

**CITY OF COTTONWOOD, ARIZONA
RIGHT-OF-WAY ENCROACHMENT AGREEMENT**

RECITALS

THIS RIGHT-OF-WAY ENCROACHMENT AGREEMENT ("Agreement") is entered into effective the 20th day of September, 2016 (the "Effective Date"), between the City of Cottonwood, an Arizona municipal corporation ("City"), and Lamain 919, LLC ("Licensee") its heirs and assigns.

- A. Licensee owns certain real property within that part of the City known as "Old Town," on which it plans to operate commercial/residential buildings, which is located at 920 N. Main Street.
- B. The City holds in trust for the public certain real property located on two sides of the building which Licensee is preparing to construct (the "Right-of-Way Property"). A legal description of the area is attached as Exhibit A and Exhibit A-1 to this Agreement.
- C. Licensee's decks/balconies encroach upon the Right-of-Way property.
- D. In consideration of the anticipated benefits to the City in the form of increased sales tax revenues, and other good and valuable consideration as recited herein, the City agrees to allow Licensee to encroach upon and use the Right-of-Way Property on the terms and conditions set forth herein.

I. ENCROACHMENT AREA:

The property that is the subject of this Agreement is located east and west of the proposed building (currently vacant land) located at 920 N. Main Street that is currently under review for rezone , as depicted in Exhibits A, A-1, B and C, attached hereto and incorporated herein by this reference (the "Encroachment Area").

II. LICENSED USE:

Licensee is hereby authorized to use the Encroachment Area for construction of overhanging balconies/decks as part of the residential portions of the new buildings, and by its acceptance of this Agreement and use thereof, agrees to comply with and be bound by all applicable federal, state and local

laws, ordinances and regulations pertaining to its use thereof, and to each and all of the terms and conditions of this Agreement. The City also specifically acknowledges and consents to the continuing encroachment upon the Right-of-Way property represented by the location of the building.

IV. SPECIFIC REQUIREMENTS:

- 4.1. Community Development Department Consultations. Licensee shall consult with the City's Community Development Department to develop and implement specific plans for any future modifications to the existing improvements in the Encroachment Area and the installation or construction of any additional hardscape and landscape improvements necessary to accommodate the Licensed Use.
- 4.2. Signage. Licensee shall comply with all applicable City ordinances, codes, regulations and rules regarding the posting of signage on or about the Encroachment Area.

V. GENERAL CONDITIONS:

- 5.1. Prior Approval of Modifications to Encroachment Area. Any future modifications or additions to the Encroachment Area must be approved by the City's Community Development Department.
- 5.2. City Retains Full Rights. This Encroachment Agreement is limited to the Licensed Use within the Encroachment Area. The City of Cottonwood retains full ownership of and rights to the City Property, including the Encroachment Area.
- 5.3. Insurance. Licensee shall maintain, and shall require that any contractor performing work or services on Licensee's behalf within the Encroachment Area maintain insurance against claims for injuries to persons or damages to property which may arise from or in connection with the use of the Encroachment Area by Licensee, its contractors, and by the respective agents, representatives, employees or contractors of either Licensee or its contractors under the terms

and conditions required by Licensee and the City but in no event less than the insurance requirements set forth herein. The insurance requirements herein are minimum requirements under this Encroachment Agreement and in no way limit the indemnity covenants required herein. The City of Cottonwood in no way warrants that the minimum limits contained herein are sufficient to protect the Licensee or Licensee's contractor(s) from liabilities that might arise out of this Agreement or the Licensee's use of the Encroachment Area for the Licensee, its agents, representatives, employees or contractors, and Licensee and Licensee's contractor(s) are free to purchase such additional insurance as may be determined necessary.

(a) **Minimum Coverage Requirements.** Licensee and Licensee's contractor(s) shall each provide coverage at least as broad and within limits of liability not less than those stated below:

- (i) Commercial General Liability, Each Occurance.....\$1,000,000
- (ii) General Aggregate/Per Project.....\$2,000,000
- (iii) Products-Completed Operations Aggregate\$2,000,000
- (iv) Personal and Advertising Injury\$1,000,000
- (v) Medical Expense (Any one person).....\$5,000
- (vi) Workers' Compensation & Employers' Liability.....Per Statute

(b) **Policy Provisions.** The insurance policies are to contain, or be endorsed to contain, the following provisions: (i) commercial general liability insurance shall include broad form contractual liability coverage; (ii) the insurance coverage shall be primary insurance with respect to the City, its officers, officials, agents and employees, who shall be named as additional insureds under the applicable policy(ies); (iii) the insurance shall apply separately to each insured against whom claim is made or suit is brought; (iv) coverage provided shall not be limited to the liability assumed under the indemnification provisions of this Agreement; (v) the policy shall contain a waiver of subrogation against the City, Licensee and their respective officers, officials, agents, and employees for losses arising from the operations, occupancy and use of the Encroachment Area and/or other actions of Licensee or Licensee's contractor(s).

