

RESOLUTION OF
THE LOCAL PLANNING AGENCY OF
THE TOWN OF FORT MYERS BEACH, FLORIDA
RESOLUTION NUMBER 2009-19

RECOMMENDATIONS FOR STANDARD TOWN RIGHT-OF-WAY AGREEMENT
(COMMERCIAL DESIGN STANDARDS)

WHEREAS, the existence of the Local Planning Agency (LPA) is mandated by Florida Statutes Section 163.3174; and

WHEREAS, the LPA is statutorily responsible for the review of proposed land development regulations, land development codes, or amendments thereto, and for making recommendations to the Town Council as to the consistency of such proposals with the adopted Comprehensive Plan (Plan); and

WHEREAS, Section 34-120(4) of the Town Land Development Code (LDC) states that the LPA will review proposed LDC amendments and make recommendations to the Town Council regarding their consistency with the Plan, and

WHEREAS, Section 34-120 (12) of the LDC states that the LPA will aid Town officials charged with the direction of projects or improvements embraced within the Plan and generally promote the realization of the Plan; and

WHEREAS, Section 34-120 (14) of the LDC states that the LPA will perform any other duties which lawfully may be assigned to it by Town Council; and

WHEREAS, the Town Council has requested the LPA to review various components and facets of Town right-of-way matters, and

WHEREAS, in compliance with the direction from Town Council, the LPA at its meetings of August 25, 2009 and September 17, 2009, reviewed the terms and conditions of the standard Town Agreement for Use of Town Right-of-Way/Commercial Design Standards (hereafter "the ROW Agreement").

IT IS HEREBY RESOLVED BY THE LPA OF THE TOWN OF FORT MYERS BEACH, FLORIDA as follows.

1. The LPA recommends various changes to the standard Town Agreement for Use of Town Right-of-Way/Commercial Design Standards (hereafter "the ROW Agreement"). The LPA request that Town staff provide a recommendation as to two (2) sections of paragraph 9 (insurance): (a) whether \$100,000/300,000 is an appropriate threshold amount to require for insurance purposes and (b) what price index should be used to determine the increase in such insurance over the terms of the Agreement. The LPA requests that such recommendation be provided to Town Council prior to Council's consideration of this matter, and that a copy be provided to the LPA as well.

2. The ROW Agreement showing proposed changes is attached hereto as Exhibit "A" and hereby incorporated by reference into this LPA Resolution.

The foregoing Resolution was adopted upon a motion by LPA Member Ryffel and seconded by LPA Member Mandel. Upon being put to a vote, the result was as follows:

Rochelle Kay <u>aye</u>	Alan Mandel <u>aye</u>
Carleton Ryffel <u>aye</u>	Joanne Shamp <u>aye</u>
Bill Van Duzer <u>aye</u>	Dennis Weimer <u>aye</u>

DULY PASSED AND ADOPTED THIS 17th day of September, 2009.

LOCAL PLANNING AGENCY OF THE TOWN OF FORT MYERS BEACH

By: *Dennis J. Weimer*
Dennis Weimer, LPA Chair

Approved as to legal sufficiency:

By: *Anne Dalton*
Anne Dalton, Esquire
LPA Attorney

ATTEST:

By: *Michelle D. Mayher*
Michelle D. Mayher, Town Clerk



THIS INSTRUMENT PREPARED BY
AND, AFTER RECORDING, RETURN TO:
THE TOWN OF FORT MYERS BEACH
2523 ESTERO BOULEVARD
FORT MYERS BEACH, FL 33931

AGREEMENT FOR USE OF TOWN RIGHT- OF-WAY

COMMERCIAL DESIGN STANDARDS

The Town of Fort Myers Beach, a municipal corporation whose address is 2523 Estero Boulevard, Fort Myers Beach, FL 33931 ("Town") and _____ ("Licensee") a Florida (*Corporation, Partnership, Limited Liability Company, etc.*) whose address is _____ enter into this Agreement ("Agreement") on this ____ day of _____, 200__ for use of portions of Town Right-of-Way on an annual basis, under the following terms and conditions:

1. Town Land Development Code Provisions. The Town Land Development Code (LDC) requires that commercial buildings have traditional pedestrian-oriented exteriors and further requires, pursuant to LDC Section 34-995(e), that commercial buildings located at 450 Old San Carlos Blvd. maintain a continuous awning or canopy unless the sidewalk is shaded by an arcade or colonnade. LDC Section 34-995(e)(6)(a) further states that arcades and colonnades may encroach into a Town Right-of-Way, provided explicit permission is granted by the Town.

