

THIS INSTRUMENT PREPARED BY:

Allison Brackins
Assistant City Attorney
City of Orlando
400 S. Orange Avenue
Orlando, FL 32801
(407) 246-2295

RIGHT-OF-WAY UTILIZATION AGREEMENT FOR WALL AND PATIO

THIS AGREEMENT (the "Agreement") made and entered into this 8 day of March, 2016, by and between CUCINA NAPOLI II LLC D/B/A ARMANDO'S COLLEGE PARK, a Florida limited liability company, hereinafter referred to as the "Tenant", and the CITY OF ORLANDO, a Florida municipal corporation, organized and existing under the laws of the State of Florida, hereinafter referred to as the "City".

R E C I T A L S:

WHEREAS, COLONNADÉ RETAIL, LLC, a Florida limited liability company, (the "Owner") is the owner of certain condominium units situated in THE WELLESLEY, a condominium located on the first floor of The Wellesley at 2305 Edgewater Drive within the corporate limits of the City of Orlando, Orange County, State of Florida. The Wellesley is a multi-use condominium in which there is located in the first floor commercial condominium units, all of which are owned by the Owner; and

WHEREAS, the Owner and the Tenant have entered into a Lease (the "Lease") for a portion of the commercial condominium units at The Wellesley owned by the Owner, which portion or demised premises (the "Premises") is generally described as Suite H, 2305 Edgewater Drive, Orlando, Florida. The Tenant operates a business at the Premises known as Armando's Restaurant College Park; and

WHEREAS, the Tenant desires to install an outdoor seating area including a patio deck with a wall (hereinafter "Improvements") along and on a portion of the Right-of-Way of Vassar Street held by the City; and

WHEREAS, the City will permit the location of the Improvements within the street right-of-way area pursuant to the terms and conditions set forth herein; and

WHEREAS, Tenant is required to enter into this Agreement in order to allow the Improvements to encroach into the street right-of-way area in compliance with Section 61.203 of the City's Land Development Code; and

WHEREAS, provided that Tenant agrees to immediately remove the Improvements, at its own expense, the City will permit the encroachment of the Improvements, into the street right-of-way area until the City notifies Tenant of the necessity of the area for public use or any other purpose, such as roadway widening improvements or sidewalk/streetscape improvements; and

WHEREAS, the Improvements will continue to be subject to all applicable provisions of the City Code; and

WHEREAS, the Owner is joining in this Agreement to acknowledge the foregoing arrangement between the Tenant and the City as hereinafter set forth.

NOW, THEREFORE, in consideration of the mutual covenants herein contained, and other good and valuable considerations each to the other, the parties agree as follows:

1. **Preamble Incorporated.** The foregoing Recitals are true and correct and are incorporated herein as part of this Agreement.

2. **Encroachment.** The City hereby grants permission as described in this Agreement for the encroachment of the Improvements within the right-of-way of Vassar Street as depicted on Exhibit "A", attached hereto and incorporated herein, by reference.

3. **Revocation.** The City shall have the right to immediately revoke the permission in Paragraph 2 above, should public purposes demand use of the street right-of-way area.

4. **Removal.** Within thirty (30) days after receipt of written notice from the City, Tenant agrees to undertake and complete removal of the Improvements, which encroach in the City street right-of-way area. Tenant shall incur all costs for the removal of the Improvements. Tenant shall be responsible for any damage to the street right-of-way area or any other property. Upon removal, Tenant shall restore the street right-of-way area to its condition prior to the installation of the Improvements. These improvements must be temporary and movable. The Tenant shall not drill into the sidewalk or affix any permanent improvements within the easement or City right of way.

5. **Existing Utilities.** The location, installation, operation, maintenance and repair of the Improvements shall not interfere with any existing utilities located within, upon or under the rights-of-way.

