

## TEMPORARY CONSTRUCTION EASEMENT AGREEMENT (PARCELS A, B & C)

THIS TEMPORARY CONSTRUCTION EASEMENT AGREEMENT ("Agreement") is made as of \_\_\_\_\_, 2005 by THE CITY OF MIAMI, a municipal corporation of the State of Florida ("City"), to and for the benefit of FLAGSTONE ISLAND GARDENS, LLC, a Delaware limited liability company, f/k/a and successor by merger to Flagstone Properties, LLC, a Florida limited liability company ("Flagstone").

### RECITALS

A. City and Flagstone heretofore entered into that certain Agreement to Enter into Ground Lease dated January 1, 2003 (as may be amended from time to time, the "Agreement to Enter Into Ground Lease").

B. Pursuant to the Agreement to Enter Into Ground Lease, City and Flagstone agreed to enter into a Ground Lease in the form attached thereto as Exhibit "C" (as may be amended from time to time, the "Ground Lease"), subject to and in accordance with the terms and conditions set forth in the Agreement to Enter Into Ground Lease. Unless otherwise defined herein, capitalized terms used herein shall have the meanings given to them in the Ground Lease.

C. City is the owner in fee simple of certain upland on Watson Island and certain submerged land located adjacent thereto (collectively, the "Leased Property"), all as more particularly described in the Ground Lease.

D. Pursuant to the Ground Lease, City will lease to Flagstone, and Flagstone will lease from City, the Leased Property, and Flagstone or one or more Major Subtenants will develop and operate a mixed use project thereon (the "Project").

E. City will derive substantial benefits from the development and operation of the Project.

F. City is also the owner in fee simple of certain other land located on Watson Island.

G. The construction of the Project requires that Flagstone be granted certain easements over, across and upon a portion of Watson Island on a temporary basis for construction staging access and other purposes described herein.

H. City has agreed to grant such easements, all as more particularly described herein.

NOW, THEREFORE, in consideration of Ten and No/100 Dollars and other good and valuable consideration, the receipt and sufficiency of which are acknowledged by the parties, City and Flagstone agree as follows:

### AGREEMENTS

1. **Recitals.** The foregoing recitals are true and correct and are incorporated herein as if set out in full in the body of this Agreement.

2. **Grant of Easements.** City hereby grants to Flagstone and its employees, agents, contractors, subcontractors, invitees and guests:

2.1 Parcel A: a temporary non-exclusive easement over, across and upon approximately 6.53 acres, as described in Exhibit "A" attached hereto (Parcel A"), for the limited purpose

of construction staging, and/or sales and construction offices related to the Project and equipment and materials lay-down.

2.2 Parcel B: use from time to time and subject to availability, as determined by the Chief Executive Officer or his designee, of a temporary non-exclusive easement over, across and upon approximately 1.11 acres, as described in Exhibit "B" attached hereto ("Parcel B"), for the limited purpose of construction staging and/or sales and construction offices related to the Project and equipment and materials lay-down.

2.3 Parcel C: a temporary non-exclusive easement over, across and upon approximately 2.15 acres, as described in Exhibit "C" attached hereto ("Parcel C"), for the limited purpose of providing ingress and egress to Parcel A and B, and/or for sales and construction offices related to the Project and equipment and materials lay-down; provided, however, that the City reserves the right to eliminate the equipment and material lay-down areas on Parcel C while continuing to provide access to the Project if needed for other development on Watson Island.

These parcels may also be used for the placement of permanent utilities, including but not limited to, underground electrical, water, sewer, telephone, and cable lines as well as natural gas and fuel lines which may be for the exclusive use of any one of the City's island tenants. Said authorization for placement of utilities shall be subject to plans submitted to the Chief Executive Officer for his prior written approval, which approval may be conditioned or withheld in his sole discretion.

The above easements are hereby collectively referred to as "Easement Area" and are granted for the limited purposes set forth herein and for no other purpose unless first approved by the Chief Executive Officer or his designee, in writing, which consent may be withheld or conditioned in his sole discretion. The City reserves the right to use portions of the Easement Area, for itself or others, as it may require, and Flagstone will not interfere with such shared use and if necessary, will relocate equipment that may be located in the Easement Area and/or make additional alterations, at Flagstone's sole cost, to provide for such shared use. Flagstone may implement reasonable security measures provided they are coordinated and approved by the Chief Executive Officer.

