

RIGHT OF ENTRY AND ACCESS AGREEMENT

CITY OF NIAGARA FALLS, NY and NIAGARA BEAUTIFICATION COMMISSION

THIS AGREEMENT (hereinafter, "Agreement") is made and entered into as of the _____ day of _____, 2021 by the **City of Niagara Falls, NY**, a municipal corporation organized and existing pursuant to the Laws of the State of New York, with offices at 745 Main Street, P.O. Box 69, Niagara Falls, NY 14302-0069 (hereinafter, "**CITY**"), and the **Niagara Beautification Commission**, a non-profit entity organized pursuant to the Laws of the State of New York, P.O. Box 1945, Niagara Falls, NY 14302-1945 (hereinafter, "**NBC**").

WITNESSETH:

WHEREAS, CITY is the owner of numerous parks and green areas which offer a wide range of recreational opportunities (hereinafter, "Properties"); and

WHEREAS, NBC is a non-profit organization which furnishes services to citizens throughout the City by promoting and fostering neighborhood beautification projects; and

WHEREAS, NBC, its volunteers and members have been actively involved in maintenance, stewardship and restoration efforts throughout the CITY and, in particular, at CITY Properties, including the Hyde Park Rose Garden ("Rose Garden"); and

WHEREAS, NBC has requested the right of entry upon and access to the Properties, particularly the Rose Garden, for the purpose of conducting certain "Maintenance and Preservation Activities"; and

WHEREAS, CITY has agreed to grant to NBC, and NBC has agreed to accept from CITY, a non-exclusive, revocable license to enter upon the Properties to perform the Maintenance and Preservation Activities in accordance with the terms and provisions of this Agreement;

WHEREAS, CITY and NBC desire to execute and enter into this Agreement for the purpose of setting forth their agreement with respect to the Maintenance and Preservation Activities and NBC's entry upon the Properties.

NOW, THEREFORE, for and in consideration of the foregoing promises, the mutual covenants and agreements contained herein, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, CITY and NBC do hereby covenant and agree as follows:

1. **NBC's Access to Properties.**

A. Subject to NBC's compliance with the terms and provisions of this Agreement, until the earlier to occur of (i) December 31, 2022 or (ii) the earlier termination of this Agreement, NBC and NBC's agents, employees, contractors, representatives and other designees (herein collectively called "NBC's Designees") shall have the right to enter upon the Properties for the purpose of conducting the Maintenance and Preservation Activities as described in subsection "B (1)" below.

B. NBC hereby expressly agrees that:

- 1) any activities by or on behalf of NBC, including, without limitation, the entry by NBC and/or NBC's Designees onto the Properties in connection with the Maintenance and Preservation Activities shall consist of the following: planting, weeding, trimming, deadheading and trash pickup. Watering may be done as needed, using onsite spigots where available. NBC and/or NBC's Designees shall bring their own tools to the site; when carrying tools, NBC and/or NBC's Designees will use the access road. Fertilizer, soil and plant material used in the Maintenance and Preservation Activities will be purchased by NBC.
- 2) In addition to the requirements specified in subsection 1(B)(1) above, Maintenance and Preservation Activities conducted at the Rose Garden, NBC and/or NBC's Designees will use the access road when carrying tools.
- 3) Prior to conducting any Maintenance and Preservation Activities on the Properties, NBC and/or NBC's Designees will contact the CITY's Director of Parks and Public Works with regard to the location, scheduling

and coordination of said Maintenance and Preservation Activities.

- 4) NBC not damage the Properties in any manner whatsoever or disturb or interfere with the rights or possession of any patron or lessee on the Properties;
- 5) In the event the Properties is altered or disturbed in any manner in connection with the Maintenance and Preservation Activities other than in the manner described in subsection 1(B)(1) above, NBC shall immediately return the Properties to the condition existing prior to the Maintenance and Preservation Activities

2. **Term of Agreement.** This Agreement shall remain in effect from May 26, 2021 through December 31, 2022, provided that such Agreement is not earlier terminated as provided hereunder. If mutually agreeable, the parties may extend this Agreement annually for up to two (2) additional years, through December 31, 2024, at the same terms and conditions contained herein. However, CITY reserves the right to terminate this Agreement at any time for any reason, in whole or in part, upon thirty (30) days written notice to NBC.

3. **Insurance and Indemnification.** To the fullest extent permitted by New York law, NBC shall, and shall cause all of NBC's Designees performing the Maintenance and Preservation Activities for NBC, defend, indemnify and hold harmless CITY, its officers, agents and employees, from and against any and all claims, suits, loss, costs, charges,

expenses (including but not limited to reasonable attorney's fees and disbursements) and/or damage of any kind including bodily injury, death and damage to Properties of CITY or others claimed to be sustained or arising out of NBC's or its agents', subcontractor' or employees' acts, errors or omission arising directly or indirectly out of this Agreement or the work or activities undertaken pursuant hereto. NBC shall maintain in force during the full term of this Agreement the comprehensive general liability, professional liability insurance and other insurance as required by the insurance requirements set forth on Exhibit "A" and annexed hereto. Such insurance shall be maintained in force throughout the term of this Agreement. All such proof(s) of insurance required by this paragraph shall be delivered to the City and approved by the Corporation Counsel prior to the commencement of any Maintenance and Preservation Activities.

