:

In consideration of the foregoing, the mutual covenants set forth herein, and other good and valuable consideration, the receipt and adequacy of which is acknowledged hereby, the City, DDA and Village Green agree as follows:

1. ***Incorporation.***

The above General Recital clauses and all documents referenced therein are incorporated herein and made a part hereof. In case of a conflict among the documents referenced in any term or requirement, the terms and requirements of Amendment No. 2 shall prevail.

2. ***Project Goals.***

- a. By execution of the Option Agreement and Parking Agreement, Village Green has agreed to cause to be designed, constructed and delivered to the City upon Completion, on a “turnkey” basis (as hereinafter defined), a multi-level Parking Garage on or before May 1, 2012. It is Village Green’s sole responsibility to design, construct, and equip in accordance with the design criteria and Approved Plans, the Parking Garage, and it is the intent of the parties that Village Green shall deliver the Parking Garage lien-free, fully and finally completed and furnished, and in functional, unimpeded, operating condition fit for its intended purpose as a municipal parking deck, all as set for in the Parking Agreement and the applicable provisions of Development Agreement and Option Agreement and further specified in the Option Agreement Project Goals and Milestones. It is acknowledged by the parties that upon acquisition of the Property at Closing, Village Green shall record a condominium Master Deed for the Property and immediately convey to the City a unit (“City’s Unit”) and that Village Green shall construct the multi-level Parking Garage within the City’s Unit and upon Completion of same convey it to the City pursuant to warranty bill of sale or other mutually agreed instrument on the terms and conditions specified in the Option Agreement. Prior to conveyance of the Parking Garage, it is acknowledged that the City has agreed that the City’s Unit may be subject to the lien of a construction loan mortgage for the Project in accordance with Amendment No. 2 to the Option Agreement (being Article 1(f)).
- b. In addition, and as a condition of compliance with Amendment No. 5 to the Option Agreement, Village Green, the City and the DDA have agreed to execute

a Parking Operation Agreement with the City and the DDA which will set forth the requirements for operation and management of the Parking Garage.

3. **Approved Plans**

There shall be no material changes to the Approved Plans as defined in Amendment No. 1 to Parking Agreement, dated May 22, 2008, without advance submission to and approval by the City and the DDA in the manner required for such changes. For purposes hereof, Material Changes shall be any change in the structural design and/or exterior elevations, or appearance of or materials utilized in the Parking Garage or any other modification thereof, either individually or in the aggregate, which exceeds the sum of \$5,000.00.

4. **Commencement and Completion of Parking Garage.**

a. Construction Drawings and Specifications. As soon as possible, Village Green shall make available for review by the DDA and its engineers the detailed construction drawings and specifications for the parking garage. The DDA will review these documents with the purpose of ensuring the minimum 75-year useful life set forward in the Parking Agreement, and shall have no less than four calendar weeks to review these drawings and specifications and shall return to Village Green, AND PROVIDE A COPY TO THE CITY BUILDING OFFICIAL, detailed comments outlining any concerns and requests for modifications. Village Green shall address the concerns raised by DDA, and shall modify the construction documents TO THE EXTENT THE REQUESTED MODIFICATIONS DO NOT CONFLICT WITH OR ALTER THE APPROVED PLANS, CONSTRUCTION PLAN REVIEW APPROVAL REQUIREMENTS OR THE APPROVED STAGING PLAN. accordingly This review shall not replace **OR SUPERSEDE** the plan review process by the City's building official.

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a-b. Evidence of Funding. Prior to commencement of construction, Village Green shall make available for review evidence reasonably satisfactory to City that it has sufficient funds either on hand, or committed by the Lender or another lender or lenders, and/or private equity participants, to cover the anticipated cost of the Parking Garage and the site improvements based on the budget therefor, and thereafter during construction shall upon request by City and from time to time provide evidence of further funding, or commitments therefor, to cover any material increases in the cost of the Parking Garage based on the updated budget therefor, so that Village Green shall at all times have available all funding necessary to complete the construction of the Improvements.

b-c. Construction Schedule. Village Green shall commence as soon as practicable after obtaining all necessary permits and financing, and thereafter diligently proceed with, the construction of the Parking Garage to Completion on or before May 1, 2012 in conformity with the Approved Plans and the Project Goals and Milestones specified in the Option Agreement. Unless otherwise specifically provided in the Approved Plans, all equipment, material, and articles incorporated in the Improvements shall be new and of the most suitable grades for the intended purpose which is the minimum 75-year useful life of the new structure. Materials shall conform to manufacturer's standards in effect at the date of execution of this Agreement and shall be installed in accordance with

manufacturer's latest directions. Village Green shall, if required by City or DDA, furnish satisfactory evidence as to the kind and quality of any materials.

