

Return to: Jean Roush-Burnett, Chief Assistant City Attorney
City of Orlando
400 S. Orange Avenue
Orlando, FL 32801

PREPARED BY
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Orlando, FL 32802-2809

Orange Co FL 1997-0324648
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OR Bk 5322 Pg 4639
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SOUTHERN GATEWAY DEVELOPER'S AGREEMENT

THIS SOUTHERN GATEWAY DEVELOPER'S AGREEMENT (the "Agreement") is made and entered this 1st day of September, 1997, by and between the CITY OF ORLANDO, FLORIDA, a municipal corporation organized and existing under the laws of the State of Florida (the "City"), whose address is 400 South Orange Avenue, Orlando, Florida 32801 and SOUTHERN GATEWAY CORPORATION, a Florida corporation (the "Developer");

WITNESSETH:

WHEREAS, Developer intends to develop a parcel of property containing approximately 1.172 acres located within the City of Orlando and more particularly described on Exhibit "A" attached hereto (the "Property"); and

WHEREAS, the Developer intends to construct on the Property a mixed use development containing approximately 163,000 gross square feet of office use, 10,000 gross square feet of retail use, 2,000 gross square feet of restaurant/food and beverage use, and a structured parking facility containing up to 510 parking spaces (together, the "Project") (with the structured parking facility sometimes separately referred to as the "Parking Garage"); and

WHEREAS, the Project is located on the perimeter of the City's downtown core and is in close proximity to City Hall and to the site of the City's proposed Performing Arts Center (the "PAC"); and

WHEREAS, it is in the City's interest to provide for parking facilities to serve the needs associated with City Hall and the PAC, and the uses of the Project and the PAC are of such a nature that the period of use of parking facilities associated with each use will not conflict; and

WHEREAS, the Developer has agreed to assume the cost of construction, debt service, maintenance and operations for parking in excess of that required by the City Code for the Project, and to own and operate additional spaces in the Parking Garage for the benefit of the City; and

City Council Meeting: 8-11-97
Item: 6W1 Documentary: 30495

WHEREAS, it is in the interest of the City to allow the development of the Project and to promote the operation of the Parking Garage as part of the Downtown Parking Program (the "Program") in the manner and under the terms and conditions of this Agreement, but only as a result of the specific circumstances associated with the location of the Project and the proposed availability of Project parking relative to City Hall and the PAC; and

WHEREAS, on February 10, 1997, the City approved the master plan for the Project subject to certain conditions (the "Master Plan"), including a condition requiring the Developer and the City to enter into an agreement addressing the floor area ratio ("FAR") of the Project, the number of parking spaces to be located in the Parking Garage, and the availability of certain spaces in the Parking Garage for use as part of the Program;

NOW THEREFORE, in consideration of the mutual promises contained herein and other valuable considerations, the receipt and sufficiency of which are hereby acknowledged, the parties hereby agree as follows:

1. INCORPORATION OF PREAMBLE. The preamble of this Agreement is true and correct and is incorporated herein as if fully set out below.

2. BENEFITS TO CITY. The City hereby makes the following findings in connection with this Agreement:

OR Bk 5322 Pg 4640
Orange Co FL 1997-0324648

(a) City Hall is located immediately northwest of the Project and the proposed PAC site is located immediately north of the Project, and both City Hall and the PAC require (or will require) parking open to the general public to serve those respective facilities.

(b) The Program presently is limited in the number of parking spaces that are available for use by existing or new development in the vicinity of the Project, City Hall, and the PAC site.

(c) The parking facility in the Program located closest to City Hall, the proposed PAC site and the Project with available capacity (the Central Boulevard Garage) is located several blocks from City Hall, the PAC site and the Project. City Hall, the PAC site and the Project are located in the southern edge of the Downtown Parking Area, and there are no other Program garages located at, or currently planned for, the southern edge of the Downtown Parking Area.

(d) By allowing the Project to contain more parking than would be otherwise permitted under the City Code, and by requiring the Developer to make such additional parking available for use by the general public in connection with City Hall and the PAC as provided hereinbelow, the City will extend the benefits and operation of the Program to the southern end of the downtown core and the vicinity of City Hall and the PAC site without the expenditure of additional public funds.

Based on the foregoing findings and the specific terms and conditions set forth in this Agreement, the City is willing to enter into this Agreement and to allow the Developer to construct, maintain and operate the Parking Garage as part of the Project in accordance with the terms and conditions of this Agreement.

