

**SECOND AMENDMENT
to the
LEASE AGREEMENT WITH OPTION TO PURCHASE**

This Second Amendment to the Lease Agreement with Option to Purchase ("Second Amendment") is made and entered into this _____ day of _____, 2017 by and between the City of Mesa, a municipal corporation ("Landlord"), and Benedictine University, an Illinois not-for-profit corporation (the "Benedictine" or "Tenant"). Landlord and tenant may be referred to jointly as "Parties," and each separately as "Party."

RECITALS

- A. Landlord and Tenant entered into that certain Lease Agreement with Option to Purchase effective November 5, 2012 (the "Lease Agreement") for real property, including parking lots, and any and all improvements then-existing and improvements Landlord agreed to complete located at what is commonly known as 225 E. Main Street, Mesa, Arizona (APNs: 138-65-015 and 138-65-016) and a parking lot adjacent to the same (APN 138-65-006E, or "the Adjacent Parking Lot"), all of which are defined in the Lease Agreement as the "Premises." Subsequently, on April 17, 2017, the Parties executed that certain First Amendment to the Lease Agreement with Option to Purchase (the "First Amendment"), which, among other things, provided for a reduction in the minimum Premises Rent due under the Lease Agreement to support increased enrollment, expanded program offerings, and facilitate Tenant-funded improvements to the Premises.
- B. On May 22, 2017, Landlord entered into a Memorandum of Understanding with 3W Management, concerning the possible development of a mixed-use project (the "Mixed-Use Development") on Landlord-owned property east of the Premises and on the Adjacent Parking Lot.
- C. The proposed Mixed-Use Development would provide amenities and uses that would complement and benefit a nearby university, including multi-residential housing, retail, and developed parking. That being the case, Tenant is willing to release its leasehold interest and Purchase Option for the Adjacent Parking Lot if Landlord enters into a development agreement concerning construction of the Mixed-Use Development (the "Mixed-Use Development Agreement") with a developer (the "Mixed-Use Developer").
- D. In exchange for this release, the City will agree to provide (45) covered parking spaces in the Pomeroy Garage at no additional charge, subject to the terms and conditions in this Second Amendment.

AGREEMENT

IN CONSIDERATION of the foregoing recitals and representations and the mutual covenants and agreements and conditions in this Second Amendment, the Parties agree as follows:

1. Definitions. All capitalized words and phrases used in this Second Amendment shall have the same meanings as set forth in the Lease Agreement, unless a different definition is set forth in this Second Amendment.
2. Effective Date. This Second Amendment shall be effective as of _____, 2017.
3. Release of Lease and Purchase Option for the Adjacent Parking Lot. Upon the execution of the Mixed-Use Development Agreement, Tenant's leasehold interest and option to purchase the Adjacent Parking Lot shall automatically terminate and be of no force or effect. Additionally, and without limiting the foregoing, in order to eliminate any title issues, the Parties shall execute and record a release of Tenant's leasehold interest and option to purchase the Adjacent Parking Lot using the form attached hereto as Exhibit A within ten (10) days of the execution of the Mixed-Use Development Agreement.
4. Stay of Purchase Option. Tenant hereby agrees that should it choose to exercise its Purchase Option under the Lease Agreement prior to Landlord's execution of the Mixed-Use Development Agreement, that the Adjacent Parking Lot shall be excluded from the exercise of that Purchase Option.
5. Reserved Parking Spaces. In exchange for the release of Tenant's leasehold interest in and Purchase Option for the Adjacent Parking Lot, beginning on the first day of the month following such release, City shall provide Tenant with forty-five (45) reserved and covered parking spaces within the Pomeroy Parking Garage under terms and conditions set forth on the form of parking license found on Exhibit B (the "Parking License"), which the Parties may execute following the formal release of Tenant's interests in the Adjacent Parking Lot. The Parking License shall have a term ending no later than July 31, 2028.
6. Restoration of Leasehold Interest and Purchase Option. Tenant may be granted a new leasehold interest and Purchase Option for the Adjacent Parking Lot, under the same terms and conditions of the Lease Agreement, if all leases, lease rights, leasehold interests, options or other land rights for the Adjacent Parking Lot that Landlord has granted or entered into with Mixed-Use Developer have terminated under the Mixed-Use Development Agreement and/or the related lease or other agreements (all of which may be amended from time-to-time) with the Mixed-Use Developer, and no construction under the Mixed-Use Development Agreement has occurred on the Adjacent Parking Lot; and in such an event, Landlord shall provide Tenant with written notice of the occurrence, upon receipt of which Tenant shall have ninety (90) days to notify Landlord in writing of its intent to restore its leasehold interest and Purchase Option for the Adjacent Parking Lot. If timely notice from Tenant is received by Landlord of Tenant's intent to restore the leasehold interest and Purchase Option, the Parties shall execute an amendment to the Lease Agreement to restore the leasehold interest and option for the Adjacent Parking Lot, which amendment will include a provision terminating the Parking License. If, however, Tenant does

not respond within the 90-day period, or declines the opportunity to restore its leasehold interest and option to purchase, then the Parking License shall remain in effect, according to its terms.