~~e-d~~ Conformance with Applicable Law. The Parking Garage shall be constructed in such a manner as to not be in violation of any applicable law, ordinance, rule, regulation or requirement of any governmental authority having jurisdiction thereover, including without limitation environmental law, and those pertaining to zoning, building, health or safety, of the municipal, county, state or federal governments, and the Development Agreement.

5. **Construction Information.**

- a. Construction Information, General. One or more representative(s) of City and/or DDA shall be given the opportunity at the City's cost to consult with and provide regular and ongoing input to Village Green's field representatives, and to attend the regular construction briefings and status meetings with the contractor/construction manager, the Architect and Village Green's own field representative and shall have the authority to request changes to construction means and methods as needed to assure the minimum 75-year service life of the garage, but shall not have the authority to require changes to the Approved Plans or the Construction Schedule once the DDA has signed off on the construction drawings and specifications. Village Green shall from time to time, upon request by City and/or DDA, arrange other meetings, or reports in lieu of meetings, by, between or among City and/or the DDA, the general contractor/construction manager or its project superintendent, and/or the architect, so that City and the DDA is kept fully advised and informed as to the progress of construction. The CITY AND THE DDA shall be provided copies of all regular construction reports which shall note progress and items of significance. The CITY AND THE DDA shall be provided with copies of certifications for all trained personnel working on the job site, including welders, dewatering engineers, earth retention contractors, steel workers, etc. The CITY AND THE DDA shall be provided with copies of independent inspector reports attesting to concrete quality, tie back installation, and other necessary elements of construction. THE DDA shall provide Village Green with specifications for equipment, lighting, signage, systems, furniture, and other elements needed to operate this parking garage, which will be in keeping with what is in place in other city-owned parking garages.
- b. Records Inspection. Village Green shall deliver to City OR AT THE CITY'S REQUEST and the DDA for review by City and its consultants and/OR the DDA the following items (to the extent not previously so delivered) to the extent in Village Green's possession or under its reasonable control, provided however, Business Agreements need not be physically delivered, but shall in any event be made available for review by the City at such locations in the City of Ann Arbor as may be mutually agreeable: (i) true, correct, complete and legible copies of all Business Agreements, Permits, Environmental Reports and Engineering Documents pertaining in any way to the Parking Garage, including expressly but without limitation all mortgage and related documents encumbering all or part of the Parking Garage; and (ii) all litigation files, if any, with respect to any pending litigation and claim files for any claims made or threatened, the outcome of which might have a material adverse effect on the Parking Garage or the use and operation of the Parking Garage. Any of the foregoing materials prepared or

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furnished by third parties are delivered without any representation or warranty by Village Green as to their accuracy or completeness.

- c. Rights of Inspection. City, DDA and their respective consultants shall at all times and from time to time have the right (but not the obligation) to access to the Property and the work being constructed for the purpose of inspecting the same, determining the conformance of the work to the Approved Plans and construction DRAWINGS AND specifications, the progress of the work with relationship to the Construction Schedule, and any other factor that City deems appropriate to determining its satisfaction therewith. This right of entry and inspection (as it relates to the Parking Garage only) shall be in addition to and separate from the City's Planning and Development Services Unit normal inspection of construction projects, and no such entry or inspection under this Section shall be deemed to waive, diminish or impair in any way the obligation of Village Green to deliver the Project fully in accordance with the Approved Plans and construction drawings and specifications approved by the DDA, in the operational condition and consistent with all other requirements set forth in this Agreement. In the event that the City or DDA become aware of any issue concerning Village Green's performance under this Agreement, such matters shall be promptly brought to the attention of Village Green for resolution.
- d. Warranties. At or before Completion of the Parking Garage, Village Green shall furnish the City and DDA originals, or true and complete copies, as the case may be, of all warranties and guaranties, if any, received from the General Contractor or any subcontractor or supplier furnishing labor, materials, equipment, fixtures or furnishings in connection with the construction of the Parking Garage, all of which shall be expressly assigned to the City as owner of the Parking Garage; provided, however that all such warranties shall be made available to, and may be enforced by, the DDA, under the Parking Garage Operating Agreement.
- e. Systems Start-Up. Upon Completion of the Parking Garage, Village Green shall also deliver to the City and DDA all operating manuals, procedures and other materials relating to building systems, furniture, fixtures and equipment incorporated in and servicing the Parking Garage, and the City, or its designee the DDA, shall be entitled to be present at (and shall receive reasonable advance notice of) initial start-up and testing thereof.
- f. Architect's Certificate of Completion. Upon completion of the Parking Garage, Village Green shall obtain and deliver to the City the Architect's Certificate of Completion.
- ~~g. Uninterrupted Operation of the Parking Garage. Upon Village Green's completion of the parking garage and deliverance of the Certificate of Occupancy, at no time shall the parking garage be obstructed from operation due to the installation of site improvements or ongoing construction of Village Green's apartments.~~
- ~~g-h. "As-Built". Upon Completion of Village Green's construction of the Parking Garage, Village Green shall obtain and provide to City: (i) an updated, "as-built" Survey, and (ii) an updated (to a date after Completion) Title Commitment. City shall have the period of thirty (30) days following its receipt of the last of the~~