3. **Operations.** Flagstone shall, at its sole cost and expense, make any and all improvements required for its use of the Easement Area. Flagstone shall regulate the installation and its future operations of the Easement Area so as not to conflict or interfere with operations of the City, its tenants, sub-tenants, sub-subtenants, licensees, agents, successors, and assigns and the general public. In the event Flagstone's use or operations conflicts with the operations of the City, its tenants, licensees, agents, successors or assigns, or the general public, the City, or its successors or assigns, shall have the right to impose reasonable rules and regulations to govern the use of the Easement Area so as to eliminate or minimize such conflicts and/or interference; provided, however, that the City shall, to the extent practicable, afford Flagstone reasonable access to and use of the Easement Area at all times.

Flagstone shall not encroach beyond the boundaries of the Easement Area. Should the Easement Area be abandoned or discontinued by law or otherwise, said easements shall cease and revert with the right of immediate possession and right of entry to the City or its successors in interest, upon the City providing Flagstone thirty (30) days' advance written notification of such action, and Flagstone's failure to reactivate usage of the Easement Area within such thirty (30) day period.

4. **Changes and Additions to Easement Area.** City reserves the right at any time and from time to time and at its sole cost and expense, to make or permit changes or revisions to the Easement Area, including additions to, subtractions from, rearrangements of, alterations of, and modifications of, the Easement Area. Notwithstanding the rights of City above, in the event the change or revision (i) affects the functionality of the Easement Area, or (ii) materially and adversely affects Flagstone's use of the Easement Area, Flagstone's prior written consent to such change or addition shall be required, which consent shall not be unreasonably withheld or delayed.

5. **Condition of the Property.** Flagstone accepts the Easement Area "as-is", in its present condition and state of repair and without any representation by or on behalf of City, and agrees that City shall, under no circumstances, be liable for any latent, patent or other defects in the Easement Area. Flagstone, at its sole cost, shall maintain the Easement Area (other than any portions used by others as authorized by the City) in good order and repair at all times and in an attractive, clean, safe and sanitary condition and shall suffer no waste or injury thereto. Flagstone shall be responsible for all repairs to the Easement Area required or caused by Flagstone's use of any part thereof.

6. **Expense and Maintenance Responsibilities.** Flagstone shall design, construct, install, maintain and repair any improvements required for its use of the Easement Area, including, but not limited to, all related infrastructure improvements, drainage, lighting, and pavement, at Flagstone's sole cost and expense. Flagstone shall keep the Easement Area (other than any portions used by others as authorized by the City) in a safe, sightly, good and functional condition during the term of this Agreement at Flagstone's sole cost and expense. All work performed by or on behalf of Flagstone shall be conducted in a lien-free manner. Not less than thirty (30) days prior to the Effective Date, which may run concurrently with the 30 day notice period provided for in Sections 13 and 22, Flagstone shall submit plans and specifications for the initial improvements to be constructed or installed within the Easement Area, which plans and specifications shall be subject to the Chief Executive Officer's prior written approval. Flagstone shall submit to the Chief Executive Officer proof of funding and/or its financing plans along with the plans and specifications. For purposes of this Agreement, improvements may include, but not be limited to, construction trailers, building, fencing, barricades, signage, utilities and construction equipment and apparatus.

In the event Flagstone elects to make additional improvements (hereinafter "Alterations"), Flagstone shall submit plans and specifications for such Alterations, to the Chief Executive Officer for his prior written approval. The approvals of the Chief Executive Officer pursuant to this Section 6, shall be made in accordance with the Chief Executive Officer Procedures; provided, however, that any improvements that will remain on the Easement Area after the expiration of this Agreement shall be subject to the Chief Executive Officer's prior written approval in his sole discretion. Flagstone shall be solely responsible for any and all costs associated with any Alteration, including, but not limited to, design, construction, installation and permitting costs. All Alterations to the Easement Area, whether or not by or at the expense of Flagstone, shall, unless otherwise provided by written agreement of the parties hereto, immediately upon their completion become the property of the City and shall remain surrendered with the Easement Area unless removed by Flagstone. In the event of an emergency, Flagstone may reasonably proceed to perform such repair work and shall immediately notify the City of such work.

Flagstone shall provide all construction, maintenance and use of the Easement Area in a manner that will minimize any unreasonable interference with the use and operations of the City, its tenants, sub-tenants, sub-subtenants, licensees, agents, successors, and assigns and the general public.

