

STATE OF FLORIDA DEPARTMENT OF TRANSPORTATION
USE AND OCCUPANCY AGREEMENTITEM/SEGMENT NO.: 4093341MANAGING DISTRICT: ThreeF.A.P. NO.: 4221-084-CSTATE ROAD NO.: 30COUNTY: Escambia

PARCEL NO.: _____

THIS AGREEMENT, made this _____ day of _____, between
City of Pensacola, a municipal corporation authorized and existing under the laws of the State of Florida
_____ at 222 West Main Street, Pensacola, Florida

(Lessee) and the STATE OF FLORIDA DEPARTMENT OF TRANSPORTATION (Department), an agency of the State of Florida (State).

WITNESSETH:

WHEREAS, the Department may convey a leasehold in the name of the State, in any land, buildings, or other property, real or personal, acquired under Section 337.25, Florida Statutes; and

WHEREAS, the United States Department of Transportation, Federal Highway Administration (FHWA), requires any use of airspace above, and/or below the highway's established gradeline, lying within the approved right of way limits on a Federal Aid System, to be accomplished pursuant to a right of way use and occupancy agreement in accordance with 23 CFR, Part 710, and

WHEREAS, the Department has acquired sufficient legal right, title, and interest in the right of way of US HWY 98 (SR30) Bayfront Pkwy & US HWY 98 (SR30) Gregory Street
_____ which includes the property described in Exhibit "A" attached hereto and made a part hereof, which right of way is part of a highway on a Federal Aid System; and

WHEREAS, the Department desires to lease to Lessee the airspace which is that space located above and/or below the gradeline of the property described in Exhibit "A", attached and such airspace is hereinafter referred to as the "real property interest" or the "leased property" and made a part hereof for the following purpose: location of the sign that replaces the Five Flags Memorial and landscaping associated with the sign.

WHEREAS, the proposed use will not impair the full use and safety of the highway, require or permit vehicular access to such space directly from the established gradeline of said highway, or interfere with the free flow of traffic on said highway.

NOW, THEREFORE, in consideration of the premises made a part hereof, and the covenants, promises, understandings, and agreements made by each party to the other as set forth herein, the Department and the Lessee do hereby mutually agree as follows:

1. **Premises**

The premises hereto are true and correct and form an integral part of this Agreement.

2. **Term**

The Department does hereby lease unto Lessee the real property interest for a period of Fifty (50) years beginning with the date of this Agreement. One renewal of this Agreement may be made for Fifty (50) years. However, except for a public purpose conveyance, such renewal may not exceed five years. Nothing herein shall be construed to in any way grant an interest in the property lying below said airspace.

3. **Rent**

a. Lessee shall pay to the Department as rent each ☐ month ☐ quarter ☐ year on or before the first day of each rent

payment period, N/A plus applicable sales tax. When this Agreement is terminated, any unearned rent and sales tax payment shall be refunded to Lessee. However, no such refund shall be made where termination is due to Lessee's violation of a term or condition of this Agreement.

b. The Department reserves the right to review and adjust the rental fee biannually and at renewal to reflect market conditions.

c. All rental payments are to be made by check or money order, payable to the State of Florida Department of Transportation and delivered on or before the due date to: N/A

d. Lessee shall be responsible for all state, county, city, and local taxes that may be assessed, including real property taxes and special assessments. In the event that no rent is specified herein, then it has been determined that either the use by Lessee is a nonproprietary use by a governmental agency or an exception from the current fair market rental value requirement (23 U.S.C. Section 156) has been obtained for social, environmental, or economic mitigation (SEE) purposes. In the event that it should be determined at any time that the use is not a nonproprietary use by a governmental agency or that the SEE exception does not apply or has been revoked, Lessee agrees to pay, at that time, rent as determined to be the fair market rental value by an independent appraiser certified by the Department, and Lessee further agrees to pay such rent, under the remaining terms and conditions of this Paragraph 3, for the remaining term (including renewals) of this Agreement.

e. Any installment of rent not received within ten (10) days after the due date shall bear interest at the highest rate allowed by law from the due date thereof, per Section 55.03(1), Florida Statutes. This provision shall not obligate the Department to accept late rent payments or provide Lessee a grace period.