3. CONSTRUCTION OF PARKING GARAGE AND ALLOCATION OF SPACES.

The Developer agrees to construct the Parking Garage at its expense as part of and in conjunction with the construction of the Project. Except as specifically provided otherwise herein, the City shall have no obligation or responsibility for the cost of construction, debt service, operation, maintenance or repair of the Parking Garage.

Of the parking spaces contained in the Parking Garage, approximately 90 parking spaces located on one or two floors of the Parking Garage shall be allocated and designated for use by the general public on a non-exclusive basis (the "Public Parking Spaces"). All spaces within the Parking Garage other than the Public Parking Spaces (the "Project Parking Spaces") may be reserved and designated for the exclusive use and benefit of the tenants, employees, customers, guests and other users of the Project, subject to the other terms and conditions of this Agreement.

This Agreement is a public-private agreement designed to ensure that the Project has sufficient available parking and that the benefits and operation of the Program are extended to the southern edge of the Downtown Parking Area, in order to serve the existing and future parking needs of City Hall, the PAC and the Project. Because the Public Parking Spaces will be owned, operated and maintained by the Developer for the benefit of the City and as part of the Program pursuant to the public-private arrangement represented by this Agreement, and because the Developer will make certain of the Project Parking Spaces available to serve as part of the Program during Off-Peak Hours pursuant to Section 4 below, the City finds that the Public Parking Spaces constitute and shall be deemed to be "City-owned facilities" for the purposes of, and within the meaning and intent of, Sections 61.404(a)(1) and 61.405 of the City Code. Consequently, the Public Parking Spaces shall be considered Principal Use Parking Facilities and therefore shall not be deemed a part of, or counted toward, the number of parking spaces required or permitted for the Project.

Under the City Code as of the date of this Agreement, the maximum number of parking spaces permitted for a private development of the nature and size of the Project is 263 spaces on-site and an additional 175 spaces off-site in the Program, for a total of 438 parking spaces. Thus: (i) because the Public Parking Spaces will comprise approximately 90 spaces, (ii) the Parking Garage will contain no more than 510 spaces, and (iii) the Public Parking Spaces shall not be counted toward the number of parking spaces required or permitted for the Project, the City finds that the Project's parking spaces will number less than 438 spaces and the Project therefore will contain less than the maximum number of parking spaces permitted by City Code (although all spaces will be located on-site).

OR Bk 5322 Pg 4641
Orange Co FL 1997-0324648

Further, under Section 61.402(a)(2) of the City Code, the first required parking space per 1000 square feet of the Project shall be provided in the Program by payment to the Program Trust Fund. Because the Developer will expend significant sums of money to develop and construct the Parking Garage (which includes the Public Parking Spaces) and because the Developer will make available certain of the Project Parking Spaces to serve as part of the Program during Off-Peak Hours pursuant to Section 4 below, the City finds that the Developer's performance of its obligations under this Agreement constitutes a contribution to the Program in lieu of a direct payment to the Program Trust Fund and satisfies the requirements of Section 61.402(a)(2).

Notwithstanding anything in this Agreement to the contrary, the City and the Developer acknowledge and agree that the characterization of the Public Parking Spaces as "City-owned facilities" only reflects the nature of the use and operation of the Public Parking Spaces in a manner which extends the benefits and operation of the Program to the southern edge of the Downtown Parking Area, pursuant to the public-private agreement represented hereby. Neither the use of the phrase "City-owned facilities" nor the other terms and conditions of this Agreement shall be construed such that the City has any actual or legal ownership or leasehold interest in either the Public Parking Spaces or the Parking Garage.

4. OPERATION OF PARKING GARAGE. The Developer shall cause the Public Parking Spaces to be open and available to the general public, at a minimum, from 8:00 am to 6:00 pm, Monday through Friday of each week except for legal holidays (the "Business Hours"). The rates and charges applicable to the Public Parking Spaces shall not exceed those charges applicable to other daily users of the Parking Garage. The Developer shall install and maintain signage in the Project and the Parking Garage which designates the Public Parking Spaces. The Public Parking Spaces shall be made available to the general public during Business Hours on a first-come, first-served basis except as otherwise specifically provided in this Agreement.