7. Effect of Second Amendment. All terms and conditions of the Lease Agreement and First Amendment not in conflict with this Second Amendment shall remain in full force and effect.

8. Severability. In the event any term or provision of this Second Amendment is held to be invalid or unenforceable, the validity of the other provisions shall not be affected, and this Second Amendment shall be construed and enforced as if it did not contain the particular term or provision that is deemed to be invalid or unenforceable.

9. Governing Law, Venue, and Jurisdiction. This Second Amendment shall be governed by the laws of Arizona. A Party shall bring any action related to a dispute arising out of this Second Amendment or the Lease Agreement in a court of appropriate venue and jurisdiction in Maricopa County, State of Arizona.

10. Statutory Notice Requirement. The Parties acknowledge that this Second Amendment and the Lease Agreement are subject to cancellation by Mesa pursuant to the provisions of A.R.S. § 38-511.

11. Incorporation of Recitals. The recitals set forth herein are acknowledged by the Parties to be true and correct and are incorporated herein by this reference.

IN WITNESS WHEREOF, the Parties have executed this Amendment the day and year first above written.

TENANT:

Benedictine University,
an Illinois not-for-profit corporation

By: _____
Name:
Title

LANDLORD:

CITY OF MESA,
a municipal corporation

By: _____
Name: Christopher J. Brady
Title: City Manager

EXHIBIT A TO SECOND AMENDMENT

PARTIAL RELEASE OF LEASEHOLD INTEREST AND OPTION TO PURCHASE

The City of Mesa, an Arizona municipal corporation, and Benedictine University, an Illinois not for profit corporation ("Benedictine"), entered into that certain Lease Agreement with Option to Purchase effective November 5, 2012 (the "Lease Agreement").

NOW, THEREFORE, Benedictine does hereby release, without covenant or warranty, express or implied, all rights, obligations, options, and interests which were heretofore acquired by the Benedictine under said Lease Agreement, in and to that portion of the property identified as Maricopa County Assessor Parcel Number 138-65-006E and described in said Lease Agreement as follows:

See Exhibit A attached hereto and made a part hereof

This Partial Release releases only the above described property and does not affect in any way the balance of the property described in said Lease Agreement, which continues to be held by Benedictine under the terms of said Lease Agreement.

Dated: _____, 2017

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BENEDICTINE UNIVERSITY,
an Illinois not for profit corporation.

By: _____
Name:
Title:

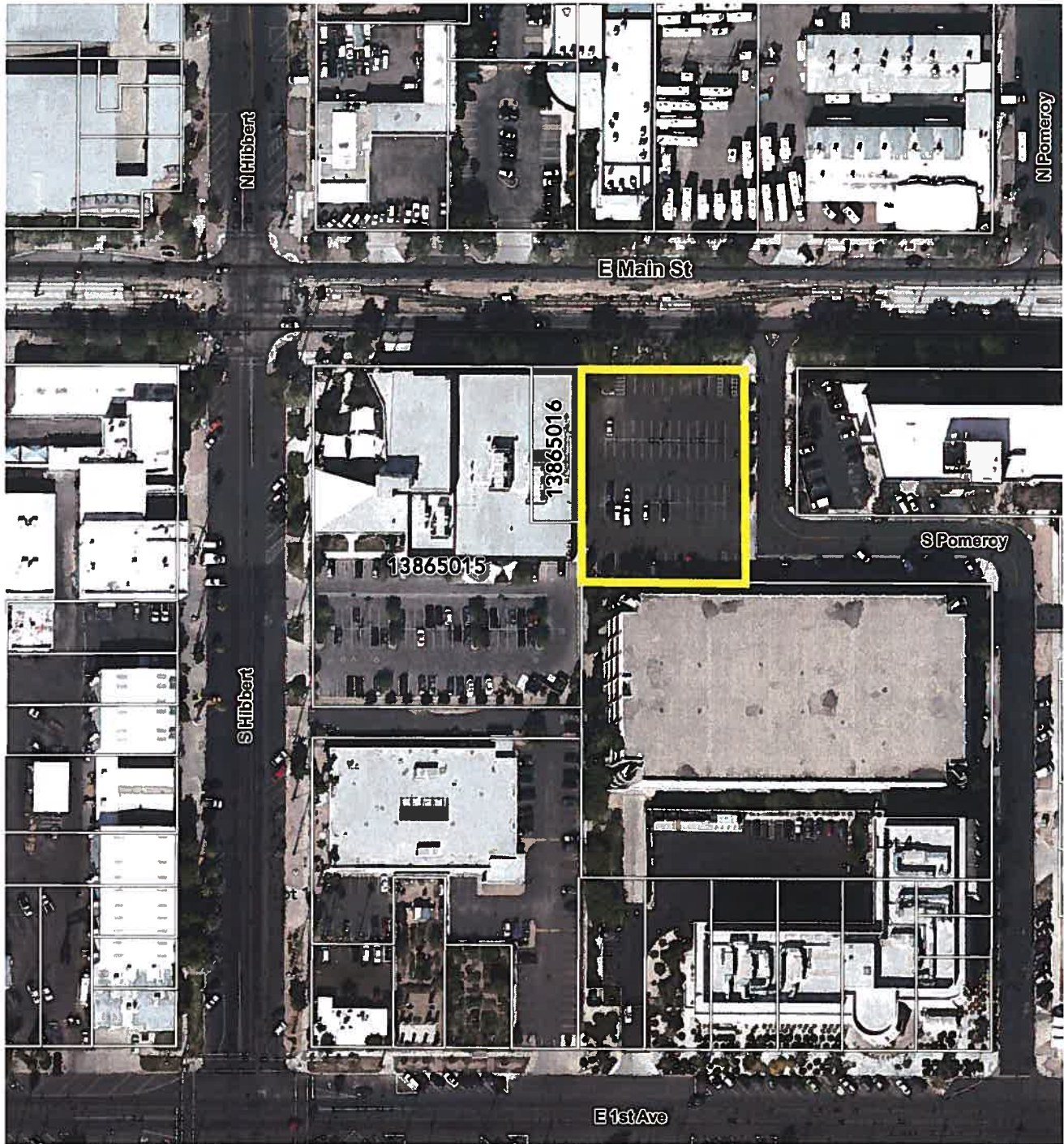
STATE OF _____)
) ss.
COUNTY OF _____)

This instrument was acknowledged before me on _____, 2017,
by _____, _____, of Benedictine University, an
Illinois not for profit corporation.

NOTARY PUBLIC

Printed Name _____

My Commission Expires: _____



0 250 500
Feet

Exhibit A

Released Parcel

 Released Parcel  Assessor Parcels

“EXHIBIT B TO SECOND AMENDMENT”

**CITY OF MESA
REAL ESTATE SERVICES**

**LICENSE AGREEMENT
FOR USE OF CITY OF MESA PARKING SPACES**

This Agreement made and entered into this _____, _____, (the "Effective Date") by and between the City of Mesa, a municipal corporation ("City") and Benedictine University, an Illinois not-for-profit corporation ("Licensee").

RECITALS

- A. Licensee is the ground lessee of real property located at 225 E. Main Street, Mesa, AZ 85201 (the "Premises") under that certain Lease Agreement with Option to Purchase dated November 5, 2012, and as amended the First Amendment to the Lease Agreement with Option to Purchase dated April 17, 2017, and the Second Amendment to the Lease Agreement and Option to Purchase (the "Second Amendment") dated _____, 201__.
- B. Under the Second Amendment, Licensee has released its interest in a vacant parking lot adjacent to the Premises, and therefore requires substitute parking elsewhere.
- C. City owns certain real property located at 32 S Pomeroy, Mesa, Arizona, also known as the Pomeroy Garage, on which there is a parking facility with available parking spaces.
- D. City is willing to designate and license 45 parking spaces within the Pomeroy Garage to Licensee for use by its employees, students, agents, service personnel, contractors, invitees, and guests, subject to all terms and conditions of this Agreement.

AGREEMENT

NOW, THEREFORE, in consideration of the mutual promises and conditions hereinafter set forth, it is agreed by City and Licensee as follows:

Section 1. Definitions

- 1.1 The term "Licensing Area" shall mean the Pomeroy Garage.
- 1.2 The term "Business Hours," shall mean all times when Licensee's building or campus (which are located at 225 E. Main Street) are open for classes, business, or events.
- 1.3 The term "Pomeroy Garage" shall mean the Pomeroy Garage, Mesa, Arizona.
- 1.4 The term "Licensed Parking Spaces" shall mean those 45 parking spaces within the Licensing Area, that City has designated for use by the Licensee for use by its employees, students, agents, service personnel, contractors, invitees, and guests under the terms of Section 3.2 of this Agreement. The Licensed Parking Spaces may be designated by color decal or other reasonable method as determined by City.

