

1. Incorporation of Recitals. The above and foregoing Recitals are true and correct and are incorporated herein and made a part of this Agreement for all purposes.

2. Grant of license. The City does hereby grant to Post and to Tenant a revocable license (a) to place and locate within and upon the Encroachment Area (shown on the attached Exhibit A) tables, chairs, and other business personal property that is customary and incidental to the operation of an outdoor café (the “Café Property”), and (b) to place and locate within the Encroachment Area and above the public sidewalk the Awnings as shown on the attached Exhibit B. In no event shall Post or Tenant cause any property located within the Encroachment Area to be affixed or located or placed in a permanent manner.

The license hereby granted is subject to and shall be used by Post and Tenant in accordance with the City Charter and with all applicable laws, rules, regulations, codes, policies, and standards of the City and of any other governmental entity having jurisdiction over the public street, right-of-way, and sidewalk (whether in effect on the Effective Date or adopted or enacted thereafter) (“Applicable Law”), and with the terms and conditions of this Agreement. In no event shall Post or Tenant have the right to use the Encroachment Area for any purpose other than as set forth in this Agreement, nor the right to use any portion of the public sidewalk, right-of-way and/or street that is outside of the Encroachment Area.

3. Term. This Agreement shall be in effect for a period of ten (10) years from and after the Effective Date, subject, however, to termination as set forth in paragraph 8 hereof.

4. Non-exclusive license. The license granted by this Agreement is not exclusive, and is subject and subordinate to: (a) the right of the City to use the Encroachment Area for any purpose, including the right to make any repairs, modifications, or other changes to the Encroachment Area; (b) any existing utility, drainage or communication facility located within, on, under, over, or upon the Encroachment Area and/or Addison Circle Drive; (c) all vested rights presently owned by any utility or communication company; (d) any existing license, lease, easement, or other interest heretofore granted by the City; (e) the terms and conditions of this License Agreement; and (f) Applicable Law.

5. Use, operation, maintenance.

(a) All use, operation, and maintenance of the Encroachment Area under this Agreement by Post and/or by Tenant shall be conducted and performed in such a manner so as not to interfere with the public use of any public sidewalk, right-of-way, or street or to create a dangerous condition on any public sidewalk, right-of-way, or street (including Addison Circle Drive). The City’s approval of any use, operation or maintenance of the Encroachment Area by Post and/or Tenant shall not and does not relieve Post and/or Tenant of all responsibility and liability for such use, operation and/or maintenance.

(b) The use, operation, and maintenance of the Encroachment Area by Post and by Tenant shall be conducted and performed in a safe, clean, and neat manner, as determined by the City, and the Encroachment Area shall be maintained by Post and Tenant in good condition, as determined by the City. Prior to instituting any maintenance or work on or within the Encroachment Area, Post and/or Tenant (as required by Applicable Law) shall secure from the City any necessary permits, including building and/or right-of-way permits. The City shall be the sole judge of the quality of the maintenance, and upon written notice from the City, by and through the

City Manager or the City Manager's designee, stating in general terms how and in what manner the maintenance is required, Post and/or Tenant shall perform such required maintenance. If Post or Tenant fail to do so, the City shall have the right (in addition to any other rights of the City provided for herein) to perform such maintenance, the cost of which shall be borne by Post and/or Tenant.

(c) In connection with this Agreement, (i) Post is and shall at all times be and remain responsible and liable for the acts and omissions of Post, its owners, directors, partners, managers, officers, employees, representatives, agents, contractors, consultants, licensees, guests, and invitees, and their respective owners, directors, partners, managers, officers, employees, representatives, agents, contractors, consultants, licensees, guests, and invitees, and (ii) Tenant is and shall at all times be and remain responsible and liable for the acts and omissions of Tenant, its owners, directors, partners, managers, officers, employees, representatives, agents, contractors, consultants, licensees, guests, and invitees, and their respective owners, directors, partners, managers, officers, employees, representatives, agents, contractors, consultants, licensees, guests, and invitees. The provisions of this subparagraph (c) shall survive the termination or expiration of this Agreement.

(d) The City has and shall at all times have the right to enter into, upon, under and over the Encroachment Area for any purpose whatsoever, including to make any modifications, repairs, or other changes to the Encroachment Area.

