

PARKING MANAGEMENT SERVICES AGREEMENT  
between  
THE COUNTY OF ALBANY  
and  
SMG

Contract Authorization: Resolution No. 443 for 2011

This Parking Management Services Agreement ("Agreement") is made and entered into between **THE COUNTY OF ALBANY, NEW YORK** ("County"), a municipal corporation and a political subdivision organized and existing under the laws of the State of New York, with a current principal address at 112 State Street, Albany, New York 12207, and **SMG**, a Pennsylvania general partnership, whose current address is 300 Conshohocken State Road, West Conshohocken, Pennsylvania 19428 ("SMG").

**WITNESSETH**

**WHEREAS**, the County owns a parking garage located at 100 Beaver Street, Albany, New York, consisting of approximately 960 parking spaces; and

**WHEREAS**, pursuant to the Albany County Resolution No. 256 for 2006, the County and SMG entered into an agreement to provide parking management services for such parking garage in accordance with the terms and conditions set forth in that agreement. The prior agreement is incorporated herein and made a part hereof in entirety by reference.

**WHEREAS**, pursuant to the Albany County Resolution No. 443 for 2011, the County is exercising its option to renew the prior agreement for an additional five year pursuant to Section 2.1 of that agreement.

**NOW, THEREFORE**, in consideration of the mutual promises and covenants herein contained, the County and SMG, intending to be legally bound hereby, mutually agree as follows:

## 1. DEFINITIONS

§ 1. In addition to such other terms as may be defined elsewhere herein, for purposes of this Agreement, the following terms shall have the meanings set forth in this section.

§ 1.1. "**Affiliate**" - a person or entity that directly or indirectly, through one or more intermediaries, controls, or is controlled by, or is under common control with, SMG, where "controls" shall mean employment, agency or contractual relationship with a person or the ownership, whether direct or indirect, of equity or other similar interest which represents more than fifty percent of the voting power of the controlled entity.

§ 1.2. "**Agreement**" - this Agreement between the County and SMG as the same may be amended from time to time.

§ 1.3. "**Capital Improvements and Capital Equipment**" - With respect to Capital Improvements, any and all building additions, alterations, renovations, repairs or improvements that have an initial dollar cost of not less than \$250,000.00 per project, and with respect to Capital Equipment, any and all furniture, fixtures, machinery or equipment, either additional or replacement, having a per item original cost of \$250,000.00 or more or an expected useful life of more than one year. Notwithstanding the foregoing, the parties agree that solely for purposes of calculating Operating Expenses and the ratios described in Section 8.3 hereof, the dollar amounts set forth above in this definition shall be \$3,000.00.

§ 1.4. "**Contract Administrator**" - the Department of General Services Commissioner or his/her designee of the County.

§ 1.5. "**Facility**" - the real and personal property located at 100 Beaver Street, Albany, New York, consisting of building space including the land underneath and all fixtures, furniture, office equipment, technical and mechanical equipment and supplies provided by the County for

the management and operation of said property which consists of approximately 960 parking spaces.

§ 1.6. **“Operating Expenses”** – (a) any and all expenses and expenditures of whatever kind or nature incurred, directly or indirectly, by SMG in promoting, operating, maintaining and managing the Facility, as such category of expense items are generally described in the Projected Annual Operating Budget attached hereto as Attachment D and as are described in the County’s RFP.

(b) Solely for purposes of identifying Operating Expenses which will be budgeted in the Approved Budget, Operating Expenses shall exclude all extraordinary expenses and all interest, income tax, depreciation and amortization expenses.

§ 1.7. **“Operating Revenues”** - any and all revenues of every kind or nature derived from owning, operating, managing or promoting the Facility, including, but not limited to revenues from daily parking receipts, special events and monthly parking and revenues from the sale of advertising inventory at the Facility.

§ 1.8. **“Operating Year”** - the period beginning with January 1 and continuing through December 31.

## **2. TERM**

§ 2.1. Unless sooner terminated as provided herein, this Agreement shall be effective as for a term of five (5) years commencing on January 1, 2012 and ending December 31, 2016 subject to availability of funding and the terms herein described.

### **3. ENGAGEMENT OF SERVICES**

§ 3.1. The County hereby: (a) designates SMG as the “general manager” of the Facility; (b) engages SMG as its managing agent to manage, operate and promote the Facility; and, (c) delegates to SMG the duties and responsibilities described in this Agreement.

§ 3.2. SMG hereby accepts such designation as general manager and the delegation of duties and authority and agrees to manage, operate and promote the Facility pursuant to the duties and authority so delegated and in accordance with the terms of this Agreement and all applicable laws and ordinances.

§ 3.3. SMG shall have authority over the day-to-day operation of the Facility and the activities therein, but shall be subject to policies and guidelines which may be adopted or amended from time to time by the County; provided, that no such policy or guideline shall unreasonably interfere or impair the ability of SMG to manage the Facility effectively and consistent with this Agreement. The initial operating hours of the Facility as established by the County are set forth in Attachment A, which is made a part hereof by this reference.

### **4. DUTIES OF SMG**

§ 4.1. Standard of Services. SMG shall manage, operate and promote the Facility in accordance with industry standards for similar facilities and shall utilize industry standards for the maintenance of all mechanical equipment, unless the applicable manufacturers warranty for such equipment calls for a different maintenance program.

§ 4.2. Scope of Service. Except as otherwise provided herein, SMG, in its capacity as general manager of the Facility, shall provide the scope of services set forth in Attachment B, which is made a part hereof by this reference and as more fully set forth in the original agreement

§ 4.3. Fees and Charges. The County shall fix, and may from time to time adjust, all charges and fees for the use of the Facility. Rates for the use of the Facility shall be generally applicable and uniformly applied to all users, except that different rates may apply to different classes of users, but only if the difference in rates is customary and reasonable. The County shall provide SMG a schedule of the rates it establishes under this Agreement and shall provide SMG with a revised schedule of such rates whenever any changes are made. The initial schedule of rates adopted by the County is set forth in Attachment C, which is made a part hereof by this reference.