Section 2. Term of this Agreement

2.1 Initial Term. This Agreement shall expire on July 31, 2028, unless otherwise cancelled or terminated earlier as provided herein.

Section 3. Grant of Licenses

3.1 Grant of License. The City hereby grants to the Licensee a license to use the Licensed Parking Spaces for use by employees, students, agents, service personnel, contractors, invitees, and guests during Business Hours, for use as provided herein. The Licensed Spaces may not be used by, or for, others parties, except as otherwise approved in writing by the City in its sole and absolute discretion.

3.2 City's Designation of the Licensed Parking Spaces. Within 30 days of the Effective Date, City shall designate in writing the location of the 45 parking spaces within the Licensing Area that will be the Licensed Parking Spaces. After the City's initial designation of the Licensed Parking Spaces, the City may, and hereby reserves the exclusive right to, change the location of the Licensed Parking Spaces from time to time within the Licensing Area, including during a period of construction and development of the Pomeroy Garage. Construction on the Pomeroy Garage is expected to begin soon after the Effective Date and may require the relocation of Licensed Parking Spaces for at least two years. City will provide 30-days written notice to Licensee prior to relocating the Licensed Parking Spaces, except no such notice will be required for temporary relocations necessary for such things as repairs, maintenance, or construction. To the extent possible, such temporary relocations shall utilize substitute spaces in the immediate vicinity of the Pomeroy Garage. If the City elects to permanently relocate the Licensed Parking Spaces within the Pomeroy Garage, City will provide the same number of Licensed Parking Spaces (45) that existed prior to any such change.

3.3 Public Parking During Other Hours. At times other than the Business Hours, the Licensed Parking Spaces will be open to the public for public parking on a first-come, first-serve basis, and subject to special events. At times other than the Business Hours, the Licensee will be able to use the Pomeroy Garage on the same basis as the general public.

3.4 Security. Licensee acknowledges and understands that the City provides no security at or for the Pomeroy Garage, and agrees that the City shall have no obligation to provide security at the Pomeroy Garage. City agrees Licensee, at its sole cost and expense, may implement security measures at the Pomeroy Garage so long as Licensee gives reasonable notice to City if such measures involve the installation of improvements at the Pomeroy Garage. In addition to and without limiting any other indemnity in this Agreement, Licensee shall indemnify, defend, and hold the City and its employees harmless for and from any claims or damages (including, but not limited to, injury and death to persons and loss of property) arising or related to Licensee's, or its tenants' or subtenants', employees, agents, clients, and invitees use of the Pomeroy Garage or the security at the Pomeroy Garage (including, but not limited to, adequacy of security, lack of security, and types of security installed).

Section 4. Payments to the City

4.1 License Fee. Use of the Parking Spaces shall be free of charge.

4.2 Payment Procedures. Licensee shall pay the amount set forth in Section 4.1 of this Agreement, without prior notice or demand and without any set off or deduction whatsoever, not later than thirty (30) days after the Effective Date. For each year thereafter, the License Fee as calculated in Section 4.1 shall be paid on or before the anniversary date of the Effective Date of this

Agreement. The License Fee is NOT subject to proration or refund for any reason whatsoever.

4.3 Late Payment. Licensee covenants and agrees that for each month, in which the fee contemplated in 4.1(a) is not paid to Licensee within ten (10) days of the due date, Licensee shall promptly pay to City a sum equal to one and one-half percent (1&1/2%) of the unpaid fee as special damages.

Section 5. Permitted Uses

5.1 General. During Business Hours on Monday through Friday, except for holidays observed by the State of Arizona, the Licensed Parking Spaces may be used by, and are for the sole use of, the Licensee's employees, students, agents, service personnel, contractors, invitees, and guests for parking passenger type automobiles. At all times and days other than the Business Hours on Monday through Friday, and on holidays observed by the State of Arizona, the City retains all rights to the Licensed Parking Spaces including, but not limited to, the right of the City to use these parking spaces for special events or public parking.

5.2 Storage Prohibited. In addition to the limitation in Section 5.1, Licensee agrees that the Licensed Parking Spaces, and the Pomeroy Garage, shall not be used for the storage of any vehicles, equipment, or materials, or for overnight parking, unless prior approved in writing by City, which may be granted or denied in the City's sole discretion.

