

RECORDING REQUESTED BY:

(enter business mailing address)

AFTER RECORDING RETURN TO:

CITY CLERK
CITY OF OCEANSIDE
300 NORTH COAST HIGHWAY
OCEANSIDE, CA 92054

SPACE ABOVE FOR RECORDERS USE ONLY
City Clerk Doc. No.

APN

DOCUMENTARY TRANSFER TAX \$ None

(_____, City of Oceanside)
Signature of declarant or agent determining tax - Firm name

**SIDEWALK CAFÉ
ENCROACHMENT PERMIT AND REMOVAL AGREEMENT
(CERA) E-07-09**

THIS SIDEWALK CAFÉ ENCROACHMENT PERMIT AND REMOVAL AGREEMENT ("Agreement") is entered into this _____ day of _____, 2010, by and between the **CITY OF OCEANSIDE**, a municipal corporation, (hereinafter called "City"), and, _____. (hereinafter called "Business Owner").

RECITALS

WHEREAS, Business Owner is the owner/proprietor of [*Business Name*] located at [*Business Address*], Oceanside, California 92054, which is a business duly licensed by City to conduct and operate a food and beverage establishment in accordance with all local, state and federal laws;

WHEREAS, Business Owner has requested that City grant permission to Business Owner to install and maintain _____, etc. for outdoor food service, (hereinafter called the "Encroachment"), for the use and benefit of said Business Owner, over and upon [*describe the area of encroachment i.e. "the westerly four (4) feet of the public sidewalk on the west side of North Coast Highway"*] adjacent to said business, (hereinafter called the "Right-of-Way"), as said Encroachment and Right-of-Way are fully illustrated and shown on a sketch thereof, marked Exhibit "A", attached hereto and incorporated herein;

WHEREAS, Business Owner hereby acknowledges that it has received, and is in possession of, and understands City's Outdoor Eating Area Guidelines, which are incorporated herein by reference as if set forth in its entirety herein, and agrees to abide by all terms, conditions and obligations therein contained and required of Business Owner related to said Encroachment and use of said Right-of-Way; and

WHEREAS, Business Owner, hereby acknowledges and agrees that the public's use of the public Right-of-Way is paramount and superior to that of Business Owner's use of the Right-of-Way for the Encroachment.

AGREEMENT

NOW, THEREFORE, in consideration of the above recitals, the City granting permission for the Encroachment within the Right-of-Way and other valuable considerations herein contained, Business Owner covenants and agrees as follows:

Section 1. Authorization to Encroach Upon the Right-of-Way. Subject to the terms and conditions contained herein, City hereby authorizes Business Owner to encroach upon the Right-of-Way, as illustrated and shown on said Exhibit "A", for the purpose of constructing, operating, maintaining, repairing and removing an outdoor dining area. Business Owner agrees that the Encroachment shall be installed and maintained in a decent, safe and sanitary condition and in accordance with the requirements of this Agreement and said Outdoor Eating Guidelines, at the sole cost, expense and responsibility of Business Owner, its heirs, and any approved assigns or successors in interest.

Section 2. Term and Commencement Date; Valid Business License Required. This Agreement shall have an initial term of **six (6) months**, commencing on the date this Agreement is approved by the City as evidenced by the date first written hereinabove, and thereafter shall automatically be renewed on an annual basis, provided that Business Owner obtains and maintains a valid business license issued by City for the above-referenced business establishment and use.

In the event Business Owner fails or refuses to hold and maintain a valid business license, this Agreement shall automatically terminate and be of no further force or effect, and Business Owner agrees to immediately remove the Encroachment and discontinue to occupy and use the Right-of-Way for the purposes granted herein by City.