7. **Mechanics' Liens.** Flagstone shall not knowingly suffer or permit any mechanics' liens to be filed against the title to the Easement Area by reason of work, labor, services or materials supplied to Flagstone or anyone having a right to possession of the Easement Area as a result of an agreement with Flagstone acting, with or without Flagstone's consent. Nothing in this Agreement shall be construed as constituting the request of the City, expressed or implied, by inference or otherwise, to any contractor, subcontractor, laborer or materialman for the performance of any labor or the furnishing of any materials, for any specific work on the Easement Area nor as giving Flagstone the right, power or authority to contract for or permit the rendering of any services or the furnishing of any materials that would give rise to the filing of any mechanics' liens against the City's interest in the Easement Area. If any mechanics' lien shall at any time be filed against the Easement Area by reason of work, labor services or materials supplied to Flagstone, its tenants, subtenants, contractors or subcontractors, Flagstone shall cause it to be discharged of record (by bonding, notice of bond or otherwise) within thirty (30) days after the date that it has notice of its filing; provided, however, that Flagstone shall not be required to pay or discharge any mechanics' lien within the thirty (30) day period, so long as Flagstone shall in good faith proceed to contest the lien by appropriate proceedings or shall furnish reasonably satisfactory evidence that funds are or will be available to pay the

amount of the contested lien claim with all interest on it and costs and expenses, including reasonable attorney's fees to be incurred in connection with it. If Flagstone does not: i) cause a mechanics lien to be discharged of record within thirty (30) days after the date Flagstone has notice of the filing of a lien; or ii) in good faith proceed to contest the lien by appropriate proceedings within the thirty (30) day period, then Flagstone shall be in default of this Agreement.

8. **Utilities.** Flagstone shall pay for all utilities, including, but not limited to, electricity, water, stormwater fees, gas, telephone, garbage and sewage disposal used by Flagstone during its occupancy of the Easement Area pursuant to this Agreement, as well as all costs for installation of any lines and equipment needed by Flagstone, its tenants, subtenants, contractors or subcontractors. Flagstone, at its sole cost, shall install all utilities required for its use and install separate utility meters required thereby and shall be billed directly by the applicable utility company for such services.

9. **Advertising.** Flagstone shall not permit any signs or advertising matter to be placed either in the interior or upon the exterior of the Easement Area without having first obtained the approval of the Chief Executive Officer or his designee in accordance with the Chief Executive Office Approval Procedures. Flagstone shall, at its sole cost and expense, install, provide and maintain such sign, decoration, advertising matter or other things as may be permitted hereunder in good condition and repair at all times. Flagstone must further obtain approval from all governmental authorities having jurisdiction, and must comply with all applicable requirements set forth in the City of Miami Code and Zoning Ordinance. Upon the cancellation of this Agreement, Flagstone shall, at its sole cost and expense, remove any sign, decoration, advertising matter or other thing permitted hereunder from the Easement Area subject to Section 10 below. If any part of the Easement Area is in any way damaged by the removal of such items, said damage shall be repaired by Flagstone at its sole cost and expense. Should Flagstone fail to repair any damage caused to the Easement Area within ten (10) days after receipt of written notice from City directing the required repairs, City shall cause the Easement Area to be repaired at the sole cost and expense of Flagstone. Flagstone shall pay City the full cost of such repairs within five (5) days of receipt of an invoice indicating the cost of such required repairs. Flagstone hereby understands and agrees that the City may, at its sole discretion, erect or place upon the Easement Area an appropriate sign indicating that the City has entered into this Agreement.

10. **Ownership of Improvements.** As of the Effective Date and throughout the Term, title to all buildings and improvements on the Easement Area shall be vested in Flagstone, unless otherwise provided by other written agreement.

11. **Removal of Property.** In the event of termination of this Agreement, or upon the expiration of the term of this Agreement, Flagstone shall promptly remove all personal property, fixtures and equipment from the Easement Area, and if the City so requires by written notice to Flagstone, Flagstone shall also promptly remove any buildings and other improvements constructed or caused to be constructed by Flagstone on the Easement Area. In the event Flagstone fails to remove its personal property, equipment and fixtures, and any such buildings and other improvements so designated by the City from the Easement Area within thirty (30) days period after the termination of this Agreement, said property shall be deemed abandoned and thereupon shall become the sole property of the City. The City, at its sole discretion and without liability, shall remove the same and Flagstone shall reimburse the City for all reasonable expenses associated with such removal and disposal. Any and all improvements made to the Easement Area, other than those portions used by other parties not under Flagstone's control, shall be done at the sole cost, expense and risk of Flagstone. No repayment for investment shall be made to Flagstone if the Ground Lease is not executed for Flagstone's failure to comply with all requirements under the Agreement to Enter into Ground Lease. Flagstone has agreed to perform all work in the Easement Area required for its use, at its sole cost and expense.