4. **Successors**. To the extent any rights or obligations under this Agreement remain in effect, this Agreement shall be binding upon and enforceable against, and shall inure to the benefit of, the parties hereto and their respective heirs, legal representatives, successors and permitted assigns.

5. **Limitations**. CITY does not hereby convey to NBC any right, title or interest in or to the Properties, but merely grants the specific rights and privileges hereinabove set forth. NBC shall provide all services hereunder as an independent contractor, and not as an employee of CITY. NBC shall be solely responsible for compensation of all independent contractors or employees hired by NBC and shall retain full control over the employment, direction, compensation, and discharge of all persons assisting in the performance of services. NBC shall have no authority (and shall not hold itself out as

having authority) to bind the CITY in any manner, and NBC shall not make any agreements or representations on the CITY's behalf without the CITY's prior written consent.

6. **Notice**. All notices, demands and other communications regarding the terms, conditions and operation of this Agreement shall be given in writing and shall be delivered by certified mail, postage prepaid, and return receipt requested, or by personal delivery. Notices shall be considered given upon the earlier of (a) personal delivery or (b) two (2) business days following deposit in the United States mail, postage prepaid, certified or registered, return receipt requested. Notices shall be addressed as provided below for the respective party; provided that if any party gives notice in writing of a change of name or address, notices to such party shall thereafter be given as demanded in that notice:

NBC: Niagara Beautification Commission
P.O. Box 1945
Niagara Falls, NY 14302-1945

CITY: City of Niagara Falls, NY
745 Main Street
P.O. Box 69
Niagara Falls, NY 14302-0069
Attention: Anthony J. Restaino, City Administrator
and Christopher M. Mazur, Corporation Counsel

7. **Entire Agreement**. This Agreement, together with all exhibits hereto, integrates all of the terms and conditions mentioned herein or incidental hereto, and supersedes all negotiations or previous agreements between the parties or their predecessors in interest with respect to all or any part of the subject matter hereof.

8. **Severability**. The provisions of this Agreement are severable, and, if any one or more provisions may be determined to be judicially unenforceable, in whole or in part, the remaining provisions, and any partially unenforceable provision, to the extent enforceable, in any jurisdiction, shall nevertheless be binding and enforceable if and to the extent that the economic and legal substance of the transactions contemplated is not materially adversely affected in any matter as to any party and shall be construed and enforced so as to effectuate the intent of the entire Agreement, including the wholly or partially unenforceable provision, to the maximum extent legally permissible.

9. **Assignment and Amendment**

- A. NBC shall not assign, transfer or convey this Agreement or any right, title or interest thereunder nor shall any part of the same subcontracted without the written consent of the City, but in no case shall such consent relieve NBC of its obligations, or change the terms of this Agreement.
- B. Any assignment in violation of the foregoing shall be null and void. The CITY may assign its rights and obligations under this Agreement at any time. Subject to the limits on assignment stated above, this Agreement will inure to the benefit of, be binding on, and be enforceable against each of the parties hereto and their respective successors and assigns.
- C. This Agreement may only be amended, modified or supplemented by an agreement in writing signed by each party. Any of the terms

hereof may be waived only by a written document signed by the party waiving compliance with the term. Any amendments to this Agreement shall be effective only when duly executed by CITY and NBC.

10. **Representations and Warranties**

A. NBC represents and warrants to the CITY that:

- 1) NBC has the right to enter into this Agreement, to grant the rights granted herein and to perform fully all of its obligations in this Agreement;
- 2) NBC's entering into this Agreement with the CITY and its performance of the Services do not and will not conflict with, or result in any breach or default under, any other agreement to which NBC is subject;
- 3) NBC has the required skill, experience and qualifications to perform the Services in accordance to the standards set forth in this Agreement, and shall perform the Services in accordance with the standards set forth in this Agreement. NBC shall devote sufficient resources to ensure that the Services are performed in a timely and reliable manner; and

- 4) All Services shall be performed by NBC in compliance with all applicable federal, state, and local laws, rules and regulations.

B. The CITY hereby represents and warrants to NBC that:

- 1) It has the full right, power, and authority to enter into this Agreement and to perform its obligations hereunder; and
- 2) The execution of this Agreement by its representative whose signature is set forth at the end hereof has been duly authorized by all necessary corporate action.

11. **No Third Party Beneficiary Rights**. This Agreement is entered into for the sole benefit of CITY and NBC and no other parties are intended to be direct or incidental beneficiaries of this Agreement and no third party shall have any right in, under or to this Agreement.

12. **Governing Law**. This Agreement shall be governed by and construed in accordance with the laws of the State of New York (without giving effect to the laws of such state in relation to choice of laws).