6. **Maintenance and Repair.** Tenant shall notify the City in writing prior to performing any maintenance or repair to the portion of the Improvements located within the right-of-way. Tenant shall obtain approval of the City if the repair or maintenance of the Improvements requires any portion of Vassar Street to be closed to pedestrian or vehicular traffic. Upon the installation, repair, or maintenance of the Improvements, Tenant shall restore the rights-of-way to its prior condition. All costs for the installation, operation, repair, and maintenance of the Improvements and for the restoration of the rights-of-way shall be paid by Tenant, except that Tenant shall not be responsible for any damage to the Improvements or rights-of-way caused by the City's negligent repair or maintenance of Vassar Street.

7. **Maintenance Security.** The Tenant shall post a Maintenance Security for the repair or correction of material defects or failures of the Improvements during the lifetime of the Improvements on the Premises. The Maintenance Security shall be in an amount equal to 15% of the actual construction cost of the Improvements, and shall consist of either: (1) a bond, or (2) equivalent cash deposit with the City, or (3) a certificate of deposit, or (4) a irrevocable letter of credit by a Florida bank, or (5) a cashier's check or a certified check drawn upon a Florida bank. Upon default, the City Council, City Engineer or other applicable public body may exercise its rights under the Maintenance Security upon ten (10) days written notice by certified mail, return receipt requested, to the parties to the instrument.

8. **Insurance.** Tenant shall purchase and maintain such insurance specified below and which is necessary to fully protect it and the City from any claims that may arise out of or result from Tenant's location, installation, operation, maintenance, and repair of the Improvements in the right-of-way (Tenant's Operations) whether Tenant's Operations are performed by Tenant, its contractors, agents, or anyone for whose acts it may be liable:

a. **Worker's Compensation**

(present Florida Statutory and Employer's Liability limit)

b. Comprehensive General Liability

Bodily Injury
Property Damage
\$1,000,000.00
\$ 500,000.00

The City and the Owner shall each be named as an additional insured on all required insurance except Worker's Compensation. An insurance certificate evidencing the required coverage shall be filed with the City and furnished to the Owner upon the execution of this Agreement. The insurance certificate shall provide that the insurance coverage shall not be canceled without at least thirty (30) days prior written notice having been given to the City and the Owner. The insurance required herein shall apply on a primary basis and any other insurance maintained by the City or the Owner shall be secondary.

9. **Indemnification.** Tenant agrees that it shall indemnify, hold harmless and defend the City and the Owner, each of their representatives, employees and elected and appointed officials from and against all claims, damages, loss and expenses of any sort including reasonable attorney's fees and costs including appeals, arising out of or resulting from any tort, intentional action, negligent act or omission of Tenant, its agents or subcontractors or anyone for whose act or acts any of them may be liable, for actions or omissions occurring in that portion of the street right-of-way area on which the Improvements is located.

10. **Signage.** Signage shall be added to the café area directing pedestrians to the public way (under the building arcade) to the south of the café area.

11. **Recording.** Tenant will record this Agreement, at its expense, in the Public Records of Orange County, Florida, where it shall be a covenant running with the land and encumber the property hereinabove described.

12. **Controlling Laws.**

a. This Agreement and the provisions contained herein shall be construed, controlled, and interpreted according to the laws of the State of Florida, and all duly adopted ordinances, regulations, and policies of the City now in effect and those hereinafter adopted.

b. The location for settlement of any and all claims, controversies, disputes, arising out of or relating to any part of this Agreement, or any breach hereof, shall be in Orange County, Florida.

c. Tenant shall comply with all applicable federal, state, and local laws, ordinances, rules and regulations pertaining to the installation, operation, maintenance, and repair of the Improvements in the rights-of-way.

13. **Entire Agreement.** This Agreement constitutes the entire Agreement between the parties with respect to the specific matters contained herein and supersedes all previous discussions, understandings, and agreements. Any Amendments to or waivers of the provisions herein shall be made by the parties in writing. No other agreements, oral or otherwise, regarding the subject matter of this Agreement shall be deemed to exist or to bind either party hereto.

