

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 **SILVER METEOR CENTER, LLC**, a Florida corporation, whose mailing address is 6345 Markham Woods Road, Lake Mary, Florida, 32746 (hereinafter referred to as the “OWNER”).

RECITALS:

WHEREAS, OWNER owns certain property, “Subject Property,” within the City of Orlando located at 2800 Pennington Road, at the southerly terminus of Pennington Road, south of Hazelhurst Avenue; and

WHEREAS, the Subject Property is currently developed as a propane gas storage and distribution facility, known as Discount Propane, in several warehouse buildings with an attendant surface parking lot, “Development;” (See **Exhibit “A”** attached hereto and made a part hereof by reference); and

WHEREAS, the CITY owns right-of-way adjacent to (east of) the Subject Property, shown as Unnamed Road, “Right-of-Way,” in **Exhibit “A;”** and

WHEREAS, the Right-of-Way is currently unimproved but there is a possibility that a roadway will be constructed within the Right-of-Way at a future date in order to provide better traffic circulation in the area; and

WHEREAS, in conjunction with operation of the Development, OWNER has requested that the CITY authorize OWNER fence and maintain²s-use-of the Right-of Way, to ~~fence in and further~~ help secure the Development from trespassers and illegal dumping, “Fencing”; and

WHEREAS, termination of this Agreement and OWNER's loss of ~~use of the area~~ ~~any~~ established by the Fencing will not render the Development non-conforming under Code; and

WHEREAS, OWNER's assumption of maintenance and other obligations related to the Right-of-Way will benefit the CITY through cost savings and a transfer of the primary responsibility for security and maintenance; and

WHEREAS, Orlando City Code requires that the OWNER enter into an agreement providing for (i) utilization of the Right-of-Way for placement and maintenance of Fencing; (ii) encroachment of said Fencing into the Right-of-~~W~~ay and (iii) removal of said Fencing upon termination of this Agreement; and

WHEREAS, the Fencing, the Development and the Subject Property remain subject to all applicable provisions of the 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 Owner's construction and maintenance of the Fencing as shown in **Exhibit "A."** During the term of this Agreement, Owner' use of the Right-of-Way will be limited to clearing and maintaining said Right-of-Way ~~_____~~, and said use ~~The subject R-O-W as described in Exhibit "A"~~ shall not otherwise be altered or expanded in any way except in the case of a written amendment to this Agreement.
3. Release. OWNER 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. The Development and OWNER's utilization of the Right-of-Way 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.

5. Fencing. The OWNER agrees, at its sole cost and expense, to install and construct Fencing within the Right-of-Way on the R-O-W in the location shown on Exhibit "A," and consistent with City Code and reasonable engineering standards and all applicable laws, codes, and regulations. OWNER is solely responsible for the Fencing and all liability arising therefrom. Furthermore, OWNER is responsible for maintaining the Fencing and the Right-of-Way enclosed by the Fencing in a safe and reasonable manner, including, though not exclusively, ensuring security within said Right-of-Way.
6. No Waiver/No Vesting. This Agreement does not constitute a waiver of the CITY's regulatory authority and said Fencing, the Development and the Subject Property remain subject to City Code and all other applicable laws, rules, codes and regulations. OWNER must still obtain any and all necessary permits from the CITY for construction and -maintenance of Fencing and this Agreement does not operate to vest any interest or right whatsoever.
7. Insurance. OWNER shall possess and maintain, at all times during the construction, operation and maintenance of Fencing within the Right-of-Way, 1) worker's compensation insurance in the amount of the Florida Statutory Limit; and 2) 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 said Fencing and the Right-of-Way. CITY shall be listed as an additional insured on the general liability policies. The above liability policy shall contain a contractual liability endorsement in favor of the CITY and shall provide that the CITY will receive at least sixty (60) days 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 in this Agreement ~~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 OWNER 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; (ii) the actions of third parties within or

upon the Right-of-Way; and (iii) 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 Right-of-Way or (iii) the construction and maintenance of Fencing, 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 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 Fencing. The CITY retains the right to revoke this License and terminate this Agreement at any time and for any reason or no reason at all, by providing written notification, "Notice," to the OWNER 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, OWNER shall complete ~~begin and diligently pursue~~ removal of Fencing 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 OWNER fails to remove Fencing and attendant improvements and property, within sixty (60) days 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 improvements 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. Said lien may be enforced as provided by law. In the alternative, CITY may, in its sole discretion, instruct OWNER in the Notice that removal of the Fencing will not be required.
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: _____
Alana Brenner, City Clerk

By: _____
Mayor / Mayor Pro Tem

Date: _____

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: _____

SIGNATURES CONTINUE NEXT PAGE _____

TWO WITNESSES:

SILVER METEOR CENTER, LLC, a
Florida corporation (CORPORATE SEAL)

Print Name: _____

By: _____

Print Name: _____

Print Name: _____

Title: _____

STATE OF FLORIDA
COUNTY OF ORANGE

The foregoing was acknowledged before me this _____ day of _____, 2016,
by _____, as _____ of Silver Meteor Center, LLC, a
Florida corporation, 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.

Signature of Notary Public

(Print Notary Name)

My Commission Expires: _____

Commission No.: _____

Personally known, or

Produced Identification

Type of Identification Produced

AFFIX NOTARY STAMP

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

_____, 2016.

Chief Assistant City Attorney