6. Insurance.

At all times in connection with this Agreement, Post and Tenant shall purchase and maintain in a company or companies lawfully authorized to do business in Texas such insurance coverages as set forth below:

1. Commercial General Liability insurance at minimum combined single limits of \$1,000,000 per-occurrence and \$2,000,000 general aggregate for bodily injury and property damage, which coverage shall include products/completed operations (\$2,000,000 products/completed operations aggregate), and XCU (Explosion, Collapse, Underground) hazards. Coverage for products/completed operations must be maintained for at least two (2) years after any construction work has been completed. Coverage must be amended to provide for an each-project aggregate limit of insurance. An alternative would be to have separate limits for all lines of General Liability coverage for each project, and must include contractual liability, covering, but not limited to, the liability assumed under the indemnification provisions of this Agreement.

2. Worker's compensation at statutory (Texas) limits, including employer's liability coverage at minimum limits of \$1,000,000 each-occurrence each accident/\$1,000,000 by disease each-occurrence/\$1,000,000 by disease aggregate.

With reference to the foregoing insurance requirement, Post and Tenant shall specifically endorse applicable insurance policies as follows:

1. The Town of Addison, Texas shall be named as an additional insured with respect to all liability policies.

2. All liability policies shall contain no cross liability exclusions or insured versus insured restrictions applicable to the claims of the Town of Addison.

3. A waiver of subrogation in favor of the Town of Addison, Texas, its officers, employees, and agents shall be contained in each policy required herein.
4. All insurance policies shall be endorsed to require the insurer to immediately notify the Town of Addison, Texas of any material change in the insurance coverage.
5. All insurance policies shall be endorsed to the effect that the Town of Addison, Texas will receive at least sixty (60) days' notice prior to cancellation or non-renewal of the insurance.
6. All insurance policies, which name the Town of Addison, Texas as an additional insured, must be endorsed to read as primary coverage regardless of the application of other insurance.
7. Required limits may be satisfied by any combination of primary and umbrella liability insurances.
8. Post and Tenant may maintain reasonable and customary deductibles.
9. Insurance must be purchased from insurers that are financially acceptable to the City and licensed to do business in the State of Texas.

All insurance must be written on forms filed with and approved by the Texas Department of Insurance. Certificates of Insurance shall be prepared and executed by the insurance company or its authorized agent, delivered to Post and Tenant and the City prior to the commencement of the use of the Encroachment Area by Post and/or Tenant, and shall :

1. List each insurance coverage described and required herein. Such certificates will also include a copy of the endorsements necessary to meet the requirements and instructions contained herein.
2. Specifically set forth the notice-of-cancellation or termination provisions to the Town of Addison.

Upon request, Post and Tenant shall furnish the Town of Addison with complete copies of all insurance policies certified to be true and correct by the insurance carrier. The City has the right to review the insurance requirements contained herein and to adjust coverages and limits when deemed necessary and prudent by the City.

7. **Post's and Tenant's Indemnity Obligation.** Post and Tenant each covenant, agree to, and shall DEFEND (with counsel reasonably acceptable to the City), INDEMNIFY, AND HOLD HARMLESS the Town of Addison and the elected and appointed officials, and the officers, employees, agents, and representatives of the Town of Addison, Texas, individually or collectively, in both their official and private capacities (collectively, the "City Persons" and each a "City Person"), from and against any and all claims, liabilities, judgments, lawsuits, demands, harm, losses, damages, proceedings, suits, actions, causes of action, liens, fees, fines, penalties, expenses, or costs, of any kind and nature whatsoever made upon or incurred by the City or any other of the City Persons, or any of them, whether directly or indirectly, (the "Claims"), that arise out of, result from, or relate to: (i) the use,