14. **Severability.** If any sentence, phrase, paragraph, provision or portion of this Agreement is for any reason held invalid or unconstitutional by any court of competent jurisdiction, such portion shall be deemed an independent provision and such holding shall not affect the validity of the remaining portions hereto.

15. **Effective Date.** The effective date of this Agreement is the date of its execution by the last person to execute it.

16. **Legal Counsel.** Tenant acknowledges that it has had ample opportunity to seek and consult with independent legal counsel prior to executing this Agreement, and that either Tenant represents and warrants that he has sought such independent legal advice and counsel or has knowingly and voluntarily waived such right.

17. **Attorney's Fees.** Tenant agrees that it shall be liable for reasonable attorney's fees incurred by City, if City is required to take any actions, through litigation or otherwise, to enforce this Agreement.

18. **Negotiation.** The parties to this Agreement acknowledge that all terms of this Agreement were negotiated at arm's length and that this Agreement and all documents executed in connection herewith were prepared and executed without undue influence exerted by any party or on any party. Further, this Agreement was drafted jointly by all parties, and no parties are entitled to the benefit of any rules of construction with respect to the interpretation of any terms, conditions or provisions of this Agreement in favor of or against any person or party who drafted this Agreement.

19. **Joinder by Owner.** The Owner is joining in this Agreement solely for the purpose of acknowledging this Agreement, and the matters between the Tenant and the City, and permitting same under the Lease, provided, however, nothing contained herein shall impose upon the Owner any duties or obligations whatsoever in regard to the matters herein or the actions or inactions of the Tenant.

20. **Reverter.** In the event of a Revocation of this Agreement pursuant to paragraphs three (3) and four (4), the property shall revert back to its original condition(s) and the Tenant shall no longer be responsible for the Insurance requirements as stated in paragraph eight (8). Paragraphs nine (9) and sixteen (17), shall survive termination or revocation of this Agreement.

[Signatures on Following Pages]

IN WITNESS WHEREOF, the parties have executed this Agreement on the day and year first written above.

CITY OF ORLANDO

Mayor/Pro Tem

ATTEST:

Amy T. Iennaco, City Clerk

STATE OF FLORIDA

COUNTY OF ORANGE

The foregoing instrument was acknowledged before me this _____ day of _____, 2016, by _____, and Amy T. Iennaco, to me known as the Mayor/Pro Tem and City Clerk respectively, of the City of Orlando, who acknowledged before me that they have executed the foregoing instrument for the purposes therein expressed, and that they were duly authorized to do so.

Notary Public:

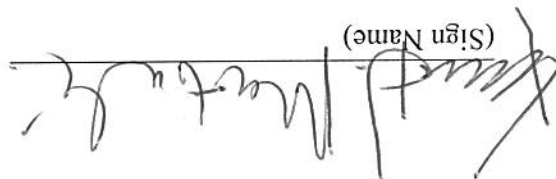
Commission Expires: _____

APPROVED AS TO FORM AND LEGALITY
for the use and reliance of the
City of Orlando, Florida, only.

_____, 2016.

Assistant City Attorney
Orlando, Florida

WITNESSES:

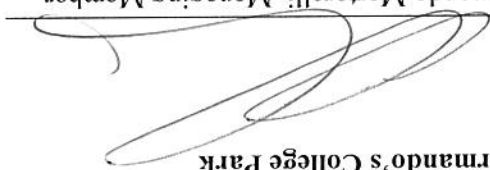

(Sign Name)

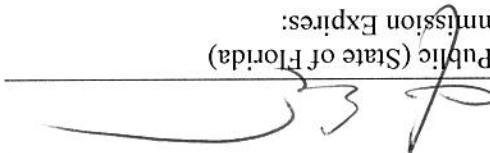
Karen H. Martorelli
(Print Name)

STATE OF FLORIDA

COUNTY OF ORANGE

The foregoing instrument was acknowledged before me this 8th day of March, 2016, by Armando Martorelli, as managing member of Cucina Napoli II LLC d/b/a Armando's College Park. He/she is personally known to me or has produced PE (live) (type of identification) as identification.