(c) **Prior Notice and Certificate of Insurance Required.** Each insurance policy required by the insurance provisions of this Agreement shall not be suspended, voided, canceled by either party, reduced in coverage or in limits except after thirty (30) days prior written notice has been sent to the City of Cottonwood Risk Management Department as set forth herein. Such notice shall be sent by certified mail, return receipt requested. Insurance is to be placed with insurers duly licensed or approved and

licensed companies in the State of Arizona and with a "Best's" rating of not less than A-:VII. The City of Cottonwood in no way warrants that the above required minimum insured rating is sufficient to protect the Licensee or Licensee's contractor(s) from potential insurer insolvency. Licensee's contractor(s) shall furnish the City of Cottonwood with certificates of insurance (ACORD form or equivalent approved by the City) and with original endorsements affecting coverage as required by this Agreement. The certificates and endorsements for each insurance policy are to be signed by a person authorized by the insurer to bind coverage on its behalf. Any policy endorsements that restrict or limit coverage shall be clearly noted on the certificate of insurance. All certificates and endorsements shall be received and approved by the City prior to issuance of this License. Each insurance policy required by this Agreement must be in effect at or prior to Licensee's use of the Encroachment Area and remain in effect for the duration of this Agreement. Failure of Licensee or Licensee's contractor(s) to maintain the insurance policies required by this Agreement or to provide evidence of renewal shall be grounds for immediate termination of this Agreement. All certificates of insurance required by this Agreement shall be sent directly to the City of Cottonwood at the address set forth herein. The City of Cottonwood reserves the right to require complete certified copies of valid insurance policies required by this Agreement at any time.

- {d) Any modification or variation from the insurance requirements in this Agreement shall be approved by the Risk Management Department of the City of Cottonwood, whose decision shall be final.

5.4. Indemnification.

- (a) Licensee agrees to and shall cause Licensee's contractor(s) to indemnify, defend, save and hold harmless the City of Cottonwood, its directors, officers, officials, agents, employees and volunteers (hereinafter referred to as "Indemnitees") from and against any and all claims, demands, actions, liabilities, damages, losses, or expenses, including court costs, attorneys' fees, and costs of claim processing, investigation and litigation (hereinafter collectively referred to as "Claims"), for personal injury (including death) or property damage caused, or alleged to be caused, in whole or in part, by the negligent or willful acts or omissions of Licensee, Licensee's contractor(s) or any of their respective directors, officers, agents, employees, volunteers or subcontractors of Licensee's contractor(s). This indemnity includes any Claim or amount arising or recovered under the Workers' Compensation Law or arising out of the failure of Licensee or Licensee's contractor(s) to conform to any federal, state or local law, statute, ordinance, rule, regulation or court decree and any Claims arising out of this Agreement or the exercise of the rights granted hereunder. It is the specific intention of the parties that the

Licensee and the City shall, in all instances, except for Claims arising solely from the negligent or willful acts or omissions of the City, be indemnified by Licensee's contractor(s) from and against any and all Claims. Licensee shall be responsible for Claims caused, or alleged to be caused, in whole or in part, by the negligent or willful acts or omissions of Licensee's officers, agents or employees. It is agreed that Licensee or Licensee's contractor(s), as applicable, will be responsible for primary loss investigation, defense and judgment costs where this indemnification is applicable.

- 5.5 No Transfer of Privileges. The privileges granted to Licensee under this Agreement shall not be assigned, leased, sold or transferred either in whole or in part without the prior written consent of the City, which shall not be unreasonably withheld.
- 5.6 Notice of Change of Address. The Licensee shall notify the City at the address set forth herein within 30 days of any change in Licensee's mailing address, proposed lease, assignment, sale or transfer of the Site.
- 5.7 No Interest in Real Property. This Agreement shall not be deemed to be a franchise, an easement, a covenant running with the land, an interest in real property or a lease. This Agreement only allows the Licensed Use within the Encroachment Area for a finite period of time.
- 5.8 Rights to Encroachment Area Revocable at Will. This Agreement is subject to revocation at any time in the discretion of the City Council or by the City Manager or Community Development Manager with ratification by the Council. Such discretion shall be controlled solely by consideration of the best interests of the City of Cottonwood, which may include but are not limited to violation or breach of any federal, state or City of Cottonwood law, ordinance, code, rule, regulation, court decree or any term or condition of this Agreement. Without limiting the generality of the foregoing, the failure of the Licensee to pay any annual fee or maintain any required insurance shall be grounds for immediate revocation of this Agreement.
- 5.9 Restoration of Encroachment Area. Upon revocation of this Agreement all signage, fencing or structures installed pursuant to this Agreement (collectively, the "Encroachments") shall be removed to the satisfaction of the Community Development Manager at no cost to City of Cottonwood within 10 calendar days. In the event that the Encroachments are not removed from the Licensed Area after written notice by the City, the City reserves the right to remove them and Licensee shall be responsible for and shall pay all costs related to the removal. If Licensee fails to pay the costs for the City's removal of the Encroachments within ninety (90) calendar days of written request for payment, Licensee hereby agrees that the City of Cottonwood may recover from Licensee all of the City's costs of

