

1. Discussion Objective:

Work Session Date: Jan 22, 2013

Determine and provide direction to staff as to process, requirements, and allowances for use of the Town public right-of-way.

2. Submitter of Information:

- Council
- Town Staff – Public Works
- Town Attorney

3. Estimated Time for this item:

30 minutes

5. Background:

In Agenda Management discussion, the Council expressed a desire for staff to bring forward information associated with the use of the Town’s public right-of-way.

There is currently various agreements and leases for utilization of rights-of-way within the Town depending on zoning area and use. The attached information provides a summary of the methods and programs currently in existence and includes examples of the documents that are currently in place.

Town Manager	Town Attorney	Finance Director	Public Works Director	Community Development Director	Parks & Recreation Director	Town Clerk
						

TOWN OF FORT MYERS BEACH



MEMORANDUM

DATE: January 8, 2013
TO: Terry Stewart, Town Manager
FROM: Cathie Lewis, Public Works Director *CLM*
SUBJECT: Rights-of-Way Parking/Use Leases

Resulting from the planned improvements associated with the North Estero Blvd. project, staff brought forward the issues associated with private properties utilizing the Town right-of-way. The direction received through that workshop was that the public R-O-W is to be reclaimed, including the removal of signs, landscaping, dumpsters, displays, construction staging areas, newspaper/periodical boxes, and parking.

Many properties on the island were developed long before the Town incorporated and prior to development standards being implemented. Throughout the Town property owners have extended their uses into the public R-O-W, some for convenience others due to necessity.

Ultimately there were only two properties along North Estero Blvd. that needed to utilize the R-O-W, which was for parking. In addition to a lease agreement being implemented for parking, the owners provided the Town with a sidewalk easement.

The use of the R-O-W in the Downtown District is encouraged in the Town's LDC and a program for that was established with the redevelopment of Times Square and has continued with the redevelopment of Old San Carlos Blvd. The use is controlled via a lease agreement based on a per square foot charge that is established from by Town Council. These agreements are termed on an annual basis. Structures within the R-O-W of Old San Carlos Blvd. area have been controlled via a long term lease/hold harmless agreement.

The process that staff has used to determine the annual rate for parking is based on an annual average of metered parking revenue from areas in close proximity to any subject property divided by one-half and multiplied by the number of parking spaces needed.

To date there has not been a thorough evaluation of all island properties and their encroachment into the Town rights-of-way. Community Development has been working through a number of situations, i.e. dumpsters, signs. Many encroachment issues are brought forth through complaints, public improvement projects and property redevelopment.

Processes have been established as is outlined above and attached for review are copies of the lease utilized for N. Estero, Times Square Business Extension, and a table lease and hold harmless agreement utilized on Old San Carlos Blvd.

Please let me know if you have any questions regarding this matter or the implementation of the same.

RIGHT-OF-WAY LICENSE AGREEMENT

THIS RIGHT-OF-WAY LICENSE AGREEMENT is made this ____ day of _____, 2010 by and between the **TOWN OF FORT MYERS BEACH**, a Florida Municipal Corporation (hereinafter "**TOWN**"), and **Sand Castle Beach Club Condominium Association, Inc.** (hereinafter "**LICENSEE**").

WITNESSETH:

WHEREAS, the members of **LICENSEE**, and their licensees, invitees and guests (collectively, "Licensee Users") have in the past parked vehicles that they own or use in the public right-of-way of Estero Boulevard; and

WHEREAS, the **TOWN** is utilizing the full width of the public right-of-way of North Estero Boulevard for the North Estero Boulevard Drainage Improvement Project; and

WHEREAS, **LICENSEE** cannot accommodate the parking needs for the Condominium without the use of a portion of the public right-of-way on North Estero Boulevard for said parking; and

WHEREAS, in order for the Licensee Users to use the right-of-way for parking, the **TOWN** requires that **LICENSEE** enter into this License Agreement.

NOW, THEREFORE, in consideration of the mutual covenants and conditions contained in this Agreement, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties hereby agree as follows:

1. **INCORPORATION OF RECITALS.** The parties hereby represent and warrant that the above recitals are accurate and correct and hereby incorporate them in this Agreement.

2. **USE OF RIGHT-OF-WAY.** The **TOWN** agrees to allow **LICENSEE** and the Licensee Users the use of a portion (the "Parking Area") of the North Estero Boulevard right-of-way for parking of motor vehicles. Sixteen (16) parking spaces within the public right-of-way of North Estero Boulevard will be provided solely for the benefit of the **LICENSEE** and the Licensee Users on the property identified, and at the locations marked, on attached Exhibit "A" to provide the necessary parking for the said Condominium. **LICENSEE** shall not sub-let, rent, sell or otherwise utilize the Parking Area except as identified in this Agreement. The **TOWN** hereby authorizes **LICENSEE** to post signs identifying the Parking Area for the exclusive use of the **LICENSEE** and providing notice that violators will be towed at their own expense. Exhibit "A" is hereby incorporated by reference.

3. **CONSIDERATION.** As consideration for the right to use **TOWN** right-of-way for parking, **LICENSEE** agrees to pay to **TOWN** the sum per parking space of Five Hundred Dollars (\$500.00) per year, due and payable on the first business day of each year throughout the term of this Agreement.

4. **TERM.** The initial term of this Agreement shall be twenty-five (25) years unless terminated prior to that date pursuant to Paragraph 5 herein. Five (5) years from the date of this Agreement, and continuing every five (5) years thereafter for the term of this Agreement, **TOWN** shall have the right to adjust the price per parking space and shall give notice of the proposed new rate to **LICENSEE** not less than ninety (90) days prior to the effective date of the new rate. Any proposed rate adjustment shall be based on a comparison of market conditions at the time this Agreement was entered into and the market conditions at the time of the proposed

change. **TOWN** will provide **LICENSEE** with copies of all written materials utilized in conducting the analysis at the time **TOWN** provides **LICENSEE** with notice of the proposed new rate. After the initial twenty-five (25) year term of this Agreement, it may be renewed for successive five (5) year terms upon mutual agreement of the parties.

5. **TERMINATION.** This Agreement may be terminated by **TOWN** upon sixty (60) days' prior written notice to **LICENSEE** in the event **TOWN** determines the property is needed for a public purpose. Said public purpose shall be stated with specificity, and **TOWN** shall use its best efforts to replace the resulting lost parking spaces with facilities located at a site acceptable to **LICENSEE** and rented to **LICENSEE** at a cost not exceeding the annual Five Hundred Dollars (\$500.00) per parking space described above. This license agreement shall automatically terminate in the event the property is altered such that it loses its current legal non-conforming status and **LICENSEE** is, as a result, required to provide on-site parking.

6. **COMPLIANCE WITH LAWS.** **LICENSEE** agrees to comply with all state and local laws regarding parking as same may be amended from time to time.

7. **NOTICES.** Notices required to be provided pursuant to this Agreement shall be sent to the following addresses:

To **TOWN:** Town of Fort Myers Beach
2523 Estero Boulevard
Fort Myers Beach, FL 33931

To **LICENSEE:** Sand Castle Beach Club Condominium Association
905 Estero Boulevard
Fort Myers Beach, FL 33931

8. **INDEMNIFICATION.** **LICENSEE** shall protect, defend, indemnify and hold harmless the **TOWN** from and against any and all claims, suits, actions, damages and/or causes of action arising during the Term of this License Agreement for any personal injury, loss of life and/or damage to property sustained in or about the Parking Area by reason of or as a result of the use of the right-of-way by **LICENSEE** and **LICENSEE USERS** from and against any orders, judgments, and/or decrees which may be entered thereon, and from and against all costs, attorney fees, expenses and liabilities incurred in and about the defense of any such claim. In the event the **TOWN** shall be made a party to any litigation commenced against **LICENSEE** or by **LICENSEE** against any third party, then the **LICENSEE** shall protect, defend, indemnify and hold the **TOWN** harmless and pay all costs and attorney's fees incurred by the **TOWN** in connection with such litigation, and any appeals thereof.

9. **THIRD PARTIES.** Nothing in this Agreement, whether express or implied, is intended to confer any rights or remedies under or by reason of this Agreement upon any person other than the parties hereto and their respective heirs, successors, legal representative, and permitted assigns, nor is anything in this Agreement intended to relieve or discharge the obligation or liability of any third persons to any party to this Agreement, nor shall any provision thereof give any third person any right of subrogation or action over against any party to this Agreement.

10. **ASSIGNMENT.** This Agreement shall not be assigned without the express written consent of the **TOWN**.

11. **BINDING EFFECT.** All of the terms and provisions of this Agreement shall be binding upon, inure to the benefit of, and be enforceable by the parties hereto and their respective heirs, successors, legal representative, and permitted assigns.

12. **ENTIRE AGREEMENT.** This Agreement shall constitute the entire agreement of the parties with respect to the subject matter of it. All prior understandings and agreement between the parties with respect to such matters are merged into this Agreement, which alone fully and completely expresses their understanding.

13. **AMENDMENTS.** This Agreement may not be amended, modified, altered, or changed in any respect, except by a further agreement in writing duly executed by each of the parties hereto.

14. **RECORDING.** This Agreement shall be recorded in the Public Records of Lee County, Florida and shall be governed by the laws of the State of Florida.

IN WITNESS WHEREOF, the parties have set their hands and seals on the day and year first above written.

Witnesses:

LICENSEE:

Sand Castle Beach Club Condominium Association, Inc.,
a Florida not-for-profit corporation

1st Witness

Print Name

By: _____

2nd Witness

Print Name

STATE OF FLORIDA)
COUNTY OF LEE)

The following instrument was acknowledged before me this ____ day of _____, 2010 by _____ as _____ of Sand Castle Beach Club Condominium Association, Inc., Grantor. He/She/They're personally known to me or have produced _____ as identification.

Print Name: _____
Notary Public - State of Florida
Commission No.: _____

My Commission Expires: _____

(SEAL)

TOWN OF FORT MYERS BEACH

ATTEST:

TOWN MANAGER

BY: _____
TOWN CLERK

APPROVED AS TO LEGAL FORM:

BY: _____
TOWN ATTORNEY

ACTIVE: 3167266_1

PERMIT AGREEMENT FOR EXTENSION OF BUSINESS OPERATION
(RESTAURANT)

The Town of Fort Myers Beach, pursuant to the authority set out in Ordinance #97-5, and in furtherance of the desires and intention of the Town Council with regard to the redeveloped business district known as Times Square, hereby grant to _____ this permit for an extension of business operation, into the Town Right-Of-Way as defined in Section 5 C of the above referenced Ordinance, on the property located adjacent to the business known as _____, _____ Fort Myers Beach, FL 33931, under the following terms and conditions.

1. Permit shall extend from **October 1, 2012 through September 30, 2013.**
2. Permittee may place personal property, limited to tables (with or without umbrellas) in an area designated as _____ **(width and depth of business)** feet immediately adjacent to their place of business known as _____.
3. This Permittee shall be charged for _____ square feet with no more than _____ chairs at this location, and the location shall be marked off and designated by use of rope or other approved material or indicators. A detailed scaled drawing showing the location of all personal property shall be attached hereto as Exhibit A.
4. Hours of operation of the area of extended use shall be from _____ but shall be subject to review and modification based on health and safety concerns as they develop.
5. The Permittee assumes and accepts responsibility of any damage caused to Town property by reason of the use of the property covered under this agreement.
6. The Permittee shall remove said personal property and cease the permitted uses when so directed by the Town of Fort Myers Beach.
7. The use of the Town property as set forth herein shall be allowed at a cost of \$ _____ **per square foot per year** (as indicated in Section 2 above), payable yearly upon execution of this Permit Agreement in the amount of _____ or monthly in the amount of _____ by the Permittee to the Town of Fort Myers Beach, regardless of whether the extension is used or not used throughout the year. This cost includes sales tax. Should the Permittee fail to pay the annual or monthly fee, this agreement will be considered null and void and Permittee will be required to vacate the extension of premises.
8. By signing this permit agreement, Permittee agrees to abide by all the Rules and Regulations as attached hereto and made a part hereof.

Date: _____

Permittee

Town Representative

PERMIT AGREEMENT FOR BUSINESS OPERATION
WITHIN THE PUBLIC RIGHT-OF-WAY
(INFORMATION AND SALES KIOSKI)

The Town of Fort Myers Beach, pursuant to the authority set out in Ordinance #97-5, and in furtherance of the desires and intention of the Town Council with regard to the redeveloped business district known as Times Square, hereby grant to _____ this permit for an extension of business operation, into the Town Right-Of-Way as defined in Section 5 C of the above referenced Ordinance, on the property located within the Times Square Pedestrian Mall area for the business _____ Fort Myers Beach, FL 33931, under the following terms and conditions.

1. Permit shall extend from **October 1, 2012 through September 30, 2013.**
2. Permittee may place personal property, limited to an informational and sales kiosk in an area designated as **8 feet by 8 feet** in an area of mutual agreement by the parties.
3. This Permittee's use shall be set out in a detailed scaled drawing showing the location of all personal property which shall be attached hereto as Exhibit A.
4. Hours of operation of the area of extended use shall be from 6:00 a.m. and 2:00 a.m. but shall be subject to review and modification based on health and safety concerns as they develop.
5. The Permittee assumes and accepts responsibility of any damage caused to Town property by reason of the use of the property covered under this agreement.
6. The Permittee shall provide the Town with proof of adequate insurance coverage relative to the intended use of the property.
7. The Permittee shall remove said personal property and cease the permitted uses when so directed by the Town of Fort Myers Beach.
8. The use of the Town property as set forth herein shall be allowed at a cost of \$ _____ per month, payable yearly or monthly by the Permittee to the Town of Fort Myers Beach, regardless of whether the area is used or not used throughout the year. This cost includes sales tax. Should the Permittee fail to pay the annual or monthly fee, this agreement will be considered null and void and Permittee will be required to vacate the extension of premises.
9. By signing this permit agreement, Permittee agrees to abide by all the Rules and Regulations of the Town of Fort Myers Beach
10. During the entire length of this permit, Permittee shall be the exclusive informational and/or sales kiosk in the Times Square Pedestrian Mall area.

Permittee

Date: _____

Town Representative

RIGHT-OF-WAY LICENSE AGREEMENT

THIS RIGHT-OF-WAY LICENSE AGREEMENT is made this ____ day of _____, 2011 by and between the **TOWN OF FORT MYERS BEACH**, a Florida Municipal Corporation (hereinafter “**TOWN**”), and **ZUSHI ZUSHI, LLC**, (hereinafter “**LICENSEE**”).

WITNESSETH:

WHEREAS, LICENSEE desires to offer its patrons seating on the public right-of-way adjacent to its business located at 201 Old San Carlos Boulevard, Fort Myers Beach, Florida; and

WHEREAS, Section 34-678(d)(7) permits dining tables and chairs in the DOWNTOWN Zoning District upon issuance of a **TOWN** right-of-way permit; and

WHEREAS, as a condition of the permit, the **TOWN** requires that **LICENSEE** enter into this License Agreement.

NOW, THEREFORE, in consideration of the mutual covenants and conditions contained in this Agreement, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties hereto agree as follows:

1. **INCORPORATION OF RECITALS.** The parties hereby represent and warrant that the above recitals are accurate and correct and hereby incorporate them in this Agreement.

2. **USE OF RIGHT-OF-WAY.** The **TOWN** hereby agrees to allow **LICENSEE** the use of a portion of the Old San Carlos Boulevard right-of-way, measuring approximately Two Hundred Ninety (290) square feet in area, immediately adjacent to **LICENSEE**'s business located at 201 Old San Carlos Boulevard, Fort Myers Beach, Florida, for placement of up to twelve (12) tables of not more than seven (7) square feet of surface area each, forty-eight (48) chairs, and twelve (12) table top umbrellas. A detailed scale drawing showing the Licensed Area and location of all tables, chairs and umbrellas and hours of operation for such area is attached hereto and incorporated herein as Exhibit “A.” No consumption of alcoholic beverages shall be permitted in the Licensed Area unless and until **LICENSEE** applies for and is granted a Special Exception permitting same by the **TOWN** Council. All tables, chairs and umbrellas shall be removed from the Licensed Premises and securely stored whenever the **TOWN** is under a Tropical Storm or Hurricane Warning or from time to time as directed by the **TOWN** for maintenance purposes.

3. **CONSIDERATION.** As consideration for the right to use **TOWN** right-of-way for dining/seating, **LICENSEE** agrees to pay to **TOWN** the sum of Eight Hundred Seventy Dollars (\$870.00) per year, plus 6% sales tax due and payable on January 1st of each year, provided, however that a prorated amount for the period from the date of execution of this agreement until December 31, 2011 shall be due and payable upon execution of this Agreement.

4. **TERM.** The initial term of this Agreement shall commence on the date this agreement has been executed by both parties and shall terminate on December 31, 2011. Thereafter, this Agreement shall automatically renew for successive one (1) year terms unless

either party provides notice to the other party of an intent not to renew not less than thirty (30) days prior to the expiration of any term.

5. **MAINTENANCE OF LICENSED AREA.** **LICENSEE** shall maintain the Licensed Area in a neat, clean and sanitary manner. **LICENSEE** shall comply with all applicable laws and regulations of governmental entities with jurisdiction, including, but not limited to, the Lee County Health Department. All tables, chairs and umbrellas shall be maintained in the same or comparable condition to that originally approved by the **TOWN**. No furniture or other structures shall be affixed or attached to the public right-of-way.

6. **ASSIGNMENT.** **LICENSEE** may not assign or transfer this license without the prior written consent of **TOWN**. Any attempted assignment or transfer in violation of this paragraph shall be void and shall confer no rights upon any third person.

7. **INDEMNIFICATION.** In consideration of the payment by **LICENSEE** to **TOWN** of the amounts prescribed in Paragraph 3, **LICENSEE** shall protect, defend, indemnify and hold harmless the **TOWN** from and against any and all claims, suits, actions, damages and/or causes of action arising during the Term of this License Agreement for any personal injury, loss of life and/or damage to property sustained in or about the licensed right-of-way area by reason of or as a result of the use of the right-of-way by **LICENSEE** and **LICENSEE**'s agents, employees, invitees or guests, and from and against any orders, judgments, and/or decrees which may be entered thereon, and from and against all costs, attorney fees, expenses and liabilities incurred in and about the defense of any such claim. In the event the **TOWN** shall be made a party to any litigation commenced against **LICENSEE** or by **LICENSEE** against any third party, then the **LICENSEE** shall protect, defend, indemnify and hold the **TOWN** harmless and pay all costs and attorney's fees incurred by the **TOWN** in connection with such litigation, and any appeals thereof.

8. **LIABILITY INSURANCE.** **LICENSEE** shall maintain in effect throughout the term of this License Agreement public liability insurance providing minimum coverage of \$1,000,000 combined single limit, which insurance shall cover any accident, injuries or damage suffered on, about, or within the Licensed Area or as a result of rights granted pursuant to this License Agreement. the **TOWN** shall be named as an additional insured and certificate holder on such insurance policy. **LICENSEE** shall provide **TOWN** with proof of such insurance which shall be attached to this License Agreement as Exhibit "B." Proof shall be in the form of a certificate from an insurance company authorized to do business in the State of Florida and shall contain a provision that such insurance shall not be cancelled except after fifteen (15) days' prior written notice to **TOWN**.

9. **THIRD PARTIES.** Nothing in this Agreement, whether express or implied, is intended to confer any rights or remedies under or by reason of this Agreement upon any person other than the parties hereto and their respective heirs, successors, legal representative, and permitted assigns, nor is anything in this Agreement intended to relieve or discharge the obligation or liability of any third persons to any party to this Agreement, nor shall any provision thereof give any third person any right of subrogation or action over against any party to this Agreement.

10. **ASSIGNMENT.** This Agreement shall not be assigned without the express written consent of the **TOWN**. Same as 6.?

11. **TERMINATION.** **TOWN** may terminate this License Agreement at any time without any compensation to **LICENSEE** upon thirty (30) days' prior written notice to **LICENSEE**. Notwithstanding the foregoing, **TOWN** may immediately terminate this License Agreement for cause if **LICENSEE** fails in any respect to perform any agreements, covenants or obligations contained in this License Agreement. In the event of termination, **LICENSEE** shall at its own expense remove all items from the right-of-way. In the event **LICENSEE** fails to do so, **TOWN** may, at its sole option, take possession and ownership of any items remaining on the public right-of-way and **LICENSEE** shall pay **TOWN** for the cost of removal and storage.

12. **LIMITATION OF RIGHTS.** **LICENSEE** acknowledges and agrees that no property or other right in the premises is created other than as specifically defined and limited by this License Agreement.

13. **NOTICES.** Notices required to be provided pursuant to this Agreement shall be sent to the following addresses:

As to **TOWN**:

As to **LICENSEE**:

14. **BINDING EFFECT.** All of the terms and provisions of this Agreement shall be binding upon, inure to the benefit of, and be enforceable by the parties hereto and their respective heirs, successors, legal representative, and assigns.

15. **ENTIRE AGREEMENT.** This Agreement shall constitute the entire agreement of the parties with respect to the subject matter herein. All prior understandings and agreements between the parties with respect to such matters are merged into this Agreement, which alone fully and completely expresses their understanding.

16. **AMENDMENTS.** This Agreement may not be amended, modified, altered, or changed in any respect, except by a further agreement in writing duly executed by each of the parties hereto.

17. **MISCELLANEOUS.**

A. This License Agreement shall be construed and enforced in accordance with the laws of the State of Florida.

B. If any provision of this License Agreement is held invalid or unenforceable, the remainder of this License Agreement shall not be affected thereby, and each other provision of this License Agreement shall be valid and enforceable to the fullest extent permitted by law.

C. In any action brought to enforce the terms or arising out of this License Agreement, the prevailing party shall be entitled to recover from the non-prevailing party reasonable attorney's fees and costs.

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

Witnesses:

LICENSEE:

1st Witness

Print Name

2nd Witness

Print Name

STATE OF FLORIDA)
COUNTY OF LEE)

The following instrument was acknowledged before me this ____ day of _____, 200 by _____, as _____ of Licensee. He/She is personally known to me or has produced _____ as identification.

Print Name:
Notary Public - State of Florida
Commission No.: _____
My Commission Expires: _____

(SEAL)

TOWN OF FORT MYERS BEACH

ATTEST:

TOWN MANAGER

BY: _____
TOWN CLERK

APPROVED AS TO LEGAL FORM:

BY: _____
TOWN ATTORNEY

This Instrument Prepared by:
Marilyn W. Miller
Fowler White Boggs
2235 First Street
Fort Myers, FL 33901

AGREEMENT FOR USE OF TOWN RIGHT-OF-WAY
(Commercial Design Standards)

THIS AGREEMENT is made this ____ day of _____, 2011 by and between the **TOWN OF FORT MYERS BEACH**, a Florida Municipal Corporation (hereinafter "**TOWN**"), and **ZUSHI ZUSHI, LLC**, (hereinafter "**LICENSEE**").

WITNESSETH:

WHEREAS, 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 along Old San Carlos Boulevard 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; and

WHEREAS, LICENSEE owns a parcel of real property located at 201 Old San Carlos Boulevard, Fort Myers Beach, FL, as is more particularly described in Exhibit "A" which is attached hereto and incorporated herein by reference; and

WHEREAS, LICENSEE has constructed an arcade on the subject property in order to comply with the TOWN's Commercial Design Standards and the architectural design has structural element extending into and over the TOWN right-of-way; and

WHEREAS, the sketch which is attached hereto and incorporated herein as Exhibit "B" depicts the dimensions and location of the columns and structures that are located in the TOWN right-of-way; and

WHEREAS, as a condition of allowing structures in the TOWN right-of-way, the TOWN requires that LICENSEE enter into this License Agreement.

NOW, THEREFORE, in consideration of the mutual covenants and conditions contained in this Agreement, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties hereto agree as follows:

1. **INCORPORATION OF RECITALS.** The parties hereby represent and warrant that the above recitals are accurate and correct and hereby incorporate them in this Agreement.

2. **USE OF RIGHT-OF-WAY.** The TOWN hereby grants to LICENSEE a non-exclusive license to construct and maintain the structures depicted on Exhibit "B" in the Old San Carlos Boulevard right-of-way.

3. **MAINTENANCE, USE AND REPAIR.** **LICENSEE** is responsible for all construction costs associated with the use of the subject right-of-way and is responsible for all costs associated with the maintenance and repair of the structures located therein. **LICENSEE** hereby covenants and agrees to construct, maintain and use the subject right-of-way and the structures in a manner consistent with the depiction in Exhibit "B." In the event the structures or any part of the right-of-way licensed under this Agreement is damaged by **LICENSEE** or any third party as a result of the use allowed hereunder or if any of the structures are damaged or destroyed by fire, wind, water or other casualty, **LICENSEE** must repair the structures to comply with the then-current Florida Building Code and **LICENSEE** must also repair any damage to the **TOWN** 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." This paragraph shall not be deemed to be a waiver of any of **LICENSEE**'s obligation to comply with the requirements of the LDC.

4. **TERM.** The term of this Agreement shall commence on the date this agreement has been executed by both parties and shall terminate when the structures are no longer located in the right-of-way, if not sooner terminated as provided elsewhere in this Agreement.

5. **ASSIGNMENT.** **LICENSEE** may not assign or transfer this license without the prior written consent of **TOWN**. Any attempted assignment or transfer in violation of this paragraph shall be void and shall confer no rights upon any third person.

6. **TOWN ACCESS TO RIGHT-OF-WAY.**

A. From time to time, **TOWN** may require access to a portion or the entire subject right-of-way within which **LICENSEE**'s structures are located. The **TOWN** will endeavor to minimize the impact of such access on **LICENSEE**'s structures whenever possible, but **LICENSEE** accepts and agrees that **TOWN** has the sole discretion as to whether such partial or full access is required by the **TOWN** and **TOWN**'s judgment as to the need for and extent of such access shall be final. **LICENSEE** further agrees that such access by **TOWN** may require removal and replacement of the structures in whole or in part, at **LICENSEE**'s sole cost.

B. **TOWN** will endeavor to notify **LICENSEE** as soon as practicable of the potential need for access or use of any or all of the portion of the subject right-of-way upon which the structures are located and/or the necessity of removal of the structures from the subject right-of-way. **TOWN** will not be required to provide advance notice in the event of an emergency, as defined by the **TOWN**.

C. **LICENSEE**'s cost of removing all or part of the structures from the subject right-of-way shall be **LICENSEE**'s sole responsibility. In the event of an emergency, however, **TOWN** may remove all or part of such structures in its sole discretion. The cost of replacement and/or repair of any part of the structures due to **TOWN**'s need for access to the right-of-way shall be **LICENSEE**'s sole responsibility. If **LICENSEE** fails to promptly comply with **TOWN**'s request for access, or in the event of an emergency, **TOWN** may remove all or part of the structures and place temporary structural components in their stead, and **LICENSEE** shall be required to reimburse the **TOWN** for the cost of all labor, materials, and other costs related thereto within fifteen (15) days of being invoiced for same.

7. **INDEMNIFICATION.** LICENSEE shall protect, defend, indemnify and hold harmless the TOWN from and against any and all claims, suits, actions, damages and/or causes of action arising during the Term of this License Agreement for any personal injury, loss of life and/or damage to property sustained in or about the licensed right-of-way area by reason of or as a result of the use of the right-of-way by LICENSEE and LICENSEE's agents, employees, invitees or guests, and from and against any orders, judgments, and/or decrees which may be entered thereon, and from and against all costs, attorney fees, expenses and liabilities incurred in and about the defense of any such claim. In the event the TOWN shall be made a party to any litigation commenced against LICENSEE or by LICENSEE against any third party, then the LICENSEE shall protect, defend, indemnify and hold the TOWN harmless and pay all costs and attorney's fees incurred by the TOWN in connection with such litigation, and any appeals thereof.

8. **LIABILITY INSURANCE.** LICENSEE shall maintain in effect throughout the term of this License Agreement public liability insurance providing minimum coverage of \$1,000,000 combined single limit, which insurance shall cover any accident, injuries or damage suffered on, about, or within the Licensed Area or as a result of rights granted pursuant to this License Agreement. the TOWN shall be named as an additional insured and certificate holder on such insurance policy. LICENSEE shall provide TOWN with proof of such insurance which shall be attached to this License Agreement as Exhibit "B." Proof shall be in the form of a certificate from an insurance company authorized to do business in the State of Florida and shall contain a provision that such insurance shall not be cancelled except after fifteen (15) days' prior written notice to TOWN.

9. **THIRD PARTIES.** Nothing in this Agreement, whether express or implied, is intended to confer any rights or remedies under or by reason of this Agreement upon any person other than the parties hereto and their respective heirs, successors, legal representative, and permitted assigns, nor is anything in this Agreement intended to relieve or discharge the obligation or liability of any third persons to any party to this Agreement, nor shall any provision thereof give any third person any right of subrogation or action over against any party to this Agreement.

10. **ASSIGNMENT.** This Agreement shall not be assigned without the express written consent of the TOWN.

11. **TERMINATION.** TOWN may terminate this License Agreement at any time without any compensation to LICENSEE upon thirty (30) days' prior written notice to LICENSEE. Notwithstanding the foregoing, TOWN may immediately terminate this License Agreement for cause if LICENSEE fails in any respect to perform any agreements, covenants or obligations contained in this License Agreement. In the event of termination, LICENSEE shall at its own expense remove all items from the right-of-way. In the event LICENSEE fails to do so, TOWN may, at its sole option, remove all structures remaining on the public right-of-way and LICENSEE shall pay TOWN for the cost of such removal.

12. **LIMITATION OF RIGHTS.** LICENSEE acknowledges and agrees that no property or other right in the premises is created other than as specifically defined and limited by this License Agreement.

13. **NOTICES.** Notices required to be provided pursuant to this Agreement shall be sent to the following addresses:

As to **TOWN**:

As to **LICENSEE**:

14. **BINDING EFFECT.** All of the terms and provisions of this Agreement shall be binding upon, inure to the benefit of, and be enforceable by the parties hereto and their respective heirs, successors, legal representative, and assigns.

15. **ENTIRE AGREEMENT.** This Agreement shall constitute the entire agreement of the parties with respect to the subject matter herein. All prior understandings and agreements between the parties with respect to such matters are merged into this Agreement, which alone fully and completely expresses their understanding.

16. **AMENDMENTS.** This Agreement may not be amended, modified, altered, or changed in any respect, except by a further agreement in writing duly executed by each of the parties hereto.

17. **MISCELLANEOUS.**

A. This License Agreement shall be construed and enforced in accordance with the laws of the State of Florida.

B. If any provision of this License Agreement is held invalid or unenforceable, the remainder of this License Agreement shall not be affected thereby, and each other provision of this License Agreement shall be valid and enforceable to the fullest extent permitted by law.

C. In any action brought to enforce the terms or arising out of this License Agreement, the prevailing party shall be entitled to recover from the non-prevailing party reasonable attorney's fees and costs.

18. **RECORDING.** This agreement shall be recorded in the Public Records of Lee County, Florida by **LICENSEE** at **LICENSEE**'s sole cost and expense and a certified copy shall be provided to **TOWN** within three (3) business days of such recording.

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

Witnesses:

LICENSEE:

1st Witness

Print Name

2nd Witness

Print Name

STATE OF FLORIDA)
COUNTY OF LEE)

The following instrument was acknowledged before me this _____ day of _____, 200 by _____, as _____ of Licensee. He/She is personally known to me or has produced _____ as identification.

Print Name:

Notary Public - State of Florida

Commission No.: _____

My Commission Expires: _____

(SEAL)

TOWN OF FORT MYERS BEACH

ATTEST:

TOWN MANAGER

BY: _____
TOWN CLERK

APPROVED AS TO LEGAL FORM:

BY: _____
TOWN ATTORNEY