5.3 Nuisance Prohibited. Licensee shall not use the Licensed Parking Spaces or Pomeroy Garage, nor permit the Licensed Parking Spaces or Pomeroy Garage to be used in a manner that creates or causes to be created nuisances or hazards to the public health or safety. Licensee shall not use the Licensed Parking Spaces or Pomeroy Garage, nor permit the Licensed Parking Spaces or Pomeroy Garage to be used for any illegal or immoral purposes. Licensee shall comply with all Federal, State, and local laws, regulations, or ordinances, whether in effect at present or in the future concerning the Licensed Parking Spaces and Pomeroy Garage and the use thereof.

5.4 Quiet Enjoyment. Licensee agrees that the use of the Licensed Parking Spaces shall be conducted in such a manner so as to insure the quiet enjoyment of the neighboring properties and other users of the Pomeroy Garage.

Section 6. Improvements, Additions, Alterations

6.1 General. Licensee shall not make any temporary or permanent improvements, additions, or alterations to the Licensed Parking Spaces or Pomeroy Garage unless prior approved in writing as provided in Section 6.2 of this Agreement. Licensee shall insure that all improvements, additions, or alterations meet and conform to all applicable Mesa City Codes, regulations, and requirements.

6.2 Approval Procedures. Prior to constructing any improvements or making any other additions or alterations to the Licensed Parking Spaces or Pomeroy Garage, Licensee shall submit a request in writing to City. This request shall include all construction plans for the proposed project. Licensee, in its sole discretion, may approve or disapprove the request. If the proposed project is approved, any work performed on the Licensed Parking Spaces or Pomeroy Garage shall be done and maintained in a good workmanlike manner in compliance with all laws, code, rules, regulations and orders of all governmental authorities having jurisdiction thereof. Licensee shall, at Licensee's own expense, promptly remove from the Licensed Parking Spaces or Pomeroy Garage area all trash and debris which may accumulate in connection with any improvement work.

6.3 Removal of Improvements. On or before the termination of this Agreement, whether by expiration or otherwise, Licensee, at Licensee's expense, shall remove any and all improvements to the Licensed Parking Spaces or Pomeroy Garage made by Licensee. If removal of these improvements defaces or causes other damage to the property, Licensee at Licensee's expense, shall replace or repair any such damage prior to termination of this License. If Licensee fails to remove the improvements by the termination of this License, the improvements shall be deemed abandoned to City and if such abandonment is accepted by City, the improvements shall become the sole and separate property of City at no cost to City.

Section 7. Maintenance and Repairs

7.1 Maintenance. City or its assignee shall at all times keep the Licensed Parking Spaces and Pomeroy Garage in a neat and orderly condition and shall perform all normal repairs to the Pomeroy Garage and adjacent grounds including lighting and emergency signs. City shall be responsible for the removal and recycling, as appropriate, of all trash and solid waste from the Pomeroy Garage at a minimum of once per week.

7.2 Damage to Licensed Parking Spaces or Pomeroy Garage. Licensee shall be liable for and reimburse City for any and all damage and wear and tear not ordinary to the use of the Licensed Parking Spaces or Pomeroy Garage, which is caused by Licensee's or its tenant's employees, agents, service personnel, contractors, invitees, or guests. City will repair such damage subject to Licensee reimbursing City. Said repair costs shall be due and payable within thirty (30) days after the date of the invoice in which City bills Licensee for such costs. If Licensee does not make full payment for the repairs within thirty (30) days of invoice, Licensee agrees to pay a late charge equal to the greater of \$250 or 5% of the unpaid amount.

Section 8. Default and Termination

8.1 Events of Default. The occurrence of any of the following shall constitute an "Event of Default" hereunder:

- (a) The filing of a petition by or against Licensee for adjudication as a bankrupt or insolvent, or for its reorganization or for the appointment of a receiver or trustee of Licensee's property; an assignment by Licensee for the benefit of creditors or the taking of possession of the property of, Licensee by any governmental officer or agency pursuant to statutory authority for the liquidation of Licensee.
- (b) Failure of Licensee to pay when due any sum required by this Agreement to be paid and the continuance of such nonpayment for five (5) days after written notice from City.
- (c) Licensee's non-use of all the Licensed Parking Spaces for a period greater than one year.
- (d) Misuse of the Licensed Parking Spaces or Pomeroy Garage by Licensee, or the failure of Licensee to prevent its employees, tenants, agents, service personnel, licensees, invitees, guests, successors and assigns from misusing the Licensed Parking Spaces or Pomeroy Garage that is not cured within the following cure periods: within five (5) days of written notice to Licensee for the first violation in a 12 month period; within two (2) days of written notice to Licensee for a second violation that is within 12 months of a first violation; and within 24 hours of written notice to Licensee for a third violation that is within 12 months of a first violation; and no notice is required and no cure period exists for a fourth violation

that is within 12 months of a first violation. Written notice for this Section 8.1(d) may be provided by email to Licensee's management company for One MacDonald.