4. Use, Occupancy, and Maintenance

a. The Lessee shall be responsible for developing and operating the real property interest as set forth herein.

b. The Lessee's proposed use of the real property interest is as follows: location of the sign that replaces the Five Flags Memorial, and landscaping associated with the sign, and maintenance to the sign and the landscaping

c. The general design for the use of the real property interest, including any facilities to be constructed, and the maps, plans, and sketches setting out the pertinent features of the use of the real property interest in relation to the highway facility are set forth in composite Exhibit "B" attached hereto and by this reference made a part hereof. In addition, said composite Exhibit "B" also contains a three-dimensional description of the space to be used, unless the use is of a surface area beneath an elevated highway structure or adjacent to a highway roadway for recreation, public park, beautification, parking of motor vehicles, public mass transit facilities, or other similar uses, in which case, a metes and bounds description of the surface area, together with appropriate plans or cross sections clearly defining the vertical use limits, may be substituted for said three-dimensional description in said composite Exhibit "B".

d. Any change in the authorized use of the real property interest or revision in the design or construction of the facility described in Exhibit "B" shall require prior written approval from the appropriate District Secretary of the Department, subject to concurrence by the FHWA.

e. The Department, through its duly authorized representatives, employees, and contractors, and any authorized FHWA representative, may enter the facility at any time for the purpose of inspection, maintenance, or reconstruction of the highway and adjacent facilities, when necessary; or for the purpose of surveying, drilling, monitoring well installations, sampling, remediation, and any other action which is reasonable and necessary to conduct an environmental assessment or to abate an environmental hazard.

f. Lessee, at Lessee's sole cost and expense, shall maintain the facility to occupy the real property interest so as to assure that the structures and the area within the highway right of way boundaries will be kept in good condition, both as to safety and appearance. Such maintenance will be accomplished in a manner so as to cause no unreasonable interference with the highway use. Lessee shall ensure vertical and horizontal access to the Department for maintenance purposes. In the event that Lessee fails to so maintain the facility, the Department, through its duly authorized representatives, employees, and contractors, may enter the facility to perform such work, and the cost thereof shall be chargeable to the Lessee and shall be immediately due and payable to the Department upon the performance of such work.

g. Portable or temporary advertising signs are prohibited.

h. The design, occupancy, and use of the real property interest shall not adversely affect the use, safety, appearance, or enjoyment of the highway by lights, sounds, wireless frequencies, smoke, fumes, vapors, odors, droppings, or any other objectionable discharges, or emissions, or nuisances of any kind therefrom.

i. When, for the proposed use of the real property interest, the highway requires additional highway facilities for the proper operation and maintenance of the highway, such facilities shall be provided by the Lessee without cost to either the Department or the FHWA and subject to both Department and FHWA approval.

j. The proposed use shall not cause or allow any changes in the existing drainage on the property under the real property interest.

k. Lessee shall not occupy, use, permit, or suffer the real property interest, the property, the facility, or any part thereof to be occupied or used for any illegal business use or purpose, for the manufacture or storage of flammable, explosive, or hazardous material, or any other hazardous activity, or in such manner as to constitute a nuisance of any kind, nor for any purpose or in any way in violation of any present or future federal, state, or local laws, orders, directions, ordinances, or regulations.

l. Any activities in any way involving hazardous materials or substances of any kind whatsoever, either as those terms may be defined under any state or federal laws or regulations, or as those terms are understood in common usage, are specifically prohibited. The use of petroleum products, pollutants, and other hazardous materials affecting the property is prohibited. Lessee shall be held responsible for the performance of and payment for any environmental remediation that may be necessary, as determined by the Department. Similarly, if any contamination either spread to or was released onto adjoining property as a result of Lessee's use of the real property interest under lease, the Lessee shall be held similarly responsible. The Lessee shall indemnify, defend, and hold harmless the Department from any claim, loss, damage, cost, charge, or expense arising out of any such contamination.

m. Existing utilities and all corresponding easements shall remain in place and Lessee shall not disturb or interfere with the same.