removal of the Encroachments, including attorneys' fees and collection costs, as afforded by Arizona law.

- 5.10 No Recourse. The Licensee shall have no recourse whatsoever against the City of Cottonwood or its officials, boards, agents or employees for any loss, costs, expenses or damage arising out of any of the conditions or provisions of this Agreement or because of any defects in the City's title to the Encroachment Area, or should the Licensee in accordance with the terms hereof be lawfully deprived of the use of the Encroachment Area.
- 5.11 Rights Subject to Ordinances. As Amended. This Agreement and the rights conveyed to Licensee hereunder are subject to general ordinance provisions now in effect and as may be amended from time to time. Except as specifically provided herein, nothing in this Agreement shall be deemed to waive the requirement of the various codes and ordinances of the City of Cottonwood regarding Licensee's use of the Encroachment Area or any other property, or prerequisites for construction of improvements. This Agreement is subject to and the Licensee shall comply with any future ordinances that may be adopted by the City Council pertaining to the location and relocation of the Licensed Uses.
- 5.12 Cancellation for Conflict of Interest or Convenience of the City. The parties acknowledge that this License is subject to cancellation pursuant to the provisions of Arizona Revised Statutes Section 38-511. **The City also reserves the right to cancel this Agreement at any time for any reason, in the public interest and at the convenience of the City.**
- 5.13 Maintenance and Disturbance of Encroachment Area.
- (a) The Licensee shall maintain the Encroachment Area in a manner satisfactory to the Community Development Manager. Failure to provide satisfactory maintenance can result in revocation of this Agreement pursuant to Section 5.8 of the General Conditions.
 - (b) Whenever the Licensee disturbs a public right-of-way, alley, public highway, street easement, or public utility easement for any reason as a result of construction or due to failure of any of its facilities or subsequent right-of-way restoration work, the Licensee shall restore the same to the satisfaction of the City of Cottonwood Community Development Manager and shall obtain all appropriate construction licenses, permits and approvals.
 - (c) The City of Cottonwood may in its own discretion remedy Licensee's failure to maintain the Encroachment Area or otherwise comply with the provisions of this License. The cost thereof, including the cost of inspection and supervision, shall be paid by the Licensee. If Licensee fails to pay the City's costs within ninety (90) calendar days of written request

for payment, Licensee hereby agrees that the City may seek to recover all of the City's costs, including attorneys' fees and all costs of collection, as afforded by Arizona law. All activities in, on and around the Encroachment Area, the Right-of-Way Property and other public rights-of-way by the Licensee, its agents and contractors shall be undertaken in a safe manner, and in accordance with all Directives of the City's Community Development Manager.

- (d) Maintenance contracts for the Encroachment Area, if any, with another party shall be filed with the Community Development Department. Licensee or its maintenance contractor shall obtain insurance and Workers' Compensation insurance as provided herein and perform work in a satisfactory manner and according to plans approved by the City of Cottonwood Community Development Department.
- (e) The City of Cottonwood shall not assume any maintenance responsibility for maintenance of the Encroachment Area.
- (f) The City of Cottonwood shall retain the right of access to the Encroachment Area at all reasonable times for inspection, for maintenance or for repairs.

5.14 Emergency Work by Licensee. Emergency work by Licensee in and around the Encroachment Area and the City Property shall be properly barricaded in a manner approved by the Community Development Manager. Barricading shall be followed immediately by contacting all affected utility companies and the Community Development Department. Licensee shall also obtain a construction license from the City of Cottonwood Development Services Department before Licensee, its contractors or agents restore the Encroachment Area or the Right-of-Way Property to original conditions as approved by the City of Cottonwood. Licensee shall follow emergency procedures set forth by Community Development Department.

5.15 User Conflicts. Nothing in the License shall be construed to prevent the City of Cottonwood or its Licensees from constructing facilities, grading, paving, and/or altering any facilities, street, alley, or constructing any other public work or private facility licensed by the City of Cottonwood elsewhere on the Right-of-Way Property or in other adjoining public rights-of-way.