Section 3. Assignment and Subletting-No Encumbrance. The permission granted herein by City to encroach upon the Right-of-Way is personal to Business Owner and shall not run with the land and shall be binding upon and inure to the benefit of the parties, their respective heirs, personal representatives, and approved assigns or successors. Business Owner **may not** assign this Agreement to any other person or entity without the express written approval of the City, which approval shall not be unreasonably withheld. The assignment, acceptance of assignment and consent to assignment shall be substantially in the form and content as contained in Exhibit "B", attached hereto and made a part hereof by this reference. Any assignment of this Agreement, without first receiving said approval by City, shall be null and void of any effect. Assignment shall only be for the same use as herein described in Section 1, subject to the assignee assuming all of the Business Owner's obligations herein, subject further to the assignee obtaining all necessary licenses and permits for any use not consistent with the then existing current use of the Right-of-Way. Upon assignment Business Owner shall be relieved of all-future performance, liabilities, and obligations under this Agreement. Business Owner shall not have the right to sublet this Agreement without City's consent. Notwithstanding anything to

the contrary contained in this Agreement, Business Owner **may not** assign, mortgage, pledge, hypothecate or otherwise transfer its interest in this Agreement to any financing entity, or agent on behalf of any financing entity to whom Business Owner (i) has obligations for borrowed money or in respect of guaranties thereof, (ii) has obligations evidenced by bonds, debentures, notes or similar instruments, or (iii) has obligations under or with respect to letters of credit, bankers acceptances and similar facilities or in respect of guaranties thereof.

Section 4. Public Interest and Use of the Right-of-Way. Whatever rights were acquired and held by City with respect to the Right-of-Way, shall remain and continue in full force and effect and in no way be affected by City's grant of permission contained in this Agreement. Business Owner hereby acknowledges and agrees that the public's use of the Right-of-Way is paramount and superior to that of Business Owner and that City retains the exclusive right to demand the removal of the Encroachment at any time to serve the needs and convenience of the public at any time, without any cost, expense or liability to City

a. In the event that City, at its sole discretion, determines that the public convenience and necessity requires the relocation, removal and/or discontinuance of the Encroachment, whether permanent or temporary, City shall provide Business Owner with **ten (10) days** advanced written notice, or in the event of an emergency upon the effective date so indicated by the City, Business Owner hereby agrees, at its sole cost and expense to promptly relocate and/or remove the Encroachment and discontinue to use the Right-of-Way, as directed by City, so as not to interfere or impede with the public's use of the Right-of-Way.

b. Should Business Owner fail or refuse to relocate and/or remove the Encroachment as directed by the City, the City may cause such work to be done at Business Owner's cost and expense, and the costs thereof shall be paid by Business Owner to City within **ten (10) days** of Business Owner's receipt of an itemized invoice from City, and in the event Business Owner fails to remit payment of said invoiced amount within said timeframe, City may (i) revoke the permission granted herein for the Encroachment; (ii) terminate this Agreement; and (iii) take other actions and remedies afforded by law for the collection of said monies owed and protect the public's interest in the Right-of-Way.

Section 5. Revocation of Authorization. If the Business Owner fails to comply with any of the terms and conditions of this Agreement and/or any applicable ordinance, regulation or law, the City may revoke the authorization granted herein. Prior to revoking Business Owner's authorization to place the Encroachment within or upon the Right-of-Way, the City shall notify the Business Owner of its failure to comply and Business Owner shall have **Forty-eight (48) hours** from the date of such notification to correct such default to the City's reasonable satisfaction. In the event, due to acts or causes beyond Business Owner's reasonable control, that such default requires more than **Forty-eight (48) hours** to cure Business Owner shall promptly notify City, in writing, of the estimated time that it will take to cure said default and Business Owner agrees to diligently prosecute the cure of the default as soon as possible.

Section 6. Indemnification of City. Business Owner shall defend, indemnify and hold harmless the City and its officers, agents and employees against all liabilities, special, incidental, consequential, punitive, and all other damages to persons or property arising out of

the conduct of the Business Owner or its employees, agents or others in connection with its use and occupation of the Right-of-Way under this Agreement or event with respect to the Encroachment, except only for those claims arising from the sole negligence or sole willful conduct of the City, its officers, agents, or employees. Business Owner's indemnification shall include any and all costs, expenses, attorney's fees and liability incurred by the City, its officers, agents, or employees in defending against such claims, whether the same proceed to judgment or not. Further, Business Owner at its own expense shall, upon written request by the City, defend any such suit or action brought against the City, its officers, agents, or employees.