In order for the Parking Garage to constitute a part of the Program as contemplated by this Agreement, the Developer acknowledges and agrees that not less than fifty percent (50%) of both the Public Parking Spaces and the Project Parking Spaces (together, the "Off-Peak Spaces") shall be made available for use by the general public on a non-exclusive basis during times other than Business Hours in conjunction with events held at either City Hall or the PAC (the "Off-Peak Hours"). The City shall provide written notice to the Developer at least five (5) business days in advance identifying with specificity the Off-Peak Hours the City desires the Off-Peak Spaces to be available for public use and, subject to the provisions hereinafter set forth, the Developer shall make the Off-Peak Spaces available during the specified Off-Peak Hours as provided herein; provided, however, the Parking Garage (and the Off-Peak Spaces) may be closed within two (2) hours after the end of any scheduled event unless special arrangements are made between the City and the Developer. During the operation of the Parking Garage during Off-Peak Hours at the City's request, the Developer shall be entitled to charge and collect parking rates comparable to those charged by the City during events held at the Orlando Centroplex for parking in the City-owned parking garages adjacent to the Orlando Centroplex (or such other rates to which the City and the Developer shall mutually agree). Nothing herein

shall be construed to prohibit the Developer from opening and operating the Parking Garage for use by the general public during Off-Peak Hours other than those requested by the City as contemplated herein.

5. TEMPORARY LIMITATION ON USE OF PUBIC PARKING SPACES. Subject to the City's review rights set forth below, in the event the Developer determines in good faith and with the exercise of reasonable business judgment that there is insufficient use of the Public Parking Spaces during City-requested Off-Peak Hours to pay the cost of operations and maintenance of the Off-Peak Spaces, and said circumstances continue for a time reasonably deemed by Developer to be excessive, then the Developer shall have the right to terminate the use of the Off-Peak Spaces during City-requested Off-Peak Hours until such time as it is mutually determined by the City and the Developer that the Off-Peak Spaces can be operated and maintained on a break even basis during such City-requested Off-Peak Hours. In order for the Developer to avail itself of the right to terminate the operation of the Off-Peak Spaces pursuant to this Section 5, the Developer first shall provide supporting documentation and information to the City not less than thirty (30) days prior to the proposed date of termination. In such event, the parties shall negotiate in good faith regarding resolution of the issue, such resolution including, at the City's discretion, the City underwriting the cost of operation and maintenance of the Off-Peak Spaces during City-requested Off-Peak Hours. In the event of a dispute between the City and the Developer regarding the temporary termination of operations pursuant to this Section 6, the parties shall submit the matter to a mediator satisfactory to both parties for the purpose of seeking a resolution to the dispute. For the purposes of this Section 5, the cost of operation and maintenance of the Off-Peak Spaces during City-requested Off-Peak Hours shall include those costs normally associated with operating a structured parking facility during such periods, including without limitation costs associated with employees and personnel, security, insurance and cleaning.

OR Bk 5322 Pg 4643
Orange Co FL 1997-0324648

6. DEVELOPMENT RIGHTS. In consideration of the Developer's agreement to construct and operate the Parking Garage as provided in this Agreement, and in determining that the development of the Project as contemplated herein serves the intent and purposes of Sections 58.1000 and 58.1001 of the City Code, the City hereby agrees as follows:

(a) The Parking Garage shall not be included in calculating the FAR of the Project; and

(b) Because portions of the Parking Garage shall constitute a part of the Program as provided herein, and because approximately 7% of the net floor area of the Project will be used for retailing/restaurants/eating and drinking establishments, the City agrees that the Project shall receive an intensity bonus equal to 0.5 FAR.

With the foregoing considerations, because the Project has an FAR of 3.43, and pursuant to this Agreement and Figure 1 of Chapter 58 of the City Code the Project may have an FAR of up to 3.5, the City hereby finds and determines that Project meets the FAR requirements of the City Code.

7. COMMENCEMENT OF CONSTRUCTION. Construction of the Project shall commence on the Property within two (2) years after the effective date of this Agreement. For the purposes of this Section 7, "commencement of construction" shall be defined in accordance with the City's Building Code, Section 13.03-1, Orlando City Code. The City, in its sole discretion, may grant extensions to the time frames established in this paragraph for good cause shown.

8. FORCE MAJEURE. The parties shall use reasonable diligence to ultimately accomplish the purpose of this Agreement but shall not be liable to each other, or their successors or assigns, for damages, costs, attorney's fees (including costs or attorney's fees on appeal) for breach of contract, or otherwise for failure, suspension, diminution, or other variations of services occasioned by any cause beyond the control and without the fault of the parties. Such causes may include but shall not be limited to Acts of God, or of the public enemy, acts of other governments (including regulatory entities or courts) in their sovereign or contractual capacity, fires, floods, epidemics, quarantines, restrictions, strikes, or failure or breakdown of transmission or other facilities.

