

THIS INSTRUMENT PREPARED BY:

Roy K. Payne, Esq.
Chief Assistant City Attorney
City of Orlando
400 S. Orange Avenue
Orlando, Florida 32801
(407) 246-2295

STREET RIGHT-OF-WAY UTILIZATION
and
ENCROACHMENT AGREEMENT

THIS AGREEMENT, made and entered into this ____ day of _____, 2016, by and between **CITY OF ORLANDO**, a Florida municipal corporation, (hereinafter referred to as “CITY”), whose mailing address is 400 S. Orange Avenue, Orlando, FL, 32802 and **WEDGEWOOD GROVES HOMEOWNER’S ASSOCIATION, INC.** a Florida non-profit corporation, whose mailing address is 2180 West SR 434, Ste. 5000, Longwood, Florida, 32779 (hereinafter referred to as the “ASSOCIATION”).

RECITALS:

WHEREAS, ASSOCIATION represents homeowners in the Wedgewood Groves Neighborhood located in the City of Orlando, east of Conway Gardens Road and west of Watauga Avenue, as shown in **Exhibit “A,”** attached hereto, “Subject Property;” and

WHEREAS, CITY owns right-of-way adjacent to the Subject Property, known as Watauga Avenue, “Right-of-Way,” also as shown in Exhibit “A;” and

WHEREAS, pursuant to an Agreement entered into between the CITY and ASSOCIATION on August 29, 1994, “Original Agreement,” the Right-of-Way is currently closed to vehicular traffic at the intersections of Watauga Avenue and Grant Street and Watauga Avenue and Brandy Street, “Intersections;” and

WHEREAS, the Intersections are currently open to pedestrian travel; and

WHEREAS, the ASSOCIATION represents that it has the full support of the homeowners in the Wedgewood Groves Neighborhood and has requested that the CITY authorize ASSOCIATION’s use of the Right-of Way for the construction, operation and maintenance of a fence, “Fence,” and attendant landscaping and other such improvements, at each Intersection location, “Project;” and

WHEREAS, the Project includes those areas shown in Exhibit “A” that will be located on the Watauga Avenue side of the Fence; and

WHEREAS, the ASSOCIATION’s construction and maintenance of the Project constitutes a public purpose by improving public safety in the area.

NOW, THEREFORE, for and in consideration of the mutual covenants herein contained, and other good and valuable consideration, the sufficiency of which is hereby acknowledged by the parties hereto, the parties agree as follows:

1. Recitals. The foregoing Recitals are true and correct and incorporated into the substantive body of this Agreement.
2. Encroachment/Utilization. The CITY hereby grants permission for the utilization of, and encroachment into, the Right-of-Way strictly limited to ASSOCIATION’s construction, maintenance and operation of the Project as shown in Exhibit “A.”
3. Release. ASSOCIATION hereby releases the CITY, its representatives, employees and elected officials from any and all damages, claims, or liability arising under this Agreement, including, though not exclusively, the CITY’s termination of this Agreement pursuant to Paragraph 16, below.
4. Priority of City Right-of -Way. ASSOCIATION’s utilization of the Right-of-Way is subordinate to, and shall not be operated or maintained in such a manner so as to interfere with, the CITY’s operation or maintenance of its Right-of-Way or property, including, though not exclusively, any public or general utility and stormwater drainage improvements located thereon.
5. Project. ASSOCIATION is responsible for the design of the Project. Prior to ASSOCIATION’s submittal of a permit application to the CITY for construction of the Project, ASSOCIATION shall obtain approval of the design from the CITY’s Streets and Stormwater Division. The design of the Project shall be consistent with Exhibit “A” and reasonable engineering standards and will not interfere with existing utilities, including, though not exclusively, storm water facilities. The ASSOCIATION agrees, at its sole cost and expense, to install, construct, maintain and operate the Project consistent with CITY Code and reasonable engineering standards and all applicable laws, codes, and regulations. ASSOCIATION is solely responsible for the Project and all liability arising therefrom. Furthermore, ASSOCIATION is solely responsible for maintaining the Project and the Right-of-Way on which the Project is located in a reasonable manner and consistent with CITY standards.