Business Owner indemnification shall also include, but not be limited to, any and all claims and demands, actions, proceedings, losses, liens, costs, judgments, civil fines, and penalties of any nature whatsoever in regard to or resulting from the construction, maintenance, state of use, repair or presence of the Encroachment installed hereunder, including but not limited to expenses incurred in legal actions, death, injury, or damage of any nature that may be caused directly or indirectly by:

a. Condition. Any unsafe or defective condition in or on the Right-of-Way, of any nature whatsoever, which may exist by reason of any act, omission, neglect, or any use or occupation of the Right-of-Way by Business Owner; and/or

b. Operation. Any operation, use, or occupation conducted on the Right-of-Way by Business Owner or any third party;

c. Negligence. Any act, omission, or negligence on the part of Business Owner, its employees, agents, sublessee, invitee, licensees; and/or

d. Compliance. Any failure by Business Owner to comply or secure compliance with any of the terms or conditions of this Agreement and any applicable local, state or federal law, ordinance or regulation, related to the use and occupation of said Right-of-Way

Section 7. Liability Insurance. Business Owner, and any contractor or contractors acting on behalf of Business Owner under this Agreement, shall take out and maintain at all times during the term of this Agreement the following insurance at its sole expense:

a. Business Owner shall maintain, general liability and property damage insurance the following minimum limits for bodily injuries and property damage resulting from the Business Owner's or its employee's, agents, invitees', or contractor's activities with regard to the authorized Encroachment:

Combined Single Limit Per Occurrence	\$1,000,000
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b. All insurance companies affording coverage to the Business Owner shall be required to add the City of Oceanside as "additional insured" under the insurance policy(s) required in accordance with this Agreement.

c. All insurance companies affording coverage to the Business Owner shall be insurance organizations acceptable to the City, authorized by the Insurance Commissioner of the State Department of Insurance to transact business of insurance in the State of

California and must carry a rating by Best of not less than "A".

d. All insurance companies affording coverage shall provide **30 days** written notice to the City of Oceanside should the policy be canceled before the expiration date. For the purposes of this notice requirement, any material change in the policy prior to the expiration shall be considered a cancellation.

e. Business Owner shall provide evidence of compliance with the insurance requirements listed above by providing a certificate of insurance, in a form satisfactory to the City Attorney, concurrently with the submittal of this Agreement.

f. Business Owner shall provide a substitute certificate of insurance no later than **30 days** prior to the policy expiration date. Failure by the Business Owner to provide such a substitution and extend the policy expiration date shall be considered a default by Business Owner and may subject the Business Owner to a termination of this Agreement.

g. Maintenance of insurance by the Business Owner as specified in this Agreement shall in no way be interpreted as relieving the Business Owner of any responsibility whatever and the Business Owner may carry, at its own expense, such additional insurance as it deems necessary.

h. If Business Owner fails or refuses to take out and maintain the required insurance, or fails to provide the proof of coverage, City has the right to obtain the insurance. Business Owner shall reimburse City for the premiums paid with interest at the maximum allowable legal rate then in effect in California. City shall give notice of the payment of premiums within **30 days** of payment stating the amount paid, names of the insurer(s) and rate of interest. Said reimbursement and interest shall be paid by Business Owner on the **first (1st) day** of the month following the notice of payment by City.

Notwithstanding the preceding provisions of this Subsection, any failure or refusal by Business Owner to take out or maintain insurance as required in this Agreement, or failure to provide the proof of insurance, shall be deemed a default under this Agreement.

i. City, at its discretion, may require the revision of amounts and coverage at any time during the term of this Agreement by giving Business Owner **Sixty (60) days** prior written notice. City's requirements shall be designed to assure protection from and against the kind and extent of risk existing on the Rights-of-way. Business Owner also agrees to obtain any additional insurance required by City for new improvements, in order to meet the requirements of this Agreement.