12. **Restoration of Easement Area.** In consideration of the granting of this Agreement, Flagstone shall provide Chief Executive Officer approved services and construct improvements to the Easement Area at a cost of up to \$1,000,000 to improve the open space area. Such improvements may include, but not be limited to, master planning of Southside Park, open air pavilion or covered support facility, fencing, removal of invasive trees and plants, underground utilities, park pathways, bicycle and

jogging trails, public restroom facilities, security cameras and/or devices, and parking area. Flagstone, at its sole cost, agrees to repair and restore the Easement Area to a condition better than it was delivered to Flagstone and in substantial accordance with the Master Plan for the South Side Park to be approved by the City. Such restoration shall be done prior to the expiration of this Agreement.

13. **Notices to Chief Executive Officer.** Prior to commencing the initial construction and mobilization of the Easement Area, Flagstone shall give the Chief Executive Officer or his designee thirty (30) days' prior written notice, describing the anticipated commencement date(s) and completion date(s) with respect to same.

14. **Compliance With Permits and Laws.** In connection with the construction, maintenance and use of the Easement Area, Flagstone shall: (i) obtain and maintain all required permits and approvals from applicable Governmental Authorities having jurisdiction or regulatory authority over same; and (ii) comply with all Applicable Laws with respect to the Easement Area, including, but not limited, to Chapter 713, F.S.

15. **Insurance.** In connection with the Easement Area, Flagstone shall obtain and maintain or cause to be obtained and maintained throughout the term of this Agreement the types and amounts of insurance coverages set forth in Exhibit D, attached hereto and incorporated herein by this reference.

16. **Indemnity.** Flagstone shall indemnify, defend and save harmless City and City's successors, permitted assigns, officials, employees and agents (the "City Indemnified Parties") from and against any and all claims, actions, proceedings, damages, losses, liabilities, costs and expenses (including, without limitation, reasonable attorneys' fees and costs), arising out of, or resulting from, any personal injury, loss of life or damage to property, which shall occur in, on or over the Easement Area in any way connected to, construction, installation, maintenance and repairs which Flagstone its tenants, subtenants, contractors or subcontractors perform or cause to be performed in the Easement Area and the use of the easements described herein (the "Indemnified Matters"). In case any action or proceeding is brought against City by reason of any of the Indemnified Matters, the indemnifying party, upon sixty (60) days' written notice from City, shall, at the indemnifying party's expense, resist or defend the action or proceeding by counsel reasonably satisfactory to City. City shall also be entitled to appear, defend, or otherwise take part in such action or proceeding, at its election, and at the sole expense of City by counsel located within Miami-Dade County, Florida of its own choosing, provided that: (i) such action by City shall not limit or make void any liability of any insurer of Flagstone or City with respect to the claim or matter in question; and (ii) City shall not, without Flagstone's prior written consent, settle any such action or proceeding or interfere with Flagstone's defense or prosecution of such action or proceeding. The provisions of this Section shall survive the expiration or termination of this Agreement.

17. **No Liability.** In no event shall the City be liable or responsible for injury, loss or damage to the property, improvements, fixtures and/or equipment belonging to or rented by Flagstone, its officers, agents, employees, contractors, and sub-contractors, Major Subtenants, assigns, invitees or patrons occurring in or about the Easement Area that may be stolen, destroyed, or in any way damaged, including, without limitation, fire, flood, steam, electricity, gas, water, rain, vandalism or theft which may leak or flow from or into any part of the Easement Area, or from the breakage, leakage, obstruction or other defects of the pipes, sprinklers, wires, appliances, plumbing, air conditioning or lighting fixtures on the Easement Area, or from hurricane or any act of God or any act of negligence of any user of the facilities or occupants of the Easement Area or any person whomsoever whether such damage or injury results from conditions arising upon the Easement Area or upon other portions of the Easement Area or from other sources. Flagstone indemnifies the City, its officers, agents and employees from and against any and all such claims even if the claims, costs, liabilities, suits, actions, damages or causes of action arise from the negligence or alleged negligence (but not gross negligence or willful misconduct) of the City, including any of its employees, agents, or officials so long as they are acting within their scope of employment.