§ 4.4. Control of Employees. SMG shall supervise and direct all its employees and personnel consistent with the provisions of this Agreement. Any individual hired by SMG shall be an employee of SMG and not of the County. SMG shall determine the number, function, qualifications, compensation, including benefits, of any such individual and may, at its discretion, revise or rescind the terms and conditions relating to such employment. All costs related to their employment shall be an Operating Expense. SMG acknowledges the County's concern with the performance and/or activities of SMG's employees at the Facility. Accordingly, SMG will work with the County to develop a mutually acceptable procedure whereby the County can raise issues concerning SMG's employees and engage in dialogue with the appropriate member of SMG's executive management to address such issues promptly. Notwithstanding the foregoing, the County retains the right, acting reasonably, to direct SMG regarding the termination of any employee of SMG at the Facility.

§ 4.5. Contracts – Third Parties. Except as otherwise provided herein, SMG, in its capacity as general manager of the Facility, is authorized by the County to negotiate, enter into and administer, service and procurement contracts required in the ordinary course of business for

the management, operation or promotion of the Facility (including agreements related to the maintenance of the Facility's equipment and the Facility itself), so long as the term of any service or procurement contract shall not extend beyond the term of this Agreement without the prior written approval of the Contract Administrator. In connection with such contracting activities, SMG will comply with the County's procurement policies, as applicable.

§ 4.6. Control of Contractors. SMG shall undertake the supervision of all of its contractors and subcontractors, and all other similar contracting parties.

§ 4.7. Contracts - Enforcement. SMG may, after consultation with the County's legal counsel, institute in its name as the general manager of the Facility and for the benefit of the County, any and all legal actions or proceedings: (a) to collect charges, or other income generated by the Facility and due to the County, or (b) to cancel, terminate or sue for damages under any license, use, or contract agreement for the default or breach thereof entered into by SMG in connection with the operation of the Facility. SMG shall use the services of the County's legal counsel or other counsel as may be designated by the County, except to the extent that the County's legal counsel determines that it is not feasible to use such services and, in that event, SMG may select legal counsel and the legal expenses shall be included as an Operating Expense of the Facility.

§ 4.8. Bank Deposits. The County shall establish and maintain in a depository designated by it a bank account (the "County Account") for the deposit of any and all Operating Revenues generated by the Facility. SMG shall have the right and obligation to deposit all such revenues in such account as provided herein. Additionally, SMG shall establish and maintain in a depository designated by it a bank account (the "SMG Parking Account") for the deposit of the initial cash deposit and all monthly voucher reimbursements described in Section 7 hereof. The

SMG Parking Account will be in SMG's name for the benefit of the County, with signature authority in such employees of SMG and the County as SMG and the County shall, respectively, determine. Any interest earned on the funds in the SMG Parking Account shall be distributed to the County on a basis mutually agreed upon by the County and SMG. SMG shall provide, and keep in force at all times, a written authorization to the depository bank for the County or its designee to obtain information and records from the bank concerning the SMG Parking Account and to inspect the same. Daily deposits are to be made in the County Account and no revenue is to be maintained overnight at the Facility. SMG shall use the funds in the SMG Parking Account to pay any and all Operating Expenses arising from the Facility. SMG makes no guarantee, warranty or representation that Operating Revenue will exceed Operating Expenses in any Operating Year.

§ 4.9. Record Keeping. SMG shall keep or cause to be kept adequate and appropriate books and records in accordance with standard industry practice and generally accepted United States accounting principles and reflecting all activities and operations of the Facility. SMG shall maintain such books and records for a period of three (3) years subsequent to each transaction day. Such records shall, at a minimum, correlate monthly contract parkers, the number of active access cards with revenue generated, and correlate for transient parking activity, tickets issued, vehicles present, with time parked and revenue generated and shall include bank deposit slips, along with corresponding cashier shift reports. Such books and records shall be available for inspection and audit by the County or its agents upon reasonable notice during business hours at the Albany, New York office of SMG. Such records shall include any and all files, bank statements concerning the SMG Parking Account established under section 4.8 of this Agreement, together with any computer databases and other records and

reports as are customarily maintained by SMG, relating to the management, operation, promotion, revenue and expenses of the Facility for any particular series of days, months, or any particular period of time. The County may make and retain copies of any bank statement, file, record or report so inspected.

§ 4.10. Monthly and Annual Reports. Not later than the fifteenth (15<sup>th</sup>) day of each month SMG shall submit to the County detailed financial statements concerning the management, operation and promotion of the Facility for the prior month. Such report shall include the activities of the SMG Parking Account described herein.

§ 4.11. Operational Maintenance. To the extent that Operating Revenues or other funds supplied by the County are made available, SMG shall (a) be responsible for the ordinary maintenance of the Facility, including the stairs, elevators and other structures erected on the sidewalks in or about the Facility, and take reasonable care to keep the same free from snow and ice; (b) keep the Facility clean and free from all ashes, dirt and other refuse matter; (c) keep all garbage, refuse matter and inedible foodstuffs in covered metal receptacles and replace any broken glass, windows, doors, etc., and keep all drainpipes open; and, (d) make all repairs and replacements (other than Capital Improvements and Capital Equipment purchases), reasonable wear and tear, fire and other casualty alone excepted, so as to keep the Facility in suitable condition for monthly, daily and event parking users. Such repairs and replacements shall include but not be limited to the repair of all damage to the furniture, machinery, equipment and fixtures therein situated, as well as the plumbing, electrical, HVAC (heating, ventilation and air conditioning) or similar major building components and shall include the housekeeping and maintenance items identified in Attachment A to the County's RFP. However, SMG shall not



make any structural changes to the walls, roof or floors of the Facility without the prior written consent of the County.

§ 4.12. Compliance with Laws. SMG shall comply with all laws, statutes, ordinances, rules, orders, regulations, requirements of all federal, state, county, municipal governments and any and all departments, bureaus, commissions, boards and offices thereof which may be applicable to the management, operation or promotion of the Facility, including: (i) all rules, orders and regulations of the Board of Fire Underwriters for the prevention of fires and use every reasonable precaution against fire; and (ii) Title III of the Americans with Disabilities Act, 42 U.S.C., §§ 12101 - 12213, as amended by the Civil Rights Act of 1991, 42 U.S.C. § 1981(a), as it now exists and as it may be amended by statute or judicial interpretation (collectively "ADA"), and the provision of such auxiliary aids or alternate services as may be required by ADA; provided, however, that nothing in this subsection or this Agreement shall require SMG to undertake any of the foregoing compliance activity, nor shall SMG be liable under this Agreement if such activity requires any Capital Improvements or Capital Equipment purchases.