13. **Counterparts**. This Agreement may be executed simultaneously in one or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.

IN WITNESS WHEREOF, the parties hereto set forth their signatures intending to be legally bound as of the date set forth above. This constitutes the entire agreement and understanding of the parties.

Dated: May 26, 2021

CITY OF NIAGARA FALLS, NY

NIAGARA BEAUTIFICATION
COMMISSION

Robert M. Restaino
Mayor

Name: _____
Title: _____

ATTEST: _____ City Clerk

EXHIBIT A

INSTRUCTIONS FOR CITY STANDARD INSURANCE REQUIREMENTS

Standard Insurance Requirements apply to the following classifications:

- Construction and Maintenance
- Purchase of or lease of merchandise or equipment
- Professional Services
- Properties leased to others or Use of Facilities or grounds
- Concessionaire Services
- Livery Services
- All purpose Public Entity Contracts

The Provider of any of the above classifications shall obtain, at his own costs and expense, the following insurance coverage with insurance companies licensed in the State of New York with a Best Rating of at least B+ and shall provide a Certificate of Insurance as evidence of such coverage to the CITY before commencement of work and/or lease or delivery of merchandise or equipment.

Certificates should be made to the City of Niagara Falls, NY, P.O. Box 69, Niagara Falls, N.Y. 14302-0069 and should reference the operation.

Prior to non-renewal, cancellation of insurance policies, or material change, at least 30 days advance written notice shall be given to the Certificate Holder.

All Certificates of Insurance shall be approved by the Corporation Counsel prior to the inception of any work.

Minimum coverage with limits and provisions are as follows:

Comprehensive General Liability:

With a minimum combined single limit of liability for Bodily Injury and Properties Damage of \$1,500,000.00 per occurrence and \$3,000,000.00 annual aggregate. The coverage shall include:

- *Premises and Operations
- *Products and Completed Operations
- *No exclusion for X C U coverages (explosion, collapse and underground)
- *Independent ON GUARD s
- *Broad Form Properties Damage
- *Contractual Liability
- *Fire Legal Liability
- *Personal Injury Liability (Coverage A, B, and C)
- *Liquor Liability (if alcoholic beverages are to be dispensed under NYS License.)

If the work to be performed is undertaken pursuant to a home improvement contract and a City of Niagara Falls right-of-way permit is required only by reason of the installation, repair or replacement of a driveway, apron, or sidewalk within the City right-of-way, then the limit of liability for comprehensive general liability set forth in this section shall be \$1,000,000 per occurrence and \$2,000,000 aggregate.

CITY shall be named as an Additional Insured on the General Liability Policy with the following provisions:

1. The insurance company or companies issuing the policies shall have no recourse against CITY for payment of any premiums or for assessments under any form of policy.

2. The insurance shall apply separately to each insured (except with respect to the limit of liability.)

B. **Auto Liability:** (if licensed vehicles are to be used in the operation)

With a combined single limit for Bodily Injury and Properties Damage of \$1,000,000.00 each occurrence, the coverage shall include Owned, Hired and Non-owned autos (Symbol 1 should be designated for Liability Coverage on Business Auto Policy.)

C. **Excess Umbrella Liability:**

If General Liability and/or auto limits are lower than required in the above sections, Umbrella Liability or Excess Liability to the required limit is acceptable.

D. **Owners Protective Liability*:**

With a minimum limit of \$1,500,000.00 each occurrence and \$3,000,000.00 aggregate. Named insured shall be City of Niagara Falls, NY.

*(for construction contracts with a cost exceeding \$100,000.00).

E. **Professional Liability:**

If the contract includes professional services (engineers, architects, etc.), ON GUARD will carry professional liability insurance with a minimum limit of one million dollars (\$1,000,000.00).

F. **Properties Insurance:** (if applicable)

ON GUARD shall purchase and maintain Properties insurance upon the work at or off the site to 100% of the contract completed value. This insurance shall include the interest of the Owner, ON GUARD, and Subcontractors in the work; shall insure against the perils of fire and extended coverage; shall include "all risk" insurance for physical loss and damage including theft, vandalism and malicious mischief, collapse and water damage. All such insurance required by this Paragraph shall remain in effect until the Work is completed and accepted by the Owner.

G. **Statutory Worker's Compensation and Employers Liability:**

All contractors doing business with or vendors entering upon CITY Properties shall carry the above insurance, in compliance with the Worker's Compensation Law of the State of New York.

H. **Performance and Payment Bond:** (where applicable)

A performance and payment bond shall be issued by a Surety Company who is licensed by the Insurance Department of the State of New York in favor of CITY in the amount of not less than one hundred (100) per centum of the total amount of the accepted

proposal and shall be delivered before commencement of lease or assumption of operations under Contract.

NOTE: IF THE CONTRACT IS FOR PROFESSIONAL SERVICES ONLY (ENGINEERS, ARCHITECTS, ETC.), PARAGRAPHS D, F, AND H WILL NOT APPLY