2. Licensee's Property. Licensee owns a parcel of real property located at _____ Fort Myers Beach, FL, as is more particularly described on Exhibit "A" attached hereto and incorporated herein by reference.

3. Licensee's Addition and R-O-W Structure(s). Licensee desires to construct (*name of project*) on the subject property for the purpose of compliance with the Town's Commercial Design Standards and the architectural design thereof has structural and habitable space extending into or over the subject Right-of-Way ("Licensed Area" or "Structure"). Exhibit "B," which is attached hereto and incorporated by reference, sets forth the proposed Structure(s) inclusive of the legal description for the area of the Town Right-of-Way referenced in this Agreement.

4. Term of License. This License will continue indefinitely unless terminated by either party in writing upon sixty (60) days' prior notice or as provided elsewhere herein. ~~be for a twelve (12) month period, commencing on January 1 (with the exception of the initial term, wherein the date of Certificate of Compliance/Certificate of Occupancy (CC/CO) may be the commencement date). It will expire on December 31 of each year, and will be automatically renewed for an additional period of twelve (12) months unless cancelled by either party on or before October 31 of such year.~~ It is the Licensee's sole responsibility to contact the Town for payment of the applicable fee(s) prior to December 31 of each year. The Town assumes no responsibility to notify the Licensee of any obligation hereunder.

5. Grant of License. The Town hereby grants, gives and conveys to Licensee, its successors, and assigns, an annual and non-exclusive license to use the subject right-of way for purposes of placement and the maintenance of the Structure(s) for the subject property, limited to the area described in Exhibit "B."

EXHIBIT "A"

- a. At the time of mutual execution hereof, Licensee agrees to pay the Town the total sum of (none) per square foot of Licensed Area, at the time this License is issued, as follows:
 - i. The annual base fee of (none); and
 - ii. The annual fee of (none) for use of Town Right-of-Way for habitable space; and
 - iii. The annual fee of (none) for usage of the surface of the Town right-of-way.
 - iv. The License Fee set forth in this paragraph shall be pro-rated from the date of issuance of the Certificate of Compliance/Certificate of Occupancy to December 31.
- b. The fee amount in subparagraph (a) above is subject to modification by the Town on an annual basis, commencing on January 1 of each year. The Town will notify Licensee of such fee modification on or before October 31 of each year this agreement is in effect. If the Town fails to notify the Licensee, the fee(s) set forth in subparagraph (a) above shall remain in full force and effect.

6. Maintenance and Use. Licensee is responsible for all construction costs associated with its use of the subject Right-of-Way and is responsible for all costs associated with the maintenance and repair of the Structure(s). Licensee covenants and agrees to construct, maintain and use the subject Right-of-Way and the Structure(s) in a manner consistent with the depiction in Exhibit "B" and applicable Elevations and as set forth elsewhere in this Agreement.

7. Town Access To Subject Right-of-Way.

(a) From time to time, the Town may require access to a portion or all of the subject Right-of-Way within which Licensee's Structure(s) are located. The Town will endeavor to minimize the impact of such access on Licensee's Structure(s) if possible but Licensee accepts and agrees that (i) the Town has sole discretion as to whether such partial or full access is required by the Town and (ii) the Town's judgment as to the need for and extent of such access shall be final, and (iii) it may be necessary for Licensee to remove and replace the Structure(s) in their entirety at Licensee's sole cost.

(b) As soon as practicable, the Town will notify Licensee of the potential need for use of any or all of the portion of the subject Right-of-Way upon which the Structure(s) are located and/or the necessity of removal of the Structure(s) from the subject Right-of-Way. The Town will not be required to provide advance notice in the event of an emergency, as defined by the Town. In the event that this License is not renewed for any reason, Licensee shall remove any and all structures from the Town Right-of-Way within seven (7) days of expiration hereof.

(c) The cost of Licensee's removing part or all of the Structure(s) from the subject Right-of-Way promptly upon request shall be Licensee's sole responsibility; however in the event of an emergency, as defined by the Town, the Town may remove all or part of such Structure(s), in its sole discretion. The cost of replacement and/or repair of any section of the Structure(s) due to the Town's need for access to the Right-of-Way shall be Licensee's sole

responsibility. If Licensee does not promptly comply with the Town's request for access, or in the event of such emergency, as defined by the Town, the Town may remove the Structure(s) in part or in full and place temporary structural components in their stead, and Licensee shall be required to reimburse the Town for all labor, materials, and other costs to the Town related thereto, within fifteen (15) days of being invoiced.