- (e) Failure to obtain or maintain the insurance coverages as required herein.
- (f) Licensee's failure to perform any other term, condition, or requirement of this Agreement within ten (10) days after written notice and demand.
- (g) An Event of Default under the Ground Lease shall be an Event of Default under this Agreement.

8.2 Remedies for an Event of Default.

- (a) If an Event of Default occurs, City, at its election, may terminate this Agreement and the License created thereby. In such case, Licensee shall immediately cease to use the Licensed Parking Spaces. Notwithstanding the foregoing, no action of City shall be construed as an election to terminate this License unless written notice of such intention is given to Licensee.
- (b) No waiver of any default, breach or failure of Licensee under this Agreement shall be construed as a waiver of any subsequent or different default, breach or failure. In case of a breach by Licensee of any of the covenants or undertakings of Licensee, City nevertheless may accept from Licensee any payments hereunder without in any way waiving City's right to exercise the remedies hereinbefore provided for by reason of any breach or lapse which was in existence at the time such payment or payments were accepted by City.
- (c) The specific remedies set forth in this Agreement are cumulative and are not intended to be exclusive of any other remedies or means of redress to which City may be entitled to; and City may seek any claim or remedy, either in law or in equity, for an Event of Default or a threatened breach of any provisions of this Agreement.

8.3 Termination by Licensee

- (a) Notice of Termination. Licensee may only terminate this Agreement if: (i) there is no uncured Event of Default under this Agreement; (ii) Licensee is in full compliance with all terms and conditions of this Agreement; and (iii) Licensee provides not less than 30 days prior written notice of its intent to terminate this Agreement. If Licensee fails to comply with all foregoing requirements for the notice of termination, such notice of termination shall be void, and of no force or effect, for all purposes, and Licensee shall remain responsible for payment of all License Fees.

Section 9. Indemnification, Insurance

9.1 Indemnification. Licensee shall defend, indemnify and hold City, its Manager, Council, council members, boards, commissions, elected and appointed officials, officers, agents, authorized representatives and employees, individually and collectively, from and against all losses, expenses (including attorney fees), damages, claims, charges, fines, suits, actions, demands, or other liabilities of any kind ("Liability"), including without limitation Liability for bodily injury, illness, death, or for property damage, resulting from or arising out of: (i) Licensee's failure to comply with any term, condition, requirement, or covenant under this Agreement; (ii) the use or misuse of the Licensed Parking Spaces or Pomeroy Garage by Licensee or its

employees, tenants, agents, service personnel, licensees, invitees, or guests or Licensee's tenant's employees, agents, service personnel, contractors, invitees, or guests (including the Licensee's employees, agents, service personnel, contractors, invitees, and guests); provided, however, the foregoing indemnity shall not apply to Liabilities arising solely from the negligent, willful or grossly negligent acts or omissions of the City, its employees, or its agents.

9.2 Insurance Requirements.

(a) Comprehensive General Liability. Licensee, at its cost, shall maintain comprehensive general liability insurance with limits of not less than \$1,000,000 per occurrence, insuring against all liability of Licensee and its authorized representatives arising out of and in connection with Licensee's use or misuse of the Licensed Parking Spaces or Pomeroy Garage, and including any use or misuse by Licensee or its employees, tenants, agents, service personnel, licensees, invitees, or guests or Licensee's tenant's employees, agents, service personnel, contractors, invitees, or guests. Said insurance shall include broad form contractual liability covering, without limitation, the liability assumed under this indemnification provisions of this Agreement. If the policy is to be written with an annual aggregate limit, that limit shall be not less than \$2,000,000

(b) Additional Insureds. Comprehensive general liability shall name the City, its Manager, Council, council members, boards, commissions, elected and appointed officials, officers, agents, authorized representatives and employees as additional insureds.

(d) Special Items. Each insurance policy shall provide the following: (i) the policies cannot be cancelled, or substantially modified until and unless thirty (30) days written notice is received by City; (ii) the insurance company shall have no recourse against City for payment of any premium or for assessments under any form of policy; and (iii) the policies are intended as primary coverage for City and that any insurance or self-insurance maintained by City shall apply in excess of the insurance provided by these policies.

(e) Certificates on File. Certificates and applicable endorsements of the required insurance coverage shall be furnished to City upon execution of this Agreement and shall be kept current at all times.

(f) Waiver of Subrogation. All insurance policies shall contain a waiver of subrogation if favor of the City, and its agents, officials, volunteers, officers, elected officials and employees.