OR Bk 5322 Pg 4644
Orange Co FL 1997-0324648

9. INDEMNIFICATION. To the extent permitted by law:

(a) Developer shall indemnify 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 Developer's performance of the services and activities as provided herein, and which are caused in whole or in part by Developer 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.

(b) The City shall indemnify and hold harmless Developer to the extent allowable under Florida law, including Section 768.28, Florida Statutes (as it may be from time to time amended), its agents, employees, and 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 the performance of the City as provided in the Agreement, and which are caused in whole or in part by the City, any of its subcontractors, anyone directly or indirectly employed by it, or anyone for whose acts it may be liable.

10. AGENCY. Developer and the City, and their agents, contractors or subcontractors, shall perform all activities that are outlined in this Agreement as independent entities and not as agents of each other.

11. BINDING EFFECT. This Agreement and the terms and conditions hereof shall be binding upon and inure to the benefit of the City and the Developer and their respective successors and assigns. Notwithstanding or foregoing, the parties acknowledge and agree that this Agreement: (i) is intended to govern and relate to the construction, use and operation of the Project on the Property, (ii) shall not be transferable to any other real property, and (iii)

shall terminate upon either its expiration pursuant to Section 13 below or the expiration of the Master Plan.

12. THIRD-PARTY BENEFICIARY. This Agreement is solely for the benefit of the parties signed hereto and no right, nor any cause of action, shall accrue to or for the benefit of any third party.

13. TERM AND NATURE OF AGREEMENT. This Agreement shall become effective upon the effective date as set forth herein, and shall terminate upon the earlier of: (i) ten (10) years after the opening of the PAC, or (ii) January 1, 2018. This Developers Agreement shall run with the title to the Property.

OR Bk 5322 Pg 4645
Orange Co FL 1997-0324648

14. 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 or disputes, arising out of or relating to any part of this Agreement, or any breach hereof, shall be Orange County, Florida.

15. 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. Amendment to or waivers of the provisions herein shall be made by the parties in writing.

(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.

(c) Developer, upon the execution of this Agreement, shall pay to the City the cost of recording this Agreement in the Public Records of Orange County, Florida.

(d) Any notice required or allowed to be delivered hereunder shall be in writing and be deemed to be delivered when (i) hand delivered to the person hereinafter designated; or (ii) upon receipt of such notice when deposited in the United States Mail, postage prepaid, certified mail, return receipt requested, addressed to a party at the address set forth opposite the party's name below, or at such other address as the applicable party shall have specified, from time to time, by written notice to the other party delivered in accordance herewith:

City:

City Clerk
Orlando City Hall
400 So. Orange Avenue
Orlando, FL 32801

With a copy to:

Office of Legal Affairs
Orlando City Hall
400 So. Orange Avenue
Orlando, FL 32801
ATTN: Jean Roush-Burnett, Esq.

Developer:

Southern Gateway Corporation
c/o Dickinson Development Corp.
1266 Furnace Brook Parkway #104
Quincy, MA 02169
ATTN: Mark C. Dickinson, Pres.

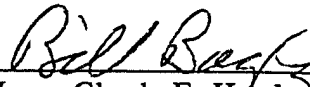
With a copy to:

Thomas E. Francis, Esq.
Lowndes, Drosdick, Doster,
Kantor & Reed, P.A.
215 No. Eola Drive
Orlando, FL 32801

16. EFFECTIVE DATE. The effective date of this Agreement shall be the date it is executed by the City.

IN WITNESS WHEREOF, the parties hereto have caused these presents to be executed in a manner and form sufficient to bind them as of the day and year first above written.

CITY OF ORLANDO

BY: 
Mayor ~~Glenda E. Hood~~ Pro Tem

OR Bk 5322 Pg 4646
Orange Co FL 1997-0324648

ATTEST:

Grace A. Chewning

Grace A. Chewning, City Clerk

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

Dated: August 28, 1997

Jan A. Bush-Burnett
City Attorney, Orlando, Florida

OR Bk 5322 Pg 4647
Orange Co FL 1997-0324648

STATE OF FLORIDA
COUNTY OF ORANGE

Personally appeared before me, the undersigned authority, Glenda E. Hood and Grace A. Chewning, well known to me to be the Mayor and City Clerk, respectively, of the City of Orlando, 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 to do so.

