

This instrument was prepared by
and after recording return to:
Gregory L. Urbancic, Esq.
Roetzel & Andress
850 Park Shore Drive
Third Floor, Trianon Centre
Naples, Florida 34103
(941) 649-6200

(Space above this line for recording data)

USE, MAINTENANCE, AND INDEMNIFICATION AGREEMENT

THIS USE, MAINTENANCE, AND INDEMNIFICATION AGREEMENT (this “Agreement”) is made and entered into this _____ day of _____, 2002, by and between **THE CITY OF NAPLES, a Florida municipal corporation** (“City”) and **5th AVENUE/3rd STREET DEVELOPMENT, LLC, a Florida limited liability company d/b/a HOTEL ESCALANTE** (“Owner”).

WITNESSETH:

WHEREAS, Owner is the fee simple title holder to that certain real property located in Collier County, Florida and more particularly described in Exhibit “A” attached hereto and made a part hereof (the “Owner’s Property”); and

WHEREAS, City is the owner of an alley right-of-way bisecting the Owner’s Property and running between and perpendicular to 2nd Street South and 3rd Street South (the “Alley”); and

WHEREAS, Owner has requested approval from City to construct, place and/or install certain improvements in the Alley to improve the aesthetic appearance and enhance the marketability of the Property; and

WHEREAS, City is willing to accommodate Owner’s request on the terms and conditions contained herein.

NOW THEREFORE, in consideration of the sum of Ten and No/100ths Dollars (\$10.00), and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, City and Owner do hereby covenant and agree as follows:

1. **Recitals.** The foregoing recitals are true and correct and are incorporated herein as part of this Agreement.
2. **Alley Improvements.** Owner shall be permitted to install within the Alley those improvements described on Exhibit “B” attached hereto and made a part hereof (the “Alley Improvements”). Owner shall not construct or install any other improvements within the Alley other than the Alley Improvements without the prior written approval of City, which approval may be withheld by City in its sole and exclusive discretion. Alteration of the Alley Improvements (other than maintenance and

repair) shall also require prior written approval of City, which approval may be withheld by City in its sole and exclusive discretion. The Alley Improvements shall be constructed or installed in accordance with applicable federal, state, and/or local laws, ordinances and regulations.

3. **Maintenance of Alley Improvements.** Owner shall have the sole responsibility to maintain and repair, or cause to be maintained or repaired, all Alley Improvements in good condition and repair. All maintenance and repair shall be at the sole cost and expense of Owner and shall be completed in a timely manner.

4. **Indemnification.** Owner agrees to indemnify, hold harmless and defend City, its officers, agents, and employees from and against any and all losses, damages, costs, claims, demands, liabilities, actions, causes of action, payments, recoveries, judgments, and expenses of whatever kind (including reasonable attorneys' fees and costs) which arise or result from, in whole or in part, by reason of any act or omission of Owner, or Owner's agents, contractors, subcontractors, consultants, or employees during the construction, installation maintenance, or use of the Alley Improvements by Owner, or Owner's agents, employees, guests, invitees, and members of the general public and as otherwise contemplated by this Agreement. Owner shall promptly give notice to City of any claim or potential claim that may be covered by this indemnity provision.

5. **Insurance.** Owner shall obtain and keep in force for the benefit of City and Owner such public liability insurance policies as will reasonably hold City harmless against claims for bodily injury, death, pollution or contamination, or property damage occurring on or in connection with the use of the Alley; such insurance policies, in respect of any one occurrence, shall be in the single limit of \$1,000,000.00 for injury or death and in the single amount of \$100,000.00 for property damage, and shall include City as a co-loss payee. The insurer shall be legally qualified to do business in Florida and shall be acceptable to City. Written proof of such insurance coverage shall be supplied to City prior to construction or installation of the Alley Improvements and such proof shall include a statement by the insurer or his agent that City will receive a least fifteen (15) days' notice of any cancellation.