## **5. MANAGEMENT CONDITIONS**

§ 5.1. SMG will endeavor to purchase all operations-related and ordinary maintenance supplies and equipment from vendors located in the Albany County, New York, which such items shall be Operating Expenses paid from the SMG Parking Account established pursuant to section 4.8. In connection with any such purchases, SMG will follow the procurement policies provided in writing by the County to SMG from time to time.

§ 5.2. SMG shall not enter into any contract relating to the Facility with any of its subsidiaries, related, sister or parent corporations or entities except as set forth in this Agreement or upon the prior written approval of the County. No such contract shall be undertaken by SMG where the performance period would extend beyond the term of this Agreement, and SMG shall

submit no such contract for approval under this section unless SMG also submits documentation to the County which demonstrates that the proposed contract is upon terms and prices competitive within the industry and customarily charged for comparable goods and services in Albany, New York by non-affiliated third parties. Notwithstanding anything contained herein to the contrary, it is expressly understood and agreed to by the parties that SMG will utilize its staff at the Times Union Center,( the "Arena"), as appropriate, to support SMG's activities hereunder, including for security and maintenance activities. In addition, certain equipment from SMG's Arena operations will be used, as appropriate, in the operation of the Facility, and all payroll for SMG employees hereunder will be handled through the existing payroll account that SMG maintains for its activities at the Arena, which will allow for the initial funding and payment of such payroll, subject to reimbursement on a monthly basis as provided in section 7 hereof.

§ 5.3. SMG shall inform the County of any condition of which it becomes aware which impairs the structural soundness or sound operating condition of the Facility (and which cannot be corrected by SMG in the ordinary course of business) or otherwise adversely affects the ability of SMG to perform under this Agreement. The County will, subject to appropriation, make available the funds necessary to correct such condition in an expeditious manner and within such time as is required under the circumstances.

§ 5.4. SMG shall otherwise not use the Facility in any other manner or for any purpose other than those set forth herein and shall, unless otherwise directed by the County, identify the Facility by its proper name, which shall be determined by the County.

§ 5.5. SMG shall not provide any free parking facilities or complimentary parking privileges in the Facility, except as authorized by the Contract Administrator.

§ 5.6. Notwithstanding any provision herein to the contrary and except for SMG's express indemnification undertakings in Section 11.1, SMG shall have no obligation to fund any cost, expense or liability with respect to the operation, management or promotion of the Facility.

## **6. OBLIGATIONS OF THE COUNTY**

§ 6.1. The County shall be responsible for the following items as they relate to the Facility: (a) payment of the fixed annual management fee provided for herein; (b) payment of all interest and principal payments, and debt service costs, on bonds or notes issued by the County to fund the construction and maintenance of the Facility; (c) making Capital Improvements and Capital Equipment purchases or any other alterations or additions to the Facility; (d) providing code inspections; (e) covering any and all operating losses and cash flow deficits sustained from the operation of the Facility; (f) payment of real estate taxes, if any, or any similar occupancy or use taxes or assessments, or any federal or state income taxes charged to the County; and (g) depreciation or amortization. Unless expressly stated herein, the term "Operating Expenses" shall not include any of the items described in this subsection. In making payments for the items listed in this subsection, the County shall use funds appropriated, or otherwise available for such purposes.

§ 6.2. On or before May 1 of each year, SMG shall submit to the County, SMG's projection of the Capital Improvements and Capital Equipment purchases which, in the opinion of SMG, will be required in each of the Operating Years hereunder to properly operate, manage and promote the Facility. SMG shall include in such projection an estimate of the total cost of each such improvements or purchases.

§ 6.3. If the County fails or refuses to make any Capital Improvements and Capital Equipment purchases necessary to operate, manage and promote the Facility or to fund the items described in section 5.3 hereof, then SMG may terminate this Agreement. Notwithstanding

anything to the contrary contained in this Agreement, SMG will not be deemed to be in breach of this Agreement if SMG cannot fulfill its obligations hereunder as a result of such failure or refusal of the County under this subsection.

## **7. BUDGETS AND CASH FLOW FUNDING**

§ 7.1. SMG shall submit to the County commensurate with the execution of this Agreement, and thereafter annually on or before June 1 each year a Projected Annual Operating Budget, which shall include a projection of the monthly Operating Revenues and Operating Expenses relating to the operation of the Facility in the next Operating Year. The initial Projected Annual Operating Budget for the first full Operating Year is set forth in Attachment D hereto, which is made a part hereof by this reference. The annual budget referred to above shall be reviewed and is subject to approval by the County. On or before thirty (30) days prior to the beginning of each Operating Year, the County shall notify SMG of any changes to the Proposed Annual Operating Budget for such Operating Year proposed by SMG and with such changes, if any, as are made by the County. Such budget, as so approved by the County, shall be the Approved Budget for such upcoming Operating Year. In any Fiscal Year, SMG shall not exceed the total amount of the Operating Expenses in the Approved Budget, without the prior consent of the County.

§ 7.2. Within ten (10) days after the commencement of this Agreement, the County shall make an initial cash flow deposit into the SMG Parking Account in an amount mutually agreed upon by SMG and the County. On a monthly basis during the term hereof, SMG shall submit to the County a voucher detailing all Operating Expenses incurred for the immediately preceding month, including all payroll costs hereunder that have been paid from SMG's payroll account at the Arena. Within forty-five (45) days after the submission of such voucher, the County will pay SMG the amount of such voucher for deposit into the SMG Parking Account. SMG may, at any

time, notify the Contract Administrator in writing of the need for additional cash flow required to sustain the operation of the Facility for any period up to four weeks. Such notification shall indicate the amount of funding required and shall state in detail the reason for the need for additional funding and the reason such need was not included in prior projections.

§ 7.3. In the event that the County fails to provide sufficient funding to cover any monthly voucher reimbursement in Section 7.2, then SMG, either upon the request of the County or on its own initiative, shall submit a plan for the reduction of expenditures to a level consistent with and within the funding available to the County.