5.16 Entire Agreement; Amendment; Waivers. This Agreement constitutes the entire agreement between the City of Cottonwood and Licensee with respect to the transactions contemplated herein and supersedes all prior negotiations, communications, discussions and correspondence, whether written or oral, concerning this subject matter. No supplement, modification, or amendment of any term of this Agreement shall be deemed binding or effective unless executed in writing by all the parties. No waiver of any of the provisions of this Agreement

shall be deemed, or shall constitute, a waiver of any other provision, whether or not similar, nor shall any waiver constitute a continuing waiver. No waiver shall be binding unless executed in writing by the party making the waiver.

- 5.17 Rights of Parties. Nothing in this Agreement, whether express or implied, is intended to confer any rights or remedies on any persons other than the parties to this Agreement and their respective successors and assigns, nor is anything in this Agreement intended to relieve or discharge any obligation or liability of any person who is not a party to this Agreement, nor shall any provision hereof give any persons not a party to this Agreement any right of subrogation or action over or against any party to this Agreement.
- 5.18 Construction. This Agreement is the result of negotiations between the parties, none of whom has acted under any duress or compulsion, whether legal, economic or otherwise. Accordingly, the terms and provisions of this Agreement shall be construed in accordance with their usual and customary meanings. The parties hereby waive the application of any rule of law that otherwise would be applicable in connection with the construction of this Agreement that ambiguous or conflicting terms or provisions should be construed against the party who (or whose attorney) prepared the executed Agreement or any earlier draft of the same. Unless the context of the Agreement otherwise clearly requires, references to the plural include the singular and the singular the plural. The words "hereof", "herein", "hereunder" and similar terms in this Agreement refer to this Agreement as a whole and not to any particular provision of this Agreement. All references to "Sections" herein shall refer to the sections and paragraphs of this Agreement unless specifically stated otherwise. The section and other headings contained in this Agreement are inserted for convenience of reference only, and they neither form a part of this Agreement nor are they to be used in the construction or interpretation of this Agreement. All references to "days" herein shall mean calendar days unless specifically noted otherwise.
- 5.19 Severability. If any covenant, condition, term or provision of this Agreement is held to be illegal, or if the application thereof to any person or in any circumstances shall to any extent be judicially determined to be invalid or unenforceable, the remainder of this Agreement or the application of such covenant, condition, term or provision to persons or in circumstances other than those to which it is held invalid or unenforceable, shall not be affected thereby, and each covenant, term and condition of this Agreement shall be valid and enforceable to the fullest extent permitted by law.
- 5.20 Governing Law. This Agreement, and the rights and obligations of the parties hereunder, shall be governed by, and construed and interpreted in accordance with, the internal substantive laws of the State of Arizona and the City of Cottonwood.

- 5.21 **Cooperation and Further Documentation.** Licensee agrees to provide the City of Cottonwood such other duly executed documents as shall be reasonably requested by the City of Cottonwood to implement the intent of this Agreement.
- 5.22 **Survival of Representations and Warranties.** All representations and warranties made in this Agreement by Licensee shall survive the execution and delivery of this Agreement.
- 5.23 **Exhibits.** All exhibits attached to this Agreement are by this reference incorporated into and made a part of this Agreement.
- 5.24 **Notices.** All notices, requests, demands, other communications, certificates of insurance or payments under this Agreement shall be in writing and shall be deemed to have been duly given and received (i) on the date of service if personally delivered on the party to whom notice is to be given (ii) on the third day after the date of the postmark of deposit if mailed to the party to whom notice is to given, by first-class United States Mail, registered or certified, postage prepaid and properly addressed as follows; or (iii) on the second day after deposit with a nationally recognized private express courier service providing proof of receipt and delivery and guaranteed "same day" or "next day" delivery and properly address as follows:

If to City of Cottonwood: City Manager
City of Cottonwood
827 North Main Street
Cottonwood, AZ 86326

If to Licensee: John Haupt
LaMain 919, LLC
10008 E. South Bend
Dr
Scottsdale, AZ 85255

- 5.25 **Conflict Among Provisions.** In the event of any inconsistency or conflict among the Cottonwood City Charter and City Code, City of Cottonwood Ordinances or Resolutions, General Conditions of this Agreement or Special Conditions of this Agreement, the terms and conditions as set forth in the following priority shall prevail and control (1) City of Cottonwood Charter and Code; (2) City of Cottonwood Ordinances or Resolutions; (3) the General Conditions of this Agreement; and (4) the Special Conditions of this Agreement