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foregoing items to review and object to any new matter disclosed therein (not resulting from the acts or omissions of City) which constitutes, or may constitute, an adverse change from the state of facts and conditions approved by City in the initial Survey and Title Commitment provided under the Purchase Agreement between the parties. Village Green shall have the period of thirty (30) days following its receipt of such objections from City to cure both the matter to which objection is made, and any prior matters objected to by City under the Purchase Agreement not previously cured, and the Closing shall be conditioned on such cure.

h-i Protection Against Liens. As an express condition to Closing, Village Green shall pay and discharge all claims (whether or not the subject of liens) for labor, materials and services furnished in connection with the construction (under contract with Village Green, and exclusive of any such items provided by or under separate contract, if any, with the City or DDA) of the Parking Garage, take all actions required to prevent the assertion of claims of lien against the Property and/or Parking Garage, and provide City evidence of such payment and true copies of any documents recorded to discharge any such lien, without any requirement of City having first provided notice thereto Village Green. Nothing contained herein shall obligate Village Green to pay any claim so long as such claim is being contested in good faith and by appropriate proceedings, or if a lien claim is disputed by either party, if that party bonds over the lien in accordance with applicable Michigan law or provides other adequate security therefore; provided, however, Village Green shall nevertheless be obligated to convey title to the Property and Parking Garage to City free and clear of any such lien or claim.

h-j Insurance. Village Green and its General Contractor shall at all times comply with all insurance requirements mandated by its lenders in connection with construction of the Parking Garage, including without limitation general liability coverage. The City and the DDA shall be an additional named insured on all such policies, as its interest may appear. Village Green shall provide to the City before commencement of physical construction on the Property, or at such earlier time as such insurance coverage is required by Lender, documentation demonstrating it has obtained the above mentioned policies. Documentation must provide and demonstrate an unconditional 30 day written notice of cancellation in favor of the City of Ann Arbor. Further, the documentation must explicitly state the following: (a) the policy number; name of insurance company; name and address of the agent or authorized representative; name and address of insured; project name; policy expiration date; and specific coverage amounts; (b) any deductibles or self-insured retentions which shall be approved by the City, in its sole discretion; (c) that the policy conforms to the requirements specified. An original certificate of insurance may be provided as an initial indication of the required insurance, provided that no later than 21 calendar days after commencing any work the Village Green supplies a copy of the endorsements required on the policies. Upon request, Village Green shall provide within 30 days a copy of the policy(ies) to the City. If any of the above coverages expire by their terms during the term of this Contract, the Village Green shall deliver proof of renewal and/or new policies to the Administering Service Area/Unit at least ten (10) days prior to the expiration date.

6. **Representations and Warranties of the Parties.** As a material inducement to the City's agreement to enter into this Agreement and to proceed with the transaction contemplated hereby, each parties hereby warrants and represents to the other parties, as of the date of this Agreement
- a. Each party is duly formed or organized, validly existing and in good standing under the laws of the State of Michigan.
 - b. Each party has all requisite power and authority to execute and deliver this Agreement and perform its obligations hereunder and the execution, delivery and performance by the Parties of this Agreement has been duly authorized by all necessary corporate action and all necessary consents required under its organizational documents have been obtained. This Agreement has been duly executed and delivered and is a valid and binding obligation of the Parties, enforceable in accordance with its terms.
 - c. The execution, delivery and performance of this Agreement and the consummation of the transactions contemplated hereby by the Parties will not (i) conflict with, violate or result in a breach of any provision of its organizational documents; or (ii) conflict with or violate any statute, law, rule, regulation, ordinance, order, writ, injunction, judgment or decree of any court or any local, state or federal governmental or regulatory authority applicable to the parties, individually or jointly.
 - d. No party has received written notice that any litigation materially affecting its ability to acquire, transfer or accept ownership of the Property or to carry out its respective obligations for develop or operation of the Property, is pending or currently threatened.