7. Licensee's Obligation to Repair In the Event of Damage and/or Destruction. In the event the Structure(s), and/or the subject property and/or any part of the Town's Right-of-Way is/are damaged by Licensee or any third party as a result of the use allowed hereunder, or if any of the foregoing is/are destroyed by fire, wind, water or other casualty, Licensee must repair the Structure(s) to comply with the then-current Florida Building Code and Licensee must also repair the Town's Right-of-Way to the satisfaction of the Town. All costs of such repair are at the sole expense of Licensee, and all such repairs must be consistent with Exhibit "B" attached hereto and incorporated herein. This paragraph does not waive Licensee's obligation to comply with the requirements of the LDC.

8. Indemnification and Hold Harmless. The Licensee, its successors, and assigns, agree to defend, indemnify and hold the Town, its employees, contractors and representatives harmless from and against any and all loss, liability, claim, damage and expense (including but not limited to attorney fees and appellate attorney fees) that may result from, arise out of, or concern the subject matter of this Agreement.

9. Insurance. Licensee covenants and agrees to obtain and maintain general liability insurance, property damage insurance, and other insurance for the term of this Agreement in the amount of \$100,000/\$300,000, with a maximum deductible of \$25,000 subject to an automatic increase in the amount thereof (but not the deductible) based upon the following index: Municipal Cost Index as determined by American City and County. The insurance type, amount, and deductible required herein are subject to reasonable amendment by the Town in the Town's sole discretion. Licensee shall designate the Town as an additional insured and shall deliver to the Town a Certificate of Insurance showing the Town as an additional insured upon mutual execution of this Agreement and provide annual updates of such Certificate of Insurance to the Town Finance Department on January 2 of each year this Agreement is in effect. In the event that Licensee fails to comply with the requirements of this paragraph, the Town shall have the ability, but not the requirement, to force-place such insurance on the property upon thirty (30) days' prior notice to Licensee, and to do any act necessary to create a lien against the property for collection thereof.

10. Successors and Assigns; Transfer of Property. This Agreement shall be binding upon the parties hereto, their respective heirs, successors and assigns. In the event Licensee shall sell or otherwise transfer its interests in the subject property, such transfer shall be subject to this Agreement and such transferee shall become bound to all terms and obligations accruing subsequent to such transfer.

11. Notices. All notices which may be given or which are required to be given under this Agreement, shall be deemed effective when either: (i) personally delivered to the intended recipient; (ii) upon acknowledgment of receipt of certified or registered mail by the recipient or (iii) immediately if sent during regular business hours by facsimile, provided that receipt for such facsimile is verified by the sender and followed by a notice sent in accordance with one of the other provisions set forth above.

12. Entire Agreement; Modification. This Agreement, with all exhibits referenced herein, contains the entire understanding and agreement between the parties hereto and there are no promises, agreements, conditions, undertaking or warranties or representations, oral or written, expressed or implied, between them except as set forth herein. No change or modification hereto shall be effective unless it is in writing and signed by the parties hereto.

13. Dispute Resolution and Attorneys Fees. Venue for resolution of any disputes arising from this Agreement shall be in the Twentieth Judicial Circuit Court in and for Lee County, Florida. The prevailing party shall be entitled to an award of attorney's fees up through and including any appeal.

14. Effective Date; Recording. The Effective Date of this Agreement shall be the date when the last party has signed this Agreement. This Agreement shall be recorded in the Public Records of Lee County, Florida by Licensee at Licensee's sole cost and a certified copy shall be provided to the Town within three (3) business days of such recording.

IN WITNESS WHEREOF, the parties have executed this Agreement effective the day and year set forth above.

Licensee:

Witness for Licensee:

(name)

BY: _____

Print name: _____

Print name of person signing:

Title of person signing:

ATTEST:

TOWN OF FORT MYERS BEACH

Michelle D. Mayher, Town Clerk

_____, Town Manager

Approved as to Legal Form and Sufficiency:

By: _____
Anne Dalton, Esquire, Town Attorney

EXHIBIT A:

LEGAL DESCRIPTION OF SUBJECT PROPERTY

EXHIBIT B:

DESCRIPTION OF PROPOSED STRUCTURE(S)

(INCLUSIVE OF LEGAL DESCRIPTION FOR AFFECTED AREA OF TOWN RIGHT-OF-WAY)