occupancy, or maintenance of, or operation within, the Encroachment Area of the Café and/or the Awnings, (ii) any representations and/or warranties by Post and/or Tenant (as the case may be) under this Agreement, (iii) any personal injuries (including but not limited to death) to any Post Persons and/or Tenant Persons (as hereinafter defined) and any third persons or parties arising out of or in connection with Post's or Tenant's use, occupancy, or maintenance of, or operation within, the Encroachment Area, under this Agreement, and/or (iv) any act or omission under, in performance of, or in connection with this Agreement by Post and/or Tenant or by any of their respective owners, directors, officers, managers, partners, employees, agents, contractors, subcontractors, invitees, patrons, guests, customers, licensees, or any other person or entity for whom Post and/or Tenant is legally responsible, and their respective owners, directors, officers, directors, officers, managers, partners, employees, agents, contractors, subcontractors, invitees, patrons, guests, customers, and licensees (collectively, "Post/Tenant Persons"). SUCH DEFENSE, INDEMNITY AND HOLD HARMLESS SHALL AND DOES INCLUDE CLAIMS ALLEGED OR FOUND TO HAVE BEEN CAUSED IN WHOLE OR IN PART BY THE NEGLIGENCE OR GROSS NEGLIGENCE OF ANY CITY PERSON, OR CONDUCT BY ANY CITY PERSON THAT WOULD GIVE RISE TO STRICT LIABILITY OF ANY KIND. However, Post and Tenant's liability under this section shall be reduced by that portion of the total amount of the Claims (excluding defense fees and costs) equal to the City Person or City Persons' proportionate share of the negligence, or conduct that would give rise to strict liability of any kind, that caused the loss. Likewise, Post and Tenant's liability for City Person's defense costs and attorneys' fees shall be reduced by that portion of the defense costs and attorneys' fees equal to City Person or Persons' proportionate share of the negligence, or conduct that would give rise to strict liability of any kind, that caused the loss.

Post and Tenant shall promptly advise the City in writing of any claim or demand against any City Person related to or arising out of Post's and/or Tenant's activities under this Agreement and shall see to the investigation and defense of such claim or demand at Post's and Tenant's sole cost and expense. The City Persons shall have the right, at the City Persons' option and own expense, to participate in such defense without relieving Post and Tenant of any of its obligations hereunder. This defense, indemnity, and hold harmless provision shall survive the termination or expiration of this Agreement.

8. Termination. This Agreement and the license granted hereunder may be terminated:
 - (a) By the City:
 - (i) in the event either Post or Tenant fails to comply with any of the terms of this Agreement within ten (10) days after receipt of notice by Post and/or Tenant from the City of such failure to comply; or
 - (ii) if Tenant discontinues the use of the Property for the Restaurant, or abandons the use of the Encroachment Area for the purposes set forth herein; or
 - (iii) for any reason or for no reason whatsoever upon thirty (30) days' written notice by the City to Post or Tenant; or
 - (b) For any reason or for no reason whatsoever By Post and/or Tenant upon thirty (30) days' written notice by Post or Tenant to the City.

Upon the termination or expiration of this Agreement, Post and Tenant shall remove all Café Property, the Awnings, and any other equipment or other property of any kind whatsoever, and shall return the Encroachment Area to the condition it was in when Post and/or Tenant first occupied and/or used the Encroachment Area pursuant to this Agreement. At such time, there shall be no encroachments by either Post or Tenant into the Encroachment Area (or any other public sidewalk, right-of-way, or street). The obligations of this paragraph shall survive the termination or expiration of this Agreement.

9. Miscellaneous.

(a) *Assignment.* Neither Post nor Tenant shall, and neither has authority to, assign, sell, pledge, transfer, encumber, or otherwise convey (any of the foregoing, and the occurrence of any of the foregoing, a “Conveyance”) in any manner or form whatsoever (including by operation of law, by merger, or otherwise) all or part of its rights and obligations hereunder without the prior written approval of the City. Any Conveyance of any kind or by any method without the City’s prior written consent shall be null and void.

(b) *Independent Contractor.* Each of Post and Tenant are independent contractors, and nothing in this Agreement creates nor shall be construed to create an employer-employee relationship, a joint venture relationship, a joint enterprise, and each of Post and Tenant have and shall have exclusive control of and the exclusive right to control the details of their respective operations, and all persons performing same, and shall be solely responsible for the acts and omissions of its officers, agents, servants, employees, contractors, subcontractors, licensees, guests, and invitees.

