

This instrument prepared by and
after recording return to:

Alexander I. Tachmes, Esq
Shutts & Bowen, LLP
200 South Biscayne Blvd., Suite 4100
Miami, FL 33131

(For Recorder's Use Only)

GRANT OF EASEMENT FOR AIR RIGHTS

This Grant of Easement for Air Rights (the "Easement") is made and entered into as of this ____ day of _____, 2019, by the CITY OF MIAMI BEACH, FLORIDA, a municipal corporation duly organized and existing under the laws of the State of Florida, having an address at 1700 Convention Center Drive, Miami Beach, Florida 33139 ("Grantor"), in favor of **ESSEX HOUSE COLLINS, LP**, a Delaware limited partnership having an address at c/o Jesta Management Corp., 755 Rue Berri, Suite 200, Montreal, Quebec, Canada H2T 3E5 ("Grantee").

RECITALS

- A. Grantee is the fee owner of the Essex House (1001 and 1021 Collins Avenue), the legal description of which is attached hereto as **Exhibit "A,"** and an affiliate, Clevelander Holdings, LP, a Delaware limited partnership (the "Clevelander"), is the owner of the Clevelander Hotel (1020 Ocean Drive), the legal description of which is attached hereto as **Exhibit "B"** (collectively, the "Hotel Property").
- B. The right-of way of Ocean Court located between the Clevelander Hotel and the Essex House, as depicted in **Exhibit "C"** attached hereto and made a part hereof, was dedicated by plat to Grantor as a public right of way, and this dedication also includes the air rights over the Ocean Court right-of-way (the "Ocean Court Right of Way").
- C. The City's Historic Preservation Board ("HPB"), pursuant to HPB Order No. ____, a copy of which is attached hereto and made a part hereof as **Exhibit "D,"** approved the installation by Grantee of an elevated pedestrian bridge to connect the Clevelander Hotel and Essex House at approximately the fourth floor level, and which pedestrian bridge is approximately six (6) feet in width, twenty (20) feet in length, fourteen (14) feet in height (for a total of approximately 1,680 cubic feet of air space), and located a minimum of thirty-six (36) feet above the grade surface of a portion of the Ocean Court Right of Way (the "Pedestrian Bridge"). The use of the term "Pedestrian Bridge" in this Easement shall include the associated improvements, equipment, and infrastructure, including, without limitation, electrical and utility connections, lighting, and fire sprinkler systems, necessary for the proper permitting and operation of the Pedestrian Bridge. The Pedestrian Bridge shall not impede vehicular access through the Ocean Court Right of Way.

- D. Grantor has agreed to grant an easement to Grantee, for the use of all of Grantor's air rights within that volume of space above a portion of the Ocean Court Right of Way, as legally described in **Exhibit "E"** attached hereto and made a part hereof ("Easement Area"), for the sole purpose of the construction, operation and use of the Pedestrian Bridge within the Easement Area, subject to the terms and conditions set forth herein.

NOW, THEREFORE, in consideration of the sum of Ten Dollars (\$10.00) and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties hereto agree as follows:

1. Recitals. The above recitals are true and correct and by this reference are incorporated as if fully set forth herein.
2. Easement. Subject to the terms and conditions of this Easement, Grantor hereby grants, bargains and conveys to Grantee, for the use and benefit of Grantee and, its successors and assigns and its agents, employees and invitees (including, without limitation, the Clevelander) a perpetual, exclusive easement in, through, over and across the Easement Area, for the Grantee's construction, operation, use, maintenance, repair, and replacement of the Pedestrian Bridge, along with a non-exclusive right of ingress and egress over and across the portions of the Ocean Court Right of Way necessary to access the Easement Area for the construction and maintenance of the Pedestrian Bridge, as provided herein. Grantor also hereby authorizes Grantee to construct the Pedestrian Bridge provided that it is consistent with the HPB approval of same. Grantee shall exercise its easement rights hereunder without obstructing or interfering with the continued use of the Ocean Court Right of Way by Grantor and/or the public as a dedicated public right of way for pedestrian and vehicular travel, and utility services, except as permitted pursuant to a temporary right-of-way closure permit for any construction, repair or maintenance activities that obstruct the Ocean Court Right of Way or otherwise require temporary closure of any portion thereof.
3. Consideration. As consideration and inducement for Grantor's grant of this Easement, Grantee shall pay to Grantor the amount of \$240,000 ("Contribution") to be paid in installments as follows: (1) \$80,000 upon application for a building permit to construct the Pedestrian Bridge; (2) \$80,000 upon issuance of a building permit for the construction of the Pedestrian Bridge; and (3) \$80,000 upon the issuance of a Certificate of Occupancy for the Pedestrian Bridge.
4. Construction and Maintenance of the Pedestrian Bridge. Grantee agrees to develop, design, permit, construct, use, operate, maintain, repair and replace the Pedestrian Bridge, or necessary portions thereof, so that same is at all times in good working order and condition and free of material defects, subject only to occasional interruption of service due to (i) ordinary wear and tear and use thereof; (ii) routine or extraordinary maintenance, repair or replacement; or (iii) events beyond the Grantee's reasonable control. Grantee shall have the right to select the contractor(s) of its choice in connection with all aspects of installation or construction, maintenance, repair, and replacement of the Pedestrian Bridge; provided, however, that the contractor(s) shall be subject to prior approval of Grantor, which approval shall not be unreasonably withheld so long as the work is performed by contractor(s) with prior experience performing similar projects, with the requisite licenses to perform the work, and sufficient bonding capacity to obtain a performance and payment bond covering the value of such work.

- A. Grantee shall cause for plans and specifications to be prepared for any construction work related to the installation of the Pedestrian Bridge, and shall be solely responsible for obtaining any and all governmental permits and approvals required in connection with the Pedestrian Bridge (collectively, the "Permits").
- B. After completion of any work by Grantee, Grantee shall, at its sole cost and expense, immediately, with due diligence, restore the roadway surface of the Ocean Court Right of Way to the condition in which it existed immediately prior to the performance of such work (the cost of which shall be included in Operating Costs).
- C. Grantee shall assume the responsibility, at its sole cost and expense, to maintain the Pedestrian Bridge in a good and safe condition and to repair and/or replace same as necessary from time to time, all in accordance with the Permits and any and applicable regulations of the federal, state, County, City of Miami Beach Code of Ordinances, and any other regulation governing the Pedestrian Bridge.
- D. Grantee shall be solely responsible for, and shall bear any and all costs and expenses of, installation, maintenance, utilities, taxes (including, without limitation, any ad valorem or other taxes or governmental charges that may be assessed in connection with this Easement and the Pedestrian Bridge), insurance, repairs, and replacement or restoration work (including, without limitation, any replacement or restoration in the event of any casualty or as otherwise required in the normal and customary operation of the Pedestrian Bridge), and any and all other costs and expenses, including any necessary relocation or undergrounding of existing utilities in conflict with the Pedestrian Bridge, or any damage to the Ocean Court Right of Way in connection with the Grantee's installation, operation and use of the Pedestrian Bridge (the "Operating Costs").
- E. Grantee assumes all risks in connection with the construction, operation or use of the Pedestrian Bridge, at its sole cost and expense. The Grantor disclaims any and all implied warranties of merchantability and fitness, fitness for a particular purpose, intended use, workmanship or construction respecting the use of the Easement Area or the construction, operation or use of the Pedestrian Bridge. Grantor, and its successors and assigns, shall have no obligations with respect to the operation, use, maintenance, repair, replacement or restoration Pedestrian Bridge, except to the limited extent provided in Section 5.A of this Easement and to the extent caused by the gross negligence or willful misconduct of Grantor and/or its representatives.
- F. Grantee shall, at all times, exercise diligent, good-faith efforts to: (a) avoid causing any damage to or unreasonable interference with the Ocean Court Right of Way; and (b) minimize any disruption or inconvenience to Grantor and the public in the use of the Ocean Court Right of Way as a dedicated public right of way.
- 5. Grantor's Continued Use and Maintenance of the Ocean Court Right of Way. Except with respect to the Grantee's exclusive rights over the Easement Area, the Grantor reserves unto itself, and its successors, assigns, and its authorized invitees, agents, employees, contractors, and licensees, and without the need for any notice to Grantee, the perpetual right and privilege to (i) use the Ocean Court Right of Way for the purposes of providing the general public with an unrestricted right of passage, ingress, egress, access to, and reasonable use of the Ocean Court Right of Way; (ii)

