

THIS INSTRUMENT PREPARED BY:

Roy K. Payne
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 _____, 20____, by and between **CITY OF ORLANDO**, a Florida municipal corporation, (hereinafter referred to as “CITY”), and **ONE NORTH ORANGE, LLC**, a Florida limited liability company, whose address is 770 N. Halsted Street, Ste. 306, Chicago, IL, 60642, (hereinafter referred to as the “OWNER”).

RECITALS:

WHEREAS, OWNER owns certain property, “Subject Property,” within the City of Orlando located at 1 North Orange Avenue, in the northeast quadrant of Central Boulevard and Orange Avenue; and

WHEREAS, OWNER intends to develop the Subject Property as a boutique hotel containing less than one hundred (100) rooms, “Hotel” together with ancillary uses; and

WHEREAS, in conjunction with operation of the Hotel, OWNER has requested that the CITY allow OWNER to utilize portions of the CITY right-of-way for Central Boulevard, “Right-of- Way,” immediately west of Orange Avenue for a valet parking operation, “Valet Parking,” as shown in **Exhibit “A”**, attached hereto and made a part hereof by reference; and

WHEREAS, in order to conduct Valet Parking, OWNER must construct a valet parking lane with attendant improvements, “Project,” within the southern fourteen (14) feet of the Right-of-Way, as shown on **Exhibit “A”** attached hereto and made a part hereof; and

WHEREAS, Orlando City Code requires that the OWNER enter into an agreement providing for (i) utilization of the Right-of-Way for Valet Parking, (ii) encroachment of the Project into the Right-of-Way and (iii) removal of the Project; and

WHEREAS, the Valet Parking, the Project and the Hotel will continue to be subject to all applicable provisions of the Orlando City Code and any other applicable government regulation.

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 the manner and extent of the Valet Parking, and the Project as described in **Exhibit "A."**
3. Valet Contractor. The parties acknowledge that OWNER intends to contract with a valet contractor, "Valet Contractor," to operate the Valet Parking. Prior to use of the Right-of-Way for Valet Parking, OWNER shall submit the qualifications of the proposed Valet Contractor to CITY for review and approval, which approval shall not be unreasonably withheld. This paragraph does not constitute a waiver of the CITY's regulatory authority and LICENSEE or LICENSEE's assignee, must still obtain any and all necessary permits from the CITY for the operation of valet services under City Code and applicable law.
4. Release. OWNER hereby releases the CITY, its representatives, employees and elected officials from any and all damages, claims, or liability arising under this Agreement and the CITY's operation and maintenance of the Right-of-Way, including, though not exclusively, the CITY's termination of this Agreement pursuant to Paragraph 16, below.
5. Priority of City's Right-of Way. The Project and the Valet Parking are 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 improvements located thereon.
6. Project. The OWNER agrees, at its sole cost and expense, to install, conduct and operate the Project, and Valet Parking consistent with reasonable engineering standards and all applicable laws, codes, and regulations.
7. No Waiver/No Vesting. This Agreement does not constitute a waiver of the CITY's regulatory authority and the Project, Valet Parking, and the Hotel remain subject to all

applicable laws, rules, codes and regulations and OWNER must still obtain any and all necessary permits from the CITY for the operation of valet services under City Code and applicable law. This Agreement does not operate to vest any interest or right whatsoever.

8. Insurance. OWNER shall possess and maintain, at all times during the construction, operation and maintenance of the Project and Valet Parking within the CITY's Right of Way, 1) worker's compensation insurance in the amount of the Florida Statutory Limit; 2) automobile liability insurance of at least \$2,000,000; and 3) general liability insurance in the amount of at least \$2,000,000, 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 construction, operation or maintenance of the Project and Valet Parking. 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. 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. CITY may request proof of such insurance at any time.
9. Indemnification. The OWNER agrees that it shall indemnify, hold harmless and defend the CITY, its 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, in any way arising out of or resulting from (i) third parties associated with this Agreement; and (ii) any tort, intentional action, negligent act or omission of the OWNER, its employees, agents, assigns, tenants, contractors, subcontractors, or anyone for whose act or acts any of them may be liable, for acts or omissions occurring in the CITY's Right-of-Way or (iii) the operation or maintenance of the Project and Valet Parking.
10. Representatives Bound Hereby. This Agreement shall be recorded and shall be binding upon the successors, heirs, executors, administrators, representatives, or assigns of the OWNER, 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. OWNER acknowledges that it has had ample opportunity to seek and consult with independent legal counsel prior to executing this Agreement, and that OWNER 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 Encroachment. The CITY retains the right to revoke this License and immediately terminate this Agreement upon (i) a change of use occurring on the Subject Property so that it is no longer predominantly utilized as a Hotel and (ii) the CITY's determination that operation of the Project or the Valet Parking constitutes a danger to public safety or a significant impairment to traffic circulation in the area, by written notification to the OWNER within the time periods specified herein at the address listed in the initial paragraph of this Agreement. OWNER shall remove 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, within thirty (30) days of the date of receipt of the written notice to OWNER. If the OWNER fails to remove the Project and attendant improvements and property, within the above-described timeframe, the CITY may remove same and charge the cost of removal to the OWNER. Should the OWNER fail to pay the costs of CITY's removal of the Project and attendant encroachments within thirty (30) days of the CITY's request, the CITY may file a lien against the Subject Property to accrue interest at the statutory rate.
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 on which OWNER receives a permit from the CITY to construct the Hotel (the "Hotel Permit"). In the event OWNER does not receive a Hotel Permit on or before December 31, 2016, this Agreement shall become null and void and have no further effect.

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

Attest:

CITY OF ORLANDO

Alana C. Brenner, City Clerk

Mayor / Mayor Pro Tem

STATE OF FLORIDA
COUNTY OF ORANGE

The foregoing instrument was acknowledged before me this ____ day of _____, 20__, by _____, and Alana C. Brenner, to me known as the Mayor/ 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: _____

TWO WITNESSES:

**ONE NORTH ORANGE, LLC,
a Florida limited liability company**

Print Name: _____

By: _____

Print Name: _____

Print Name: Marc Bortz
Title: Manager

STATE OF FLORIDA
COUNTY OF ORANGE

The foregoing instrument was acknowledged before me this ____ day of _____, 2014, by Marc Bortz, as the Manager of One North Orange, LLC, a Florida limited liability company.

AFFIX NOTARY STAMP

Signature of Notary Public
My Commission Expires: _____
Commission No.: _____
**Personally known, or
Produced Identification**
Type of Identification Produced

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

_____, 2014.

Chief Assistant City Attorney

EXHIBIT "A"