Section 8. Accident Reports. Business Owner shall, within **Forty-eight (48) hours** after occurrence, report to City any accident causing property damage or any serious injury to persons resulting from any of Business Owner's activities under this Agreement. This report shall contain the names and addresses of the parties involved, a statement of the circumstances, the date and hour, the names and addresses of any witnesses and other pertinent information.

Section 9. Business Owner to Bare Costs. The Business Owner, or any heirs, authorized assigns or successors, shall bear all costs incurred in connection with the

planning, design, installation, construction, maintenance, repair, operation and removal of the Encroachment.

Business Owner, at its sole cost and expense, shall make all repairs to the public improvements within the Right-of-Way as City may, at its sole discretion, deem necessary and appropriate. All such repairs shall be completed by Business Owner, to the full satisfaction of City, within **five (5) business days** following receipt of a written notice from City, which notice shall specify in sufficient detail what repairs are needed. All work in the Right-of-Way shall be done in a good workmanlike manner and utilizing materials and methods approved by the City.

Section 10. Future Rules or Agreements. The Business Owner shall abide by any agreements, rules, regulations, orders, or directives governing the use of the Rights-of-Way, as the City may find necessary or appropriate in the exercise of its police powers. Business Owner shall bear all costs resulting from any relocation or removal of the Encroachment resulting from such agreements, rules, regulations, or directives.

Section 11. Business Owner to Secure Permits. Prior to construction and installation of the Encroachment, Business Owner shall prepare and submit, for approval by the City Engineer, a final improvement plan showing the location, dimension and any other details the City may require and the City shall be authorized to require an alternate layout or location for the Encroachment within the Right-of-Way to avoid conflict with other permitted uses in and/or present or future public needs of the Right-of-Way. The City also reserves the right to inspect the installation and maintenance of the Encroachment at any and all times. Business Owner shall pay all plan check, inspection and other related fees prior to issuance of a permit for the installation and construction of the Encroachment within or upon the Right-of-Way.

Section 12. As Built Drawing to be Provided. The Business Owner shall provide City with an as-built drawing; acceptable to the City Engineer, detailing the location and nature of the Encroachment installed pursuant to this Agreement.

Section 13. Terms and Conditions Specific to this Agreement. The terms and conditions of this Agreement shall apply solely to the Encroachment described in said Exhibit "A", and shall not apply to, nor establish any precedent for, the conditions the City may impose upon Business Owner in the event Business Owner seeks to provide other use or types of services to the public within or upon the Right-of-Way.

Section 14. Current Enforceability; No Opposition. By execution of this Agreement, the Business Owner acknowledges the validity of the terms and conditions of this Agreement under applicable law in existence on the effective date hereof and pledges it will not assert in any manner or in any forum that this Agreement or the processes and procedures pursuant to which this Agreement was entered into are not consistent with the applicable law in existence on the effective date.

Section 15. Governing Law; Jurisdiction. This Agreement shall be governed and construed by and in accordance with the laws of the State of California without reference to its conflicts of law principles. If suit is brought by a party to this Agreement, the parties agree that trial of such action shall be vested exclusively in the State courts of San Diego.

County, California.

Section 16. Entire Agreement. This Agreement contains the entire understanding between the parties with respect to the subject matter herein. There are no representations, agreements, or understandings, whether oral or written, between or among the parties relating to the subject matter of this Agreement, which are not fully expressed herein. Each party has relied on advice from its own attorneys, and the warranties, representations, and covenants of this Agreement itself.

This Agreement does not limit any other rights or remedies available to City.

The Business Owner shall be responsible for complying with all Local, State, and Federal laws whether or not said laws are expressly stated or referred to herein.

Should any provision herein be found or deemed to be invalid, the Agreement shall be construed as not containing such provision, and all other provisions which are otherwise lawful shall remain in full force and effect, and to this end the provisions of this Agreement are severable.

This Agreement shall inure to the benefit of and be binding upon the parties hereto and their respective successors and assigns.

Section 17. Taxes. Business Owner shall pay, before delinquency, all taxes, assessments, and fees assessed or levied upon Business Owner or the Encroachment, including, any, structures, fixtures, furniture, machines, equipment, appliances, or other improvements or property of any nature whatsoever erected, installed, or maintained by Business Owner or levied by reason of the business or other Business Owner activities related to this Agreement, including any licenses or permits.

