

**THIS INSTRUMENT PREPARED BY
AND RETURN TO:**

Roy K. Payne, Esq.
Chief Assistant City Attorney
400 S. Orange Avenue
Orlando, FL 32801
Roy.Payne@CityofOrlando.Net

UTILITY EASEMENT AGREEMENT

THIS UTILITY EASEMENT AGREEMENT (the “**Agreement**”) is made and entered into as of the ____ day of _____, 2016, by and between **THE BANCORP BANK**, a Delaware state chartered bank, whose address is 3755 Park Lake St., Orlando, FL 32803, (“**Owner**”), and the **CITY OF ORLANDO**, a municipal corporation organized and existing under the laws of the State of Florida (the “**City**”).

W I T N E S S E T H:

WHEREAS, the City is the owner of that certain roadway located in Orange County, Florida and known and hereinafter referred to as Park Lake Street (all such capitalized terms being defined below); and

WHEREAS, in connection with the construction of Owner’s improvements and the relocation of certain public sanitary sewer lines into the right-of-way of Park Lake Street, Owner intends to install the Private Utility Lines for the Private Utilities within the Utility Easement Property; and

WHEREAS, the City has agreed to grant to Owner an easement to allow Owner to install the Private Utility Lines for the Private Utilities within the Utility Easement Property in the right-of-way of Park Lake Street on the terms and conditions set forth herein.

NOW, THEREFORE, for an in consideration of the premises hereof, of the sum of Ten and no/100ths Dollars (\$10.00) paid by Owner to the City, and for other good and valuable considerations, the receipt and sufficiency of which are hereby acknowledged, Owner and the City hereby agree as follows:

1. **Recitals.** The recitals set forth above are true and correct and are incorporated herein by this reference.
2. **Definitions.** The following terms shall have the following meanings throughout this Agreement:

“**Park Lake Street**” means that certain roadway located in the City that runs from Herndon Avenue on the east.

“**Private Utilities**” means, among other things, waste water, chilled water, steam and condensate, electrical service and oxygen that will be inside the Private Utility Lines, as depicted in

Exhibit “A” attached hereto.

“**Private Utility Lines**” means those certain underground private utility lines to be installed by Owner within the Utility Easement Property in the Park Lake Street right-of-way that will contain and be for the Private Utilities.

“**Utility Easement Property**” means the area cross-hatched within the right-of-way of Park Lake Street as depicted in **Exhibit “A”** attached hereto and incorporated herein by this reference.

3. **Utility Easement.** The City hereby grants and conveys to Owner a perpetual, non-exclusive easement in, under, through and across the Utility Easement Property for purposes of installing the Private Utility Lines for the Private Utilities, and all activities incidental and related thereto. This Easement is strictly limited to the extent reasonably necessary to install, construct, use, operate, repair, replace and maintain the Private Utility Lines for the Private Utilities as permitted by the City, and may not be expanded to include any other utilities except as may be permitted by the City by amendment of this Agreement.

4. **Construction of the Utility Improvements.**

(a) **Review of Construction Plans.** Owner shall coordinate the design of the Private Utility Lines with City staff designated by the City’s Public Works Director. The City’s review herein is in addition to the City’s regulatory authority with respect to permitting the construction plans for the Private Utility Lines.

(b) **Insurance During Design, Installation and Construction of Private Utility Lines.** Owner shall require that the construction contractor (the “Contractor”), at all times during the construction, possesses: 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 \$3,000,000. All liability insurance shall be maintained throughout the course of the construction and for a period of time thereafter as required by the City in order to protect the City from any covered liability, claims, damages, losses or expenses arising from or out of in any way connected with the construction. The City shall be listed as an additional insured on the automobile, general liability, and builder’s risk policies. In addition, the Contractor shall also be required to purchase and possess builder’s risk, “all risk”, insurance covering physical loss and property damage, in the amount of at least the bid for the construction costs. Owner shall require the Contractor to provide to the City proof of such insurance coverages, as described above, ten (10) days prior to commencement of construction. In the alternative, Owner may provide, via its self-insured Owner Controlled Insurance Policy, the City-required coverages for general liability and workman’s compensation. In addition, Owner is the party carrying the builder’s risk on the project and will provide builder’s risk coverage to the City, as required by City Code.