6. **Damage.** Owner shall promptly repair any damage that may occur to any building, structure, utility facility, roadway, City property or other private property during the course of construction, installation, or maintenance of the Alley Improvements pursuant to this Agreement.

7. **Alley Repair.** In the event City determines from time to time, in its sole and exclusive discretion, that repair, replacement, or reconstruction of any portion of the Alley is necessary, City shall provide 30 days notice to Owner of such action and Owner shall remove or relocate as necessary for the City's actions. The relocation, removal or replacement of the Alley Improvements shall be at the sole cost and expense of Owner. In the event Owner fails to remove the Alley Improvements in a timely manner, City may remove and relocate the Alley Improvements. All costs incurred by City in removing or relocating the Alley Improvements shall be paid by Owner. City shall restore the surface of the Alley to the condition existing immediately prior to any such work activities, but shall not be responsible for relocating or replacing the Alley Improvements.

8. **Utilities.** In the event City or any public utility (including water, sewage, gas, electric, telephone or cable utilities) is scheduled for or requires placement, replacement, repair or reconstruction within the Alley and this activity requires the removal or relocation of the Alley Improvements, Owner shall remove, relocate and replace the Alley Improvements at its sole cost and expense within 30 days of receiving written notice of such action. In the event Owner fails to remove the Alley Improvements in a timely manner, City or the public utility may remove and relocate the Alley Improvements. All costs incurred by City or the public utility in removing or relocating the Alley Improvements shall be paid by Owner. City or the public utility performing the work shall restore the surface of the Alley to the condition

existing immediately prior to any such work activities, but shall not be responsible for relocating or replacing the Alley Improvements.

9. **Public Alley/License.** Notwithstanding the provisions contained herein, the Alley shall remain the property of City and a public road for use by the general public. Further, this Agreement shall not be construed as granting Owner exclusive rights to use the Alley. This Agreement constitutes a license only, revocable pursuant to the terms hereof, and shall not in any way be construed to be an easement.

10. **Termination.** Owner may terminate this Agreement upon thirty (30) days written notice to City. City may terminate this Agreement if Owner defaults in the performance of any provision of this Agreement if such default continues for a period of fifteen (15) days after written notice is sent by City to Owner, or for non-continuing defaults if such default or a similar default occurs again within a twelve (12) month period after written notice is sent by City to Owner of the first default. Upon termination of this Agreement, Owner shall remove all Alley Improvements at the Owner's sole cost and expense, and the parties shall record a notice in the Public Records of Collier County, Florida that this Agreement has been terminated.

11. **Notices.** Any notice, request, demand, instruction or other communication to be given to any party hereunder shall be in writing and either hand delivered, delivered by overnight courier, telecopier or facsimile transmission, or sent by registered or certified mail, return receipt requested, postage prepaid, addressed as follows:

If to City: City of Naples
735 8th Street South
Naples, Florida 34102
Attn: Kevin J. Rambosk, City Manager
Phone: (941) 213-4610
Facsimile: (941) 213-1033

With a copy to: Roetzel & Andress, L.P.A.
850 Park Shore Drive
Naples, Florida 34103
Attn: Robert D. Pritt, Esq.
Phone: (941) 649-6200
Facsimile: (941) 261-3659

If to Owner : 1170 Third Street South
Suite C-206
Naples, Florida 34102
Attn: _____
Phone: (941) _____
Facsimile: (941) _____

With a copy to: Conroy, Coleman & Hazzard, P.A.
2640 Golden Gate Pkwy., Suite 115
Naples, Florida 34105
Attn: J. Thomas Conroy, III, Esq.
Phone: (941) 649-5200
Facsimile: (941) 649-8140

