

Anne Dalton, Esquire  
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Fort Myers, Florida 33901  
(239) 337-7900

# Memorandum

**To:** LPA Chair, Vice Chair, Members  
**CC:** Town Manager, Town Clerk  
**Date:** August 17, 2009  
**Subject:** Town Right of Way Agreement – Commercial Design Standards

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Per LPA direction at the last LPA meeting, attached is a copy of the standard Right of Way Agreement used for projects subject to the Commercial Design Standards in the Land Development Code. The material terms include:

1. **Term.**
  - The Agreement is structured as an annual license
  - The term starts each January 1 through December 31
  - Either party can terminate the agreement on or before October 31 of any year
  - Problem: if the Town terminates, what happens to structures previously put into the right of way?
2. **Compensation to the Town.**
  - As of now, there has never been a charge for this license.
  - However, the license does have provision for such charge.
3. **Insurance.**
  - The Licensee is required to provide insurance in perpetuity. The amounts can be changed by the Town
  - The Licensee is required to indemnify and hold the Town harmless.
4. **Town Access to Right of Way**
  - The Town can require the Licensee to move part or all of the structures the Licensee has put in the ROW, at the Licensee's sole cost, if the Town needs access
  - In the event of an emergency, the Town can remove the Licensee's structures at the Licensee's sole cost.
5. **Damage or Destruction.**
  - Licensee is solely responsible for any damage or destruction of its structures in the Right of Way.

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.*) 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 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."

- 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 CC/CO to December 31.
- b. The fee amount in subparagraph (a) above is subject to modification by the Town on an annual basis. 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.

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. Damage and/or Destruction. In the event the Structure(s), and/or the subject property 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. 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. The insurance type, amount, and deductible required herein are subject to 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.

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:

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)**