

MIAMI BEACH

APPLICATION AND AGREEMENT FOR VOLUNTARY CITY SUBSIDY ADVANCE PROGRAM FOR SIDEWALK CAFÉS AND PARKLETS

This Application and Agreement ("Agreement") for Voluntary City Subsidy Advance Program for Sidewalk Cafés and Parklets (the "Program") is made and entered into this _____ day of _____, 20 ____ by and between the **City of Miami Beach, Florida** (hereinafter the "City"), and _____ (hereinafter "Participant"). This Agreement shall be in effect during the Permit Year listed in Article I.

ARTICLE I / PROGRAM SUMMARY

PARTICIPANT:

PROGRAM SITE:

CITY, STATE, ZIP:

Miami Beach, FL 331_____

PHONE, FAX, E-MAIL:

SIZE OF PROGRAM SITE:

☐ SIDEWALK CAFÉ

Approximately _____ square feet

☐ PARKLET (max. two 187sf each parking spaces)

PROGRAM SUBSIDY:

\$ _____

PROGRAM GUIDELINES:

See Exhibit "1"

PERMIT YEAR:

October 1, _____ – September 30, _____

ARTICLE II / GENERAL CONDITIONS

1. BACKGROUND AND PROGRAM DESCRIPTION:

A. The City has determined that allowing privately owned sidewalk cafes and parklets, operated in a manner that advance the interests of the City, as defined by the City (in its sole discretion), are desirable and provide positive dining options for the enjoyment of public outdoor areas, thereby enhancing the quality of life for residents and the quality of the experience for the City's visitors, and therefore a valid public purpose. The City currently issues sidewalk cafe or parklet permits to restaurant

operators for the use of the City's valuable public property solely in its proprietary capacity as the owner of the interest in the land on which sidewalk cafes and parklets shall be allowed. the City is not required to allow private business operations, including sidewalk cafes and parklets, on the City's sidewalks or other rights-of-way, and the City retains at all times its right to discontinue issuing sidewalk cafe and parklet permits (in whole or in part) if their operation no longer advances the City's interests, as determined by the City in its sole discretion.

In order to incentivize and fund activities that advance its interests (as defined in its sole discretion) and that funding recipients agree voluntarily to undertake, the City has created the Program, codified in City Code Section 82-391 (Voluntary City Subsidy Advance Program for Sidewalk Cafes and Parklets); said Program approving an advanced payment, in the amount of \$125 per square foot ("Program Subsidy") of permitted sidewalk cafés and/or parklet areas (each a "Program Site") to each Program Site operator responsible for paying the standard per square foot permit fee. Provided that the City Manager does not terminate this Agreement during the Permit Year, pursuant to paragraph 5, Participant will not be required to repay the City the Program Subsidy advanced payment.

B. PROGRAM REQUIREMENTS: The Program Subsidy is being offered to Recipient in connection with the approval of a permit to operate a Program Site pursuant to Chapter 82, Article III, Division 5 of the City Code (Sidewalk Cafes), as may be amended from time to time (the "Permit"). Recipient is required to comply with the Permit; the Program Guidelines incorporated herein by reference and set forth in Exhibit "1", attached hereto; and all applicable Federal, State, County and City laws, including, without limitation, Section 82-389 of the City Code (Sidewalk Café Code of Conduct), as may be amended from time to time, incorporated herein by reference as if more fully set forth herein.

2. INSPECTOR GENERAL AUDIT RIGHTS:

A. Pursuant to Section 2-256 of the Code of the City of Miami Beach, the City has established the Office of the Inspector General which may, on a random basis, perform reviews, audits, inspections and investigations on all City contracts, throughout the duration of said contracts. This random audit is separate and distinct from any other audit performed by or on behalf of the City.

B. The Office of the Inspector General is authorized to investigate City affairs and empowered to review past, present and proposed City programs, accounts, records, contracts and transactions. In addition, the Inspector General has the power to subpoena witnesses, administer oaths, require the production of witnesses and monitor City projects and programs. Monitoring of an existing City project or program may include a report concerning whether the project is on time, within budget and in conformance with the contract documents and applicable law. The Inspector General shall have the power to audit, investigate, monitor, oversee, inspect and review operations, activities, performance and procurement process including but not limited to project design, bid specifications, (bid/proposal) submittals, activities of Participant, its officers, agents and employees, lobbyists, City staff and elected officials to ensure compliance with the contract documents and to detect fraud and corruption. Pursuant to Section 2-378 of the City Code, the City is allocating a percentage of its overall annual contract expenditures to fund the activities and operations of the Office of Inspector General.