Any notice demand, request or other communication shall be deemed to be given upon actual receipt in the case of hand delivery, facsimile or telecopier transmission, or delivery by overnight courier, or three (3) business days after depositing the same in a letter box or by other means placed within the possession of the United States Postal Service, properly addressed to the party in accordance with the foregoing and with the proper amount of postage affixed thereto. In the event of any notice via telecopier or facsimile transmission, a hard copy shall be sent via certified mail, return receipt requested on the day of such transmission. Any such transmission received after 5:00 p.m. Eastern Standard Time (or Daylight Savings Time, whichever then applicable) shall be deemed to have been given on the next following business day. For purposes of delivering and receiving any notices, demands, requests or other communications under this Contract, the attorneys for City may directly contact Owner and the attorneys for Owner may directly contact City. The respective attorneys for both City and Owner are hereby expressly authorized to give or receive any notice, demand, request or to make any other communication pursuant to the terms of this Agreement on behalf of their respective clients.

The addressees and addresses for the purpose of this Article may be changed by either party by giving written notice of such change to the other party in the manner provided herein. For the purpose of changing such addresses or addressees only, unless and until such written notice is received, the last addressee and respective address stated herein shall be deemed to continue in effect for all purposes.

12. **Parties Bound.** This Agreement shall constitute a covenant running with the Owner's Property and the Alley and shall be binding on the parties and their heirs, successors and/or assigns.

13. **Amendment.** This Agreement may not be changed or modified, except in writing by an instrument executed by the parties hereto.

14. **Severability.** If any term or provision of this Agreement or the application thereof to any party, person or circumstance shall, to any extent, be declared invalid or unenforceable by a court of law, the remainder of this Agreement, or the application of such term or provision to parties, persons or circumstances other than those to as to which it is held invalid or unenforceable, such term or provision shall be modified to the minimum extent necessary to make it or its application valid and enforceable, and the validity and enforceability of all other terms and provisions of this Agreement and all other applications of any such term or provision shall not be affected thereby, and each term and provision of this Agreement shall be valid and enforced to the fullest extent permitted by law.

15. **Applicable Law.** This Agreement shall be construed and enforced in accordance with the laws of the State of Florida, exclusive of choice of law rules, and this Agreement shall not be construed more strictly against one party than against another party merely by virtue of the fact that it may have been prepared by counsel for one of the parties, it being recognized that all parties hereto have contributed substantially and materially to the negotiations and preparation of this Agreement. Venue for any legal action arising out of this Agreement shall lie in Collier County, Florida.

16. **Recording.** This Agreement shall be recorded in the Public Records of Collier County, Florida.

(Signatures on next Page)

IN WITNESS WHEREOF, the parties have extended these presents effective as of the date and year first above written.

WITNESSES:

CITY OF NAPLES,
a Florida municipal corporation

(Print Name: _____)

By: _____
Bonnie R. MacKenzie, Mayor

(Print Name: _____)

5TH AVENUE/3RD STREET DEVELOPMENT, LLC,
a Florida limited liability company

(Print Name: _____)

By: _____

Print Name: _____

(Print Name: _____)

Title: _____

STATE OF FLORIDA)
) ss.
COUNTY OF COLLIER)

The foregoing instrument was acknowledged before me, this _____ of _____, 2002, by BONNIE R. MACKENZIE, Mayor of the City of Naples, on behalf of the City, who is () personally known to me or () has produced _____ as evidence of identification.

(SEAL)

NOTARY PUBLIC
Name: _____
(Type or Print)
My Commission Expires: _____

STATE OF FLORIDA)
) ss.
COUNTY OF COLLIER)

The foregoing instrument was acknowledged before me, this _____ of _____, 2002, by _____, as _____, of 5th Avenue/3rd Street Development, LLC, a Florida limited liability company, on behalf of said company, who is () personally known to me or () has produced _____ as evidence of identification.

(SEAL)

NOTARY PUBLIC
Name: _____
 (Type or Print)
My Commission Expires: _____

372841_1

OWNER'S PROPERTY

[To Be Completed]

EXHIBIT "A"

ALLEY IMPROVEMENTS

[To Be Completed]