(c) **Payment & Performance Bonds.** Owner shall require the Contractor to obtain performance and payment bonds, prior to commencement of construction and in a form acceptable to the City, with the penal amount of each bond equal to the contract amount. 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 shall be listed as an obligee on each bond. Owner shall act diligently to prevent construction liens from being filed on the property necessary for construction or operation of the Private Utility Lines. If a lien is filed, Owner shall take the requisite action to have the lien removed or bonded. If the Contractor is not currently carrying performance and payment bonds on this project, the Owner will reimburse the Contractor for the cost of performance and payment bonds or will provide the bonds to the City directly.

(d) **Warranty/Maintenance Bond.** Prior to certification by the City as described in subparagraph (e) below, Owner shall obtain from the Contractor a two-year warranty (in a form acceptable to the City) on the materials and work performed with regard to the Private Utility Lines. The City shall be named as additional beneficiary of the warranty/bond. The commencement date of the warranty/bond shall be the date upon which the Private Utility Lines are completed and certified by the City as described in subparagraph (e) below, unless otherwise agreed by the parties. If the Contractor is not currently carrying the cost of any City required bonds on the project, the Owner will elect to either reimburse the Contractor for the costs of providing the bonds to the City or provide the City-required bonds directly.

(e) **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 the construction plans which have been permitted by the City, 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 work to the satisfaction of the City. The City has final authority over the determination that certain work related to the Private Utility Lines is non-conforming or defective and that said non-conforming or defective work has been remedied, which determination shall be made in the City’s reasonable discretion in accordance with the City permitted construction plans. Any costs associated with correcting such deficient work shall be borne by Owner. In any such event, determinations by the City will be communicated by the City to Owner. Owner will then provide direction to the Contractor, who is the agent of Owner, to correct or remedy such deficient work. Owner shall be responsible for any additional costs for work that is objected to by the City, but which is in conformance with the City approved construction documents; provided, however, that the foregoing shall not create any obligation or liability on the part of Owner to undertake any corrective or remedial action on any work that is in conformance with the City approved construction documents.

(f) **Certification.** Upon completion of the Private Utility Lines and prior to opening the Private Utility Lines for use, the City shall conduct a final inspection. If the City determines in its reasonable discretion that all work has been completed in conformance with the permitted construction plans and any other applicable construction, permitting or engineering requirements, the City shall notify Owner in writing of said conformance. Upon receipt of the City’s written notification, Owner shall cause the Contractor to submit a final completion certification of the Private Utility Lines. 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 determination under this subparagraph does not operate to impose any liability or responsibility on the City with respect to the Private Utility Lines, which remains the sole and exclusive responsibility of Owner.

(g) **Independent Contractors.** Owner, its agents, Contractor, 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 Utility Easement Property or the construction, operation or maintenance of the Private Utility Lines.

5. **Insurance.** No later than the date Owner signs this Agreement, and throughout the remainder of the term of this Agreement, Owner shall maintain: 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 \$3,000,000 to protect the City from any liability arising from this Agreement or Owner's operation, repair and maintenance of the Private Utility Lines, or which is 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. The City shall be listed as an additional insured on the above-referenced liability policy. 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.

6. **Indemnification.** To the extent permitted by law 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), arising out of or resulting from this Agreement, construction, installation, operation, use, replacement or maintenance of the Private Utility Lines, or which are caused in whole or in part, directly or indirectly, by Owner or any of its subcontractors, anyone directly or indirectly employed by any of them, or anyone for whose acts any of them may be liable. Notwithstanding anything in this paragraph to the contrary, Owner shall not be liable for any claims, damages, losses and expenses (including any costs and attorney's fees and all costs and attorney's fees on appeal) arising out of or resulting from the City's gross negligence.