Flagstone acknowledges that, as lawful consideration for being granted the right to utilize and occupy the Easement Area, Flagstone, on behalf of itself, its agents, invitees, employees, contractors,

and sub-contractors does hereby release from any legal liability the City, its officers, agents and employees, from any and all claims for injury, death or property damage resulting from Flagstone's use of the Easement Area.

Flagstone further agrees that it shall be responsible for providing security whenever personal property either owned or used by Flagstone, its employees, agents, contractors, or subcontractors is placed in the Easement Area, including property necessary for set-up and dismantling the construction mobilization, regardless of whether or not the Project is open to the general public.

18. **Safety.** Flagstone and each of its employees, agents, officers, contractors and subcontractors shall allow the City inspectors, agents or representatives the ability to monitor compliance with safety precautions as required by federal, state or local laws, rules, regulations and ordinances. By performing these inspections, the City, its agents, or representatives are not assuming any liability by virtue of these laws, rules, regulations and ordinances. Flagstone and each of its employees, agents, officers, contractors and subcontractors shall have no recourse against the City, its agents or representatives from the occurrence, non-occurrence or result of such inspection(s). Simultaneously with the Effective Date, Flagstone shall contact the City's Risk Management Department Safety Unit in writing to coordinate such inspection(s).

19. **Americans With Disabilities Act.** Flagstone and each of its employees, agents, officers, contractors and subcontractors shall affirmatively comply with all applicable provisions of the Americans with Disabilities Act ("ADA"), including Titles I and II of the ADA (regarding nondiscrimination on the basis of disability) and all applicable regulations, guidelines and standards. Additionally, Flagstone and each of its employees, agents, officers, contractors and subcontractors shall take affirmative steps to ensure nondiscrimination in the employment of disabled persons.

20. **Taxes.** Flagstone covenants and agrees to pay all taxes of whatsoever nature lawfully levied or assessed against the Easement Area other than those portions used by other parties that are not under Flagstone's control and improvements, property, sales, rents or operations thereon, including but not limited to, ad valorem taxes but only as applicable to the term of this Agreement. City shall provide to Flagstone any tax bills received within fifteen (15) days of receipt. Payment thereof shall commence with and shall include taxes, if any assessed for then current year. Flagstone further covenants and agrees to pay all of the said taxes, if any, lawfully assessed, on such dates as they become due and payable. In the event Flagstone fails to pay the real property taxes by April 1<sup>st</sup> of each year, Flagstone shall be responsible to pay the City a late fee equal to 5% of such overdue amount. The parties hereby agree that such late charge represents a fair and reasonable estimate of the costs the City will incur by reason of late payment by Flagstone. Acceptance of such late charge by the City shall not constitute a waiver of Flagstone's default with respect to such delinquent amount, nor prevent the City from exercising any of its other rights and remedies or at law or in equity. Any real property taxes not paid by April 1<sup>st</sup> of each year shall bear interest at the rate of 12% per annum, commencing on April 1. Flagstone shall pay such interest to the City. Payment of such interest shall not excuse or cure any default by Flagstone under this Agreement.

In the event that Flagstone becomes delinquent in the payment of real property taxes, the City, upon providing written notice to Flagstone, may require either of the following, at its sole option: (1) Flagstone to escrow monthly to the City an amount equal to one-twelfth of the amount billed for ad valorem taxes, without discounts, during the previous calendar year plus 5% to cover estimated annual tax increases. Said amount shall be paid on the first day of each month. In the event the amount escrowed is not sufficient to pay the full amount of taxes due, Flagstone shall pay the difference to the City for remittance to the County within fifteen (15) days of receipt of notice from the City of the amount of such deficiency. In the event the amount of monies escrowed are in excess of the taxes due, the balance shall be applied to the following year's tax payment; or (2) Flagstone shall enroll in the Dade County Ad Valorem Tax Payment Plan.

Failure of Flagstone to pay the real property taxes when due and any late fees in connection therewith, to pay a monthly real estate tax escrow to the City, or to enroll in the Dade County Ad Valorem Tax Payment Plan as aforesaid shall constitute an event(s) of default under this Agreement.

Notwithstanding the foregoing, Flagstone shall have the right to appeal or contest the imposition of any taxes and/or the assessed values in accordance with applicable law.