Witness my hand and official seal this 28 day of September 1997.

Tanya A. Dong

Notary Public

My commission expires:



TANYA A. DONG
My Comm Exp. 8/25/00
Bonded By Service Inc
No. CC578171

Personally Known Other I D

SOUTHERN GATEWAY CORPORATION,
a Florida corporation

BY: *Mark C. Dickinson*
Mark C. Dickinson, President

OR Bk 5322 Pg 4648
Orange Co FL 1997-0324648

STATE OF Massachusetts
COUNTY OF Norfolk

Personally appeared before me, the undersigned authority, Mark C. Dickinson, known to me to be the President of Southern Gateway Corporation and he acknowledged before me that he executed the foregoing instrument on behalf of the Developer, Southern Gateway Inc., as its true act and deed, and that he is duly authorized to do so.

Witness my hand and official seal this 14th day of August

Mark C. Dickinson
Notary Public
My commission expires: 11/15/97

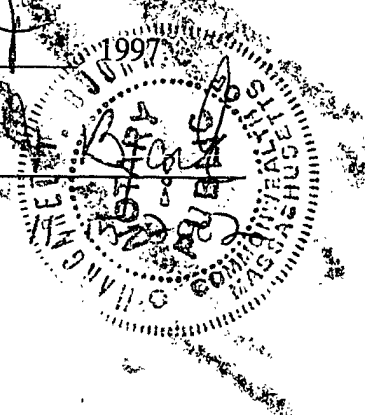


EXHIBIT "A"

Legal Description of Property

OR Bk 5322 Pg 4649
Orange Co FL 1997-0324648
Recorded - Martha O. Haynie

LEGAL DESCRIPTION:

The South 230 feet of the West 170 feet of Lot 16, H.C. HARRISON'S ADDITION TO THE TOWN OF ORLANDO, according to the Plat thereof as recorded in Plat Book C, Page 83, of the Public Records of Orange County, Florida; Less: Begin at the Southwest corner of Lot 16, run North 230 feet; thence East 5 feet, thence South 53.63 feet; thence Southeasterly 165.81 feet on an arc with a radius of 293 feet; thence Southeasterly 43.21 feet on an arc with a radius of 43 feet to the South line of Lot 16; thence West 86.57 feet to the Point of Beginning.

TOGETHER WITH:

Beginning at a point 56.05 feet North of the Southwest corner of Lot 15, run East 115 feet; thence South 15 feet; thence West 115 feet; thence North to the Point of Beginning, being portions of Lot 15 in H.C. HARRISON'S ADDITION TO THE TOWN OF ORLANDO, according to the Plat thereof as recorded in Plat Book C, Page 83 of the Public Records of Orange County, Florida, AND beginning at a point 81.05 feet North of the Southwest corner of Lot 15, run East 170 feet; thence South 25 feet; thence West 170 feet; thence North to Point of Beginning being portions of Lots 14 and 15, all in H.C. HARRISON'S ADDITION TO THE TOWN OF ORLANDO, according to the Plat thereof as recorded in Plat Book C, Page 83 of the Public Records of Orange County, Florida. Less that portion lying within the right-of-way of South Orange Avenue.

AND:

The West 11 feet of the South 81.05 feet of Lot 14, H.C. HARRISON'S ADDITION TO THE TOWN OF ORLANDO, according to the Plat thereof as recorded in Plat Book C, Page 83 of the Public Records of Orange County, Florida; ALSO, beginning at the Southwest corner of Lot 15 of said H.C. HARRISON'S ADDITION TO THE TOWN OF ORLANDO, run North along Orange Avenue a distance of 41.05 feet to the Southwest corner of lands heretofore conveyed by a Deed recorded in Deed Book 583, Page 354 of the Public Records of Orange County, Florida; thence run East a distance of 115 feet, more or less, to the Southeast corner of the lands conveyed by said Deed; thence run North a distance of 40 feet; thence run East a distance of 44 feet, more or less, to the East of said Lot 15; thence run South to the Southeast corner of said Lot 15; thence run West to the Point Beginning; ALSO, the North 18.95 feet of the West 170 feet of Lot 16 of said H.C. HARRISON'S ADDITION TO THE TOWN OF ORLANDO.