§ 7.4. Should the County reduce the funding available for the operation of the Facility to the point where SMG reasonably believes that, after implementation of the SMG plan for the reduction of expenditures, the level of County funding will have a materially adverse affect on the ability of SMG to perform its duties hereunder, then SMG may elect any one or both of the following:

(a) continue to manage and operate the Facility utilizing revenues made available by the County and funds generated by the Facility; or

(b) terminate this Agreement and the provisions of Section 12.4 through 12.7 shall apply in respect of such termination; provided, that the date of any such termination shall occur not more than sixty days after the effective date of any such reduction in the County funding, and provided further that SMG provide the County with thirty days written notice of its election to terminate this Agreement.

§ 7.5. Notwithstanding anything contained herein to the contrary, no default shall be deemed to occur in the event no funds or insufficient funds are appropriated and budgeted by or are otherwise unavailable to the County for payment. The County will immediately notify SMG

of such occurrence and this Agreement shall terminate on the last day of the fiscal period for which appropriations were received without penalty or expenses for the County of any kind whatsoever, except as to those portions herein agreed upon for which funds shall have been appropriated and budgeted.

## **8. MANAGEMENT COMPENSATION**

§ 8.1. The County shall pay SMG a fixed annual management fee of fifty four thousand three hundred dollars (\$54,300), which amount shall be adjusted upward on the first day of each Operating Year, other than the first full Operating Year starting January 1, 2012, during the term hereof by an amount equal to two and one-half percent (2.5%) of the immediately preceding fixed fee. The foregoing annual fixed compensation shall be payable in equal monthly installments due on or before the last day of each month during such Operating Year.

§ 8.2. In the event this Agreement shall terminate prior to the expiration of the term described in section two hereof, the management fee payable to SMG shall be pro-rated from the date included in the most recent management fee payment through such early termination date.

§ 8.3. The parties have agreed that in each Operating Year during the term hereof, commencing with the Operating Year starting January 1, 2012, the targeted ratio of Operating Expenses for such year to the Operating Revenues (less only sales taxes related thereto) should not exceed thirty percent (30%). In any such year, if the actual ratio of Operating Expenses to such Operating Revenues exceeds 30%, then for each 1% overage, SMG shall rebate to the County 1% of its fixed management fee for such year. Within thirty (30) days following the end of each such year, SMG shall calculate such ratio, provide a copy of such calculation to the County and to the extent applicable, pay to the County the amount of such rebated fee. By way of illustration only, if the actual ratio of Operating Expenses to such Operating Revenues in such

an Operating Year was 35%, then SMG would rebate 5% of its fixed management fee for such year. In calculating such ratio, SMG will round to the nearest whole percentage point.

## 9. FACILITY ACCESS

§ 9.1. In order to carry out the duties and obligations of this Agreement, the County hereby grants SMG the unrestricted access to any and all parts of the Facility.

§ 9.2. The County shall provide the Facility with all fixtures, furniture, office equipment, technical and mechanical equipment and supplies necessary and proper for the conduct of the operations, or the same may be procured by SMG in accordance with the terms of this Agreement as Operating Expenses.

§ 9.3. The County shall provide SMG with necessary and reasonable office space in the Facility necessary and reasonable to carry out the terms of this Agreement.

§ 9.4. Notwithstanding the above, the Facility shall be and remain the sole property of the County and no property rights shall accrue to SMG in all or any portion of the Facility, as defined herein, excepting only: (a) computer software which is proprietary to SMG and was designed without regard to the Facility; (b) SMG personnel records, employee manuals and proprietary operational manuals; and, (c) any items of personal property which might be acquired by SMG without charge to the Facility.

§ 9.5. As owner of the Facility, the County, its officials, employees and agents or contractors, shall have unrestricted access to the Facility; provided, however, that no such access shall unreasonably interfere with the use of the Facility by any user of the Facility or unreasonably interfere with SMG in the performance of its rights and responsibilities under this Agreement. To the extent feasible, the County shall advise SMG in advance of any such access, which will occur outside of usual business hours and days (8:00 A.M. - 5:30 P.M., Monday through Friday, holidays excepted).

## 10. INSURANCE

§ 10.1. At all times during the term of this Agreement, SMG shall obtain and maintain, as an Operating Expense, insurance policies in the following types and amounts, in a form acceptable to the County, naming the County and the State of New York as additional insureds (excepting, however, the Worker's Compensation and Errors and Omissions insurance coverages).

(a) Insurance to save harmless the County, SMG and both of their agents and employees from all claims and liability for damages arising out of bodily injury to or death of any person or persons, and for all claims and liability for damages arising out of injury to or destruction of property caused by accident or which may arise from operations under this Agreement, whether by anyone directly or indirectly employed by either of them.

### **Comprehensive General Liability:**

Bodily injury and property damage (including blanket contractual and independent operator liability coverage) with combined single limits of not less than:

|                        |             |
|------------------------|-------------|
| General Aggregate      | \$1,000,000 |
| Products-Comp/Op Agg.  | \$1,000,000 |
| Personal & Adv. Injury | \$1,000,000 |

### **Garage Keeper's Legal Liability:**

Garage Keeper's Legal Liability coverage of not less than \$1,000,000 per each occurrence.

### **Comprehensive Automobile Liability and Property Damage:**

Insurance covering use of owned, non-owned and hired motor vehicles required in performance of the Agreement with limits of not less than the following:

|                            |  |
|----------------------------|--|
| Bodily Injury              | \$1,000,000 per person<br>\$1,000,000 per occurrence |
| Property Damage            | \$1,000,000 per occurrence                           |
| or                         |  |
| A combined single limit of | \$1,000,000  |



**Worker's Compensation:**

Insurance in accordance with applicable laws of the state of New York.

**Fidelity Bond**

A fidelity bond in the amount of one million dollars (\$1,000,000) written by an insurance company qualified to do business in New York covering all employees of SMG who may handle money in the course of such employee's employment at the Facility. Such bond shall run in favor of SMG and the County, as their interests may appear.

**Errors and Omissions**

Errors and omissions insurance in amounts no less than one million dollars (\$1,000,000) per occurrence.

(b) No cancellation of any insurance whether by the insurer or by the insured shall be effective unless written notice thereof is given to the County at least THIRTY (30) days prior to the intended effective date thereof, which date has been expressed in the notice. Prior to the effective date of any such cancellation, SMG shall take out new insurance to cover the policies so canceled.

