



**CITY OF WESTLAKE, OHIO  
ORDINANCE NO. 2015-109:**

**AN ORDINANCE AMENDING EXHIBIT  
“A” OF ORDINANCE NO. 2015-56 AS  
TO THE MARKET SQUARE  
OPERATION AND MAINTENANCE  
AGREEMENT WITH CROCKER PARK  
MANAGEMENT, LLC, AND  
DECLARING AN EMERGENCY.**

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**WHEREAS**, by and through Ordinance No. 2015-56, Council authorized and directed the Mayor to enter into the Market Square Operation and Maintenance Agreement; and

**WHEREAS**, the Mayor and Director of Engineering have recommended that Council amend Exhibit “A” of Ordinance No. 2015-56 to reflect a revised Agreement.

**NOW, THEREFORE, BE IT ORDAINED BY THE COUNCIL OF THE CITY OF WESTLAKE, COUNTY OF CUYAHOGA AND STATE OF OHIO:**

**Section 1:** That Exhibit “A” of Ordinance No. 2015-56 be and the same is hereby amended by the substitution of the original Market Square Operation and Maintenance Agreement with the revised Market Square Operation and Maintenance Agreement which is attached hereto as Exhibit “A”.

**Section 2:** That any Ordinances or parts of Ordinances in conflict herewith are hereby repealed.

**Section 3:** That it is found and determined that all formal actions of this Council concerning and relating to this legislation were adopted in an open meeting of this Council and that all deliberations of this Council and any of its committees that resulted in such formal action were in meetings open to the public in compliance with all legal requirements including Section 10, Article XI of the Charter of the City of Westlake and Section 121.22 of the Ohio Revised Code.

**Section 4:** That this legislation is hereby declared to be an emergency measure immediately necessary for the preservation of the public health, safety and welfare, and for the further reason that it is immediately necessary to provide for the continued development of the

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Market Square Project within the Crocker Park Development, and further provided it receives the affirmative vote of two-thirds of all members elected to Council, it shall take effect and be in force immediately upon its passage and approval by the Mayor.


Passed: 9/3/15

  
\_\_\_\_\_  
Michael F. Killeen  
President of Council

Presented to Mayor: 9/4/15

Approved: \_\_\_\_\_  
Effective 9/13/15 per Article II, Sec. 5(c)

ATTEST:

  
\_\_\_\_\_  
Denise L. Rosenbaum, Clerk of Council

\_\_\_\_\_  
Dennis M. Clough, Mayor

I, Denise L. Rosenbaum, Clerk of Council of the City of Westlake do hereby certify that Ordinance/Resolution no. 2015-109 adopted 9/3/15 was duly posted on 9/4/15 and remained posted for a period of 15 days thereafter in not less than 2 of the most public places in the City as determined by the Charter of said City.

RECEIVED

AUG 04 2015

ORDINANCE NO. 2015-109

EXHIBIT "A"

ENGINEERING DEPT.  
CITY OF WESTLAKE

MARKET SQUARE

OPERATION AND MAINTENANCE AGREEMENT

This **OPERATION AND MAINTENANCE AGREEMENT** (this "Agreement") is executed as of the \_\_\_\_\_ day of \_\_\_\_\_, 2015, by and among the **CITY OF WESTLAKE, OHIO**, a municipal corporation duly organized and existing under and by virtue of the Constitution and laws of the State of Ohio and a duly adopted Charter (the "City") and **CROCKER PARK MANAGEMENT, LLC**, an Ohio limited liability company (the "Manager").

RECITALS

WHEREAS, the City and Crocker Park, LLC ("CP") are parties to that certain Market Square Development Agreement, dated as of March 26, 2014, as amended (the "Development Agreement"), and

WHEREAS, it is the intention of the parties to provide a superior facility and venue for the City and its residents, and

WHEREAS, this Agreement is executed pursuant to Section 10 of the Development Agreement; all capitalized terms not expressly defined in this Agreement shall be as defined in the Development Agreement, and

WHEREAS, the Manager is a wholly owned subsidiary of CP and has been delegated by CP to serve as the Manager under this Agreement.

Now, therefore, in consideration of the mutual agreements set forth herein, the City and the Manager do hereby agree as follows:

**1. Appointment of Manager**

The Manager is hereby engaged and appointed by the City to manage and operate the Market Square Project (the "Project") in accordance with the terms of this Agreement after the Project is initially constructed pursuant to the Development Agreement. The Project shall include all grounds and facilities, including public restrooms, within the area set forth in the Development Agreement.