21. **Eminent Domain.** In the event the whole or any part of the Easement Area is taken by right of eminent domain or any similar authority of law (a "Taking"), the entire award for the value of the land and improvements so taken shall belong to the City, and Flagstone shall not have a right to claim any portion of such award by virtue of any interest created by this Agreement. Flagstone may, however, file a collateral claim with the condemning authority over and above the value of the land being so taken to the extent of any damage suffered by Flagstone resulting from the severance of the land or improvements so taken if such claim shall not operate to reduce the award allocable to the City of the Taking. In the event a portion of Parcel A is subject to a Taking, the City shall use reasonable efforts to identify and facilitate alternative staging areas.

22. **Term.** Flagstone shall provide the Chief Executive Officer with no less than thirty (30) days' prior written notice of the date on which Flagstone requires to commence utilizing the Easement Area (hereinafter the "Effective Date"). The term of this Agreement shall expire on the earlier of one (1) year after the Occupancy Date or such earlier date as is mutually agreed upon by the parties; provided, however, that this Agreement shall sooner terminate if the Agreement to Enter Into Ground Lease is terminated or expires in accordance with its terms (without the Ground Lease having been mutually executed and delivered), or the Ground Lease is terminated or expires in accordance with its terms (whereupon the easements granted herein shall be deemed automatically terminated and of no further force or effect). Upon termination of this Agreement, all rights and privileges derived from, and all duties and obligations created and imposed by the provisions of this Agreement, shall terminate and have no further force or effect; provided, however, that the termination of this Agreement shall not limit or affect any remedy at law or in equity that either party may have against any other parties with respect to any liability or obligation arising or to be performed under this Agreement prior to the date of such termination.

23. **Security Deposit.** The Security Deposit (the "Security") required pursuant to the Agreement to Enter Into Ground Lease and the Ground Lease, as applicable, shall also serve as security for the faithful performance by Flagstone of all provisions of this Agreement. If Flagstone is in violation beyond any applicable notice or cure period, the City may use apply or retain all or any part of the Security for the payment of (i) any fee or other sum of money which Flagstone was obligated to pay but did not pay, (ii) any sum expended by City on Flagstone's behalf in accordance with the provisions of this Agreement, or (iii) any sum which the City may expend or be required to expend as a result of Flagstone's default hereunder beyond any applicable notice and cure period. The use, application or retention of the Security or any portion thereof by the City shall not prevent the City from exercising any other right or remedy provided for under this Agreement or at law and shall not limit any recovery to which the City may be entitled otherwise. At any time or times when the City has made any such application of all or any part of the Security Deposit, Flagstone shall deposit the sum or sums equal to the amounts so applied by City within ten (10) days of written notice by the City.

24. **Compliance with Environmental Laws.** Flagstone represents and warrants that during the term of this Agreement, it will not use or employ the Easement Area, or any other City-owned property, to handle, transport, store or dispose of any Hazardous Materials and that it will not conduct any activity on Easement Area or City-owned property in violation of any applicable environmental laws. Notwithstanding the foregoing, Flagstone may handle, transport, store or dispose of Hazardous Materials as necessary for Flagstone's Project on the Easement Area as long as such handling, transportation, storage and disposal is performed in strict compliance with all applicable laws and regulations. Flagstone hereby indemnifies and holds harmless the City and their respective officers, employees and agents, from and against all actions and liabilities relating to Flagstone's handling, transportation, storage and disposal of Hazardous Materials on or about the Easement Area or City-owned property. The requirements of this paragraph shall survive the cancellation, revocation, termination or expiration of this Agreement.

25. **Hazardous Materials.** In connection with its activities hereunder, Flagstone shall, at its sole cost and expense, at all times and in all respects comply with all federal, state and local laws, statutes, ordinances and regulations, rules rulings, policies, orders and administrative actions and orders relating to hazardous materials ("Hazardous Materials Laws"), including, without limitation, any Hazardous Materials Laws relating to industrial hygiene, environmental protection or the use, storage, disposal or transportation of any flammable explosives, toxic substances or other hazardous, contaminated or polluting materials, substances or wastes, including without limitation, any "Hazardous Substances", "Hazardous Wastes", "Hazardous Materials" or "Toxic Substances" (collectively "Hazardous Materials"), under any such laws, ordinances or regulations. In connection with its activities hereunder, Flagstone shall, at its sole cost and expense, procure, maintain in effect and comply with all conditions of any and all permits, licenses and other governmental and regulatory approvals relating to the presence of Hazardous Materials within, on, under or about the Easement Area or required for Flagstone's use of any hazardous materials in or about the Easement Area in conformity with all applicable Hazardous Materials Laws and prudent industry practices regarding management of such Hazardous Materials. Upon cancellation, revocation, termination or expiration of this Agreement, Flagstone shall, at its sole cost and expense, cause all Hazardous Materials, including their storage devices, placed in or about the Easement Area by Flagstone or at Flagstone's direction, to be removed from the Easement Area and transported for use, storage or disposal in accordance and compliance with all applicable Hazardous Materials Laws. Flagstone may operate according to the custom of the industry so long as the use or presence of Hazardous Materials is strictly and properly monitored according to, and in compliance with, all applicable governmental requirements. The requirements of this paragraph shall survive the cancellation, revocation, termination or expiration of this Agreement.