(c) *Notices.* Any notice, correspondence, or statement required to be given or delivered hereunder, or otherwise given or delivered in connection with this Agreement, shall be in writing and shall be deemed to have been properly given for all purposes (i) if sent by a nationally recognized overnight carrier for next business day delivery, on the first business day following deposit of such notice with such carrier unless such carrier confirms such notice was not delivered, then on the day such carrier actually delivers such notice, or (ii) if personally delivered, on the actual date of delivery, or (iii) if sent by certified U.S. Mail, return receipt requested postage prepaid, on the third business day following the date of mailing. Addresses for any such notice, statement and/or report hereunder are as follows:

To the City:

Town of Addison, Texas
5300 Belt Line Road
Dallas, Texas 75254
Attn: City Manager

To Post:

Attn: _____

To Tenant:

Attn: _____

The addresses and addressees for the purpose of this paragraph may be changed by giving notice of such change in the manner herein provided for giving notice.

(d) *Governing Law; Venue.* This Agreement and performance hereunder shall be governed by and construed in accordance with the laws of the State of Texas, without regard to choice of laws rules of any jurisdiction. Any and all suits, actions or legal proceedings relating to this Agreement shall be maintained in the state or federal courts of Dallas County, Texas, which courts shall have exclusive jurisdiction for such purpose. Each of the parties submits to the exclusive jurisdiction of such courts for purposes of any such suit, action, or legal proceeding hereunder, and waives any objection or claim that any such suit, action, or legal proceeding has been brought in an inconvenient forum or that the venue of that suit, action, or legal proceeding is improper.

(e) *Severability.* The terms, conditions, and provisions of this Agreement are severable, and if any provision of this Agreement shall be held to be invalid, illegal or unenforceable by a court of competent jurisdiction, the validity, legality and enforceability of the remaining provisions shall in no way be affected or impaired thereby.

(f) *Headings; "Includes".* Paragraph headings are for convenience only and shall not be used in interpretation of this Agreement. For purposes of this Agreement, "includes" and "including" are terms of enlargement and not of limitation or exclusive enumeration, and use of the terms does not create a presumption that components not expressed are excluded.

(g) *Binding Agreement; No Third Party Beneficiaries.* This Agreement shall be binding on and inure to the benefit of the parties, their respective permitted successors and permitted assigns. This Agreement and all of its provisions are solely for the benefit of the parties hereto and do not and are not intended to create or grant any rights, contractual or otherwise, to any third person or entity.

(h) *No Waiver of Immunity.* Notwithstanding any other provision of this Agreement, nothing in this Agreement shall or may be deemed to be, or shall or may be construed to be, a waiver or relinquishment of any immunity, defense, or tort limitation to which the City, its officials, officers, employees, representatives, and agents are or may be entitled, including, without limitation, any waiver of immunity to suit.

(i) *Rights, Remedies; Waiver.* Except as set forth in or otherwise limited by this Agreement, the remedies and rights set forth in this Agreement: (a) are and shall be in addition to any and all other remedies and rights either party may have at law, in equity, or otherwise, (b) shall be cumulative, and (c) may be pursued successively or concurrently as either party may elect. The exercise of any remedy or right by either party shall not be deemed an election of remedies or rights or preclude that party from exercising any other remedies or rights in the future. Any rights and remedies either party may have with respect to the other arising out of this Agreement shall survive the expiration or termination of this Agreement. All waivers must be in writing and signed by the waiving party.

(j) *Entire Agreement; Amendment.* This Agreement represents the entire and integrated agreement between the City, Post and Tenant with regard to the matters set forth herein and

supersedes all prior negotiations, representations and/or agreements, either written or oral. Any amendment or modification of this Agreement must be in writing and signed by authorized representatives of each of the City, Post and Marcus or it shall have no effect and shall be void.

(k) *Authorized Persons.* The undersigned representatives of the parties hereto are the properly authorized persons and have the necessary authority to execute this Agreement on behalf of the respective parties hereto.

SIGNED by the parties on the dates set forth below, and this Agreement shall be effective as of the Effective Date set forth above.

TOWN OF ADDISON, TEXAS

**POST ADDISON CIRCLE LIMITED
PARTNERSHIP**

By: _____
Lea Dunn, City Manager

By: _____

Its: _____

ATTEST:

By: _____
Matt McCombs, City Secretary

By: _____

Its: _____

EXHIBIT A

[depiction of the Property lying adjacent to/abutting public sidewalk/right-of-way/street; depiction of Encroachment Area]

EXHIBIT B

[depiction of Awnings and their location]