**2. Term and Right to Terminate**

This Agreement shall be in effect from the date the Project is substantially completed and shall have an initial term of ten (10) years (the "Initial Term"). However, the Initial Term shall be deemed to commence on January 1<sup>st</sup> of the succeeding calendar year after substantial completion. The Manager shall have one-time right to terminate this Agreement at the fifth (5<sup>th</sup>) anniversary of the commencement of the Initial Term upon delivery to the City of a written notice of termination at least six (6) months before such anniversary. After the Initial Term, this Agreement automatically shall renew for successive one (1) year terms, unless either party shall give the other at least six (6) months prior notice of its election to not renew the term, effective upon the expiration of the then current term. In addition, the City shall have the right to terminate this Agreement at any time, including during the Initial Term, upon at least six (6) months prior written notice to the Company. If such notice is given, the Manager will not expend funds under this Agreement without the express written consent of the City.

### **3. Scope of Services and Duties**

(a) The City shall establish and/or approve, in its sole and absolute discretion, but after consultation with the Manager, all policies, procedures, rules and regulations governing the maintenance, operation, and use of the Project, including, without limitation, the fees, if any, to be charged for such use. Such policies, procedures, rules and regulations shall include, but not be limited to, those matters set forth on the attached Exhibit A, the provisions of which are incorporated herein. Manager hereby agrees to operate and manage the Project in accordance with all such policies, procedures, rules and regulations.

(b) Pursuant to this Agreement, the Manager shall perform the following duties: (i) the Manager shall pay for all utilities serving the Project; (ii) the Manager shall procure and pay for all general and public liability insurance, at liability limits acceptable to the City, covering the Project and name the City as an additional insured; (iii) the Manager shall maintain workers compensation insurance, employers liability and automobile insurance for its own protection and at its own expense and name the City as an additional insured; (iv) the Manager shall provide security for the Project consistent with its security for Crocker Park's mixed-use core; and (v) the Manager's license agreement for events at the Project shall require, among other things, that such events comply with all applicable legal requirements and that such events maintain adequate insurance coverage and name the City as an additional insured. The City shall maintain at its cost property casualty insurance on the Project. Manager shall be responsible for performance of all maintenance and repairs to the Project. Capital improvements determined to be necessary by Manager and the City and which have a cost less than \$25,000.00 shall be performed by Manager; capital improvements with a cost of \$25,000.00 or more shall be performed by the City in accordance with public bidding requirements. The City shall bear the responsibility of paying

for capital improvements with a cost of \$2,500.00 or more and which have a useful life in excess of five (5) years; the Manager shall bear the responsibility of paying for all other capital improvements.

(c) In the event that revenues in any year are insufficient to pay in full all out-of-pocket expenses from the operation of the Project, the Manager will be obligated to pay the unpaid portion of such out-of-pocket expenses after applying any reserve funds then held by the Manager or by the City in the City Fund (as defined below). Furthermore, The City retains the right to make improvements and modifications to the Project after it is completed so long as they are substantially consistent with the attached Conceptual Plans attached to the Development Agreement and after consultation with the Manager, provided that the City shall be obligated to pay in full the costs associated with such improvements and modifications.

#### 4. Expenses and Revenues

(a) The Manager expressly acknowledges that all revenue (including but not limited to rental fees, charges for services, insurance proceeds and reimbursements from third parties to the extent related to expenses incurred by Manager) generated from the operation and management of the Project shall be applied to the expenses of the operation and management of the Project and that any excess revenues shall be held and applied in the manner described in subsection (c) below, such that no profits shall be earned by the Manager pursuant to this Agreement.

(b) The City and the Manager shall meet annually to discuss an annual budget for the operation and maintenance of the Project. The Manager shall provide to the City monthly operating statements and year-end financial statements (certified, but not audited) by a CPA firm or by an officer of the Company with respect to the operation and maintenance of the

Project. The Manager shall keep detailed records and receipts to support its reimbursement of its out-of-pocket expenses and will enable the City or its designee, including but not limited to its auditors, whether independent or from the Office of the Auditor of the State, to review the books and records of the Manager at the City's reasonable discretion.

(c) All revenues derived from the operation of the Project will be applied, to the extent received, and pursuant to the annual budget, as follows: (i) first, to reimburse the Manager for documented out-of-pocket expenses incurred in the current or prior years in the operation of the Project, including, without limitation: the cost of routine maintenance, clean-up and trash removal, snow removal, security services, street sweeping of the plaza and power washing after events; the cost of landscaping and any annual landscaping of planter beds, flower baskets, etc.; and the cost of the Manager's on-site personnel to the extent that such personnel devote time to running the Project; (ii) second, to a reserve fund, to be held by the Manager during the Manager's management of the Project, for the payment of future out-of-pocket expenses incurred by the Manager net of current revenues, the balance of which fund cannot exceed the highest out-of-pocket expenses incurred by the Manager in the course of its operation and management of the Project in any of the 5 prior years; and, (iii) third, paid by check to the City by March 31 of the following year which shall be credited to a maintenance, repair and capital improvements fund, to be held by the City (the "City Fund"). Amounts in the City Fund may be used, pursuant to the annual budget, (i) for maintenance and repair of the Project, with the maintenance and repair priorities determined collaboratively by the City and the Manager, but with the City having final decision-making authority, not to be unreasonably withheld, or (ii) for capital improvements to the Project, with the capital improvements determined collaboratively by the City and Manager, but with the City having final decision-