5. Indemnification. (select applicable paragraph)

☒ Lessee is a Governmental Agency

To the extent provided by law, Lessee shall indemnify, defend, and hold harmless the Department and all of its officers, agents, and employees from any claim, loss, damage, cost, charge, or expense arising out of any act, error, omission, or negligent act by Lessee, its officers, agents, or employees, during the performance of the Agreement, except that neither Lessee, its agents, or its employees will be liable under this paragraph for any claim, loss, damage, cost, charge, or expense arising out of any act, error, omission, or negligent act by the Department or any of its officers, agents, or employees during the performance of the Agreement.

When the Department receives a notice of claim for damages that may have been caused by Lessee in the performance of services required under this Agreement, the Department will immediately forward the claim to Lessee. Lessee and the Department will evaluate the claim and report their findings to each other within fourteen (14) working days and will jointly discuss options in defending the claim. After reviewing the claim, the Department will determine whether to require the participation of Lessee in the defense of the claim or to require that Lessee defend the Department in such claim as described in this section. The Department's failure to promptly notify Lessee of a claim shall not act as a waiver of any right herein to require the participation in or defense of the claim by Lessee. The Department and Lessee will each pay its own expenses for the evaluation, settlement negotiations, and trial, if any.

Note: No longer required for local governments.

☐ Lessee is not a Governmental Agency

Lessee shall indemnify, defend, save, and hold harmless the Department, its agents, officers, and employees, from any losses, fines, penalties, costs, damages, claims, demands, suits, and liabilities of any nature, including attorney's fees (including regulatory and appellate fees), arising out of or because of any acts, action, neglect, or omission by Lessee, or due to any accident, happening, or occurrence on the leased property or arising in any manner from the exercise or attempted exercise of Lessee's rights hereunder whether the same regards person or property of any nature whatsoever, regardless of the apportionment of negligence, unless due to the sole negligence of the Department.

Lessee's obligation to indemnify, defend, and pay for the defense or at the Department's option, to participate, and to associate with the Department in the defense and trial of any claim and any related settlement negotiations, shall be triggered by the Lessor's notice of claim for indemnification to Lessee. Lessee's inability to evaluate liability or its evaluation of liability shall not excuse Lessee's duty to defend and indemnify within seven days after such notice by the Department is given by registered mail. Only an adjudication or judgment after the highest appeal is exhausted specifically finding the Department solely negligent shall excuse performance of this provision by Lessee. Lessee shall pay all costs and fees related to this obligation and its enforcement by the Department. The Department's failure to notify Lessee of a claim shall not release Lessee of the above duty to defend.

Note: No longer required for local governments.

6. **Insurance.** Lessee at its expense, shall maintain at all times during the term of this Agreement, public liability insurance protecting the Department, FHWA, and Lessee against any and all claims for injury and damage to persons and property, and for the loss of life or property occurring in, on, or about the land arising out of the act, negligence, omission, nonfeasance, or malfeasance of Lessee, its employees, agents, contractors, customers, licensees, and invitees. Such insurance shall be carried in a minimum amount of not less than N/A (\$) for bodily injury or death to any one person or any number of persons in any one occurrence and not less than N/A (\$) for property damage, or a combined coverage of not less than N/A (\$). All such policies shall be issued by companies licensed to do business in the State of Florida and all such policies shall contain a provision whereby the same cannot be canceled or modified unless the Department is given at least sixty (60) days prior written notice of such cancellation or modification. Lessee shall provide the Department certificates showing such insurance to be in place and showing the Department and FHWA as additional insured under the policies. If self-insured or under a risk management program, Lessee represents that such minimum coverage for liability will be provided for the property.

