

AGREEMENT
BETWEEN
CITY OF MIAMI BEACH, FLORIDA
AND
SUNSET ISLANDS PROPERTY OWNERS, INC.

This Agreement is entered into this _____ day of _____, 2018, by and between the **CITY OF MIAMI BEACH, FLORIDA**, a municipal corporation located at 1700 Convention Center Drive, Miami Beach, Florida 33139 (the "City"), and the **SUNSET ISLANDS PROPERTY OWNERS, INC.**, a non-profit Florida corporation, whose principal address is 1620 North View Drive Miami Beach, Florida 33140 (the "HOA").

RECITALS:

WHEREAS, the City is the owner of the Sunset Island Gate House located at 1356 W 29 Street, Miami Beach Florida 33140-4273 (folio # 9388353583 ROW) (the "Gate House"), as well as the other improvements located in the public right of way along W 29 Street;

WHEREAS, as part of the City's FY14/15 Capital Budget, the Mayor and City Commission appropriated funding in the amount of \$200,000 (the "City Appropriation") for the design, permitting, demolition of the existing Gate House and construction of a new Gate House in the center of entrance road with road widening and new gates; and

WHEREAS, due to the historic nature of the existing Gate House, it could not be demolished; and

WHEREAS, the HOA has requested modifications to the original scope of work; and

WHEREAS, the new scope would consists of renovations to the existing Gate House including the restroom, cooling system, lighting, new roof and the construction of a new Gate House Kiosk in the center of the entrance road (West 29 Street) including widening of the existing median, hardscape improvement and brick pavers, conduits for the HOA's security system, new security gates, landscaping and irrigation system (the "Project"); and

WHEREAS, the City Appropriation is insufficient to fund the construction of the modified Project, which the City and the HOA believe would be beneficial in the area; and

WHEREAS, a portion of City Appropriation has been encumbered for the design, construction administration and fees for the Project; and

WHEREAS, the design of the Project is depicted in the concept plan **attached as Exhibit "A"**; and

WHEREAS, the estimated construction cost for the Project, including contingency, is approximately \$462,000; and

WHEREAS, following the City's payment of expenditures for design and related Project costs, the amount remaining from the City Appropriation, and available for the construction of the Project, is \$104,000, which funds are insufficient to fund the construction of the Project; and

WHEREAS, subject to the terms and conditions of this Agreement, the HOA agrees to provide funding in excess of the City Appropriation (the "HOA Contribution"), in an effort to collaborate with the City to facilitate the construction of the Project, for the benefit of the HOA, its residents, and the City; and

WHEREAS, the City and the HOA desire to confirm, in this Agreement, the terms agreed to between the City and the HOA with respect to the HOA Contribution and the City's construction of the Project.

NOW THEREFORE, in consideration of the mutual promises contained herein, and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the City and HOA hereby agree as follows:

1. **Incorporation of Recitals.** The above Recitals are hereby made a part of this Agreement and expressly incorporated by reference herein.
2. **Project.** The City shall be responsible for designing, developing, permitting and constructing the Project in accordance with all City procurement and applicable laws, and the budget for the Project shall reflect such requirements. The City shall be responsible for entering into the contract with the architect-engineer, the construction contractor, and any ancillary professionals or other vendors required to complete the Project and related improvements. The City's Office of Capital Improvements Projects shall serve as the Contract Administrator.
3. **Procurement of Contractor and Schedule for the Project.**
 - a. Following the execution of this Agreement, the City shall issue a formal competitive bid ("Invitation to Bid" or "ITB") for a general contractor ("GC") with the requisite license and experience necessary to construct the Project. In accordance with the City's procurement requirements, the award of the ITB shall be to the lowest responsive, responsible bidder. The HOA shall be invited to the bid opening.
 - b. Before the Administration makes a recommendation to the Mayor and City Commission with respect to the award of the ITB, the City shall provide the HOA with the opportunity to review the pricing submitted by the lowest responsive, responsible bidder, to permit the HOA to verify whether the proposed pricing (including a standard 10% contingency for covering unforeseen Project costs) is in line with the anticipated construction cost estimates and available HOA Contribution for the Project.
 - c. In recognition that the City Appropriation is not sufficient to fund the Project and that the HOA Contribution is critical to the City's ability to move forward with the Project, as proposed, within thirty (30) days following the ITB bid opening, the HOA shall, at its reasonable discretion, either:

- 1) confirm that the HOA has reviewed the bid pricing received from the lowest, responsive, responsible bidder for the Project, and that the HOA approves the Project and the HOA Contribution; or
- 2) request that the City make scope reductions to the Project, in an amount necessary for the Project to be completed with the available funding (the City Appropriation and HOA Contribution); or
- 3) decline to proceed with the HOA Contribution to the Project, in which case the City Administration shall, based on the lack of funding for the overall Project, reject bids, and in such event, the City may thereafter work with the HOA to identify potential options for moving forward with the Project, or any portion thereof, if any, or cancel the Project.

d. The City shall not proceed with the Project (or any portion thereof) until such time as (1) the HOA confirms its agreement with respect to the Project and the HOA Contribution; (2) the City has received the advance deposit of the HOA Contribution, as provided in Section 4 below; and (3) the City Commission, at its sole and absolute discretion, approves the award of a contract for construction and authorizes the Administration to proceed with the Project (or any portion thereof). For the avoidance of doubt, the City shall have no obligation to proceed with the Project, except as may be authorized by the City Commission, at its sole discretion.

e. With respect to the schedule for the Project, the City anticipates that following the issuance of the ITB, the City will execute the contract for construction and issue a notice to proceed to the contractor to authorize the commencement of construction activity ("Notice to Proceed") by January 4, 2019, at the earliest.

f. Assuming the City and HOA agree to move forward with the Project, the City shall notify the HOA prior to the issuance of a Notice to Proceed, so that the HOA may keep residents informed as to the commencement of construction for the Project. The City shall, on a monthly basis, provide the HOA with an update as to the progress of construction.

4. Payment of the HOA Contribution to the City.

The HOA shall pay the City the HOA Contribution by November 1, 2018, prior to the City Commission's award of the contract for construction of the Project, which the City anticipates will occur no earlier than November 14, 2018. The City shall account for the HOA Contribution separately from its other funds, in a restricted special revenue fund, for use solely by the City for the payment of Project costs for the design, permitting and construction of the Project, as provided herein.

For purposes of payment of the Project costs, the City Appropriation shall be applied first, prior to the HOA Contribution. In the event that the Project is constructed for less than the estimated total Project cost (including, for example, if any contingency funds remain at the conclusion of the Project), any unused portion of the HOA Contribution shall be returned to the HOA within 60 days following (i) the issuance of a Certificate of Occupancy for the Project and (ii) receipt of a certificate of final payment/release of all claims from the construction contractor. In the event the Project experiences additional

Project costs in excess of the 10% contingency, the City shall diligently work with the HOA to either identify additional funds or adjust the project scope, as necessary.

5. **Notices.**

All notices and communications in writing required or permitted hereunder may be delivered personally to the representatives of the HOA and the City listed below or may be mailed by registered mail, postage prepaid (or airmailed if addressed to an address outside of the city of dispatch).

Until changed by notice in writing, all such notices and communications shall be addressed as follows:

TO HOA:

Sunset Islands Property Owners, Inc.
Attn: _____, President of HOA
Guard House, _____ Drive
Miami Beach, Florida 33140
(____) _____

TO CITY:

City of Miami Beach
Attn: David Martinez, P. E.
CIP Director
1700 Convention Center Drive
Miami Beach, Florida 33139
(305) 673-7000

Notices hereunder shall be effective:

If delivered personally, on delivery; if mailed to an address in the city of dispatch, on the day following the date mailed; and if mailed to an address outside the city of dispatch on the seventh day following the date mailed.

6. **Governing Law and Venue.** 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 letter of understanding shall be Miami-Dade County, Florida, if in State court, and the U.S. District Court, Southern District of Florida, if in Federal court.
7. **WAIVER OF JURY TRIAL.** BY ENTERING INTO THIS AGREEMENT, THE CITY AND THE HOA EXPRESSLY WAIVE ANY RIGHTS EITHER PARTY MAY HAVE TO A TRIAL BY JURY OF ANY CIVIL LITIGATION RELATED TO, OR ARISING OUT OF, THIS MEMORANDUM OF UNDERSTANDING.
8. **No Assignment.** Neither party may assign this Agreement. Neither this Agreement, nor any of its terms, may be changed, modified or otherwise amended except by an instrument in writing, signed by an authorized representative, which shall be the City Manager (on behalf of the City), and the HOA President (on behalf of the HOA).