7. **Indemnity of Village Green.**

In the event City becomes aware of any breach of any representation or warranty of Village Green as set forth in this Agreement prior to Closing, City shall provide advance written notice of such breach to Village Green and if Village Green is unable to cure such breach or otherwise satisfy City with respect to the subject matter of such representation or warranty, then City's sole remedy in such circumstance shall be to terminate this Agreement, in which event the provisions of Option Agreement between the parties shall apply. If such breach is first discovered by City following Closing then, Village Green hereby agrees to indemnify and defend, at its sole cost and expense, and hold City, its successors and assigns, harmless from and against and to reimburse City with respect to any and all claims, demands, actions, causes of action, losses, damages, liabilities, costs and expenses (including without limitation reasonable attorneys' fees and court costs) of any and every kind or character, known or unknown, fixed or contingent, asserted against or incurred by City at any time and from time to time by reason of or arising out of (a) the breach of any representation or warranty of Village Green set forth in this Agreement, (b) the failure of Village Green, in whole or in part, to perform any obligation required to be performed by Village Green pursuant to this Agreement, following notice and expiration of any applicable cure period, or (c) except for the matters disclosed herein, or resulting from the acts and/or omissions of City and its agents, employees and/or contractors, the ownership, construction, occupancy, operation, use and maintenance of the Property prior to Closing, or (d) the violation by

Village Green, its agents, employees, contractors and/or consultants, after the Closing Date of any Environmental Law and any and all matters arising out of any act or omission by Village Green, its agents, employees, contractors and/or consultants, existing or occurring on or prior to the Closing Date which results in a violation of an Environmental Law. The provisions of this Section shall be subject to the other provisions of this Agreement and survive the Closing of the transaction contemplated by this Agreement and shall continue thereafter in full force and effect for the benefit of City, its successors and assigns. However, except as otherwise provided above, City may exercise any right or remedy City may have at law or in equity should Village Green fail to meet, comply with or perform its indemnity obligations required by this Section.

8. **General Conditions.**

- a. This Agreement, which may be executed in multiple counterparts, is to be governed by and construed under the laws of the State of Michigan that are applied to contracts made and to be performed in that state concerning real property located therein, is to take effect as a sealed instrument, sets forth the entire contract between the parties, and, together with the Option, merges all prior and contemporaneous agreements, understandings, warranties or representations with respect to the purchase or potential purchase of the Property by Village Green and may be cancelled, modified or amended only as set forth herein or by a written instrument executed by both City and Village Green. The captions are used only as a matter of convenience and are not to be considered a part of this Agreement.
- b. No waiver of any provision or condition of this Agreement by any party shall be valid unless in writing, signed by such party. No such waiver shall be taken as a waiver of any other or similar provision or of any future event, act, or default.
- c. This Agreement shall be binding upon and shall inure to the benefit of the parties hereto, and their respective heirs, executors, personal representatives, successors, and assigns.
- d. Except as otherwise expressly limited by the terms of this Agreement, all of the representations, warranties, covenants, agreements and indemnities (but not matters or items identified as condition for parties' obligation to close) of Village Green, the City and DDA, whether contained in the Parking Agreement or any other agreement by and between the parties, to the extent not performed at Closing, shall survive Closing for a period of ~~six (6) years~~ one (1) year (provided Village Green shall assign to the City any warranties covering the Parking Garage) for a period of three (3) years. Provided, all construction and design guarantees and warranties that are required pursuant to the Approved Plans shall be provided on turnover of the Parking Garage.
- e. The City and/or DDA shall not assume any of the liabilities, indebtedness, commitments or obligations of any nature whatsoever (whether fixed or contingent) of Village Green in respect to the Parking Garage or the Project.
- f. After closing of the acquisition of the Property by Village Green, until conveyance to the City of the Parking Garage as a condominium unit, the risk of loss of any portion of the Parking Garage shall be solely that of Village Green.

g. Each party hereto represents to the other that it is duly authorized to enter into this Agreement, and that the person or persons executing this Agreement on its behalf are and have been duly exercised to do so and to bind such party.

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

**VILLAGE GREEN RESIDENTIAL
PROPERTIES, L.L.C.**

By _____
Its:

CITY OF ANN ARBOR

By _____
John Hieftje, Mayor

By _____
Jacqueline Beaudry, City Clerk

Approved as to Substance

Roger W. Fraser, City Administrator

Approved as to Form

Stephen K. Postema, City Attorney

**ANN ARBOR DOWNTOWN
DEVELOPMENT AUTHORITY**

By _____
Its: Chairperson

Approved as to Substance

Susan Pollay, Executive Director