7. **Termination**

a. This Agreement may be terminated by either party without cause upon 180 (180) days prior written notice to the other party.

b. It is understood and agreed to by the Lessee that the Department reserves the right to terminate this Agreement immediately without prior notice, in the event the Lessee violates any of the conditions of this Agreement and such violation is not corrected within a reasonable time after written notice of noncompliance has been given. In the event the Agreement is terminated and the Department deems it necessary to request the removal of the facility on the property, the removal shall be accomplished by the Lessee in a manner prescribed by the Department at no cost to the Department or the FHWA.

c. The Lessee must notify the Department of its intention to renew this Agreement not later than thirty (30) days prior to the expiration of the original term. Lessee's failure to comply with the foregoing notice provision may result in the Department's refusal to renew the Agreement.

d. Upon termination of this Agreement, Lessee shall deliver the property to the Department, or its agents, in the condition existing at the commencement of this Agreement, normal wear and tear excepted, unless a facility, any improvement, or any part thereof has been constructed on the property.

e. If removal of the facility, improvements, or any part thereof is requested by the Department, any such structures shall be removed by the Lessee at Lessee's expense by midnight of the day of termination of this Agreement and the property restored as nearly as practicable.

f. This Agreement is terminable by the Department in the event that the facility ceases to be used for its intended purpose, is abandoned, or if use of the facility is required by the Department for transportation, maintenance or emergency purposes.

8. **Eminent Domain**

Lessee acknowledges and agrees that its relationship with the Department under this Agreement is one of landlord and tenant and no other relationship either expressed or implied shall be deemed to apply to the parties under this Agreement. Termination of this Agreement for any cause shall not be deemed a taking under any eminent domain or other law so as to entitle Lessee to compensation for any interest suffered or lost as a result of termination of this Agreement, including any residual interest in the Agreement or any other facts or circumstances arising out of or in connection with this Agreement.

Lessee hereby waives and relinquishes any legal rights and monetary claims which it might have for full compensation, or damages of any sort, including special damages, severance damages, removal costs, or loss of business profits, resulting from Lessee's loss of occupancy of the property specified in this Agreement, or any such rights, claims, or damages flowing from adjacent properties owned or leased by Lessee as a result of Lessee's loss of occupancy of the property specified in this Agreement. Lessee also hereby waives and relinquishes any legal rights and monetary claims which it might have for full compensation, or damages of any sort as set out above, as a result of Lessee's loss of occupancy of the property, when any or all adjacent properties owned or leased by Lessee are taken by eminent domain proceedings or sold under the threat thereof. This waiver and relinquishment applies whether this Agreement is still in existence on the date of taking or sale or has been terminated prior thereto.

9. **Miscellaneous**

a. The real property interest and Lessee's rights under this Agreement shall not be transferred, assigned, pledged or conveyed to another party without the prior written consent of the Department, subject to concurrence by the FHWA. Lessee shall not allow any liens or other encumbrances to attach to the leased property.

b. In conformance with the Civil Rights Act of 1964 (Title VI, Appendix "C") and 49 CFR Part 21, Lessee agrees as follows:

1. That as a part of the consideration hereof, Lessee does hereby covenant and agree as a covenant running with the land that (1) no person, on the grounds of race, color, sex, or national origin shall be excluded from participation in,

be denied the benefits of, or be otherwise subjected to discrimination in the use of said property and facility; (2) that in connection with the construction of any improvements on said property and facility and the furnishing of services thereon, no discrimination shall be practiced in the selection of employees and contractors, by contractors; and (3) that the Lessee shall use the property and facility in compliance with all other requirements imposed pursuant to 49 CFR part 21..

2. That in the event of breach of any of the above covenants, the Department shall have the right to terminate this Agreement and to re-enter and repossess said property and the facility thereon, and hold the same as if this Agreement had never been made or issued.

c. During the term of this Agreement Lessee shall, at Lessee's own cost and expense, promptly observe and comply with all present or future laws, requirements, orders, directions, ordinances, and regulations of the United States of America, the State of Florida, county or local governments, or other lawful authority whatsoever, affecting the land, property, and facility or appurtenances or any part thereof, and of all insurance policies covering the property, land, and facility, or any part thereof.

d. In addition to or in lieu of the terms and conditions contained herein, the provisions of any Addendum of even date herewith which is identified to be a part hereof is hereby incorporated herein and made a part hereof by this reference. In the event of any conflict between the terms and conditions hereof and the provisions of the Addendum(s), the provisions of the Addendum(s) shall control, unless the provisions thereof are prohibited by law.