C. Upon ten (10) days written notice to Participant, Participant shall make all requested records and documents available to the Inspector General for inspection and copying. The Inspector General is empowered to retain the services of independent private sector auditors to audit, investigate, monitor, oversee, inspect and review operations activities, performance and procurement process including but not limited to project design, bid specifications, (bid/proposal) submittals, activities of Participant, its officers, agents and employees, lobbyists, City staff and elected officials to ensure compliance with the contract documents and to detect fraud and corruption.

D. The Inspector General shall have the right to inspect and copy all documents and records in Participant's possession, custody or control which in the Inspector General's sole judgment, pertain to performance of the contract, including, but not limited to original estimate files, change order estimate files, worksheets, proposals and agreements from and with successful subcontractors and suppliers, all project-related correspondence, memoranda, instructions, financial documents, construction documents, (bid/proposal) and contract documents, back-change documents, all documents and records which involve cash, trade or volume discounts, insurance proceeds, rebates, or dividends received, payroll and personnel records and supporting documentation for the aforesaid documents and records.

E. Participant shall make available at its office at all reasonable times the records, materials, and other evidence regarding the acquisition (bid preparation) and performance of this Agreement, for examination, audit, or reproduction, until three (3) years after final payment under this Agreement or for any longer period required by statute or by other clauses of this contract. In addition:

- i. If this Agreement is completely or partially terminated, Participant shall make available records relating to the work terminated until three (3) years after any resulting final termination settlement; and
- ii. Participant shall make available records relating to appeals or to litigation or the settlement of claims arising under or relating to this Agreement until such appeals, litigation, or claims are finally resolved.

F. The provisions in this section shall apply to Participant, its officers, agents, employees, subcontractors and suppliers. Participant shall incorporate the provisions in this section in all subcontracts and all other agreements executed by Participant in connection with the performance of this Agreement.

G. Nothing in this section shall impair any independent right to the City to conduct audits or investigative activities. The provisions of this section are neither intended nor shall they be construed to impose any liability on the City by Participant or third parties.

3. **INDEMNIFICATION:** Participant agrees to indemnify, defend, save and hold harmless the City, its officers, employees or agents, from any and all claims, liability, lawsuits, damages and causes of action which may arise out of this Agreement, including Participant's participation in this Program.

4. **ASSIGNMENT:** Participant shall not be permitted to assign this Agreement, and any purported assignment will be void, and shall be treated as an event of default pursuant to this Agreement.

5. **DEFAULT/TERMINATION PROVISIONS:**

A. In the event Participant shall fail to comply with any of the provisions of this Agreement including, without limitation, breach of the Program Requirements as set forth in subparagraph 1(B) of Article II, the City Manager or the City Manager's designee shall provide Participant's manager of the Program Site, with twenty-four (24) hours to cure the default. If, at the City Manager's sole discretion, the breach is cured within that period, continued participation in the Program may be allowed. If, however, the Participant fails to cure the breach, or again breaches this Agreement during the Permit Year, no further cure period shall be allowed and the City Manager may terminate this Agreement with hand-delivered notice to a manager at the Program Site, and demand the return of the City's Program Subsidy advanced, thereby relieving the City of any further obligation to Participant under this Agreement. If repayment of the Program Subsidy is demanded, the advanced Program Subsidy credit issued to the Participant on its annual Permit invoice shall be reversed and the balance owed for the full standard square footage sidewalk café and/or parklet Permit fee for the Permit Year ("standard Permit fee") shall be due to the City within ten (10) days of notice of termination. A Participant that fails to pay the standard Permit fee at the applicable rate within ten (10) days shall be deemed to have failed to timely pay the standard Permit fee, retroactively, as of the effective date of the Permit, and enforcement may follow pursuant to Chapter 82, Article III, Division 5 of the City Code (Sidewalk Cafes), without limiting the City from pursuing any other available remedies in equity or at law. The provisions of this subparagraph 5(A) shall apply to a termination of this Agreement while the Permit is active.