The City represents that:

- (i) To the best of its knowledge, there are no environmental violations, whether under federal, state, or local laws, existing on the Easement Area;
- (ii) To the best of its knowledge, there are no Hazardous Materials presently existing on the Easement Area.

26. **Default.** If, prior to the mutual execution and delivery of the Ground Lease, Flagstone in any manner defaults in the performance of this Agreement, the Chief Executive Officer may give written notice to Flagstone of such default. If Flagstone fails to cure such default within fifteen (15) days after written notice is given to Flagstone (or such longer period as may be reasonably necessary to cure such default), the City may elect to: (i) terminate this Agreement; (ii) proceed to enforce the performance bond(s) obtained in connection with this Agreement; or (iii) pursue any other remedy available at law or in equity. If, after the mutual execution and delivery of the Ground Lease, Flagstone in any manner defaults in the performance of this Agreement, the Chief Executive Officer may give written notice to Flagstone of such default, and if the Chief Executive Officer does so, the Chief Executive Officer shall contemporaneously give a copy of such notice to any Approved Mortgagee, provided that such Approved Mortgagee has theretofore given the City written notice of its address for notices and acknowledged in writing its cure rights hereunder. If Flagstone or such Approved Mortgagee fails to cure such default within fifteen (15) days after written notice is given to Flagstone and such Approved Mortgagee (or such longer period as may be reasonably necessary to cure such default), the City may elect to: (i) terminate this Agreement; (ii) proceed to enforce the performance bond(s) obtained in connection with this Agreement; or (iii) exercise such rights and remedies as the City may have under the Ground Lease on account of Flagstone's failure to perform its obligations hereunder.

27. **Notices.** All notices and other communications under this Agreement shall be in writing and shall be deemed to have been duly given or made in the manner required by the Agreement to Enter Into Ground Lease (and after the Ground Lease is mutually executed and delivered, in the manner required by the Ground Lease).

28. **Assignment; Binding Effect.** This Agreement may not be assigned, pledged, transferred or encumbered except in connection with any such assignment, pledge, transfer or encumbrance of the Ground Lease as is permitted by the terms of the Ground Lease. Without limiting the generality of the

foregoing, it is acknowledged and agreed that Flagstone may assign this Agreement in whole or in part to any Major Subtenant(s), and that Flagstone or any such Major Subtenant(s) may pledge and encumber its rights hereunder in favor of any Approved Mortgagee(s). This Agreement shall be binding upon and inure to the benefit of City and Flagstone and their respective successors and permitted assigns. Every agreement, covenant, promise, undertaking, condition, easement, right, privilege, option and restriction made, granted or assumed, as the case may be, by any party to this Agreement shall run with the land and constitute an equitable servitude on the Easement Area, for the benefit of the Project as provided herein. Any transferee of any part of the Easement Area shall automatically be deemed, by acceptance of the title to any portion of the Easement Area, as the case may be, to have assumed all obligations of this Agreement.

29. **Headings.** The captions and headings contained in this Agreement are for convenience of reference only and shall not affect the construction or interpretation of this Agreement.

30. **Non-Dedication.** Nothing contained in this Agreement shall be deemed to be a gift or dedication of any portion of the Easement Area to Flagstone, it being the intention of the parties hereto and their successors and assigns that nothing in this Agreement, expressed or implied, shall confer upon any person other than the parties hereto and their successors and assigns, any rights or remedies under or by reason of this Agreement.

31. **Severability.** Any provision of this Agreement which is prohibited or unenforceable in any jurisdiction shall, as to such jurisdiction, be ineffective to the extent of such prohibition or unenforceability without invalidating the remaining provisions hereof or affecting the validity or enforceability of such provision beyond such extent or in any other jurisdiction. It is the intention of the parties to this Agreement that if any provision of this Agreement is capable of two constructions, one of which would render the provision void and the other of which would render the provision valid, the provision shall have the meaning which renders it valid.