9.3 Insurance – Additional Provisions.

(a) The procuring of the policy of insurance shall not be construed to be a limitation upon Licensee's liability or as a full performance on its part of the indemnification provisions of this Agreement. Further, the limits of insurance set forth herein shall not limit the Licensee's financial indemnification obligation, which shall extend to the full loss, expense, damage, claim, charge, fine, suit, action, demand or liability of the indemnitees.

(b) Failure to maintain such insurance in effect shall constitute default of this Agreement. City may at its option purchase the required insurance and charge the actual insurance expense thereof to Licensee, which expense Licensee shall assume and pay.

Section 10. Environmental Requirements

10.1 Licensee's Environmental Requirements.

(a) **Use of Hazardous Material.** Licensee shall not cause or permit any hazardous material, as defined in Section 10.5, to be generated, brought onto, used, stored, or disposed of in or about the Licensed Parking Spaces or Pomeroy Garage by Licensee or its employees, tenants, agents, service personnel, licensees, customers, contractors, invitees, guests, concessionaires, except for limited quantities of such substances that are approved by City. Licensee shall:

- (1) Use, store and dispose of all such hazardous material in strict compliance with all applicable statutes, ordinances, and regulations in effect during the term of this Agreement that relate to public health and safety and protection of the environment (environmental laws), including those environmental laws identified in Subsection 2; and
- (2) Comply at all times during the term of this Agreement with all environmental laws.

10.2 **Notice of Release or Investigation.** If, during the term of this Agreement (including any extensions), either City or Licensee becomes aware of (i) any actual or threatened release of any hazardous material on, under, or about the premises or the building, or (ii) any inquiry, investigation, proceeding, or claim by any government, agency, or other person regarding the presence of hazardous material on, under, or about the premises of the building, that party shall immediately, not to exceed twenty four (24) hours after learning of it, notify the other party, and shall provide written notice of the release or investigation within five (5) days after learning of it and shall simultaneously furnish to the other party copies of any claims, notices of violation, reports, or other writings received by the party providing notice that concern the release or investigation.

10.3 Indemnification

(a) In addition to, and without limiting, any other indemnity obligation under this Agreement: Licensee shall, at Licensee's sole expense and with counsel reasonably acceptable to City, indemnify, defend, and hold harmless City, or City's authorized agents or representatives, with respect to all losses arising out of or resulting from the release of any hazardous material in or about the premises or the building, or the violation of any environmental law, by Licensee or Licensee's employees, tenants, agents, service personnel, licensees, customers, contractors, invitees, guests, concessionaires. This indemnification includes:

- (1) Losses attributable to diminution in the value of the Licensed Parking Spaces or Pomeroy Garage; and
- (2) All other liabilities, obligations, penalties, fines, claims, actions (including remedial or enforcement actions of any kind and administrative or judicial proceedings, orders, or judgements), damages (including consequential and punitive damages), and costs (including attorney, consultant and expert fees and expenses) resulting from the release or violation.

10.4 **Remediation Obligations.** If the presence of any hazardous material brought onto the Licensed Parking Spaces or Pomeroy Garage by Licensee or Licensee's employees, tenants, agents, service personnel, licensees, customers, contractors, invitees, guests, concessionaires results in contamination of the building, Licensee shall promptly take all necessary actions, at Licensee's sole expense, to return the Licensed Parking Spaces or Pomeroy Garage to the condition that existed before the introduction of such hazardous material. Licensee shall first obtain City's

written approval of the proposed remedial action. This provision does not limit the indemnification obligation set forth in Section 10.3, above.

10.5 Definition of Hazardous Material

(a) As used in this Agreement, "Hazardous Material" shall mean any hazardous or toxic substance, material, or waste that is or becomes regulated by the United States, the State of Arizona, or any local government authority having jurisdiction over the building or premises. Hazardous material includes without limitation:

- (1) Any "hazardous substance" as that term is defined in the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) (42 United States Code §§ 9601-9675);
- (2) "Hazardous waste" as that term is defined in the Resource Conservation and Recovery Act of 1976 (RCRA) (42 United States Code §§ 6901-6992K);
- (3) Any pollutant, contaminant, or hazardous, dangerous, or toxic chemical, material, or substance, within the meaning of any other applicable Federal, State, or local law, regulation, ordinance, or requirement (including consent decrees and administrative orders imposing Liability or standards of conduct concerning any hazardous, dangerous, or toxic waste, substance, or material, now or hereafter in effect);
- (4) Petroleum products in excess of those that would typically be found within the systems of automobiles;
- (5) Radioactive material, including any source, special nuclear, or byproduct material as defined in 42 United States Code §§ 2011-2297G-4;
- (6) Asbestos in any form or condition; and
- (7) Polychlorinated biphenyls (PCBs) and substances or compounds containing PCBs.