CUCINA NAPOLI II LLC
d/b/a Armando's College Park
By: 
Armando Martorelli, Managing Member


Notary Public (State of Florida)
My Commission Expires:

NOTARY PUBLIC
STATE OF FLORIDA
Jack E. Grace, Jr.
State of Florida
MY COMMISSION # EE 884218
Expires: March 14, 2017

JOINDER BY OWNER

OWNER – COLONNADE RETAIL, LLC

By: Real Estate Collaborative, LLC,
its managing member

By:

James W. Kersey, as its Manager

(Sign Name)

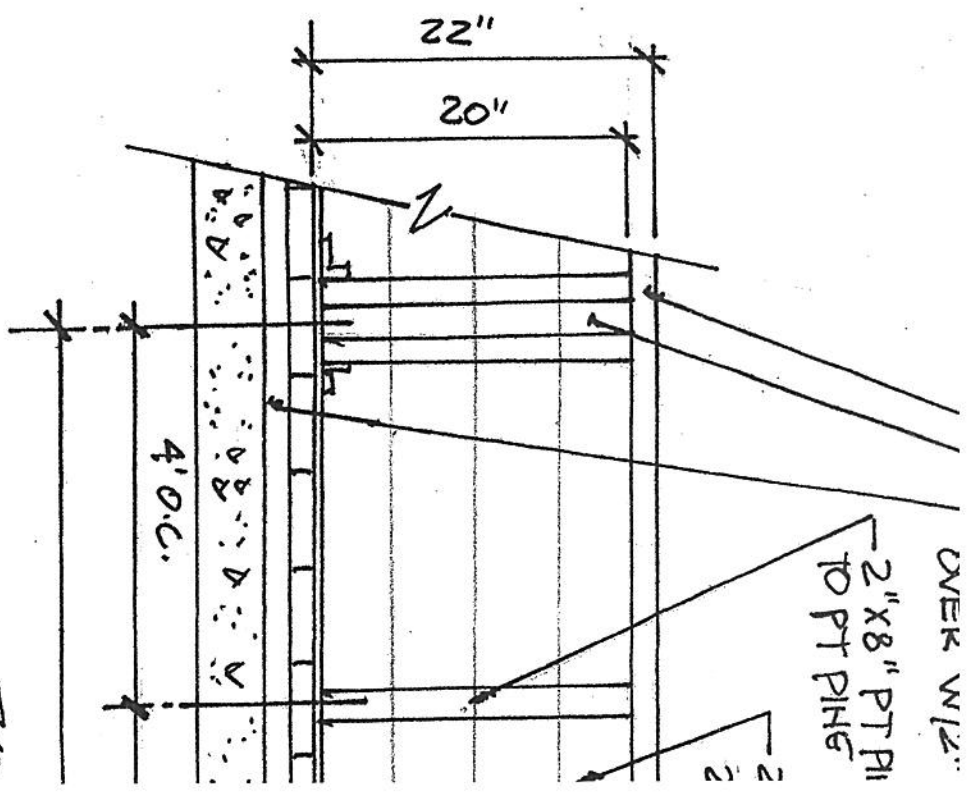
(Print Name)

STATE OF FLORIDA

COUNTY OF ORANGE

The foregoing instrument was acknowledged before me this _____ day of _____, 2016, by James W. Kersey, the Manager of Real Estate Collaborative, LLC, as the managing member of COLONNADE RETAIL, LLC. He/she is personally known to me or has produced _____ (type _____ as identification)

Notary Public (State of Florida)
My Commission Expires:



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