making authority in its sole discretion. In the event that this Agreement is terminated by either party, as permitted by this Agreement, any balance in the reserve fund held by the Manager, after application to all expenses incurred by Manager pursuant to this Agreement prior to the effective date of termination, shall be paid by check to the City within ninety (90) days. Further, all amounts in the City Fund shall remain the exclusive property of the City.

**5. Guarantees**

The obligations and performance of the Manager as set forth herein shall be guaranteed by its parent, Crocker Park, LLC, which shall be an additional signatory to this Agreement.

**6. Default**

In the event either party to this Agreement shall be in default of its obligations hereunder, and such default remains uncured after thirty (30) days written notice of such default or within such longer time as may be reasonably necessary to cure such default, the non-defaulting party shall have the right to terminate this Agreement.

**7. Miscellaneous**

(a) A notice, demand, or other communication under this Agreement by either party to the other shall be sufficiently given or delivered if it is dispatched by registered or certified mail, postage prepaid, return receipt requested, or delivered personally, and

- i. in the case of the Manager, is addressed to or delivered personally to the Manager at:

Crocker Park Management, LLC  
1350 West 3rd Street  
Cleveland, OH 44113  
Attn: General Counsel



- ii. in the case of the City, is addressed to or delivered personally to the City at the office of the:

Mayor  
City of Westlake, Ohio  
27700 Hilliard Boulevard  
Westlake, OH 44145

or at such other address with respect to either such party, as that party may from time to time, designate in writing and forward to the other as provided in this Section.

(b) This Agreement constitutes the entire agreement among the parties with respect to the subject matter hereof, and supersedes all prior agreements and understandings, oral and written, between the parties hereto with respect to the subject matter hereof, and may not be changed, modified, terminated, or discharged, in whole or in part (other than in accordance with the respective terms thereof), except by a writing executed by the parties.

(c) This Agreement may be executed in any number of counterparts, each of which shall be deemed to be an original and all of which together shall be deemed to be one and the same instrument, and the signature page of any counterpart may be removed therefrom and attached to any other counterpart.

(d) The captions in this Agreement are included for purposes of convenience only and shall not be considered a part of this Agreement in construing or interpreting any provision hereof.

(e) The invalidity or unenforceability of any term or provision in this Agreement, or the application of such term or provision to any person or circumstances, shall not impair or affect the remainder of this Agreement and its application to other persons and circumstances, and the remaining terms and provisions hereof shall not be invalidated but shall remain in full force and effect.

(f) Time is of the essence with respect to all time periods and dates for the performance of the City's and the Manager's respective obligations under this Agreement.

(g) The Manager shall not assign or transfer its obligations hereunder to any other entity or person without the express written consent of the City.

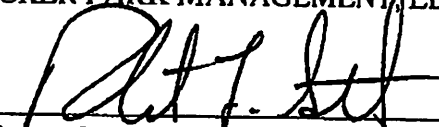
(h) This Agreement shall be governed by and construed in accordance with the laws of the State of Ohio applicable to a contract executed and performed in the State of Ohio, without giving effect to the conflicts of law principles thereof.

IN WITNESS WHEREOF, the City and the Manager have each caused this Agreement to be executed on its behalf as of the day and year first above written.

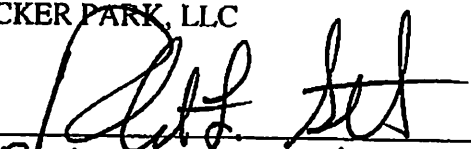
CITY OF WESTLAKE, OHIO

By: \_\_\_\_\_  
Mayor

CROCKER PARK MANAGEMENT, LLC

By:  \_\_\_\_\_  
Robert L. Stark,  
Manager

CROCKER PARK, LLC

By:  \_\_\_\_\_  
Robert L. Stark,  
Manager

Approved as to  
form and correctness:

\_\_\_\_\_  
Director of Law

## EXHIBIT A

### MARKET SQUARE OPERATION AND MAINTENANCE AGREEMENT PRELIMINARY POLICIES, PROCEDURES, RULES AND REGULATIONS

1. The City shall retain all naming rights for the Project.
2. Advertising and signage shall be allowed within the Project only with the consent of the City. The City and the Manager shall agree upon a signage plan with sign criteria prior to the City's delivery of the Closing Notice. The City and the Manager further agree to consult with each other to ensure that signage remains consistent with sign criteria for the Development. Signage and/or artwork requested by the City shall be produced and installed at the City's cost.
3. The Project, as a City park, shall be subject to, *inter alia*, Westlake City Ordinances Chapter 941, "City Parks", in accordance with Section 3 of the Agreement.
4. The duration of any single event at the Project shall not exceed three (3) consecutive days without the prior approval of the City designated "City Project Coordinator" and who shall be the Manager's day-to-day contact for all Project-related matters.
5. The Manager and the City Project Coordinator shall meet in January of each calendar year to discuss and agree upon the ensuing year's plans, exceptions to the three consecutive day rule, rental/activity rate schedule, necessary repairs, the schedule of events, and other matters relating to the maintenance and operation of the Project. The Manager and City Project Coordinator shall thereafter meet from time to time as necessary to discuss and agree upon such matters. The Manager shall submit additions to the schedule to the City Project Coordinator; further, the schedule shall be updated monthly to the extent necessary. Unless the City Project Coordinator objects to any such addition within ten (10) business days from notice from Manager, such event shall be

deemed approved and added to the schedule. In addition to the foregoing, in the event that an event requires scheduling prior to January of the year in which such event is to be held, ("an Early Approval Event"), Manager may send a written request for approval to the City Project Coordinator, and if the City Project Coordinator approves such Early Approval Event, such Early Approval Event shall become a scheduled event for the year in question and shall have the same status as an event which is approved as part of the January scheduling process for the year in question. The request for approval of an Early Approval Event shall be deemed approved unless the City Project Coordinator objects within five (5) business days following receipt of such request. All matters as set forth herein shall require the agreement of the Manager and City Project Coordinator.

6. The City shall have scheduling priority for the Project, provided it gives the Manager at least four (4) weeks' notice of any scheduled use and provided that the scheduled use is not in conflict with plans to which the Manager and the City Project Coordinator previously agreed. The City shall have the right to use the Project without fees for usage, except as provided herein. The City shall be provided usage at no charge for events to be held weekdays (Monday through Thursday) and for a maximum of seven (7) single-day events occurring on weekends (Friday through Sunday). Any use of the facilities for less than seven (7) weekend events will not prejudice the City's right to use the facility for seven (7) weekend events in other years. The City may assign event usage up to the maximum of seven (7) scheduled weekend events within the City's sole discretion. For usage in excess of the maximum of seven (7) scheduled weekend events, the City shall have the right to designate City-related organizations which shall pay a reduced usage fee

for use of the Project, the number of such events and the rate of such discount to be agreed upon by the City and Manager at the beginning of each calendar year.

7. The Manager shall have the right to close streets surrounding the Project for special event purposes, with proper notification to and approval by the appropriate City police and fire personnel.
8. The Manager shall, at its sole expense as part of the approved Project budget, provide 24-hour security services with respect to the Project; such services shall be provided in a commercially reasonable manner, taking into account the use by the public and others of the Development and other surrounding areas. The Manager shall maintain or cause to be maintained at its sole expense all equipment related to security. The Manager may provide such services through subcontracts as reasonably approved by the City.
9. The Manager shall be responsible, at its sole cost and expense as part of the approved Project budget, for developing a security plan within ninety (90) days prior to the earliest date that any portion of the Project is to be placed in service. The security plan shall be consistent with and provide the same level of service as the security plan currently in effect at Crocker Park Phase I and Phase II (taking into account the scope of the Project). That security plan shall be submitted to the City (including the Planning Department and Police Department). The City shall have thirty (30) days from receipt to either provide comment to or approval of the plan to the Manager, which approval shall reasonably be given if the security plan meets the standard set forth above. If the City fails to respond within such thirty (30) day period, the security plan shall be deemed approved. That security plan shall be instituted and deployed at the Manager's sole cost and expense at all times. Any material revisions to the security plan shall be submitted to City for

approval prior to implementation. Manager shall report all security issues, damage to property or persons, vandalism, or crimes to the City on a regular basis and crimes against a person or persons shall be reported to the Westlake Police Department promptly.

10. The Manger shall be responsible at its sole expense for all maintenance, operation and repair of adjacent land and/or streets and walking areas on land owned by the City to the extent such repairs are necessitated by Manager's use of the Project, and such land shall not be used by the Manager for long-term storage or any use inconsistent with access by the public; provided, however, that the Manager may use such adjacent lands for loading and unloading and temporary staging in connection with Project events.
11. All restrooms located in the Project shall be the sole responsibility of the Manager. The Manager's responsibility shall be for the repair, cleaning and maintenance of the restrooms; further, the Manager shall be responsible for any and all capital improvements to these restrooms necessary for use of the restrooms. The necessity of such improvements shall be determined by mutual agreement of the Manager and the City.