(c) SMG shall provide certificates of insurance evidencing the above-described coverages to the County on or prior to the effective date of this Agreement. All insurance maintained by SMG pursuant to this Agreement shall be written by insurance companies licensed to do business in New York. Those insurance policies maintained by SMG pursuant to this Agreement which furnish the County with coverage as an additional insured shall state that the insurance coverage shall be primary with respect to the County and the County's own insurance shall be non-contributing.

(d) All policies of insurance of the character described in this section shall have attached thereto an endorsement waiving and releasing, to the extent permitted by law, all rights

to subrogation against the County and SMG, their officers, directors, officials, agents, servants, representatives and employees.

## 11. INDEMNIFICATION

§ 11.1. SMG hereby indemnifies, defends and saves harmless the County and its officers, employees, appointees, agents and representatives ("County Indemnitees") from and against any and all liabilities, losses, damages, interest, judgments, liens, and reasonable counsel fees and disbursements (collectively "Losses"), arising out of or incurred in connection with any and all claims, demands, suits, actions or proceedings which may be made or brought against the County or County Indemnitees, by reason of or as a result of (i) the lack of exercise of reasonable care by SMG in the employment of any of its employees or the lack of reasonable care in the supervision of such employees' ongoing employment, (ii) the negligent or willful act or omission of SMG, its agents, officers, employees, directors or others in privity of contract with SMG (other than the County), or (iii) the material failure or omission of SMG to observe or perform any of its obligations under this Agreement.

§ 11.2. The County hereby indemnifies, defends and saves harmless SMG, its partners and their respective officers, agents, employees, and representatives ("SMG Indemnitees") from and against any and all Losses arising out of or incurred in connection with any and all claims, demands, suits, actions or proceedings which may be made or brought against SMG or SMG Indemnitees by reason of or as a result of: (i) the negligent or willful act or omission of the County, or any of its officers, employees, appointees, agents or representatives (other than SMG); (ii) the material failure or omission of the County to observe or perform any of its obligations under this Agreement; (iii) the County's execution of this Agreement; (iv) any direction given by the County to SMG pursuant to the last sentence in Section 4.4 hereof; and (v)

the failure or refusal of the County to make Capital Improvements and Capital Equipment purchases as provided in Section 6.3 hereof.

§ 11.3. Nothing herein shall be deemed to waive or diminish the rights of the County or SMG, against each other, to equitable or compensatory relief for any breach of this Agreement.

## 12. TERMINATION

§ 12.1. Material Breach. Each of the following, and the matters described in Section 12.2 hereof with respect to SMG, shall constitute a "Material Breach" under this Agreement:

(a) Failure to pay when due any amount required to be paid under this Agreement; if the failure continues for thirty (30) days after written notice has been given to the breaching party;

(b) Either party shall (i) admit in writing its inability to pay its debts as they become due or (ii) file a petition in bankruptcy or for the reorganization or for the adoption of an arrangement under the Bankruptcy Code as now or in the future amended, or file a pleading asking for such relief, or have or suffer to be filed an involuntary petition in bankruptcy against it which is not contested and discharged within sixty (60) days, or (iii) make an assignment for the benefit of creditors, or (iv) consent to an appointment of a trustee or receiver for all or a major portion of its property, or (v) be adjudicated a bankrupt or insolvent under any federal or state law, or (vi) suffer the entry of a court order, under any federal or state law appointing a receiver or trustee for all or a major part of its property or ordering the winding up or liquidation of its affairs, or approving a petition filed against it under the Bankruptcy Code, as now or in the future amended, which order, if not consented to by it shall not be vacated, denied, set aside or stayed within sixty (60) days after the date of its entry; or

(c) Failure to perform any other obligation under this Agreement if the failure to perform is not cured within sixty (60) days after notice has been given to the breaching party,

except that if the breach cannot reasonably be cured within sixty days, a Material Breach shall not be deemed to have occurred if the breaching party begins to cure the breach within such sixty (60) day period and diligently and in good faith continues to pursue the cure of the breach.

§ 12.2. Non-Curable Material Breach by SMG. Each of the following shall also constitute a non-curable "Material Breach" of SMG under this Agreement:

(a) Any representation or warranty of SMG contained herein which shall be knowingly false or misleading in any material respect as of the date made or deemed to have been made; or

(b) Any misappropriation by SMG relating to any funds belonging to the County that are in SMG's possession or control, including, without limitation, moneys from the SMG Parking Account.

§ 12.3. Neither the County or SMG shall terminate this Agreement if, after receipt of a notice of default under section 12.1, the party in receipt of such a notice takes diligent action to remedy the default and additional time beyond the thirty days provided is reasonably required to complete the remedy; provided however, that the maximum time to remedy any default shall be ninety days from the date of receipt of the notice provided under section 12.1.

§ 12.4. Rights of Non-Breaching Party. If a Material Breach occurs and is not waived in writing by the non-breaching party, then the non-breaching party shall have the following remedies which are not exclusive but cumulative and in addition to any other remedies now or later allowed at law or in equity:

(a) The right to cure, at the breaching party's cost and expense, any such breach;

(b) The right to sue to collect any sums not paid when due, together with interest accrued thereon at a rate equal to nine percent (9%) per annum;

(c) The right to sue to collect damages suffered by the non-breaching party by reason of the occurrence of a material breach other than a material breach in the payment of money, as described in section 12.7 hereof;

(d) The right to terminate this Agreement; and/or

(e) The right to seek specific performance of the materially breached obligation.

§ 12.5. Upon the termination of this Agreement, whether by its expiration or by any early termination, the delegation of County to SMG made under this Agreement shall also be deemed revoked and rescinded.

§ 12.6. Upon expiration or termination of this Agreement, SMG shall promptly vacate the Facility and deliver to the County all equipment, supplies, manuals, records and inventories, as received, excepting only those items of SMG property described in section 9.4 herein and normal wear and tear, fire or other casualty losses.