7. **Maintenance and Repairs.** The Private Utility Lines shall be constructed, installed, used, owned, maintained, replaced and repaired by Owner, and Owner hereby assumes any and all responsibility and liability with respect to, or arising from, or in any way associated therewith, including, though not exclusively, any and all damage to the City's roadway and any improvements located within the Park Lake Street right-of-way to the extent that said damage is caused by the operation, maintenance and repair of the Private Utility Lines. In the event Owner fails to maintain the Private Utility Lines in good condition and in accordance with applicable laws and regulations, or in the event that the operation, maintenance or repair of the Private Utility Lines has caused damage to the City's roadway or other improvements within the Park Lake Street right-of-way, the City may give Owner written notice thereof and Owner shall be obligated to promptly and diligently conduct such maintenance and/or correct such deficiency within a reasonable period of time, or within forty-eight (48) hours after written notice from the City, in the case of an emergency situation

if such maintenance and/or correction is commercially feasible to complete within forty-eight (48) hours. In the event Owner fails to maintain the Private Utility Lines and correct any such deficiency within the time period provided in the immediately forgoing sentence, 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 adjacent Owner 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, installation, use, operation or maintenance of the Private Utility Lines. In the event of an emergency situation resulting in an immediate threat to public health, safety or welfare, the City shall only be required to attempt to give reasonable written notice as provided herein, prior to taking action in accordance with this paragraph.

8. **Termination**. This Agreement may be terminated by mutual consent of the parties hereto or upon Owner's abandonment of the Private Utility Lines. Except as otherwise agreed by the parties, Owner shall remove the Private Utility Lines within one hundred eighty (180) days of termination of this Agreement, said removal to occur in compliance with any and all applicable rules, laws and regulations. If Owner fails to remove the Private Utility Lines within said one hundred eighty (180) day period, the City may do so, and, in such case, Owner shall 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 adjacent Owner real property. Nothing herein obligates the City to take any action to remove the Private Utility Lines, and the City's removal of the Private Utility Lines shall not operate to impose any obligation, responsibility or liability whatsoever upon the City with respect to this Agreement. Upon any such termination, this Agreement and all rights and obligations created hereunder shall be deemed null and void and of no further force or effect, except as otherwise provided herein.

9. **Defaults**. Failure by either party to comply with or perform any of the terms, conditions, covenants, agreements or obligations contained in this Agreement to be performed by each of them respectively, shall constitute a default under this Agreement, and (i) if such default is not cured or remedied within sixty (60) days after the non-defaulting party provides written notice to the defaulting party specifying with particularity the nature of such default, or (ii) if such default cannot be reasonably cured or remedied within such sixty (60) day period, the defaulting party fails to commence to cure or remedy the default within such sixty (60) day period and thereafter fails to diligently and expeditiously pursue such cure or remedy, then the non-defaulting party, in its sole discretion, shall be entitled to exercise any and all rights and remedies available to it under this Agreement, at law and in equity. In addition to the foregoing, upon any failure by Owner to cure a default as provided in the forgoing sentence, Owner shall pay to the City, as a penalty, the sum of ONE HUNDRED AND NO/100THS DOLLARS (\$100.00) per day for each and every day that any such default remains uncured.

10. **Litigation and Attorneys' Fees**. In the event either party to this Agreement should bring suit to enforce or interpret any provision hereof, each party shall be responsible for its own

attorneys' fees, experts' fees and costs, in addition to any other relief granted as a result of such litigation.

11. **Binding Effect.** The easement herein granted by the City shall run in favor of Owner. The terms and conditions of this Agreement shall run with the title to (i) the real property owned by Owner as of the date hereof, and (ii) the Utility Easement Property and shall be binding upon and inure to the benefit of the parties hereto and their respective successors and assigns.