B. In the event that the Permit is revoked by the City for any reason during the Permit Year and thereafter Participant's sidewalk café or parkette operation remains closed through the end of the Permit Year, this Agreement shall be deemed terminated, effective as of the date of the termination of the Permit and Participant shall not be required to repay the Subsidy. In the event that the Permit is reinstated during the same Permit Year, the Program shall be reactivated and subparagraph 5(A) shall apply to any termination of this Agreement.

C. In the event that this Agreement is terminated pursuant to this paragraph 5, Participant shall be ineligible to again participate in the Program for the next two Permit Years, and thereafter shall only be eligible for this City funding at the sole discretion of the City Manager.

6. **FLORIDA PUBLIC RECORDS LAW:**

A. Participant shall comply with Florida Public Records law under Chapter 119, Florida Statutes, as may be amended from time to time.

B. The term "public records" shall have the meaning set forth in Section 119.011(12), which means all documents, papers, letters, maps, books, tapes, photographs, films, sound recordings, data processing software, or other material, regardless of the physical form, characteristics, or means of transmission, made or received pursuant to law or ordinance or in connection with the transaction of official business of the City.

C. Pursuant to Section 119.0701 of the Florida Statutes, if Participant meets the definition of "Contractor" as defined in Section 119.0701(1)(a), Participant shall:

- i. Keep and maintain public records required by the City to perform the service;
- ii. Upon request from the City's custodian of public records, provide the City with a copy of the requested records or allow the records to be inspected or copied within a reasonable time at a cost that does not exceed the cost provided in Chapter 119, Florida Statutes or as otherwise provided by law;
- iii. Ensure that public records that are exempt or confidential and exempt from public records disclosure requirements are not disclosed, except as authorized by law, for the duration of the contract term and following completion of this Agreement if Participant does not transfer the records to the City;
- iv. Upon completion of this Agreement, transfer, at no cost to the City, all public records in possession of Participant or keep and maintain public records required by the City to perform the service. If Participant transfers all public records to the City upon completion of this Agreement, Participant shall destroy any duplicate public records that are exempt or confidential and exempt from public records disclosure requirements. If Participant keeps and maintains public records upon completion of this Agreement, Participant shall meet all applicable requirements for retaining public records. All records stored electronically must be provided to the City, upon request from the City's custodian of public records, in a format that is compatible with the information technology systems of the City.

D. REQUEST FOR RECORDS; NONCOMPLIANCE

- i. A request to inspect or copy public records relating to the City's contract for services must be made directly to the City. If the City does not possess the requested records, the City shall immediately notify Participant of the request, and Participant must provide the records to the City or allow the records to be inspected or copied within a reasonable time.

- ii. Participant's failure to comply with the City's request for records shall constitute a breach of this Agreement, and the City, at its sole discretion, may: (1) unilaterally terminate this Agreement; (2) avail itself of the remedies set forth under this Agreement; and/or (3) avail itself of any available remedies at law or in equity.
- iii. If Participant fails to provide the public records to the City within a reasonable time may be subject to penalties under s. 119.10.

E. CIVIL ACTION

- i. If a civil action is filed against Participant to compel production of public records relating to the City's contract for services, the court shall assess and award against Participant the reasonable costs of enforcement, including reasonable attorneys' fees, if:
 - a. The court determines that Participant unlawfully refused to comply with the public records request within a reasonable time; and
 - b. At least 8 business days before filing the action, the plaintiff provided written notice of the public records request, including a statement that Participant has not complied with the request, to the City and to Participant.
- ii. A notice complies with subparagraph (i)(b) if it is sent to the City's custodian of public records and to Participant at Participant's address listed on its agreement with the City or to Participant's registered agent. Such notices must be sent by common carrier delivery service or by registered, Global Express Guaranteed, or certified mail, with postage or shipping paid by the sender and with evidence of delivery, which may be in an electronic format.
- iii. If Participant complies with a public records request within 8 business days after the notice is sent is not liable for the reasonable costs of enforcement.