maintain, repair and replace, and/or install improvements within the Ocean Court Right of Way, including surface or subsurface improvements, as Grantor may deem necessary from time to time, at its sole and absolute discretion; and (iii) grant third-parties providing utility services with the right to use and occupy the Ocean Court Right of Way for the sole purpose of providing any such utilities, including, but not limited, to water, sewer, stormwater, electrical, gas, telecommunications, telephone and cable, at Grantor's sole and absolute discretion.

- A. If the Pedestrian Bridge is damaged during any maintenance, repair or other work performed by Grantor or its employees, agents or contractors within the Ocean Court Right of Way, the Grantor shall work with the Grantee to make all necessary repairs to the Pedestrian Bridge, at Grantor's sole cost and expense. Notwithstanding anything to the contrary herein, Grantor's issuance, in its regulatory capacity, of any right of way or other permit to a third-party (such as utility providers), shall not be construed as an assumption of any liability for the acts or omissions of that third-party, and Grantor shall not be responsible for the acts or omissions of third-parties not contracted by Grantor (such as utility providers).
 - B. Notwithstanding anything herein contained to the contrary, this Section 5 shall not be construed or deemed to relieve Grantee of its obligations, to maintain, repair, replace and/or restore the Pedestrian Bridge.
6. Payment Covenants. Grantee shall be responsible for any and all Operating Costs of the Pedestrian Bridge.
7. Term. The term of this Easement shall not commence and shall be of no force or effect unless and until Grantee submits its application for a building permit for the construction of the Pedestrian Bridge, and once in effect, shall be perpetual unless terminated upon mutual agreement of the parties, in writing. This Easement shall not merge with any deed to the Hotel Property or any part thereof, and shall survive for the term described herein. For the avoidance of doubt, the decision to proceed with the construction of the Pedestrian Bridge is within the Grantee's sole discretion. In the event that Grantee elects not to proceed, this Easement shall be of no force or effect and the obligations herein, including the Contribution, shall be void. Subsequent to the construction of the Pedestrian Bridge, Grantee shall have the right to demolish and remove the Pedestrian Bridge, provided that all required permits and approvals are obtained from the City. In the event that the Pedestrian Bridge is removed, this Easement shall automatically terminate, and the parties agree to promptly execute a written release of the Easement and record said release in the Public Records of Miami-Dade County, Florida.
8. Successors and Assigns. This Easement shall bind, and the benefit thereof shall inure to the respective successors and assigns of the parties hereto. Any transferee of the Hotel Property, or any portion thereof, shall automatically be deemed, by acceptance of the title thereto, to be subject to all of the terms of this Easement.
9. Limitation. It is the intention of the parties hereto that this Easement shall be limited to and utilized for the purposes expressed herein and only for the benefit of the persons and properties named herein. The roadway surface of the Ocean Court Right of Way shall continue to be used for appropriate pedestrian and vehicular access and activity, except as necessary during times of installation, maintenance, repair or replacement of the

Pedestrian Bridge by Grantee, or maintenance, repair or replacement of the Ocean Court Right of Way or utilities located therein. Grantor shall not be responsible for the acts or omissions of third-parties not contracted by Grantor who may cause damage to the Pedestrian Bridge. Although Grantee may perform maintenance activities, Grantee shall be required to obtain a temporary right-of-way closure permit, if any of its maintenance activities obstruct the Ocean Court Right of Way, or otherwise requires temporary closure of the Ocean Court Right of Way due to such maintenance actions.