9. **No Joint Venture.** The City and HOA acknowledge and agree that they are not joint venturers, partners, or joint owners with respect to this Agreement or the Project. Nothing contained herein shall be construed as creating a partnership, joint venture or similar relationship between the City and the HOA.
10. **City Ownership of Right of Way.** Notwithstanding the HOA Contribution to the Project, the City retains ownership of the Project, and all public-rights-of-way and improvements located thereon, with the exception of any security system or other personal property or equipment the HOA may install at the Guard House structures, which security system or other personal property or equipment shall be owned by the HOA.
11. **No Third Party Beneficiaries.** This Agreement is not intended to, and shall not be construed to give, any third party (including, without limitation, any individual members of the HOA) any rights or interests whatsoever, nor is it intended that any third party shall be a third party beneficiary of any provisions hereof.
12. **Contractor's Warranty.** City shall cause for the contractor to provide a warranty for the work, for a period of one (1) year from the date the Project is substantially completed (as evidenced by the date on the Substantial Completion Certificate executed by the Project Administrator). Except as provided herein, neither City nor HOA make any warranties or guarantees with respect to the Project.
13. **Insurance and Indemnity.** City shall cause its construction contractor to indemnify and hold harmless the HOA, and its officers, employees, and agents, from and against any and all claims, suits, actions, damages or causes of actions arising from or in connection with the construction of the Project, and for any personal injury, loss of life or damage to property sustained in connection with the construction of the Project. In addition, as a condition precedent to the commencement of any work, City shall cause its construction contractor to provide proof of the following minimum levels of insurance: (1) Commercial General Liability Insurance in an amount not less than \$ 1 Million combined single limit per occurrence for bodily injury and property damage, (2) Automobile Liability Insurance covering all owned, non-owned and hired vehicles used in collection with the operations of the City's contractor, in an amount not less than \$1 million combined single limit per occurrence for bodily injury and property damage, and (3) Workers' Compensation Insurance for all employees of City's contractor as required by Florida Statutes. The HOA shall be an additional insured on all liability coverages, except Workers' Compensation Insurance.
14. **Damage to or Destruction of the Improvements.** During the construction of the Project, the City shall cause for its construction contractor to protect the Project work against all loss or damage of any nature, and to promptly repair any such loss or damage prior to completion of the Project. Following the completion of the Project, any loss or damage to the Project shall be governed by the provisions of the Maintenance and Use Easement Agreement, attached as Exhibit "B" hereto.
15. **City's Sovereign Immunity.** No provision contained in this Agreement shall be construed or deemed a waiver of City's sovereign immunity, or of the limitations set forth in Section 768.28 of the Florida Statutes.
16. **Maintenance and Use Easement.** City and the HOA shall execute a "Maintenance and Use Easement Agreement" to the Guard House area, in the form attached as

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Exhibit “B” hereto, to provide for and memorialize the HOA’s use of, operation, and maintenance of the Guard House.

17. **Representation on Authority of Parties/Signatories.** Each person signing this Agreement warrants and represents that he or she is duly authorized and has the legal capacity to execute and deliver this Agreement, and that this Agreement is a valid and legal agreement binding on such party and enforceable in accordance with its terms.
18. **Effective Date.** This Agreement shall be effective following approval by the Mayor and City Commission and, thereafter, upon the last date signed by the parties hereto (the Effective Date).

[SIGNATURES ON FOLLOWING PAGE]

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IN WITNESS WHEREOF, this Agreement has been duly executed by the parties hereto as of the day and year first written above.

BY CITY:

Attest:

CITY OF MIAMI BEACH, FLORIDA

Rafael Granado, CITY CLERK

Dan Gelber, MAYOR

BY HOA:

SUNSET ISLANDS PROPERTY OWNERS, INC.

Attest:

Signature

Signature

[HOA Secretary
Print Name]

[Name/title]

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Exhibit “A”
Project Description and Concept Plan

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Exhibit “B”
Maintenance and Use Easement Agreement

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