e. This Agreement constitutes the complete and final expression of the parties with respect to the subject matter hereof and supersedes all prior agreements, understandings, or negotiations with respect thereto. Any provision hereof found to be unlawful or unenforceable shall be severable and shall not affect the validity of the remaining portions hereof.

f. Lessee acknowledges that it has reviewed this Agreement, is familiar with its terms, and has had adequate opportunity to review this Agreement with legal counsel of Lessee's choosing. Lessee has entered into this Agreement freely and voluntarily. This Agreement contains the complete understanding of the parties with respect to the subject matter hereof. All prior understandings and agreements, oral or written, heretofore made between the parties and/or between Lessee and any previous owner of the property and landlord of Lessee are merged in this Agreement, which alone, fully and completely express the agreement between Lessee and the Department with respect to the subject matter hereof. No modification, waiver, or amendment of this Agreement or any of its conditions or provisions shall be binding upon the Department or Lessee unless in writing and signed by both parties.

g. Lessee shall be solely responsible for all bills for electricity, lighting, power, gas, water, telephone, and telegraph services, or any other utility or service used on the property.

h. This Agreement shall be governed by the laws of the State of Florida, and any applicable laws of the United States of America.

i. All notices to the Department shall be sent to the address for rent payments and all notices to Lessee shall be sent to the property address provided herein or otherwise provided in writing to the Department.

j. The parties to this Agreement hereby understand and agree that the venue for any action that may arise as a result of this Agreement shall be in Leon County, Florida.

k. If Lessee is a "contractor" for the purposes of Section 119.0701, Florida Statutes, Lessee shall comply with public records laws and specifically shall:

1. Keep and maintain the public records that ordinarily and necessarily would be required to be kept and maintained by the Department in order to perform the services identified herein.
2. Provide the public with access to those public records on the same terms and conditions that the Department would provide the records and at a cost that does not exceed the cost provided by law.
3. Ensure that public records that are exempt or confidential and exempt from public records disclosure requirements are not disclosed except as authorized by law.
4. Meet all requirements for retaining the public records and transfer, at no cost, to the Department all the public records in possession of Lessee upon termination of this Agreement and destroy any duplicate public records that are exempt or confidential and exempt from public records disclosure requirements. All such public records (if any) stored electronically must be provided to the Department in a format that is compatible with the information technology systems of the Department.

If Lessee fails during such times to comply with a public records request, the Department shall enforce this section in accordance with this Agreement.

Lessee shall otherwise allow public access to all documents, papers, letters or other materials, made or received by Lessee in connection with this Agreement and the lease of the Demised Premises, to the extent such access is required because such documents, papers, letters or other materials are subject to the provisions of s. 24(a) of the State Constitution or Chapter 119, Florida Statutes.

l. Section 287.133(3)(a), Florida Statutes, requires that Lessee be informed of the following provisions of section 287.133 (2)(a), Florida Statutes: "A person or affiliate who has been placed on the convicted vendor list following a conviction for a public entity crime may not submit a bid on a contract to provide any goods or services to a public entity, may not submit a bid on a contract to provide any goods or services to a public entity, may not submit a bid on a contract with a public entity for the construction or repair of a public building or public work, may not submit bids on leases of real property to a public entity, may not be awarded or perform work as a contractor, supplier, subcontractor, or consultant under a contract with any public entity, and may not transact business with any public entity in excess of the threshold amount provided in section 287.017, F.S., for Category two for a period of thirty-six (36) months from the date of being placed on the convicted vendor list.

m. The Department shall consider the employment knowingly by Lessee of unauthorized aliens a violation of Section 274(e) of the Immigration and Nationalization Act. Such violation shall be cause for unilateral cancellation of this Agreement.

n. This Agreement shall not create any third-party beneficiary hereunder, nor shall this Agreement authorize anyone not a party hereto to maintain a suit against the Department pursuant to the terms of this Agreement.

o. This Agreement shall be binding upon the successors, assigns and legal representatives of Lessee and the Department.

p. All Exhibits attached to this Agreement are made a part hereof as if fully copied herein. All submittals required to be submitted by Lessee that are approved by the Department are by reference made a part of this Agreement as if fully copied herein.

q. Nothing in this Agreement or in any documents executed pursuant to the terms of this Agreement shall be construed as a waiver or attempted waiver by the Department of its sovereign immunity in tort under the Constitution and laws of the State of Florida.

r. "RADON GAS: Radon is a naturally occurring radioactive gas that, when it has accumulated in a building in sufficient quantities, may present health risks to persons who are exposed to it over time. Levels of radon that exceed federal and state guidelines have been found in buildings in Florida. Additional information regarding radon and radon testing may be obtained from your county health department.

g. Lessee does not qualify for relocation benefits under the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, as amended (42 U.S.C. Section 4601 et seq.)