§ 12.7. Upon expiration or termination of this Agreement, all Operating Expenses incurred or committed for prior to the date of expiration or termination shall be paid using funds on deposit in the SMG Parking Account. To the extent such funds are not sufficient, the County shall pay all such Operating Expenses and shall indemnify and hold SMG harmless therefrom. The County shall promptly pay SMG the fixed management fee, pro-rated to the date of expiration or termination; provided that the County shall be entitled to offset against such unpaid fees any actual damages directly incurred by the County in remedying any default by SMG hereunder which resulted in such termination. Upon a termination pursuant to subsection 12.1 or 12.2, all further obligations of the parties hereunder shall terminate except for the obligations in this section 12.7 and in sections 11.1, and 11.2; provided, however, that if such termination is the result of a willful default, the non-defaulting party exercising its right to terminate this

Agreement shall be entitled to recover damages for breach arising from such willful default. Without limiting the foregoing, in the event of a breach by either party under this Agreement, the breaching party shall pay to the non-breaching party all direct and consequential damages caused by such breach, including, but not limited to, in the case of the County as a non-breaching party all sums expended by the County to procure a substitute contractor to satisfactorily complete the contract work, together with the County's own costs incurred in procuring a substitute contractor.

### **13. FORCE MAJEURE**

§ 13.1. Except as otherwise provided, neither party shall be obligated to perform hereunder and neither shall be deemed to be in default if performance by either party is prevented from carrying out its obligations under this Agreement by: (i) fire, earthquake, flood, act of God, riot, civil commotion; or, (ii) explosion, unavailability of sufficient fuel or energy to operate the Facility or any other matter not in the reasonable control of the affected party; or, (ii) any law, ordinance, rule, regulation, or order of any public or military County stemming from the existence of economic controls, riot, hostilities, war or governmental law or regulation.

§ 13.2. In the event of a labor dispute which results in a strike, picket or boycott which has a material adverse affect on the ability of SMG to perform its obligation to manage, operate and promote the Facility under this Agreement, SMG shall not thereby be deemed to be in default or to have breached any part of this Agreement.

### **14. NOTICES**

§ 14.1. Except as otherwise provided herein, all notice; consents, waivers, directions, requests, votes or other instruments or communications provided for under this Agreement must be in writing and shall be deemed properly given if, and only if, (a) delivered personally with executed receipt evidencing such delivery; or (b) sent by generally recognized prepaid overnight

air courier service; or, (c) sent by certified United States Mail, postage prepaid; or, (d) by telecopy transmission if the same is followed by the delivery of such notice in hand or by mail, as follows:

If to the County:

County of Albany, New York  
112 State Street, Suite 200  
Albany, New York 12207  
Attention: County Executive

with a copy to:

The County Attorney  
112 State Street, Suite 900  
Albany, New York 12207

If to SMG:

SMG  
300 Conshohocken State Road  
West Conshohocken, Pennsylvania 19428  
Attention: President

with a copy to:

SMG  
51 South Pearl Street  
Albany, New York 12207  
Attention: General Manager

§ 14.2. Any notice sent hereunder will be deemed given as of the date of receipt (or refusal to receive, as the case may be) of such notice. Either party may at any time change the address for the notices to such party or the person to whom such notices shall be directed by hand delivery, mailing, overnight express mail, or electronic transmission as aforesaid, of a notice stating the aforesaid change.

## **15. ASSIGNABILITY**

§ 15.1. This Agreement may not be assigned, in whole or in part, by SMG without the prior written consent of the County unless such assignment is to another firm or corporation controlled by SMG (defined as not less than fifty percent) stock or ownership interest. A transfer of a controlling interest in SMG shall be included within the definition of "assignment" hereunder.

## **16. NON-DISCRIMINATION**

§ 16.1. In accordance with all State and Federal statutory and constitutional non-discrimination provisions, SMG agrees that it shall not, by reason of race, creed, color, national origin, age, sex or disability: (a) discriminate in hiring against any person who is qualified and available to perform the work, or (b) discriminate or intimidate any employee hired for the work contemplated by this Agreement. The provisions of this Section 16.1 shall be included by SMG in any subcontracts entered into by SMG hereunder.

## **17. MACBRIDE PRINCIPLES CLAUSE**

§ 17.1. SMG hereby represents that it is in compliance with the MacBride Principles of Fair Employment as set forth in Albany County Local Law [D] for 1993, in that SMG either (a) has no business operations in Northern Ireland or (b) shall take lawful steps in good faith to conduct any business operations in Northern Ireland in accordance with the MacBride Principles, and shall permit independent monitoring of their compliance with such principles. In the event of a violation of this stipulation, Principal reserves all rights to take remedial measures as authorized under section 4 of Local Law [D] for 1993, including, but not limited to, imposing sanctions, seeking compliance, recovering damages, declaring SMG in default and/or seeking debarment or suspension of SMG.



## 18. MISCELLANEOUS

§ 18.1. No Partnership or Joint Venture. Nothing contained in this Agreement shall constitute or be construed to be or create a partnership or joint venture between the County and SMG.

§ 18.2. Waiver. No consent or waiver, express or implied, by either party to or of any breach of any covenant, condition or duty of the other shall be construed as a consent to or waiver of any other breach of the same nature or any other covenant, condition or duties.

§ 18.3. Entire Agreement; Amendments; Headings. This Agreement consists of this Agreement, the Exhibits attached hereto and the prior agreement between the parties which other documents are expressly incorporated by reference herein and deemed an integral part hereof. This Agreement, the Exhibits attached hereto, the prior agreement are sometimes hereinafter referred to as the "Agreement Documents." If there is any conflict among or between the terms of any of the Agreement Documents, such conflict shall be resolved by reference to the following priority rules: (i) this Agreement has the highest priority, followed by in descending order (ii) the Exhibits attached hereto, (iii) the prior agreement. This Agreement may not be altered or amended in any manner except by a written instrument signed by the parties hereto. The headings contained in this Agreement are inserted only as a matter of convenience and reference, and in no way define, limit or describe the scope or intent of this Agreement

§ 18.4. Approval & Consent. Whenever, under any provision of this Agreement, the approval or consent of any party is required, the decision thereon shall be promptly given and such approval or consent shall nor be unreasonably withheld. It is further understood and agreed that whenever under any provisions of this Agreement approval or consent is required, the approval or consent shall be deemed to have been duly given if such approval or consent is given

in writing by the person executing this Agreement or by any one of the persons, as the case may be, designated in the notification signed by or on behalf of the County or SMG.