10. Indemnification.

- A. Grantee shall indemnify, defend and hold harmless Grantor, its officers and employees, from any costs, liabilities, claims, losses, and damages (including, without limitation, reasonable attorneys' fees and disbursements at the trial level and all levels of appeal), whether suit is instituted or not, relating to death of or injury to persons, or loss of or damage to property, arising out of, or incurred in connection with, this Easement, or with the use and/or operation of the Easement Area or Pedestrian Bridge by Grantee, and/or its officials employees, contractors, and agents; and including, but not limited to, any violation by the Grantee, and/or its officials, employees, contractors, and agents, of any laws, rules, regulations or ordinances regarding hazardous materials, hazardous wastes, hazardous substances, solid waste, or pollution, whether now existing or hereafter enacted or promulgated, as they may be amended from time to time ("Environmental Laws"); any presence, release, or threat of release of hazardous materials, hazardous wastes, hazardous substances, solid waste or pollution at, upon, under, from or within the Easement Area by Grantee, and/or its officials, employees, contractors; and agents; the failure of Grantee, and/or its officials, employees, contractors, and agents, to duly perform any obligations or any clean-up required to be taken by Grantee under any Environmental Laws;; liability for personal injury or property damage;; and any fines, penalties, and punitive damages, or any fines or assessments incurred by or claimed against Grantor and arising out of the failure of Grantee, and/or its officials, employees, contractors, and agents, to comply with Environmental Laws in connection with the use of the Easement by Grantee, and/or its officers, employees, contractors, and agents. For the avoidance of doubt, the liability in this Section 10 as to Environmental Laws shall not apply to Grantee unless the liability is caused by the actions of Grantee and/or its officials, employees, contractors, and agents.
- B. Grantee shall also, as part of the indemnification provided to Grantor pursuant to this Section 10, defend any and all claims asserted against Grantor resulting from, arising out of, or incurred in connection with the existence and/or use of the Easement and the Easement Area or Pedestrian Bridge by Grantee, and/or its officials, employees, contractors, and agents. Grantee shall be entitled to select counsel of Grantee's choice to defend claim; provided however, that such counsel shall first be approved by Grantor's City Attorney, which approval shall not be unreasonably conditioned, withheld, or delayed; and, provided further, that the Grantor shall be permitted, at its cost and expense, to retain independent counsel to monitor the claim proceeding. The duty to defend set forth in this subsection shall be severable and independent from the indemnity obligations otherwise set forth in this Section 10, to the extent that if any other provisions and/or subsections of this Section 10 are deemed to be invalid and/or unreasonable, this duty to defend provision shall remain in full force and effect.

- C. Notwithstanding anything contained in Section 10 to the contrary, Grantee shall not be obligated or liable to Grantor, or any third parties, for any costs, liabilities, expenses, losses, claims or damages, with respect to claims resulting from the gross negligence, recklessness or willful misconduct of Grantor or its officials, employees, contractors, and agents.
 - D. The indemnity and defense obligations set forth in this Section 10 including, without limitation, the provisions of its subsections, shall survive the expiration of the Term or any termination of this Easement regarding any and all costs, liabilities, claims, losses, and damages (including, without limitation, reasonable attorneys' fees and disbursements at the trial level and all levels of appeal), whether suit is instituted or not, relating to death of or injury to persons, or loss of or damage to property, resulting from, arising out of, or incurred in connection with the existence and use of the Easement and the Easement Area by Grantee and/or its officials, employees, contractors, and/or agents during the term of the Easement. For purposes of example only and without limiting the generality of the foregoing, costs, liabilities, claims, losses and/or damages which are unknown or unaccrued as of the date of the expiration of the Term or other Termination of the Easement could include, without limitation, latent construction defects and/or environmental remediation claims.
11. Insurance. Grantee shall maintain insurance sufficient to cover Grantee's liability exposure with respect to its construction, use or operation of the Pedestrian Bridge, which insurance shall include Commercial General Liability Insurance, including Products-Completed Operations and Contractual Liability, in an amount not less than \$1,000,000 combined single limit per occurrence, and \$2,000,000 in the aggregate, for bodily injury and property damage, and Workmen's Compensation as required by law. Grantee shall name the Grantor as an additional named insured on the Certificates of Insurance for Commercial General Liability Insurance, and upon request of the Grantor, shall provide City with a certificate of insurance evidencing the foregoing coverages.
12. Default.
- A. Default by Grantee. In the event of a default by Grantee in the maintenance, operation or repair of the Pedestrian Bridge, Grantor shall give written notice to Grantee, specifying the nature of such default. Grantee shall have a period of thirty (30) days following receipt of said notice in which to remedy the default (or such longer time as may be necessary and reasonable, provided Grantee shall have commenced a cure within said 30-day period and is diligently and continuously prosecuting same); failing which Grantor shall have the right to enter upon the Easement Area, for the limited purpose of effecting the required repair or maintenance of the Pedestrian Bridge. Notwithstanding the foregoing, if the default is of such a nature that an emergency situation arises constituting an unsafe or unsanitary condition, the period for cure of such default shall be accelerated to a period of time which is reasonable in light of the nature of the emergency. All costs incident to curing a default by the Grantee under this subsection A shall be the sole responsibility and obligation of, and accordingly, shall be borne by, the Grantee.
 - B. Default by Grantor. In the event of a default by Grantor, Grantee shall give written notice to Grantor, specifying the nature of such default. Grantor shall have

a period of thirty (30) days following receipt of said notice in which to remedy the default (or such longer time as may be necessary and reasonable, provided Grantor shall have commenced a cure within said 30-day period and is diligently prosecuting same), failing which Grantee shall have the right to effectuate the required repair of the Pedestrian Bridge. Notwithstanding the foregoing, if the default is of such a nature that an emergency situation arises constituting an unsafe or unsanitary condition, the period for cure of such default shall be accelerated to be a period of time which is reasonable in light of the nature of the emergency. All costs incident to repair of the Pedestrian Bridge shall be borne by the Grantor.

13. Inspection. Grantor's employees or representatives shall have the right to enter and investigate the Easement Area at any time, to verify compliance with the conditions of this Easement or any applicable laws.
14. No Liens. Grantee shall not cause liens of any kind to be placed against the Easement Area or any portion thereof. The right, title and interest of the Grantor in the Easement Area shall not be subject to liens or claims of liens for improvements made by Grantee. Nothing contained in this Easement shall be deemed or construed to constitute the consent or request of the Grantor, express or by implication or otherwise, to any contractor, subcontractor, laborer or materialman for the performance of any labor or the furnishing of any materials for any specific improvement of, alteration to, or repair of the Pedestrian Bridge, or any part thereof, nor as giving Grantee, any mortgagee or lessee of the Grantee or Hotel Property any right, power or authority to contract for, or permit the rendering of, any services or the furnishing of materials that would give rise to the filing of any lien, mortgage or other encumbrance against Grantor's interest in the Easement Area, or any part thereof, or against assets of the Grantor. In the event Grantee fails to remove any lien or desires to contest any lien placed against the Easement Area or any portion thereof, Grantee shall indemnify, defend and hold harmless the Grantor against all loss, expense or damages in connection therewith, in accordance with Section 10 of this Easement. Notwithstanding the foregoing, Grantee's rights under this Easement may be part of the collateral for any mortgage encumbering the Essex House.
15. Enforcement. In the event it becomes necessary for any party to defend or institute legal proceedings as a result of the material failure of either party to comply with the terms, covenants and conditions of this Easement, the prevailing party in such litigation shall recover from the other party all costs and expenses incurred or expended in connection therewith, including, without limitation, reasonable attorney's fees and costs, at all levels.
16. Venue and Jurisdiction; WAIVER OF JURY TRIAL. This Easement shall be enforceable in Miami-Dade County, Florida, and if legal action is necessary by either party with respect to the enforcement of any or all of the terms and conditions herein, exclusive venue for the enforcement of same shall be Miami-Dade County, Florida. This Easement shall be governed by, and construed in accordance with, the laws of the State of Florida, both substantive and remedial, without regard to principles of conflict of laws. The exclusive venue for any litigation arising out of this Easement Agreement shall be Miami Dade County, Florida, if in state court, and the U.S. District Court, Southern District of Florida, if in federal court. BY ENTERING INTO THIS EASEMENT, GRANTOR AND GRANTEE EXPRESSLY WAIVE ANY RIGHTS EITHER PARTY MAY HAVE TO A TRIAL BY JURY OF ANY CIVIL LITIGATION RELATED TO, OR ARISING OUT OF, THIS EASEMENT.

17. No Joint Venture. Nothing in this Easement shall be construed to create a joint venture, partnership, tenancy in common, or joint tenancy relationship between the Grantor and the Grantee, nor shall this Easement render either party liable for the debts or obligations of the other party.
18. Interpretation. No provision of this Easement will be interpreted in favor of, or against, any of the parties hereto by reason of the extent to which any such party or its counsel participated in the drafting thereof or by reason of the extent to which any such provision is inconsistent with any prior draft hereof or thereof.
19. Counterparts. This Easement may be executed in any number of counterparts, each of which shall be deemed an original and all of which, taken together, shall constitute a single document.
20. Notices. Any notices required or permitted to be given under this Easement shall be in writing and shall be deemed to have been given if delivered by hand, sent by recognized overnight courier (such as Federal Express) or mailed by certified or registered mail, return receipt requested, in a postage prepaid envelope, and addressed as follows:

If to Grantee at:

Essex House Collins, LP
c/o Jesta Group
755 Rue Berri, Suite 200
Montreal, Quebec, Canada
H2T 3E5

With a copy to:

Alexander I. Tachmes, Esq.
Shutts & Bowen, LLP
200 South Biscayne Blvd.
Suite, 4100
Miami, FL 33131

If to the Grantor at:

City of Miami Beach, City Hall
1700 Convention Center Drive
Miami Beach, Florida 33139
Attention: City Manager

With a copy to:

City of Miami Beach, City Hall
1700 Convention Center Drive
Miami Beach, Florida 33139
Attention: City Attorney

Notices personally delivered or sent by overnight courier, or mailed in accordance with the foregoing shall be deemed given upon receipt. The terms of this Section shall survive the termination of this Easement.

21. Severability. If any clause or provision of this Easement is deemed illegal, invalid or unenforceable under present or future laws effective during the term hereof, then the

validity of the remainder of this Easement shall not be affected thereby and shall be legal, valid and enforceable.

22. Entire Agreement; Recordation. This Easement constitutes the entire agreement between the parties hereto relating in any manner to the subject matter of this Easement, and may be recorded by Grantee in the Public Records of Miami-Dade County, Florida, at its sole cost and expense. No prior agreement or understanding pertaining to same shall be valid or of any force or effect. This Easement may not be amended, modified or terminated except by a written instrument executed by the Grantor (through its City Manager) and Grantee, and which is recorded in the Public Records of Miami-Dade County, Florida. All provisions of this Easement, including the benefits and burdens of the same, are covenants that run with the land, are not intended to be executory in nature, and shall be binding upon, and shall inure to the benefit of, the parties and their respective heirs, legal representatives, successors and assigns.

SIGNATURE PAGES TO FOLLOW

22C 10/21/19
City Attorney Date

WITNESSES:

GRANTEE

Essex House Collins, LP
A Delaware limited partnership

Sign

By: _____

Name: _____

Title: _____

Print Name

Sign

Print Name

STATE OF _____)

ss:
COUNTY OF _____)

The foregoing instrument was acknowledged before me this _____ day of _____, 2019, by _____, as _____ of Essex House Collins, LP, a Delaware limited partnership. He is personally known to me or produced valid _____ driver's licenses as identification.

Notary Public, _____

My commission expires:

EXHIBIT "A"

[legal description of Essex]

EXHIBIT "B"

[legal description of Clevelander]

EXHIBIT "C"

[legal description of Alley]

EXHIBIT "D"

[HPB Order]

EXHIBIT "E"

[legal description of Easement Area]