IN WITNESS WHEREOF, the parties hereto have caused these presents to be executed, the day and year first above written.

City of Pensacola
LESSEE (Company Name, if applicable)

STATE OF FLORIDA
DEPARTMENT OF TRANSPORTATION

By: _____

By: _____
District Secretary

Name: _____

Name: Phillip Gainer, P.E.

Title: _____

Attest: _____

Attest: _____ (Seal)

Name/Title: _____

Name: _____

Legal Review:

Title: _____

District Counsel

Name: _____

ADDENDUM

This is an Addendum to that certain Right of Way Use and Occupancy Agreement between City of Pensacola, a municipal corporation authorized and existing under the laws of the State of Florida

and the State of Florida Department of Transportation dated the _____ day of _____, _____.
In addition to the provisions contained in said Agreement, the following terms and conditions shall be deemed to be a part thereof pursuant to Paragraph 9 (d) of said Agreement:

The Department will design and construct a sign to replace the current Five Flags Memorial as a result of construction associated with the Department's project identified by Item/Segment No. 4093341. The sign will be located on property donated by Lessee and upon which the current Five Flags Memorial is located. After completion of the construction of the sign and installation of landscaping associated therewith, the Department will provide the Lessee with a written description of the property encompassing said sign and landscaping, signed by the Department's District Secretary. The signed description shall become a part of this Agreement and Exhibit "A" thereof, without more, and shall be deemed to be the "real property interest" or "leased property" to which Exhibit "A" and this Agreement pertain.

City of Pensacola
LESSEE (Company Name, if applicable)

STATE OF FLORIDA
DEPARTMENT OF TRANSPORTATION

By: _____

By: _____
District Secretary

Name: _____

Name: Phillip Gainer, P.E.

Title: _____

Attest: _____

Attest: _____ (Seal)

Name/Title: _____

Name: _____

Legal Review:

Title: _____

District Counsel

Name: _____

Exhibit A

That portion of the following described property which shall be set out and described in a writing provided by the Department upon completion of construction of a sign pursuant to this Agreement:

A parcel of land situate, lying and being in Block 211, 15th Avenue and DeLeon Street, Waterfront or Pintado Grant, City of Pensacola, according to map of said City, copyrighted by Thomas C. Watson in 1906, being described as follows: Commence at the Southeast corner of Block 32, New City Tract according to said map copyrighted by Thomas C. Watson; thence South 10°24'24.26" East 102.55 feet; thence North 69°08'25.74" East 197.58 feet to the beginning of a curve, concave to the Southerly having a radius of 1869.87 feet; thence run Northeasterly 332.60 feet along said curve through a central angle of 10°11'29" to the end of curve; thence North 10°24'24" West 50.00 feet to the POINT OF BEGINNING; thence continue North 10°24'24" West 111.70 feet to a point on a curve, concave Southwesterly having a radius of 1422.69 feet; thence from a tangent bearing of South 83°59'05" East run Southeasterly 350.99 feet along said curve through a central angle of 14°08'18" to the end of curve, said point being the beginning of a curve, concave Southerly having a radius of 693.21 feet; thence from a tangent bearing of North 87°19'54" West run Northwesterly, Westerly and Southwesterly 69.91 feet along said curve through a central angle of 5°46'43" to the end of curve, said point being the beginning of a curve, concave Southerly, having a radius of 1919.87 feet; thence from a tangent bearing of South 86°53'24" West run Southwesterly 253.03 feet along said curve through a central angle of 7°33'05" to the end of said curve and the POINT OF BEGINNING;

Containing 18,693 square feet, more or less.