32. **Responsibility.** Notwithstanding anything to the contrary contained in this Agreement, each party to this Agreement shall be liable and responsible for the obligations, covenants, agreements, and responsibilities created by this Agreement and for any judgment rendered hereon only to the extent of its respective interest in the Easement Area and the improvements thereon.

33. **Attorneys' Fees.** In the event of any litigation or arbitration between the parties, all expenses, including reasonable attorneys' fees and court costs at both the trial and appellate levels, incurred by the prevailing party, shall be paid by the non-prevailing party. The term "attorneys' fees" shall be deemed to include, without limitation, any paraprofessional fees, investigative fees, administrative costs and other charges billed by the attorney to the prevailing party (including any fees and costs associated with collecting such amounts). The provisions of this Agreement shall survive the expiration or termination of this Agreement.

34. **Waiver of Jury Trial.** The parties hereby knowingly, irrevocably, voluntarily and intentionally waive any right either may have to a trial by jury in respect of any action, proceeding or counterclaim based on, or arising out of, under or in connection with this Agreement or any amendment or modification of this Agreement or any other agreement executed by and between the parties in connection with this Lease, or any course of conduct, course of dealing, statements (whether verbal or written) or actions of any party hereto. This waiver of jury trial provision is a material inducement for City and Flagstone to enter into this Agreement.

35. **Arbitration.** Any dispute arising under this Agreement shall be submitted to binding arbitration in the manner set forth in Article XVII of the Ground Lease.

36. **No Third Party Beneficiaries.** Nothing in this Agreement shall confer upon any person, other than the parties and their respective successors and permitted assigns, any rights or remedies under or by reason of this Agreement.

37. **Construction.** Both parties substantially contributed to the preparation and negotiation of this Agreement. Accordingly, this Agreement shall not be construed against the party responsible for preparing it.

38. **Governing Law.** This Agreement shall be governed by, and construed in accordance with, the laws of the State of Florida, without application of its conflict of law principles.

39. **Entire Agreement.** This Agreement embodies and constitutes the entire understanding between City and Flagstone concerning the Easement Area, and all prior or contemporaneous agreements, understandings, representations, and statements, oral or written, with respect thereto are merged therein. Nothing in this Agreement shall be construed to make the parties hereto partners or joint venturers or render either of said parties liable for the debts or obligations of the other. The parties agree that there are no commitments, agreements, or understandings concerning the subject matter of this Agreement that are not contained in this Agreement, and that this Agreement contains the entire agreement between the parties as to all matters contained herein. Accordingly, it is agreed that no deviation from the terms hereof shall be predicated upon any prior representations or agreements, whether oral or written. It is further agreed that any oral representations or modifications concerning this Agreement shall be of no force or effect. This Agreement may be modified, altered or amended only by a written amendment duly executed by both parties hereto or their authorized representatives. The Chief Executive Officer is authorized to amend or modify this Agreement as needed.

40. **Chief Executive Officer Approvals.** The approvals of the Chief Executive Officer pursuant to this Agreement shall be made in accordance with the Chief Executive Officer Approval Procedures; provided, however, that: (i) any improvements that will remain on the Easement Area after the expiration of this Agreement shall be subject to the Chief Executive Officer's prior written approval at the Chief Executive Officer's discretion; and (ii) the period for the City's initial response to a request for approval of any construction plans and specifications for all Easement Areas shall be the same as for Construction Plans and Specifications.

41. **Counterparts.** This Agreement may be executed in any number of counterparts, all of which taken together shall constitute one and the same instrument and any party hereto may execute this Agreement by signing any such counterpart.

42. **Performance Bond.** Draft Note: Language for provision to be provided by City's Risk Management Department and Office of City Attorney upon execution of Agreement with specific Exhibit E attachment for Agreement.

**IN WITNESS WHEREOF,** City and Flagstone have executed this Easement Agreement as of the date set forth above.

Attest:

"City"

CITY OF MIAMI, a municipal corporation

\_\_\_\_\_  
Priscilla A. Thompson  
City Clerk

By: \_\_\_\_\_  
Joe Arriola  
City Manager

**APPROVED AS TO RISK REQUIREMENTS**

**APPROVED AS TO FORM  
AND CORRECTNESS**

\_\_\_\_\_  
Dania F. Carrillo, Administrator  
Risk Management

By: \_\_\_\_\_  
Jorge L. Fernandez  
City Attorney