12. **No Waiver of Regulatory Authority.** Owner acknowledges that the City is the entity responsible for issuing building permits and certain other types of permits which will be required in connection with activities on the Utility Easement Property and other property owned by Owner, and further acknowledges that nothing in this Agreement constitutes or is intended to operate as a waiver of such regulatory authority or the application of any applicable laws, rules or regulations. Furthermore, nothing herein operates to vest any particular manner or means of development of any property owned by Owner and nothing herein operates as an amendment of, or modification to, the development of regional impact that encumbers the Owner's property. Lastly, the Private Utility Lines and the Utility Easement Property remain subject to the City's police power and shall not be operated or utilized in any manner so as to interfere with the operation and maintenance of the City's right-of-way or any improvements located within said right-of-way.

13. **Estoppel Certificate.** Owner and the City shall execute and deliver to each other, within fifteen (15) days of any written request therefore by the other party, a certificate addressed as indicated by the requesting party and stating: (i) whether this Agreement is in full force and effect; (ii) whether this Agreement has been modified or amended in any respect; (iii) whether there are any existing defaults hereunder known to the party executing the certificate, and specifying the nature thereof; and (iv) such other matters as may be reasonably requested.

14. **Notices.** Any notices required or permitted under this Agreement, and copies thereof, shall be addressed to Owner and the City at the following addresses, or at such other addresses designated in writing by the party to receive notice:

City: City of Orlando
Public Works Director
400 S. Orange Avenue
Orlando, FL 32801

With a copy to: City of Orlando
City Attorney's Office
400 S. Orange Avenue
Orlando, FL 32801

Owner: The Bancorp Bank
3755 Park Lake St.
Orlando, FL 32803

Notices shall be either: (i) personally delivered (including delivery by Federal Express or other overnight courier service) to the addresses set forth above, in which case they shall be deemed delivered on the date of delivery; or (ii) sent by certified mail, return receipt requested, in which

case they shall be deemed delivered on the date shown on the receipt unless delivery is refused or intentionally delayed by the addressee, in which event they shall be deemed delivered on the date of deposit in the U.S. Mail.

15. **Amendment.** This Agreement may not be terminated, modified or amended except by an instrument in writing signed by each of the parties.

16. **Taxes/Fees.** Owner shall be responsible for the payment of all taxes or fees which may be assessed or levied against the Private Utility Lines and/or the Private Utilities, or any equipment or other personal property located therein, and all taxes or fees associated with Owner's use of the Utility Easement Property.

17. **Effective Date.** This Agreement shall become effective on the date of full and complete execution by all parties hereto.

IN WITNESS WHEREOF, Owner and the City have executed this Agreement in manner and form sufficient to bind them as of the day and year first written above.

Signed, sealed and delivered
in the presence of:

OWNER:

THE BANCORP BANK, a Delaware state
chartered bank

Print Name: _____

By: _____

Print Name: _____

Print Name: _____

Title: _____

STATE OF _____
COUNTY OF _____

The foregoing instrument was acknowledged before me this ____ day of _____, 2016, by _____, as the _____ of **THE BANCORP BANK,** a Delaware state chartered bank, on behalf of the bank.

Signature of Notary Public

(Print Notary Name)

My Commission Expires: _____

Commission No.: _____

Personally known, or

Produced Identification

Type of Identification Produced

AFFIX NOTARY STAMP

ATTEST:

CITY OF ORLANDO

Amy T. Iennaco, Interim City Clerk

By: _____
Mayor / Pro Tem

**STATE OF FLORIDA
COUNTY OF ORANGE**

PERSONALLY APPEARED before me, the undersigned authority, _____ and, Amy T. Iennaco, well known to me and known by me to be Mayor / Mayor Pro Tem and Interim City Clerk, respectively, of the City of Orlando, Florida, and acknowledged before me that they executed the foregoing instrument on behalf of the City of Orlando as its true act and deed, and that they were duly authorized so to do.

WITNESS my hand and official seal this _____ day of _____, 2016.

Notary Public
Print Name: _____
My Commission expires:

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

Chief Assistant City Attorney
_____, 2016

EXHIBIT "A"