Business Owner recognizes and agrees that this Agreement may create a possessory interest subject to property taxation, and that Business Owner may be subject to the payment of taxes levied on such interest, and that Business Owner shall pay all such possessory interest taxes.

Section 18 Notices. All notices, demands, requests, consents or other communications which this Agreement contemplates or authorizes, or requires or permits either party to give to the other, shall be in writing and shall be personally delivered or mailed to the respective party as follows:

To City:

City of Oceanside
Property Management
300 North Coast Highway
Oceanside, CA 92054

To Business Owner:

Oceanside CA 92054

Either party may change its address by notice to the other party as provided herein. Communications shall be deemed to have been given and received on the first to occur of

(i) actual receipt at the offices of the party to whom the communication is to be sent, as designated above, or (ii) three working days following the deposit in the United States Mail of registered or certified mail, postage prepaid, return receipt requested, addressed to the offices of the party to whom the communication is to be sent, as designated above.

Section 19. Defaults and Termination. This Agreement may be terminated without further liability on **thirty (30) days** prior written notice as follows: (i) by either party upon a default of any covenant or term hereof by the other party, which default is not cured within **thirty (30) days** of receipt of written notice of default, provided that the grace period for any monetary default is **ten (10) days** from receipt of notice; or (ii) by either party for any reason or for no reason, provided either party delivers written notice of early termination no later than **thirty (30) days** prior to the parties election to terminate this Agreement; or (iii) by Business Owner if it does not obtain or maintain any license, permit or other approval necessary for the construction and operation of Encroachment.

If either party ("demanding party") has a good faith belief that the other party ("defaulting party") is not complying with the terms of this Agreement, the demanding party shall give written notice of the default (with reasonable specificity) to the defaulting party and demand the default to be cured within **ten (10) days** of the notice.

If the defaulting party is actually in default of this Agreement and fails to cure the default within **ten (10) days** of the notice, or, if more than **ten (10) days** are reasonably required to cure the default and the defaulting party fails to give adequate assurance of due performance within **ten (10) days** of the notice, the demanding party may terminate this Agreement upon written notice to the defaulting party.

City may also terminate this Agreement upon written notice to Business Owner in the event that:

a. Business Owner has previously been notified by City of Business Owner's default under this Agreement and Business Owner, after beginning to cure the default, fails to diligently pursue the cure of the default to completion, or

b. Business Owner shall voluntarily file or have involuntarily filed against it any petition under any bankruptcy or insolvency act or law, or

c. Business Owner shall be adjudicated a bankruptcy, or

d. Business Owner shall make a general assignment for the benefit of creditors.

Upon termination, City may immediately enter and take possession of the Right-of-way.

Section 20. Other Regulations. All Business Owner's use of the Right-of-Way under this Agreement shall be in accordance with the laws of the United States of America, the State of California and in accordance with all applicable rules and regulations and ordinances of the City of Oceanside now in force, or hereinafter prescribed or promulgated by resolution or ordinance or by State or Federal law.

Section 21. Related Actions. By the granting of this agreement, neither City nor the Council of the City is obligating itself to any other governmental agent, board, commission, or agency with regard to any other discretionary action relating to the use of the Right-of-Way. Discretionary action includes, but is not limited to, rezoning, conditional use permits, environmental clearances or any other governmental agency approvals which may be required for the development and operation of the Encroachment within and/or upon the Right-of-Way.

Section 22. Number and Gender. Words of any gender used in this Agreement shall include any other gender, and words in the singular number shall include the plural, when the tense requires.

Section 23. Captions. The Agreement outline, section headings, and captions for various articles and paragraphs shall not be held to define, limit, augment, or describe the scope, content, or intent of any or all parts of this Agreement. The numbers of the paragraphs and pages of this Agreement may not be consecutive. Such lack of consecutive numbers is intentional and shall have no effect on the enforceability of this Agreement.