§ 18.5. Governing Law. This Agreement shall be deemed to have been made and shall be construed and interpreted in accordance with the laws of the State of New York. The United States District Court for the Northern District of New York and the Supreme Court for the State of New York, County of Albany shall be the exclusive jurisdiction and venues for any dispute arising out of or related to this Agreement. Each of the parties consents to the jurisdiction and venue of any such court and waives any argument that any such court does not have personal or subject matter jurisdiction or that such venue is not appropriate or convenient.

§ 18.6. Binding Effect. This Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective successors and permitted assigns.

§ 18.7. Gender. Whenever the context of this Agreement requires, the masculine gender includes the feminine or neuter and the singular number includes the plural.

§ 18.8. Applicability of General and Special Law. In the case of an inconsistency between the terms of this Agreement and any applicable general or special law, said general or special law shall govern.

§ 18.9. Severability. If any provision of this Agreement (other than compensation to SMG) or any portion of such provision or the application thereof to any person or circumstance shall be held to be invalid or unenforceable or shall become a violation of any local, state or federal laws, then, the same as so applied shall no longer be a part of this Agreement, but the remainder of the Agreement, such provision and the application thereof to other persons or circumstances shall not be affected thereby and this Agreement as so modified shall continue in full force and effect.

§ 18.10. Certain Representations & Warranties.

(a) The County represents and warrants to SMG the following: (i) all required approvals have been obtained, and the County has full legal right, power and authority to enter into and perform its obligations hereunder, and (ii) this Agreement has been duly executed and delivered by the County and constitutes a valid and binding obligation of County, enforceable in accordance with its terms, except as such enforceability may be limited by bankruptcy, insolvency, reorganization or similar laws affecting creditors' rights generally or by general equitable principles.

(b) SMG represents and warrants to the County the following: (i) all required approvals have been obtained, and SMG has full legal right, power and authority to enter into and perform its obligations hereunder, and (ii) this Agreement has been duly executed and delivered by SMG and constitutes a valid and binding obligation of SMG, enforceable in accordance with its terms, except as such enforceability may be limited by bankruptcy, insolvency, reorganization or similar laws affecting creditors' rights generally or by general equitable principles.

**19. ALTERNATIVE DISPUTE RESOLUTION**

§ 19.1. The parties desire to cooperate with each other in the management and operation of the Facility pursuant to the terms hereof. In keeping with this cooperative spirit and intent, any dispute arising hereunder may, with the mutual consent of both parties, be first referred to the parties' respective agents or representatives prior to either party initiating a legal suit, who in such instance will endeavor in good faith to resolve any such disputes within the limits of their County and within forty-five days after the commencement of such discussions. If any dispute remains unresolved after the parties have elected to follow the dispute resolution procedure set

forth above, the matter may, at the option of both parties, be resolved pursuant to subsection 19.2 and 19.3 below.

§ 19.2. If both parties so elect, and such elections are made in written form executed by an officer of each party legally authorized to do so and delivered to the other party in compliance with the notice provisions hereof, (either after exhausting the procedures in subsection 19.1 above or as an initial means of dispute resolution), the parties will endeavor to settle the dispute by mediation under the then current CPR International Institute for Conflict Prevention and Resolution or its successor ("CPR") model procedure for mediation of business disputes or, if such model procedure no longer exists, some other mutually agreeable procedure. Within ten business days from the date that the parties mutually elect to proceed with mediation hereunder, the County shall select a neutral third party mediator, who shall be subject to the reasonable approval of SMG. Each party will bear its own cost of mediation; provided, however, the cost charged by any independent third party mediator will be borne equally by the parties.

§ 19.3. The parties agree that any mediation proceeding (as well as any discussion pursuant to subsection 19.1. above) will constitute settlement negotiations for purposes of the federal and state rules of evidence and will be treated as non-discoverable, confidential and privileged communication by the parties and the mediator. No stenographic, visual or audio record will be made of any mediation proceedings or such discussions. All conduct, statements, promises, offers and opinions made in the course of the mediation or such discussion by any party, its agents, employees, representatives or other invitees and by the mediator will not be discoverable nor admissible for any purposes in any litigation or other proceeding involving the parties and will not be disclosed to any third party.

§ 19.4. The parties agree that if the parties mutually elect to proceed with mediation hereunder then this mediation procedure will be obligatory and participation therein legally binding upon each of them. In the event that either party refuses to adhere to the mediation procedure as set forth in this subsection, the other party may bring an action to seek enforcement of such obligation in any court of competent jurisdiction.

§ 19.5. The parties' efforts to reach a settlement of any dispute will continue until the conclusion of the mediation proceeding. The mediation proceeding will be concluded when: (i) a written settlement agreement is executed by the parties, or (ii) the mediator concludes and informs the parties in writing that further efforts to mediate the dispute would not be useful, or (iii) the parties agree in writing that an impasse has been reached. Notwithstanding the foregoing, either party may withdraw from the mediation proceeding without liability therefor in the event such proceeding continues for more than forty-five days from the commencement of such proceeding. For purposes of the preceding sentence, the proceeding will be deemed to have commenced following the completion of the selection of a mediator as provided in subsection 19.2.

§ 19.6. If the parties mutually elect to proceed with the above dispute resolution procedures and any dispute has not been resolved pursuant to those procedures, either party can then initiate litigation and/or terminate the Agreement as provided in section twelve hereof. If the parties mutually elect to proceed with the above disputed resolution procedures, then such procedures shall be the sole and exclusive procedures for the resolution of disputes between the parties arising out of or relating to this Agreement; provided, however, that a party, without prejudice to the above procedures (if they have been so selected by the parties) may file a complaint to seek a preliminary injunction or other provisional judicial relief, if in its sole

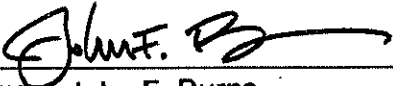
discretion such action is necessary to avoid irreparable damage or to preserve the status quo. Despite such action, the parties will continue to participate in good faith in the procedures specific in this section eighteen, if they have been so selected by the parties.