Section 11. General Provisions

11.1 Compliance with Laws. Licensee shall procure all permits and licenses and pay all charges and fees necessary and incidental to its use of the Licensed Parking Spaces. The Licensee shall comply with all applicable laws, ordinances and regulations, which in any manner affect its use of the Licensed Parking Spaces or Pomeroy Garage or its performance under this Agreement. Licensee shall pay or cause to be paid, before delinquent, any and all taxes levied or assessed and which become payable during the term of this Agreement upon Licensee's vehicles, fixtures or other personal property located in the Licensed Parking Spaces or Pomeroy Garage.

11.2 NonDiscrimination. Licensee agrees to take all actions necessary to ensure that everyone is treated fairly, courteously, and without bias so as to preserve human dignity and to respect cultural diversity. The Licensee agrees to comply with all provisions of applicable federal, state, and local laws related to nondiscrimination, equal employment opportunity, and the Americans with Disabilities Act.

11.3 Status of License. Licensee acknowledges and agrees that the right, granted by this Agreement, to enter upon the Pomeroy Garage and use the Licensed Parking Spaces is nothing

more than a license granted solely for the purpose of exercising its rights and performing its duties under this Agreement. Nothing set forth in this Agreement, creates a tenancy between the City and Licensee or grants the Licensee possession of the Licensed Parking Spaces. Upon any termination of this Agreement, the City shall have the absolute right to remove and exclude from the Pomeroy Garage and the Licensed Parking Spaces any of Licensee's employees, agents contractors, customers, invitees, and tenants and Licensee's tenant's employees, agents contractors, customers, and invitees.

11.6 Independent Operator. Licensee shall, at all times, be an independent operator and shall not, at any time, purport to act as an agent for the City or any of its officers, agents, or employees.

11.7 Entire Agreement, Amendments. This Agreement represents the entire Agreement of the Parties and with respect to its subject matter. All agreements or licenses, oral or written, entered into prior to this Agreement are revoked and superseded by this Agreement. The Parties acknowledge and agree that no representations, warranties, inducements, or oral agreements have been made by the parties except as expressly set forth herein and any attempted oral evidence of any oral agreement shall be barred by the partial evidence rule. This Agreement may not be changed, modified, or rescinded, except through a writing signed by both Parties.

11.8 Governing Law, Forum. It is mutually understood and agreed that this Agreement will be governed by the laws of the State of Arizona, both as to interpretation and performance. Any action at law, suit in equity or judicial proceeding for the enforcement of this Agreement or any provision thereof may only be instituted in a court in Maricopa County, State of Arizona.

11.9 Severability. If any term or provision of this Agreement is held to be invalid or unenforceable, the validity of the other provisions shall not be affected, and the Agreement shall be construed and enforced as if it did not contain the particular term or provision that is deemed to be invalid or unenforceable.

11.10 Required Statutory Notice. This Agreement may be subject to cancellation pursuant to A.R.S. § 38-511.

11.11 Surviving Provisions. All payment and indemnity obligations, all obligations under Sections 6.3, 7.2, 8.2, 9.1, and any other provision which reasonably should survive, shall survive expiration or other termination of this Agreement.

11.11 Notices. All notices given, or to be given, by either party to the other, shall be given in writing, by certified mail return receipt requested, and shall be addressed to the parties at the addresses hereinafter set forth, or at such other address as the parties may by written notice hereafter designate. Notice shall be deemed to have been received three (3) business days after the date of mailing by certified mail. Notices shall be addressed as follows:

To City:

City of Mesa
Real Estate Services
P.O. Box 1466
Mesa, AZ 85211-1466

To Licensee:

Benedictine University
5700 College Road
Lisle, Illinois 60532
Attn: Charles Gregory

11.12 Governmental Capacity. Any approvals Licensee is required to obtain from City under this Agreement are in addition to and separate from approvals Licensee must obtain from the City of

Mesa in its governmental capacity, including but not limited to applicable approvals required under the City of Mesa Building Code or Zoning Ordinance. Additionally, this Agreement is not intended, and does not, modify or amend in any manner the City of Mesa Code, including but not limited to the City of Mesa parking ordinances and requirements, which must be complied with. Further, and notwithstanding anything in this Agreement to the contrary, this Agreement does not affect the City of Mesa in its governmental capacity.

IN WITNESS WHEREOF, this Agreement has been executed by the parties on the date first written above.

CITY OF MESA

BENEDICTINE UNIVERSITY

By:

Christopher J. Brady
City Manager

Name:
Title: