

PREPARED BY AND RETURN TO:
Roy K. Payne, Esquire
Chief Assistant City Attorney
City of Orlando
400 S. Orange Avenue
Orlando, Florida 32801
407-246-2295

MAINTENANCE AGREEMENT

This Maintenance Agreement, entered into this ____ day of _____, 2015, by and between the **City of Orlando**, a municipality duly enacted under the laws of the State of Florida, whose address is 400 South Orange Avenue, Orlando, Florida, 32802, (the “City”), and **Pizzuti Sevens LLC**, a Delaware limited liability company, whose mailing address is 629 North High Street, Suite 500, Columbus, Ohio, 43215, (the “Owner”).

Recitals

WHEREAS, Owner is the owner of certain real property located at 777 North Orange Avenue, more particularly described in **Exhibit “A”**, attached hereto and made a part hereof by reference, (hereinafter referred to as “Property,”) in the City of Orlando; and

WHEREAS, Owner is building a 333-unit apartment complex, known as The Sevens Apartments, “Project,” on the Property; and

WHEREAS, in conjunction with the development of the Project, City and Owner have agreed that Owner will install certain landscaping and sidewalk improvements, (the “Improvements”), as shown in **Exhibit “B”**, attached hereto and made a part hereof by reference; and

WHEREAS, a portion of the Improvements will be constructed and maintained within the right-of-way for Orange Avenue, owned by the Florida Department of Transportation (FDOT), (the “FDOT Right-of-Way”) also as shown in Exhibit “B”; and

WHEREAS, the area for construction and maintenance of the Improvements, including the FDOT Right-of-Way, is referred to herein as (the “Maintenance Area”); and

WHEREAS, concurrently with the execution of this Agreement, City and FDOT will enter into a Landscape, Construction and Maintenance Memorandum of Agreement, (the “FDOT Agreement”), whereby the City assumes the installation and maintenance responsibilities for the Improvements; and

WHEREAS, City and Owner acknowledge that the Improvements are a benefit to the City as well as an integral part of the overall development of the Project and agree that it is in both parties’ best interests that the Improvements be properly installed and maintained; and

WHEREAS, City and Owner intend, by this Agreement, to transfer the City’s responsibility, under the FDOT Agreement, related to installing and maintaining the Improvements to Owner; and

WHEREAS, City and Owner acknowledge that installation and maintenance of the Improvements within the FDOT Right-of-Way, as shown in Exhibit “B”, and as memorialized in the FDOT Agreement and this Agreement, constitutes a public purpose by separating the sidewalk from the travel lanes and providing for the installation of landscaping between the travel lanes and the sidewalk and allows for more efficient and productive development of the Property; and

WHEREAS, the parties hereto desire to memorialize their agreement.

W I T N E S S E T H

NOW, THEREFORE, in consideration of the mutual covenants herein contained, the sufficiency of which is hereby acknowledged, the parties agree as follows:

1. Recitals. The above recitals are true and correct and hereby incorporated into the substantive body of this Agreement.

2. Construction of Improvements. Owner, at its sole cost and expense, shall construct and install the Improvements, as shown in Exhibit “B”, consistent with reasonable engineering standards and all applicable laws, codes, and regulations, including any City or FDOT permits and furthermore, consistent with the terms of the FDOT Agreement, which is attached hereto as **Exhibit “C,”** and incorporated herein by reference. The Improvements shall be constructed and installed prior to the issuance of a certificate of occupancy for any portion of

the Project. Owner shall initiate construction and installation of the Improvements within thirty (30) days of the Effective Date of this Agreement and shall diligently pursue completion of said construction and installation.

3. Maintenance of Improvements. Owner shall be solely responsible for maintaining the Improvements and all costs associated therewith, in compliance with FDOT standards and consistent with this Agreement and the FDOT Agreement. In particular, Owner shall comply with the Maintenance Plan attached to the FDOT Agreement, as Exhibit “B”. In addition Owner shall maintain the portion of the sidewalk outside of the FDOT Right-of-Way which adjoins and/or connects to the portions of the sidewalk located within the Maintenance Area, as shown on Exhibit “B”

Under the terms of this Agreement, City shall not be responsible for maintaining or repairing any portion of the Improvements. Owner shall within thirty (30) days of this Agreement provide to the City a proposed schedule, “Maintenance Schedule”, of maintenance activities, consistent with the Maintenance Plan attached to the FDOT Agreement as Exhibit “B.” Owner shall revise the Maintenance Schedule to accommodate the City’s or FDOT’s comments or concerns. Owner shall not commence any maintenance activities prior to City approval of the Maintenance Schedule. Any requested changes to the approved Maintenance Schedule shall be submitted to the City in writing and are subject to City review and approval. Except in the case of an emergency, Owner shall only enter upon the Maintenance Area to carry out construction and maintenance activities, as authorized by this Agreement and the FDOT Agreement. Any default or inadequacy in Owner’s performance under this Agreement, after written notice and sixty (60) days opportunity to cure, shall be deemed a violation of conditions of the City’s approval of the Project and shall further entitle the City to terminate this Agreement and/or to pursue any remedy at law or in equity.

Owner acknowledges that any and all activities within the FDOT Right-of-Way are subject to FDOT regulation and approval, to which regulation the Owner hereby consents, and that any such activities shall be conducted in strict compliance with all applicable laws, rules, standards and regulations, including the FDOT Agreement.

In the event of damage to FDOT or City property, or any other property arising from Owner’s activities, or the activities of anyone for whom Owner is responsible, under this Agreement, the Owner, at its sole cost and expense, must immediately undertake and complete

repairs to said property. Owner must have repair plans prepared by a specialty engineer, who has been approved in advance by the FDOT and as defined by current Florida Department of Transportation Standard Specifications. The plans that Owner prepares to repair the damage must be reviewed and approved in advance by the City and FDOT, and City and FDOT must inspect and approve the completed repairs prior to the release of Owner from its repair obligation.

City has the right, but not the duty or obligation, to inspect the Improvements at any time. In the event Owner fails to construct or maintain the Improvements in good condition and in accordance with this Agreement, the FDOT Agreement and applicable laws and regulations, the City may give Owner written notice thereof and Owner shall be obligated to conduct such repair or maintenance and correct such deficiency within a reasonable period of time. In the event Owner fails to maintain the Improvements and correct any such deficiency within a reasonable time after such written notice by the City, then the City shall have the right, but not the obligation, to correct any such deficiency and Owner shall then reimburse the City for the City's reasonable expenses in connection therewith, no less than sixty (60) days after written request by the City, failing which the full amount shall bear interest at the highest rate allowed by law and shall become a lien in favor of the City upon the Property. Such liens shall become effective upon the filing of a Claim of Lien by the City in the Official Records of Orange County, Florida and may be foreclosed in the manner as provided by Florida law. The City's conduct of remedial action shall not operate to impose any obligation, responsibility or liability whatsoever upon the City. Furthermore, nothing herein operates to impose any obligation, responsibility or liability upon the City with respect to the construction, operation or maintenance of the Improvements under this Agreement.

4. City's Reliance. Owner confirms that it has reviewed, and is fully aware of, the FDOT Agreement and shall comply with the terms thereof. Owner acknowledges that even though Owner is solely responsible for installing and maintaining the Improvements under this Agreement, FDOT will ultimately hold the City responsible for said installation and maintenance under the terms of the FDOT Agreement. City would therefore not enter into the FDOT Agreement or this Agreement if not for the representations and obligations of Owner contained herein.

5. Removal. It is understood between the parties hereto that the landscaping covered by this Agreement may be removed, relocated or adjusted by the FDOT at any time in the future as determined to be necessary by the FDOT in order that the state road be widened, altered or otherwise changed. The Owner shall be given sixty (60) calendar days' notice to remove said improvements after which time the FDOT may remove the same, with Owner being responsible for the cost of removal.

6. Notices. Any notices which may be permitted or required hereunder shall be in writing and shall be deemed to have been duly given as of the date and time the same are personally delivered, transmitted electronically or within three (3) days after depositing with the United States Postal Service, postage prepaid by registered or certified mail, return receipt requested, or within one (1) day after depositing with Federal Express or other overnight delivery service from which a receipt may be obtained, and addressed as follows:

City:	Attn: City Engineer City of Orlando, Florida 400 South Orange Ave. Orlando, Florida 32802 Telephone: 407-246-3222 Facsimile: 407-246-2266
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Owner:	Attn: Scott West Pizzuti Sevens, LLC 629 North High Street, Suite 500 Columbus, Ohio 43215 Telephone: 614-280-4000 Facsimile: 614-280-5000
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With Copy to:	Attn: Rebecca Wilson, Esq. Lowndes, Drosdick, Doster, Kantor & Reed, P.A. 215 N. Eola Drive Orlando, Florida 32801 Telephone: 407-418-6250 Facsimile: 407-843-4444
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or to such other address as either party hereto shall from time to time designate to the other party by notice in writing as herein provided.

7. Modification. This Agreement may not be amended, modified, altered, or changed in any respect whatsoever, except by a further Agreement in writing duly executed by the Parties and recorded in the Public Records of Orange County, Florida.

8. Successors and Assigns. The terms and conditions of this Agreement shall constitute covenants running with the land, and all rights and privileges granted herein shall be appurtenant to the lands herein described, and, except as hereinafter set forth, shall run with said lands forever and be binding upon and inure to the benefit of and be enforceable by the heirs, legal representatives, successors and assigns of the Parties hereto and shall continue in perpetuity, unless otherwise modified in writing by the Parties hereto. All obligations of the Parties hereunder shall be binding upon their respective successors-in-title and assigns; provided the covenants and obligations herein are only personal to and enforceable against the Parties or successors-in-title, as the case may be, owning title to the respective properties at the time any liability or claim arising under this Agreement shall have accrued, it being intended that upon the conveyance of title by a Party, the Party conveying title shall thereupon be released from any liability hereunder as to the property conveyed for any breach of this Agreement or claim arising under this Agreement accruing after the date of such conveyance.

9. Entire Agreement. This Agreement constitutes the entire agreement between the Parties hereto with respect to the transactions contemplated herein, and it supersedes all prior understandings or agreements between the Parties.

10. Attorneys' Fees. In the event of any dispute hereunder or of any action to interpret or enforce this Agreement, any provision hereof or any matter arising herefrom, the prevailing party shall be entitled to payment of its costs, fees and expenses, including, but not limited to, witness fees, expert fees, consultant fees, attorney (in-house and outside counsel), paralegal and legal assistant fees, costs and expenses and other professional fees, costs and expenses whether suit be brought or not, and whether in settlement, in any declaratory action, at trial or on appeal.

11. Relationship Between the Parties. Nothing contained in this Agreement, nor the relationship between the parties which may arise as a result of the provisions of this Agreement, are intended to, or shall be construed as, creating a partnership, joint venture, or other such relationship as between the Parties.

12. Section Headings. The section headings as used herein are for convenience of reference only and shall not be deemed to vary the content of this Agreement or the covenants, agreements, representations and warranties herein set forth, or limit the provisions or scope of any section herein.

13. Severability. This Agreement is intended to be performed in accordance with, and only to the extent permitted by, all applicable laws, ordinances, rules and regulations. If any provision of this Agreement or the application thereof to any person or circumstance shall, for any reason and to any extent, be invalid or unenforceable, the remainder of this Agreement and the application of such provision to other persons or circumstances shall not be affected thereby, but rather shall be enforced to the greatest extent permitted by law.

14. Recording of Agreement. Owner shall be responsible for recording this Agreement (including all costs associated therewith) within the Public Records of Orange County, Florida and shall send a copy of said recorded Agreement to the City within 30 days of the execution of this Agreement.

15. Counterpart Execution. This Agreement may be executed in counterparts, each of which shall constitute an original, but all taken together shall constitute one and the same instrument.

16. Right-of-Way Encroachment Agreement. If any City right-of-way is affected by construction or maintenance of the Improvements, the City and Owner shall enter into a Right-of-Way Encroachment Agreement with regards to construction of the Improvements within City right-of-way.

17. Governing Law. This Agreement shall be governed by and construed under the laws of the State of Florida.

18. No Waiver/No Vesting. Nothing in this Agreement operates as a waiver of the City's regulatory authority or a vesting of rights.

19. Effective Date. This Agreement shall become effective upon full and complete execution by the parties hereto.

20. Payment & Performance Bonds. Owner shall require the contractor for construction of the Improvements, "Contractor", to obtain performance and payment bonds, prior to commencement of construction of the Improvements and in a form acceptable to the City and FDOT, with the penal amount of each bond equal to the contract amount for the Improvements.

The Surety must be authorized to issue bonds in Florida, must be listed in the most recently issued United States Department of the Treasury's "Companies Holding Certificates of Authority as Acceptable Sureties on Federal Bonds and as Acceptable Reinsuring Companies," as published in the Federal Register and is subject to the final approval of the City. The City and FDOT shall be listed as additional obligees on each bond. Owner shall act diligently to prevent construction liens from being filed and if a lien is filed, Owner shall immediately take the requisite action to have the lien removed.

21. Indemnification. Owner shall indemnify, release and hold harmless the City, its agents, employees and elected and appointed officials, from and against all claims, damages, losses and expenses (including all costs and attorney's fees and all costs and attorney's fees on appeal), to the extent arising out of or resulting from Owner's construction, installation and maintenance of the Improvements, or which are caused in whole or in part, directly or indirectly, by Owner or any of its contractors, subcontractors, anyone directly or indirectly employed by any of them, or anyone for whose acts any of them may be liable.

22. Insurance. Owner shall at all times during the term of this Agreement, possess or required its contractor(s) to possess: 1) worker's compensation insurance in the amount of the Florida Statutory Limit; 2) automobile liability insurance of at least \$1,000,000; and 3) general liability insurance in the amount of at least \$5,000,000. All liability insurance shall be maintained throughout the course of the construction, installation and maintenance of the Improvements and for a period of time thereafter as required by the City in order to protect the City from any liability, claims, damages, losses or expenses arising from or out of or in any way connected with this Agreement, and construction, installation and maintenance of the Improvements. City and FDOT shall be listed as additional insureds on the automobile and general liability policies of insurance and each policy shall contain a contractual liability endorsement in favor of the City. Owner shall provide proof of such insurance coverages, as described above, ten (10) days prior to commencement of construction of the Improvements and ten (10) days prior to the commencement of maintenance of the Improvements, respectively. 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.

23. Warranty/Maintenance Bond. Upon completion of the Improvements, Owner shall obtain from the Contractor, a two-year warranty (in a form reasonably acceptable to the City) on the materials and work performed with regard to the Improvements. City and FDOT shall be named as additional beneficiaries of the warranty/bond. The commencement date of the warranty/bond shall be the date upon which the Improvements are completed unless otherwise agreed by the parties.

24. Non-Conforming Work. In the event work is discovered, whether by the City or Owner, its consultants or contractors, which is defective or otherwise non-conforming to the requirements of this Agreement or the FDOT Agreement or any applicable permits, the City or Owner, shall promptly notify the other party of such defect or non-compliance. Owner shall immediately cause such work to be removed and replaced with conforming work or otherwise remedy the non-conforming to the satisfaction of the City. Any costs associated with correcting such deficient work shall be borne by Owner.

25. Certificate of Completion. Upon completion of the Improvements, the City shall conduct a final inspection. If the City determines that all work has been completed in conformance with the permitted Plans, this Agreement, the FDOT Agreement and any other applicable construction, permitting or engineering requirements, City shall notify Owner in writing. Upon receipt of the City's notice, Owner shall cause the Contractor to submit a final completion certification of the Improvements to Owner and City. This certification shall be accompanied by the As-Built drawings as well as any necessary warranties, waivers and releases from contractors, subcontractors and suppliers, test certifications, operation manuals and documentation of approval of the construction by governmental agencies having jurisdiction other than the City, if any. The City's approval under this subparagraph does not operate to impose any liability or responsibility on the City with respect to the Improvements, which remain the sole and exclusive responsibility of Owner under this Agreement. If, during the City's inspection, the City discovers deficiencies in construction of the Improvements, City shall notify Owner in writing. Owner shall, at its sole cost, repair or remedy the referenced deficiencies to the satisfaction of the City.

26. Independent Contractors. Owner, its agents, contractor(s), subcontractors or design engineer, shall perform all activities that are outlined in this Agreement as independent entities and not as agents, employees or representatives of the City, or their employees or

representatives. Nothing herein operates to impose any obligation, responsibility or liability upon the City with respect to the Improvements.

27. Coordination with City/Reports. Owner shall coordinate with the City during all phases of the construction and maintenance of the Improvements and shall incorporate the City's comments and concerns as much as reasonably practicable. City will be entitled at all times to be advised, at its request, as to the status of work being done by Owner and of details thereof. Either party to the Agreement may request and shall, within a reasonable time thereafter be granted a conference with the other party.

28. Termination. Owner or City may terminate this Agreement at any time and for any reason, upon thirty (30) days written notice to the non-terminating party. In the event of termination by either party, Owner shall remove any and all of the landscape portion of the Improvements, within thirty (30) days of the date of mailing of the written notice, whether or not the notice is received, unless the City agrees in writing to the abandonment and acceptance of the Improvements so installed. If the Owner fails to remove the landscaping portion of the Improvements, within the above-described timeframe, the City may remove same without liability to Owner. City shall be entitled to recover the cost of removing the Improvements as provided in Paragraph 4, above.

29. License. This Agreement constitutes a License and does not rise to the level of a real property interest in the Maintenance Area or any other property or right of way.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed as of the date set forth above.

ATTEST:

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

By: _____
Celeste T. Brown, City Clerk

By: _____
Mayor / Mayor Pro Tem

Date: _____

STATE OF FLORIDA

COUNTY OF _____

The foregoing was acknowledged before me this _____ day of _____, 2015, by _____, as Mayor/Mayor Pro Tem, of City of Orlando, Florida, a municipal corporation, organized and existing under the laws of the State of Florida, on behalf of the City. He/she is personally known to me or has produced _____ as identification.

(Affix Notary Seal)

(Signature of Notary Public)

(Typed name of Notary Public)

Notary Public, State of Florida

Commission No. _____

My commission expires: _____

Signed in the presence of Two Witnesses:

PIZZUTI SEVENS LLC, a Delaware limited liability company

By: Pizzuti Sevens Holdings LLC, a Delaware limited liability company, its Sole Member

By: Pizzuti Park Lake LLC, an Ohio limited liability company, its Managing Member

Sign Name: _____
Print Name: _____

By: _____
Name: _____
Title: _____

Sign Name: _____
Print Name: _____

STATE OF _____

COUNTY OF _____

The foregoing Maintenance Agreement was acknowledged before me this ____ day of _____, 2015, by _____, as _____ of Pizzuti Park Lake LLC, Managing Member of Pizzuti Sevens Holdings LLC, as Sole Member of Pizzuti Sevens LLC, a Delaware limited liability company, on behalf of the company. He/she is personally known to me or has produced _____ as identification.

(Signature of Notary Public)

(Typed name of Notary Public)

Notary Public, State of Florida

Commission No. _____

My commission expires: _____

EXHIBIT “A”

EXHIBIT “B”

EXHIBIT “C”
FDOT Agreement