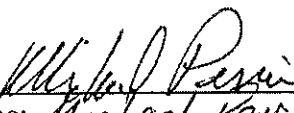
§ 19.7. All applicable statutes of limitation and defenses based upon the passage of time shall be tolled while the procedures specific in this section eighteen are pending. The parties will take such action, if any, required to effectuate such tolling. Each party shall be required to perform its obligations under this Agreement pending final resolution of any dispute arising out of or relating to this Agreement, unless to do so would be impossible or impracticable under the circumstances.

IN WITNESS WHEREOF, the parties hereby have caused this Agreement to be executed by their duly authorized officers and representatives as of the day and year first above written.

SMG

COUNTY OF ALBANY, NEW YORK

By:   
Name: John F. Burns  
Title: Chief Financial Officer

By:   
Name: Michael Kestin  
Title: Deputy County Exec.

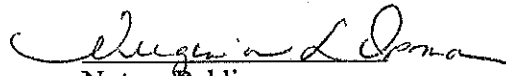
STATE OF NEW YORK)  
COUNTY OF ALBANY ) SS.:

On the \_\_\_\_ day of \_\_\_\_\_, 2012, before me, the undersigned, a notary public in and for the state, personally appeared Daniel P. McCoy, personally known to me or proved to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the attached instrument and acknowledged to me that s/he executed the same in his/her capacity, and that by his/her signature on the instrument, the individual, or the person upon behalf of which the individual acted, executed the instrument.

\_\_\_\_\_  
Notary Public

STATE OF NEW YORK )  
COUNTY OF ALBANY ) SS.:

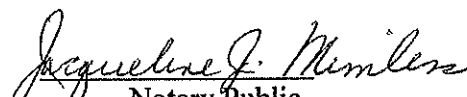
On the 18<sup>th</sup> day of April, 2012 before me, the undersigned, a notary public in and for the state, personally appeared Michael Perrin, personally known to me or proved to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the attached instrument and acknowledged to me that s/he executed the same in his/her capacity, and that by his/her signature on the instrument, the individual, or the person upon behalf of which the individual acted, executed the instrument.

  
Notary Public

VIRGINIA L. OSMAN  
Notary Public, State of New York  
No. 010S6176561  
Qualified in Albany County  
Commission Expires October 25, 2015

STATE OF Penna )  
COUNTY OF Montgomery ) SS.

On the 11 day of April, 2012, before me, the undersigned, a notary public in and for the state personally appeared John F. Burns, personally known to me or proved to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the attached instrument and acknowledged to me that s/he executed the same in his/her capacity, and that by his/her signature on the instrument, the individual, or the person upon behalf of which the individual acted, executed the instrument.

  
Notary Public

COMMONWEALTH OF PENNSYLVANIA

Notarial Seal  
Jacqueline J. Mirnless, Notary Public  
West Conshohocken Boro, Montgomery County  
My Commission Expires July 6, 2014  
Member, Pennsylvania Association of Notaries

## Attachment A

### Scope of Services

SMG will perform all services necessary for the care, protection, maintenance and management of the Facility including but not limited to the following:

#### 1. Staffing and Personnel

SMG will be responsible for maintaining adequate on-site staffing of the Facility as follows:

- a) A full time manager who shall serve as the day time supervisor and have authority on behalf of SMG to manage operations, training and scheduling of SMG's personnel at the Facility and who shall have such other responsibilities as described in the County's RFP, as well as such number of shift managers as are required to perform SMG's services hereunder.
- b) Cashiers – such number of part time cashiers as are required to service the parking patrons of the Facility during all operating hours, especially peak activity.
- c) Custodian/Maintenance – as required to perform routine housekeeping duties and minimal maintenance in those areas of the Facility not provided for by the county.
- d) SMG shall provide management and operating personnel to perform functions of supervision, exit booth operations, maintenance, accounting, record keeping and other activities as required to ensure the effective and efficient continuous operation of the Facility at all times during the terms of this Agreement.
- e) SMG shall provide the necessary training to ensure that all employees of SMG are fully trained and competent to perform their duties and shall provide county-approved uniforms and name tags, which are to be worn by all non-management on-site personnel, along with photo identification, which must be worn by all on-site employees with a copy of photos forwarded to the Contractor Administrator.

#### 2. Financial Control and Accountability

- a) SMG will oversee the accounting and controls implemented at the Facility and provide effective financial control for collection and remittance of Operating Revenues from daily receipts, special events and monthly parking. All systems and procedures will be within the guidelines established by SMG and are subject to the County's review and approval.
- b) The County will provide to SMG records and financial information produced by the Department of General Services or the Department of Management and



Budget including contracts and invoices pertaining to the parking garage starting as of January 1, 2012 to enable SMG to consolidate all financial accounting of the garage operations.

3. Howard Street Garage

1. There is an additional parking structure that Albany County uses, which is located on Howard Street directly behind County Building at 112 State Street, which Albany County exclusively uses. This parking garage has roughly (40) forty parking spaces. The vehicles that are parked in this structure are mostly owned by Albany County. This parking structure is not used for event parking. SMG has agreed to oversee this additional parking garage to make sure the garbage is removed the facility will be clean and safe for County employees and/or others will be able to park their vehicles and go to work. SMG has already received a commitment from the cleaning company that currently cleans the Albany County Parking Garage whereby they will bring their cleaning staff up to the Howard Street additional parking structure to keep it clean daily. The cleaning company (Executive Cleaning) has agreed to perform the necessary daily cleaning with no additional charge for labor. SMG has agreed "not" to charge any additional fees for the oversight and management of this additional 40 car parking structure. The only charge that would be submitted to Albany County from SMG would be the cost of any additional materials or repairs to the structure, parking surfaces and/or entry-ways in the Howard Street additional parking structure. Albany County will continue to be solely responsible for the structure and property and will carry property damage insurance. Such property and structure shall be up to code and shall meet all City, County and State building codes and if for any reason it does not, Albany County will be responsible for all work and materials that would be required to meet such codes. SMG will not be responsible for any claims current or in the past against Albany County as it relates to this additional parking structure on Howard Street. In addition, Albany County will continue to maintain and provide general liability insurance on the Howard Street parking structure and SMG would require a hold harmless and indemnity provision in the agreement. SMG would also be co-named as an additional insured party on such insurance related to the Howard Street parking structure.