Section 24. Powers to Enter into Agreement. The individuals executing this Agreement represent and warrant that they have the right, power, legal capacity and authority to enter into and to execute this Agreement on behalf of the respective legal entities of the Business Owner and the City.

IN WITNESS WHEREOF, the parties hereto for themselves, their heirs, executors, administrators, successors, and assigns do hereby agree to the full performance of the covenants herein contained and have caused this Agreement to be executed by setting hereunto their signatures on the day and year respectively written hereinbelow.

BUSINESS OWNER:

CITY:

(Print Name) _____

City Engineer

Dated: _____

SIGNATURES MUST BE NOTARIZED (NOTARY PUBLIC, USE ALL PURPOSE ACKNOWLEDGMENT FORM)

EXHIBIT “A”

Sketch Illustrating and Showing Location of Encroachment

Recording Requested By and
When Recorded Mail To:

City Clerk
City of Oceanside
300 North Coast Highway
Oceanside CA 92054

Space Above This Line For Recorder's Use

ASSIGNMENT OF SIDEWALK CAFÉ ENCROACHMENT PERMIT AND REMOVAL AGREEMENT

FOR VALUE RECEIVED, the undersigned _____ [Insert Name of Business Owner] _____ do hereby assign, transfer, and set over unto _____ [Insert Name of Assignee] _____ all right, title and interest in and to that certain Sidewalk Café Encroachment Permit and Removal Agreement, recorded in the Office of the San Diego County Recorder on _____ [Date] _____, as Document Number [Insert Recording Information] _____, covering that certain public right-of-way described in said document, together with all my/our right, title and interest in and to prepaid rent and/or security type deposit, if any.

ASSIGNOR(S):
[Insert Name of Business Owner]

By: _____
[Name of Business Owner]

Dated: _____

By: _____
[Name of Business Owner]

Dated: _____

STATE OF CALIFORNIA
COUNTY OF SAN DIEGO

On _____ before me, _____

a Notary public in and for said State, personally appeared _____ personally known to me (or proved to me on the basis of satisfactory evidence) to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or entity upon behalf of which the person(s) acted, executed the instrument.

WITNESS my hand and official seal.

Signature _____ (This area for official notary seal)

ACCEPTANCE OF ASSIGNMENT OF SIDEWALK CAFÉ
ENCROACHMENT PERMIT AND REMOVAL AGREEMENT

I/We the undersigned [Insert Name of Assignee] do hereby accept the above Assignment of Sidewalk Café Encroachment Permit and Removal Agreement and agree to be bound by all the terms, conditions, provisions and covenants contained in said Sidewalk Café Encroachment Permit and Removal Agreement, and promise to perform all acts required of Business Owner as therein specified.

ASSIGNEE(S):
[Insert Name of Assignee]

By: _____
[Name of Assignee]

Dated: _____

By: _____
[Name of Assignee]

Dated: _____

STATE OF CALIFORNIA
COUNTY OF SAN DIEGO

On _____ before me, _____

a Notary public in and for said State, personally appeared _____
personally known to me (or proved to me on the basis of satisfactory evidence) to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or entity upon behalf of which the person(s) acted, executed the instrument.

WITNESS my hand and official seal.

Signature _____

(This area for official notary seal)

CONSENT TO ASSIGNMENT OF SIDEWALK CAFÉ
ENCROACHMENT PERMIT AND REMOVAL AGREEMENT

The City of Oceanside, a municipal corporation, does hereby consent to the Assignment of Sidewalk Café Encroachment Permit and Removal Agreement, on the understanding that all the terms, conditions, provisions and covenants of the original Sidewalk Café Encroachment Permit and Removal Agreement shall remain and continue in full force and effect.

CITY OF OCEANSIDE

By: _____
City Engineer

Dated: _____

STATE OF CALIFORNIA
COUNTY OF SAN DIEGO

On _____ before me, _____

a Notary public in and for said State, personally appeared _____
personally known to me (or proved to me on the basis of satisfactory evidence) to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or entity upon behalf of which the person(s) acted, executed the instrument.

WITNESS my hand and official seal.

Signature _____

(This area for official notary seal)