F. IF Participant HAS QUESTIONS REGARDING THE APPLICATION OF CHAPTER 119, FLORIDA STATUTES, TO PARTICIPANT'S DUTY TO PROVIDE PUBLIC RECORDS RELATING TO THIS AGREEMENT, CONTACT THE CUSTODIAN OF PUBLIC RECORDS AT:

**CITY OF MIAMI BEACH
ATTENTION: RAFAEL E. GRANADO, CITY CLERK
1700 CONVENTION CENTER DRIVE
MIAMI BEACH, FLORIDA 33139**

E-MAIL: RAFAELGRANADO@MIAMIBEACHFL.GOV

PHONE: 305-673-7411

7. **WRITTEN NOTICES:** Any notices required under this Agreement will be effective when delivered to the City in writing and addressed to the City Contract Administrator. Otniel Rodriguez

Right-of-Way Manager

Public Works Department

1700 Convention Center Drive

Miami Beach, FL 33139

Tel: 305-673-7000 ext. 6108

Email: otnielrodriguez@miamibeachfl.gov

Any notices required under this Agreement to Participant shall be delivered in person to Participant's manager of the Program Area.

ARTICLE III / MISCELLANEOUS PROVISIONS

8. **NO DISCRIMINATION:** Participant also accepts and agrees to comply with the following Special Conditions:

A. Participant hereby agrees that it will comply with Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.) prohibiting discrimination on the basis of race, color, national origin, handicap, or sex.

B. Participant hereby agrees that it will comply with City of Miami Beach Human Rights Ordinance as codified in Chapter 62 of the City Code, as may be amended from time to time, prohibiting discrimination in employment, housing and public accommodations on account of actual or perceived race, color, national origin, religion, sex, intersexuality, gender identity, sexual orientation, marital and familial status, age, disability, ancestry, height, weight, domestic partner status, labor organization membership, familial situation, or political affiliation.

C. The City endorses, and Participant shall comply with, the clear mandate of the Americans with Disabilities Act of 1990 (ADA) to remove barriers, which prevents qualified individuals with disabilities from enjoying the same employment opportunities that are available to persons without disabilities.

D. The City also endorses the mandate of the Rehabilitation Act of 1973 and Section 504 and prohibits discrimination on the basis of disability and requires that Participant provides equal access and equal opportunity and services without discrimination on the basis of any disability.

9. **GOVERNING LAW AND EXCLUSIVE VENUE AND ATTORNEY'S FEES:** This Agreement 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 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. In connection with any litigation arising out of this Agreement, each party shall bear their own costs and attorney's fees. BY ENTERING INTO THIS AGREEMENT, THE CITY AND RECIPIENT EXPRESSLY WAIVE ANY RIGHTS EITHER PARTY MAY HAVE TO A TRIAL BY JURY OF ANY CIVIL LITIGATION RELATED TO, OR ARISING OUT OF, THIS AGREEMENT.

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IN WITNESS WHEREOF, the parties hereto have executed this Agreement.

FOR CITY:

CITY OF MIAMI BEACH, FLORIDA

ATTEST:

By: _____
Rafael E. Granado, City Clerk

Alina T. Hudak, City Manager

Date

FOR PARTICIPANT:

ATTEST:

By: _____


Authorized Signature

Print Name and Title


Print Name and Title

Date

APPROVED AS TO
FORM & LANGUAGE
& FOR EXECUTION



City Attorney

 9-1-21

Date

EXHIBIT 1
PROGRAM GUIDELINES

1. Prior to issuance of an annual sidewalk cafe and/or parklet permit, each eligible sidewalk cafe and/or parklet operator shall be offered the opportunity to participate in the Program and receive, at the operator's election, an annual voluntary City subsidy advance payment from the City equal to \$125 per square foot of permitted sidewalk cafe and/or parklet space to each sidewalk café and/or parklet operator responsible for paying the standard per square foot permit fee.
2. Prior to each sidewalk cafe Permit Year, each eligible sidewalk cafe and/or parklet operator who elects to voluntarily request the City subsidy payment shall annually complete a Program application and agreement setting forth the sidewalk cafe and/or parklet operator's election to receive the City subsidy payment and its agreement to comply with the Program Guidelines, which shall be applicable to both sidewalk cafes and parklets as defined in section 82-390.
3. This Agreement, including these Guidelines, shall govern each Permit Year and shall not be amended to be more restrictive during the Permit Year, except that Ordinances and Resolutions generally applicable to sidewalk cafes and parklets may be adopted, amended, or repealed at any time.
4. Program Guidelines for permit year beginning October 1, 2021 and ending September 30, 2022:
 - (a) Participant voluntarily agrees not to serve or allow the consumption of any beverage on the public right of way that exceeds 22 ounces in size, except that standard bottles of unaltered wine up to 750 ml or water or champagne up to 1.5 L may be served at a table in the sidewalk cafe permit area.
 - (b) Participant voluntarily agrees not to allow smoking of any vapor-generating devices, including but not limited to hookah smoking, within the sidewalk cafe permit area.
 - (c) Participant voluntarily agrees to require all employees visible to the public to wear a uniform such as basic black or a logo bearing uniform produced by Participant.
5. The Sidewalk Cafe Code of Conduct as set forth in Section 82-389 is hereby incorporated by reference into this Agreement. Any violation of the Sidewalk Cafe Code of Conduct shall additionally constitute a breach of this Agreement.
6. Once this Agreement is executed by the City Manager, the Program subsidy payment shall be advanced by the City to Participant by means of an invoice credit on the current year sidewalk cafe and/or parklet permit invoice. The advanced funds shall remain the City's property at all times until the end of the permit year; at which time it will become the property of Participant, unless the Agreement is terminated by the City Manager prior to the end of the permit year.
7. During the permit year, the City Manager or designee shall notify Participant of any breach of the Program Guidelines via hand-delivery to a manager of the sidewalk café and/or parklet. The City Manager shall then allow a one-time cure period of twenty-four (24) hours. If, at the City Manager's sole discretion, the breach is cured within that period, continued participation may be allowed. If, however, Participant fails to cure the breach or again breaches a Program Guideline during the permit year, no further cure period must be allowed and the City Manager may terminate this Agreement (with hand-delivered notice to a manager), and demand the return of the City's subsidy funds advanced. If repayment of the City's funds is demanded, the advanced funds credit issued to the Participant on its

annual sidewalk cafe and/or parklet permit invoice for the current year shall be reversed and the balance owed for the standard square footage sidewalk cafe and/or parklet permit fee for the permit year shall be simultaneously billed to the sidewalk cafe and/or parklet operator. The City Manager's decision to terminate this Agreement shall be final and at his or her sole discretion. In the event this Agreement is terminated by the City Manager, Participant shall pay the advanced funds to the City within ten (10) days of notice of termination. Any failure by Participant to pay the full standard fee at the applicable rate within ten days shall be deemed to have failed to timely pay the sidewalk cafe and/or parklet permit fee as of that date and enforcement may follow pursuant to Chapter 82, Article III, Division 5 of the City Code for failing to pay the annual sidewalk cafe and/or parklet permit fee.

8. Participant shall initially be eligible to receive the Program's City funded subsidy advance payment starting with the 2022 sidewalk cafe and/or parklet permit year. However, if this Agreement is terminated by the City Manager, Participant shall be ineligible to again participate for the next two permit years, and shall only subsequently be eligible for this City funding at the sole discretion of the City Manager.
9. The Program, its funding and payment, its guidelines, and its termination solely implicates City funds that Participant voluntarily requests from the City, and the Program funds remain at all time property of the City until the end of the permit year covered by each annual Agreement. At the end of each year, the City's authority to demand the return of its advance funding for the Program shall end for that year. Otherwise, decisions relating to granting access to the Program, governing the Program, funding the Program, paying Program funds, demanding return of Program funds, and terminating the Program for Participant at any point during the Permit Year (or in whole before the start of the next Permit Year) shall be made solely at the discretion of the City Manager, whose decisions regarding the Program shall be final.
10. Nothing in this section creates any right to participate in the Program, right to receive City funds, right to retain advanced City funds, right to challenge or appeal any decision related to the Program, or any other right (including, but not limited to, any property right, due process right, or other statutory or constitutional right) related to the Program.