6. Environmental Contamination. ASSOCIATION hereby accepts the Right-of-Way in its present ("as is") condition, and warrants that the Project area shall not be used, nor will ASSOCIATION allow it to be used, for any purposes other than the Project. ASSOCIATION shall ensure that there is no discharge of hazardous, toxic, flammable or other dangerous chemicals, goods, items or materials on, over or within the Right-of-Way. If ASSOCIATION breaches its obligations set forth herein, ASSOCIATION shall release, indemnify, defend and hold CITY harmless from and against any and all claims, judgments, damages, penalties, fines, costs, liabilities or losses including reasonable attorney's fees which may arise during or after the term of this Agreement as a result of such contamination.
7. No Waiver/No Vesting. This Agreement does not constitute a waiver of the CITY's regulatory authority and the Project remains subject to City Code and all other applicable laws, rules, codes and regulations. ASSOCIATION must still obtain any and all necessary permits from the CITY for construction, maintenance and operation of the Project and this Agreement does not operate to vest any interest or right whatsoever.
8. Insurance. ASSOCIATION shall possess and maintain, at all times during the construction, operation and maintenance of the Project within the Right-of-Way, general liability insurance in the amount of at least \$1,000,000, in order to protect the CITY from any liability, claims, damages, losses or expenses arising from or out of in any way connected with this Agreement and the construction, operation or maintenance of the Project and the Right-of-Way. CITY shall be listed as an additional insured on the automobile and general liability policies. Each of the above liability policies shall contain a contractual liability endorsement in favor of the CITY and shall provide that the CITY will receive written notice prior to termination of coverage. Said insurance shall also be primary, and not contributory, as to any insurance coverage maintained by CITY of Orlando. This provision shall survive termination of this Agreement to the extent necessary to protect the CITY from liability arising during the term of this Agreement. Nothing herein operates as a waiver of the CITY's grant of sovereign immunity or the limits of liability established under Florida law. The Certificate of Insurance, which has been reviewed and approved by the CITY, is attached hereto as **Exhibit "B"**, incorporated herein by reference.
9. Indemnification. The ASSOCIATION agrees that it shall indemnify, hold harmless and defend the CITY, its representatives, employees and elected and appointed officials from and against all liability, claims, damages, loss and expenses of any sort including reasonable attorney's fees and costs including appeals, in any way arising

out of or resulting from (i) this Agreement, and (ii) the construction, operation and maintenance of the Project and the Right of Way, except to the extent that any such liability, claims, damages, loss and expenses arise from the negligence of CITY.

10. Representatives Bound Hereby. This Agreement shall be recorded and shall be binding upon the successors, heirs, executors, administrators, representatives, or assigns of the ASSOCIATION, and upon all persons acquiring an interest thereunder.

11. 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. The parties to this Agreement agree to comply with all applicable federal, state, and local laws, ordinances, rules and regulations pertaining to the utilization of the property under this Agreement.

12. Miscellaneous.

- a. 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.
- b. 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.

13. Legal Counsel. ASSOCIATION acknowledges that it has had ample opportunity to seek and consult with independent legal counsel prior to executing this Agreement,

and that ASSOCIATION represents and warrants that it has sought such independent legal advice and counsel.

14. Attorney's Fees. In the event there is a dispute between the Parties regarding the terms and/or enforceability of this Agreement, the prevailing party in such an action shall be entitled to recover reasonable attorney's fees incurred to take any actions, through litigation or otherwise, to enforce this Agreement.
15. 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, no party is 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.
16. Termination of License and Removal of Project. The ASSOCIATION acknowledges and agrees that the CITY has the right to revoke this License and terminate this Agreement (without liability to ASSOCIATION) at any time and for any reason or no reason at all, by providing written notification, "Notice," to the ASSOCIATION at the address listed in the initial paragraph of this Agreement. The Notice shall provide the date of termination of this Agreement and License which date shall be no less than five days from the date of the Notice. Within twenty (20) days of the date of termination contained in the Notice, ASSOCIATION shall begin and diligently pursue removal of the Project and any and all attendant improvements and property, from the Right-of-Way, and restore the Right-of-Way to its condition existing on the Effective Date of this Agreement. If the ASSOCIATION fails to remove the Project and attendant improvements and property, within sixty (60) days timeframe, the CITY may remove same and charge the cost of removal to the ASSOCIATION. Should the ASSOCIATION fail to pay the costs of CITY's removal of the Project and attendant improvements within thirty (30) days of the CITY's request, the CITY may file a lien against ASSOCIATION property within the Subject Property to accrue interest at the statutory rate. Said lien may be enforced as provided by law.
17. License. This Agreement constitutes a License and does not rise to the level of a real property interest in the CITY's Right-of-Way.
18. Effective Date. The effective date of this Agreement shall be the date of full execution by both parties.

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

ATTEST:

CITY OF ORLANDO, FLORIDA, a municipal corporation, organized and existing under the laws of the State of Florida

By: _____
Amy T. Iennaco, Interim City Clerk

By: _____
Mayor / Mayor Pro Tem

Date: _____

STATE OF FLORIDA
COUNTY OF ORANGE

The foregoing was acknowledged before me this ____ day of _____, 20__, by _____, and _____, to me known as the Mayor/ Mayor Pro Tem and Interim 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: _____

TWO WITNESSES:

WEDGEWOOD GROVES HOMEOWNER'S ASSOCIATION, INC., a Florida non-profit corporation (CORPORATE SEAL)

Print Name: _____

By: _____

Print Name: _____

Title: _____

Print Name: _____

STATE OF FLORIDA
COUNTY OF ORANGE

The foregoing was acknowledged before me this ____ day of _____, 20__, by _____, as _____ of **WEDGEWOOD GROVES HOMEOWNER'S ASSOCIATION, INC.**, a Florida non-profit corporation, who acknowledged before me that they have executed the foregoing for the purposes therein expressed, and that they were duly authorized to do so.

AFFIX NOTARY STAMP

(Print Notary Name)
My Commission Expires: _____
Commission No.: _____
____ Personally known, or
____ Produced Identification

EXHIBIT “A”

EXHIBIT “B”